

# Justice after War

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Sadly, there are few restraints on the endings of wars. There has never been an international treaty to regulate war's final phase, and there are sharp disagreements regarding the nature of a just peace treaty. There are, by contrast, restraints aplenty on starting wars, and on conduct during war. These restraints include: political pressure from allies and enemies; the logistics of raising and deploying force; the United Nations, its Charter and Security Council; and international laws like the Hague and Geneva Conventions. Indeed, in just war theory—which frames moral principles to regulate wartime actions—there is a robust set of rules for resorting to war (*jus ad bellum*) and for conduct during war (*jus in bello*) but not for the termination phase of war.<sup>1</sup> Recent events in Afghanistan, and the “war against terrorism,” vividly underline the relevance of reflecting on this omission, and the complex issues related to it.

The international community should remedy this glaring gap in our ongoing struggle to restrain warfare. The following facts bear this out:

- Recent armed conflicts—in the Persian Gulf, Bosnia, Rwanda, and Kosovo—demonstrate the difficulty, and illustrate the

importance, of ending wars in a full and fair fashion. We know that when wars are wrapped up badly, they sow the seeds for future bloodshed.<sup>2</sup>

- To allow unconstrained war termination is to allow the winner to enjoy the spoils of war. This is dangerously permissive, as winners have been known to exact peace terms that are draconian and vengeful. The Treaty of Versailles, terminating World War I, is often mentioned in this connection.<sup>3</sup>

- Failure to regulate war termination may prolong fighting on the ground. Since they have few assurances regarding the nature of the settlement, belligerents will be sorely tempted to keep using force to jockey for position. Many observers felt that this reality plagued the Bosnian civil war, which saw many failed negotiations and a three-year “slow burn” of continuous violence as the very negotiations took place.<sup>4</sup>

- Allowing war termination to be determined without normative restraints leads to inconsistency and confusion. First, how can we try to regulate the first two phases of war—the beginning and middle—yet not the end? Second, the lack of established norms to guide the construction of peace treaties leads to patchwork “solutions,” mere ad hoc

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<sup>1</sup> On just war theory in general, see Michael Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books, 2000); and Brian Orend, *Michael Walzer on War and Justice* (Cardiff: University of Wales, 2000).

<sup>2</sup> David E. Decosse, ed., *But Was It Just? Reflections on the Morality of the Persian Gulf War* (New York: Dou-

bleday, 1992); David Rieff, *Slaughterhouse: Bosnia and the Failure of the West* (New York: Simon and Schuster, 1995); Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995); and Brian Orend, “Crisis in Kosovo: A Just Use of Force?” *Politics* 19, no. 3 (1999), pp. 125-30.

<sup>3</sup> Manfred F. Boemeke, Gerald D. Feldman, and Elisabeth Glaser, eds., *The Treaty of Versailles: A Reassessment after 75 Years* (Cambridge: Cambridge University Press, 1998).

<sup>4</sup> Rieff, *Slaughterhouse*.

arrangements that may not meet well-considered standards of prudence and justice.

Peace treaties should still, of course, remain tightly tailored to the historical realities of the particular conflict in question. But admitting this is *not* to concede that the search for general guidelines, or universal standards, is futile or naïve. There is no inconsistency, or mystery, in holding particular actors in complex local conflicts up to more general, even universal standards of conduct. Judges and juries do that daily, evaluating the factual complexities of a given case in light of general principles. We should do the same regarding war termination.

This article will consider what participants should do as they move to wrap up a war. It will do so while drawing on the resources contained within the just war tradition, particularly its reworking offered by Michael Walzer.<sup>5</sup> Since just war theory has played a constructive role thus far in its influence on political and legal discourse concerning launching and carrying out war, there is reason to believe it has light to shed on war termination. My goal is to construct a general set of plausible principles to guide communities seeking to resolve their armed conflicts fairly.

## THE ENDS OF A JUST WAR

The first step is to answer the question: What may a participant rightly aim for with regard to a just war? What are the goals to be achieved by the settlement of the conflict? We need some starting assumptions to focus our thoughts on these issues. First, this article will consider classical cases of interstate armed conflict to provide a quicker, cleaner route to the general set of postwar principles sought after. I hope to show that the resulting set can then be applied more broadly, not only to civil wars but also to unconven-

tional armed conflicts involving complex mixtures of state and nonstate actors. For instance, I believe the forthcoming principles are as meaningful for the current “war against terrorism” as they were for World War II. Next, the set of postwar principles is being offered as guidance to those participants who want to end their wars in a fair, justified way. Not all participants do, of course, and to the extent they fail to do so, they act unjustly during the termination phase. A related assumption is that there is no such thing as “victor’s justice.” The raw fact of military victory in war does not of itself confer moral rights upon the victor, nor duties upon the vanquished. In my judgment, it is only when the victorious regime has fought a just and lawful war, as defined by international law and just war theory, that we can speak meaningfully of rights and duties, of both victor and vanquished, at the conclusion of armed conflict.<sup>6</sup>

Such a just and lawful war is defined by just war theorists as one that was begun for the right reasons, and that has been fought appropriately. The resort to war was just (*jus ad bellum*), and only the right methods were used during the war (*jus in bello*). A war begun for the right reasons is a war fought in

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<sup>5</sup> This is not to deny the importance of the robust conflict-resolution literature. Much of that literature is relevant to the present concern, but not much of it is located within the explicitly *ethical* values and commitments of just war theory, whereas this piece is. For more on conflict resolution in general, see Stephen J. Cimbala, ed., *Strategic War Termination* (New York: Praeger, 1986); Paul R. Pillar, *Negotiating Peace: War Termination as a Bargaining Process* (Princeton: Princeton University Press, 1983); Stuart Albert and Edward Luck, eds., *On the Endings of Wars* (Port Washington, N.Y.: Kennikat Press, 1980); A. J. P. Taylor, *How Wars End* (London: Hamilton, 1985); and Fen Osler Hampson, *Nurturing Peace: Why Peace Settlements Succeed or Fail* (Washington, D.C.: U.S. Institute of Peace, 1996).

<sup>6</sup> Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford: Oxford University Press, 1999).

response to aggression, defined by Walzer as “any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another.”<sup>7</sup> Such state rights are themselves founded, ultimately, upon individual human rights to life and liberty. The most obvious example of an act of international aggression would be an armed invasion by one state bent on taking over another, much as Iraq did to Kuwait in August 1990. But this requirement of just cause, in terms of resisting aggression, is not the only rule just war theorists insist on prior to beginning war. They also stipulate that the war in question be launched as a last resort, be publicly declared by a proper authority, have some probability of success, be animated by the right intention of resisting aggression, and also be expected to produce at least a proportionality of benefits to costs. These general norms have worked their way into various pieces of international law.<sup>8</sup>

A war begun justly must also be fought appropriately. For just war theorists, this means that a state’s armed forces obey at least three rules of right conduct: they must discriminate between combatant (military) and noncombatant (civilian) targets and direct their armed force only at the former; they may attack legitimate military targets only with proportionate force; and they are not to employ methods which, in Walzer’s words, “shock the moral conscience of mankind.” Examples of such heinous methods include the deployment of weapons of mass destruction, and the use of mass rape campaigns as instruments of war. These principles of *jus in bello*, alongside those of *jus ad bellum*, offer a coherent set of plausible values to draw on while developing an account of just war settlement.<sup>9</sup>

It is often contended that the just goal of a just war is the proverbial status quo ante bellum: the victorious regime ought simply

to reestablish the state of affairs that obtained before the war broke out. Restore the equilibrium disturbed by the aggressor, traditionalists advise. As Walzer points out, however, this assertion makes little sense: one ought not to aim for the literal restoration of the status quo ante bellum because that situation was precisely what led to war in the first place. Also, given the sheer destructiveness of war, any such literal restoration is empirically impossible. War simply changes too much. So the just goal of a just war, once won, must be a more secure and more just state of affairs than existed prior to the war. This condition Walzer refers to as one of “restoration plus.”<sup>10</sup> What might such a condition be?

The general answer is a *more secure possession of our rights*, both individual and collective. The aim of a just and lawful war is the resistance of aggression and the vindication of the fundamental rights of political communities, ultimately on behalf of the human rights of their individual citizens. The overall aim is, in Walzer’s words, “to reaffirm our own deepest values” with regard to justice, both domestic and international. It is not implausible to follow John Rawls in claiming that, in our era, no deeper, or more basic, political values exist than those human rights that justify a reasonable set of social institu-

<sup>7</sup> Walzer, *Just and Unjust Wars*, p. 62.

<sup>8</sup> For more on *jus ad bellum*, see Walzer, *Just and Unjust Wars*, pp. 3-33 and 51-125; and David Luban, “Just War and Human Rights,” *Philosophy and Public Affairs* 9 (1980), pp. 160-81. On law, see Roberts and Guelff, eds., *Documents on the Laws of War*.

<sup>9</sup> For more on *jus in bello*, see Walzer, *Just and Unjust Wars*, pp. 34-50 and 127-224 (quote at p. 107); Thomas Nagel, “War and Massacre,” *Philosophy and Public Affairs* 1 (1972), pp. 123-45; Robert K. Fullinwider, “War and Innocence,” *Philosophy and Public Affairs* 5 (1975), pp. 90-97; and Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994).

<sup>10</sup> Walzer, *Just and Unjust Wars*, pp. xx, 119.

tions and ultimately enable a satisfying political existence.<sup>11</sup>

From this general principle, that the proper aim of a just war is the vindication of those rights whose violation grounded the resort to war in the first place, more detailed commentary needs to be offered. For what does such “vindication” of rights amount to: what does it include; what does it permit; and what does it forbid? The last aspect of the question seems the easiest to answer, at least in abstract terms: The principle of rights vindication forbids the continuation of the war after the relevant rights have, in fact, been vindicated. To go beyond that limit would itself become aggression: men and women would die for no just cause. This bedrock limit to the justified continuance of a just war seems required in order to prevent the war from spilling over into something like a crusade, which demands the utter destruction of the demoralized enemy. The very essence of justice of, in, and after war is about there being firm limits, and constraints, upon its aims and conduct. Unconstrained fighting, with its fearful prospect of degenerating into barbarity, is the worst-case scenario—regardless of the values for which the war is being fought.

This emphasis on the maintenance of limits in wartime has the important consequence that there can be no such thing as a morally mandated unconditional surrender. This is so because, as Walzer observes, “conditions inhere in the very idea of international relations, as they do in the idea of human relations.” The principles vindicated successfully by the just state themselves

impose outside constraints on what can be done to an aggressor following its defeat. This line of reasoning might spark resistance from those who view favorably the Allied insistence on unconditional surrender during the closing days of World War II. But we need to distinguish here between rhetoric and reality. The policy of unconditional surrender followed by the Allies was not genuinely unconditional; there was never any insistence that the Allies be able to do whatever they wanted with the defeated nations. Churchill himself, for example, said: “We are bound by our own consciences to civilization. [We are not] entitled to behave in a barbarous manner.”<sup>12</sup> At the very most, the policy the Allies pursued was genuinely unconditional vis-à-vis the governing regimes of the Axis powers, but not vis-à-vis the civilian populations in those nations.

Such a discriminating policy on surrender may be defensible in extreme cases, involving truly abhorrent regimes, but is generally impermissible. For insistence on unconditional surrender is disproportionate and will prolong fighting as the defeated aggressor refuses to cave in, fearing the consequences of doing so. Walzer believes this was the case during the Pacific War, owing to America’s insistence on Japan’s unconditional surrender. It is thus the responsibility of the victor to communicate clearly to the losing aggressor its sincere intentions for postwar settlement, intentions that must be consistent with the other principles of postwar justice here developed.<sup>13</sup>

What does the just aim of a just war—namely, rights vindication, constrained by a proportionate policy on surrender—precisely include or mandate? The following seems to be a plausible list of propositions regarding what would be at least permissible with regard to a just settlement of a just war:

<sup>11</sup> Walzer, *Just and Unjust Wars*, pp. 110, 117, 123; John Rawls, “The Law of Peoples,” in Steven Shute and Susan Hurley, eds., *On Human Rights* (New York: Basic Books, 1993), pp. 40-80.

<sup>12</sup> Churchill quoted in Walzer, *Just and Unjust Wars*, p. 112.

<sup>13</sup> Walzer, *Just and Unjust Wars*, pp. 113, 263-68.

• The aggression needs, where possible and proportional, to be rolled back, which is to say that the unjust gains from aggression must be eliminated. If, to take a simple example, the aggression has involved invading and taking over a country, then justice requires that the invader be driven out of the country and secure borders reestablished. The equally crucial corollary to this principle is that the victim of the aggression is to be reestablished as an independent political community, enjoying political sovereignty and territorial integrity.

• The commission of aggression, as a serious international crime, requires punishment in two forms: compensation to the victim for at least some of the costs incurred during the fight for its rights; and war crimes trials for the initiators of aggression. I will later argue that these are not the only war crimes trials required by justice in war's aftermath.

• The aggressor state might also require some demilitarization and political rehabilitation, depending on the nature and severity of the aggression it committed and the threat it would continue to pose in the absence of such measures. "One can," Walzer avers, "legitimately aim not merely at a successful resistance but also at some reasonable security against future attack."<sup>14</sup> The question of forcible, forward-looking rehabilitation is one of the most controversial and interesting surrounding the justice of settlements.

Metaphorically, one might say that a just war, justly prosecuted, is something like radical surgery: an extreme yet necessary measure to be taken in defense of fundamental values, like human rights, against serious, lethal threats to them, such as violent aggression. And if just war, justly prosecuted, is like radical surgery, then the justified conclusion to such a war can only be akin to

the rehabilitation and therapy required after the surgery, in order to ensure that the original intent—namely, defeating the threat and protecting the rights—is effectively secured and that the patient is materially better off than before the exercise. The "patient" in this case is, in the first instance, the victim(s) of aggression. Secondly, the term refers to the international community generally—including even the aggressor(s) or at least the long-term interests of the civilians in aggressor(s).<sup>15</sup>

Sufficient comment has already been offered on what the first proposition requires and why: aggression, as a crime that justifies war, needs to be rolled back and have its gains eliminated as far as is possible and proportional; and the victim of aggression needs to have the objects of its rights restored. This principle seems quite straightforward, one of justice as rectification. But what about compensation, "political rehabilitation," and war crimes trials?

## COMPENSATION AND DISCRIMINATION

Since aggression is a crime that violates important rights and causes much damage, it is reasonable to contend that, in a classical context of interstate war, the aggressor nation, "Aggressor," owes some duty of compensation to the victim of the aggression, "Victim." This is the case because, in the absence of aggression, Victim would not have to reconstruct itself following the war, nor

<sup>14</sup> Walzer, *Just and Unjust Wars*, p. 118.

<sup>15</sup> This image of just war as radical surgery, and just settlement as the subsequent therapy, came to mind while reading Nissan Oren, "Prudence in Victory," in Nissan Oren, ed., *Termination of War: Processes, Procedures and Aftermaths* (Jerusalem: Hebrew University Press, 1982), pp. 147-64.

would it have had to fight for its rights in the first place, with all the death and destruction that implies. Walzer says that the deepest nature of the wrong an aggressor commits is to make people fight for their rights, that is, make them resort to violence to secure those things to which they have an elemental entitlement, and which they should enjoy as a matter of course. To put the issue bluntly, Aggressor has cost Victim a considerable amount, and so at least some restitution is due. The critical questions are how much compensation, and by whom in Aggressor is the compensation to be paid out?

The “how much” question, clearly, will be relative to the nature and severity of the act of aggression itself, alongside considerations of what Aggressor can reasonably be expected to pay. Care needs to be taken not to bankrupt Aggressor’s resources, if only for the reason that the civilians of Aggressor still, as always, retain their claims to human rights fulfillment, and the objects of such rights require that resources be devoted to them.<sup>16</sup> There needs, in short, to be an application of the principle of proportionality here. The compensation required may not be draconian in nature. We have some indication, from the financial terms imposed on Germany at the Treaty of Versailles, that to beggar thy neighbor is to pick future fights.<sup>17</sup>

This reference to the needs of the civilians in Aggressor gives rise to important consid-

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<sup>16</sup> James Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987).

<sup>17</sup> Boemeke, Feldman, and Glaser, eds., *The Treaty of Versailles*.

<sup>18</sup> One of my reviewers concurred with Walzer, drawing on the analogy of shareholders being collectively responsible, at least in financial terms, for corporate wrongdoing even when such was committed by management only. But I’m not sure that analogy holds: shareholders lose money they risked voluntarily in pursuit of capital gains, whereas citizenship is less voluntary and far weightier.

erations of discrimination with regard to answering the “from whom” question: When it comes to establishing terms of compensation, care needs to be taken by the victorious Victim, and/or any third-party “Vindicators” who fought on behalf of Victim, not to penalize unduly the civilian population of Aggressor for the aggression carried out by their regime. This entails, for example, that any monetary compensation due to Victim ought to come, first and foremost, from the personal wealth of those political and military elites in Aggressor who were most responsible for the crime of aggression. Walzer seems to disagree when he suggests that such a discriminating policy on reparations “can hardly” raise the needed amount. But he ignores the fact that, historically, those who launch aggressive war externally have very often abused their power internally to accumulate personal fortunes. In light of this supposed shortfall, Walzer argues that, since “reparations are surely due the victims of aggressive war,” they should be paid from the taxation system of the defeated Aggressor. There ought to be a kind of postwar poll tax on the population of Aggressor, with the proceeds forwarded to Victim. In this sense, he says, “citizenship is a common destiny.”<sup>18</sup> I believe, however, that this fails to respect the discrimination principle during war termination. Though Walzer insists that “the distribution of costs is not the distribution of guilt,” it is difficult to see what that is supposed to mean here: Why not respond by asking why civilians should be forced, through their tax system, to pay for the damage if they are not in some sense responsible for it? Respect for discrimination entails taking a reasonable amount of compensation only from those sources that can afford it *and* that were materially linked to the aggression in a morally culpable way.

If such reparations “can hardly” pay for the destruction Aggressor meted out on Victim, then that fiscal deficiency does not somehow translate into Victim’s moral entitlement to tax everyone in Aggressor. The resources for reconstruction simply have to be found elsewhere.<sup>19</sup>

An application to recent events can be seen through consideration of the following question: Should the United States levy a postwar poll tax on the citizens of Afghanistan to increase the funds available to compensate and care for those who lost loved ones during the 9-11 strikes, or else to rebuild New York’s financial district? The principles just developed would seem to argue against such a tax, as there is a serious question of affordability in Afghanistan and an even sharper one regarding responsibility, as the available evidence points to a collusion between the now-routed Taliban regime and the al-Qaeda network as the source of the attacks. Commendably, there has been little talk of any such punitive measure on Afghanistan, and Americans have instead turned toward each other to raise the needed reconstruction resources. Indeed, it is Afghanistan’s interim government that has formally requested American resources to help rebuild its broken social and physical infrastructure.

A further implication of respect for discrimination in settlements is a ban on sweeping socioeconomic sanctions. The reasoning is clear: Sanctions that cut widely and deeply into the well-being of the civilian population are not only punitive, they surely end up punishing some who do not deserve such treatment. Such sanctions are properly condemned as inappropriately targeted and morally wrongheaded. Great controversy, of course, surrounds the issue of whether American-led sanctions on Iraq, following the Persian Gulf War, count as such sanctions or not. There is a vocal and apparently grow-

ing community of thought that commends instead sanctions that target elites, for instance by freezing personal assets, blocking weapons trade, and banning foreign travel.<sup>20</sup> The assets of some organizations alleged to be involved in terrorism have been frozen since 9-11; it will be interesting to see whether further sanctions in the war against terrorism will be applied, for instance, to entire countries, and, if so, what kind.

## REHABILITATION

The notion under this heading is that, in the postwar environment, Aggressor may be required to demilitarize, at least to the extent that it will not pose a serious threat to Victim—and other members of the international community—for the foreseeable future. The appropriate elements of such demilitarization will clearly vary with the nature and severity of the act of aggression, along with the extent of Aggressor’s residual military capabilities following its defeat. But they may, and often do, involve: the creation of a demilitarized “buffer zone” between Aggressor and Victim (and any Vindicator), whether it be on land, sea or air; the capping of certain aspects of Aggressor’s military capability; and especially the destruction of Aggressor’s weapons of mass destruction. Once more, proportionality must be brought to bear upon this general principle: The regime in Aggressor may not be so

<sup>19</sup> Walzer, *Just and Unjust Wars*, p. 297.

<sup>20</sup> See Ramsey Clark, *The Children are Dying: The Impact of Sanctions on Iraq* (New York: World View Forum, 1996); Anthony Arnove and Ali Abunimah, eds., *Iraq Under Siege: The Deadly Impact of Sanctions and War* (London: South End Press, 2000); Albert Pierce, “Just War Principles and Economic Sanctions,” *Ethics & International Affairs* 10 (1996), pp. 99-113; and the multi-essay exchange on the issue between Joy Gordon and George Lopez, *Ethics & International Affairs* 13 (1999), pp. 123-50.

demilitarized as to jeopardize its ability to fulfill its function of maintaining law and order within its own borders, and of protecting its people from other countries who might be tempted to invade if they perceive serious weakness in Aggressor. Another way this requirement could be met would be for the victors to provide reliable security guarantees to the people of Aggressor.

The imposition of some substantial requirement of political rehabilitation seems the most serious and invasive measure permitted a just regime, following its justified victory over Aggressor. As Walzer asserts, the “outer limit” of any surrender by Aggressor to Victim, and any Vindicator, is the construction and maintenance of a new kind of domestic political regime within Aggressor, one more peaceable, orderly, and pro-human rights in nature. It is probably correct to agree with him, however, when he cautions that, as a matter of proportionality, such measures are in order only in the most extreme cases, such as Nazi Germany at the close of World War II.<sup>21</sup>

If the actions of Aggressor during the war were truly atrocious, or if the nature of the regime in Aggressor at the end of the war is still so heinous that its continued existence poses a serious threat to international justice and human rights, then—and only then—may such a regime be forcibly dismantled and a new, more defensible regime established in its stead. But we should be quick to note, and emphasize, that such construction necessitates an additional commitment on the part of Victim and any Vindicators to assist the new regime in Aggressor with this enormous task of political restructuring. This assistance would be composed of seeing such “political therapy” through to a reasonably successful conclusion—which is to say, until the new regime can stand on its own, as it were, and fulfill its core functions

of providing domestic law and order, human rights fulfillment, and adherence to the basic norms of international law, notably those banning aggression. The rehabilitations of the governing structures of both West Germany and Japan following World War II, largely by the United States, seem quite stellar and instructive examples in this regard.<sup>22</sup> They also illustrate the profound and costly commitments that must be borne by any Victim or Vindicator seeking to impose such far-reaching and consequential terms on the relevant Aggressor following defeat.

One open question concerns whether we “probably” should agree with Walzer that rehabilitation be reserved only for the most grave cases of aggression, like Nazi Germany. Why shouldn’t we impose at least some rehabilitative measures on *any* aggressor? Given the serious nature of any act of aggression—so serious that, by Walzer’s own lights, it justifies war—why should we refrain from imposing political reform upon the defeated aggressor, unless its regime is as bad as that of the Nazis? After all, the immediate postwar environment would seem the perfect opportunity to pursue such reform, and presumably it would contribute to a more peaceful world order in the long run. The German and Japanese examples might even be cited as evidence in favor of this. Some cited such cases in 1991, while arguing that the allies in the Gulf War should have

<sup>21</sup> Walzer, *Just and Unjust Wars*, pp. 113, 119, 267-68.

<sup>22</sup> Leon V. Sigal, *Fighting to the Finish: The Politics of War Termination in the United States and Japan, 1945* (Ithaca: Cornell University Press, 1989); Howard B. Schonberger, *Aftermath of War: Americans and the Remaking of Japan, 1945-1952* (Ohio: Kent State University Press, 1989); Michael Schaller, *The American Occupation of Japan* (Oxford: Oxford University Press, 1987); and Eugene Davidson, *The Death and Life of Germany: An Account of the American Occupation* (St. Louis: University of Missouri Press, 1999).

moved on to change the regime in Iraq, and not “merely” to have pushed it out of Kuwait. The reason Walzer hesitates to affirm this more expansive view on forcible rehabilitation is because of the great value he attaches to political sovereignty, to shared ways of life, and to free collective choice—even if these end up failing to express the degree of domestic human rights fulfillment that we in Western liberal democracies might prefer. He cautions against “the terrible presumption” behind external powers’ deliberately changing domestic social institutions, even in aggressors.<sup>23</sup>

My judgment is that Walzer’s caution here may be too cautious, and that his reluctance to permit institutional restructuring may reveal the limitations of his strong commitment to national sovereignty. I suggest that there should be a presumption *in favor of permitting rehabilitative measures* in the domestic political structure of a defeated aggressor. But such rehabilitation does need to be proportional to the degree of depravity inherent in the political structure itself. This way, complete dismantling and constitutional reconstruction—like the sea change from totalitarian fascism to liberal democracy—will probably be reserved for exceptional cases similar to those Walzer cites. But comparatively minor renovations—like human rights education programs, police and military retraining programs, reform of the judiciary and bureaucracy into accountable institutions, external verification of subsequent election results, and the like—are permitted in *any* defeated aggressor, subject to need and proportionality. It is worthy of notice that many of the most recent peace treaties—like that ending the Bosnian civil war—have included this more permissive principle in favor of political rehabilitation. Political activity here seems to be outpacing political

theory, leaving some of the strictures of sovereignty behind in favor of augmenting adherence to international values.<sup>24</sup>

It is interesting to reflect on Afghanistan in connection with these issues. A more representative interim government has been formed in the Taliban’s wake, and there has been talk of partially secularizing and modernizing the education system, for instance by permitting the participation of girls and women. Foreign peacekeepers, though, currently serve as the effective enforcers of law and order, external humanitarian aid is still needed simply to feed people, and much of the country’s infrastructure has been ruined—by conflicts that started well before the U.S.-led campaign. Moreover, the exact details regarding the move from a merely “interim” government to a more stable system have yet to be clarified, and the support of some important communal leaders in parts of the country has yet to be secured.

We should also expect, to return to rehabilitation in general, a formal apology by Aggressor to Victim and any Vindicator for its aggression. While it is right to agree with Walzer that “official apologies somehow seem an inadequate, perhaps even a perfunctory, way” of atoning for aggression,<sup>25</sup> this is no reason to rule such an apology out of the terms of the peace. For even though formal apologies cannot of themselves restore territory, revive casualties, or rebuild

<sup>23</sup> Walzer, *Just and Unjust Wars*, pp. xvii–xx.

<sup>24</sup> On Bosnia, see Rieff, *Slaughterhouse*; and the text of the Dayton Peace Agreement itself, at [www.state.gov/www/regions/eur/bosnia/bosagree.html](http://www.state.gov/www/regions/eur/bosnia/bosagree.html), which ended the war in November 1995. See also the text of the Ahtisaari Accord, at [www.nato.int/usa/policy/d990609.htm](http://www.nato.int/usa/policy/d990609.htm), Serbia’s initial agreement in May 1999 to NATO’s terms on ending its armed intervention in favor of the Kosovars. Also relevant is Alcira Kreimer et al., *Bosnia and Herzegovina: Post-Conflict Reconstruction* (Washington, D.C.: World Bank, 2000); and Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

<sup>25</sup> Walzer, “Untitled,” *Dissent* (1995), p. 330.

infrastructure, they do mean something real to us. If not, why do formal apologies, and victims' campaigns to secure such apologies, generate considerable political and media attention? If not, why do informed people know that Germany has apologized profusely for its role in World War II whereas Japan has hardly apologized at all? Walzer must concede that we expect wrongdoers eventually to admit their wrongdoing and to express their regret for it. We feel that victims of wrongdoing are owed that kind of respect and that aggressors must at least show recognition of the moral principles they violated. Apologies are a nontrivial aspect of a complete peace treaty.<sup>26</sup>

This perspective on rehabilitation—calling for disarmament, institutional reform, political transformation, infrastructure investments, and official apologies—brings into focus important questions. Does it follow from the above that the imposition of rehabilitation on an aggressor is itself a legitimate war aim? Can a just state set out, from the start of the war, not only to vindicate its violated rights but, in addition, to impose institutional therapy upon the aggressor? If so, what does that imply in terms of the use of force *during* war, since being in a position to impose institutional therapy after the war is at least linked to, and may even depend on, the achievement of a certain degree of military superiority at war's end? The therapy requires the strength to see it through.<sup>27</sup> My sense is that the imposition of institutional therapy on an aggressor is consistent with, even implied by, the overall goal of a justified war argued for previously, namely, rights vindication constrained by a proportionate policy on surrender. The therapy is justly invoked when required to prevent future aggression and to enable the defeated community to meet international commit-

ments to law and order, and basic human rights. In terms of war fighting, having rehabilitation as a war end does not somehow diminish the responsibility to fight in accord with the *jus in bello* rules of right conduct. The importance of the end does not lessen the constraints just communities face when they vindicate their rights by force. Will insistence on rehabilitation as part of war settlement itself prolong the fighting? While it might do so as a matter of fact, relative to a less stringent or unjust settlement offer, seeing it through is not wrong *provided* the fighting continues to respect *jus in bello*. The duty falls on Aggressor to agree to reasonable terms of rehabilitation, not on Victim/Vindicator to avoid seeking those means necessary to secure adherence to them.

It is an implication of this discussion that the three sets of just war principles—of, in, and after war—must not be applied sequentially as each phase arises but, rather, considered together right from the start. There needs to be a consistent commitment that encompasses, from the outset, all three stages of a military engagement. Potential participants in armed conflict should consider in advance whether it is likely that the requirements of all three sets of just war principles can be satisfied prior to engaging in political violence.<sup>28</sup>

## WAR CRIMES TRIALS

This leaves the vexed topic of war crimes trials, perhaps the one issue of justice after war that has already received searching attention. The normative need for such trials follows from Walzer's dictum: "There can be no

<sup>26</sup> Walzer, *Just and Unjust Wars*, p. 20.

<sup>27</sup> I owe these questions to Michael Walzer.

<sup>28</sup> Christian Barry rightly pushed me to point this out.

justice in war if there are not, ultimately, responsible men and women.”<sup>29</sup> Individuals who play a prominent role during wartime must be held accountable for their actions and what they bring about. There are, of course, two broad categories of war crimes: those that violate *jus ad bellum* and those that violate *jus in bello*.

*Jus ad bellum* war crimes have to do with “planning, preparing, initiating and waging” aggressive war. Responsibility for the commission of any such crime falls on the shoulders of the political leader(s) of the aggressor regime. Such crimes, in the language of the Nuremberg prosecutors, are “crimes against peace.”<sup>30</sup> What this principle entails is that, subject to proportionality, the leaders of Aggressor are to be brought to trial before a public and fair international tribunal and accorded full due process rights in their defense. Why subject this principle of punishment to proportionality constraints? Why concur with Walzer when he says that “it isn’t always true that their leaders ought to be punished for their crimes?”<sup>31</sup> The answer is that sometimes such leaders, in spite of their moral decrepitude, retain considerable popular legitimacy, and thus bringing them to trial could seriously destabilize the polity within Aggressor. NATO forces, for example, held off for a long time on the seizure of prominent persons charged with war crimes in the former Yugoslavia, presumably for reasons including this one. Care needs to be taken, as always, that appeal to proportionality does not amount to rewarding aggressors, or to letting them run free and unscathed despite their grievous crimes. Yet this care does not vitiate the need to consider the destruction and suffering that might result from adhering totally to what the requirements of justice as retribution demand.

Should political leaders on trial for *jus ad bellum* violations be found guilty, through a public and fair proceeding, then the court is at liberty to determine a reasonable punishment, which will obviously depend upon the details of the relevant case. Perhaps the punishment will only consist of penalizing the leaders financially for the amount of compensation owed to Victim, as previously discussed. Or perhaps, should the need for political rehabilitation be invoked, such leaders will need to be stripped of power and barred from political participation, or even jailed. Some figures in the Bosnian Serb community were, for instance, barred from seeking office in the first postwar election.<sup>32</sup> It is not possible, a priori, to stipulate what exactly is required with regard to such personal punishments. The point here is simply that the principle itself, of calling those most responsible for the aggression to task for their crimes, must be respected as an essential aspect of justice after war. It is relevant to add that the actual enforcement of this principle might constitute a nontrivial deterrent to future acts of aggression on the part of ambitious heads of state. If such figures have good reason to believe that they will themselves, personally, pay a price for the aggression they instigate and order, then perhaps they will be less likely to undertake such misadventures in the first place.

Important progress has recently been made on this front. First, the former prime minister of Rwanda in late 1998 was found guilty of war crimes and crimes against

<sup>29</sup> Walzer, *Just and Unjust Wars*, p. 288. See also W. Michael Reisman and Chris T. Antoniou, eds., *The Laws of War* (New York: Vintage, 1994), pp. 317-405.

<sup>30</sup> Walzer, *Just and Unjust Wars*, pp. 292-301.

<sup>31</sup> *Ibid.*, p. 123.

<sup>32</sup> The Dayton Peace Agreement, [www.state.gov/www/regions/eur/bosnia/bosagree.html](http://www.state.gov/www/regions/eur/bosnia/bosagree.html).

humanity in connection with the brutal civil war that consumed that country in the summer of 1994. Moreover, Serbian president Slobodan Milosevic was formally indicted by an international tribunal for committing war crimes in May 1999, the first time a *sitting* head of state has faced such a charge. In June 2001, after losing power, Milosevic was taken under arrest and transported to The Hague for trial.<sup>33</sup>

*Jus ad bellum* war crimes trials are not the only ones mandated by international law and just war theory: attention must also, in the aftermath of conflict, be paid to trying those accused of *jus in bello* war crimes. Such crimes include: deliberately using indiscriminate or disproportionate force; failing to take due care to protect civilian populations from lethal violence; using weapons that are themselves intrinsically indiscriminate and/or disproportionate, such as those of mass destruction; employing intrinsically heinous means, like rape campaigns; and treating surrendered prisoners of war in an inhumane fashion, for example, torturing them. Primary responsibility for these war crimes must fall on the shoulders of those soldiers, officers, and military commanders who were most actively involved in their commission. Officers and commanders carry considerable moral burdens of their own during war time. They are duty-bound not to issue orders that violate any aspect of the laws of war. Furthermore, they must plan military campaigns so that foreseeable civilian casualties are minimized, and must teach and train their soldiers not only about combat but also about the rules of just war theory and the laws of armed conflict.<sup>34</sup>

Something of note here is that, unlike *jus ad bellum* war crimes, *jus in bello* war crimes can be, and usually are, committed by all sides in the conflict. So, care needs to be taken that Victim and any Vindicator avoid

the very tempting position of punishing only *jus ad bellum* war crimes. In order to avoid charges of applying a double standard and exacting revenge, the justified side must—despite the justice of its cause in fighting—also be willing to submit members of its military for the commission of *jus in bello* war crimes to an impartially constructed international tribunal. We know that, in 1998, the international community voted in Rome to establish at The Hague a permanent court for the prosecution of war crimes and other crimes against humanity. Ratification of the Treaty of Rome is close at hand, and before the end of 2002 an important new international institution should be born.

## PUBLICITY

Do the terms of the settlement, as thus far discussed, need to be public? On the one hand, war settlements often exert deep impact on people's lives. They are thus entitled to know the substance of peace settlements, and especially how such are predicted to affect them. Immanuel Kant, for one, was vehement about this publicity requirement in his famous writings on war.<sup>35</sup> But someone might challenge this publicity principle, for instance, by citing a counterexample. We know that part of the reason why the Soviet Union backed down during the Cuban Missile Crisis was

<sup>33</sup> For more on war crimes trials, see Reisman and Antoniou, eds., *The Laws of War*, pp. 317-405. See also Juan E. Méndez, "National Reconciliation, Transnational Justice, and the International Criminal Court," pp. 25-44, and Thomas Pogge, "Achieving Democracy," pp. 3-23, both in *Ethics & International Affairs* 15, no. 1 (2001).

<sup>34</sup> Walzer, *Just and Unjust Wars*, pp. 304-28.

<sup>35</sup> Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1995), pp. 114-24; and Brian Orend, *War and International Justice: A Kantian Perspective* (Waterloo: Wilfrid Laurier University Press, 2000).

because of John F. Kennedy's secret assurances that the United States would remove missiles from Turkey shortly after the Soviets removed theirs from Cuba.<sup>36</sup> But this instance does not deal with a full-blown war, much less a postwar period, and so it is not directly analogous. People who have suffered through a war deserve to know what the substance of the settlement is.

This does not mean that the people must explicitly and immediately endorse the proposed settlement, for instance through a plebiscite. Nor does it mean that the settlement must be drafted up in a formal treaty. Both things are clearly permissible, and perhaps desirable as well: a show of popular support for a settlement might bolster its endurance; and writing out the peace terms can enhance the clarity of everyone's understandings and expectations. But it seems needlessly stringent to insist that both phenomena must be there for the settlement to be legitimate. We can imagine numerous practical difficulties with running a plebiscite in the immediate postwar period, and we can imagine communities that come to an understanding on the settlement—even going so far as to adhere to it—without nailing down every possible contingency in a detailed legal document.

## SUMMARY OF THE SET

Perhaps it would be helpful to list the professed set of settlement principles. A just state, seeking to terminate its just war successfully, ought to be guided by all of the following norms:

*Proportionality and Publicity.* The peace settlement should be both measured and reasonable, as well as publicly proclaimed. To make a settlement serve as an instrument of revenge is to make a volatile bed one may

be forced to sleep in later. In general, this rules out insistence on unconditional surrender.

*Rights Vindication.* The settlement should secure those basic rights whose violation triggered the justified war. The relevant rights include human rights to life and liberty and community entitlements to territory and sovereignty. This is the main substantive goal of any decent settlement. Respect for rights is a foundation of civilization, whether national or international. Vindicated rights, not vindictive revenge, is the order of the day.

*Discrimination.* Distinction needs to be made between the leaders, the soldiers, and the civilians in the country one is negotiating with. Civilians are entitled to reasonable immunity from punitive postwar measures. This rules out sweeping socioeconomic sanctions as part of postwar punishment.

*Punishment #1.* When the defeated country has been a blatant, rights-violating aggressor, proportionate punishment must be meted out. The leaders of the regime, in particular, should face fair and public international trials for war crimes.

*Punishment #2.* Soldiers also commit war crimes. Justice after war requires that such soldiers, *from all sides of the conflict*, likewise be held accountable at trial.

*Compensation.* Financial restitution may be mandated, subject to both proportionality and discrimination. A postwar poll tax on civilians is impermissible, and enough resources need to be left so that the defeated country can begin its reconstruction. To beggar thy neighbor is to pick future fights.

*Rehabilitation.* The postwar environment provides a promising opportunity to reform decrepit institutions in an aggressor regime.

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<sup>36</sup> Martin Walker, *The Cold War: A History* (New York: Henry Holt, 1995), pp. 160-83.

Such reforms are permissible but they must be proportional to the degree of depravity in the regime. They may involve: demilitarization and disarmament; police and judicial retraining; human rights education; and even deep structural transformation toward a peaceable liberal democratic society.

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

### CONCLUSION: AN ETHICAL “EXIT STRATEGY”

The topic of justice after war, or *jus post bellum*, has been somewhat neglected, yet has recently become prominent, even pressing, in international relations. This article offers one plausible set of just war settlement norms, which communities seeking to conclude their just wars properly ought to obey. The terms of a just peace should satisfy the requirements listed above in the summary. There needs to be an ethical “exit strategy” from war, and it deserves at least as much

thought and effort as the purely military exit strategy so much on the minds of policy planners and commanding officers.

One final aspect merits consideration: To what extent can these principles of just war settlement, developed mainly in a conventional interstate context, be applied to non-traditional intrastate conflicts? This question gains sharpness when we note that most recent conflicts seem to have been of the latter sort: brutal civil wars in Rwanda and Bosnia; multifaction wars in central Africa; armed insurrection in Chechnya; and forcible armed intervention in Somalia and Kosovo. The short answer is that the extension of these principles is another project.<sup>37</sup> It remains important, though, to get the principles right in the more conventional case, before moving on to the nonconventional, and arguably more complex, ones. The longer answer to the question is that, with modifications, the principles developed here no doubt serve as a compelling moral blueprint for application to these other cases. Indeed, some attempt was made here to do just that, in connection with the “war against terrorism” in Afghanistan. The principles offered here deal with the core controversies involved in any use of mass political violence, and they capture precisely those values and concepts we all employ to reflect on, and speak intelligently about, the ethics of war and peace.

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<sup>37</sup> See Nigel Biggar, ed., *Burying the Past: Making Peace and Doing Justice After Civil Conflict* (Washington, D.C.: Georgetown University Press, 2001).