JUS POST BELLUM AND THE POTTERY BARN RULE:
DEFINING JUST PEACE IN A POST-WESTPHALIAN WORLD

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ABSTRACT

The purpose of this thesis is several fold. First, it considers the emerging concept of *jus post bellum* (justice after war). Second, it analyzes and compares the way the topic is being considered in three discrete academic fields: philosophy, international law and security studies. Third, from this analysis, it determines whether this concept belongs as a third strand of the classic just war tradition. Finally, this thesis makes policy-oriented recommendations regarding the application of this idea to ongoing and emerging conflicts.

The predominant conception of *jus post bellum* in this study is that of the so-called “Pottery Barn Rule.” Specifically, the rule encapsulates the idea that the victor has obligations to the defeated state and its citizens. These obligations include repairing what has been damaged or destroyed as a result of the conflict and leaving the defeated state as a functioning member of international society. An increasingly common reference, this rule constitutes both a single interpretation of and a useful gateway into a larger and more complex topic, that of *jus post bellum*.

This thesis is underpinned by constructivism, the view that “the structures of human association are determined primarily by ideas rather than material forces.”¹ Specifically it has analyzed the evolving norms surrounding the concept of warfare in the

¹ Wendt, Social Theory of International Politics (Cambridge, UK: Cambridge University Press, 1999), 1.
post-Cold War era, and how these norms have changed international society’s expectations as to how wars should end.

The overarching conclusion of this thesis is that the norms of war have changed. There is now an expectation that warfare and humanitarian interventions undertaken by western liberal democracies will be concluded with post-war reconstruction and transformation projects. This conclusion rests on the concept of international legitimacy, along with the conclusion that there has been a de-legitimation of warfare as an instrument of policy during post-World War II era.

This thesis also concludes that Clausewitz’s famous dictum that “war is a continuation of policy by other means,” remains valid, but requires significant and sometimes unprecedented caveats in contemporary practice. Under the UN Charter system, warfare is a highly regulated legal event. It is only a legitimate instrument of policy when conducted within the existing legal paradigm. These boundaries constitute the contemporary codification of *jus ad bellum* and *jus in bello*.

This thesis also revealed a significant divide as to the proper principal point of reference regarding the issue of *jus post bellum* and contemporary warfare. This divide is between those scholars who undertake a state centric approach versus those who undertake a cosmopolitan one. This fundamental divide accounts in large part for the range of recommendations regarding the proper scope of *jus post bellum*. Further, international law is currently codified to ensure state security, rather than human security. However, contemporary political philosophy and the expanded approach to security studies have irreversibly introduced and emphasized the importance of human security.

The final conclusion of this thesis deals specifically with “The Pottery Barn Rule.” The punch line of this rule – You broke it, you bought it – is incorrect. Many of
the situations into which the U.S., other western states, and the UN have decided to intervene were non-functional long before the intervention occurred. The rule is more aptly stated – You touch it, you own it – This is the expectation in contemporary international society. In this sense, the legal construct of neutrality is alive and well. Obligations/expectations only apply if a state makes the decision to intervene. However, once intervention has been undertaken, the expectations are high and international society is watching closely.

This revision of “The Pottery Barn Rule” is more problematic and risky for states; it implies that a state doesn’t have “to break it to own it.” In fact, it doesn’t have to be involved at all when it’s “broken.” However, when every contemporary norm, as well as overwhelming domestic political pressure demands that a government “do something,” the intervening state must understand that a decision to “do something” is the equivalent of taking responsibility for “everything.” The policy implications of this are enormous when considering military action or humanitarian intervention.
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CHAPTER ONE
INTRODUCTION

The Problem

What constitutes *jus post bellum* (justice after war) in the current international environment? Conflicts in Iraq, Afghanistan and elsewhere have precipitated a re-evaluation of classic just war tradition. Specifically, increasing attention is being paid to the quality of the post-war environment created as a critical factor in determining a conflict's overall justness. The umbrella term under which this discussion has been occurring is *jus post bellum*. In policy circles, this idea is somewhat flippantly expressed as “The Pottery Barn Rule”: you break it, you bought it.

The idea of “The Pottery Barn Rule” came into common usage following the U.S. invasion of Iraq in 2003. In Bob Woodward's *Plan of Attack*, he describes a meeting between President George W. Bush and then Secretary of State Colin Powell prior to the invasion. During this meeting, Secretary Powell cautioned the President that military success would bring its own set of problems. Specifically, Powell warned the President that he was going to “own” Iraq as a result of the military action. The years following the successful military “victory” against the Iraqi army proved Powell correct. Recent American experience with rapid military success followed by uncertain strategic outcomes has led to a significantly renewed interest in ending wars well.

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2 Throughout this work, justice is defined simply as the righting old wrongs or fairly administering rewards and punishment.

Powell's invocation of “The Pottery Barn Rule,” while simple and vivid, is too broad to adequately encompass the significant issues of ethics and legality inherent in any consideration of *jus post bellum*. It also presupposes obligations of the victor in armed conflict that do not necessarily follow from either the classical just war tradition or current international law.

Further, the idea of the rule itself is flawed in its conception. There is a fundamental false assumption embedded within it. In many cases, the defeated party was “broken” from the outset. This brokenness could be in terms of governmental structure, economic (in)dependence, or the absence of physical or social infrastructure necessary to sustain a state capable of functioning as a responsible member of the international community.

Therefore, the requirement levied upon the intervening party is often actually for initial construction and creation of infrastructure and governance rather than the recreation and reconstruction thereof. This can become a very expensive, labor intensive, multi-year endeavor, the total cost of which could far exceed that of the conflict itself. This requirement constitutes both the bête noir of post war planning and a central point of debate for *jus post bellum*.

Nonetheless, “The Pottery Barn Rule” is the title under which many, if not most, *jus post bellum* focused discussions occur in military and policy circles. Given this, it is useful to adopt this title to focus scholarly work on an issue (justice after war) that frustrates military officers, human rights activists, and policy makers alike and on which no consensus currently exists.

Clarifying, reaffirming and applying this rule requires that any war must include from the outset provisions for the restoration of the defeated party as a functioning member of the international community. This has ramifications for the parties to the conflict, as well as for the international community writ large, particularly given the effects of globalization on the traditional Westphalian state system. This work will explore the intersection of the just war
tradition, international law and national security planning in an emerging Post-Westphalian world order.

Ultimately, this thesis seeks to accomplish a focused comparison of these three strands of literature: legal, ethical, and policy-oriented, to determine where the interdependencies of thought lie. From this analysis, will come a coherent set of recommendations that successfully integrate the three discrete strands of thought that now populate the *jus post bellum* intellectual and policy community.

The majority of contemporary scholarship on just war discusses the issue either from a legal or ethical perspective. On the other hand, scholarly works on military and defense planning are generally extremely practical, policy-oriented documents that rarely touch the idea of just peace. Thus, there is little discussion on the intersection of ideas. In the words of Steven Neff, a scholar of *jus post bellum*, “The concept of the development of *jus post bellum* requires more of an interdisciplinary discourse.”

This lack of dialogue among the communities is a critical shortcoming in the current state of the literature. If the motivation behind military intervention is to achieve a more secure post-war environment, then any conflict should be prosecuted with an eye towards setting the conditions to create a just peace. This has ramifications for every aspect of defense and military planning, from the micro-tactical level through geo-strategic calculations.

**The Classic Just War Tradition and the Idea of Jus Post Bellum**

The desire to delineate the legitimate causes of war, as well as to limit war's destructiveness are nearly as ancient as warfare itself. The classic just war tradition has a

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millennia old history dating back to the ancient Greeks and the Roman Empire. Aristotle is credited with having coined the term just war in Politics.\textsuperscript{5} From this auspicious beginning, the complex problem of justness and warfare has been considered and written about by such august scholars as Cicero, Saint Augustine, Immanuel Kant and Hugo Grotius.

Over time, the classical just war tradition has consistently adapted to maintain its relevance. During the past fifteen hundred years, just war thinking has evolved significantly to accommodate the changing structure of the international system, the changing concept of war itself, and the prevailing concept of the morality of the times in which the authors were writing. Throughout the centuries, the just war tradition has remained a remarkably consistent (though often implicit) basis for discussion concerning the ethics of warfare.

The classical just war tradition currently has two recognized major components. These are \textit{jus ad bellum} (justice of war) and \textit{jus in bello} (justice during war). \textit{Jus ad bellum} considers the justness of the war itself. It takes into consideration such issues, as whether the decision to go war was just and not motivated by an unstated, but selfish reason such as territorial or financial gain; whether there was an expectation of victory; and whether the party declaring war had sufficient authority to do so.\textsuperscript{6}

\textit{Jus In Bello} is concerned principally with issues of military conduct. Is there discrimination made between combatants and non-combatants? Are the methods used proportional to outcome desired? Are prisoners of war (POWs) treated according to international

\footnote{5 Mark J. Allman and Tobias L. Winright, After The Smoke Clears: The Just War Tradition and Post War Justice (New York: Orbis Books, 2010), 23.}

\footnote{6 The classical just war tradition is not retrospective in nature. The \textit{jus ad bellum} criteria for just cause are in the present tense. Specifically, does the party making the decision at the time believe there is just cause and an expectation of victory? Is that party fighting with right intention and using means that are consonant with \textit{jus in bello}? The use of the past tense in this thesis is not intended to imply that these calculations can only be made \textit{post hoc}. However, given the nature of academia, conclusions about what was going on in the mind of a policy-maker at the time of the decision will necessarily be analyzed in the past tense.}
laws and norms? Today, the concept of *jus in bello* is reasonably well codified within the Law of Armed Conflict.\(^7\)

The just war tradition is not a static list of rules, but rather a core set of ideas that have been refined and adapted to meet changing conditions and values. Major shifts within the international system have precipitated revisions of it. For example, classical just war theory predates a system of sovereign nation states, but has been adapted to it and presently proceeds from a foundation of state sovereignty. Current interest in the idea of *jus post bellum* signifies a desire to once again change or evolve this classic, but enduring tradition, to better meet the conditions of the current international system and the changing norms and values that currently dominate it.

Recent conflicts have resulted in a renewed interest in the just war tradition, specifically as it relates to war's end. Over the past decade, there has been a proliferation of scholarly work on the issue from the perspectives of military strategy, international law, just war theory and development aid for war torn societies.\(^8\) The United States military has been devoting ever increasing resources to the study of war’s end, beyond its conception as simple military victory. Although the topic of war’s conclusion includes a broad range of issues and encompasses a variety of professional and academic disciplines, the umbrella term under which this discussion has been aggregated is *jus post bellum* or justice after war.

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7 The Law of Armed Conflict is now also commonly referred to as international humanitarian law (IHL). IHL is an umbrella term that encompasses multiple international treaties and conventions. Prominent among these are the Geneva Conventions of 1949, along with its two additional protocols of 1977. IHL is also composed of a variety of other international agreements seeking to prohibit the use of certain weapons or protect certain categories of people. For a comprehensive understanding of the Law of Armed Conflict or IHL, refer to Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010).

Critical Assumptions

This work rests on four critical assumptions concerning the nature of the international system. The common thread among them is that the international system is currently undergoing a profound transition on the order of magnitude of the one brought about by the Peace of Westphalia in 1648. The root cause of this change is the phenomenon referred to as globalization.9 This work makes no normative claim as to whether the effects globalization on the international system are positive or negative in the aggregate. Rather, it simply affirms the importance of the phenomenon.10

The first assumption is the erosion of state sovereignty and the rise of non-state actors. The international system is currently in transition from a Westphalian system in which states were the lone significant actors and sovereignty was inviolable, towards a system in which states and sovereignty still matter, but will increasingly share the stage with a variety of other players from religious groups, to non-governmental organizations (NGOs) to international organizations and multi-national corporations (MNCs).

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9 For the purposes of this thesis, globalization is defined as “The exorable integration of markets, nation-states, and technologies to a degree never witnessed before in a way that is enabling individuals, corporations and nation-states to reach around the world, farther, faster and cheaper than ever before . . . .” Thomas Friedman, The Lexus and the Olive Tree New York: Random House, 2000), 7-8.

10 The purpose of this thesis is not to debate the relative merits of the phenomenon commonly recognized as globalization. This author understands that scholarship on globalization is currently under-theorized and is more akin to a Rorschach inkblot than a tightly constructed theory. Nonetheless, rapid advances in technology have caused and are continuing to cause significant shifts in the means, speed and quantity of human interaction worldwide. Something fundamental is happening and it is having secondary and tertiary effects on international relations. It is this author's contention that one of these secondary effects is the growing international interest in the idea of jus post bellum. For works dealing with the effects of globalization, see Anne-Marie Slaughter, A New World Order. Princeton: Princeton University Press, 2004. Also, Thomas Friedman's work, The Lexus and the Olive Tree (New York: Random House, 2000) is often used as a primer on the issue. For a critical look at globalization from an economic perspective, see, Joseph Stiglitz's Globalization and Its Discontents (New York: W.W. Norton and Company, 2003).
This assumption is critical because both the contemporary understanding of the just war tradition and international law proceed from a foundation of state sovereignty. National security decision-making also proceeds from a state-centric thought process. Today, policymakers, philosophers and lawyers alike are grappling with the issue of non-state actors in warfare. Although the traditional paradigm has been to deal with states, the rise of transnational groups such as Al Qaeda and the Taliban has precipitated changes in decision-making. Therefore, the erosion of sovereignty is a critical factor underpinning shifts in each of the three disciplines considered by this thesis.

The second assumption is that nature of warfare itself has changed. In fact, question even exists over what constitutes “war” in today’s world. This is a critical point. For the purposes of this work, Clausewitz's definition of war has been adopted. In Book One, Chapter One of On War, Clausewitz proposes, “War is nothing but a duel on an extensive scale.” He further states, “War is an act of violence to compel our opponent to fulfill our will.” Finally, Clausewitz makes his most famous pronouncement “War is a mere continuation of policy by other means.” Through the use of this well recognized definition of warfare, this thesis will be able to consider the topic of war in its broadest sense.

The dynamic of conflict has changed since the end of the Second World War; both in terms of how force is used and to what end(s) it is employed. Over the past sixty years, the incidence of warfare as it has typically been defined (high intensity conflict between the military forces of two or more sovereign states) has declined precipitously. However, there has also been

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11 Clearly the just war tradition was developed long before the current international state system. However, the just war tradition has adapted to the current realities and proceeds from a foundation of sovereignty.
a distinct upturn in intrastate conflict. Given the respect accorded the right of sovereignty in the contemporary just war tradition and international law, intrastate conflict has normally been excluded from the term “war.”

In terms of a formal declaration of war – a recognized component of the *jus ad bellum* calculus – the United States has not declared war since the attack on Pearl Harbor and there has been increasing reluctance internationally to do so. For example, The United States has intervened in Korea, Vietnam, Grenada, Kosovo, Somalia, Afghanistan, Iraq and Libya without such a declaration. Since the end of World War II, declaring war seems to have become anathema within the international system, although there certainly seems to have been no concomitant problem participating in one.

The reasons for this Post World War II aversion to declarations of war lie partly in the United Nations Charter. In its preamble, the charter affirms “that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all people.” Further, article 51 of the Charter reserves every nation the right to self defense. In addition to article 51, the UN Charter also gives the Security Council “primary responsibility for the maintenance of international peace and

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15 Public Law 107-40 (S. J. RES. 23) enacted September 18, 2001 was one of two congressional resolutions commonly referred to as the “AUMF” (authorization to use military force). The other was Public Law 107- 243 (H.J. RES. 114), which was passed on October 16, 2002 and authorized force against Iraq, http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html (accessed, September 2, 2011.) Although these resolutions authorize the use of military force, they never use the word war. The aversion to the use of the word is an important point that will be explored in later chapters of this thesis.

security.” Chapter VII of the charter allows the Security Council to undertake coercive measures, including the use of force in order to maintain that peace and security. This formulation restricts the legitimate use of force to self-defense and the implementation of Security Council decisions. Given this, the traditional notion of declared war has become almost irrelevant in today’s international environment. Declarations notwithstanding, conflicts among armed groups remain common.

In his book, *The Utility of Force*, General Rupert Smith, former Deputy Commander of NATO, takes an extreme position on this phenomenon. He argues:

> War no longer exists. Confrontation, conflict and combat undoubtedly exist all around the world—most noticeably, but not only, in Iraq, Afghanistan, the Democratic Republic of the Congo and the Palestinian Territories—and states still have armed forces which they use as a symbol of power. Nonetheless, war as cognitively known to most non-combatants, war as battle in a field between men and machinery, war as a massive deciding event in a dispute in international affairs: such war no longer exists.\(^\text{19}\)

However, Smith's assertion that war is extinct has certainly not resulted in a more peaceful planet. The United States military has been almost constantly deployed since the U.S. invasion of Panama in 1989. The frequency with which the armed forces of the United States have been called out and the magnitude of the tasks they have been asked to undertake are both unprecedented in American history. With several hundred thousand troops currently deployed in active combat status around the globe on a continuous basis since 2002, the United States

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\(^{17}\) Ibid., Ch. IV, art. 24.

\(^{18}\) Ibid., Ch. VII, art. 39.

military has concluded that the protracted high pace of deployment will not abate in the near future.\textsuperscript{20}

Rather than concerning itself with the distinctions between war and interstate violence, the United States Department of Defense has labeled the post 9-11 era as one of “persistent conflict.” In its 2008 Posture Statement for Congress, the United States Army leadership argues:

Persistent conflict and change characterize the strategic environment. We have looked at the future and expect a future of protracted confrontation among state, non-state, and individual actors who will use violence to achieve political, religious, and other ideological ends. . . . Operations in the future will be executed in complex environments and will range from peace engagement, to counterinsurgency, to major combat operations. This era of persistent conflict will result in high demand for Army forces and capabilities.\textsuperscript{21}

Given the statistical evidence in the changes in the nature of conflict and the preparations being taken by the United States, which is responsible for more than half the world's military current military spending, there is every reason to believe that conflict and issues associated with conflict termination will remain relevant for the foreseeable future.\textsuperscript{22} Changes in the nature of warfare precipitate change in conflict termination processes. With civil wars on the rise along with increasing numbers of military interventions into civil conflicts, the process by which conflict is ended has also changed.


The third assumption from which this thesis proceeds is that globalization has significantly expanded the reach of war's effects. As a result of our globalized world, war is seldom isolated to the parties in conflict. Rather, its effects are felt internationally through such things as economic shocks and acts of terrorism to the potential for nuclear fallout. Although this has always been true to some degree, the technological interconnectivity has greatly increased the degree of interdependence in the last several decades.

Given this desire to stem the far-reaching consequences of conflict, the interest in ending wars well has also increased. This is because it is generally recognized that wars that are not satisfactorily concluded sow the seeds of future conflicts. The Versailles Treaty constitutes the traditional poster child for this argument. However, the First Gulf War (1990-1991) is rising fast as a cautionary tale of how not to end a war.

Therefore, there are moral grounds on which to evaluate a conflict's ending and there are also practical grounds. A peace treaty that does not result in a just peace can have significant negative consequences for not only the conflict's belligerents, but also for the entire international system, given its current globalized nature. As a consequence, the interest in *jus post bellum* has risen substantially.

Fourth, the reasons for which states intervene in the affairs of other states have also undergone a profound shift. In her work, *The Purpose of Intervention: Changing Beliefs About the Use of Force*, Martha Finnemore explores the frequency and character of military intervention and concludes that since the fall of the Soviet Union, the reasons for intervention have changed qualitatively. Specifically, she argues that these changes are not the result of new weapons technology or other hard power shifts, but rather changing norms about acceptable behavior. Finnemore argues that “Norms about human equality and human rights have become
increasingly powerful over the past several centuries and have had profound effects, including effects on military intervention.”

The shift away from state sovereignty to the increasing focus on individual human rights not only changes the calculus of military intervention, but also produces greater interest in the quality of the peace produced by military action, either traditional warfare or humanitarian intervention. Former United Nations Secretary General, Kofi Annan states:

State sovereignty in its most basic sense is being redefined . . . . States are now widely understood to be instruments at the service to their people and not vice versa . . . . When we read the UN Charter today, we are more than ever conscious that its aim is to protect individual human rights, not protect those who abuse them.

From the multiple interventions in the former Yugoslavia, to the intervention in Libya, there has been a distinct predisposition toward armed intervention into internal conflicts during the post Cold-War era. These interventions have been largely justified on the basis of humanitarianism. Returning to the ideas expressed in Kofi Annan's quote above, the unit of analysis considered when contemplating the use of force has gone from being only the state, to being the state and the individual. International boundaries still matter. However, they have become less important.

Theorists considering this issue have debated this change as a difference between a "statist" view of the international system versus a "cosmopolitan" view of it. Statists hold that the

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24 Finnemore’s work is a consciously constructivist argument. Constructivism will be explained at a later section in this introduction and will be used throughout this thesis for its ability to provide a hypothesis regarding the changing norms of war.

obligation is to state sovereignty while cosmopolitans view the obligation to individuals.\footnote{26 Patrick Hayden, “Security Beyond the State: Cosmopolitanism, Peace and the Role of Just War Theory,” in \textit{Jus Post Bellum: Towards a Law of Transition from Conflict to Peace}, Carsten Stahn and Jann K. Kleffner, eds. (The Hague: TMC Asser Press, 2008), 157.} This has massive connotations for the use of force in the international system. If a cosmopolitan view forms the basis of decision making for military intervention, a moral obligation to protect human rights exists. This in turn has implications for the evolution of the classic just war tradition, international law and national security decision-making.

As the effects of globalization have become more widespread and the world more interconnected, it is no longer possible to view war simply as an affair between two or more sovereign states. In fact, the traditional ideas of war and peace seem less and less satisfactory to describe either current international relations or contemporary armed conflict. Rather, any conflict has effects on and implications for the entire international community. Thus, the concept of \textit{jus post bellum}, or justice after war, as it fits within the broader just war tradition, is a critical facet of contemporary international relations and should be regarded as such regardless of whether one is considering the issue from the perspective of moral philosophy, international law or security studies.

\textbf{The Issue of Post Bellum}

The next step in the process is to consider the question of the changing nature of warfare and applying it to the idea of \textit{jus post bellum}. If wars are no longer recognizable as high intensity conflict between opposing militaries, how does one determine what is post conflict? The idea of victory is now just as problematic as the idea of war. A quick review of ongoing operations in Afghanistan effectively illustrates the difficulty associated with this determination.
The United States made the decision to invade Afghanistan shortly after the 9/11 attacks. The U.S. military began its campaign to overthrow the Taliban on October 7, 2001. By December 15, 2001, the Taliban leaders had fled and the Afghans had signed agreement to hold elections and establish a new government in Afghanistan.\(^{27}\) Nonetheless, a decade after the “military victory,” NATO forces in Afghanistan remain engaged in some of the most intense combat operations since the Vietnam War.\(^{28}\)

Is this post conflict? In many senses it is. There have been two national elections in Afghanistan since the fall of the Taliban. Billions of dollars have been spent to create infrastructure where none previously existed and children are attending school in ever increasing numbers.

However, coalition casualties are mounting, as are noncombatant casualties. Afghanistan typifies the difficulty inherent in making the distinction between war and post war. Either way, the situation in Afghanistan today is certainly a long way from the idea of peace. Thus, the case of Afghanistan illustrates the problem. Aspects of the continuing military intervention there, such as work with governance and infrastructure building are clearly “post conflict” activities. However, there are ongoing combat operations in Southern and Eastern Afghanistan that appear as though they will persist for the foreseeable future.\(^{29}\)

\(^{27}\) Seth Jones, *In the Graveyard of Empires* (New York: W. W. Norton and Co., 2009), 94.


\(^{29}\) The issue of when war actually ends is not new, but permeates the entire discussion of war. In his book *Fighting Talk, Forty Maxims on War, Peace and Strategy*, (Westport, CT: Praeger Security International, 2007) Colin S. Gray thoroughly discusses the cyclical nature of war and the continuum between war and peace. Given that war and peace are not absolute, but reside on a continuum, the exact transition point between *bellum* and *post bellum* is fundamentally cloudy. Nonetheless, military commanders and politicians do separate the phases of war along a set continuum. In United States military doctrine, combat operations are considered to be Phase III of a five-phase process between peace and war. For the purposes of this thesis, the declared transition between Phase III (combat) and Phase IV (transition) is utilized as the breaking point between war and post war. For a full explanation of the
Some scholars interested in the evolution of the just war tradition have dismissed the viability of the idea of *jus post bellum* based on this lack of a firm boundary between “conflict” and “post-conflict.”³⁰ They argue that *jus post bellum* cannot be separated as a distinct element of the just war tradition. Therefore, it should be considered as part of the overall *jus ad bellum* calculation. This argument is unconvincing and even potentially dangerous from a policy perspective. Clearly, there is a fundamental inter-relationship between the elements of *jus ad bellum* and *jus in bello*. However, the focus is different. The same logic applies to the relationship between *jus ad bellum* and *jus post bellum*.

*Jus ad bellum* is centrally concerned with the purposes for which a war is fought. It does not specifically concern itself with the quality of the end-state achieved. *Jus post bellum* scholars on the other hand, have focused on such issues as post-war security, the reconstruction of war-torn societies, transitional justice and the creation of independent governance and an economic base as central. These issues will certainly be considered in judging the overall “justness” of any conflict in the same way that *jus in bello* issues contribute to the overall judgment of how a war was fought. However, these issues are not treated separately or specifically in traditional *jus ad bellum* calculations.

Further, there is a danger that a war, which was fought for an unjust cause or with unjust methods, could be “written off” from a policy perspective if there is no separate consideration of *jus post bellum*. For example, if one determines that Operation Iraqi Freedom did not meet the

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jus ad bellum criteria for just cause, then without a separate consideration of jus post bellum issues, one could make the argument that there is no further reason to remain in Iraq and that the United States bears no moral or ethical obligation for reconstruction based on traditional just war criteria. Clearly, the issues of cause, conduct and peace-making each contribute to the overall judgment of a war's justness. Thus, they should be treated as separate, but related topics. As noted just war scholar Brian Orend states, “Conceptually, war has three phases: beginning, middle and end, so if we want a complete just war theory – or comprehensive international law – we simply must discuss justice during the termination phase of the war.”

Although the exact moment of transition from conflict to post conflict may be somewhat blurry, there is a point in every conflict where the main focus of military activity shifts from defeating an opposing force to stabilizing and securing the conflict zone in preparation for a transition to civilian authority. This thesis will consider the primary intention of military operations as the critical factor determining when the post bellum phase of a conflict actually begins.

Inextricably related to the idea of war's conclusion is the idea of victory. Who won? Who lost? If a war (or conflict) has ended, then it would follow that in the majority of cases a victor has emerged. This is another seemingly basic fact of warfare that has become difficult to determine given the contemporary international environment.

Although Clausewitz believed no outcome in war was final, he had no difficulty with the word victory. However, today the concept is problematic. In contemporary American military

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and national security planning the word does not exist. Rather than victory, American military and political planners discuss the issues associated with “war termination.”

In a recent essay on the topic, military historian Roger Spiller wrote:

Today you will search in vain for any definition of victory in American military doctrine. Exactly when the classical idea of victory disappeared from official doctrine is an open question, but its absence invited the thought that at some time in the recent past, victory, which so long dominated military thought and practice, lost some of its official appeal.33

In the words of the most recognized contemporary just war scholar, Michael Walzer, “War is a social creation.”34 As such, the definitions of the vocabulary involved shift with changing norms and understandings. Thus, like the term war and the concept of jus post bellum, the concept of victory has also morphed since the Japanese surrender in August 1945.

Clausewitz's cautions notwithstanding, the idea of victory has a sense of finality to it, as well as ring of success that the concept of war termination lacks. Spiller further states, “The term (war termination) implies something less than ideal outcome of a war: reservation, equivocation, ambiguity, limitation--substitutes for victory.”35 It may be for this reason that the concept of war termination has been so relatively ignored in military writing and analysis.

Regardless of the terminology applied however, conflicts do normally end with one side or group having an advantage over the other. When the fighting is over, one can group is determining the rules of the game. These rules include such issues as when and how elections are to be held, how post-war justice is meted out and how economic systems are revitalized. By


determining which group is making the rules for society, one can determine who is in charge at the end of the war, whether the term “victor” is applied or not.

**Methodology**

The just war tradition is inherently interdisciplinary. Over the millennia, philosophers, theologians, historians, policy makers, military officers, international relations theorists, sociologists and lawyers have undertaken consideration of what constitutes justness in warfare. Each thinker has applied a methodology common to his or her particular field of study in order to consider the question of just war. All of these endeavors have provided critical insights into the complex topic of justice and warfare. Often however, the methodological rigor required by a discipline specific undertaking has required focus on discrete aspects of the topic at the expense of the whole.

The corpus of literature that currently constitutes the just war tradition is so rich and deep that no single work can ever hope to look at it comprehensively. Nonetheless, a more interdisciplinary approach to the problem would be useful. This work seeks to accomplish a deliberately interdisciplinary analysis of recent scholarship on the topic *jus post bellum* undertaken within the fields of philosophy, international law and security studies. The desired outcome is a synthesis of major ideas in order to make practical, policy-oriented recommendations.

This thesis will follow the method of structured focused comparison among three competing strands of thought in the *jus post bellum* literature; philosophy, international law and security studies. Although the topic is itself broadly interdisciplinary, current scholarship falls...

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36 The method of Structured, focused comparison is set out in *Case Studies and Theory Development in the Social Sciences* (Boston: MIT Press, 2005). According to the authors, “The method is structured in that the researcher writes general questions that reflect the research objective and that these questions are asked of each case
predominantly into discrete disciplinary bins. The approaches of the three different disciplines and their conclusions will be compared for determining what constitutes just peace. From there, areas of congruence and convergence will be determined. With this analysis a set of recommendations for policy makers and senior military officers can be operationalized for an applied definition of *jus post bellum* that represents a synthesis of the three currently divergent views of the problem. Furthermore, this will also provide useful insights from which planners, lawyers and moral philosophers can launch additional research.

This approach should yield new insights. However, no discipline ever provides a monolithic view of any topic. Individual theorists and practitioners each have unique perspectives on the nature of a problem based upon their world view, individual experiences and the particular angle from which they approach the problem. Therefore, it is necessary to construct a method by which the major *jus post bellum* scholars can be differentiated, apart from the disciplines to which each of their works belong. Thematic categorization is as necessary as disciplinary sorting.

When reviewing the literature on the topic of *jus post bellum*, some significant common themes emerge. The first is that the just war tradition can be broadly placed within the field of international relations, but cannot be easily situated within it. Several just war scholars have remarked upon the degree to which the just war tradition defies the current major categories of international relations theory; realism and idealism.

Realism is a school of international relations theory characterized by constant competition and a struggle for power among states operating within a system of international anarchy. Realists are interested in material capabilities as predictors of outcomes in international

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under study in order to guide and standardize data collection . . . . The method is focused in that it deals only with certain aspects of the cases considered.” 67.
affairs. Further, within the realist tradition, the role of morality is subordinate to that of power.\(^{37}\) Thucydides' *History of the Peloponnesian Wars* remains a classic realist text. More recent works critical to understanding the evolution of the realist tradition include Hans Morgenthau's *Politics Among Nations* and Kenneth Waltz's *Theory of International Politics*. Realist views of international relations predominated during the Cold War Era.\(^{38}\)

The main competitor to realism within the field of international relations has been idealism or liberalism. Within this school of thought, states remain the principal actors, however international institutions and even individuals can have significant roles. Also, unlike with realism, cooperation among states is possible, particularly economic cooperation, although competition remains probable. Influential authors within this strand of international relations theory are Robert Keohane and Bruce Russett.\(^{39}\)

Despite the fact that realism and liberalism have been the most prominent strands of thinking, several influential just war scholars have specifically opined that neither school adequately encompasses the tradition's scope. Jean Bethke Elshtain notes, "Just war refuses to fit inside the realist and idealist categories."\(^{40}\) Further, Walzer titled the first chapter of *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, "Against Realism." This is

\(^{37}\) This is not to suggest that morality plays no role in the realist conception of international relations. Ideals do matter. However, in situations of crisis, calculations of self interest and power will prevail over calculations of morality and ideals. For an excellent discussion on the realist conception of the relation between power and morality, please refer to John Mearsheimer, “E. H. Carr vs. Idealism: The Battle Rages On,” *International Relations* 19, no. 2 (2005): 139-52.


relevant considering that *Just and Unjust Wars* has probably been the single most influential book on the topic since it was published in 1977.

In it, Walzer takes aim at the belief that “In time of war, law is silent,” arguing that “notions of right conduct are remarkably persistent.”\(^{41}\) Finally, Orend considers the utility of the realist paradigm in his book, *The Morality of War*. In his analysis, Orend determines that realism is congruent with certain facets of the just war tradition. In fact, he argues most of realism's pragmatic cautions about behavior in war have been incorporated into *jus ad bellum* calculations of last resort, probability of success and proportionality. However, Orend believes that realism's fundamental denial of morality and justice in international affairs is incompatible with the just war tradition.\(^{42}\)

Given the just war tradition concerns itself with one of the most important phenomena of international relations; war, it seems strange that neither main school of international relations theory can fully account for the tradition's longevity and impact on the practice of diplomacy, warfare and international politics.

Since the end of the Cold War, a third strand of international relations theory has gained prominence within academia. This is constructivism. Constructivist scholar, Alexander Wendt writes that constructivism is guided by two tenets. First, “The structures of human association are determined primarily by ideas rather than material forces.”\(^{43}\) Second is that, “identities and interests of purposive actors are constructed by these shared ideas rather than given by nature.”\(^{44}\)

\(^{41}\) Walzer, *Just and Unjust Wars*, 3 and 16.


\(^{43}\) Alexander Wendt, *Social Theory of International Politics* (Cambridge, UK: Cambridge University Press, 1999), 1.

\(^{44}\) Ibid.
Indeed, the underlying point of constructivism is that international relations are constructed by the ideas and values that underpin them. Wendt argues that international structure is “made of social structure rather than material phenomenon.”

Approaching international relations through the lens of constructivism allows for the admission of ideas as the major driver in international relations. The just war tradition is one such set of ideas. International law is another. Therefore, a constructivist approach to the issue is likely to prove most productive. Walzer himself bolstered this assertion when he wrote, “War is a social creation,” in Just and Unjust Wars.

A second point concerning the utility of approaching this topic from a constructivist perspective is that ideas can and do change. Realism has considerable difficulty with accounting for any changes in the international system, never mind ones that lead towards greater harmony and international cooperation. As this thesis considers the just war tradition over the three millennia of its lifespan thus far, the reader will note that it has evolved significantly in order to maintain relevance with contemporary ideas of ethics and law. Thus, the constructivist allowance for change is also critical to being able to fully explore the evolution of the just war tradition.

Theo Ferrell has written a worked entitled The Norms of War: Cultural Beliefs in Modern Conflict. In it, he seeks to determine how prevailing notions of ethics and morality have shaped the way that militaries have fought. He posits, “ideas shape the way humans make war.” In his book, he considers the changing norms surrounding humanitarian intervention, from an ethical perspective as well as a legal one. His investigation leads him to conclude that a “non-legal”


46 Walzer, Just and Unjust Wars, 24.

A norm of humanitarian intervention has emerged since the end of the Cold War.\textsuperscript{48} Considering that the interest in \textit{jus post bellum} has also arisen since the end of the Cold War, it seems useful to consider whether changing norms can account for the rise in interest of the ideas that constitute \textit{jus post bellum}. This is a specifically constructivist line of investigation that will be relied upon in the conclusions of this thesis.

Although constructivism is a strand of international relations theory, it can be equally applied to the disciplines of law, philosophy and security studies that will be considered within this thesis, which make it a particularly useful tool for comparing differing discipline’s views on a single topic.

For instance, the idea of sovereignty, which has provided a foundation for international law, is a political and legal construction. It has no existence outside that which humans give it. Further, restraint in warfare, \textit{jus in bello}, is based on shared beliefs of moral conduct in wartime. In the words of military historian, Roger Spiller, “... even the most vicious of America's wars have been shot through with shared assumptions, traditions, treaties, and formal or informal understandings with the enemy.”\textsuperscript{49} Given this, constructivism is a useful lens through which to consider the issues of \textit{jus post bellum}.

Taking this idea of constructed beliefs and norms one step further is international relations theorist Ian Clark who considers the importance of norms in international relations in his book, \textit{Legitimacy in International Society}. Clark writes, “The core principles of legitimacy express rudimentary social agreement about who is entitled to participate in international

\begin{tabular}{l}
\textsuperscript{48} Ibid., 137. \\
\textsuperscript{49} Spiller, “Six Propositions,” 11. \\
\end{tabular}
relations and also about the appropriate forms of conduct.” Clark considers the idea of legitimacy to be a “meeting ground” of the norms of morality, legality and constitutionality.

Clark's definitions of legality and morality are straightforward enough. However, the idea of constitutionality requires explanation. He defines it as “political expectations on which international society is from time to time founded and which are not fixed legal rules.” Clark then goes on to describe legitimacy as a “... process of accommodation as actors reach a tolerable consensus on how these various norms are to be reconciled in any particular case.”

For Clark, there is stability in the international system when there is a balance among the three norms (constitutionality, legality and morality). However, when there is no consensus on how these norms should be balanced, then there is instability within international relations arising from a crisis of legitimacy.

Clark's construction of legitimacy is useful to the examination of jus post bellum. The three strands of literature considered in this thesis: philosophy, international law and security studies correspond well to Clark's three critical norms: morality, legality and constitutionality. Currently there is little consensus within or even among the disciplines on how to define jus post bellum. Thus, the debates surrounding jus post bellum can be construed as a crisis of legitimacy.

Although this argument has been crafted on very theoretical terms, the effects of this crisis of jus post bellum legitimacy are quite real. If political, moral and legal consensus is missing, then the real world outcomes for just peace will be constantly perceived as suboptimal.

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51 Ibid., 19.

52 Clark, Legitimacy In International Society, 209.

53 Ibid., 20.
Given that the subject in question is war, a perceived lack of legitimacy surrounding war's end, will likely result in more violence.

This argument has been built on a foundation of constructivist international relations scholarship, examining the ways in different norms, world views, and disciplines converge (and diverge) around the topic of *jus post bellum*. The concept of war has been considered, the idea of post-war has been considered and the notion of victory has been considered. Before this methodology section can be completed, the idea of peace must also be explored. It is the diverging views on what constitutes peace that is causing much of the dissonance on the topic of *jus post bellum*.

In *The Invention of Peace*, Sir Michael Howard, begins by quoting Sir Henry Maine (1822-1880), “War appears to be as old as mankind, but peace is a modern invention.”\(^{54}\) For the remainder of the book, Howard considers the changes the ideas of war and peace have undergone over the millennia. War, Howard argues, “. . . has been the universal norm in human history.”\(^{55}\) However, he sees peace in a fundamentally different way.

As the title of this book would imply, Howard views peace as a recent human invention. He credits the Enlightenment generally and Immanuel Kant in particular with the invention of peace as more than a “pious aspiration.”\(^{56}\) It was the Enlightenment ideal of individual freedom and human liberty that became the bedrock of peace that existed as more than the simple absence of war. This Kantian conception of a possibility of positive peace has become a defining trait of the liberal worldview, as well as an underpinning for an expansive conception of *jus post bellum*.


\(^{55}\) Ibid.

\(^{56}\) Ibid., 31.
Other philosophers, such as Thomas Hobbes and John Locke have provided the philosophical underpinnings for different, more restrained conceptions of *jus post bellum*.

Wendt has developed worldviews that can help differentiate among the divergent conceptions of *jus post bellum*. In his book, *Social Theory of International Politics*, he develops three different worldviews or cultures underpinning international relations theories that he names for the philosophers most associated with constructing them. These are Hobbesian, Lockean and Kantian cultures.57

The Hobbesian culture is based on Thomas Hobbes' *Leviathan*. Wendt describes this culture of international relations as an “enemy” culture. States do not recognize each other’s right to exist and warfare is unconstrained by morality. Violence can only be constrained by the power of other actors within the system.58 In many respects, the Hobbesian culture best underpins the realist tradition.

Wendt explains that the Lockean culture is a culture of international rivalry in which state behavior is constrained by the mutual recognition of sovereignty. The Westphalian state system is an example of Wendt's Lockean culture. War and violence are accepted methods of conduct, but they are governed by rules and constrained by ethics. Law has legitimacy within the Lockean culture.59

The final culture Wendt identifies is the Kantian culture. He argues this is a culture of friendship within the international system. War is no longer viewed as a legitimate method of

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57 Alexander Wendt, *Social Theory of International Politics*, 246-312. In his Chapter, "Three Cultures of Anarchy," Wendt explains that anarchy, which is taken as a given in international relations theory, is really a construction and can take multiple forms depending upon the culture prevailing within the international system at a given point in time. He names his three cultures of anarchy Hobbesian, Lockean and Kantian as they most closely align with the writings of these three philosophers.

58 Ibid., 261.

59 Ibid., 270-297.
dispute resolution and states will fight collectively against any third party that threatens the system.⁶⁰

Although international relations has never seen the emergence of a Kantian system at the global level, an argument can made that the U.S.-U.K. relationship is Kantian in nature and that the European Union is showing similar tendencies. Further, one can argue that the delegitimation of war as a method for dispute resolution shown by the ratification of the United Nations Charter shows a desire on the part of the UN member states to build towards a more Kantian culture for international relations.

Adopting Wendt's three cultures for the purposes categorizing *jus post bellum* scholarship is useful on several levels. First, all three of the philosophers Wendt has chosen have contributed in some way to the evolution of the just war tradition. In fact, several *jus post bellum* authors specifically reference one or more of these philosophers within their own writings. Thus, using these three cultures is not overlaying an alien construction onto just war thinking.

These three philosophers, although not generally identified as major just war thinkers, already belong within the tradition. Second, these writers' works can be applied to differentiate thought processes across all three disciplines under consideration within this thesis; philosophy, international law, and security studies. Third, the process of differentiating the *jus post bellum* writers' underlying world view is instructive in itself. Overall categorization of a thinker in terms of the realist and liberal paradigms will provide another method by which to understand the thought process that led to a specific conclusion regarding the viability and applicability of the concept of *just post bellum*. Therefore, for the purposes of this thesis, all authors will be considered from the perspective of the discipline in which they are writing and also from their underlying (or explicit) reliance on Hobbesian, Lockean or Kantian worldviews.

⁶⁰ Wendt, *Social Theory of International Politics*, 298-306.
The purpose of this thesis is several fold. First is to consider the emerging concept of *jus post bellum* (justice after war); next to analyze and compare the way the topic is being considered in three discrete academic fields: philosophy, international law and security studies; third, from this analysis determine whether this concept belongs as a third strand of the classic just war tradition; finally to make policy-oriented recommendations regarding the application of this idea to ongoing and emerging conflicts.

The methodology employed in this thesis is most often used in qualitative historical and political science case studies. In this case, the comparison will be among the different disciplines' approach to the overarching question: What constitutes a just peace? From this overarching question, this work will seek to answer a set of sub-questions to investigate and compare. These are:

- At war's end, how do we define peace?
- What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?
- What are the obligations of the victor to international community? Is there an obligation for reconstruction to ensure greater chance of international stability?
- What are the obligations of the international community towards the belligerents (both winners and losers?)
- Do victors have the right to reparations or remuneration from the defeated state? (under what conditions?)

Through investigating the answer to these questions, the core elements of each disciplinary strand's views on *jus post bellum* will emerge. From here, this work will develop a series of recommendations for the policy community.
This thesis will proceed to examine the concept of *jus post bellum* through the lens of three distinct disciplines: philosophy, international law and security studies. Chapter Two will provide an overview of the historical evolution of the just war tradition from ancient Greece to its current form. Each discipline will be given two chapters (Chapters 3-8). The first of these will determine the evolution of the discipline's approach to justice after war, through a review of the relevant literature. The second of the discipline specific chapters will analyze the major trends and current conclusions of each discipline regarding the issue of *jus post bellum* with regard to the questions posited. Chapter nine will consist of a comparative analysis of the results of the discipline specific inquiry looking for areas of convergence and divergence shown as a result of the comparison. It will then focus on concrete policy recommendations resulting from this comparison and overall conclusions reached as a result of the research.

Directing these millennia old questions of justice and warfare at the contemporary intersection of law, just war tradition and policy making in a time of shifting global order will provide a lens through which decision makers can determine what constitutes *jus post bellum*. Conversely, debates and decisions undertaken by statesmen will have ramifications for academic and legal scholars concerned with war and its outcomes. The parameters of the discussion are shifting and it is equally critical that philosophers and legal scholars focus their energy on this complex and fundamental issue of human values.

Given increasing levels of interdependence, conflict erupting anywhere could have global implications. Putting this in just war terms, *jus ad bellum* cannot be separated from *jus in bello* and neither can be considered without regard to the desired end state (*jus post bellum*). The three phrases represent a complete set. None stands alone. In the view of Saint Augustine, war without
regard to the desired end is “wickedness.” Therefore, defining the requirements for *jus post bellum* is more than a simple academic exercise. It is a matter of critical importance.

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CHAPTER TWO
THE HISTORICAL EVOLUTION OF THE JUST WAR TRADITION FROM ANCIENT GREECE THROUGH THE END OF THE COLD WAR

Introduction

The desire to delineate the legitimate causes of war, as well as to limit its destructiveness is nearly as ancient as warfare itself. The scholarly just war tradition has more than a 3000-year history, with roots dating back to ancient Greece and the Roman Empire. Aristotle is commonly credited with having coined the term *just war*. From this auspicious beginning, the complex problem of justness and warfare has been considered and written about by such eminent scholars as Cicero, Saint Augustine, Immanuel Kant and Hugo Grotius. Each of these figures, along with many others, has contributed to what has become a rich, multidisciplinary tradition that has remained a consistent touchstone for discussions concerning the justness of war.

This chapter will explore the evolution of the classic just war tradition from its ancient beginnings through to the end of the Cold War era. The period since the fall of the Berlin Wall has seen a remarkable resurgence in just war scholarship and the beginnings of the debate over *jus post bellum*. Therefore, the most recent just war thinking will be reserved for more comprehensive treatment in chapters three and four.

Thinking about what constitutes just war is not unique to the western liberal tradition. It can be found in the writings of many civilizations from ancient the Babylonians and Egyptians, to classical Hindu texts. One of the best-known ancient non-western works that considers the topic of just war is Sun Tzu's *The Art of War*. Writing in China, twenty-five hundred years ago,

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Sun Tzu advises on such topics as the treatment of prisoners, the requirement to win having expended as little force as necessary and the need to cause the least amount of damage possible.\textsuperscript{65}

Clearly, just war thinking is not limited to the Judeo-Christian tradition and can be found in many other cultures. However, it is the European tradition that has provided the roots for contemporary international law and the most common lexicon for contemporary academic discussions of justice in warfare. Further, this thesis is concerned with tracing the contemporary development of just war thinking from its roots within the western liberal tradition. Therefore, this chapter will concentrate on the topic of just war from this perspective.

Classical just war thinking, taken in its entirety, is a multi-disciplinary body of work. Through the millennia, it has straddled the line between secular and theological writing, as well as the line between political and military perspectives. The tradition has also profoundly influenced the evolution of contemporary international law. In the words of James Turner Johnson:

\begin{quote}
The just war tradition . . . coalesced as a cultural consensus in the middle ages as a product of interaction among various intellectual sources: cannon and civil law, theology and philosophy, the customs of a knightly class and the practice of statecraft.\textsuperscript{66}
\end{quote}

This consensus produced a long line of thinkers who were concerned with the morality and permissibility of warfare.

According to Spiller, “All wars are defined not by their extremes, but by their limitations.”\textsuperscript{67} The just war tradition has consistently sought to define these limits.

\begin{flushright}65\textsuperscript{Sun Tzu, }\textit{The Art of War,} trans. Samuel B. Griffith (London: Oxford University Press, 1971), 76.

\begin{flushright}4\textsuperscript{James Turner Johnson, “The Just War in the Thought of Paul Ramsey,” }\textit{The Journal of Religious Ethics} 19, no. 2 (Fall 1991): 184.
\end{flushright}
Over time, just war thinking has advanced criteria that allow for moral and ethical judgment of an armed conflict.

The just war tradition was never intended to be a checklist for making *post hoc* judgments about the justness of a particular conflict. Rather, it is intended to be a tool for decision makers who are confronted with the morally complex choices associated with the employment of military force. Further, the classical tradition does not contain a presumption against the use of force. Rather, in certain cases, there was a presumption of a moral obligation to use force on behalf of the state in order to preserve political order.\(^{68}\) The decision to use force, although regrettable for the destruction it would cause, was always a viable option so long as the criteria for *jus ad bellum* were met. The just war tradition is not pacifism.

The tradition has also consistently sought to place limits on what is permitted by a soldier, sovereign or state in the pursuit of military victory. It is equally true that the tradition has been used as often to criticize military action as to justify it. This creates an inherent tension within the tradition, as it constantly seeks to define both the permissibility of and limitations to any given conflict.

**The Evolution of the Just War Tradition**

Just war thinking has adapted substantially through the centuries to maintain its relevance. It has evolved significantly to accommodate the changing structure of the international system, the changing concept of war itself, and the prevailing concept of the morality of the times in which the scholars were writing. It is not comprised of a static list of

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\(^{67}\) Spiller, “Six Propositions,” 8.

rules, rather it is a core set of ideas that have been refined and adapted to conform to contemporary conditions and values.

Shifts within the international system have precipitated significant revisions of the just war tradition. For example, classic just war theory predates a system of sovereign nation states, but has been adapted to it through its incorporation into international law. International law, which is the contemporary legal codification of the just war tradition proceeds from a foundation of state sovereignty.

The just war tradition also provides a foundation of modern military codes and rules of engagement. Over the ages, the classical just war tradition has evolved to address contemporary moral and ethical concerns. It has shown remarkable dynamism, resilience and utility over a broad sweep of human history.

The classical just war tradition currently has two recognized major components. These are *jus ad bellum* (justice of war) and *jus in bello* (justice during war). *Jus ad bellum* considers the justness of the war itself. It takes into consideration such issues as whether the decision to go to war is just and not motivated by desire for conquest or gain, whether there is an expectation of victory, and whether the party declaring war has sufficient authority to do so. *Jus in bello* is concerned principally with issues of military conduct. Is there discrimination made between combatants and non-combatants? Are the methods used proportional to outcome desired? Are prisoners of war (POWs) treated according to international laws and norms? Today, the concept of *jus in bello* is well codified within the Law of Armed Conflict.

This thesis concerns itself with the growing body of literature on the concept of *just post bellum*. Although *jus post bellum* is not currently a recognized component of the just war tradition, changing norms and shifts in the international system are precipitating significant
debate about what currently constitutes justness in war. Specifically, the current debates centers on whether the justness of war should be determined in part by the quality of the peace or outcome created by the conflict in addition to the already recognized criteria: the cause for which the war was fought (jus ad bellum) and the restraints placed upon the fighting itself (jus in bello). This debate has evolved quickly and could precipitate a radical change in the contemporary understanding of what constitutes just war.

**Just War Thinking in Ancient Greece and the Roman Empire**

Considerations of what constitutes justice in war can be traced as far back as ancient Greece. In *The Republic*, Plato talks of prohibitions against the burning cities, and inflicting suffering on women and children. He also mentions the requirement for war to be initiated and ended by a “proper authority.” Aristotle also considered the issues of justice during war in both *Politics* and *Nichomachean Ethics*. Like Plato, Aristotle viewed warfare to be an inevitable by-product of human nature. However, Aristotle felt that war must be limited to the extent possible and thus he criticized city-states such as Sparta for being excessively concerned about the prosecution of war. For Aristotle, war was a means to an end, which was establishing a “good life” for Greek citizens.

The idea of just war can also be found in the Roman era in the writings of Cicero. As a lawyer and a politician, as well as a philosopher, it is not hard to see that Cicero's arguments contain legal, as well as moral conditions for a war to be considered just. Like Plato, Cicero believed that war should be initiated and terminated by proper authority. He also insisted that a

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69 Christopher, *The Ethics of War and Peace*, 10.

just war required a formal declaration of hostilities. Cicero also wrote on the methods by which a just war could be fought, noting that only soldiers could wage war. Further, Cicero cautioned that even warfare had limits and that mercy must be shown to soldiers who had surrendered and consideration shown for those who had been conquered. From the works of Plato, Aristotle and Cicero, one can see the emerging outline of the current formulation of *jus in bello* and *jus ad bellum*.

**The Christian Roots of the Just War Tradition**

When considering the just war tradition from a Christian perspective, Augustine is the usual starting point for discussion. His seminal work, *The City of God,* was written in the fifth century A.D. and was designed to “solidify the Christianization of the Roman world.” It was written during a time when, “...the church was attempting to become the universal religion of a universal political order.”

In *The City of God,* Augustine wrestled with the use of violence, considering the conditions under which a Christian could morally use force and also when it would be correct for a sovereign to go to war. Augustine determined that a sovereign’s right to rule was “...defined by his responsibility to secure and protect the order and justice...” This responsibility for protecting order and justice included war if the circumstances demanded. Augustine concludes

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72 Ibid.

73 Augustine, *The City of God,* X.


that war is a regrettable, but sometimes justifiable undertaking. However, Augustine states that
the goal of such violence is to secure a better state of peace:

> It is therefore with the desire for peace that wars are
> waged, even by those who take pleasure in
> exercising their warlike nature in command and
> battle. And hence, it is obvious that peace is the
> end sought by war. For every man seeks peace by
> waging war, yet no man seeks war by making
> peace.76

Saint Augustine never differentiates between the causes of war and the methods of
fighting one (jus ad bellum versus jus in bello). Rather, his work considers the morality of
warfare in general. Thus, there is no specific differentiation between bellum and post-bellum.
The work was set against a framework of a larger question about how to constitute a moral
civilization. Thus, the explicit differentiation was unnecessary. Nonetheless, one can argue that
within Augustine’s work, there is the potential for conclusions to be drawn with regard to jus
post bellum. If the goal of war is to secure a better state of peace, then the manner in which
warfare is concluded is as central to the calculation of the morality of the war as the cause for
which it was fought or the manner in which it was prosecuted.

Equally important to note in Augustine's work is the idea that the true evil in warfare
occurs when fighting is undertaken with a spirit of vengeance.77 Thus, for Augustine, there are
implications for restraint in the conduct of warfare even though he makes no explicit attempt to
delineate what they are. Finally, it should also be emphasized that Augustine's arguments never
included a proscription against warfare in general. His intent was to provide an ethical standard

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76 Augustine, The City of God, 621.

77 Serena Sharma, "Reconsidering the Jus Ad Bellum/Jus In Bello Distinction," in Jus Post Bellum:
Towards A Law of Transition from War to Peace, eds. Carsten Stahn and Jann Kleffner (The Hague: TMC Asser
of warfare for “. . . the practicing Christian who also had to render unto Caesar his services as a soldier.”

**The Dark and Middle Ages**

Following the fall of Rome, there was some important just war scholarship prior to the modern era, particularly significant advances in the criteria for *jus in bello*. The ethical dilemma of the era was different than in Augustine’s time and pointed towards *jus in bello* limitations rather than *jus ad bellum* ones. During this timeframe, common citizens were generally unarmed, although they were often the victims of the worst horrors of warfare. Therefore, the issue at hand was limiting the means that soldiers used in the prosecution of wars.

As a result, the idea of non-combatant immunity emerged, specifically as it applied to women and children. Further, limitations were made on the types of weapons that could be justly used in combat. Crossbows were outlawed, as were all weapons with poisonous edges. Further, attacks on food were proscribed and churches were officially granted status as places of sanctuary. The knight's chivalric code merged with the early just war tradition, thus allowing for the two current strands of thought, *jus ad bellum* and *jus in bello* to more fully emerge.

During the 12th century, in the city of Bologna, Gratian completed an immense compilation of canon law that became a text entitled, *Concordia Discordantium Canon*, or as it was more commonly referred to, the *Decretum*. This text was less an original work than the first systematic combination of previously existing sources into a single work. Gratian's purpose

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78 Miller, “The Contemporary Significance of the Doctrine of Just War,” 255.


for the *Decretum* was to describe circumstances under which was could be considered just.\(^8\) The *Decretum* was accepted and used throughout the twelfth and thirteenth centuries as the basis for adjudicating canon law and justness in warfare. Gratian's contribution to the just war tradition was significant in that he began to differentiate just war thinking from being a strictly a moral or theological concern towards it becoming a legal one.\(^8\)

Saint Thomas Aquinas was the next major philosopher/theologian to make a significant contribution to the evolution of the just war tradition. Writing in the 13\(^{th}\) century, Aquinas’ political and theological worldview was considerably different than that of Augustine. The Roman Empire no longer existed and Christianity was the universal religion of Europe at the time. Although the church’s doctrine was universally binding, it was executed by a variety of independently and secularly concerned princes. Thus, Aquinas was interested in developing a theory of *bellum* in opposition to *duellem*. *Bellum* is a conflict commanded by a sovereign that could either be just or unjust depending upon the underlying reasons for it, whereas *duellem* is a private war, or conflict waged for gain, which could never be justified.\(^8\)

Thus, Aquinas' ethical objective for further delineating just war doctrine was different than Augustine’s. Aquinas wished to differentiate war as declared by a sovereign from private conflicts and to determine under what circumstances war declared by such a sovereign could be justified. His *Summa Theologica* deals directly with this issue. In question 40 of the second part of the work he asks; “whether it is always sinful to wage war?” Aquinas concludes it is not, so

\(^8\) Ibid., 61.
\(^8\) Ibid., 85.
\(^8\) Johnson, “Just War As It Was and Is,” 20.
long as the war is waged with “right authority, just cause and right intention.” These three considerations became the principal criteria for the judgment of *jus ad bellum*. One must also note that following Aquinas, there was a gradual, but significant reduction in the number of private wars waged until the consolidation of sovereignty following the Peace of Westphalia.

In the 16th century, Spain's conquests in the new world precipitated new ethical dilemmas that spurred advances in just war thinking, specifically in the area of *jus in bello*. Spain's harsh treatment of the Indians in the New World provoked substantial criticism among the contemporary just war thinkers. The most dramatic expression of this disapproval occurred in 1520, when the entire faculty of the University of Salamanca publicly resolved that Spain's actions in the new world constituted an unjust war.

The Salamanca School, as it came to be called, included several notable just war theorists, Francisco de Vitoria, Francisco Suarez, and Bartoleme De Casas among them. Vitoria was the most influential of these writers in terms of the evolution of the classical just war tradition as he drew upon the concept of natural law to discuss Spanish conquests in America in a cross-cultural

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85 In later centuries, additional criteria for *jus ad bellum* have emerged. These are: probability of success and proportionality. Johnson refers to these as “additional prudential criteria,” as they are not as firmly associated with the justness of the decision to wage war itself. Proportionality is a criteria for *jus in bello* that has been migrated into the *jus ad bellum* criteria, while probability of success is a less a calculation of justness than one of pragmatism. For additional discussion of this issue and the hierarchy of the *jus ad bellum* criteria, please refer to James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*. Princeton: Princeton University Press, 1975.


87 Orend, *The Morality of War*, 16.

context. Vitoria was adamant that enlargement of empire was never a just cause for war. He also argued that neither differences of religion nor the greater glory of a ruler ever provided a justification for war. Vitoria also returned to Augustine's interest in the quality of the peace resulting from war. He believed that war should not be waged as to “ruin the people against whom it was directed,” and that “moderation and humility” should shape the means by which a military victory is implemented.

The Spanish scholastics that followed Vitoria expounded upon the potential for just cause on the part of both belligerents. This then led to a larger discussion on the necessity for restraint in the conduct of warfare in order to allow for the possibility that all parties were “in the right.” This scholarship continued to progress the growing distinction between *jus in bello* and *jus ad bellum*.

**The Peace of Westphalia and the Emergence of International Law**

The end of the Thirty Years War and the ensuing Peace of Westphalia mark the next major shift in the understanding of the basis for just war theory. As a result of the Peace of Westphalia in 1648 and the enshrinement of the modern state system, with its foundational concept of national sovereignty, the need arose for the creation of international law.

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89 Serena Sharma, “Reconsidering the *Jus Ad Bellum/Jus In Bello* Distinction,” 13.


91 Ibid., 302.


Hugo Grotius, writing in the seventeenth century, authored an exhaustive text defining the legal basis for just war theory. His work, *De Jure Belli ac Pacis*, or *On the Laws of War and Peace*, are credited with secularizing the major tenets of the Just War theory. Grotius based his ideas on a conception of natural law that was binding on all human beings regardless of religion, nationality, or local customs. For Grotius, war must contain a legal cause in order to be just. In order to qualify as a just war in Grotius’ thinking, there must be a stated reason for war that would recognized as legal in a court of law. In addition to legally codifying elements of the classical just war tradition, Grotius' work also went far to legally codify the emergent concept of national sovereignty. As a result, the classical Christian just war tradition became incorporated into the emerging body of international law, where it remains today.

Grotius' work consists of three books. The first is a general inquiry into the nature of and lawfulness of war, while the second and third concern themselves with just cause (*jus ad bellum*) and justice in war (*jus in bello*). This work remains the foundation for international law concerning the justice of armed conflict and the actions taken during armed conflict. Grotius' writings also solidified the current separation of thought in just war theory: that of just cause, versus that of just conduct.

Although Grotius never employed the term *jus post bellum*, he did deal with war's end in concrete, legal terms. His books dealt with the issue of peace treaties and the circumstances

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under which reparations could be demanded by the victors.\textsuperscript{97} However, his work on the subject was more detail oriented than broadly philosophical.

**Just War and the Enlightenment**

Turning to the evolution of just war theory during the Enlightenment era, this chapter will now address the work of Immanuel Kant and its enduring relevance to the issue of just peace. In his essay, *To Perpetual Peace*, Kant creates a blueprint for a world free from war. To achieve this state, Kant argues that the international system should be populated solely by republican states, as republics are more likely to respect both the rights of their own citizenry, as well as the laws governing international sovereignty.\textsuperscript{98} Additionally, Kant argues that other states have the right to forcibly change the governmental structure of nations that are consistently belligerent and disturb the overall peacefulness of the international system. Finally, Kant also rejects the idea that any peace treaty, which holds out the potential for further conflict, could ever be viewed as a legitimate one.\textsuperscript{99}

From Kant's work, one can see that he was extremely interested in the idea of *jus post bellum*, even though he never used the term per se. In fact, Kant is generally not regarded as being a just war theorist. Despite this, when one reads Kant from the perspective of just war theory, it is clear that Kant in fact has an implicit just war theory in mind as he writes. Orend has written extensively on Kant's view of just war theory and credits Kant as the progenitor of *jus*

\textsuperscript{97} Grotius, *The Rights of War and Peace*, 385-89.


\textsuperscript{99} Kant, “To Perpetual Peace: A Philosophical Text,” 113.
post bellum. Orend is a significant figure in the contemporary debates surrounding *jus post bellum* whose views are heavily underpinned by Kantian philosophy.

For Kant, the ultimate goal of war should be to end the occurrence of war altogether. In Kant's view, this is a real possibility. However, Kant’s view of a world free from war should not be construed as an idealistic and utopian vision. Rather, Kant based his ideas on self-interest rather than an idealist view of humanity. In proposition six of his essay, *Idea For A Universal Humanity With A Cosmopolitan Purpose*, Kant laments that man is, “made from such crooked timber that nothing straight can ever be built.” To overcome humanity’s failings, Kant advocates constitutional forms of government that will ensure individual freedom, while containing the excessive power of monarchs.

Kant was also somewhat visionary in his predictions of the future. Writing in 1795, he spoke of a coming time when the world would grow to a point “where a right violated in one part of the world is felt everywhere.” Given the role of globalization and the impact of technology on human interaction, it appears as though we are currently living Immanuel Kant's prediction.

In the introduction to this thesis, Wendt’s concept of the Kantian culture of anarchy was introduced. It is based upon an assumption that cooperation is possible within the international system in order to ensure both state security and individual human rights. Several of the *post bellum* authors proceed from a Kantian basis in their writing, either implicitly or explicitly. Thus, considering *jus post bellum* through the lens of Kantian philosophy is a useful approach for this thesis to employ.

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Another prominent enlightenment figure that should be recognized in this chapter is John Locke. Like Kant, Locke is not generally considered to be philosopher concerned with the subject of just war theory. Nonetheless, his political philosophy contributed to the evolution of the just war tradition into its present form. Locke's philosophy of government was underpinned by a firm belief in natural law and in the social contract. For Locke all men were endowed with certain natural rights. In his *Second Treatise of Government*, Locke enumerates these as “life, health, liberty and possessions.”

Locke's views on inalienable rights are now commonly known as they were enshrined in the Declaration of Independence. Less well known, but equally important to this work are Locke's views on war. Locke also considered the issue of war in the *Second Treatise on Government*, discussing such things as permissibility of conquest and the justness of the dissolution of government in the aftermath of defeat. Using Locke's view of natural law imbuing "inalienable rights," in turn with the idea that governmental systems were based on social contract theory and that if that contract were abrogated, there was a “right” to rebel, one can see Locke's considerable value to the evolution of the just war tradition. Orend argues “Locke remains the classical source for insisting that for war to be legitimate, a government must respect the natural (or human) rights of all of its individuals to life, liberty and property.”

The second culture of anarchy discussed in the introduction was the Lockean culture. It is based upon maintaining an international system composed of sovereign states, in which warfare exits as a legitimate instrument of policy. An underlying premise of the Lockean culture of

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104 Ibid.

anarchy is the maintenance of security for the citizens of a particular state, rather than the security of the system as whole. The Lockean culture is based on a Westphalian state system. Several post bellum authors rely on the implicit assumption of a Lockean culture of anarchy. Thus exploring the concept of the jus post bellum in terms of Wendt’s Lockean culture of anarchy is a useful approach for this thesis.

The 18th and 19th centuries were centuries of colonization and imperialism. Although the body of international law continued to grow, the rights of powerful nations were paramount and sovereignty and its protection were the foremost concerns. Also during this time however, there was continued refinement of the concept jus in bello in such documents as the Hague Conventions (1899 and 1907) and the first articles of the Geneva Conventions (1864). Nonetheless, peace treaties agreed upon during these centuries were often more about exacting the maximum number of concessions and reparations from the vanquished than they were about justice or promoting any concept of perpetual peace.106 During this time, international law continued to evolve and further codify the rights of sovereign states.

The harsh realities of two world wars radically changed the calculation of the moral permissibility of warfare in general. The casualties resulting from these two conflicts were unprecedented in human history. As a result, there was a reasonable desire to narrow the scope of just war even further in the hope that it would prevent recourse to war. The result can be seen in the United Nations Charter whose preamble states “that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all people.”107

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The UN Charter specifically limits the legitimate uses of force in the international system. Article 2(4) states, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”

Nonetheless, Article 51 of the charter reserves for every nation the right to self-defense. However, with the exception of the obligation of states to prevent genocide and crimes against humanity, there are no legal recourses for the use of force for individual states other than self-defense or collective defense encompassed within the UN Charter and its conventions.

The legal system enshrined in the UN Charter does not conform to the criteria laid out in classical just war thinking. One of the principal *jus ad bellum* criteria is proper authority. In the case of the UN system, the argument has been made the UNSC does not have the proper authority to declare war, nor does it have the means at its disposal to ensure a probability of success. Thus, the UN system is extremely problematic in terms of the classical just war tradition. In terms of this thesis, it is also an example of the tension between a Lockean and Kantian view of the culture of anarchy. Kantian culture advocates the development of a “League of Nations,” while Lockean culture works within a system of sovereign states.

The international institutions created in the aftermath of World War II significantly narrowed the scope of what constitutes a legally justifiable recourse to war. These limitations were born of both idealism and the firsthand knowledge of the destruction that could now occur

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109 Ibid., art. 51.

110 In the Second Definitive Article For a Perpetual Peace, Kant describes that creation of a league of nations or a federation of free states to develop laws that would guarantee the rights of all citizens, to maintain the security of the system itself, and thus gradually lead to the abolition of wars. Kant, “To Perpetual Peace: A Philosophical Text,” 117-118.
as a result of the technological advances in warfare. However, the UN system of legitimizing the use force only in the case of self-defense, places it at odds with the classical just war tradition.

During the Cold War era, there were two significant ethical debates that framed arguments regarding just war and in fact, revived the academic discussion in just were terms. These debates concerned the permissibility of the use of nuclear weapons and The Vietnam War. Two major academics figures framed these debates in terms of the classic just war tradition. They were Paul Ramsey and Michael Walzer.

Ramsey’s work, War and the Christian Conscience: How Shall Modern War Be Conducted Justly, revived the classical just war tradition in the 1960s and provided a disciplined manner for Protestants to consider the issue. Johnson credits Ramsey as

“. . . the central figure in the revival of and redefinition of Christian just war theory that began in the 1960s.”\(^{(111)}\) Ramsey’s consideration of just war was not principally about when to engage in violence, but how to act out of love towards one’s neighbor.\(^{(112)}\) In Ramsey’s view, loving one’s neighbor includes defending that neighbor should circumstances require it. Ramsey was sometimes a divisive figure within the just war community given that he initially supported U.S. action in the Vietnam War and did not reject nuclear weapons as inherently immoral.\(^{(113)}\) Further, Ramsey’s work attempted to incorporate just war thinking into a theory of statecraft that is focused neither on the requirement for war or the requirement for pacifism.\(^{(114)}\) Thus,

\(^{(111)}\) Johnson, “The Just War in the Thought of Paul Ramsey,” 184.


\(^{(114)}\) Ibid., xix.
Ramsey presented an ethical challenge to the thinking on both the political left and right in the United States during the 1960s.

Michael Walzer was also motivated to write on the issue of just war as result of the United States experience in Vietnam and as a result of the destructive potential of nuclear weapons. His work, *Just and Unjust Wars* is arguably the most well known contemporary work on the subject of just war. Walzer has more recently contributed to the debate on *jus post bellum* and his work will be considered more expansively in the following chapters.

Writing on the issue of nuclear warfare, Walzer states, the concept of nuclear war "exploded the notion of 'Just War.'" If the result of warfare could now be the extinction of the entire human race, how could the resort to war ever be considered justified? And if annihilation was the likely result of war, what was the point of considering the idea of just peace?

Although the American experience in Vietnam brought the idea of just war theory back into the foreground, particularly the topic of *jus in bello*, just war scholarship remained very much tied to Cold War politics, a Westphalian state structure, and a legal prohibition against all warfare except in the narrow case of self defense, or if approved by the UNSC. The original Augustinian proposition that although war was regrettable, it was sometimes even morally obligated in order to secure justice and a better state of peace was lost in the face of the awesome destructive potential of nuclear warheads.

**The Current Principles of Just War Thinking**

As has been affirmed throughout this chapter, there are two major strands that constitute current just war thinking. These are *jus ad bellum* (justice of war) and *jus in bello* (justice in war). Although there is always danger in reducing complex issues to simple checklists, it is

useful at this point to delineate the criteria by which each strand is judged. It is also important to note, that although there is general agreement on the criteria that constitute *jus in bello* and *jus ad bellum*, the agreement is not absolute and there are differences of opinion among scholars as to the weight each individual criterion should receive when considering a conflict.

**Jus Ad Bellum Criteria**

- **Just Cause** - In order to wage war a state must show that it has just cause to do so. In contemporary international relations, just cause can be shown in cases of self-defense and also in cases where a state is protecting individuals within its borders.

- **Right Intention** - The cause for which a state fights is actually the reason it has gone to war. A state cannot cite self-defense or protection of the innocent when the actual reason is territorial conquest or a desire for access to natural resources, etc.

- **Proper Authority** - war is being waged by a duly constituted authority with the authorization to go to war.

- **Public Declaration** - One may go to war only if one has notified the citizens of one's own state, the state upon who war is being declared and the international community.

- **Probability of Success** - In order to wage war, one must believe there is a chance to succeed in achieving owns goals. A war that is expected to be futile cannot be a just war.

- **Proportionality** - A war may proceed only if the cost benefit analysis yields that the good that may come of the war exceeds the probable cost of the war.

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116 Stanford Encyclopedia of Philosophy (Stanford: Stanford University, 2005), s.v. “War,” [http://plato.stanford.edu/entries/war/](http://plato.stanford.edu/entries/war/) (accessed April 7, 2011). These are also the *jus ad bellum* criteria referenced by the Encyclopedia of Philosophy, a peer reviewed academic resource. Please see [http://www.iep.utm.edu/justwar/](http://www.iep.utm.edu/justwar/) (accessed 4 September 2011). There are differing views as to the appropriate content of *jus ad bellum*. The Catechism of the Catholic Church (no. 2309) outlines four criteria for just war: These are that the damage inflicted by the aggressor on the community of nations must be lasting, grave and certain; all other means of putting an end to it must have been shown to be impractical or ineffective; there must be serious prospects of success; the use of arms must not produce evils and disorders graver than the evil to be eliminated. Please see, Scott Richert, “The Just War Theory and the Catholic Church,” [http://Catholicism.com/od/belief/taughts/p/Just_War_Theory.htm](http://Catholicism.com/od/belief/taughts/p/Just_War_Theory.htm), (accessed 10 September 2011). Additionally, the argument has been advanced by Johnson in *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*, (Princeton: Princeton University Press, 1975), that reasonable chance of success and proportionality are additional prudential criteria that do not belong on the same level of importance as Aquinas’ original formulation of Proper Authority, Right Intention and Just Cause. *Jus ad bellum* criteria choice does not effect the conclusion or recommendations of this thesis. Nonetheless, these differences in the formulations and hierarchies of *jus ad bellum* should be understood and considered as this thesis unfolds.
**Jus In Bello Criteria**

- **Obey All International Laws on Weapons Prohibitions** - Ensure no international treaties or conventions are violated during the prosecution of the conflict.

- **Discrimination and Non-Combatant Immunity** - Military personnel are prohibited from deliberately targeting non-combatants. Collateral damage may occur, but combatants must take care to discriminate between legitimate targets of war and non-combatants.

- **Proportionality** - Combatants may only use force proportionate to the end they seek to achieve.

- **Benevolent Quarantine of Prisoners of War (POWs)** - Once military personnel have been captured, they are to be quarantined until the war ends as specified in the Geneva conventions.

- **No Means Mala In Se** - Military personnel may not use weapons or means that constitute “evil in themselves.” (mass rape campaigns; genocide or ethnic cleansing; forcing captured soldiers to fight against their own side; and using weapons whose effects cannot be controlled, (e.g. bio weapons).

This chapter has attempted to delineate the evolution of the classical just war theory within the western liberal tradition, as well as to leave the reader with the current 'state of play' vis-à-vis just war. This survey is intended to highlight major just war scholars and the changes the tradition has undergone over the centuries. It is not exhaustive. As with any tradition dating back to the ancient Greeks, there are certainly important thinkers who have been omitted in the interest of brevity. Nonetheless, the main threads of the argument are present.

The second, equally important purpose of this chapter was to impress upon the reader that idea that the just war tradition is not now, nor has it ever been, static. What constitutes 'justness' in warfare has always been a question open to debate and change. The two decades since the end

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of the Cold War have been violent ones. Rapid advances in technology and weaponry have changed the character of warfare in fundamental ways.

Further, the upturn in armed humanitarian intervention, as well as the advent of the conflict known as the Global War on Terror have each affected the way scholars and practitioners have thought about justice and war. For example, “The Bush Doctrine” of preemption has also launched considerable debate in both policy-making circles and academia over what constitutes just war in contemporary society. This thesis focuses on one aspect of these debates; that is the debate over *jus post bellum*.

Over the sweep of history, these types of changes have precipitated re-evaluation of the just war tradition. The last twenty years has been no exception to this rule. The current debate swirling within the community of philosophers, lawyers and military practitioners has centered around the question of what constitutes *jus post bellum* and whether that idea belongs as a third strand of the just war tradition.
CHAPTER THREE

JUS POST BELLUM FROM THE PERSPECTIVE OF PHILOSOPHY

Introduction

Interest in jus post bellum springs from the convergence of three phenomena that have occurred since the fall of the Berlin Wall. First is the rising number of humanitarian interventions\(^\text{118}\) beginning in the 1990s, second is the campaign (Iraq and Afghanistan) associated with the ongoing conflict best known as "The Global War on Terrorism." Third, is the increasing number of civil wars that begin and then never seem to end. Although these three phenomena are distinct, they are closely related in the conditions they create and/or assume responsibility for. Both the coercive use of military force and humanitarian interventions are likely to end with destroyed infrastructure, unstable governments and perpetrators of war crimes. Simply put, both humanitarian intervention and traditional military action are likely to result in or assume responsibility for non-functioning states and societies.

The just war tradition as it currently exists does not address the issue of post-war societies. The division between jus ad bellum and jus in bello considers the justness of the decision to go to war and the means by which the conflict should be prosecuted. Once the fighting is over, there is little mentioned regarding the requirements for a just peace, except for discussions concerning punishment and reparations. Within the classic just war tradition, one can cite the Augustinian proposition that the purpose of war is a better state of peace. This

\(^{118}\) Like the definition of War, the definition of humanitarian intervention is moving a target. For the purposes of this thesis humanitarian intervention is defined as "The threat or use of force across state borders by a state (or group of states) aimed at preventing widespread and grave violations of the fundamental human rights of individuals other than its own citizens without the permission of the state within whose territory force is applied." This definition is taken from J. L Holzgreve's chapter "The Humanitarian Intervention Debate," in Humanitarian Intervention: Political, Legal and Ethical Dilemmas (Cambridge University Press: 2001), 18.
appears a solid foundation from which to build the idea of *jus post bellum*.\textsuperscript{119} However, there are few criteria within the just war tradition by which to evaluate war's end in terms of overall justness.

There are multiple reasons for this. Prominent among them has been a respect for sovereignty since The Peace of Westphalia. If war is a state focused enterprise, when an inter-state conflict is ended, then states deal with the aftermath of a conflict independently. Peace treaties are signed between belligerents, and the instability and destruction created by the conflict reverts to being the responsibility of the individual states to deal with as they see fit.

Second among the reasons for the rising interest in *jus post bellum* is the changing nature of warfare. As has been stated previously in this work, and has been noted by many contemporary just war scholars, armed conflict is no longer likely to be an inter-state war between the militaries of two or more states. Rather, it will probably be an intra-state conflict in which the combatants are not members of a standing military force, but potentially neighbors who have taken up arms against one another for ethnic, religious or other ideological reasons.

The third reason for the increased interest in *jus post bellum* is the increased levels of global interconnectivity. From the CNN effect, to the influence of expatriate or diaspora communities on local politics, to requirements for access to natural resources such as oil, the chance that an internal conflict can remain off the world's "radar" is increasingly slim. Thus, for the combination of these reasons, there has been a significant increase in the idea of a just peace since the end of The Cold War.

Despite the increased interest in the topic, there are widely divergent views on what *jus post bellum* should consist of and how it should be pursued. Currently, the idea of *jus post bellum* is akin to a Rorschach inkblot: The meaning is in the eye of the beholder. The purpose of

\textsuperscript{119} Saint Augustine, *The City of God*, 621.
this chapter is to present a literature review of the major *jus post bellum* thinkers who are focusing on the topic from the perspective of the classic just war tradition, rather than through the lens of international law or policymaking. In the context of Clark’s idea of international legitimacy, this chapter will explore the “morality” component rather than the legality or constitutionality ones.

This chapter will proceed in three sections. First, it will discuss pertinent literature as it pertains specifically to humanitarian intervention. Second, it will consider the body of literature on *jus post bellum* generally. Third, it will synthesize the major conclusions from both strands to analyze in the next chapter.

**The 1990s: Humanitarian Intervention and the Responsibility to Protect**

The end of the Cold War and the early 1990s was a period of optimism in which the potential for international cooperation and United Nations action was no longer constrained by Cold War realities. The nearly unanimous international condemnation of Iraq's invasion of Kuwait in August 1990 began a decade of multilateral action largely legitimized on the basis of alleviating human suffering rather than on realpolitik balance of power considerations.\(^{120}\)

Throughout the 1990s, the United Nations approved an unprecedented number of peacekeeping operations on humanitarian grounds. From the deployment of the first United Nations peacekeeping operation in 1948 until the end of the Cold War, the UN only authorized 13 peacekeeping missions.\(^{121}\) Further, during that same period the veto was used by a permanent member of the Security Council 279 times, effectively rendering the council impotent to deal


with emerging crises.\textsuperscript{122} Since then however, the UNSC has authorized more than 48 operations.\textsuperscript{123} Many of these post-Cold War peacekeeping operations have been approved under the auspices of chapter VII of the UN Charter, which allows for the use of "all necessary means" to restore peace and security.\textsuperscript{124} Unlike operations that are approved under the auspices of chapter VI, chapter VII operations occur in cases where there is no peace agreement in place and often without the consent of the belligerent parties. In short, there is an expectation that military force will be required to make the peace rather than simply be present to ensure it.

Although humanitarian intervention may not immediately appear to fall into the broad category of war, humanitarian intervention undertaken without the consent of government in which the intervention is occurring has significant similarities to a classic interstate war. \textit{Jus ad bellum} and \textit{jus in bello} criteria can be and are applied to these operations. Further, from a legal standpoint, the Geneva conventions and the laws of occupation apply. Given these facts, along with the large number of humanitarian interventions that have taken place in the last twenty years, it is logical to consider the case of humanitarian intervention as it pertains to the concept of \textit{jus post bellum}.

There has been a proliferation of literature on humanitarian intervention.\textsuperscript{125} However, little of it deals with the idea of \textit{just post bellum} per se. This notwithstanding, the literature on humanitarian intervention considers such issues as the ethic underlying intervention, as well as

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{123} Ibid.
\item\textsuperscript{124} \textit{The Charter of the United Nations}, Ch. VII, art. 39.
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obligations of the intervening parties to assume responsibility for such things as reconstruction of war-torn states, the institution of functioning governance and the punishment of war criminals. Although the body of literature may not refer directly to the concept of *jus post bellum*, it considers the same issues that are at the center of the *jus post bellum* debate. Therefore, this literature must be regarded as part of the academic discussion occurring on the topic of justice after war.

However, it is not this author's intention to develop a comprehensive literature review of humanitarian intervention scholarship, but rather to highlight works which are particularly useful in explaining the major intellectual and philosophical debates within the community of scholars dealing with the topic of humanitarian intervention. Additionally, this quick review will take note of literary works that are specifically and deliberately interdisciplinary in nature and/or work to place humanitarian intervention within the context of the just war tradition.

A critical work written in response to the interventions of the 1990s is *The Responsibility to Protect* (R2P). It grew out of an initiative by the government of Canada to establish the International Commission on Intervention and State Sovereignty (ICISS). The report was commissioned to explore the “right of humanitarian intervention,” and to determine “. . . when if ever, it is appropriate for states to take coercive – and in particular, military – action against another state for the purpose of protecting people at risk in that other state.”

This document proceeded from a just war foundation, considering intervention in terms of both *jus ad bellum* and *jus in bello*. The R2P report determined the threshold for just cause to be large-scale loss of life, genocide or ethnic cleansing. The report also cited the criteria of right

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intention, last resort, proportional means and reasonable prospects for success. However, despite the use of *jus ad bellum* and *jus in bello* criteria, R2P does not make any specific reference to the just war tradition.

The ICISS also considered the responsibility to intervene versus the right of state sovereignty. It determined that individual states have the principal responsibility to protect their own citizens. However, it also noted that sovereignty has inherent obligations. First among these is the responsibility to ensure the basic human rights of its citizens. Thus, when states are unwilling or unable to exercise their sovereign obligations with respect to their own people, it argues, then the international community, specifically the United Nations, has a responsibility to step in.

This responsibility does not end when the killing does. It is far more comprehensive. The obligations of the intervening states outlined within the ICISS report are congruent with an expansive interpretation of *jus post bellum*. The ICISS argues for a “responsibility to rebuild” war torn societies. Under the heading of rebuilding comes the separate issues of recovery, reconstruction, reconciliation and amelioration of “the causes of harm the intervention was designed to avert or halt.” Beyond the mere reconstruction of infrastructure, R2P claims there is a responsibility for the complete transformation of the state in which the intervention took place, in order to ensure the human rights of all its citizens are protected.

Thus, *The Responsibility to Protect* takes a strong position with respect to “The Pottery Barn Rule.” Whether the intervening states “broke it” or not, they have “bought” the problem.

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127 Ibid., XII.


129 Ibid., 39.
According to the ICISS, the reward for stepping in to avert a crisis is to take on further responsibility for the state in which the intervention took place. Opponents of R2P, raise objections to the document on the basis of this argument, stating that the large responsibilities conveyed on the back end of the intervention will more than likely result in more human tragedies that are neglected by the international community, such as occurred in Rwanda, rather than interventions such as occurred in Kosovo.

*The Responsibility to Protect* was published in 2001 and the proximity to the 9/11 attacks caused it to receive less attention than it might otherwise have. Nonetheless, the concept of R2P was unanimously adopted by the United Nations World Summit in 2005. However, to date it has yet to be invoked as a justification for military intervention into another state.\(^{130}\)

The idea of R2P has garnered a literature industry around it. One of the ICISS Chairmen, Gareth Evans, a former foreign minister of Australia, has written, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, (Brookings: 2009). In this book, Evans considers the moral underpinnings of the idea of R2P, as well as the tension between sovereignty and human rights that pervades the concept. As a progenitor of R2P, Evans provides both insight into the debates and reasoning that led to the publication, as well as obvious passion for the topic.

Another book of note on the topic of R2P is *Responsibility to Protect* by Alex J. Bellamy. In his work, Bellamy does an excellent job of recounting the political back and forth preceding the publication of the ICISS report. He also tackles the difficult policy issues the report has surfaced with regard to its expansive definition of international responsibilities. Bellamy writes

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with a critical eye and discusses the concept in terms of both its strengths and weaknesses. He concludes by arguing that R2P must be differentiated from humanitarian intervention. Bellamy believes that R2P's mandate is far broader, including, “. . . a range of diplomatic, humanitarian and other peaceful measures to prevent and protect . . . .” By ensuring that there is an understanding of R2P as encompassing far more than non-consensual military intervention, Bellamy believes the concept will have greater impact among states at risk for genocide and other human rights violations.

Susan Yoshihara's book, *Waging War to Make Peace* takes a very critical look at R2P in terms of the international debate over humanitarian intervention. Yoshihara argues there is no consensus on what constitutes grounds for humanitarian intervention and that the text of the R2P document approved in 2005 was a “weakened version” that actually removed all international responsibility from it. She further argues that international consensus on the issue of R2P is nonexistent.

*Waging War to Make Peace* considers the arguments for intervention in the 1990s and concludes that the debates over moral and legal issues surrounding humanitarian intervention never resulted in consensus. Yoshihara warns that sovereignty is “alive and well” and that human rights activists should carefully seek to define, rather than expand the boundaries of human rights, so that debate can be more precisely framed. Her points are well taken and can

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133 Ibid., 164.

134 Ibid.
be applied with equal ease to the debates surrounding the formulation of criteria for *jus post bellum*.

Another work that should be mentioned as particularly useful to understanding the dynamics of the humanitarian intervention debate is *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*. This book seeks to explore the debates surrounding humanitarian intervention from a deliberately interdisciplinary perspective. It is a series of essays examining different aspects of humanitarian intervention from the basis of ethical obligation through pragmatic policy-oriented approaches. Contributors include such well-known academics as Michael Ignatieff and Robert Keohane. As a series of articles, the book does not proceed from a unified perspective, but rather illuminates the main debates of ethics, international law and politics that pervade any discussion of humanitarian intervention.

Theo Ferrell has written a worked entitled *The Norms of War: Cultural Beliefs in Modern Conflict*. He considers the changing norms surrounding humanitarian intervention, from an ethical perspective as well as a legal one. His investigation leads him to conclude that a “non-legal” norm of humanitarian intervention has emerged since the end of the Cold War.\(^\text{135}\) Ferrell's thoughts concerning the tension between legality and morality with regard to humanitarian intervention are instructive and when considering the same tension in the wider debate over *jus post bellum*. Further, Ferrell’s approach to the idea of humanitarian intervention is explicitly constructivist. His investigation of changing norms of humanitarian intervention is equally valid for exploring the changing norms surrounding just war and *jus post bellum* in particular.

\(^{135}\) Ibid., 137.
One last book that must be included on the topic of humanitarian intervention is *Freedom's Battle* by Gary Bass. Bass takes the radical, yet intriguing position that there is nothing new in the recent debates over humanitarian intervention. Specifically he posits:

All of the major themes of today's heated debates about humanitarian Intervention – about undermining sovereignty or supporting universal human rights, about altruistic or imperialistic motivations, about the terrible dangers in taking sides in civil wars and ethnic conflict, about the role of public opinion and the press in shaping democratic foreign policy, about multilateral and unilateral uses of force, about moral responsibility and political leaders-- were voiced loud and clear throughout the nineteenth century.¹³⁶

From this position, Bass considers cases of humanitarian intervention during the nineteenth and early twentieth centuries by the United States and the British Empire. He argues that moral grounds often trumped realpolitik in decisions to intervene militarily. He concludes there is “something to be learned from the way the diplomats of the nineteenth century managed humanitarian intervention’ and that ‘the use of force alone does not make an act imperialistic.’¹³⁷ Bass' book is useful in that it calls scholars attention to the fact that many of these “new issues” confronting policymakers today, are not so new at all and that there are historical analogies worth pursuing.¹³⁸

Bass’ exploration of 19th century humanitarian intervention is instructive for contemporary scholars and policy makers. There is a binary character to contemporary arguments about humanitarian intervention. Specifically, arguments are framed in “either-or” language. Either an intervention is pursued on the basis of security or it is undertaken on the

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¹³⁷ Ibid., 378.

¹³⁸ Ibid., 178.
basis of morality. This is a false choice in contemporary discussion that was not present in period about which Bass was writing.

From the small sample cited above, one can glean an understanding of the major threads of debate and analysis regarding humanitarian intervention. None of the work frames the issue in terms of *jus post bellum*. Nonetheless, the debates surrounding the proper endpoint of intervention are nearly identical. Once intervention has occurred, what are the obligations of the intervening power(s) and the international community? Are they obligated to leave behind a state that can protect the fundamental rights of its citizens and function as a member of the international community? Given the similarity of the core issues around which humanitarian intervention and *jus post bellum* debates revolve, humanitarian intervention will be considered as particular case of “war” for the remainder of this work.

**Beyond 9/11: Afghanistan, Iraq and *Jus Post Bellum***

The debate surrounding humanitarian intervention has yet to be resolved. Rather, it was pushed aside by the 9/11 attacks and the U.S. response to them. The Bush doctrine of preemption and the decision to pursue regime change in Iraq in particular, changed the terms and focus of the debate. It is in the aftermath of military action in Afghanistan and Iraq that the idea of *jus post bellum* began to gain traction in academic and policy circles. The fact the United States undertook a war of preemption without a strategy for “winning the peace,” has served as a focal point for discussion.\(^{139}\)

The idea of *jus post bellum* and whether it belongs as an addition to the classic just war tradition has gained attention from both well known just war scholars such as Michael Walzer.

\(^{139}\) There are many published histories detailing the planning done by the United States government in the run-up to Operation Iraqi Freedom. For comprehensive and easily accessible accounts, please refer to either *Plan of Attack: The Decision to Invade Iraq* by Bob Woodward (Simon and Schuster: 2004) or *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* by Michael Gordon and Bernard Trainor (Vintage: 2007).
and James Turner Johnson, as well as relatively young or previously unknown theorists, such as RADML (ret) Louis Iasiello who writes on the topic from his perspective as a former Navy Chief Chaplains, and Professor Brian Orend who has written prolifically on the topic from the perspective of a neo-Kantian liberal internationalist.

The topic is broad and there is considerable disagreement over whether and how the idea should be incorporated into the broader body of just war literature. This section of the literature review will include scholarly works that approach the topic from a predominantly ethical or moral perspective, rather than a legal or policy-oriented one. Unlike the humanitarian intervention literature, which is massive, the jus post bellum literature is relatively new and represents a niche community of authors concerned specifically with the topic of jus post bellum. This review intends to cover the spectrum of thinking on jus post bellum literature, as it currently exists.

The article with which to begin this literature review is “The Responsibilities of Victory: Jus Post Bellum and the Just War,” by Alex Bellamy. Published in 2008, it maps the intellectual parameters of the argument. Bellamy argues there are two major strands of thought present within the jus post bellum debate and that many scholars oscillate between the two. He names these maximalist and minimalist positions.140

Bellamy defines the minimalist position as one in concert with the classic just war tradition that draws on positive law and argues “combatants are entitled to wage war only to the point that their rights are vindicated.”141 Bellamy believes that minimalists view jus post bellum in terms of restraints to be put on the victors, while maximalists argue for further obligations for

141 Ibid., 605.
the victors in order to be able to call a war justly prosecuted. Maximalists, he opines, believe that victors have the responsibility to guarantee the security of the citizens of the losing side and to begin political and economic reconstruction of defeated states.\textsuperscript{142}

Bellamy critiques both positions on \textit{jus post bellum} stating that each has problems. He accuses the minimalists of having "inter-state myopia" that makes it difficult to apply their criteria in other than inter-state conflicts.\textsuperscript{143} Bellamy also takes issue with desire on the part of the minimalists to completely separate the classic just war tradition from international law. He argues "... it is imperative that the law relating to occupation, almost entirely ignored by \textit{jus post bellum} writers, be placed firmly within this minimalist account."\textsuperscript{144}

Bellamy also provides a strong critique of the maximalist position. Maximalism, he notes, has several significant issues. First, why should victors necessarily acquire obligations? Second, he argues that the maximalist position is actually "alien" to the classic just war tradition. He contends that the justness of the peace is an altogether different thing than the justness of a war. He further believes that scholars should not seek to add \textit{jus post bellum} as a third strand of just war theory, as it is something fundamentally apart from it. Bellamy is not however, fully against the development of an idea of \textit{jus post bellum}. He sees merit in continuing to refine the idea. He cautions that it must be developed carefully and by consensus. Barring consensus, he argues, it will never gain legitimacy.\textsuperscript{145}

A second article that seeks to frame the current academic debates surrounding \textit{jus post bellum} is "Moral Responsibilities and the Conflicting Demands of \textit{Jus Post Bellum}" by Mark

\textsuperscript{142} Ibid., 610.
\textsuperscript{143} Ibid., 605.
\textsuperscript{144} Ibid., 608.
\textsuperscript{145} Ibid., 625.
Evans. In it Evans seeks to “argue the morality of post-conflict reconstruction,” which he considers the heart of the *jus post bellum* debate. He further argues against Bellamy’s conception of minimalist and maximalist conceptions of *jus post bellum*, preferring instead to consider “restricted” and “extended” conceptions of *jus post bellum* as more apt.

Evans’s principal objection to minimalism versus maximalism is his belief that both views are limited to a short timeframe in the immediate aftermath of the war and that both focus on the rights of the combatants versus their responsibilities. Evans returns to the Augustinian conception of war as the “lesser of two evils” to argue for a very broad understanding of *jus post bellum*. Evans quotes Immanuel Kant’s call for a day of atonement following victory in war. Atonement is required because all war, even a just one, is a perpetration of evil. For Evans the evil accompanying every war carries with it inherent responsibilities. Among these is the responsibility to reconstruct the defeated state and leave it as a functioning member of the international community.

Thus from the evil perpetrated even by just warriors comes a moral obligation to reconstruct the war ravaged state. Evans develops an expanded view of *jus post bellum* on this basis. Unlike Bellamy, Evans believes that the idea of *jus post bellum* is a necessary addition to the just war tradition given the changes in the nature of warfare and also given the unanimous

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147 Ibid., 147.

148 Ibid., 150.

149 Ibid.

150 Ibid., 152.

151 In the Essay “Perpetual Peace: A Philosophical Sketch,” 105, Kant states “At the end of war, when peace is concluded, it would not be inappropriate for a people to appoint a day of atonement rather after the festival of thanksgiving. Heaven would be invoked in the name of the state to forgive the human race for the great sin of which it continues to be guilty.”
adoption of the *Responsibility to Protect* in 2005 by the United Nations General Assembly. For Evans, *jus post bellum* in the form of an extended occupation intent on reconstruction is both morally and legally required.

Thus, the range of ideas put forth as a basis for developing criteria for *jus post bellum* extend from Bellamy's minimalist conception of the term through Evans' expanded view of it. In the view of this author, neither delineation is satisfactory. The difference between Bellamy's maximalism and Evans' expanded version appears to be more in terms of degree rather than type. And, that degree changes according to both scholar and case considered. As a result, the lines between maximalist and restricted constructions of *jus post bellum*, as well as those between maximalist and expansionist ones are impossible to clearly discern. The differences are far too nuanced.

Therefore, this author would suggest that the defining division among the major *jus post bellum* scholars is better understood as division between “Restoration” and “Transformation.” Those who advocate a restorative version of *jus post bellum* are advocating a return to as close to the status quo ante bellum as possible, once the rights violation that began the war has been resolved. Advocates of transformative conceptions of *jus post bellum* are in favor of much broader responsibilities of the victor to transform the defeated society into a functioning member of the international community through political, economic and if necessary, cultural reconstruction. In short, proponents of a transformative conception of *jus post bellum* are also advocates of “The Pottery Barn Rule,” you broke you bought it. It doesn't matter whether a victorious state was the initial victim of aggression or not, for those who advocate a transformational view of *jus post bellum*, victory entails the responsibility to reconstruct the defeated state.
This literature review will consider the major *jus post bellum* scholars on the basis of whether they are advocating transformative or restorative criteria for *jus post bellum*. Further, it must be noted that authors' advocacy of restorative or transformative conceptions of *jus post bellum* are not necessarily static. A scholar may be in favor of the restorative version of *jus post bellum* in the vast majority of cases, but when confronted with a genocidal maniac such as Adolph Hitler or Pol Pot, he or she may become an advocate of transformational *jus post bellum*.

**The Restorers:***

Perhaps the most renowned living just war scholar is Michael Walzer. His book *Just and Unjust Wars* remains the seminal text for the contemporary understanding of the just war tradition. From this position, Walzer has also written on the emergent topic of *jus post bellum*.

In *Just and Unjust Wars*, Walzer crafts an argument about just war that although not directly stated as such, is rooted in human rights and a universal notion of morality. He argues, “Notions about right conduct are remarkably persistent.” He is also committed to the concept of sovereignty, but recognizes conditions in which intervention must occur. Walzer argues, “When a government is involved in the mass murder of its own people or some subgroup . . . then a foreign state or coalition of states is going to have to replace the government . . ..” Nonetheless, Walzer holds that except in especially egregious cases, such as the Nazis or the killing fields of Cambodia, sovereignty should be respected.

Walzer has joined the recent discussions regarding the idea of *jus post bellum* and whether it has a place within the just war tradition, having published several articles and opinion pieces on the topic. In “Aftermath of Wars: Reflections of Jus Post Bellum,” Walzer argues that

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152 Walzer, *Just and Unjust Wars*, 16.

153 Ibid., X.
classic just war theory advocates a return to the status quo ante bellum. However, he acknowledges that World War II and the transformative nature of its aftermath allowed for the “defensibility of criteria for *jus post bellum*.”

Walzer goes on to argue that the rules of sovereignty makes for the right not to intervene, but that once a state acts, it acquires obligations. He argues that these obligations should be understood in terms of “provisioning,” and that they include such things as law and order, food, shelter, schools and jobs. Walzer is clear however, that only a state that acts acquires such responsibilities. Inaction or neutrality remains a viable alternative.

Walzer has also written on the U.S. invasion of Iraq in terms of *jus post bellum* criteria. In his article, “Just and Unjust Occupations,” Walzer separates the idea of the justness of war from the idea of the justness of the occupation. In effect, he argues that *jus ad bellum* and *jus post bellum* have separate criteria and can thus be adjudicated separately. He writes that it is possible to fight a just war and “still make a mess of its aftermath.” Given this, he endorses the correctness of developing criteria for *jus post bellum* that are “distinct from, but not wholly independent of those that we use to judge war and its aftermath.”

Thus Walzer acknowledges the value of the idea of *jus post bellum* and the idea of obligations of the occupier. However, he leaves it to state decision-making whether the occupation occurs at all. In essence, a state or coalition is entitled to occupy another state that has

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155 Ibid., 52.

156 Ibid., 54.


158 Ibid.

159 Ibid.
committed aggression, but is not obligated to do so. Further, it is only upon exercising this choice of occupation that a state assumes responsibilities for the citizens of the defeated state. Thus Walzer treads a careful line between sovereignty and human rights. In the vast majority of cases, he espouses a minimalist stance. However, in extreme cases, such as that presented by Nazism, Walzer recognizes that societal transformation is allowable and perhaps even necessary.

Eric Patterson is another scholar who has written several books and articles on the issue of *jus post bellum*. Like Walzer, his approach and thoughts on the issue of just war proceed from an ethical foundation and can be defined as restorative versus transformational. Patterson argues that the western liberal assertion that the answer to the issue of war is human liberty is overly simple. He argues it is a form of hubris that taken root in the west. In Patterson's opinion, that hubris is confidence that, “we can fix things” and that the world wants the U.S. and its allies to do so.  

Like many “restoration” just war thinkers, Patterson explicitly cites Hobbes as providing insights to the realities of contemporary world politics. In fact, Patterson notes that despite liberal calls for a new international order, “Hobbes remains the prophet” with regards to the geopolitics of much of Asia, Africa, and the developing world. Given this, Patterson is interested in developing criteria for *jus post bellum* that will deal with situations of war in a pragmatic way that recognizes the significant limitations on the part of any outsider to “fix things.” In essence, the best that can be hoped for in most post-conflict situations is the establishment or restoration of political order.

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161 Ibid., 8.
Patterson develops a model for *jus post bellum* founded within the classic just war tradition and based on a hierarchy of priorities: Order, Justice and Conciliation. *Order* is prioritized as the necessary first step before *Justice* can really be implemented, and elements of *Justice* rooted in order and security are necessary before *Conciliation* can be achieved. For Patterson, the restoration of order is the first principle of *jus post bellum*. Order entails “stopping the killing,” which in turn create space for the restoration of governance and international sovereignty.\(^{162}\) He argues that from order, the space for justice is created, and from justice comes the possibility of reconciliation. He writes, “If Order is the attainable and Justice the possible, then (re)Conciliation is the desirable.”\(^{163}\) However, the reality is that conciliation is rare in political life and that establishing basic security and political order is the priority. Patterson believes that through narrowing the scope of what *jus post bellum* should encompass, the chance that it can be brought to fruition is far greater.

In his work, Patterson also contends with the relation between the just war tradition and international law. He argues that an unintended consequence of the just war tradition having become codified within international law is that the tradition—or some of its proponents—has lost a sense of real-world policy application and the flexibility to consider novel approaches to political dilemmas: in short, international law is black and white (legal, illegal) whereas much of the ethical consideration of policy options is shaded in gray.\(^{164}\)

For Patterson, returning to the more holistic approach to war encompassed within the classic just war tradition, rather than solely relying on a legal paradigm will increase the chances that wars will end well and that peace can be achieved on a case by case basis. For Patterson,

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\(^{162}\) Ibid., 43.

\(^{163}\) Ibid., 104.

\(^{164}\) Patterson, *Ending Wars Well*, 37.
significant investments in security—a minimalist approach—allows the maximum chance for peace.

James Turner Johnson is another just war theorist who has written on the concept of *jus post bellum* and its placement within the classic just war tradition. Johnson's thought processes fit well within the restoration view of *jus post bellum*, and he is very cautious about the use of the term, *jus post bellum* generally speaking. Using World War II as an example, he writes, “... nothing in the established customs of war nor in the agreements formally concluding this war imposed an obligation on the victors to rebuild the vanquished. This was a policy choice.”¹⁶⁵ For Johnson, the idea of an obligation of the victor runs counter to the classic just war tradition.

Johnson writes, “the idea that a nation responsible for aggression should pay the most is still very much with us, and suggests there are real limits to the idea that the victor and perhaps others have a responsibility to restore a society damaged by war.”¹⁶⁶ Finally, Johnson argues that he has difficulty with the idea of *jus post bellum* specifically because of the term *jus*. He states that *jus* literally means law, which to him implies that responsibilities in post-conflict situations can “be reduced to specific rules.”¹⁶⁷ He agrees that the issue of post-conflict resolution is real, but that it should be adjudicated on a case-by-case basis using moral and political considerations rather than on an adoption of any specific list of criteria.¹⁶⁸

Jean Bethke Elshtain is another political philosopher who has written widely on just war issues and specifically on the issue of *jus post bellum*. Her work has dealt with classic just war


¹⁶⁶ Ibid., 39.


¹⁶⁸ Ibid.
theory, just war theory as it is applied to the Global War on Terrorism and *jus post bellum*. She argues that *jus post bellum* “must be added to the just war tradition.”\textsuperscript{169} Elshtain believes as Clausewitz does in the deep connection between war and politics. She states, “Just politics and just war go together.”\textsuperscript{170}

In terms of *jus post bellum*, she argues that four criteria should be adopted to develop an “Ethics of Exit.”\textsuperscript{171} First, the greater the degree of responsibility a state has for a war, the greater the responsibility a state has for ensuring the peace. Second, if a country played a major military role, then it also assumes responsibility for repairing infrastructure and environmental harm that occurred as a consequence of military operations. Third, an occupying state must ensure for the provision of defense and security until the defeated state can do so on its own. Finally, the occupying state must not allow the defeated state to revert to the unjust ways that caused it to be occupied in the first place.\textsuperscript{172}

Elshtain can be considered a restorer because she doesn't place the burdens of reconstruction on every state that wins a war. Rather, for Elshtain, obligations stem from the degree of responsibility a state has for causing the war to begin with and also in the decision to occupy the defeated state. This line of reasoning fits within the classic just war tradition and is akin to that of Michael Walzer.

Another scholar who has carefully considered the issue of *jus post bellum* is Gary Bass. In 2004, he wrote “*Jus Post Bellum,*” published in *Philosophy and Public Affairs*. In it, Bass


\textsuperscript{171} Elshtain, “The Ethics of Fleeing,” 99.

\textsuperscript{172} Ibid., 98.
argues is was critical “to theorize about a *jus post bellum* for the sake of a more complete just war theory.” He argues that the moment a war ends should be as crucial as the moment it begins. Bass contends there are moral obligations incumbent upon the victors in war. Predominant among these is the duty of a victorious state, “. . . to get out as soon as possible.” In this regard, Bass is clearly an advocate of restoration versus transformation. However, like Michael Walzer, Bass believes that instances of genocide change these calculations completely. Bass believes the “. . . radicalism of genocide unmakes the . . . legitimacy of any state.”

In making this argument, Bass invokes John Rawls’ idea of the “outlaw state,” which is a state that refuses to comply with basic principles of human rights and international law and will engage in a war simply because it feels that doing so will advance its interests. Rawls argues that “liberal and decent states” are entitled to interfere with an outlaw state on the basis of its violation of human rights.

In the extreme cases of “outlaw states”, Bass believes there “is a compelling argument for a *jus post bellum* duty for foreigners to reconstruct a defeated government. This includes responsibility for conducting war crimes tribunals, as well as reforming the state's educational system if necessary.” Bass also argues that in cases where *jus ad bellum* is less clear-cut, there is an argument to be made for an obligation of economic restoration on the part of the victor.

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174 Ibid., 412.

175 Ibid.

176 Ibid., 399.


178 Ibid., 81.

179 Bass, “*Jus Post Bellum,*” 405.
Bass does believe in the obligations of the victor to ensure a just peace. That said, the obligations he envisions are definitely case specific and change with the character of the occupied state. Bass specifically addresses the issue of placing additional burdens on victors who may have intervened for humanitarian motives or have themselves been the victims of aggression. He states, “. . . those who would act well bear a heavy burden, and jus post bellum duties only add to that burden. People who somehow manage to act decently before and during war are rewarded only by being required to act decently again afterward.”

The Transformers:

Rear Admiral Louis Iasiello is a former Navy Chief of Chaplains who has framed an expansive argument regarding the obligations of jus post bellum. In his article, “Jus Post Bellum: The Moral Responsibilities of Victors in War,” Iasiello argues that post bellum actions should be “guided by both moral and legal precepts.” He enunciates seven “moral parameters” that should guide behavior in the post-conflict phase of war. They are: Healing Mindset, Just Restoration (of sovereign government), Safeguarding the Innocent, Respect for the

180 Ibid., 397.
182 The inclusion of Iasiello is a considered decision. It is true that he has only published a single monograph on the issue of jus post bellum and that compared to others reviewed in this document, his academic publication record is minimal. However, he is a former Chief of Navy Chaplains who has been on faculty at the Navy War College. Thus, he has the perspective of a practitioner as well as that of an academic. Further, given his status as faculty at the Navy War College, his article has “outsized” placement within the curricula of military schools, including the National Defense University. Thus, although he has published but one article on the subject, the reality is that most serving senior military officers have only read one article on the subject. For this reason, it is critical to consider Iasiello’s view on the topic of jus post bellum.
Environment, *Post Bellum Justice, Warrior Transition, and Safeguarding the Innocent.* Iasiello argues that the adoption of these principles is critical to ensure *jus post bellum.*

He argues for the adoption of these criteria on both moral and pragmatic grounds. He writes, “Thorough planning for this sometimes neglected aspect of war may ultimately save thousands of combatant and non-combatant lives and quite possibly billions of dollars.” Thus Iasiello argues that in the long run, the adoption of a transformational view of *jus post bellum* will ultimately save lives as well as fulfill moral obligations. His grounds for a maximalist viewpoint are argued on the basis of both morality and pragmatism. His seven parameters, if adopted, would represent a significant expansion of current understanding of the just war tradition and place considerable burdens on victorious states seeking a “just end” to conflict.

Perhaps the most prolific writer on the topic of *jus post bellum* has been Canadian Professor Brian Orend. Orend definitely advocates a transformative vision of *jus post bellum,* drawing much of his intellectual foundation from the work of Immanuel Kant. In his work, *War and International Justice: A Kantian Perspective,* Orend credits Kant with having invented the idea of justice after war and having done the original scholarship on the subject of *jus post bellum.* Orend adopts many of Kant's ideas from his essay entitled *Perpetual Peace.*

In *Perpetual Peace,* Kant argues that the international system should be populated solely by Republican states, as Republics are more likely to respect both the rights of their own citizenry, as well as the laws governing international sovereignty. Kant also argues for the

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184 Ibid., 40-51.
187 Immanuel Kant, *Perpetual Peace, and Other Essays,* 112.
188 Ibid.
right of the international community to reconstruct a state that is consistently belligerent and disturbs the peace of the international community.\footnote{Ibid.}

Moving from a Kantian foundation, Orend argues that the international laws governing war termination are inadequate. He further opines that this lack of positive law, or even consensus on what \textit{jus post bellum} should consist of should disturb the international community for very practical reasons. First he argues, a lack of international law regarding war termination allows the victor to set forth terms of peace in a completely unconstrained manner. Second, this lack of clarity on war termination could actually prolong fighting on the ground as states have every reason to fear the terms they might be accorded. Third, the lack of law or consensus on norms means there are no standards of conduct for war termination. And finally, the lack of norms surrounding “just war termination” leads to sub-optimal outcomes, which increases the chances of further outbreaks of violence.\footnote{Orend, \textit{War and International Justice}, 221.}

Having made his case as to why there needs to be a robust legal regime associated with \textit{jus post bellum}, Orend proceeds to ground this system on the basis of individual human rights. In the argument between state sovereignty and human rights, Orend privileges human rights over the rights of states, insisting, “respect for rights is the foundation of civilization.”\footnote{Brian Orend, “\textit{Jus Post Bellum}: A Just War Theory Perspective,” in \textit{Jus Post Bellum: Towards a Law of Transition from Conflict to Peace}, Carsten Stahn and Jann K. Kleffner, eds. (The Hague: T.M.C. Asser Press, 2008), 43.} For Orend, “the proper aim of a just war is the vindication of those rights whose violation ground the resort to war in the first place.”\footnote{Orend, \textit{The Morality of War}, 163.}
Given this basis of human rights, Orend delineates five principles for *jus post bellum* that are similar in approach to those that underpin *jus ad bellum* and *jus in bello*. First is Just Cause for War Termination. Orend states this principle has been met when the rights violations that led to the start of the war have been vindicated. Second, is Right Intention. For Orend, the critical aspect of right intention is that states must not be motivated by revenge. Rather, they must seek justice for war crimes committed by all sides. Third, he argues is Public Declaration, Legitimate Authority and Domestic Rights Protection. Orend believes that a legitimate authority must end war and that all citizens’ rights must be protected. Fourth is the principle of Discrimination. Orend argues that the leadership responsible for the war must be differentiated from the populations writ large and that mass punishment should not be imposed. Finally, Orend argues for Proportionality. He states that peace terms must be proportionate with rights vindication.193

Clearly this is a transformative view of *jus post bellum* when transformation is required to ensure human rights. Orend proceeds from a foundation of the classic just war tradition, but unlike the minimalists sees no reason to segregate international law from the just war tradition. In fact, Orend has called for a new Geneva Convention that deals specifically with the issues arising from *jus post bellum*.194 His desire to legally codify criteria for *jus post bellum* based on human rights criteria into international law is a significant departure from most *jus post bellum* scholars, the majority of whom draw a bright line between ethics and international law.

A final book that exemplifies a transformational viewpoint on *jus post bellum* is *After The Smoke Clears: The Just War Tradition and Post-War Justice* by Mark Allman and Tobias


Winright. Published in 2010, this work examines the idea of *jus post bellum* from an explicitly Christian perspective. While acknowledging the Christian tradition of pacifism, Allman and Winright approach the topic of *jus post bellum* in terms of the classic just war tradition. They base their prescriptions on justice after war on the grounds that, “the goal of a war must be to establish social, political and economic conditions that are more stable, more just and less prone to chaos than existed prior to the fighting.”\(^{195}\) Clearly these two authors are advocates of a transformational position of *jus post bellum* in which the victors will inherent substantial obligations to the citizens of the defeated state.

The authors propose four criteria for *jus post bellum*. These are Just Cause, Reconciliation, Punishment and Restoration.\(^{196}\) Under the heading of Just Cause, Allman and Winright include three separate requirements. These are holding parties accountable for accomplishment of the initial goals of the war, restraining the belligerents from expanding these goals, and restraining vengeance in the *post bellum* phase of the conflict. As to reconciliation, the authors believe that peace cannot be realized without transforming the relationships of the belligerents from animosity and hatred to tolerance. Punishment includes war crimes tribunals for belligerents on both sides of the conflict who are suspected of having violated the law of armed conflict. Finally, under the criterion of restoration, Allman and Winright assert that there must be restoration of all “political, economic, social and ecological conditions that will allow all citizens to flourish.”\(^{197}\)

Given the wide spectrum of items included in these criteria, one can determine these authors have delineated the most expansive definition of *jus post bellum* included in this

\(^{195}\) Allman and Winright, *After the Smoke Clears*, 14.

\(^{196}\) Ibid., 15.

\(^{197}\) Ibid., 15.
literature review. Allman and Winright also note that if a victor has failed to meet either the criteria for *jus ad bellum* or *jus in bello*, then its responsibility to ensure *jus post bellum* becomes that much greater. 198

**Conclusion**

Reviewing the literature written by those advocating restoration versus transformation allows for several conclusions. First, there is the distinct separation between moral considerations of *jus post bellum* and international law. This arises from a desire to maintain flexibility to deal with complex issues on a case-by-case basis, rather than through a fixed legal process. Second, those interested in restoring the status quo ante are concerned that the transformational aspirations will do more harm than good. If the "reward" for stopping genocide or ethnic cleansing is a multi-year, multi-billion dollar requirement for occupation while physical reconstruction and political rehabilitation occurs, then there is actually a negative incentive to become involved in international crises. Given this, those who advocate a restorative conception of *jus post bellum* argue, a limited conception of *jus post bellum* will likely accomplish the most good in the long run.

Although each of the authors advocating a transformational version of *just post bellum* has a unique perspective, certain commonalities are evident. Whereas the restorationists are generally advocating restraint, except in the most egregious circumstances, the transformers are much more likely to recommend actions that will cause wholesale political, economic and perhaps cultural reconstruction of defeated societies. Whether such reconstruction is required to ensure international peace and stability or whether it is a form of “hubris” is a matter for analysis. Regardless of one's position on its advisability however, there can be no doubt that the

198 Ibid., 16.
transformational view of *jus post bellum* places far more obligation on the victors in terms of time and resources. For the transformers, a return to the status quo ante bellum is insufficient.

Finally, it should be noted that there is also a significant divide between the restorers and the transformers on whether sovereignty or human rights should prevail when determining how best to achieve *jus post bellum*. This cleavage can be understood as Lockean view of the international system versus a Kantian view of it. This distinction between those who would privilege sovereignty versus those who would privilege human rights crosscuts the three disciplines considered in this thesis and will be a recurring theme throughout the succeeding chapters.

It is doubtful that any of the authors reviewed in this essay would assert that sovereignty should provide a shield behind which governments can violate the rights of its citizens with impunity. However, the respect that sovereignty should be accorded in dealing with post-war societies does vary significantly from author to author. For those authors who advocate the protection of human rights as the first principle of ensuring a just post-war society, it is useful to note Susan Yoshihara's warning in *Waging War to Make Peace*. She argues that the idea of what should fall under the definition of human rights is itself expanding.  

Consensus is also required for this term as well.

Clearly, the debate over whether *jus post bellum* belongs as an addition to the just war tradition is a lively one on which there exists little consensus. Nonetheless, the degree to which there is an interest in developing a common understanding of what constitutes justice after war leads to the inescapable conclusion that there is a consensus that the current formulation is insufficient.

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CHAPTER FOUR

JUS POST BELLUM ANALYSIS: PHILOSOPHICAL APPROACH

Introduction

The previous chapter provided a literature review of the work on *jus post bellum* written from an ethical or moral perspective. That literature was then sorted according to whether an author primarily advocates a restorative or transformative approach to *jus post bellum*. This chapter begins the work of structured focused comparison among the three strands of *jus post bellum* scholarship; philosophical, legal and policy-oriented by analyzing the literature presented in the preceding chapter. It will proceed by considering the authors' responses to five central questions regarding the definition of *jus post bellum*. These are:

- At war's end, how do we define peace?
- What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?
- What are the obligations of the victor to the international community? Is there an obligation for reconstruction to ensure greater chance of international stability?
- What are the obligations of the international community towards the belligerents (both winners and losers)?
- Do victors have a right to reparations or remuneration from the defeated states? (Under what conditions)?

When these questions have been answered, this chapter will conclude with a summary of major findings regarding the philosophical strand of the *jus post bellum* debate.

**Question 1: At war's end, how do we define peace?**

This question cuts to the heart of the *jus post bellum* debate. It returns to Saint Augustine's original proposition in *The City of God*: “And hence, it is obvious that peace is the end sought by war. For everyman seeks peace by waging war, yet no man seeks war by making
peace.” This construction of war's end seems straightforward enough. However, upon closer analysis, one finds defining “peace” is a far from simple one and is a different one than that of defining justice after war. Further, the introduction to this work describes the difficulty with defining the terms victory and war, and even determining the exact moment a conflict ends. Thus, it is essential to determine whether there is a consensus as to the end sought by jus post bellum.

The definition of peace used by a scholar is instructive in determining much about his or her conception of jus post bellum. For instance, Patterson refers to Thomas Hobbes' definition of peace in his work, Ending Wars Well: Order, Justice and Conciliation in Contemporary Post-Conflict. Sir Michael Howard also refers to the importance of knowing Hobbes' conception of peace to appreciate the patterns of war fought in Europe up through the Enlightenment. Both Patterson and Howard refer the reader to the same quotation. Hobbes writes:

For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known; and therefore the notion of time is to be considered in the nature of war; as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain; but in an inclination thereto of many days together; so the nature of war, consisteth not in actual fighting; but in the known disposition thereto, during all other time there is no assurance to the contrary. All other time is peace.

If peace is merely the temporary absence of war, then it would hold that the idea of jus post bellum would be one that sought merely to ensure order in the immediate aftermath of a conflict, rather than one that sought to create conditions in which conflict would become

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200 Saint Augustine, The City of God, 621.

201 Howard, The Invention of Peace, 2, and Patterson, Ending Wars Well, 8.

unlikely. This tracks well with Patterson's decision to privilege order above justice and reconciliation in his writing on the topic of *jus post bellum*.

However, if one were to look at the *jus post bellum* writings of Brian Orend, one would find that Kant is the more favored scholar for providing quotations.\(^{(203)}\) This is also very telling in terms of Orend's conception of peace. In his work, *The Invention of Peace*, Sir Michael Howard refers to Immanuel Kant as the inventor of peace as more than just a “pious aspiration.”\(^{(204)}\) However, the peace Kant desires certainly does not preclude the presence of war. In his essay *Toward Perpetual Peace*, Kant develops the idea of a “League of Nations” created from a federation of Republican states, whose efforts will eventually stamp out war for reasons of self-interest.\(^{(205)}\) Thus, a scholar considering *jus post bellum* from a Kantian perspective would see the desire for peace as more than the absence of war, but rather as a positive end, one which requires the transformation of the international system. This desire would require a more expansive conception of *jus post bellum*.

**Peace and a Restorative Conception of *Jus Post Bellum***

Those authors advocating a restorative version of *jus post bellum* do not completely agree on the definition and criteria for peace. However, they do generally agree that *just post bellum* is about ensuring that rights are vindicated and that aggressors are restrained from either drawing too many reparations from the losers or from requiring wholesale transformation of the defeated

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\(^{(203)}\) To understand Orend's foundational use of Immanuel Kant's work in his ideas concerning *jus post bellum*, please refer to *War and International Justice: A Kantian Perspective*. Chapter 7 specifically deals with Kant's conception of *jus post bellum*.


\(^{(205)}\) Immanuel Kant, “Perpetual Peace,” 114.
For the purposes of this work, Walzer, Patterson, Johnson, Elshtain and Bass have been categorized as advocates for a restorative conception of *jus post bellum*.

Walzer argues that the classic just war tradition requires a return to the status quo ante bellum. He writes, “We insist that the aggressor state makes things as much as it can, just like they were before. And that, on this view, is the definition of a just outcome.” Walzer argues the outcome of the First Gulf War (1990-1991) provides an excellent example of the classic just war tradition’s just end to war. Thus for Walzer, peace is a restoration of legitimate political order, not a desire to remake a society.

In his writing on *jus post bellum*, Walzer notes that given the history of the Second World War, there is an argument that can be made for expanding beyond the idea of status quo ante bellum. However, he is very cautious about this idea and places it within the confines of states that have committed atrocities such as genocide or ethnic cleansing. He states, “When a government is engaged in the mass murders of its own people or some subgroup of its own people, then any foreign state or coalition of states is going to have to replace the government or, at least to begin the process of replacement.” Therefore, Walzer allows for transformation in extreme cases. However, for Walzer, peace in most cases represents a return to status quo ante bellum, to the extent possible, once the violated rights have been restored. He is not an advocate of governmental or societal transformation except under extreme circumstances.

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208 Ibid., 50.

209 Ibid., 51.

210 Walzer, *Just and Unjust Wars*, x.
Johnson also considers the idea of peace in his writings on *jus post bellum*. He states, “... the end of peace, the implications of requiring that peace be the fundamental driving force behind any just resort to armed conflict are far-reaching. Peace, as conceived here, is not simply the absence of war; it is a state of affairs interconnected with the establishment and maintenance of a just order...”\textsuperscript{211}

Johnson goes on to discuss the limits of military force in establishing just order. He writes: “The end of peace that the just war tradition sets as the proper goal in order for the use of armed force to be just is not in fact a goal that such force by itself can bring into being...”\textsuperscript{212} Thus, for Johnson there is a paradox. The goal of war is peace, but war (the use of coercive military force) cannot establish such peace.

This very practical limitation on the establishment of peace by a military force also suggests limits to what can be expected in terms of *jus post bellum*. Although a military force is incapable of delivering peace in the aftermath of war, it is capable of providing order in the immediate aftermath of a conflict.

Johnson also considers the idea of peace as conceived by Saint Augustine as an ideal that cannot be attained outside the Kingdom of God.\textsuperscript{213} Thus for Johnson, peace consists primarily of the striving for order and justice, rather than the achievement of a world free from war. He once again returns to the writings of Augustine and his concept of *tranquillitatus ordinaris* (the tranquility of order) as opposed to peace. This is based upon Augustine’s view of the imperfectability of man and the presence of evil in human nature. Johnson explains that this

\textsuperscript{211} Johnson, “Moral Responsibility after Conflict,” 30.
\textsuperscript{212} Ibid., 40.
\textsuperscript{213} Ibid., 41.
tranquility should be understood “. . . as the moral idea for politics itself, and which comes into being only when there is proper order, namely one characterized by justice.”

Thus it would seem that the best hope for the kingdom of man would be a *jus post bellum* in which order and justice exist, rather than a hope for transformative peace, which is reserved by Saint Augustine for the City of God.

Elshtain argues that neither a return to the status quo ante bellum nor an attempt at major transformation will achieve the end of peace, which she defines as a legitimate political order. She calls for a third model that of “minimal decency” as the means to achieve *jus post bellum*. She defines minimal decency as a stable state that relies on democratic processes to achieve its political decisions. These processes include elections, and representative government, as well as a constitutional document written by the citizens of the state. According to Elshtain, minimal decency will be achieved through the restoration of “legitimate authority” within a state. Elshtain explains that she is not an advocate of major transformation, but that there are certain minimal standards that must be applied in order to achieve *jus post bellum*.

Elshtain recognizes that her third path will be “far too modest a goal for many; and far too idealistic a goal for others.” Indeed, her vision of “minimal decency” resides at the

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216 Ibid.

217 Ibid.

218 In “International Justice as Equal Regard for the Use of Force,” *Ethics and International Affairs*: vol 17, is. 2, September 2003) Elshtain argues for an international system predicated on the “equal moral regard of persons.” According to Elshtain, all states have a stake in creating a system of equal regard, but as there is currently no international body capable of enforcing such standard, then it falls to the states with the greatest levels of military capability to undertake the “lion’s share” of military intervention. Please see pages 63-65.

219 Elshtain, “Just War and an Ethics of Responsibility.” 166.
dividing line between restorative conceptions of *jus post bellum* and transformative ones. In the end, whether her vision is restorative or transformative in nature depends on the character of the defeated state prior to the advent of conflict. If the state was "minimally decent" at the outset, she is advocating restoration. However, if the state had not met these criteria at the beginning of the conflict, the concept of *jus post bellum* she is advocating would be transformative in nature.

Bass never explicitly defines peace. However, from his writings and his adoption of many of Walzer's core principles, it can be extrapolated that he too is looking for the order of tranquility within the international system. Like Walzer, he believes the goal of transformation should be reserved for states who have “unmade their claim to legitimacy” through crimes such as genocide.\(^\text{220}\)

**Transformational Views of Peace**

Orend has a far-reaching and transformational view of the idea of peace. He advocates striving towards a Kantian “cosmopolitan federation.” He argues that such a federation of states, “could lessen substantially the assurance problem at the heart of the current international system—a problem that frequently leads to war.”\(^\text{221}\) Through developing a transformational version of *jus post bellum*, Orend would move the international system towards such a federation in the hope of achieving “international peace and security.”\(^\text{222}\) This is a far more ambitious goal than that of the tranquility of order.

Orend is the only one of the authors advocating a transformational view of the international system writ large. Other transformational *jus post bellum* thinkers are looking much more narrowly at the specific state in question rather than the international system as a whole.


\(^\text{222}\) Ibid., 249.
For instance, Allman and Winright advocate a goal of the tranquility of order in their work, *After the Smoke Clears: The Just War Tradition and Post War Justice*.\(^{223}\)

Nonetheless, there is a major difference in the way that the transformers frame their arguments when compared to the restorers. It is the view of this author that is has to do with a top down versus a bottom up view of the international system. Their principal concern is for human security rather than international balance of power considerations. Simply put, the transformers advocate a more cosmopolitan view of sovereignty and privilege order in the lives of individuals over order within the international system. Conversely, those who advocate restoration privilege sovereignty over human rights in all but the most extreme cases. Although both ideas can be broadly placed under the heading of peace, the threshold for peace in a human rights based system is far higher than in one based on state sovereignty. This is a major difference between the two strands of thinking.

**Question Two: What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?**

There is some consensus among the *jus post bellum* authors on this question. However, cleavages exist and cut across the restorative and transformative conceptions of *jus post bellum*. To begin, it is useful to consider the basis of the obligation discussed above. Of all the authors, Evans most clearly defines his basis for obligation. In his article “Moral Responsibilities and the Conflicting Demands of *Jus Post Bellum*,” he argues that the obligations of the victor extend from the fact that war is the lesser of two evils. Therefore, in order to atone for the evil rendered by even a just war, the victor has incurred an obligation to reconstruct the defeated state and restore or create a legitimate government through a just occupation.\(^{224}\) Evans bolsters this claim

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\(^{224}\) Evans, “Moral Responsibilities and the Conflicting Demands of *Jus Post Bellum*,” 152-155.
by citing a legal obligation to reconstruct stemming from the United Nations General Assembly's unanimous ratification of the *Responsibility to Protect* in 2005.\textsuperscript{225} The R2P document does include a responsibility to reconstruct for states intervening in a country that has been damaged or destroyed as a result of a humanitarian crisis.\textsuperscript{226}

Elshtain also clearly develops a basis of the obligation for reconstructing a defeated state. It extends from the victor's overall responsibility for the war. In her article “Just War and an Ethics of Responsibility,” Elshtain requires a country to assess its degree of responsibility for the post-war situation. She writes, “If its role was major, its responsibility is significant.”\textsuperscript{227} Elshtain also argues that any state which has committed to major military operations “. . . bears a major burden in repairing the infrastructural and environmental harm that is a direct result of [those] operations.”\textsuperscript{228} Elshtain's “Ethics of Responsibility” can be rephrased in a more pedestrian way; “You broke it, you bought it.”

Other authors are less clear about an obligation of the victor to reconstruct a defeated state's destroyed infrastructure and return it to the status of a fully functioning member of the international community. Johnson asserts that the decisions to reconstruct Japan and Germany after World War II were policy choices rather than moral obligations.\textsuperscript{229} In his view, there is more evidence of the obligation of an aggressor to pay reparations, than for a victor's obligation to reconstruct.\textsuperscript{230}

\begin{itemize}
\item \textsuperscript{225} Ibid., 157.
\item \textsuperscript{226} ICISS, *The Responsibility to Protect*, 39.
\item \textsuperscript{227} Elshtain, “Just War and an Ethics of Responsibility,” 167.
\item \textsuperscript{228} Ibid.
\item \textsuperscript{229} Johnson, “Moral Responsibility After War,” 37.
\item \textsuperscript{230} Ibid., 39.
\end{itemize}
Walzer and Bass both argue that obligations of the victor for reconstruction arise in cases where states are committing genocide, ethnic cleansing and crimes against humanity. It also useful to note that these are the same crimes that trigger a responsibility to intervene in humanitarian crises according to *The Responsibility To Protect*. It clear however, from the writings of both Walzer and Bass, these obligations stem from a special case, which Bass describes in Rawlsian terms as the case of “The Outlaw State.” For the purposes of this thesis, the term “outlaw state” will be adopted to describes cases like those presented by Hitler and Pol Pot.

In cases where genocide and ethnic cleansing have not occurred, Walzer argues that states have the right to occupy, rather than an obligation to do so. However, once a state exercises it right to occupy, it then incurs obligations on the basis of that decision. However, the decision not to occupy is an equally valid one in which no obligation to reconstruct is incurred.

Bass also allows that the obligations of the victor to reconstruct a defeated state are greater in cases where the initial decision to go to war was questionable in terms of *jus ad bellum* (just cause). In cases where states did not have clear cause for war, the obligation to reconstruct infrastructure and assume responsibility for physical, economic and social well-being are far greater.

Orend doesn't really consider the idea of the obligations of the victor in his work, *The Morality of War*. Rather, he considers the rights of the international community. Once again,

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Orend returns to his Kantian philosophical underpinnings. For Orend, in cases where the state in question was illegitimate (commits wholesale violations of the human rights of its citizens and/or commit crimes of international aggression), other states have the right to undertake forcible regime change in order to remake that state into a minimally just one.

Orend argues that minimal justice is achieved when a state is; 1) recognized by its own people and the international community, 2) avoids violating the rights of other countries, and 3) makes reasonable effort to ensure the human rights of its own citizens. Thus, Orend does not speak in terms of obligations of the victor for post-war reconstruction, but rather the rights of the international community to undertake forcible regime change and remake a state into a functioning member of the international community. In many senses this right far exceeds the obligations considered by the methodology of this thesis.

Iasiello founds his conception of obligations of the victor on a mixture of pragmatic self-interest, international law and morality. He argues that the obligations of jus post bellum extend far beyond the restoration of order, to reconciliation among the warring parties. However, he does argue that some of these tasks (such as the prosecution of post-conflict justice) “are better left to an international group or organization, not to the victors themselves.”

Patterson argues for a restricted view of obligations of the victor. He argues that jus post bellum obligations are first about ensuring order within the defeated state. Order consists of stopping the killing and ensuring governance. He argues, “All wars should end in ways that

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235 Ibid., 203.

236 Ibid., 35-36.


238 Ibid., 48.
promote minimal order.”\textsuperscript{239} He believes that preserving and promoting order is a ‘moral imperative’ as well as a pragmatic one for the victor.\textsuperscript{240} Patterson also cautions that achieving \textit{jus post bellum} takes time and calls for states to slow down and not try to “do too much too fast.”\textsuperscript{241} Thus for Patterson, ensuring durable order is the principal obligation of the victor.

**Question Three: What are the obligations of the victor to the international community? Is there an obligation for reconstruction to ensure greater chance of international stability?**

The majority of the scholarship on \textit{jus post bellum} is silent on the issue of obligations to the international community. Rather, the majority of the scholarship concerns itself with the belligerent parties. However, the literature reviewed thus far contains two exceptions.

First is, unsurprisingly, the work of Orend whose conception of \textit{jus post bellum} is more global in nature. Therefore, he is more interested in the international system as a whole, rather than the actions of the two or more involved states. Orend writes, “The other vital thing about Kant is this: he insisted that view the end of the war as an opportunity not just to finalize that particular conflict, but moreover to contribute to and strengthen the peace and justice of the international system more broadly.”\textsuperscript{242}

Orend's Kantian conception of \textit{jus post bellum} leads him to view war's end as an opportunity to build towards “perpetual peace” through the creation of a federation of republican states. Thus, for Orend, there is an obligation at the end of war for the victor to reconstruct in a way that will lead to greater international stability.

\textsuperscript{239} Patterson, \textit{Ending Wars Well}, 43.

\textsuperscript{240} Ibid.

\textsuperscript{241} Ibid., 44.

\textsuperscript{242} Orend, “\textit{Jus Post Bellum}: A Just War Theory Perspective,” 35.
The second exception within the literature that contains obligations to the international community in the ICISS document, *The Responsibility to Protect*. It implies an obligation of the victor to the international community. The obligation to reconstruct is developed from a United Nations initiative. Therefore, the obligation to international community is incurred through the ratification of the document in the UN General Assembly. Clearly, this obligation would appear to be more legal than moral. However, given that resolutions adopted in the General Assembly are not considered to be binding international law, the choice to live up to this responsibility in fact becomes an ethical decision rather than a legal one for a state.

**Question Four: What are the obligations of the international community towards the belligerents (both winners and losers)?**

Like question three, there is little written by the authors on the topic of the responsibility of the international community towards the belligerents in the aftermath of war. Much of the literature confines itself to issues arising between or among the belligerents at war's end. Once again, only *The Responsibility to Protect*, with its inherent obligations to prevent, intervene and reconstruct place any onus on the international community to become involved in a dispute.

This is a telling point. It seems that despite all of the discussions regarding sovereignty based on a conception of human rights, the currency of the international system and the unit of analysis for war and its aftermath remains solidly the state. Despite the language codified within the R2P document, it is important to note, that *The Responsibility to Protect* has to date never been the basis for an intervention into any situation.\(^{243}\)

**Question Five: Do victors have a right to reparations or remuneration from the defeated states? (Under what conditions)?**

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The question of reparations is an interesting one. Reparations were once extremely common, but are less so today. Johnson observes, “. . .by the latter part of the 19th century, . . .this custom of war [reparations] had escalated to the idea that the loser should pay the victor's costs in the war, and perhaps also pay punitive damages.” However, this practice has largely fallen out of favor.

Many historians and international relations scholars point to the overwhelming reparations placed on Germany in the aftermath of World War I as a major contributing factor in Hitler's rise to power and the ensuing carnage of World War II. Nonetheless, there is historical and legal precedent for reparations from defeated parties who were the initial aggressors in war. This topic is not at the heart of the *jus post bellum* literature, however, it is certainly considered within it.

The question of reparations is inherently about achieving justice by punishing the state guilty of aggression for the war. In *Just and Unjust Wars*, Walzer writes, “Once an aggressor state has been military repulsed, it can also be punished.” He sees reparations as an allowable form of punishment, so long as it is not taken too far. Walzer concedes the collective aspect of reparations and notes that hardship will be incurred on people who did not have responsibility for the war. However, he also notes that “citizenship is common destiny,” and so long as the reparations are not crippling, they are morally permissible. Johnson argues that the idea that the guilty are financially responsible for war remains with us today.

245 Walzer, *Just and Unjust Wars*, 62.
Orend also believes that punishment after war is permissible. He cites the potential deterrent effect that punishment could have on future aggressors as one argument for its moral and practical value.\(^{248}\) Orend specifically argues for the permissibility of reparations and financial compensation for the victims of war, so long as these reparations conform to the just war tradition criteria of discrimination and proportionality.\(^{249}\) He argues that financial compensation may be mandated so long as it is not done the spirit of vengeance and does not impoverish the defeated state to the extent that it cannot recover from the destruction of the war. Orend condemns the sanctions placed on Iraq after the First Gulf War for violating these principles.\(^{250}\)

The general criteria for *jus ad bellum* and *jus in bello* are listed in Chapter 2 of this thesis. Two of these criteria, discrimination and proportionality are consistently cited by just war scholars with regard to the ideas of post war punishment, war-crimes tribunals and potential financial reparations. Discrimination is a *jus in bello* criterion that prohibits the deliberate targeting of civilians and affirms the principle of non-combatant immunity.\(^{251}\) The second just war criterion frequently cited in discussions of reparations and punishment is the *jus ad bellum* criterion of proportionality. Proportionality is best understood as a simple cost benefit analysis. If the good produced is likely to outweigh the costs incurred, then an action is permissible.\(^{252}\)


\(^{249}\) Ibid., 181.

\(^{250}\) Ibid., 168.


\(^{252}\) Ibid.
Another interesting aspect of the question of reparations is the degree of unity noted among all of the authors regarding this issue. Of the five questions considered as part of this comparative analysis, the issue of reparations is the only one that produced a consensus view.

This said, the consensus does not revolve most strongly around the idea of financial reparations per se, but on the corollary idea of post-war justice generally speaking. This idea is most strongly expressed as the specific requirement for war crimes tribunals and the punishment of the guilty. Thus, the idea of reparations remains allowable, however, there is much greater enthusiasm and even consensus among the authors cited for post-war justice in the form of war crimes tribunals.

In his work, *Ending Wars Well, Order, Justice and Conciliation in Contemporary Post-Conflict*, Patterson argues that the punishment of elites is critical to post-war justice.253 Iasiello also argues for the necessity of individual punishment as part of his criteria for *jus post bellum*. He states, “Justice must be done at every level. Holding people accountable for their behavior during war facilitates the reconciliation process.”254 Bass is an even stronger proponent of war crimes tribunals, stating, “. . . they are morally mandated because they place the blame on individuals, stripping away the veneer of statehood.”255 Bass also argues that post-war justice “. . . is an important part of political reconstruction,” 256 but cautions on the need for restraint.

All of the authors considered require some form of post-war justice as part of their calculation for *jus post bellum*. The idea of reparations is only one possible means to this end. Far more commonly cited by the authors is a need for war crimes tribunals as a necessary means

253 Patterson, *Ending Wars Well*, 80.


256 Ibid., 406.
for punishing the guilty without placing too large a burden on the society as a whole. Equally common among the authors is an immediate caution to ensure discrimination and proportionality in the quest for post war justice. Elshtain argues that too often, punishment can become “gratuitous” in the wake of a post-war settlement.\footnote{Elshtain, “The Ethics of Fleeing,” 166.}

**Conclusion**

One can conclude from this chapter that there are many views on what constitutes *jus post bellum* and few points of consensus. Nonetheless, there are four main points around which consensus occurred that bear significant consideration.

First, there is a growing consensus among authors writing on the topic of *jus post bellum* that states which commit crimes against humanity, genocide and ethnic cleansing have forfeited their legitimacy as states in the international community and thus are subject to being reconstructed along lines that the international community views as legitimate. Germany and Japan in the wake of World War II are the most obvious examples. However, Pol Pot's Cambodia was also raised as an example of a fundamentally illegitimate government. One can also add the Taliban government of Afghanistan to this list.

Bass refers to John Rawls' conception of the “outlaw state” when describing governments of this type. Rawls describes the “outlaw state” as one which refuses to comply with basic principles of human rights and international law and will engage in a war simply because it feels that doing so will advance its interests.\footnote{Rawls, *The Law of Peoples: With “the Idea of Public Reason Revisited,”* 90-91.} Rawls argues that “liberal and decent states” are
entitled to interfere with an outlaw state on the basis of its violation of human rights. Rawls' “outlaw state” will be adopted for the remainder of this thesis.

The second point of consensus to be carried forward from this chapter is that with the exception of The Responsibility To Protect, no author discussed the issue of jus post bellum in terms of the obligations of the international community. It will be useful to determine whether this consensus is carried through the discussions of international law and security studies.

Third, there was a strong consensus on the utility and moral permissibility of war crimes tribunals as a method for achieving post bellum justice. This should be relatively unsurprising, as war crimes tribunals have been a consistent part of the aftermath of war since Nuremberg. Thus, it may be that an ethical norm in favor of elite punishment has developed in international society since the end of the Second World War.

Finally, one can apply Wendt’s cultures of anarchy to the division between those authors who advocated a principally restorative versus principally transformative conception of jus post bellum. The authors who advocate restoration are approaching the issue of jus post bellum from a primarily Lockean point of view. War is conceived of as an event that occurs on a frequent basis and should be responded to in a way that restores order to the international system, because order among states is best that can be achieved.

The transformers on the other hand design ambitious and expensive reconstruction and governmental transformation projects designed to improve human security versus solely improve state security. These authors rely not on a system of sovereign states, but rather on a vision of a Kantian federation in which war will no longer occur. These differences among the authors are tied to fundamental differences in worldviews.

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259 Ibid., 81.
These conclusions will be carried forward and compared with the conclusions from the international law and security studies chapters. The integration of the conclusion from the three strands of literature will be used to formulate policy recommendations on the subject of *jus post bellum*. 
CHAPTER FIVE

JUS POST BELLUM AND INTERNATIONAL LAW

Introduction

The preceding chapters have considered the issue of *jus post bellum* from an ethical or moral perspective. This chapter and the one that follows will consider *jus post bellum* from the perspective of international law. This author recognizes that it is impossible to completely divorce law from its ethical and moral underpinnings. Nonetheless, considering *jus post bellum* from a legal viewpoint rather than a strictly moral one yields a different, yet complementary set of issues for analysis. This chapter will begin by considering the foundations of international law. It will continue by examining the contemporary codification of *jus ad bellum* and *jus in bello* as international law. The chapter will conclude with a literature review examining articles that propose legal criteria for *jus post bellum*. The review will also determine the issues that constitute the heart of the *jus post bellum* debate from a legal perspective.

The Question of International Law

Many texts dealing with international law and its impact on international relations begin by addressing whether or not international law is actually law at all and whether it has any relevance for either the study of international relations or for contemporary policy-making.²⁶⁰,²⁶¹ Given that scholarly opinion varies widely on such basic questions, it is prudent to begin this section by considering the question of international law itself and the major approaches

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²⁶⁰ In *The Fog of Law* (Stanford: Stanford University Press, 2010), 32, Michael Glennon argues: “Because the system is consent based and every state has the right to determine 'the very essence of its obligation,' this reasoning suggests that all international obligations undertaken by states are lacking an essential condition of law.”

²⁶¹ In his introduction to *Legal Rules and International Society* (Oxford: Oxford University Press, 1999), 5, Anthony Arend states, “After years of blasting that international legal scholars are irrelevant to the study of international relations, the realists may have seemingly turned the world's international law into a red herring.” Nonetheless, Arend does go on to argue that international law is indeed law and that it is a critical factor in understanding contemporary international relations.
undertaken in its study. This chapter will also define the approach to international law from which this thesis will proceed.

Given that this work is grounded in constructivist international relations theory, it is appropriate to adopt a similar approach to the foundation of international law. This work will adopt H.L.A. Hart's normative definition of law, found in his work, *The Concept of Law*. It will also draw heavily from Hedley Bull's chapter on international law found within *The Anarchical Society*, which is constructivist in nature. Finally, this author also relies on Anthony Arend's constructivist approach to international law found in *Legal Rules and International Society*.

In 1961, H.L.A. Hart wrote the influential work, *The Concept of Law*. In it he wrestled with the idea of law itself, law's relationship with morality, and the question of whether international law is law in the same way that domestic law is. Hart introduces his book as a "work of descriptive sociology." In it, he explores the "... multiple relations between, law, coercion and morality ..." concluding that law and morality are related but separate issues and that the study of law is a "wider" and more complex undertaking than its mere relation to morality. This conclusion is useful to this thesis because it implicitly endorses the utility of considering both ethical and legal perspectives as separate, but related entities.

Hart also argues that law and morality intersect with the concept of justice. He states, "The idea of justice seems to unite both fields [law and morality]: it is both a virtue specially appropriate to the law and the most legal of virtues." The recognition of this intersection is useful when comparing the two disciplines' approach to *jus post bellum*. Given that justice is a

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263 Ibid., 208.

264 Ibid., 207.

proposed goal of *jus post bellum* from both an ethical and a legal perspective, it is fruitful to examine the similarities and differences between the means that legal and ethical scholars use to reconcile the tension between the goals of justice and peace found within the *jus post bellum* literature.

Like the constructivists, Hart believes norms and mutual understandings are constitutive of international law. He defines law as "the primary norm that stipulates a sanction."²⁶⁶ Arend proceeds from this line of thinking vis-à-vis international law in his work, *Legal Rules and International Society*. In it Arend states, "Norms are standards of behavior defined in terms of rights and obligations."²⁶⁷ Thus, if laws are a codification of societal norms, then they reflect current societal understandings of right and wrong. Further, changes in the law signal changes within international society as to what constitutes acceptable behavior. Thus, conceiving of law as a codification of norms allows for changes in international law to be studied as an outcome of social change.

In *The Anarchical Society*, Bull states, "International law may be regarded as the body of rules which binds states and other agents in world politics and in their relations with one another."²⁶⁸ He continues, "It is by virtue of the binding character of international law that we can speak of an international society."²⁶⁹ By conceiving of the international system as society as the constructivists do, rather than a group of states, as realists do, it becomes possible to view international law not merely as a rule set, but also as an expression of collective values.

²⁶⁶ Ibid.
²⁶⁹ Ibid., 124.
In his work, *Legitimacy in International Society*, Clark identifies law as one of three critical elements of international legitimacy.\(^{270}\) As discussed in the introduction, Clark argues that legitimacy is achieved through a convergence of the norms of morality, legality and constitutionality.\(^{271}\) Therefore, analyzing the current content of international law will yield insight into what international society views as legal legitimacy in the same way that chapter three developed insight into the moral qualities of international legitimacy. Thus, international law is the second component for determining what constitutes *jus post bellum* in international society.

Despite this author's acceptance of international law as law, there are divergent views on the issue. There is consistent question from some legal theorists, as well as international relations scholars as to whether international law can really be understood as law, in the same way that domestic law can. There are several separate issues that lead to the conclusion that international law is not really law.

In *Legal Rules for International Society*, Arend discusses Inis Claude's concept of the “5 C's” of law.\(^{272}\) Claude argues that in order for law to be law, it must contain five elements. These are: “Congress, Code, Court, Cop and Clink.”\(^{273}\) Claude explains that those who argue international law is not really law cite the international system's lack of legislature, centralized international police force, courts and jails as evidence.

\(^{270}\) Ian Clark, *Legitimacy and International Society*, 4.

\(^{271}\) Ibid.

\(^{272}\) Arend, *Legal Rules of International Society*, 29-31. Arend notes that Professor Claude never put these "5C's" in writing. Rather, Arend states that he took this formulation from several lectures Claude gave on the subject. Further, Arend explains that Claude only uses the “5C” argument for illustrative purposes and that Claude never advocated this position himself.

\(^{273}\) Ibid.
The argument regarding the lack of an international court must be qualified. It is not that such a court does not exist. There is both the International Court of Justice (ICJ) and the International Criminal Court (ICC). Rather, the argument employed regarding the “lack” of international court, is that jurisdiction is predicated upon an individual state's consent. In the case of the ICJ, states must agree to come before the court and be bound by its rulings in order for international jurisdiction to exist.\(^{274}\) In the case of the ICC, states must become party to the treaty before jurisdiction applies.

This issue of consent is a primary one for those who argue against the existence of international law as law and extends beyond the issue of court jurisdiction. Simply put, states are only bound by international law if they agree to be bound by it. There is no international authority that compels them to do so. Thus, there is the difficulty determining the basis of a state's obligation to obey international law. In the words of Michael Glennon, “Absent genuine obligation rather than mere self-restraint, it is hard to make the case that international law is really law.”\(^ {275}\)

Despite international law's absence of an overarching coercive authority and an obligation that is dependent upon self-restraint, there are many legal theorists who can and do argue that international law is law and should be understood and studied as such. Proceeding from a constructivist viewpoint, Bull argues that international law is law because people believe it to be law.\(^ {276}\) Arend argues, “International law is a set of legal rules that seek to regulate the

\(^{274}\) Article 36 of *The Statute of the International Court of Justice* specifies “The jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in the *Charter of the United Nations* or in the treaties and conventions in force.” States must agree to bring their cases to the ICJ and be bound to the judgment before the judgment can be enforced. United Nations, *Statute of the International Court of Justice* (June 26, 1945), [http://avalon.law.yale.edu/20th_century/decad026.asp](http://avalon.law.yale.edu/20th_century/decad026.asp), (accessed June 21, 2011).


behavior of international actors,” and that international law is “just as much law as other law.”

That the international legal system is consent-based system increases the importance of the perception of its legitimacy. If it is not perceived as legitimate, then the logical basis of self-restraint is at least greatly diminished, if not destroyed.

Clearly disagreement remains among scholars over the status of international law. This notwithstanding, international law does exist. Additionally, it proceeds on a basis very similar to that of domestic law. Hart argues that “... two comments are perhaps worth adding. First is that the analogy [between international law and domestic law] is one of content, not of form: secondly, that in this analogy of content, no other social rules are so close to municipal law as those of international law.”

Hart also argues that perhaps international law is in a “transitional stage,” which would bring its basic rules of obligation closer to that of domestic law.

Therefore, for the purposes of this thesis, international law will be regarded and analyzed as law. Additionally, Hart's half century old musing that perhaps international law is in a transitional stage also bears revisiting in the legal analysis of jus post bellum.

Sources of International Law

Having argued for the treatment of international law as law, it now useful to articulate the main sources of international law. Almost all scholars begin by citing Article 38 of The Statute of the International Court of Justice, which is an appendix of the UN Charter. It lists four sources of international law. These are: “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom as evidence

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278 Hart, The Concept of Law, 231.

279 Ibid., 231.
of a general practice accepted as law; the general principles of law recognized by civilized nations; and the judicial decisions and teachings of the most highly qualified publicists of the various nations . . . .” 280 The statute prioritizes the first three and notes the fourth in a position of secondary importance. 281

Treaties are an extremely common source of international law. For the purposes of determining the status of jus post bellum from a legal perspective, The Charter of the United Nations and the treaties and conventions that comprise international humanitarian law are the most useful to consider. According to the International Committee of the Red Cross (ICRC), international humanitarian law is “. . . a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are no longer participating in the hostilities and restricts the means and methods of warfare.” 282 International humanitarian law is an umbrella term that encompasses multiple international treaties and conventions. Prominent among them are the Geneva Conventions of 1949, along with its two additional protocols of 1977. It is also composed of a variety of other international agreements seeking to prohibit the use of certain weapons or protect certain categories of people. 283


281 Ibid.


“applies in peacetime, and many of the provisions may be suspended during armed conflict.”\textsuperscript{284} International humanitarian law on the other hand is specifically for cases of armed conflict. As Solis explains, “The purpose of international humanitarian law is not to prevent war. More prosaically it seeks to preserve an oasis of humanity in battle . . .”\textsuperscript{285}

When considering the issue of \textit{jus post bellum} in the context of international law, it is imperative to study the 4th Geneva Convention (12 August 1949) and the Hague Conventions of 1899 and 1907. These conventions concern themselves with the “protection of civilian persons in time of war”\textsuperscript{286} and the issue of belligerent occupation. Specifically, Section III of the 4th Geneva Convention concerns itself with the treatment of persons in occupied territories.\textsuperscript{287}

The 4th Geneva Convention, in conjunction with the Hague Conventions, forms the basis of occupation law. The definition of occupation is found in article 42 of the Hague Convention of 1907. It states, “Territory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”\textsuperscript{288} The current status of occupation law and its applicability to current conflicts is a central issue in the legal scholarship concerned with \textit{jus post bellum}.

The idea of international humanitarian law itself is interesting from a normative perspective. International humanitarian law consists of the body of international law formerly

\textsuperscript{284} Ibid.

\textsuperscript{285} Solis, \textit{The Law of Armed Conflict}, 23.


\textsuperscript{287} Ibid.

\textsuperscript{288} The Hague. \textit{The Hague Conventions of 1907 (IV) Respecting the Laws and Customs of War on Land}, art. 42. 18 October 1907.
referred to as “The Law of War” or “The Law of Armed Conflict.” In the words of legal scholar Gary Solis, “The Laws of War and The Law of Armed Conflict have become deemed as passé by some legal scholars and are now being referred to as international humanitarian law.”289 This change in vocabulary is important to note, as it goes hand in hand with the overall delegitimation of war as an instrument of policy within international society.290

Also featuring prominently within the legal scholarship concerning jus post bellum is the United Nations Charter. As a multilateral treaty, it is considered international law, specifically as it relates to the legality of the use of force. Arend and Beck describe the charter as “a norm creating document” in their work, *International Law and the Use of Force: Beyond the UN Charter Paradigm*.291

Article 2(4) of the Charter explains the legal uses of the use of force in the current international system. It reads, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”292 Thus article 2(4) establishes a general *proscription* on both the actual use of force and the threat to use such force.293 Given this general illegality on the use of military force, Bull notes, “War then can be

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290 The prohibitions on the use of force encompassed within the United Nations Charter were referred to in the introduction of this thesis and will be further explored in this chapter. These prohibitions lead to the conclusion that war has lost its legitimacy within international society as an instrument of policy except under very specific conditions. In fact, the preamble of the UN Charter states that one is core function is “... to save succeeding generations from the scourge of war ...”


292 *The Charter of the United Nations*, Ch. 1, art. 2(4).

viewed as either a breach of law or as law enforcement.” This statement has tremendous limiting implications for Clausewitz's famous dictum; “War is not a mere act of policy but a true political instrument, a continuation of political activity by other means.”

Despite the seemingly clear proscriptions of Article 2(4), the charter text is ambiguous. It does not clearly specify which uses of armed force are consistent with the purposes of the United Nations. There have been a substantial number of uses of force incidents since the treaty was ratified. Many of these have been in clear violation of this article. As a result, there is substantial scholarship in both the disciplines of international law and international relations as to whether article 2(4) remains law or whether it has become irrelevant to the decision to employ force in the international system.

Given the large number of conflicts that have arisen since the ratification of the UN Charter, the case that Article 2(4) is dead would seem a simple one to make. What is interesting however is that the majority of the uses of force undertaken by states have been justified in legal language that places the particular use of force in question within the parameters of article 2(4). This allows for the argument that article 2(4) and the uses of force authorized within the UN Charter are considered legitimate within the UN system. Thus, whether it is conformed to in

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297 As early as 1970, an article titled “Who Killed Article 2(4)? or Changing Norms Regarding the Use of Force by States” by Dr. Thomas Franck was published in *The American Journal of International Law*. (vol. 64. no 809. 1970). Far more recently, Michael Glennon has argued that Article 2(4) has fallen into desuetude (abandonment through non-enforcement or non-compliance), *The Fog of Law: Pragmatism, Security and Intervention Law*, 23. In *International Law and the Use of Armed Force*, 180. Arend and Beck argue that from a legalist approach, Article 2(4) is still “good law.” They further state that it constitutes a treaty obligation.

practice or not, the charter continues to serve as a standard for legitimacy for evaluating the use of coercive military force within the international system.

The UN Charter also contains notable exceptions to article 2(4). First is article 51, which reserves the right of self defense for all states.\textsuperscript{299} Second is Chapter VII of the charter, which allows for the use of force to be authorized by the United Nations Security Council (UNSC) in cases where there is “. . . any threat to the peace, breach of the peace, or act of aggression . . . .”\textsuperscript{300} Further, chapter VII, article 39 of the charter calls upon the UNSC to “. . . make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”\textsuperscript{301}

The Security Council is empowered to make binding decisions under international law. Article 24 of the Charter requires all members of the UN will allow the UNSC to act “on their behalf,” in the “. . . responsibility for the maintenance of international peace and security,” while article 25 is an agreement of the member states to accept and carry out the decisions of the UNSC.\textsuperscript{302} These two articles confer upon the UNSC the authority to use or authorize force under international law. This point is highly relevant to the current debates in \textit{jus post bellum} legal scholarship.

In \textit{International Law and the Use of Force: Beyond the U.N. Charter Paradigm}, Arend and Beck argue that the UN Charter represents a legal paradigm for \textit{jus ad bellum}.\textsuperscript{303} However, they believe that the paradigm has been substantially challenged over the last several decades by:

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\begin{itemize}
  \item \textsuperscript{299} \textit{The Charter of the United Nations}, Ch. VII, art. 51.
  \item \textsuperscript{300} Ibid., Ch. VII, art. 39.
  \item \textsuperscript{301} Ibid.
  \item \textsuperscript{302} Ibid., Ch. V, art. 24 and 25.
  \item \textsuperscript{303} Arend and Beck, \textit{International Law and the Use of Force}, 4.
\end{itemize}
changes in the nature of armed conflict (from inter-state to intra-state); differences in charter interpretation; the perceived illegitimacy of the UN as an instrument of peaceful change; and the failure of international society and international institutions to enforce international law. They also argue that states have shown an increasing preference for justice over peace.\textsuperscript{304}

Arend and Beck's work, published in 1993, clearly foresaw the major outlines of many of the current challenges to the legal paradigm enshrined in the UN charter. With the benefit of nearly two decades more evidence on the use of force in the international system, it is easily argued that the issue of state centric conceptions of security versus a conception of human security has also been a pressing challenge to the current paradigm and is at the forefront of legal debates over the content of \textit{jus post bellum}.

In "Security Beyond the State: Cosmopolitanism, Peace and the Role of Just War Theory," Patrick Hayden argues, “. . . the traditional realist claims to sovereignty and nonintervention on the part of states are being supplanted in international relations by a norm of humanitarian assistance driven by human rights and the security interests of individuals.”\textsuperscript{305} Renowned human rights scholar Richard Falk addresses the issue of human rights law as it pertains to the UN Charter paradigm in his book, \textit{Achieving Human Rights}. He states:

\begin{quote}
By placing the norms, standards and principles in a document called the Universal Declaration of Human Rights, by modestly labeling the framework document establishing the content of international human rights as a declaration, it was acknowledged that these norms were never meant to be obligatory, but were intended only to express aspirational goals, the fulfillment of which depended on voluntary political reforms undertaken within individual states.\textsuperscript{306}
\end{quote}

\begin{flushright}
\textsuperscript{304} Arend and Beck, \textit{International Law and the Uses of Force}, 4.


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Falk further asserts, “Governmental engagement with this affirmation of human rights was understood from the beginning as never intended to be more than a gesture, and was carefully phrased so as not to challenge the sanctity of the sovereign state.”\textsuperscript{307} The Universal Declaration of Human Rights is not treaty law, and thus was never part of the \textit{jus ad bellum} paradigm established by the UN Charter.\textsuperscript{308} The tension created by the competing demands of state sovereignty and human rights stands at the center of the debate over a legal codification of \textit{jus post bellum}.

Given that the UN Charter represents a paradigm for \textit{jus ad bellum}, international humanitarian law should be regarded as the current legal paradigm for \textit{jus in bello}. The issue for consideration in the ensuing literature review is what an international legal paradigm of \textit{jus post bellum} should encompass, whether it currently exists within international law or whether new law will have to be created.

\textbf{Literature Review}

The legal literature concerning \textit{jus post bellum} revolves around three main issues and what constitutes the proper response to them under international law. First, several of the scholars propose that the legal questions comprising \textit{jus post bellum} exist in a “gap” in international law. Specifically, these authors argue that the transition from conflict to peace includes matters that are normally associated with both the laws of war and the laws of peace. These laws two types of law do not apply simultaneously. As a result, is difficult to determine exactly which, if either type of international law applies to a specific instance in the immediate

\textsuperscript{307} Ibid., 3.

\textsuperscript{308} Although \textit{The Universal Declaration of Human Rights} is not treaty law, however, \textit{The International Covenant on Civil and Political Rights}, (United Nations Treaty: 16 December 1966) is a treaty that does codify the much of the language of the original declaration. Thus, although the declaration was not initially given the same status as the \textit{United Nations Charter}, the \textit{International Covenant on Civil and Political Rights} currently has 74 state signatories.
aftermath of war. The question is definitional. Is the situation war? Or is it peace? And, what constitutes the criteria by which to determine the answer?

Other writers on this subject are concerned with international occupation law. They contend that its statist orientation is incapable of dealing with current forms and patterns of warfare. A subset of these writers are specifically concerned with “humanitarian occupations” under UN mandate that have occurred since the end of the Cold War. They consider this phenomenon to exist completely outside the scope of situations contemplated by the drafters of both occupation law and of the United Nations Charter.

All of the authors concerned with military occupation, for either traditional or humanitarian reasons are quite interested in the legality of the UNSC Chapter VII resolutions establishing de facto occupation under UN sanction. Additionally, they are concerned with the legal status of the issues encompassed within “The Pottery Barn Rule:” governmental transformation, economic reconstruction, education and infrastructure repair.

Finally, there are authors who write about the *jus post bellum* issue of international tribunals. This topic will also be covered within this review, albeit briefly. It should be noted, that most authors writing on *jus post bellum* simply take such tribunals as a given at this point in history. The scholarly writing on tribunals is oriented on the details of how they should be managed, rather than whether they belong among the criteria for *jus post bellum*.

The first author considered in this review is Carsten Stahn. He is an editor and one of the primary contributors to *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*. Stahn has also written several journal articles on the topic. In a 2006 article for *The European Journal of International Law*, he argues, “International law has been founded upon a distinction
between war and peace . . .” which he asserts is no longer correct in the current international environment.309

Stahn posits that three changes in the international system over the past century have led to this condition. First, he states that the criminalization of war in the 20th century has led war to become “regulated by law.”310 Second, he argues that the dividing line between war and peace is no longer clear due to changes in the nature of conflict. Third, he contends that the new types of conflict have defied management under existing international legal regimes.311

To address these changes and to rectify the insufficiency of the current international legal paradigm, Stahn advocates that jus post bellum receive “ . . . an autonomous legal space in the architecture of the law of armed force.”312 He argues that this legal regime would be useful to create a “ . . . building block for the legality of liberal intervention,” as well as mitigate the consequences of unauthorized uses of force in the international system.313

Stahn's concept of jus post bellum law would encompass such issues as democratization, economic reconstruction, and the assurance of minimum standards of living for the citizens of post-conflict societies. He further advocates in favor of a move away from collective responsibility towards individual criminal responsibility for those ordering illegal uses of military force.314 He is not an advocate for collective punishment of a society.


310 Ibid., 924.

311 Ibid., 924-925.

312 Ibid., 930.

313 Ibid., 938.

314 Ibid., 940-944.
Another author who has written on the legal vacuum surrounding *jus post bellum* law is Inger Osterdahl. In an article for *The Journal of Conflict and Security Law*, she argues:

> There exists a legal gap of enormous proportions and of enormous consequences when it comes to the rules designed to regulate the post-conflict phase. New international law codified and effectively observed are necessary in order to tackle the problems created by this legal gap. . . . 315

Osterdahl advocates plugging this hole in the international legal paradigm through the establishment of a new treaty, which would fuse international humanitarian law, international human rights law and the military law to regulate post-conflict situations. 316 Osterdahl also advocates including the requirements of the R2P doctrine into a treaty for *jus post bellum*. 317 If this were to come to pass, then "The Pottery Barn Rule" would effectively become international law.

Osterdahl does recognize the potential negative consequence of this action. If such a treaty were to be ratified, it is likely that states would become even more reluctant to intervene into humanitarian crises as a result of the additional costs they would incur. Nonetheless, he advocates for the creation of this treaty and for the obligation of the international community writ large for the costs of *jus post bellum*. She writes “. . . in a post-conflict phase, the international community should take responsibility through international actors for the implementation of the rules of *jus post bellum.*” 318

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316 Ibid.

317 Ibid., 8.

A second significant issue that frequently arises within the legal analysis of *jus post bellum* is that of military occupation and the anachronistic qualities of current occupation law. Section III of the Hague Convention of 1907 is titled “Military Authority Over the Territory of the Hostile State.”  

319 A careful reading of this treaty, in conjunction with the Fourth Geneva Convention, leads to the inescapable conclusion that occupation law is written to preserve the laws and governmental structure of the state being occupied, as well as to provide protection for citizens of occupied territory. This is known as the principle of conservation.  

320 A quick review of military occupations, beginning with those that ended World War II and most recently concluding with Operation Iraqi Freedom, would suggest that the current conception of occupation is incompatible with this conservationist principle.

Occupation law is statist in its orientation. It presupposes a situation in which one state temporarily occupies the territory of another state in the immediate aftermath of a war. However, many of the de facto occupations that have occurred in the post-Cold War era have been multilateral in nature and have been sanctioned either initially or retroactively by the UNSC. Further, the UN has in some cases become the *de facto* occupier or administrator of the war torn areas. For example, chapter VII resolutions established UN administrations in East Timor (UNTAET) and Kosovo (UNMIK), as well as recognized the *de facto* occupation that was underway in Iraq.  

321, 322, 323 The UNSC resolutions (UNSCRs) that either established or

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321 UNSCR 1244 established an UN interim government in Kosovo that was charged with providing a . . ."transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.” United Nation Security Council, “Resolution 1244,” (10 June 1999).
recognized these occupations were unambiguously advocating governmental and societal transformations with the occupied states or territories. When governmental transformation is either a war aim, as it was in Iraq, or defined aim of a post-conflict administration, these occupations by any other name become fundamentally incompatible with the occupation law principle of conservation.

When tracing the post-Cold War history of the sweeping changes in UN mandates and their implications for *jus post bellum*, a useful starting point is *An Agenda for Peace*, by then United Nations Secretary General Boutros Boutros-Ghali (1992). In it, he argues for a broader UN role in peacekeeping and peacemaking operations. Boutros-Ghali explicitly recognizes a linkage between stability and liberal democracy. He also notes the requirement for technical support for assistance building the institutions of government, as well as the need to assist in infrastructure projects. He writes:

There is a new requirement for technical assistance which the United Nations has an obligation to develop and provide when requested: support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions. The authority

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322 UNSCR 1272 authorized the establishment of a transitional administration in East Timor. This administration was vested with “All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET.” United Nations Security Council, “Resolution, 1272,” (25 October 1999).

323 UNSCR 1483 acknowledged the situation on the ground in Iraq and the de facto position of US and UK forces as occupiers. It recognized, “. . . the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command.” From this recognition, the UNSCR authorized under the auspices of Chapter VII, the wholesale transformation of Iraq, “. . . leading to an internationally recognized, representative government of Iraq; facilitating the reconstruction of key infrastructure, in cooperation with other international organizations; promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions; encouraging international efforts to contribute to basic civilian administration functions; promoting the protection of human rights; encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and encouraging international efforts to promote legal and judicial reform.” It further supported “. . . the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority . . .” “United Nations Security Council, Resolution 1483,” (22 May 2003).
of the United Nations system to act in this field would rest on the consensus that social peace is as important as strategic or political peace. There is an obvious connection between democratic practices - such as the rule of law and transparency in decision-making - and the achievement of true peace and security in any new and stable political order.\(^{324}\)

This deliberate connection between stability and democracy has led to the rise of what scholar Gregory Fox has labeled *Humanitarian Occupation*. Fox defines his title as “... the assumption of the governing authority of a state or portion thereof by international actors for the express purpose of creating a liberal, democratic order.”\(^{325}\) He calls these missions “social engineering projects” authorized under the auspices of Chapter VII.

From his study of these post-Cold War occupations, Fox comes to several conclusions useful for the delineation of *jus post bellum* criteria. First, he notes that the international community and international law remain committed to preserving the borders of the existing state.\(^{326}\) Second, international actors such as the UN have effectively assumed state governance.\(^{327}\) Third, he argues, “Since the end of the Cold War, the UNSC has vastly expanded its Chapter VII powers, to the point where few, if any legal limits can be discerned.”\(^{328}\) Finally, he concludes, “The principle of conservation under a military occupation designed to remake the political and economic system does not make sense.”\(^{329}\)

Also writing on the issue of occupation law is Eyal Benvenisti. His book *The International Law of Occupation*, was first published in 1993, but was republished in 2004 and


\(^{326}\) Ibid., 7.

\(^{327}\) Ibid., 2.

\(^{328}\) Ibid., 10.

\(^{329}\) Ibid., 250.
now specifically addresses the implications of Operation Iraqi Freedom on the law of occupation. He argues that the term “occupation” like the term “war” has become pejorative. As a result, occupiers are not likely to establish themselves as such, but rather refer to themselves by a euphemistic term.\textsuperscript{330} In Ian Clark's vernacular, the term occupation has lost its legitimacy in international society.

Benvenisti states that UNSCR 1483, which recognizes the \textit{de facto} US/UK occupation of Iraq, “. . . can be seen as the latest and most authoritative restatement . . . of the contemporary law of occupation.”\textsuperscript{331} He further argues that occupation is not necessarily an outcome of “actual fighting” therefore should “. . . not necessarily be linked to war.”\textsuperscript{332} Rather, he highlights instances where occupation occurred for humanitarian reasons.

Benvenisti also argues that a large challenge of occupation law has been adapting it to “modern governance.”\textsuperscript{333} Additionally, Benvenisti, along with Fox recognize that in post-Cold War occupations, the idea of sovereignty has changed. Sovereignty now resides in the population, not in the pre-war governmental structure.\textsuperscript{334} Viewed in this way, it can be argued that recent occupations have privileged human rights laws and norms and the principle of self-determination over the preservation of the pre-existing government. This is only logical given that many of the occupations have occurred in the wake of massive human rights violations.

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\textsuperscript{331} Ibid., xi.
\textsuperscript{332} Ibid., 3-4.
\textsuperscript{333} Ibid., viii.
\textsuperscript{334} Ibid., xi.
\end{flushright}
Other authors have also considered the question of sovereignty and the nature of contemporary occupations. Among them are Kristin Boon and Nehal Bhuta. In her article, “Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers,” Boon proposes three principles for jus post bellum. They are trusteeship, accountability and proportionality. Boon makes the unique proposal of grounding jus post bellum principles of occupation in Chapters XI and XII of the UN Charter. These chapters concern trusteeships for non self-governing territories and matters pertaining to decolonization. Boon argues that managing transformational occupations is akin to the process of UN trusteeship.

Bhuta also considers the idea of occupation law. In his article, “New Modes and Orders: The Difficulties of Jus Post Bellum Constitutional Transformation,” he analyzes the difficulties of including constitutional transformation as a criteria of jus post bellum and argues for the current ambiguity in the law to remain. Bhuta cites the inability of outside powers to garner the appropriate amount of domestic political capital and social understanding to build a legitimate constitutional order. Thus he argues, “An overly prescriptive . . . approach to constitution making seems unlikely to be functional . . .” As a result, Bhuta advocates an ad


336 Boon specifically refers to Article 75 of the Charter, which reads, “The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.” She also discusses article 76, which delineates the purposes of the trust system. Among these are: furthering international peace and security; promoting political, economic and social advancement of the citizens of the territory; assisting in the development of self government; and encouraging respect for human rights and fundamental freedoms. The Charter of the United Nations, ch. XII, art. 75-76.


338 Ibid., 850.
hoc approach towards constitution making specifically and towards transformative occupation in general.

Adam Roberts has also written extensively on this issue and echoes Bhuta's concern. Roberts argues, “A particular problem with occupations with transformative purposes is that changing the fundamental principles by which a society governs itself is necessarily a long process.” As a result, he too advocates caution with regard to the idea of transformative occupation.

The third issue that falls within the legal parameters of jus post bellum is that of war crimes tribunals. First used in Germany and Japan in the aftermath of World War II, the idea of conducting tribunals in the wake of conflict does not evoke controversy in the jus post bellum community. The concept of a war crimes tribunal has become a legitimate and expected stage of in the transition between war and peace. There is no argument that there is a need for post-conflict justice or transitional justice, whatever form it should take.

However, there is a large philosophical issue that underpins the legal discussions of the need for post-war truth commissions or international criminal tribunals or national criminal prosecutions. The root question underpinning the discussions of international war crimes tribunals and other mechanisms of justice is the tension between peace and justice that is found at the end of every conflict. How does one best balance this tension to create the most stable long-term outcome for the society in question? This loaded question is one that more properly belongs either in the preceding section on ethics and morality or in the forthcoming section on national decision-making and policy planning. Nonetheless, there are a few articles that discuss the mechanisms of post-war justice that bear mention in this literature review.

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First is Davida Kellogg's article, “Jus Post Bellum: The Importance of War Crimes Tribunals.” In Kellogg argues for war crimes tribunals to become a fundamental pillar of any codification of jus post bellum. She states, “. . . meting out punishment for crimes against humanity and war crimes, whether in international tribunals or in our own civil courts, court martial or military tribunals, is in fact, the natural, logical and morally indispensible end stage of just war.”

Kellogg believe that justice, in the form of war crimes tribunals should become a central pillar of any codification of jus post bellum.

Other writers on the issue of post bellum prosecution do not champion Kellogg’s declaration on the requirement for tribunals with such strong certainty. Although there is certainly an appetite for post bellum justice, the form it should take is less prescribed by other scholars. In their article, “Just Post Bellum and Transitional Justice,” Mark Freeman and Drazan Djukuc argue, “there are no universal answers,” and that each society should be allowed, “to choose its own path.”

Freeman and Djukuc consider the practical issues associated with tribunals and other mechanisms for transitional justice. They outline the capacity problem, in that the need for post-war justice almost always outstrips the capabilities of the institutions charged with providing it. They also cite the notorious lack of evidence available in post-conflict societies, as well as the double-edged nature of attempting to hold members of the ancien regime criminally responsible for their actions. They state, “Ousted regimes and demobilized combatants often retain strong-

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341 Ibid., 89.

holds of power that may threaten a new government should it attempt to hold new members to account.” The difficulties associated with the CPA's de-Ba'athification project in Iraq illustrate this point well. Freeman and Djukuc conclude that there are too many unknowns regarding the content of *jus post bellum* to make any concrete proposals beyond ad hoc approaches to *post bellum* justice. However, they concur that *post bellum* justice should become a central part of any eventual codification of *jus post bellum*.

In his article, “The Relevance of *Jus Post Bellum*: A Practitioner's Perspective,” Charles Garraway also wrestles with the issue of *post bellum* justice and the best methods for achieving it. Garraway recognizes the constant competition between the requirements of justice and requirements of peace. He considers the issue from the perspective of soldiers on the ground, citing the ambiguity created by the tension between international human rights law and international humanitarian law and the lack of clarity over which one would apply on the ground at any given moment. For this reason Garraway argues for the clarification of *jus post bellum* legal regime as part of the larger codification of *jus post bellum*.

Balancing the requirements of justice with the requirements of peace and stability is a difficult task in any post-conflict situation. There is overall agreement among scholars on the need for *post-bellum* justice. There is also little argument over the appropriateness of international criminal tribunals when circumstances merit. Finally, consensus exists over the fact that legal requirements for *post-bellum* justice should be a central pillar of any codification of *jus post bellum*. However, consensus stops there. This seems to be in large part the result of the

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343 Ibid., 215.


345 Ibid., 162.
number of questions still unresolved regarding the scope of *jus post bellum*. What are the temporal requirements (conflict versus post-conflict)? When should human rights law be applied versus international humanitarian law? What is the order of precedence between justice and peace? Until some of these fundamental questions are resolved, it seems that ad hoc approaches to *jus post bellum* justice will continue to be the only ones available.

**Conclusion**

This chapter introduced the issues of international law and its relationship to the emerging concept of *jus post bellum*. It also conducted a representative literature review of articles and books considering the issue of *jus post bellum* from a legal perspective. This is Clark’s second pillar of international legitimacy.

Several themes emerged that are relevant to the exploration of the concept of *jus post bellum* from a legal perspective. These are: the lack of consensus on whether international law is actually law at; the stark gap between the laws of war and the laws of peace; and the anachronistic qualities of some of the treaty law that governs occupation. The work in this chapter will form the basis of the analysis to be conducted in chapter six.
CHAPTER SIX

JUS POST BELLUM AND INTERNATIONAL LAW ANALYSIS

Introduction

The previous chapter provided a literature review of the work on *jus post bellum* written from the perspective of international law. The literature on the topic dealt with two principal questions. First was the void in existing law for a transition between war and peace. Second was the issue of occupation law and whether/how it should apply to an emerging concept of *jus post bellum*. Additionally, the preceding chapter briefly considered the issue of war crimes tribunals as covered in the *jus post bellum* literature. However, the topic of tribunals did not evoke fundamental disagreement within the literature considered and thus it was not treated expansively.

This chapter continues the process of structured focused comparison among the three strands of *jus post bellum* scholarship; philosophical, legal and policy-oriented by analyzing the literature presented in the preceding chapter. It will proceed by considering the authors' responses to five central questions regarding the definition of *jus post bellum*. These are:

- At war's end, how do we define peace?
- What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?
- What are the obligations of the victor to the international community? Is there an obligation for reconstruction to ensure greater chance of international stability?
- What are the obligations of the international community towards the belligerents (both winners and losers)?
- Do victors have a right to reparations or remuneration from the defeated states? (Under what conditions)?
When these questions have been answered, this chapter will conclude with a summary of major findings regarding the legal strand of the *jus post bellum* debate.

**Question 1: At war's end, how do we define peace?**

The easiest way to define peace under international law is simply to state that it is all times when the laws of war or international humanitarian law do not apply. In her work *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Christine Bell defines the laws of peace as, “the rest of international law, once the laws of war are subtracted.”\(^{346}\) This is a specific definition. However, it is neither a particularly useful nor positive one. Nonetheless, it provides a starting point for discussion of *jus post bellum* from the perspective of international law.

The fact that there is a body of laws for war and then “the rest of international law” illustrates the case made by Stahn and Osterdahl that a gap exists in the law when it comes to transitioning from a state of war to a state of peace. The law is binary, while the situation on the ground in post-conflict situations is highly complex. Charles Garraway worries that without establishing clear transition points, it is difficult for members of the military to determine exactly which laws apply during the transition stages: international humanitarian law or international human rights law.\(^{347}\) This in turn could inhibit military effectiveness and the ability to achieve *jus post bellum* at all.

At this point, it is useful to turn from the lack of definition of peace in international law to a more philosophical construction of the issue. In their book, *International Law and the Use of Force: Beyond the UN Charter Paradigm*, Arend and Beck argue that international law cannot be understood without, “. . . an appreciation of the international context within which it

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They further argue that the UN Charter represents a legal paradigm for *jus ad bellum.* Considering the charter from this perspective allows the reader to draw conclusions as to the definition of peace envisioned by the drafters and signatories of the charter.

The preamble begins:

> We the people of the United Nations determined to save succeeding generations from the scourge of war…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, . . .to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. . .to unite our strength to maintain international peace and security. . .

Clearly, this is an aspirational statement, and the reality of the international system has not begun to meet the aspirations set forth. Nonetheless, this preamble illustrates a strong desire for a positive peace, one that is far more robust than the simple absence of war. Further, actions taken by the UNSC in the post-Cold War era to maintain international peace and security reinforce the notion that there is a desire to move the international system in the direction of positive peace. Returning to Boutros-Ghali’s *Agenda For Peace,* he speaks in terms of international obligation to assist in promoting security and democracy to increase the chances for peace in the international system.

The UN charter and the reality of international law illustrate the tension between an international system based on a Lockean foundation of state sovereignty and an aspiration for a world based upon a Kantian desire for “Perpetual Peace.” This tension is further illustrated by UN Security Council Resolutions (UNSCRs) that have mandated the wholesale reconstruction of

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349 Ibid., 4.


351 Boutros-Ghali, *An Agenda For Peace,* 12.
governmental systems based on a tri-partite requirement for: enhanced international security; national self-determination; and a respect for human rights. UNSCRs such as these establish a tacit international occupation that far exceeds what is codified in occupation law.\textsuperscript{352}

That said, the appetite of the UNSC and the international community to engage in wholesale societal transformation in the name of international peace and security has been extremely selective. One need only point to the case of Rwanda to recognize that the desire for international intervention in humanitarian crises has been far from consistent. In fact, in the cases of Iraq and Kosovo, military force was used without UNSC approval.

There was no consensus or even majority approval of the US decision to undertake forcible regime change in Iraq in 2003. Nonetheless, UNSC recognition of the \textit{de facto} occupation there is instructive, as it illuminates a potential vision for \textit{jus post bellum}. UNSCR 1483 (22 May 2003) recognized the US/UK occupation of Iraq and charged the occupiers with the tasks of promoting human rights, and undertaking judicial and governmental reforms that would lead to “. . . an internationally recognized representative government of Iraq.”\textsuperscript{353}

Given that the United Nations Security Council has binding authority under international law on matters of peace and international security, these resolutions constitute a legal expression of the aspirations stated within the preamble of the UN Charter, as well as a vision of \textit{jus post bellum}. Thus, there has been a desire for a Kantian approach to creating international peace and security, as opposed to a purely Lockean requirement for the preservation of national

\textsuperscript{352} UNSCR 1244 established the transitional administration in Kosovo. The administration was charged with “. . . establishing and overseeing the development of provisional democratic self-governing institutions . . . .” UNSCR 1244 (10 June 1999.) UNSCR 1272 established the UN transitional administration in East Timor. It was also charged with ensuring the development of a democratic, representative government in East Timor. UNSCR 1272 (25 October 1999).

\textsuperscript{353} UNSCR 1483, (22 May 2003).
That said, this desire has been unevenly pursued and has created serious tension within the Security Council.

In the cases of Iraq and Kosovo, the Security Council did not approve the initial use of force. However, this lack of approval did not change the decision to use force on the parts of individual states, formal alliances, and coalitions of the willing. In these cases, the Security Council found itself responding to military faits accomplis.

Extrapolating from Arend and Beck's argument that the UN Charter constitutes the legal paradigm for *jus ad bellum*, one can argue that the resolutions concerning Kosovo, East Timor and Iraq constitute expressions of an emerging paradigm of *jus post bellum*. The resolutions that followed the use of force in East Timor, Iraq and Kosovo illustrated a strong international desire to ameliorate horrible human rights violations that had been occurring in these places. Further, these resolutions mandated the establishment of democratically elected, representative governments.

These facts notwithstanding, there has been significant reluctance by the UNSC to approve or undertake the use of force. Thus, the tension between the legal reality of sovereignty and the aspirations for peace and human security remains a significant issue within the international system.

The current definition of peace under international law is Hobbesian in nature. It is all times when there is no war occurring. However, the UNSCRs that governed the administration of East Timor, Kosovo and Iraq tacitly underwrote a different definition, one in which peace was defined in optimistic, liberal, and democratic terms.

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354 It is also useful to note that Kant was not opposed to forcible regime change in circumstances where states were consistently and negatively interfering with the stability of the overall international system. Kant, *Perpetual Peace and Other Essays*, 116.
The UNSC's unwillingness to approve the use of force in Kosovo and Iraq, but then take a very specific position on the type of peace to be created in the wake of war, is important in terms of the development of a concept of *jus post bellum*. It underscores the need for a separation between *jus ad bellum* and *jus post bellum*, as the two ideas are being differentiated in practice by the actions of the Security Council. Post-war mandates have not been contingent on use of force mandates. Ergo, *jus post bellum* has not been made contingent on *jus ad bellum*. The Security Council is treating them as related, but separate issues.

There is definite disagreement as to whether the United States met its *jus ad bellum* burden to undertake regime change in Iraq. This was underscored by the lack of UNSC sanction on the use of force. However, UNSC 1483 was a directive mandating the requirements of a lawful occupation. In essence, it defined the requirements for *jus post bellum*. Although UNSCRs are not precedent setting documents, this resolution, in conjunction with resolutions 1244 and 1272 point to an emerging international consensus on the definition of *jus post bellum* in the contemporary international system. This definition is also consonant with “The Pottery Barn Rule,” as each resolution required substantial physical reconstruction as well as governmental transformation.

**Question Two: What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?**

The obligations of the victor to the defeated state and its citizens are principally codified in two treaties. These are: the *4th Geneva Convention Relative to the Protection of Civilian Persons Time of War* (12 August 1949) and *The Hague Convention IV, Respecting the Laws and Customs of War on Land* (18 October 1907).³⁵⁵

³⁵⁵ Henceforth in this thesis, the 4th Geneva Convention will be referred to as the 4GC and the Hague Convention will be referred to as Hague (1907).
Article 38 of the 4GC provides a Bill of Rights for protected persons living in occupied territories. These rights include: the ability of people living in occupied territory to receive relief sent to them; their right to receive medical attention and hospital treatment; their right to practice their religion and receive spiritual assistance from ministers of their faith; and their right to move from areas exposed to the dangers of war. Additionally, pregnant women and children under seven years old are also entitled to special privileges as the circumstances allow.

The Hague Convention (1907) provides specific guidance regarding, “Military Authority Over the Territory of The Hostile State.” This guidance provides the basis for the “principle of conservation” discussed in Chapter V. Article 43 is particularly relevant to this principle. It states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

In addition to article 43, article 55 of the Hague Convention (1907) also underpins the principle of conservation as it relates to military occupation. It reads:

The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules

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356 Art. 3(1) of the 4GC, defines protected persons as those “... taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or other cause...” http://www.icrc.org/ihl.nsf, (accessed June 14, 2011).

357 4th GC, art. 38.

358 Ibid.


360 Ibid., art. 43.
of usufruct.\textsuperscript{361, 362}

From these two articles, one can determine that the law of occupation was written to encompass a short duration military occupation, the ultimate end of which was to return the territory to the government of the state once the hostilities were concluded. The law provides no basis for the transformation of the state and/or society, nor does it require economic and infrastructure reconstruction. The law of occupation is based on a conception of a war as an occurrence between two or more sovereign states, the conclusion of which is determined among the warring parties themselves. This is a Lockean proposition, rather than a Kantian one.

However, the reality since the end of World War II has looked remarkably and consistently different than the law of occupation would indicate. Beginning with Germany and Japan in the aftermath of World War II, there has been an appetite to remake “outlaw states,” according to liberal, democratic principles. Although this appetite lay dormant through the Cold War, the fall of the Berlin Wall has seen a renewed desire for transformational military occupations.

In his book \textit{The International Law of Occupation}, Benvenisti cites UNSCR 1483 as “. . . the latest and most authoritative restatement of several basic principles of the contemporary law of occupation.”\textsuperscript{363} He goes on to explain its significance in several respects. First, Benvenisti argues that contemporary occupation law allows for sovereignty to “inhere in the people,” rather than in the government.\textsuperscript{364} He also notes the resolution “grants a mandate” for governmental

\begin{itemize}
  \item \textsuperscript{361} Ibid., art. 55.
  \item \textsuperscript{362} Usufruct is defined as, “The legal right of using and enjoying the fruits or profits of something belonging to another,” http:\/\/www\slashmerriam\slashwebster\slashcom\slashdictionary\slashusufruct, (accessed July 5, 2011).
  \item \textsuperscript{363} Benvenisti, \textit{The International Law of Occupation}, xi.
  \item \textsuperscript{364} Ibid.
\end{itemize}
transformation, as well as “recognizes in principle the continued applicability of international human rights law . . . in tandem with the law of occupation.” Finally, Benvenisti notes that UNSCR 1483 requires the occupiers to become “heavily involved regulators,” which is a significant departure from the Hague Convention (1907).

Benvenisti approves of the modernizations effected by UNSCR 1483, but notes there are still areas in which the law is vague or insufficient. First, he notes the lack of guidance within the UNSCR regarding whether the occupant is allowed to undertake international obligations or conduct diplomacy on behalf of the occupied state. Second, he notes a lack of clarity regarding the responsibilities of the occupiers for the international actions of the citizens of the occupied state. Nonetheless, Benvenisti believes that the update created in the law of occupation by UNSCR 1483, were generally positive and “. . . prevents the occupant from hiding behind the limits imposed upon its powers as a pretext for inaction.”

In addition to the invasion of Iraq in 2003, several writers, including Benvenisti, have considered other UNSCRs invoking Chapter VII and their impact on the law of occupation and the obligations imposed under it. The two most common resolutions cited by these authors as examples are UNSCR 1244 and 1272, passed for Kosovo and East Timor respectively. Both these UNSCRs placed the governance of the occupied territories into the hands of a UN administrator.

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365 Ibid.


367 Ibid., xii.

368 Ibid.

369 Ibid. xi.
According to Bhuta in “New Modes and Orders: The Difficulties of Jus Post Bellum Constitutional Transformation,” “UN missions are not belligerent occupation within the meaning of the laws of war . . . .”³⁷⁰ Thus, in his view, the use of UNSCRs to create UN administered territories falls completely outside the scope of the law of occupation. This provides further evidence of Stahn's contention that there is a gap in existing international law to deal with situations of jus post bellum. Stahn opines, “The law of occupation, as the only branch of jus in bello which deals explicitly with post-conflict relations, is ill-suited to serve as a framework of [UN] administration.”³⁷¹

Given this, there is a divide among the writers as to whether there should be a call for a new international treaty governing the laws of occupation or whether the current system of UNSCR Chapter VII authorizations should suffice. Orend advocates the drafting and adoption of an entirely new Geneva Convention to deal with the gaps in the law.³⁷² Osterdahl agrees.³⁷³

However, other authors believe that the current approach is working well enough to ensure jus post bellum on a case-by-case basis. Bhuta argues, “The current practice of ad hoc regulation of post-conflict political transformation under the aegis of the UNSC should continue.”³⁷⁴ Fox cites the uniqueness of the UNSC in its ability to regulate post-conflict situations. He states, “The UNSC falls outside the players that the international legal system seeks to regulate. It transcends traditional categories.”³⁷⁵ Therefore, given that by virtue of being

³⁷⁰ Bhuta, “New Modes and Orders,” 826.
³⁷⁴ Bhuta, “New Modes and Orders,” 853.
³⁷⁵ Fox, Humanitarian Occupation, 274.
a product of international law, the UNSC exists outside of the normal scope of international law, it is in the unique position of being able to create binding law on a case by case basis, thus effectively bypassing a lengthy, if not impossible treaty drafting and ratification process.

Although ad hoc approaches seem unsatisfactory in dealing with what has become a recurring issue in the international system, they have the virtue of being able to be tailored to each specific case. It is difficult to imagine a new treaty could foresee and encompass all of the potential permutations of military occupations that could occur in the coming century or more.

To conclude this section on the obligations of the victors under international law, it would appear there is a significant disconnect between what is codified in treaty law and what has been approved by the UNSC in practice. The 4th GC and the Hague Convention of 1907 both affirm and codify a principle of conservation in the law of occupation. However, the UNSC resolutions creating administration in Kosovo and East Timor, as well as the one recognizing the occupation of Iraq, all specifically obligated the occupiers to a series of transformational actions on behalf of the citizens of the administered/occupied states.

These obligations included the creation of an elected representative government, the creation of the institutions of governance and law, and the respect for human rights of all citizens living within the occupied territory. In the case of Iraq, the resolution went further, requiring the restoration of infrastructure and the administration of Iraq's oil wealth on behalf of its citizens.376 Thus, despite the existing law of occupation, which endorses a principle of conservation, the reality of the post-Cold War era has been largely one of transformative occupations requiring large, expensive and lengthy commitments on the part of the victors and/or international administrators. These occupations have embodied the spirit of “The Pottery Barn Rule.”

376 UNSCR 1483 (22 May 2003), par. 20-21.
**Question Three: What are the obligations of the victor to the international community? Is there an obligation for reconstruction to ensure greater chance of international stability?**

Much of the answer to this question was discussed in answering the previous question and as such, it will not be rehashed in detail here. International law recognizes conflict principally as a phenomenon occurring between two or more sovereign states and resolved by the same parties. Given this Lockean system, there is little to be said in terms of obligations to the international community.

Nonetheless, returning once again to the idea of the United Nations Charter as a legal paradigm for *jus ad bellum*, and as a potential emerging paradigm for *jus post bellum*, there is a basis from which to make an argument for obligations of the victor to the international community, specifically as it relates to obligations created by UNSC resolutions.

The problematic nature of the word “victor” was considered in the introduction to this thesis. The word is particularly messy when applied to humanitarian interventions such as those that occurred in Kosovo and East Timor. There was no “victor” in the traditional military sense of the word. The situations on the ground in both cases were the result of intra-state violence halted by third parties to the conflict. Nonetheless, it was clear that the international community, in the form of a UN administration assumed responsibility for both situations.

In Kosovo and East Timor, the “occupier,” a role, which would normally fall to a “victor” in a traditional conflict, was the United Nations. However, the United Nations was certainly not a “victor” in any traditional sense of the word. UNSCR 1244 (10 June 1999) created a United Nations administration for Kosovo. The resolution also placed demands on both defeated party and the international community occupying Kosovo. Authorized under Chapter VII of the Charter, the resolution demanded “. . . full cooperation by all concerned . . . with the

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International Tribunal for the Former Yugoslavia." It further demanded the end of all KLA (Kosovo Liberation Army) military actions, as well as demanded that “... all states in the region cooperate fully in the implementation of all aspects of this resolution.”

Although a UNSCR does not automatically occur as a result of occupation, there is a pattern of behavior on the part of the UNSC that significantly extends the obligations of the victor and the international community as a whole in situations where UN administrations have been established as a result of humanitarian intervention. That said, there were also situations, such as the ones in Darfur and Rwanda in which the UNSC did not act decisively and as a result no international obligations were incurred. Thus, it is impossible to speak of any universal obligations of the victor to the international community under international law.

**Question Four: What are the obligations of the international community towards the belligerents (both winners and losers)?**

Again, the issues associated with answering this question have been spelled out in the answers to previous questions. The bottom line is that any obligation is dependent upon the Security Council's determination in each case and whether a UNSCR has been approved delineating the specific requirements of the obligation(s) undertaken.

This is the difficulty with an *ad hoc* approach to the issue of *jus post bellum* under international law. There is no legal precedent to discuss. In *The Norms of War*, Ferrell argues that the Security Council has “... sought to maximize its discretion ... by repeatedly declaring those humanitarian crises that it deems warrant some action under Chapter VII to be unique in some way, thereby suggesting that these cases do not set precedent.” Ferrell further argues,

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378 Ibid., par. 14.
379 Ibid., par. 18.
there has been resistance within the international system to develop a legal requirement for intervention, however a non-legal norm has evolved.\textsuperscript{381}

Considering the accumulation of evidence based on the military occupations and UN administrations that have occurred since World War II, several conclusions can be drawn. The first, draws from Finnemore's work, \textit{The Purpose of Intervention: Changing Beliefs About the Use of Force}. In it, she argues that in the contemporary international system, "force is viewed only as legitimate as a last resort and only for defensive or humanitarian purposes."\textsuperscript{382} This bolsters Bull's assertion that, "War then can be viewed as either a breach of law or as law enforcement."\textsuperscript{383}

Given these changed norms of war, it then follows that in cases where the UNSC decides to act, it is likely to do so in a manner that is transformative in nature, in order to maintain "international legitimacy." In essence, the UNSC legally binds itself to undertake a massive reconstruction project based on a Kantian conception of the international system and a respect for individual human rights. The underpinning logic of this endeavor is found in Boutro-Ghali's, \textit{An Agenda For Peace}. He writes:

\begin{quote}
The United Nations has an obligation to develop and provide when requested: support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions . . . . There is an obvious connection between democratic practices - such as the rule of law and transparency in decision-making - and the achievement of true peace and security in any new and stable political order.\textsuperscript{384}
\end{quote}

\textsuperscript{381} Ibid., 177.

\textsuperscript{382} Finnemore, \textit{The Purpose of Intervention}, 19.

\textsuperscript{383} Bull, \textit{The Anarchical Society}, 127.

\textsuperscript{384} Boutros-Ghali, \textit{An Agenda For Peace}, 12.
The final conclusion to be drawn from this section is that it is not possible to predict when the UNSC will determine there is a threat to international peace and security and thus create a binding obligation on itself and the rest of the international community.

**Question Five: Do victors have a right to reparations or remuneration from the defeated states? (Under what conditions)?**

There is almost no mention of the idea of reparations within the *jus post bellum* literature from an international law perspective. It is doubtful that if asked, any scholar on *jus post bellum* would advocate crippling reparations as a component of a just peace. Nonetheless, the absence of this topic within the *jus post bellum* literature begs the question as to why it is not discussed.

This author has concluded that the issue of reparations is absent from legal scholarly work on *jus post bellum* because it is well codified in customary international law and does not represent a gap in the current international legal regime. Therefore, rather than scouring law journals for articles that may include the term reparations in relative proximity to the term *jus post bellum*, it is more useful to briefly explain the customary international law as it pertains to the issue of reparations and thus demonstrate why it is not a high stakes issue in legal arguments about the criteria for *jus post bellum*.

Northeastern University Law School's Civil Rights and Restorative Justice Project defines reparations simply as “. . . the act of making amends for a past wrong.”\(^\text{385}\) The organization further asserts that the right to reparation is, “well established within international law.”\(^\text{386}\) For centuries, victors routinely required reparations from the losers of war to compensate them for their losses. However, the idea of reparations has changed in the past

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\(^{386}\) Ibid.

In their work, \textit{Customary International Humanitarian Law}, Henkaerts and Doswald-Beck write, “A state responsible for violations of international humanitarian law is required to make full reparation for the injury caused.”\footnote{Henkaerts and Doswald-Beck, \textit{Customary International Humanitarian Law}, under “Rule 150.”} They go on to cite several precedent setting cases in the ICJ, as well as a variety of treaty law, including the First, Second, Third and Fourth Geneva Conventions, which all cover instances in which states and/or individuals are allowed to receive reparations for violations of international humanitarian law and/or international human rights law.\footnote{Ibid.}


Thus, it appears as though the issue of reparations is a well-established and generally non-controversial principle of international law. Thus, it is not encompassed within Stahn and
Osterdahl's missing international law. As a result, the issue receives little attention within the legal *jus post bellum* literature.

**Conclusion:**

The preceding analysis has yielded several significant conclusions regarding the issue of *jus post bellum* as it relates to international law. The first of these is that there is a disconnection between codified international law and the reality of the international system in the post-Cold War era. Osterdahl and Stahn are both correct in stating that there are significant gaps in international law as it relates to military occupation and post-conflict societies.

The second conclusion that can be drawn from this analysis is that the international law of occupation is ill suited to the realities of contemporary conflict. Its state-centric foundation makes it difficult to apply to situations of intra-state war, humanitarian intervention, and UN-led post-conflict administrations.

Third, as a result of the gaps in international law and the anachronistic qualities of existing law, the UNSC has engaged in a series of supposedly *sui generis* resolutions that support the concept of a significantly expanded conception of occupation law. This conception significantly increases the obligations placed upon the victor and the international community. In fact, these obligations are consonant with the underlying premise of "The Pottery Barn Rule;" you broke it, you bought it.

The fourth conclusion from this analysis is, “The Pottery Barn Rule” of occupation is inconsistently applied. The UNSC has not held to this standard in all cases. In some of the most glaring humanitarian crises of the last two decades, the UNSC has chosen not to become meaningfully involved. Further, individual states and alliances have not consistently forced the UNSC’s hand in the manner that occurred in Kosovo and Iraq. Therefore, it is difficult to make
any prediction as to whether the UNSC will respond to a given crisis from the basis of either Kantian or Lockean principles.

Finally, there is considerable ambivalence among legal scholars of *jus post bellum* for undertaking the formal process of updating the laws of occupation to conform to current patterns of conflict and intervention. This ambivalence stems from four sources. First, there is the belief that the *ad hoc* process of Chapter VII UNSC resolutions has worked reasonably well. Second, there is a belief that the likelihood of actually drafting and ratifying a treaty is very low at this point. Third, there is a fear that new treaty law could cause the law to become self-contradictory.\textsuperscript{391} Finally, there is significant concern that too many fundamental questions regarding *jus post bellum* remain unanswered at this point.

In an essay entitled “The Future of *Jus Post Bellum,*” Stahn ruminates on the wisdom of attempting to codify new international law to deal with many of the issues raised in this analysis. He makes several points worth noting. First, he argues that the idea of *jus post bellum* is imprecise. He states, “The notion is unsatisfactorily narrow and overly broad at the same time.”\textsuperscript{392}

He further cautions that moving from an *ad hoc* approach to a codified framework could create significant contradictions within currently existing legal frameworks.\textsuperscript{393} Nonetheless, he does favor a comprehensive review of the legal issues involved to determine “ . . . the need and


\textsuperscript{392} Stahn, “The Future of *Jus Post Bellum,*” 234.

\textsuperscript{393} Ibid.
risks of regulation.” Stahn leaves the reader with the intriguing conclusion, “... it is time to overcome the conception that peace-making is simply an art.”

Stahn's objections to moving too fast towards codifying *jus post bellum* into treaty law are well taken. They are also reminiscent of Bellamy's critique of *jus post bellum* in the last section of this thesis. Bellamy is extremely cautious about adding *jus post bellum* as a third strand of just war theory, because of the significant number of unanswered questions pertaining to it. He is not however, fully against the development of an idea of *jus post bellum*. He sees merit in continuing to refine the idea. However, Bellamy cautions that the idea must be developed carefully and by consensus. Barring consensus, he argues, it will never gain legitimacy. One can reach the same conclusion regarding attempts to legally codify *jus post bellum*.

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394 Ibid., 236.
395 Ibid.
CHAPTER SEVEN

JUS POST BELLUM AND SECURITY STUDIES: THE LITERATURE

Introduction

Chapters three through six considered and analyzed the issue of *jus post bellum* from the perspectives of philosophy and international law. This chapter and the one that follows will continue this process from the perspective of security studies. Security studies, or international security studies (ISS) as it is often called, deals extensively but not exclusively with use of military force in the international system. As a result, the discipline naturally overlaps with the field of international law. ISS also intersects with the field of philosophy, as both include scholars who are concerned with the ethics and morality of the use of force. These conceptual intersections among the fields are important for the development of a holistic understanding of *jus post bellum*.

This chapter will begin by setting the parameters of the field of security studies as they currently exist. The end of the Cold War precipitated many identity crises. Less well known among these, but nonetheless highly relevant to the subject at hand, was the identity crisis within the discipline of security studies. In his article, “Security Studies at the End of the Cold War,” David Baldwin suggests the inability of the security studies scholars to foresee the fall of the Soviet Union may have been “particularly embarrassing” for the field of international relations as a whole.³⁹⁷ This inability to predict such a transformational event in geo-politics has spawned multiple attempts to “retool” the discipline and also to increase its scope. There have been

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substantial efforts to both refine and widen the parameters of security studies. There are continuing debates as to the “proper” content and future direction of the discipline.\footnote{For a concise summarization of the major threads within this ongoing debate, please see the introduction to \textit{Contemporary Security Studies} 2\textsuperscript{nd} ed. (Oxford: Oxford University Press, 2010). Written by Alan Collins, the introductory chapter, titled, “What is Security Studies?” lays out the major ongoing debates and cleavages within the discipline.}

Therefore, in order to begin analysis of \textit{jus post bellum} from the perspective of security studies; the field must first be carefully defined. Once this has been accomplished, this chapter will continue with a discussion of the methodology used and its applicability to security studies. From there, it will undertake a literature review of works that recommend criteria for \textit{jus post bellum} and/or make policy recommendations relevant to ensuring justice after war.

\textbf{The Discipline of Security Studies}

The field of security studies, or international security studies (ISS) as it is also known, came into being in the aftermath of World War II. The scholars working within the discipline were attempting to find ways to protect the remaining allies against the emerging Soviet threat.\footnote{Barry Buzan and Lene Hansen, \textit{The Evolution of International Security Studies} (Cambridge, UK.: Cambridge University Press, 2009), 8. This Anglo-American quality has left the discipline of security studies vulnerable to the charge that it is the purview of powerful states and does not consider the perspectives of either non-western or developing nations. Further, its statist orientation has also been a source of debate within academia over the future of the discipline.} This is not to say there was no literature concerning security issues prior to 1945. This is clearly not the case. However, prior to the onset of the Cold War, security studies was not recognized as its own field of study.

In their work, \textit{The Evolution of International Security Studies}, Barry Buzan and Lene Hansen argue that security studies constitutes a subfield of international relations, one that has a particularly Anglo-American ethos.\footnote{Buzan and Hansen, \textit{The Evolution of International Security Studies}, 19.} They also assert that in the early decades of the field, the
idea of national security became “. . . almost synonymous with military security.” Thus, during the Cold War, the field of security studies was imbued with a hard-power, statist orientation that it maintained until the collapse of the Berlin Wall in 1989.

In its infancy, ISS was primarily interested in protecting the state against external military threats to national security and the effective use of military force as an instrument of policy. Additionally, the advent of nuclear weapons and the concomitant interest in the development of deterrence strategies also created the conditions under which security studies could emerge as a discipline in its own right. Further, security studies was a field based on a realist conception of international relations. Power was the relevant metric and that metric was assumed to be objectively measurable.

Although the term “security” is a value laden one, there was little interest among early scholars in the field in attempting to define it. The notable exception to this was Arnold Wolfers, who published, “National Security as an Ambiguous Symbol,” in Political Science.

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401 Ibid., 12.
402 In their work Hard Power: The New Politics of National Security (New York: Basic Books, 2006), Michael O'Hanlon and Kurt Campbell define hard power as “the application of military power to meet national ends—that is, the deployment of ground troops, naval assets, and precision munitions to secure a vital national objective.” p. 7. For additional discussions and definitions of hard power in contrast with soft power, refer to the works of Joseph Nye: Soft Power: The Means to Success in World Politics, (New York: Public Affairs, 2004), as well as The Future of Power, (New York: Public Affairs, 2011). Nye also adds the coercive use of economic power in the category of hard power.

404 Ibid., 118.
406 David Baldwin explores the absence of clarity in the definition of the term “security” during the Cold War in two articles published in the 1990s. These are “The Concept of Security,” Review of International Studies 23, no. 1 (Jan. 1997): 5-26, and “Security Studies and the End of the Cold War,” World Politics 48, no. 1 (October 1995): 117-141. In these articles, Baldwin argues that defining security is difficult, particularly given the overlap between security and power. He further opines that the ambiguity left in the term was useful to both academics and policy makers. He concludes that the term is not indefinable, but has just been left “insufficiently explicated” by Cold War-era ISS scholars for a variety of reasons.
Quarterly, in 1952.\textsuperscript{407} Wolfers was among the first to note the “normative” characteristics of national security policy.\textsuperscript{408} He opines, “The possible discrepancy between the objective and subjective connotation of the term is significant in international relations despite the fact that the chance of a future attack can never be measured objectively. It must always remain a matter of subjective evaluation and speculation.”\textsuperscript{409} In spite of Wolfers' recognition of the interplay of normative and empirical factors in the development of security studies, this aspect of the field was largely overlooked until the end of Cold War.

The collapse of the Soviet Union and the rise of a new security environment did precipitate significant intellectual discussions within the field as to what security studies actually encompasses. Definitional debates surrounding the idea of security have been unrelenting in the discipline over the last two decades. There is a view among some security studies scholars that “security” is an essentially contested concept and thus, no definition will ever be possible.\textsuperscript{410}

Alan Collins takes up this issue in his book, Contemporary Security Studies. He considers the confusion and lack of clarity caused by the broadening of the topic.\textsuperscript{411} Nonetheless, he offers the following fundamental definition for security studies: “Despite the contested nature of security, you know that ultimately we are interested in how referent objects are threatened and

\textsuperscript{407} This article was highlighted in Baldwin's article, “The Concept of Security,” 13.

\textsuperscript{408} Arnold Wolfers, “National Security as an Ambiguous Symbol,” Political Science Quarterly 67, no. 4 (December 1952): 484.

\textsuperscript{409} Ibid., 485.

\textsuperscript{410} Baldwin defines an essentially contested concept as one that is so, “... value laden that no amount of argument or evidence can ever lead to agreement on a single version or correct use.” Baldwin, "The Concept of Security," 10.

\textsuperscript{411} In the table of contents of Contemporary Security Studies, ed. Alan Collins, one can find chapters that represent the developing fields of international security studies. Examples that illustrate the widening of the field are: Critical Security Studies, Gender and Security, Human Security, Energy Security, Health Security, Environmental Security and Economic Security. This list is not exhaustive. Please see pages vi-xvii for a complete list of topics covered.
what they can do to survive.” This simple idea accurately captures the nature of the discipline. Other authors have offered series of questions they believe to be fundamental in defining security studies and security issues.

In their book, *The Evolution of International Security Studies*, Buzan and Hansen argue that security is fundamentally about four questions. These are: whether to privilege the state as the sole referent objective, whether to consider the military as the primary sector of security, whether to include internal as well as external threats, and whether to see security as inextricably tied to the dynamic of threat at all.413

Baldwin has also written extensively on the changes in the discipline in the wake of the fall of the Berlin Wall.414 He argues to further define security; one must answer the following questions:

- Security for whom? The individual, state, or international system?
- Security for which values?
- Security from what threats?
- Security by what means?
- Security at what cost?
- Security during what time period?415


414 Baldwin’s work was not without its critics however. His work precipitated responses and alternate theories of the evolution of security studies. A useful article for understanding the debates ongoing within the field of Security Studies at the end of the Cold War, is K. J. Holsti’s article, “Scholarship in an Era of Anxiety: The Study of International Politics during the Cold War,” in “The Eighty Years' Crisis 1919-1999,” special issue, *Review of International Studies* 24 (Dec 1998): 17-46. Although this article is about the broader issues of the field of international relations, Holsti does consider the subfield of security studies and the evolution and debates emanating from that field. Please see pages 18-21 and 41-46.
The questions asked by these authors encompass the major debates within the discipline of security studies today. These questions are strikingly similar to those being asked in relation to *jus post bellum*. For example: should *jus post bellum* privilege state sovereignty, or should it be concerned first with the cosmopolitan issues of human security and human rights? Is peace merely the absence of war, or is a more positive conception possible? Given such intersections, the exploration of the security studies literature dealing with war's terminations will yield a fuller understanding of *jus post bellum*.

To conclude this section, it is necessary to define the current parameters of the discipline of security studies. The use of military force remains a central topic within the discipline, although it is no longer the only topic of central concern. The main cleavage in contemporary security studies debate revolves around the primacy of military power versus that of human rights.\(^4\)\(^1\)\(^6\) This too, should be a familiar theme among those offering different conceptions of *jus post bellum*. Further, there is serious reservation as to whether security studies even belongs within the broad heading of international relations at all or whether it needs to become its own broad, interdisciplinary subfield.\(^4\)\(^1\)\(^7\)

Buzan and Hansen observe that the current trend in the debate over security studies “... leads to a Kuhnian conception of the sociology of science.”\(^4\)\(^1\)\(^8\) They further opine that given the


\(^{417}\) Ibid., 5.

\(^{418}\) Buzan and Hansen, *The Evolution of International Security Studies*, 40. Buzan and Hansen consider the possibility that the end of the Cold War has produced a Kuhnian “revolution” within the discipline of security studies and that the lack of consensus now being seen is in fact evidence of a paradigm shift. The ideas here are taken from Thomas Kuhn’s *The Structure of Scientific Revolutions*, 2nd ed., (Chicago: University of Chicago Press, 1996).
absence of objective standards, the academic debate within security studies has become a quest for academic “hegemony” among the competing views.\(^{419}\)

For the purposes of this thesis, neither major competing position within the security studies debates (human security vs. military power) will be privileged. Both are equally important to explore and both have explanatory power when considering the differing conceptions of *jus post bellum*.

**Methodological Considerations**

Before commencing the literature review, it is necessary to return to Ian Clark's conception of international legitimacy as set forth in his book, *Legitimacy in International Society*. Clark hypothesizes that legitimacy within the international system is achieved through the balance of three separate, but inter-related norms: morality, legality and constitutionality.\(^{420}\)

Of the three norms Clark posits, constitutionality is arguably the most amorphous. For Clark, constitutionality is a set “... of mutual expectations on which international society is from time to time founded and which are not fixed legal rules.”\(^{421}\) It encompasses expectations about the level of voluntary political restraint states will display to remain in good standing in international society. Clark argues, “Constitutionality is in the realm of political conventions, informal understandings and, mutual expectations.”\(^{422}\)

Clark adopts the idea of constitutionality from G. John Ikenberry's definition in *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*. Given

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\(^{419}\) Ibid., 43.

\(^{420}\) Clark, *Legitimacy in International Society*, 7.

\(^{421}\) Ibid., 209.

\(^{422}\) Ibid., 220.
the subject of this thesis, *jus post bellum*, it is particularly useful to consider the cases studies on which Ikenberry built his theory of constitutionality.

Ikenberry's central question is, “What do states that have just won major wars do with their newly acquired power?” He determines that such states have three broad choices: dominate, abandon, or transform. He considers three cases in which the option of transformation was chosen. These are the Concert of Vienna in 1815, the League of Nations in 1919 and the United Nations in 1945. In each of these cases the victors chose to voluntarily limit their own power through the creation of international institutions in order to curb the ability of states to exercise raw power. This was done in the hope of preventing future wars. Ikenberry refers to the institutions created and the political orders established as constitutional orders.

Ikenberry hypothesizes that constitutional orders have three essential characteristics. These are: shared agreement on principles; established and binding rules and institutions; and entrenched rules and systems that are not easily altered. Further, Ikenberry argues that constitutional orders are established by states who have won major wars and decided to use their increased power to “... mold a post-war settlement that bound other states to each other and to them.”

Ikenberry's view of constitutionality draws on a conception of *just post bellum* that dates back to the early nineteenth century. Therefore, Clark and Ikenberry's idea of constitutionality is inextricably entwined with the current security studies debates on the establishment of justice

423 Ikenberry, *After Victory*, i.


425 Ibid., xi.

426 Ibid., 31.

427 Ibid., xi.
after war. Ikenberry's concept of constitutionality will be used as a tool for analyzing the concept of *just post bellum* from the perspective of security studies in the following chapter.

**Literature Review**

Security studies is a policy-oriented discipline. Although scholars in the field do delve into theoretical considerations, they often do so in order to underpin discussions of specific issues and bolster policy recommendations. As a result, conversations about war's end are often had under the heading of “war termination,” rather than *jus post bellum*. Nonetheless, war's end is a topic that resides at the center of security studies, regardless of whether the primary referent is the state or the human being.

A recurring cleavage among *jus post bellum* scholars has been whether they adhere to a predominantly Lockean or Kantian worldview. This has manifested in several fundamental ways. First, it can be seen in whether or not a scholar believes that violence is avoidable within the international system or whether war is an inescapable facet of human existence. Scholars who see the possibility for non-violent resolution to conflicts are more likely to lean towards a transformational view of *jus post bellum*. Those who see no escape from the cycle of conflict will lean towards an approach to *jus post bellum* based on establishing order and containing the outbreak of war.

Second, fundamental differences manifest in whether the principal referent for security is perceived to be the human being or the state. In the Lockean worldview, the order to be created is that among states. In the Kantian worldview, it should be an order based upon ensuring the security of the individual. In this case, state security can be viewed as a means to an end, rather than the end itself.
These differences among worldviews are mirrored to a large extent in the realist and liberal schools of thought in international relations. While some may dispute this, security studies is considered a subfield of international relations, therefore it appears methodologically sound to begin this literature review with a work that has been foundational to the development of the discipline of international relations, *The Twenty Years’ Crisis: an Introduction to the Study of International Relations*, by E. H. Carr. Although at first glance, this work says little about the issue of *jus post bellum* or “The Pottery Barn Rule,” there are broader themes present within the work that are significant to contemporary discussions of war's end.

Carr's, *The Twenty Years’ Crisis* sought to explore the tension between idealists, whom he referred to as “utopians” and realists during the inter-war period in the Great Britain. Noted realist international relations scholar John Mearsheimer describes Carr as “... one of the most important realist thinkers of all time.” In Carr's world view, states were the principal actors and “... all change in the end was a function of power rather than morality.” This is a classic realist worldview.

However, it is not Carr's impeccable realist credentials that make this work relevant to contemporary discussions of *jus post bellum*. Rather, it is Carr's nuanced view of the interplay between power politics and morality that make this book pertinent to the topic at hand. His proposed original title for the book was *Utopia and Reality*. Carr's intention was to consider the relationship between power and ethics in international relations. In Carr's construction, the

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430 Ibid., xxvi.
utopians would create an ethical standard and attempt to transform the world to conform to that standard, while for realists, morality was nothing more than a function of politics.431

Having constructed ideal types (utopians and realists), Carr then proceeds to demonstrate that these types are not actual opposites, but rather “different sides of the same intellectual coin.”432 Carr argues, “The function of force is to give moral ideas the time to take root.”433 To bolster his argument, Carr quotes Reinhold Neibuhr who states “Politics will, to the end of the world, be an area where conscience and power meet, where ethical and coercive factors of human life will interpenetrate and workout their tentative and uneasy compromises.”434 Carr concludes, “Every solution to the problem of political change, whether national or international, must be based on a compromise between morality and power.”435

Carr’s view that a balance must be struck between power and morality is useful when analyzing the contemporary discussions of jus post bellum from the perspective of international security studies. Although certainly a realist, Carr also showed a distinct desire to ensure human security as the end state of realism.

In the introduction to The Twenty Years’ Crisis, Michael Cox argues, “For Carr, it was absolutely vital to think of security less in terms of nations and more in terms of meeting those most basic human rights . . . that transcend boundaries and unite peoples . . . . ”436 Given this, it is useful keep Carr’s ideas in mind when considering the treatment of jus post bellum in the

431 Cox, Introduction to The Twenty Years’ Crisis, xxvi.
432 Ibid., xxviii.
433 Carr, The Twenty Years’ Crisis, 93.
435 Carr. The Twenty Years’ Crisis, 192.
436 Cox, Introduction to The Twenty Years’ Crisis, xxxvi.
context of security studies. Current trends tend to portray the core issues involved in “either/or” terms. Carr's work provides an example of how a “both/and” construction is possible.

Another foundational piece is Sir Michael Howard’s assertion that there are three basic theories of peace; Hobbesian, Augustinian, and Kantian.437 Howard explains the Hobbesian view of peace as the simple “absence of war,” while the Augustinian view is one based on just order.438 Howard further argues “. . . we have now moved into the age of Kant . . . peace is not restored, but consciously and deliberately established.”439

Howard privileges neither the human being nor the state as the referent object in his essay. Further, he is non-utopian in his perception of humanity. He writes, “War is not the default setting for mankind, but neither is peace.”440 Howard also argues that, “Peace is no more than an order in which war does not settle conflict.”441 Howard's view is that the potential for peace is not rooted in man's perfectibility, but rather in his, “. . . much more basic desire to avoid war.”442 Howard's ideas are thus also useful as a launching point in discussing *jus post bellum* from the perspective of security studies.

While a vast body of literature has been written of the topic of warfare, this is not true of the subject of war termination, or wars' end.443 Tansa George Massoud argues, “The field of


438 Howard, “Concluding Peace,” viii. Howard's view of Augustinian peace is one based on a system of laws. Although it is not specifically state centric, it bears significant resemblance to Wendt's Lockean culture.

439 Ibid.

440 Ibid., xiv.

441 Ibid.

442 Ibid.

443 To illustrate this point, I entered the term “War Termination” into the book search function of Amazon.com. It returned three results, each of which is considered in this review. A search on the same day for the
study remains neglected.” He suggests that this may be true because of the complexity of the issue itself. He writes, “There is question as to whether a general theory on war termination can be made at all given the diverse variables and circumstances of each war.”

Writing on the same topic in November 1970, Berenice Carroll suggests the topic has been neglected within the social sciences as a result of the “value orientation” and subjectivity included in the topic that makes separating distinct variables impossible.

Nonetheless, there have been some books and articles written on the subject that are directly relevant to the topic at hand. Also several books that concern themselves with the topic of nation-building and by extension, war termination will also be considered.

The modern classic of war termination literature is Every War Must End by Fred Charles Iklé. First published in 1971, it was revised and reprinted in 2005 to include reflections on the war in Afghanistan and the war in Iraq. Colin Powell credits this book in particular with influencing his decision-making regarding war termination during the First Gulf War (1991).

Iklé's argues that politicians consider war fighting (the means) in much more detail than what they expect to achieve as a result of the war. He states, “Many wars in the century have started with only the most nebulous expectations regarding the outcome, on the strength of plans that paid little, if any attention to the end at all.”

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445 Ibid., 492.
448 Ibid., 108.
of the incredible difficulty the act waging war is and how consuming it becomes for those involved. He states:

Thus it can happen that military men, while skilfully planning their intricate operations and coordinating maneuvers, remain curiously blind in failing to perceive the outcome of war, not to mention the outcome of the campaigns within it that determines how well their plan serves the nation's interests. At the same time, the senior statesman may hesitate to insist that these beautifully planned campaigns be linked to some clear ideas for ending the war, while expending their energy to oversee some tactical detail of the fighting. If generals act like constables and senior statesmen like adjutants, who will be left to guard the nations' interests? \(^{449}\)

Failure to consider war aims at the outset is one of the reasons Iklé believes states fail to achieve a just and lasting peace. He also believes that attempts to seek revenge in the post-war settlement also undermine the ability to achieve a lasting peace. \(^{450}\) Instead, Iklé recommends reconciliation to the degree possible as a method to ensure long-term stability. \(^{451}\)

Iklé never uses the term *jus post bellum*. Nonetheless, he is clearly interested in ending war in a way that ensures the best chance for the development of a stable peace. However, Iklé consistently underscores the Clausewitzian requirement that the use of force be related to the achievement of a political end. Further, he argues that many statesmen have lost sight of this connection. This is a theme that will recur throughout this literature review.

Gideon Rose, author of *How War's End: Why We Always Fight the Last Battle, A History of American Intervention from World War I to Afghanistan* also approaches his analysis of

\(^{449}\) Ibid., 2.

\(^{450}\) Ibid., xi-xii.

\(^{451}\) Iklé, *Every War Must End*, 11.
America's war termination record from an explicitly Clausewitzian perspective. Rose believes that war is an act of policy and, that “. . . every act of war has to be judged by two distinct criteria, military and political – and perhaps by two different sources of authority.” He argues that the “notion of war as combat” is largely responsible for the disconnection between the military and political spheres of American war making. This disconnection has made it extremely difficult, if not impossible for the United States to effectively achieve its war aims.

In Rose's view, war has two faces. The first is the destructive face, which is the more familiar one. The second face is a positive or constructive one, which is the political aspect of war. In Rose's opinion, it is the constructive portion of war that is most often misunderstood. He recommends that future policy makers who are confronted with a decision to go to war should, “Plan ahead and work backward . . . Start with the end state and move backwards from there.” In Rose's view, this will reconnect the political aims with the war plan.

In terms of jus post bellum, the constructive or positive aspects of war are far more important than the destructive ones to the ultimate achievement of one's war aims. Given that arguments concerning jus post bellum rest predominantly in the sphere of the political, Rose's criticism's are particularly relevant. If the United States does not even consider post-conflict

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452 Rose also identifies his underlying philosophy of international relations. He states that he is a “neo-classical realist.” He argues that this form of realism occupies a middle ground between classical realists and constructivists. For Rose, “Power matters, but . . . the world states end up inhabiting . . . is indeed partly of their own making.” For a full explanation, see Gideon Rose, “Neo-Classical Realism and Theories of Foreign Policy,” World Politics, 51, no. 1 (October 1998): 153.


454 Ibid., 2.

455 Rose, How Wars End, 3.

456 Ibid., 285.
operations as part of the war itself, then chance that a just and lasting peace will be achieved is extremely small.457

This view of the significant disconnection between means and ends, or force and politics in contemporary warfare is also echoed by Isaiah Wilson, in his work, Thinking Beyond War: Civil Military Relations and Why America Fails to Win the Peace. Wilson considers both the discipline of security studies as well as the American definition of “war” from an explicitly constructivist viewpoint. His ideas are particularly interesting as he writes from the perspective of a military academic, an international relations professor, who is also a serving colonel in the United States army and a veteran of the Iraq war.

Like Rose, Wilson believes a fundamental reason the United States has been unable to secure a stable and lasting peace is because Americans’ “. . . understanding of war is limited and only a partial definition of the full and natural definition of war.”458 He argues that thinking of war only as combat or as the act of warfare, has led to an inability to “. . . bring about lasting peace, security and prosperity.”459 He believes that as long as combat is divorced from its political purpose, it will be impossible for America to achieve the political objectives for which it began the war.

457 In fairness, it must be noted that the United States military and the Department of State have both published a significant number of doctrinal manuals specifically aimed at reconnecting the means of conflict with the desired ends. Prominent among these is the Stability Operations Manual, published on September 16, 2009. Also prominent among these is the U.S. Government Counterinsurgency Guide, published in January 2009, which looks to provide a whole of government view for fighting and winning counterinsurgency warfare. Despite these publications and the hard won knowledge of personnel actually engaged in fighting these types of operations over the last decade, this author is extremely skeptical that anything fundamental has changed within the nation's cultural psyche. One need only point to the debates surrounding recent U.S. involvement in Libya to recognize familiar patterns. Although there were extensive and expansive discussions of the means and tactics to be pursued, there was almost no discussion at any level of the political end sought by the intervention.


459 Ibid., 9.
Two of Wilson’s conclusions are particularly relevant to the issue of *jus post bellum*.

First, like Rose, he believes that American warfare become overwhelmingly concerned with the quality of the combat operations as opposed to the quality of the peace created by the combat. Second, he believes this phenomenon is linked to broad cultural understanding within democratic societies. He writes:

> The cultural legacies of our modern organizations for war-policy, war-planning, and war-fighting may have entrenched us in a recipe for war that no longer satisfies our appetites in war. The very way we have structured ourselves for war and developed our cultural understanding of what war is vice what it is not, has undoubtedly effected what we plan for in war and what we do not plan for – even how we have determined to fight.\(^{460}\)

Wilson argues the United States is currently in a “paradoxical time,” which he defines as a period when our old methods and traditions will no longer lead to success.\(^{461}\) He urges policy-makers and military members alike to reintegrate their thinking about the ideas of “war” and “peace.” Wilson contends, “War is and always has been a process that derives from a higher purpose- peace itself.”\(^{462}\)

Although Wilson never uses the term *jus post bellum* in his work, he argues that America’s inability to secure peace stems from its fundamental misunderstanding of the connection between war and peace. Therefore, given that America's definition of war is tactical and combat-focused, rather than strategic and politically oriented, The United States will always be more intent on the fighting rather than the political end state. This constitutes a critical impediment to the U.S. ability to achieve *jus post bellum*.

\(^{460}\) Wilson, *Thinking Beyond War*, 11.

\(^{461}\) Ibid., 13.

\(^{462}\) Ibid., 16.
A third scholar who echoes the difficulties associated with this misconception of war as a purely tactical endeavor is David Baldwin. In addition to his views on the future of the discipline of security studies, Baldwin has also commented on the disconnection between political ends and military means in recent wars. He writes, security studies, “. . . has tended to focus one set of means, military statecraft . . . . There is something particularly un-Clausewitzian about studying military force without devoting equal attention to the purposes for which it is used.”463

A security studies scholar who has written specifically on the topic of jus post bellum is Dan Caldwell. He has considered the topic from both a philosophical and pragmatic approach. This makes his views and recommendations particularly relevant. The following paragraphs will discuss both his works.

In 2006, Caldwell and Robert Williams co-authored, “Jus Post Bellum: Just War Theory and the Principles of Just Peace.” In this article they articulated the view that what happens following the conclusion of a war is just as important to the overall judgment of the morality of a war as the way it was fought or the reason for which it was declared.464 They further argue that a conception of jus post bellum should be based on a foundation of human rights.465 Finally, they make three specific policy recommendations for the implementation of jus post bellum from the perspective of security studies. These are: restoration of order; economic reconstruction; and self-determination.466 Williams and Caldwell argue that these are non-negotiable obligations of the victor in any conception of jus post bellum predicated on the vindication of human rights.

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465 Ibid., 317.
466 Ibid., 318.
Caldwell has more recently published, *The Vortex of Conflict, US Policy Towards Afghanistan, Pakistan and Iraq*. Like Rose and Wilson, Caldwell comments on the requirements for any strategy to be more than a plan for combat. He argues that “. . . postwar operations are vital to the execution of a successful campaign.”\(^{467}\) He concludes his book by offering rules regarding post-war operations. Critical among these are:

- Successful occupations require enormous investments of resources for a period of five years at a minimum.\(^{468}\)
- Plan for postwar reconstruction and development before the war begins and make adjustments as the war develops.\(^{469}\)
- Return real control of the government to the locals as soon as possible.\(^{470}\)
- Sustain economic development programs over the long term.\(^{471}\)

From his article on *jus post bellum*, it is clear that Caldwell favors an expansive definition of the topic. Additionally, from the recommendations Caldwell makes for securing the peace, one can see that he favors policies that are consonant with a transformative vision of *jus post bellum*.

*America’s Role in Nation-Building from Germany to Iraq*, by James Dobbins is potentially the most comprehensive policy-oriented work on *jus post bellum* that has been published since the fall of the Berlin Wall. Dobbins is a veteran American senior diplomat who has served in Somalia and Kosovo. He also served as Special Envoy to the Bonn convention. In this work, Dobbins undertook a painstaking deconstruction of seven major US/international


\(^{468}\) Caldwell, *Vortex of Conflict*, 173.

\(^{469}\) Ibid., 255.

\(^{470}\) Ibid., 259.

\(^{471}\) Ibid., 262.
efforts at nation-building since the end of World War II. These are Germany, Japan, Somalia, Haiti, Bosnia, Kosovo and Afghanistan.\footnote{472}{James Dobbins, \textit{America's Role in Nation-Building: from Germany to Iraq} (Santa Monica, CA.: Rand Corporation, 2003), 1.}

In every case Dobbins considered, “the intent was to use military force to underpin a process of democratization.”\footnote{473}{Ibid., 1.} For Dobbins success was defined as, “the ability to promote the enduring transfer of democratic institutions.”\footnote{474}{Ibid, 2.} Thus, Dobbins explored the requirements for transformational \textit{jus post bellum}.

He argues, “in spite of a reticence (for nation-building) each successive post-Cold War US-led intervention has been generally wider in scope and more ambitious in intent than its predecessors.”\footnote{475}{Ibid., xiii.} He also concludes that nation-building is “the inescapable responsibility of the world's only super-power.”\footnote{476}{Ibid.} In short, Dobbins makes the argument that the United States government must come to accept “The Pottery Barn Rule,” as a policy mandate, or evenly potentially as a requirement for \textit{jus post bellum,} even though it may not like the prospect.

This American paradox of undertaking large nation-building projects despite a profound lack of enthusiasm for doing so demonstrates an aspect of Ikenberry's conception of constitutionality. If nation-building is considered to be a requirement for the development of a stable and lasting peace, then states wishing to preserve their legitimacy in the international system will undertake exactly such a project even if there is no legal requirement to do so. Building a democratic state, which will then be more inclined to limit its own use of power, also

\footnote{473}{Ibid., 1.}
\footnote{474}{Ibid, 2.}
\footnote{475}{Ibid., xiii.}
\footnote{476}{Ibid.}
demonstrates a facet of Ikenberry's idea of constitutional order. This logic also constitutes an explanation for the rise of “The Pottery Barn Rule,” as a current political debate.

In his analysis of American and multilateral nation building enterprises since the end of World War II, Dobbins concludes:

- Nation-building is not primarily about economic reconstruction, but political transformation.477

- What distinguishes Germany, Japan and Bosnia from Somalia, Haiti and Afghanistan are not their levels of western culture, economic development, or cultural homogeneity. Rather, it is the level of effort the U.S. put into their democratic transformation.478

- Staying long does not ensure success, leaving early ensures failure.479

- To date, no effort at forced democratization has taken hold in less than five years.480

- The level of effort in terms of time, manpower and money is the largest predictor of success. 481

Thus, Dobbins has empirically demonstrated the costliness of transformational jus post bellum. State reconstruction will take at least five years in order to achieve, and will require political transformation, along with the maintenance of security and a degree of economic reconstruction.

Nicole Ball comes to similar conclusions in her article, “The Challenge of Rebuilding War-Torn Societies.” She argues that rebuilding a state ravaged by war occurs in two main

477 Ibid., xix.
478 Ibid., xix.
479 Ibid., xxiii.
480 Ibid.
481 Ibid., xxv.
stages; cessation of hostilities, followed by peace-building.\textsuperscript{482} Failing to accomplish these tasks places the society at risk for renewed conflict, either civil, or international.\textsuperscript{483} In this article, Ball articulates her “Priority Peace-Building Tasks.” It is a comprehensive list. It includes:

- Provide sufficient levels of security to civilians to enable economic activity to recover . . . .
- Strengthen the government's capacity to carry out key tasks . . . .
- Support the rejuvenation of household economies.
- Rehabilitate infrastructure critical to economic recovery . . . .
- Stabilize the national currency and rehabilitate financial institutions . . . .\textsuperscript{484}

The accomplishment of Ball's substantial list of peace-building tasks is contingent upon significant outside assistance, either from a single state, a group of states, or the international community as a whole. Regardless of who undertakes this task, Ball's conception of \textit{jus post bellum} is expansive, expensive and time consuming. It is a task list for undertaking reconstruction in accordance with the tenants of “The Pottery Barn Rule.”

Finally, is Noah Feldman's, \textit{What We Owe Iraq: War and the Ethics of Nation Building}. Written as both a practical argument for nation-building, as well as a call for the development of an ethic of nation-building, this book is particularly difficult to classify. Furthermore, Feldman speaks from his experiences working on the development of rule of law in Iraq.

Feldman argues that, “Self-interest in not inherently unethical,” and that what is needed in post war situations is an ethic of nation building that “ . . . may permissibly set its goals on the


\textsuperscript{483} Ibid., 722.

\textsuperscript{484} Ibid., 723.
basis of its own citizens' interests whenever those goals don't fundamentally conflict with the interests of the people whom the government does not represent." 485 Feldman believes that self-interest must be balanced with an acknowledgement of duties and obligations to the occupied population. He believes that the best path to self-preservation, “. . . lies in the creation of states that respect individual liberties, both political and civil.” 486

Feldman argues that post-conflict nation building should proceed from the basis of UN trusteeship and employ democratic means in order to ensure collective security. 487 He argues that the first duty of the occupiers is providing order. 488 Feldman further argues that the occupying power should hold the government in “trust” and facilitate the development of a political system in the occupied area that will allow for eventual self-determination and self-government by the occupied population. Feldman considers it absolutely necessary, however that the occupying power remains engaged after the conduct of elections. He states, “Elections are not the end point of nation building.” 489

Thus, Feldman sees postwar occupation and nation building in terms of the development of a state that is capable of independent governance and can ensure the liberties of all its citizens. For Feldman, ensuring this outcome constitutes an ethical obligation on the part of the occupying state or states, as well as a requirement for the security of the occupying state and potentially the international system as a whole. Thus, Feldman's referent for security is both the state and the


486 Ibid., 8.

487 Ibid., 3 and 8.

488 Ibid. 79.

489 Ibid., 97.
individual. Feldman's conception of *jus post bellum* is extremely developed and encompasses moral, legal and practical issues. He has developed a fully fleshed out theory of *jus post bellum*, although he never actually uses the term in any of his writing.

**Conclusion**

This concludes the introduction to security studies and the literature review concerning *jus post bellum* from the perspective of security studies. From this review, four issues have emerged that will be analyzed in the upcoming chapter. First is the appropriate referent for security. There is an ongoing debate within the security studies community as to whether the principal object to be secured is the individual or the state. This corresponds loosely to differences between transformational and restorative conceptions of *jus post bellum*. These differences will be analyzed in the upcoming chapter. Second is Clark’s idea of constitutionality as it pertains to the concept of *jus post bellum*. It is possible that "The Pottery Barn Rule" has become an expected end to a war. If this is so, the concept of constitutionality can provide a plausible explanation as to why.

The third theme that has emerged from this review is the disconnection between the political ends of war and the methods used to fight it. The impacts of this disconnection will also be analyzed in the upcoming chapter. Finally, this chapter considered several works by scholars concerned with nation-building. A key theme that has emerged from this scholarship is the extraordinarily high costs of successful post-war reconstruction and political transformation projects. The impact of this reality on the emergent concept of *jus post bellum* will be considered in chapter eight.
Introduction

The previous chapter provided a literature review of the work on *jus post bellum* written from the perspective of international security studies (ISS). The literature on the topic revealed several themes that require analysis within this chapter. First is the disagreement over the “appropriate” referent for security studies as a whole: the state or the individual. This conforms loosely to the differences between Wendt's Lockean and Kantian cultures of anarchy. Second is the application of Clark's idea of constitutionality as it relates to “The Pottery Barn Rule.” Is the “winner” required to undertake to fundamental reconstruction/transformation of the “loser” in order to maintain political legitimacy within the contemporary international order? The answer to this question is fundamental to the conclusions of this thesis. Third is the idea of war as combat. Several of the authors conclude that western states, and the United States in particular, are failing to understand the fundamentally political dimension of warfare. This critical misperception of warfare as combat has enormous negative consequences on the ability of any state or coalition to actually achieve *jus post bellum*. The final theme that has arisen from the survey of security literature is that of extreme cost. Forced democratization, which rests at the core of “The Pottery Barn Rule,” is an exorbitantly costly endeavor in terms of time, blood, and treasure.

This chapter will continue the process of structured focused comparison among the three strands of *jus post bellum* scholarship; philosophical, legal and policy-oriented by analyzing the literature presented in the preceding chapter. It will proceed by considering the authors' responses to five central questions regarding the definition of *jus post bellum*. These are:

- At war's end, how do we define peace?
• What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?

• What are the obligations of the victor to the international community? Is there an obligation for reconstruction to ensure greater chance of international stability?

• What are the obligations of the international community towards the belligerents (both winners and losers)?

• Do victors have a right to reparations or remuneration from the defeated states? (Under what conditions)?

When these questions have been answered, this chapter will conclude with a summary of major findings regarding the security studies strand of the jus post bellum debate.

**Question 1: At war's end, how do we define peace?**

There is very little distinct discussion of peace per se within the security studies literature. Nonetheless, there are some specific references to peace, as well as some conclusions regarding the idea of peace that can be developed from the broad themes discussed in the introduction of this thesis.

Sir Michael Howard focuses on peace as an invention, or as the product of conscious establishment, rather than as a naturally occurring phenomenon. In his introductory essay to Williamson Murrays' security focused work, *The Making of Peace, Rulers, States and the Aftermath of War*, Howard opines that it is not humanity's desire for peace, but rather its “... much more basic desire to avoid war,” that produces the potential for peaceful conflict resolution. This is a new distinction in Howard's thoughts on war and peace that was not present in his earlier work, *The Invention of Peace*.

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It can be argued that Ikenberry's concept of constitutionality as explained in *After Victory*, also proceeds from this same basic desire to avoid war. Ikenberry argues that states which have just “won” a war and found their power increased as a result have three broad choices: dominate, abandon or transform.\(^{492}\) Those that choose transformation through the creation of constitutional orders voluntarily entwine a portion of their newly found power within the framework of institutions specifically created to decrease the likelihood of future war. Or, stated another way, they create institutions that they believe will increase the chances of a stable and lasting peace.

Ikenberry's description of these constitutional orders, highly entrenched legal regimes and institutions based upon shared understandings, describes the current UN system. Granting that the UN is far from perfect, the web of legal regimes and institutions that form the basis of the current world order were in fact created to discourage armed conflict and open means to alternative dispute resolution processes.\(^{493}\) This is the heart of Ikenberry's view of constitutional orders and thus can be seen as a path to “peace” in the international system.

Clark adopts Ikenberry's idea of constitutionality and adapts it as one of his three pillars of international legitimacy: morality, legality and constitutionality. For Clark, constitutionality consists of playing by the political “rules of the game,” within the international system.\(^{494}\) Given this, it is possible to consider the “peace” to be established after war as a product of the international community's agreement on the legitimacy of the current order, which are based upon the variables of morality, legality and constitutionality. Thus, it can further be argued that peace has in many cases first required war in order to transform a state or states that flagrantly

\(^{492}\) Ikenberry, *After Victory*, 4.

\(^{493}\) The preamble of the UN Charter specifically states that that the United Nations was conceived in order to “save succeeding generations from the scourge of war . . . .” *The Charter of the United Nations*, Preamble.

\(^{494}\) Clark, *Legitimacy in International Society*, 7.
disregard the three components of international legitimacy. This constitutes not only Kant's argument for preventive war, but also an argument for a maximalist conception of *jus post bellum*, based on a Rawlsian conception of an “outlaw state.”

As a result, Clark and Ikenberry's concept of constitutionality is extremely relevant to the development of a conception of “peace” in international security studies, as well as ethics. Returning to Howard's invocation of Kant, peace is something that must be established. *Jus post bellum* and its contested corollary, “The Pottery Barn Rule,” can be seen as one potential means of establishing just such a federation of republican states as Kant expressed in his essay “Toward Perpetual Peace,” more than two hundred years ago.

This argument may appear radical, but it expresses the underlying logic by which western states have justified decisions to resort to armed conflict in the post-World War II era. For liberal democracies, warfare is no longer a policy option undertaken to achieve desired political outcomes, but rather a highly regulated legal decision that falls under the purview of the United Nations Security Council. Using Clark's model of legitimacy, resorts to warfare must pass moral, legal and constitutional tests in order to be perceived as legitimate. If the stated purpose of a conflict is to stop a state from continuing to act as an outlaw, then the solution to the underlying problem is political transformation. Thus, the conjunction of the idea of the “outlaw state” and the norm of constitutionality provides a strong basis upon which to argue for a

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495 In *The Law of the Peoples*, Rawls defines an outlaw states as one that exhibits consistent disregard for the political “rules of the game.” He argues that states that operate within the mutually understood boundaries of international decency have the right to interfere with outlaw states on the basis of their refusal to comply with human rights. This is an argument for war as an instrument of political transformation. Thus, according to Rawls, in contemporary international society, “liberal and decent” states can engage in war in order to secure international peace and to protect individual human rights. Please see, Rawls, *The Law of the Peoples*, 90-91.

496 Howard, "Concluding Peace," viii.

497 This is not to disregard the role that national politics and national legislatures have in the decision to go to war. The capacity of states to ignore or parse the language of the UN Charter in ways that allow for unilateral action rests at the heart of international politics and is at the center of the legal determination of what constitutes just war.
transformational conception of *jus post bellum* as a necessary condition to achieve overall justness in war.

Although the question asked in the methodology of this thesis, is about a specific discipline's definition of peace, it appears that an equally relevant question for the field of security studies is the definition of war. The belief that the definition of war under which the United States and many other nations are currently operating is critically flawed is a dominant theme emerging from the literature review and the theme that has produced by far the greatest intersection of ideas and consensus. Further, this consensus regarding the disconnection between the ends (political goal) and means (combat) of warfare is highly relevant to the topic of *jus post bellum*. Therefore, it will be considered under this question heading.

Wilson, Iklé, Rose, and Baldwin all independently discuss the American definition of war as combat within their work. This partial definition of war as combat divorces the political end of war from the means by which it is fought. Given this cleavage between the political end state and military prosecution of the conflict, the odds that *jus post bellum* can actually be achieved are extremely small.

This thesis has adopted Clausewitz's definition of war. The portion of the definition that is relevant to this discussion is Clausewitz's famous dictum that “War is a mere continuation of policy by other means.”\(^{498}\) In *On War*, Clausewitz also states, “No one starts a war – or rather no one in his right mind ought to do so – without first being clear in his mind what he intends to achieve by that war and how he intends to conduct it.”\(^{499}\) Both of these quotations stress the

\(^{498}\) Clausewitz, *On War*, 75.

\(^{499}\) Ibid., 519.
critical nature of the relationship between the combat itself and the political ends for which warfare is undertaken.

In *Thinking Beyond War*, Wilson argues that this disconnection between ends and means is a cultural “sign of the times,” exemplified by American experiences in Vietnam and the first Gulf War.\(^500\) He believes that the United States' definition of war is fundamentally incomplete. He argues that in order to achieve the political aims sought by American intervention policy since the end of the Cold War, it is necessary “. . . to become masters of the profession of war and peace.”\(^501\) He states, “Our nation's definition of war is limited and only a partial definition of the full and natural definition of war.”\(^502\) In his view, until the United States and other western nations reconnect the military portion of war (i.e. the fighting) with the political aims of warfare, it will be impossible to achieve the outcome desired.

Iklé's arguments in *Every War Must End* are similar to Wilson's. Iklé states, “Most of the exertion is devoted to the means – perfecting military instruments and deciding on their use in battles and campaigns – and far too little is left for relating these means to their ends.”\(^503\) He argues, “It is crucial that the United States and its friends relearn the rules for ending a war with strategic skill and foresight so that hard-won military victory will purchase a lasting political success.”\(^504\) For Iklé, as for Wilson, the disconnection between military means and political ends is nothing short of disastrous for the attainment of security policy objectives and by extension, makes the achievement of *jus post bellum* a near practical impossibility.

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\(^{500}\) Wilson, *Thinking Beyond War*, xvi.

\(^{501}\) Ibid., 9.

\(^{502}\) Ibid., xi.

\(^{503}\) Iklé, *Every War Must End*, 1.

\(^{504}\) Ibid., xv.
Baldwin takes up this line of argumentation briefly in his article, “Security Studies After the End of the Cold War.” He opines that during the Cold War, the study of military means dominated all aspects of the discipline of security studies.\footnote{Baldwin, "Security Studies After the Cold War," 126.} This fact clearly concerns him. He writes, “There is something particularly un-Clausewitzian about studying military force without devoting equal attention to the purposes for which it is used.”\footnote{Ibid., 130.}

Rose also considers the disconnection between ends and means in the western definition of warfare. He states, “. . . the notion of war as combat is deeply ingrained in the thinking of both the American military and the country at large.”\footnote{Rose, \textit{How Wars End}, 2.} He argues that the military, “. . . both the planners and the commanders have been schooled to see fighting as the realm of war and thus attach lesser importance to post-war issues . . . .”\footnote{Ibid.} Rose contrasts this with Clausewitz's view on the interconnection between military strategy and political policy. Rose quotes Clausewitz's observation as follows:

\begin{quote}
\textit{The main lines along which military events progress, are political lines that continue through the war into the subsequent peace. . . to bring a war, or one of its campaigns to a close requires a thorough grasp of national policy. . . . The commander-in-chief is simultaneously a statesman.} \footnote{Clausewitz, \textit{On War}, 605 and 111; quoted in Rose, \textit{How Wars End}, 3.}
\end{quote}

However, Rose does not believe that this myopic view of warfare as combat is a specifically American phenomenon. He states, “Time and again, throughout history, political and military leaders have ignored either the need for careful post-war planning or approached the
task with sugar plums dancing in their heads and been caught up short as a result.”\textsuperscript{510} Regardless of whether this is a relatively new problem or a consistent and measurable historical phenomenon, all of the authors concur that adopting such a perspective has disastrous implications for the post-war settlement.

Although the question undertaken in the methodology for this thesis was to define peace, there was a significant discussion within the security studies literature regarding the definition of war. This misperception of war as combat and the disaggregation of the means of war from its end in the mind of policy makers constitutes a critical impediment to the achievement of political war aims and also to the achievement of \textit{jus post bellum}.

\textbf{Question Two: What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?}

The discussion of \textit{jus post bellum} from the perspective of international security studies did not yield extensive literature on obligations of the victor. However, there was some discussion of obligation in the works of Feldman and Caldwell. There was also a discussion of the requirement for nation-building activities, such as democratization and economic reconstruction in Dobbins' work. However, Dobbins does not couch his discussion in terms of obligations of the victor. Rather, he writes in terms of outcomes and policy options. Nonetheless, this work is critical to the holistic understanding of the costs associated with a transformational approach to \textit{jus post bellum}.

In \textit{What We Owe Iraq}, Feldman endeavors to develop a framework for an ethic of nation-building drawing heavily from his experiences working to transform the rule of law in Iraq. His work is part philosophy, part legal scholarship, part policy planning and part memoir. As a result, it is impossible to cleanly separate the disciplines he considers and maintain the integrity of his

\textsuperscript{510} Rose, \textit{How Wars End}, 5.
conclusions. Nonetheless, there will be an attempt to consider this question primarily in terms of security studies.

Feldman argues that self-interest is not inherently unethical and constructs his ethics of nation-building based on the twin requirements of increasing security for the nation-builder's own citizens, while not violating the interests of the citizens of the state that is being occupied. He states, “Put simply, the occupying force owes the same general duties to the people being governed that an ordinary, elected democratic government would owe them. It must govern in their interests.”

Feldman considers a U.N. based trusteeship system to be the most practical method for managing these obligations. However, he differentiates his proposed model of trusteeship from earlier models in that he believes the function held in trust is the ability to govern. For Feldman, the duty of the nation-builders is to ensure the construction of a democratically governed society that “. . . respects individual liberties, both political and civil.”

Feldman also believes that it is the occupier's duty to ensure order and public safety throughout the occupation. He believes the final obligation of the occupier is to know when to leave. He remarks that nation-building should have, “. . . its own obsolesce built into the structure,” and that “. . . nation-building aspires to consume itself.”

Much of what Feldman is discussing in his book has been brought up in earlier ethical and legal debates about the obligations of *jus post bellum*. However, Feldman's construction of

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512 Ibid., 64.

513 Ibid., 62.

514 Ibid., 8.

515 Ibid., 94.
an ethic of nation-building that consciously balances duties to the occupying states' citizens with those to the occupied state's citizens along with the interests of the international community writ large is elegant and serves to further the debates over the content of *jus post bellum* as well as debates on how best to achieve it.

Nonetheless, from a strictly policy-oriented perspective, one can argue that Feldman’s “balancing act”—his desire to treat the citizens of the defeated state with the same care an occupying state would treat its own citizens is unlikely to occur in practice. Self-interest may not be inherently unethical, but it will guide the prioritization of resources. Ensuring the wellbeing of the average citizen of an occupied state is certainly a laudable goal, but history has shown that in practice, it is a goal that prioritized below the safety and security of a one’s own citizens. Therefore, Feldman’s conclusions must be caveated on these grounds.

Another article that specifically discusses the obligations of nation-building is Caldwell and Williams’ work, “*Jus Post Bellum: Just War Theory and Principles of Just Peace (2006).*” They argue that *jus post bellum* should be based on a foundation of individual human rights and can be best achieved through the restoration of order, economic reconstruction and self-determination.\(^\text{516}\) Thus, for Caldwell and Williams, *jus post bellum* obligates the victor to ensure human rights. This in turn requires political and economic reconstruction to ensure these basic obligations can be met.

Caldwell’s later book, *The Vortex of Conflict*, which details American experiences in Afghanistan and Iraq, also makes some policy recommendations that entail political transformation and reconstruction. Although these recommendations are not couched in terms of moral obligations of the victor, the practical impact is the same.

Specifically, Caldwell argues that reconstruction requires a minimum obligation of five years to succeed.\(^{517}\) He further argues that post-war planning is an initial requirement of war fighting, rather than a problem to be dealt with after the combat is over.\(^{518}\) Given this, he is echoing Wilson, Rose and Iklé's view that the means of war cannot be divorced from its ends. Finally, Caldwell argues that economic programs must be developed and sustained over the long-term in order for society to emerge from a post-bellum phase.\(^{519}\)

Dobbins work, *America’s Role in Nation-Building from Germany to Iraq*, does not speak in terms of obligations of the victor. However, it does discuss the fact that the United States has been undertaking nation-building projects of ever increasing magnitude in the post-Cold War era despite a serious lack of enthusiasm for doing so.\(^{520}\) The underlying cause of this phenomenon deserves scrutiny.

Dobbins defines success as the “. . . the ability to promote an enduring transfer of democratic institutions.”\(^{521}\) He further argues that nation-building is not principally about economic reconstruction or economic recovery, but rather about successful political transformation to a democratic form of government.\(^{522}\)

His book catalogues seven instances where the United States has undertaken such an endeavor since the end of World War II. Further, Dobbins left out one major political

\(^{517}\) Caldwell, *The Vortex of Conflict*. 172. It must be noted that Caldwell uses the same RAND data base of seven cases of nation-building undertaken by the United States in the post World War II era as Dobbins does. Therefore Caldwell’s conclusion is not based on his own analysis, but rather that of the Rand Corporation.

\(^{518}\) Ibid., 255.

\(^{519}\) Ibid., 259.

\(^{520}\) Dobbins, *America’s Role in Nation-Building*, xiii.

\(^{521}\) Ibid., 2.

\(^{522}\) Ibid., xix.
transformation project in his survey, that of South Korea. This is likely to be because the case of South Korea did not “fit” the statistical analysis categories Dobbins was considering, as South Korea was an embattled ally in a war against North Korea and China rather, than a defeated state.

Nonetheless, the past sixty years of American alliance with South Korea, including a continuous and significant American military presence there, has coincided with democratization and economic prosperity on the magnitude of that which occurred in Japan and Germany. Therefore, the case of South Korea does provide further evidence for an American propensity to undertake large political and economic transformation projects in the wake of major wars.

America has engaged in other military conflicts during this time frame. However, with the exceptions of the First Gulf War and Vietnam (which it lost), the American way of war has show a distinct preference for transforming its defeated enemies from “outlaw states,” into “liberal and decent” ones. Thus, there is a statistically significant pattern of the United States and its allies undertaking a transformational jus post bellum effort at the conclusion of most of the wars it has fought since the end of World War II. However, Dobbins argues that this occurs despite a lack desire to undertake such a project from the outset.

These facts beg the question, why do the U.S. and its allies consistently pursue an expansive and transformational version of jus post bellum given there is no legal requirement to do so and no perceived general electoral enthusiasm for bearing their costs? Clark and Ikenberry’s concept of constitutionality provides a plausible answer. If transformational jus post bellum is part political rules of the game among western democracies during the post-Cold War

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523 The U.S invasion of Panama has not been discussed within this thesis. However, an argument can be made that the United States involved itself there in order to ensure the political transformation to democracy that had been voted for by the citizens of Panama and that was being quashed by then President Manuel Noriega. For an explanation of America objectives for the invasion of Panama in 1989, as well as the reconstruction projects undertaken there, please see, Richard Schultz, In the Aftermath of War: U.S. Support For Reconstruction and Nation-Building in Panama Following Just Cause (Ann Arbor: University of Michigan Library, 1993).
era, then the likelihood is that such transformations will be undertaken in order to conform to the expected behavioral norm in international society. Stated another way, democratization is a necessary component that ultimately legitimizes the recourse to war in contemporary society.

Ikenberry's logic is particularly useful in this case. If states voluntarily intertwine their power with binding institutions in the aftermath of wars in order to ensure a greater chance of international stability, then it would follow that such states would expend further power to create states more likely to adhere to the rules. This is so because states that adhere to the rules are less likely to precipitate violent conflict.

Thus, although there is no discussion of a specific obligation, there appears to be an expectation of how the victor will behave. This expectation has grown out of the repeated cases of nation-building that have occurred in the wake of World War II from Japan and Germany through to Afghanistan and Iraq. Although there was no pre-existing international legal obligation to undertake transformational nation-building, there was a desire in the Security Council to codify just such an obligation after the fact. This penchant for transformation in the wake of combat is an expression of Ikenberry’s and Clark’s concept of constitutionality. This constitutional expectation extends to both the defeated state and the "liberal and decent" members of the international community.

**Question Three: What are the obligations of the victor to the international community? Is there an obligation for reconstruction to ensure greater chance of international stability?**

The answer to this question has largely been covered in the answers to the preceding questions. There is little discussion of obligations in war-termination literature that beyond the discussion of legal obligations to one’s own state and citizens. Legal obligations to the international community rest on compliance with international law.
The issue then, is not obligation, but expectation. This is a constructivist argument. A shared understanding currently exists about what should occur in the wake of military conflict caused by “outlaw” behavior. This shared understanding converges around the idea of political transformation in the wake of conflict. This is the essence of Clark’s idea of legitimacy. Transformational *jus post bellum* is not purely a moral issue, nor a legal one, nor is it strictly a security issue. It is a blending of the three.

Employing the idea of constitutionality, an argument can be made that an expectation exists that the end of conflict will be followed by a *post bellum* phase characterized by political and economic transformation and reconstruction. International practice has shown this to be the norm in cases where the United States and its allies have gone to war. Dobbins' work catalogs these events and his work, along with that of Caldwell and Ball, lay out the exact requirements for such a *post bellum* transformation in terms of a variety of costs; time, treasure and human life.

Based upon practice in the UN charter system since its creation, one can make the argument that for a war to be considered legitimate; it must include a robust *post bellum* phase that will transform the state whose actions required the initial resort to war. Thus, legitimacy is based upon an amalgamation of moral, legal and constitutional requirements and expectations.

As evidence in support of this statement, one must consider the texts of the Security Council resolutions that have been passed on the subject of post-war transformation since the end of the Cold War. This thesis has already discussed the texts of the resolutions for establishing transformational regimes in Kosovo, East Timor, Afghanistan and Iraq. Additionally, the US intervention into Haiti was accompanied by resolutions recognizing the need to develop
governmental and economic systems that both conform to international law, as well as ensure the basic rights and well being of Haiti’s citizenry. 524

Given the nature of the Security Council and the veto power of the permanent five members, there is no way these resolutions could have been passed if they did not conform to the shared understandings and mutual expectations of the states involved. Although resolutions such as these are not predictors of the ultimate success of political transformation, or of when the UNSC will choose to endorse the use of force in the future, they are indicators of mutual expectations of the political and economic transformation that will ensue in the aftermath of intervention.

**Question Four: What are the obligations of the international community towards the belligerents (both winners and losers)?**

As with the previous question, the security studies literature reviewed revealed little discussion with regard to the idea of obligation, whether of the victors, the defeated party, or of the international community. However, the literature did yield some policy-oriented prescriptions for the international community, specifically with regard to the process of nation-building.

Dobbins comments on the issue of multilateral nation-building. He states that it is more complex and more time consuming than unilateral nation-building. However, he also argues, “. . . it can produce a more thorough-going transformation and greater regional reconciliation than can unilateral efforts.”525

Dobbins also considers the value of multilateral nation-building in fiscal terms. He states that when America was undertaking the transformation of Germany and Japan, the United

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524 Please see UNSCR 1086, “Concerning the Situation in Haiti,” 5 December 1996.

525 Dobbins, *America's Role in Nation-Building*, xxv.
States produced approximately 50% of the world's GDP.\(^{526}\) Today, that percentage is below 25%.\(^{527}\) Given this, and given that the level of effort in terms of both time and money, has been determined to be the largest indicator of success, it would appear that if the international community is committed to a transformational conception of \textit{jus post bellum}, then greater multilateralism in future nation-building efforts is going to be required. As Dobbins notes, burden-sharing has become, “both politically more important for the U.S. and more affordable for other countries.”\(^{528}\)

In her essay, “The Challenge of Re-Building War-Torn Societies,” Ball addresses the critical role of the international community writ-large in achieving effective transition from \textit{post-bellum} to peaceful society. Her concern is not only about international conflicts, but also ensuring peaceful transitions for states and territories that have been ravaged by civil, religious or ethnic warfare.\(^{529}\)

Ball’s believes international assistance is vital to ensuring a transition from war to peace. She focuses not only on member states as potential contributors to UN and other international peace-building efforts, but also on the private and non-governmental sectors as critical to the peace-building task. She writes, “One lesson that is progressively being incorporated into the policies and programs of international actors relates to the importance of sustained assistance from the entire international community throughout the peace process.”\(^{530}\) Ball does not see this

\^526\: Ibid., xxii.
\^528\: Dobbins, \textit{America’s Role In Nation-Building}, xxii.
\^529\: Ball, "The Challenge of Rebuilding War-Torn Societies," 723-725.
\^530\: Ibid., 727.
assistance as an international obligation or a duty. However, she does see it as vital to the ultimate success of any peace-building process.

There is little mention of obligations for the international community to either the winners or losers of any conflict. However, there are significant cautions that without increasing amounts of international assistance, both in terms of monetary donations and contributions of expert personnel, the likelihood that a lasting and stable peace can be achieved is unlikely.

**Question Five: Do victors have a right to reparations or remuneration from the defeated states? (Under what conditions)?**

There is no mention in the literature surveyed of the right of a victor to exact remuneration from the defeated party under any circumstances. However, there are cautions against doing so for practical as well as ethical reasons. In *Every War Must End*, Iklé writes, “What has made all the difference for the long-term outcome of many wars is whether the militarily victorious side has managed to reform the enemy's government, to transform the foe into a new friend.”531 He considers the punitive capitulation exacted at Versailles and concludes, “taking revenge is a Neanderthal strategy.”532

For Iklé, it is important to recognize the transient nature of the conflict. He writes, “. . . not only can reconciliation be an alternative route toward a more lasting peace, but today's enemy may become a future ally, while today's ally may pose a future threat.”533 Thus, Iklé's views on reconciliation are based as much on self-interest as on altruism. Political transformation is a difficult task even when the majority of the population isn't against the

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531 Iklé, *Every War Must End*, xi.

532 Ibid., xii.

533 Iklé, *Every War Must End*, 11.
victorious powers. Iklé recognizes the task of reform is made nearly impossible if that reform is accompanied by a requirement for reparations.

**Conclusion**

This chapter provided an analysis of the security studies literature. This was undertaken to develop conclusions that will be compared with those that were drawn from the fields of philosophy and international law. Security studies has produced a significant amount of literature on Iraq and Afghanistan, but not a substantial amount that contributes to the broad, general category of war termination. This is an interesting phenomenon that has several potential explanations.

First, there is Massoud’s hypothesis that the issue of war termination contains so many variables that the development of a broad and encompassing theory to cover the subject is simply impossible. This conclusion is insufficient, as it does not provide an explanation for the lack of attempts made to codify war termination or why it should be any more difficult to undertake than the development of any other social theory. This dearth of war termination literature points to either a lack of interest in the topic or a lack of expertise to undertake the research, or both. It constitutes yet another manifestation of the disconnection of the ends and means of warfare.

The study of war termination requires a full understanding of the complex interplay between war and politics. There was a high degree of consensus among the authors analyzed that this connection has been severed in society in general, and much more disturbingly, even among American security policy planners and military officers. The absence of theoretical accounts uniting the political and military aspects of war planning are largely missing is further evidence of a critical “missing link” in the field of contemporary security studies.

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534 Massoud, “War Termination,” 492.
Second, Dobbins, Ball and Caldwell have demonstrated the potential for successful political transformation and democratization. However, their unanimous conclusion is that successful nation-building is time and resource intensive. Further, Dobbins concludes that multilateral endeavors, although harder to undertake can ultimately produce greater long-term success. These are extremely sobering facts for anyone interested in remaking a state that refuses to adhere to the current norms of constitutional behavior. Further, the unilateral U.S. attempt to undertake just such a strategy in 2003 met with international condemnation and far exceeded all U.S. pre-war estimates on the overall costs of the war.

Third, this chapter highlights the current cleavage within the field of security studies as to the proper principal referent for security: the state or the individual. This division has recurred throughout this thesis. The implications of this will be carefully considered in the conclusion of this work.

Finally, this chapter adopted the works of Ikenberry and Clark and the idea of constitutionality to develop a greater understanding of *jus post bellum* in contemporary politics. It also relied on Rawls' idea of the “outlaw state,” as an explanation for the preference for transformational approaches to *jus post bellum*. Finally, the chapter combines these constructions (legitimacy and the outlaw state) to create a hypothesis: In order to legitimate war in international society, there is a strong presumption that it will end with a transformative *post bellum* phase. In this phase, the state whose aggressive behavior provoked the violence will be transformed through a nation-building effort into a “decent and liberal” state that abides by the laws and prevailing norms of international society.
CHAPTER NINE
CONCLUSIONS AND RECOMMENDATIONS

Introduction

The purpose of this thesis has been several fold. First has been to consider the emerging concept of *jus post bellum* (justice after war); next to analyze and compare the way the topic is being considered in three discrete academic fields: philosophy, international law and security studies; third, from this analysis determine whether this concept belongs as a third strand of the classic just war tradition; finally to make policy-oriented recommendations regarding the application of this idea to ongoing and emerging conflicts.

The predominant conception of *jus post bellum* in this study has been that of the so-called “Pottery Barn Rule.” Specifically, the rule encapsulates the idea that the victor has obligations to the defeated state and its citizens. These obligations include repairing what has been damaged or destroyed as a result of the conflict and leaving the defeated state as a functioning member of international society. An increasingly common reference, this rule constitutes both a single interpretation of and a useful gateway into a larger and more complex topic, that of *jus post bellum*.

The previous six chapters investigated and analyzed the conception of *jus post bellum* from the disciplinary perspectives of: philosophy, international law and security studies. Each of these has yielded different findings on the nature of *jus post bellum* and whether the concept correctly belongs as an addition to the existing just war tradition. The purpose of this chapter is to develop, present, and compare these separate conclusions and then integrate them into overall conclusions. These conclusions will be used to identify and frame a series of recommendations for policy-makers dealing with war’s end.
Review of Critical Assumptions

The first chapter introduced four critical assumptions as the basic foundation of this work. Although these assumptions remain valid, the research revealed subtle nuances embedded within them that are relevant to the subject at hand. These nuances must be highlighted, as they significantly contribute to the overall conclusions and recommendations that follow.

The first assumption is that the contemporary phenomenon commonly referred to as globalization has a significant impact on the international system. More specifically, this thesis assumes that the international system is currently undergoing a profound change on the order of magnitude of that which emerged as a result of The Peace of Westphalia. Sovereignty is eroding and states are increasingly sharing the world stage with a variety of other actors, such nongovernmental organizations (NGOs), intergovernmental organizations (IGO’s) and multinational corporations (MNCs).

This assumption was not refuted during the research for this thesis. However, a phenomenon related to this erosion of sovereignty consistently surfaced during the research, and requires highlighting. This phenomenon is the significant tension between the requirements of state security versus the requirements of human security. The most powerful predictor of an author’s overall conclusions regarding the relevance and appropriate scope of *jus post bellum* was whether he approached the problem from a state based orientation or a human rights based one. State centric authors were more likely to advocate a restorative conception of *jus post bellum*, while those scholars who approached the subject from the perspective of human security were more likely to endorse a transformational approach to the topic.

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535 For the purposes of this thesis, globalization is defined as “The exorable integration of markets, nation-states, and technologies to a degree never witnessed before in a way that is enabling individuals, corporations and nation-states to reach around the world, farther, faster and cheaper than ever before . . .” Friedman, *The Lexus and the Olive Tree*, 7-8.
This fundamental difference in viewpoint crosscut disciplinary backgrounds and was the most significant predictor of an author’s stance on *jus post bellum*. Further, this idea of state sovereignty versus cosmopolitanism also converged to a significant degree with the differences between Wendt’s Lockean and Kantian cultures of anarchy. Given the interplay between the assumption of the erosion of state sovereignty and the rise of the idea of human security, it is imperative to note this conclusion at the outset of this chapter.

Second, this thesis assumes that the nature of warfare has fundamentally changed. Specifically, it assumes that warfare defined as a clash of militaries from two or more opposing states, has become an increasingly rare occurrence in the international system. However, the instances of intra-state conflict have increased over the last sixty years. This phenomenon is statistically demonstrable. The reasons for this shift are less clear-cut. This assumption was not challenged as a result of the research conducted for this thesis. However, the research has led this author to place caveats on the definition of the word “war” used throughout this thesis. The caveats follow.

For the purposes of this thesis, Clausewitz's famous definition of war was adopted. In Book One, Chapter One of *On War*, Clausewitz states that war is nothing more than “... a duel on an extensive scale.” This definition remains relevant regardless of the type of conflict in which one is embroiled. Clausewitz's more famous dictum, “War is a mere continuation of policy by other means,” bears caveating in light of the research undertaken for this thesis. Although war certainly remains a continuation of policy by other means, it is no longer viewed

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537 Clausewitz, *On War*, 75.
538 Ibid., 75.
as a legitimate means of continuing policy in the current international environment, except under very specific and exceptional circumstances.  

This lack of legitimacy of warfare as a method of achieving policy goals has implications for the developing concept of *jus post bellum*. If warfare is a criminal act, then in the current international society, crimes must be punished and/or rehabilitation must occur. This view provides justification for governmental and, in extreme cases, societal transformation. This phenomenon was discussed throughout this thesis in terms of John Rawls’ concept of the “outlaw state.” Thus, the “illegal” and “illegitimate” nature of warfare as a continuation of policy contributes directly to the logic underpinning the call for transformational versions of *jus post bellum*.

In the current international legal paradigm, described in chapter five, warfare has become a highly regulated legal event, one that can only be sanctioned in cases of self-defense and/or when the UNSC has determined that there are “. . . threats to international peace and security.”  

This is an important conclusion that is directly relevant to the evolving concept of *jus post bellum*. If warfare by states as a method to pursue foreign policy objectives is, in most instances, illegal, or as Bull describes, “either an act of criminality or an act of law enforcement . . .” then there must be sanctions on the perpetrators of criminal acts, as well as rehabilitation for criminal behavior. Unlike individuals, criminal states cannot be locked away from the rest of society. Therefore, in order for international society to function smoothly, rehabilitation must occur.

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539 This statement is made on the basis of Clark's definition of legitimacy in *Legitimacy in International Law*. As has been repeatedly discussed throughout this paper, Clark defines legitimacy as a function of the norms of morality, legality and constitutionality.


The third assumption deals with the increasing range of wars’ effect as a result of increased connectivity and interdependencies created through technology. This assumption remains valid and need not be caveated. Greater degrees of connectivity increase the vulnerability to shocks and other ill effects of war, even if one is not geographically proximate to the actual fighting. The vulnerability of financial systems to cyber attacks is an example of this type of effect. Navigational impediments resulting from an attack on GPS satellites is another. Both examples are intuitively obvious to a contemporary reader. Neither would have made sense twenty-five years ago.

The final assumption upon which this thesis rests is constructivist in nature. This is the assumption that the reasons for which states intervene have undergone profound shifts due to changing norms of acceptable “behavior” within the international system. Specifically, this thesis has been undergirded by Finnemore’s assumption that, “norms about human equality and human rights have become increasingly powerful over the past several centuries and have had profound effects, including effects on military intervention.” This thesis bears out this assumption.

These changing norms are also in large part responsible for the expanding interest in the concept of *jus post bellum*. The increased interest in ensuring human security along with state security at the end of a conflict has resulted in the enhanced desire to ensure the quality of the peace achieved in the aftermath of war. Thus, these changing norms can help account for the increased interest in *jus post bellum*.

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543 Ibid.
As Wilson posits in his work, *Thinking About War*, the current period is a “paradoxical time,” in which the traditional methods will no longer lead to success.\(^{544}\) It is possible that the desire to develop criteria for *jus post bellum* is an attempt to grapple with the paradoxes that contemporary warfare present, specifically that winning battles doesn’t necessarily increase security. Thus, the increasing interest in the quality of the peace produced by war constitutes yet another “sign of the times.” Chapter two demonstrated that the classic just war tradition evolves historically in order to meet the needs of the era to which it is being applied. Thus, increased interest in *jus post bellum* can be interpreted as the latest response to the changing nature of warfare and the international system.

**Review of the Questions:**

In addition to the four underpinning assumptions, this thesis utilizes five questions as the basis for comparing the three disciplines. These questions had varying utility in determining a discipline’s approach to the idea of *jus post bellum*. Further, they also revealed that differences in perspectives regarding the nature of the international system are more telling regarding a scholars’ view of *jus post bellum* than is the author’s field of expertise.

The first question, (at war’s end, how do we define peace?) was instrumental in developing conclusions for this thesis. Whether an author, regardless of discipline, believes in a Kantian conception of peace or a Hobbesian one is a crucial factor in that author’s overall outlook on the proper parameters of *jus post bellum*. Those who believe that peace constitutes nothing more than a temporary respite from fighting are interested in developing restorative conceptions of *jus post bellum*, while those convinced of the possibility of a longstanding peace are interested in transforming outlying states to increase the chances of enduring stability.

\(^{544}\)Wilson, *Thinking Beyond War*, 13.
Questions two through four centered largely on the concept of obligations of the victor at the conclusion of warfare:

- What are the obligations of the victor to the defeated state and its citizens? Is there an obligation to create or restore a functioning government? A functioning infrastructure and economic system?

- What are the obligations of the victor to the international community? Is there an obligation for reconstruction to ensure greater chance of international stability?

- What are the obligations of the international community towards the belligerents (both winners and losers)?

The analysis of the answers to these questions leads to the conclusion that there is no overarching agreement as to whether such obligations exist, or what their nature may be. What has become evident through this analysis however, is that there is an expectation, based upon recent history (post-World War II) that warfare undertaken within the existing legal paradigm will be concluded with a nation-building program designed to bring the outlaw state into the fold as a functioning member of international society. This expectation is based on current international norms.

The last question, the right to reparations also yielded little useful for data for clarifying disciplinary differences regarding *jus post bellum*, although there was a high degree of consensus on this question. Reparations are well codified within existing international law. Further there is little moral, legal, or policy-oriented disagreement as to when they should be used in contemporary society. Currently, there is a general lack of enthusiasm for imposing a “collective punishment” upon a population. The existing norm is to punish guilty individuals in international criminal tribunals and to treat ordinary citizens more as victims than as perpetrators.

Although the questions did not reveal significant discipline specific cleavages and convergences around the idea of *jus post bellum*, they were useful in determining the overall
parameters of the debate. Scholars’ views on the utility and scope of the concept were more
much more closely aligned with whether they subscribe to a Kantian or Lockean worldview than
their particular academic discipline. This is a useful conclusion.

**Conclusions Regarding Jus Post Bellum from the Perspective of Philosophy:**

Chapters three and four considered *jus post bellum* through the lens of philosophy. Authors analyzed in this section are concerned with whether the concept belongs as an addition to the classical just war tradition. They are also interested in determining the ethics of *jus post bellum* and developing criteria that define the emerging concept. Few points of consensus and many points of divergence emerged when analyzing the issue of *jus post bellum* from the perspective of ethics and morality. Nonetheless, several conclusions can be drawn.

In chapter three, the scholars examined were divided into two broad camps. These were labeled the “restorers” and the “transformers.” The restorers considered *jus post bellum* from a predominantly state-centric view of the international system. These authors consider the idea of *jus post bellum* principally as a task of restoration on two main grounds: sovereignty and order. For this group, justice after war consists of returning to a situation that was as close to the status quo ante bellum as possible once the rights violations that precipitated the conflict were vindicated.545

Second, the restorers privilege order as the most effective way to ensure that both state and human rights are protected. There is a cautionary ethos underpinning their work. This stems from the belief that adopting too broad a conception of *jus post bellum* will break with the classic just war tradition entirely, and cause more harm than good in the international system.

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This harm would stem from two sources. First, an overly expansive conception of *just post bellum* could prolong the violence and make the ends sought unachievable. Second, if the “reward” for humanitarian intervention were to become a lengthy and costly reconstruction and transformation project, then the likelihood of international intervention into humanitarian crises would decrease.

Finally, the conception of *jus post bellum* the restorers advocated is in concert with the just war tradition, as it presently exists.\(^{546}\) The classic just war tradition advocates a return to the status quo *ante bellum* and has adapted to a system of sovereign states in which individual states determines the course of their own internal politics.\(^{547}\) This is a Lockean view of the international system.

The second group of scholars, the transformers, advocate a Kantian, human rights based approach to the idea of *jus post bellum*. These scholars argue in favor of a conception of *jus post bellum* that places heavy burdens on the victors, and to a lesser degree on the international community writ large. This viewpoint is a significant expansion of the idea of just war and constitutes a serious departure from the classic just war tradition.\(^{548}\)

Advocates of transformational *jus post bellum* believe revision of the current concept is warranted for multiple reasons. First, the current system allows for unconstrained war termination that could actually prolong the fighting and lead to further outbreak of war.\(^{549}\) Second, they believe the adoption of a transformational view of *jus post bellum* will actually save

\(^{546}\) Ibid.,” 608.

\(^{547}\) Walzer, “The Aftermath of War,” 53.

\(^{548}\) Bellamy, “The Responsibilities of Victory,” 625.

\(^{549}\) Orend, “*Jus Post Bellum: A Just War Theory Perspective,*” 43.
lives in the long-term. Finally, the transformational view of *jus post bellum* is founded on the conception of securing individual human rights. The requirements for this are far higher and entail much greater effort on the part of the “victors” than restoring a slightly improved version of the status quo ante bellum.

The fundamental question for those who embrace this view is whether outside forces can and should undertake such large endeavor. The restorers generally argue no, while the transformers believe it is a fundamental requirement of *jus post bellum*.

When considering these two camps in light of the analysis undertaken in chapter four, the cleavage between the two main strands of thought remains evident throughout the analysis. The answers to the research questions highlight two main themes that carry through all of the disciplines. The first theme is how an author defines peace. The second is whether a scholar notes any obligations of the victor beyond the obligations to stop the killing and “. . . get out as soon as possible.”

Those authors who advocate a transformational idea of *jus post bellum* generally believe in the possibility of a positive conception of peace, beyond its existence as merely the simple absence of war. Michael Howard’s idea of peace in his work, *The Invention of Peace*, is a useful illustration of their concept. The restorers on the other hand are not interested in transforming the international system to achieve a Kantian conception of peace. They are far more interested in restoring and maintaining order within the current international system. In Carr’s parlance, they are more interested in “reality” than in “utopia.”

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550 Iasiello, “*Jus Post Bellum*: The Moral Responsibilities of Victors After War,” 34.

551 Bass, “*Jus Post Bellum,*” 412.
A second main difference between the restorers and the transformers deals with the idea of obligations as they pertain to *jus post bellum*. The transformers base their conception of *jus post bellum* on a concept of human security. Thus, the locus of obligation becomes the individual rather than the government of the defeated state. This is in keeping with former UN Secretary General Kofi Annan’s reconception of sovereignty.

In Annan’s definition of sovereignty, the state’s *raison d’être* is the protection of individual human rights. The restorers rely on a less sweeping concept of the obligations of the victor. This makes sense, as the classic just war tradition is currently predicated on a Westphalian system of sovereign states. Thus, obligations do not flow from victorious states to individual citizens, but to the government of the defeated state. This is a significant point of difference between the two camps.

Despite this, there was significant consensus regarding the obligations of a victor when dealing with a Rawlsian “outlaw state.” Walzer and Bass make specific exceptions to their views of a restorative conception of *jus post bellum* when confronted with a Hitler or a Pol Pot. Elshtain also argues that the idea of *jus post bellum* varies with the degree of responsibility a state had for starting a war and the requirements of *jus post bellum* can become significant in cases of clear-cut aggression.

Given this, the cleavages between the two camps are far less dramatic in practice than in theory. This is a result of the lack of legitimacy surrounding the word warfare in the current

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553 In “The Aftermath of War: The Idea of Jus Post Bellum,” Walzer argues that the classic just war theory advocates a return to the status quo ante bellum. However, he acknowledges that cases like the Nazis call for a more robust conception of *jus post bellum* in which the government may have to be replaced, 52-53. In “Jus Post Bellum,” Bass argues forthrightly that the “ . . . the radicalism of genocide . . . unmakes the legitimacy of any state.” 412.

international system. There is a norm against war in the current international system. Warfare is no longer viewed as a legitimate, although extreme means of conducting foreign policy, à la Clausewitz.

As a result, states that undertake such policy options outside the existing international legal paradigm become *de facto* and *de jure* “outlaws” within international society. Thus, the bar has been met for the international community to undertake a transformational version of *jus post bellum* according to both the restorers and the transformers. Therefore, this stark difference between the two sides in theory becomes far less meaningful. Thus, the norms of international society support a version of “The Pottery Barn Rule” in contemporary practice. This notwithstanding, the cautions of those who advocate a predominantly restorative conception of *jus post bellum* should be taken seriously. Adopting a “Pottery Barn Rule” approach places significant obligations on any intervening state. These obligations will no doubt dampen enthusiasm for undertaking intervention in cases that do not represent vital national interests.

**Conclusions Regarding *Jus Post Bellum* from the Perspective of International Law**

Having developed the main conclusions from the chapters dealing with ethics and philosophy, this section explains the main conclusions drawn from international law. At the close of chapter six, four major conclusions were developed regarding *jus post bellum* and international law.

The first conclusion drawn from the investigation of *jus post bellum* and international law is that current international law as it pertains to warfare and occupation law contains many anachronisms that are ill suited to the realities of the post Cold-War era. Specifically, changes in the types and patterns of warfare have rendered the existing international law of war insufficient.
To begin, international law is divided into the law of war and the law of everything else. Both Stahn and Osterdahl are correct in their assessments that there is a hole in the international legal framework with regard to a law of transition from war to peace. There were no legal scholars analyzed who argued against this conclusion. The disagreements only ensued with the question as to whether something should be done about this gap or whether the current system of \textit{ad hoc} solutions was both functional in practice and the best one could reasonably hope for under the current circumstances.

The second conclusion dealt with the issue of occupation law, which truly constitutes an anachronism in the current international system. Once again, there was little argument among the authors over this fact. The discussion centered on whether anything could or should be done to rectify the situation. A subset of this conclusion that was discussed in the works of several authors writing on the topic was the issue of what was actually being held “in trust” under an occupation authority. Several authors argue that the contemporary answer is simply “the ability to govern,” which is then returned to the citizens of a state through the process of democratic elections. This is a significant departure from the legally enshrined principal of conservation.

The third conclusion of this chapter was that the insufficiency of occupation law was particularly egregious when it dealt with cases where the UN was serving as the government, such as occurred under Chapter VII resolutions governing the situation in East Timor and Kosovo. There is a divide among the legal scholars as to whether revitalization of the UN system

\footnote{Stahn, \textit{“Jus Ad Bellum, Jus in Bello \ldots Jus Post Bellum?”} 924 and Osterdahl, \textit{“What Will Jus Post Bellum Mean?”} 4.}

\footnote{Boon, \textit{“Legislative Reform in Post-Conflict Zones,”} 75-76; Feldman \textit{What We Owe Iraq}, 62; and Roberts, \textit{“The End of Occupation: Iraq 2004,”} 36.}
of trusteeship could fill this gap. Boon and Feldman both argue in favor, while others dismiss the idea as unworkable.\footnote{Boon, “Legislative Reform in Post-Conflict Zones,” 294, and Feldman, What We Owe Iraq, 3 and 8. The argument against an attempt to use the trustee system are found in Roberts’ work, “The End of Occupation,” and Bhuta’s work, “New Modes and Orders,” 853.}

It is highly unlikely that any wholesale revisions of the existing international legal paradigm will be undertaken, except in the event of an extreme crisis in the international system. Ikenberry’s work, After Victory, provides evidence in support of this assertion. Ikenberry relies on four instances in which the international order was substantially remade. These are: The Peace of Westphalia, The Concert of Vienna, The League of Nations, and The United Nations.\footnote{Ikenberry, After Victory, i.}

Each of these changes to the international legal paradigm was preceded by a world shock, a war, or a series of wars of tremendous magnitude that served as overwhelming evidence of the failure of the current system. Given that the current system of \textit{ad hoc} legal solutions appears awkward but functional, there is no appetite or overwhelming impetus to reform the existing international legal paradigm. Barring such a crisis, the current paradigm will stand and allow only the potential for marginal changes.

The fourth conclusion of chapter six dealt with the implementation of “The Pottery Barn Rule,” as a result of United Nations Security Council Resolutions (UNSCRS) mandating significant reconstruction and governmental transformation projects. The UNSCRS that followed military action in East Timor, Kosovo, and Iraq placed increasingly large, legally binding burdens on the “victors” of conflicts and on the international community in general. The UNSCRs governing the three aforementioned cases legally mandated reconstruction of destroyed
infrastructure, revitalization of the economic system and governmental transformation. This seems to present evidence in favor of an increasing acceptance of a transformational view of *jus post bellum*.

However, this conclusion must be caveated. The circumstances under which the UNSC will intervene and when it will remain neutral are extremely difficult to predict. In the cases of Kosovo, Afghanistan and Iraq, UNSC action came only after a state, coalition of states, or an alliance forced the UNSC to respond. This case by case basis of intervention is supported by Walzer’s view of the obligations of the victor and the international community. Walzer argues that the rules of sovereignty allow for neutrality, but that obligations are incurred once intervention has begun. The UNSC has adopted a similar position in practice. Intervention and transformation remains a choice rather than an obligation.

Additionally, there was also evidence of the normative de-legitimation of warfare present in the research conducted on *jus post bellum* from a legal perspective. Solis explains that the “Law of War” is now referred to as “International Humanitarian Law.” He further argues that this has occurred because the term “Laws of War” has become “passé” in the mind of many legal scholars. This “rebranding” provides further evidence of the changing norms and of the de-legitimation of warfare in contemporary international society.

The final conclusion that must be drawn from the investigation of *jus post bellum* from the perspective of international law relates to Clark’s concept of “legality” in *Legitimacy in International Society*. Clark argues that legitimacy discussions occur precisely at those moments

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559 UNSCR 1244 (10 June 1999), UNSCR 1272 (25 October 1999), and UNSCR 1483 (22 May 2003).
when “. . . the legal ground appears less secure.” In the case of *jus post bellum*, the legal ground is far from secure and thus, arguments over the legitimacy of the concept itself should be expected.

**Conclusions Regarding Jus Post Bellum from the Perspective of Security Studies:**

Since the collapse of the Soviet Union, the discipline of security studies has been in unrelenting debate over its primary referent. Specifically, the question being debated is: “Security for whom? The individual, the state or the international system?” This debate mirrors the central cleavage within the *jus post bellum* community of scholars. Should the principal referent be the state or the individual?

Buzan and Hansen categorize this debate as an “academic quest for hegemony.” This disagreement over the primary referent is a subtext that pervades many discussions of *jus post bellum*. Although the issue is not often brought consciously to the foreground, all of the authors have taken a position, consciously or not, as to whether the primary point of reference is the state or the individual. While this binary character infuses most of the literature on the topic, there is no currently no literature within any of the disciplines considered that seeks to develop a dual referent for the concept of *jus post bellum*, one that takes both the state and the individual into account as equally significant actors.

Additionally, there appears to be no reason why a discussion of *jus post bellum* must privilege one referent at the expense of the other. Although there has certainly been an increasing and correct emphasis on ensuring individual human rights, there appears to be little acknowledgement within the community of scholars who consciously embrace cosmopolitanism.

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562 Clark, *Legitimacy in International Society*, 211.


564 Ibid., 43.
that the only systems currently in existence capable of ensuring these basic rights are the states themselves.

Further, this thesis has concluded that states that consistently violate the rights of their citizens have lost their legitimacy within contemporary international society. Thus, the connection between the idea of state sovereignty and human rights is essential to ensure a full and round discussion of the idea of *jus post bellum* regardless of scholarly pedigree.

The second uncontroverted conclusion that came from the security studies literature is the fact that the United States and the western world have divorced the ends and means of warfare. In Baldwin’s view, they have become “un-Clausewitzian” in their conception of war. 565 This constitutes an extremely powerful and practical argument for attempting to codify the concept of *jus post bellum* within international law.

War is fought for an end, a purpose, and if that higher purpose is lost, then the war itself becomes pointless, a futile exercise in destruction. If there is a policy-oriented argument for the inclusion of *jus post bellum* into the canon of just war thinking, then it is to rectify this disconnection.

Orend makes a marvelously simple case that war has a beginning, middle, and an end. 566 The end must be the starting point for war planning. This assertion is bolstered by Clausewitz’s statement that “No one starts a war—or rather no one in his right mind ought to do so—without first being clear in his mind what he intends to achieve by that war and how he intends to conduct it.” 567 The recent experiences in Iraq and Afghanistan have precipitated significant dialogue on this point among military officers and national security professionals. The result in

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567 Clausewitz, *On War*, 75.
the United States and in NATO countries has been the revision of many military field manuals and doctrinal publications.568

However, the current disconnection between the ends and means of warfare is the result of a broader political and cultural misunderstanding that far exceeds the boundaries of the military and security communities and the boundaries of the current wars in Iraq and Afghanistan. To be resolved, it must be debated in broader circles. An attempt to legally codify the criteria for *jus post bellum* would not likely achieve a sweeping, cultural transformation of the understanding of warfare. However, it would succeed in opening the debate to a wider audience.

The third conclusion from the security studies literature was a confirmation of the high costs associated with implementing “The Pottery Barn Rule.” Dobbins’ conclusions regarding the costs of nation-building are supported by both Caldwell’s and Ball’s analysis. Dobbins’ finding, that successful political transformation requires a minimum of five years to complete, along with a substantial commitment of personnel and cash, is sobering.569 These statistics paint a stark picture of the costs for any state or international organization that is considering undertaking a political transformation project in the wake of armed conflict or humanitarian intervention. Transformational *jus post bellum* is a time consuming and costly endeavor.

What must also be noted about Dobbins’ conclusion is that there are no guarantees of success even if one commits to the extended timeline. Dobbins concludes unequivocally,

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568 Prominent among these publications are the *Stability Operations Manual*, published in 2009. Additionally, there is the *U.S. Government Counterinsurgency Guide*, also published in 2009. Also achieving significant media attention and advocating a whole of government approach is the *The U.S. Army/Marine Corps Counterinsurgency Manual*, which was published in 2007. These publications represent a small sample of the number of military and governmental manuals that have been rewritten in the wake of the wars in Afghanistan and Iraq.

“Staying long does not ensure success, leaving early ensures failure.”\textsuperscript{570} Thus, even following the “rules” is no assurance of ultimate success. However, history does provide examples in which transformational \textit{jus post bellum} was successfully completed. Most notable among them are Germany and Japan in the wake of World War II and perhaps the former Confederate states in the wake of the American Civil War. Thus, the only conclusion one can draw is that undertaking a transformative form of \textit{jus post bellum} will be a costly and time consuming endeavor, the ultimate outcome of which is uncertain.

Dobbins’ work also argues that the United States, despite a lack of desire to undertake large nation-building projects, has actually been responsible for increasingly ambitious governmental transformation projects during the post-Cold War era.\textsuperscript{571} The obvious question that flows from this conclusion is: why?

This can best be explained through the adoption of Clark’s concept of constitutionality. The most amorphous of his elements of legitimacy, constitutionality is about adhering to the political rules of the game and thereby meeting the expectations of international society.\textsuperscript{572} Utilizing this concept, the simplest answer to the question of why the U.S. and its allies undertake such enormous transformational projects in the wake of war is that there is a normative expectation they will do so. This expectation is not based on a solely moral or legal obligation, but also on a constitutional expectation that it will occur. Therefore, in order to be considered legitimate in the current system, a transformational post-war phase is a necessary component of warfare.

\textsuperscript{570} Ibid., xxiii.

\textsuperscript{571} Ibid.

\textsuperscript{572} Clark, \textit{Legitimacy in International Society}, 20.
In his book, *The Norms of War*, Ferrell argues a non-legal norm of humanitarian intervention has arisen in the post-Cold War era.\(^{573}\) The analysis of the differing conceptions of *jus post bellum* has led to the conclusion that a non-legal norm of political transformation and reconstruction in the wake of war has also come to exist. It is not based on legal requirements, but it has become expected that when the U.S. or its allies intervene independently, or as a result of a Chapter VII resolution, then “The Pottery Barn Rule,” will apply.

**Overall Conclusions:**

This thesis is underpinned by constructivism, the view that “the structures of human association are determined primarily by ideas rather than material forces.”\(^{574}\) Specifically it has analyzed the evolving norms surrounding the concept of warfare in the post-Cold War era, and how these norms have changed international society’s expectations as to how wars should end.

The vehicle for this exploration has been the increasing volume of literature on the topic of *jus post bellum* (justice after war). Given that the desired goal of this exploration was to develop a series of recommendations for policy-makers, there was substantial attention paid throughout this thesis to one conception of *jus post bellum*, that of “The Pottery Barn Rule,” a concept invoked by many policy-making in discussions of post war justice since at least 2002.

The overarching conclusion of this thesis is that the norms of war have changed. There is now an expectation that warfare and humanitarian interventions undertaken by western liberal democracies – with or without Chapter VII authorizing UNSCRs – will be concluded with post-war reconstruction and transformation projects. This conclusion rests on the adoption of Clark’s variables of international legitimacy, along with an independent conclusion of this thesis that

\(^{573}\) Ferrell, *The Norms of War*, 137.

\(^{574}\) Wendt, *Social Theory of International Politics*, 1.
there has been a de-legitimation of warfare as an instrument of policy during the same time frame.

Clausewitz’s famous dictum that “war is a continuation of policy by other means,” remains valid, but requires significant and sometimes unprecedented caveats in contemporary practice. Under the UN Charter system, warfare is a highly regulated legal event. It is only a legitimate instrument of policy when conducted within the existing legal paradigm. These boundaries constitute the contemporary codification of *jus ad bellum* and *jus in bello*.

Warfare undertaken outside of these restrictions constitutes “outlaw” behavior. Once such behavior has been determined to constitute a threat to “. . . international peace and security,” current norms require that it be dealt with. The trend has been to punish individual leaders who perpetrate such crimes, rather than to exact reparations from the defeated states as a whole. Therefore, ordinary citizens of “outlaw states” are often viewed as victims in need of assistance, rather than as collaborators who should be held responsible. This view has strengthened the case for reconstruction and transformation, as well as decreased the likelihood that the victors in war will demand wholesale reparations.

This analysis also revealed a significant divide as to the proper principal point of reference regarding the issue of *jus post bellum* and contemporary warfare. This divide is between those scholars who undertake a state centric approach versus those who undertake a cosmopolitan one. This fundamental divide accounts in large part for the range of recommendations for and against transformative conceptions of *jus post bellum*. Further, international law is currently codified to ensure state security, rather than human security. However, contemporary political philosophy and the expanded approach to security studies have irreversibly introduced and emphasized the importance of human security.
Jus Post Bellum: The Third Strand of Just War Theory?

A final goal of this paper was to render a conclusion on whether *jus post bellum* should be incorporated as a third strand of the just war tradition alongside *jus ad bellum* and *jus in bello*. There is currently no consensus on this issue, in part because there is no consensus on what the criteria for *jus post bellum* should be. The concept of *jus post bellum* currently resembles a Rorschach inkblot. The meaning of the term and the appropriate criteria for determining it are in the eye of the beholder.

Chapter two provided a brief synopsis of the evolution of the classical just war tradition. This chapter demonstrated the just war tradition is not comprised of static rules set forth millennia ago. Rather, it is constantly evolving in order to maintain relevance. Therefore, the rising interest in the concept of *jus post bellum* can be interpreted as the latest cycle of evolution of this age-old tradition.

While this thesis has demonstrated that there is currently little consensus as to criteria for *jus post bellum*, there is considerable agreement that the current understanding of the tradition is somehow incomplete. If this were not the case, then there would be no inter-disciplinary academic debate on the topic. This debate will continue, and the outcome of future conflicts will feed the development of such specific criteria over time.

The Pottery Barn Rule Revised:

The final conclusion of this thesis deals specifically with “The Pottery Barn Rule.” The punch line of this rule – You broke it, you bought it – is incorrect. Many of the situations into which the U.S., other western states, and the UN have decided to intervene were non-functional long before the intervention occurred. The rule is more aptly stated –You touch it, you own it – This is the expectation in contemporary international society. In this sense, Walzer’s view of
neutrality is alive and well. Obligations/expectations only apply if one makes the decision to intervene. However, once intervention has been undertaken, the expectations are high and international society is watching closely.

In essence, this revision of “The Pottery Barn Rule” is more problematic and risky for states; it infers that you don’t have to break it to own it. In fact, you don’t have to be anywhere around when its broken. When every contemporary norm, as well as overwhelming domestic political pressure demands that a government “do something,” the intervening state must understand that the decision to “do something” is the equivalent of taking responsibility for “everything.” The policy implications of this are enormous when considering military action or humanitarian intervention.

**Recommendations:**

The policy recommendations are based on the belief that *jus post bellum* will continue to evolve through both academic debate and state practice. Given this, it is imperative that state action takes into consideration both the current expectations of what constitutes justice after war, while also proactively seeking to shape the “constitutional” idea of what *jus post bellum* should be understood to mean. Further, it is imperative that the debates over the concept of *jus post bellum* continue within academic circles. Both policy makers and academicians have critical roles to play in the practical and definitional debates that will serve to refine this concept over the coming decades.

Academic conferences and articles on the issue of *jus post bellum* have the potential to significantly influence policy making in much the same way that conferences and articles about the democratic peace theory influenced national security policy during the 1990s.\(^{575}\) This is an

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\(^{575}\) The democratic peace theory is a theory of international relations that argues democratic states do not fight wars against one another. This theory has spurred many academic fights over the decades. For a reasonable
area that is presently under theorized and on which no consensus currently exists. It is also an area in which a lack of clarity can have profound, concrete consequences for national and human security. A convergence of scholarship and policy making is required in order to develop policy oriented answers to the fundamental questions of *jus post bellum*.

The recommendations that follow are formulated at a strategic level. They are aimed at changing the way that states currently understand warfare and its relationship with politics, rather than suggesting specific ways in which warfare should be conducted. The desire is that these broad recommendations are taken as guidance for undertaking high level reforms rather than as a checklist of actions to be accomplished to meet the specific demands of one conception of *jus post bellum*.

**Recommendation One: Reconnect the ends and means of warfare.**

One of the main themes developed in the security studies literature was the current disconnection between the purpose of a war and the means by which it is fought. Rose opines that this disconnection is evident in the war-planning and execution processes of many western states. He argues that there is a logical desire to create two separate divisions of responsibility. However, in the end, the separation of the political aims and military means of understanding of the pro and con positions on this theory, please see Stephen Walt, “International Relations: One World Many Theories,” *Foreign Policy* 110 (Spring 1998): 29-46. This thesis does not seek to take a position on the validity of this theory. However, it does use it as an example of the impact of scholarship on national-security policy. President Clinton’s National Security Strategy, published in 1995 was titled, *A National Security Strategy of Engagement and Enlargement*. One of its three central goals was, “To Promote Democracy Abroad.” This goal was based on the belief that “…democratic states are less likely to threaten our interests and promote free trade and sustainable development.” See, *A National Security Strategy of Engagement and Enlargement* (Washington D.C.: The White House, 1995), i. Additionally, there is an argument to be made that the democratic peace theory also underpinned White House thinking in the decision to invade Iraq in 2003. There was an expectation that the creation of “An Iraq that is prosperous and free . . .” would not “war with, or abuse its neighbors . . . .” Please see, Catherine Dale, *Operation Iraqi Freedom: Strategies, Approaches and Issues For Congress*, (Washington D.C.: Congressional Research Service, 2008), 9.

warfare makes it nearly impossible for a state to succeed in achieving its overall war aims. This is true because military plans remain disconnected from political goals.

Western powers, and the United States in particular, need to think much more holistically about war, rather than managing the ends and means as two separate spheres, as has been happening. This requires equal attention to both spheres of war, destructive and constructive from the outset. Achieving this requires that military planners conceive of their already complex tasks in an even broader way, accounting for variables that exist far from the traditional military sphere of battlefield competence. Further, this also requires that civilian leadership develop a much fuller understanding of all aspects of military planning in order to effectively execute the duties of political oversight.

The recent lessons of Operation Iraqi Freedom and Operation Enduring Freedom have left strong impressions in the psyches of both politicians and military officers in the United States and Europe. This represents both a danger and an opportunity. The continuing difficulties associated with bringing both campaigns to a successful close lead to a understandable desire on the part of those countries involved to disengage from the combat and adopt a “case closed” view of the situation.

Closing the door on the past is a simple course of action politically speaking, but it ignores the opportunity to truly learn from the lessons identified as a result of the experiences. The danger stems from the completely understandable desire to “turn the page” and never truly evaluate and integrate the lessons of the past decade.

This appears to be happening as the Obama administration disengages from Iraq and plans the impending drawdown in Afghanistan. The January 2012 Defense Strategy states categorically, “… U.S. forces will no longer be sized to conduct large – scale, prolonged
The decision to turn away from large scale post bellum stability and reconstruction operations is understandable from a fiscal perspective. However, by ignoring the long-term issue, that of developing a stable state in the wake of conflict greatly increases the potential that conflict will reignite quickly and that yet another military intervention will follow closely on the heels of the original use of force.

Clean divisions between the “political” and “military” aspects of war are attractive in their simplicity and seemingly more consonant with the military subordination to civilian authority, which constitutes a foundational aspect of modern democracy. This notwithstanding, war has always required the need for integrated political military planning. Rose, Wilson and Iklé all have argued this. Further, Dobbins’ detailed recommendations about the time frames required to undertake successful nation-building reinforces the need for policy experts to have an integrated understanding of the nature of war and an appreciation for the mechanical and detailed requirements of holistic war planning.

Identifying, codifying and integrating the lessons of Iraq and Afghanistan is a necessary step to prevent repeating these lessons in future conflicts. Equally vital to this process is ensuring that lessons learned and best practices developed are integrated into military doctrine and political practice. This thesis has argued that jus post bellum is different than jus ad bellum and jus in bello. However, it has also argued that the three concepts are integrally related. Current practice in both political and military circles severs this fundamental connection. It must be remade.

Recommendation Two: Acknowledge the reality of “The Revised Pottery Barn Rule.”

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One of the principal conclusions of this thesis is that there is a non-legal expectation that any military intervention sanctioned by the UNSC or undertaken independently by western liberal democracies will conclude with a major reconstruction and rehabilitation effort.

This must be taken into account at the outset of any future intervention planning. Calculations for total costs and time required must factor in the rehabilitation phase. This thesis also argues that neutrality remains a viable option in the international community. Intervention remains a policy option, rather than a requirement. However, once intervention has occurred, rebuilding is expected.

Despite the recent experience of Afghanistan and Iraq, it appears as though NATO failed to grasp this reality with its latest intervention in Libya. Although NATO has been aiding the anti-Qaddafi rebels for months, the collapse of the regime finds the alliance without a plan for the aftermath. Following months of NATO involvement, The New York Times reports “... few among the Western countries and their allies anticipated the speed of the demise of the Qaddafi government, and they are now scrambling during the August vacation and the holy month of Ramadan to put together a post-conflict plan for Libya.”

This most recent example of military success without a post-war plan in Libya, along with the growing prospect for the same in Syria, underscores the need for implementation of both recommendations one and two. Clearly, the melding of the political and military aspects of the campaign did not occur, nor was a plan for post-conflict stabilization developed in advance of the actual requirement. Both glaring oversights in the political and military spheres provide yet another, more recent example of the need to adopt a holistic conception of *jus post bellum.*

**Recommendation Three: Always attempt to find multinational solutions.**

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It is not only imperative that the reconstruction and rehabilitation phase be part of the plan from the outset, it is also imperative to build the post-conflict coalition from the beginning. Dobbins argues multilateral nation-building projects are more complicated and costly to execute, but have a higher success rate overall than projects undertaken by a single state. Therefore, it is more likely that the project will actually receive adequate levels of funding and be seen through to ultimate success when the burden is shared among a larger number of states.

This is not to ignore the fact that multilateral operations are much more complicated and encumbered by the substantially increased number of political tethers emplaced by the participating national governments. Regardless of the reduced efficiency caused by the interplay of domestic and coalition politics however, the overall effectiveness of a multilateral operation is greater and the cost borne by each additional state is lower. Additionally, multinational operations also command a greater degree of legitimacy than those undertaken by a single state. Therefore, despite the inefficiencies, multinational operations are preferred.

**Recommendation Four: Establish order first.**

Patterson, Feldman and Ball each discuss the primacy of order in their work. Although each author has a slightly different take on the subject, the central message is clear. There is both a pragmatic requirement and an ethical duty for the occupier to first restore order in post-conflict society. Practically speaking, order is required to build the political and economic institutions

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579 Dobbins *America’s Role in Nation-Building*, xxv.

580 In Afghanistan in particular, the issue of “national caveats” (restrictions emplaced by national capitals on the types of missions and functions their forces were allowed to undertake) was a significant impediment to the smooth functioning of the NATO mission there. For further information on this, please see Vincent Moretti and Paul Belkins’ *NATO In Afghanistan: A Test of the Transatlantic Alliance* (Washington D.C.: Congressional Research Service, 2009).

that will allow for long-term stability to return in a post-conflict society. Ethically, Feldman argues, “. . . The first duty of nation building power, is to produce order in the very literal sense of monopolizing violence.” To have any chance of achieving *jus post bellum*, the first requirement for a intervening state or coalition is to ensure that basic order is returned within the occupied society. This seems so obvious as to not require stating. However, in post-war interventions, the (re-) establishment of order has either been taken for granted or ignored. It either never occurs (as in Somalia) or was not planned for (as in Iraq). As a result, the missions become vastly more difficult than originally conceived.

**Recommendation Five: Begin work on a “New Geneva Convention.”**

Orend has recommended that a “New Geneva Convention” be written in order to close the gaps in the existing laws of war and to codify the emerging legal requirements for *jus post bellum*. He argues that codifying a new Geneva Convention would focus international attention on doing something constructive and would elevate *jus post bellum*, out of abstract theory and into “. . . the concrete reality of global politics.”

He argues further than through the codification of *jus post bellum* all parties involved in a conflict would benefit. “Losers” would be assured they would be treated fairly, while “victors” would understand their legal rights and obligations.

Orend pays less attention to the specific issue of occupation law than other authors. However, existing occupation law does fall within the purview of issues encompassed within the broad idea of *jus post bellum*. Further, several authors express the degree to which occupation

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582 Feldman, *What We Owe Iraq*, 79.
584 Ibid.
585 Ibid., 211-212.
law with its embedded “principal of conservation” truly represents an anachronism within existing international law.\textsuperscript{586} Thus, paying careful and specific attention to revising the law of occupation as part of this effort would be a particularly useful undertaking.

However, it is highly unlikely that a new Geneva Convention could be codified in the current international legal paradigm. The appetite for such a major change does not currently exist. This notwithstanding, the attempt to write such a convention is not a useless undertaking. Rather, it would serve several purposes. First, it would capture and codify the \textit{ad hoc} work that has been accomplished through the series of UNSCRs regulating post-war and post-intervention occupying regimes. Second, it would also accomplish Stahn’s recommendation to catalog existing gaps and overlaps in international law.\textsuperscript{587} Third, it would expose the major areas political consensus and dissent surrounding the idea of \textit{jus post bellum}. Therefore, when future international events give this idea traction, the effort will already have begun.

This project could occur within the confines of a think tank or academia. It need not be undertaken as a governmentally sponsored project. Academic work does have standing within international law. \textit{The Statute of the International Court of Justice} defines four sources of international law. One of these is the ideas of scholars.\textsuperscript{588} Therefore, an attempt by legal scholars to flesh out legal criteria for \textit{jus post bellum} constitutes more than a mere academic exercise. It can be viewed as a law creating exercise as well.

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\textsuperscript{587} Stahn, “The Future of \textit{Jus Post Bellum}, 236.

\textsuperscript{588} \textit{The Statute of the International Court of Justice}, art. 38. This article lists one of the sources of international law as, “ . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”
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Final Thoughts:

The idea of *jus post bellum* is clearly a complex and controversial one around which no current consensus exists. Further, fleshing out the concept crosscuts ongoing academic debates in several different disciplines. First, it requires staking out a position among the major schools of international relations theory. Second, developing the concept requires taking a position on whether human rights or state sovereignty should prevail as the principal referent in international security studies. Third, it requires understanding the changing nature of warfare in the contemporary international environment. Each of these actions is requires a value judgment that cannot empirically be proven until after the fact. However, each of these judgments has significant impact on the conception of *jus post bellum* an author espouses.

This lack of consensus on whether *jus post bellum* belongs as third strand of the just war tradition or whether it merely constitutes a passing fad is to be expected given the newness of the subject. The topic is a relatively new arrival in the circles of academic debate, having only appeared in the last decade. However, the stakes involved are high, as there are implications for the conduct of warfare, as well as for criteria for humanitarian interventions into ongoing conflicts. Given the relative importance of the topic, vigorous debate surrounding its correct incarnation is useful and to be expected.

The years since the collapse of the Soviet Union have been particularly turbulent and there is no reason to believe that the trend will abate. Thus, choices between state sovereignty and human rights will continue to be required. Further, the gaps between international humanitarian law (law of war) and the international human rights law will continue to be highlighted, as will the completely *ad hoc* fashion in which these gaps are overcome.
This thesis approached the idea of *just post bellum* from the perspective of changing norms. Specifically, it highlighted the current tension between a Kantian conception of the international system and a Lockean one. This tension is so evident because the international system exhibits characteristics of both cultures. Recognition of this “dual personality” is essential as policy-makers and scholars continue to define the concept of justice after war. State sovereignty is eroding, yet states alone maintain the power to force change and protect human rights in the international system. Recognition of the dual referent for security – both state and human – is critical to developing and being able to actually implement a concept of *jus post bellum* that could be considered legitimate in current international society.
Selected Bibliography


