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Post Bellum Aspects of the Laws of Armed Conflict

JEREMY WALDRON*

I. INTRODUCTION

§ 1. In recent years, theorists of international law have revived an interest in *jus post bellum* as one of the bodies of law that are supposed to regulate armed conflict.¹ We now have *jus ad bellum*, governing the just grounds for making war, the occasions on which war may be made, the entities that make war, and the formalities by which war may be initiated.² *Jus ad bellum* includes, *inter alia*, the principles prohibiting aggressive war and defining self-defense, and the rules requiring international authorization and specific declarations. We also have *jus in bello*, which governs the behavior that may be engaged in during the course of war: this includes laws prohibiting the targeting of civilians; laws that require armed forces to offer quarter and accept individual and unit surrenders; laws that govern the treatment of prisoners of war and other detainees; and laws and principles that regulate plunder, booty, and the targeting and destruction of civilian and economic infrastructure.³ Now, a third body of law has emerged—*jus post bellum*—a body of law that is supposed to regulate occupation, reparations, the dismantling of aggressive regimes, re-formation of belligerent nations, treaties of peace subsequent to war, and so on.⁴

§ 2. I said that this is a revival, for the study of *jus post bellum* was characteristic of natural lawyers and early international lawyers. For example, Alberico Gentili devoted the third book of

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1. See, e.g., MICHAEL WALZER, *ARGUING ABOUT WAR* (Yale Univ. Press 2005).
2. See also *id.* at xiii.
3. See also *id.* at xiii, 161.
4. See also *id.*

his treatise *De Jure Belli Libri Tres*,⁵ first published in 1598, to the law of victory and the law of peace, with chapter titles such as “Of the Vengeance of the Victor,” “On Exacting Tribute and Lands from the Vanquished,” “On Ensuring Peace for the Future,” and “Whether it is Right to Make a Treaty with Men of a Different Religion.”⁶ Nearly two centuries later, Emer de Vattel devoted an entire book of his treatise *The Laws of Nations* to the topic “Of the Restoration of Peace; and of Embassies”⁷ which followed Book III, entitled “Of War.”⁸ Book III also included chapters on truces, the ransom of prisoners, post-liminius, and conquest.⁹

§ 3. In these early treatises and among contemporaries, each of the three bodies of law—*jus ad bellum*, *jus in bello*, and *jus post bellum*—were presented as *positive* law, constituted, in part, by the treaties and conventions of the international community and in part, by the law of nations (*jus gentium*). Associated with this, there is in each case also a body of jurisprudence, i.e., a set of principles and fairly abstract doctrine, and behind that, in turn, we find a body of philosophical thought about the various topics that these three bodies of law address.¹⁰

The background philosophy is taken quite seriously in the jurisprudence of the law of armed conflict, and the jurisprudence is taken quite seriously in articulations of the applicable positive law. This is partly because of the thoughtfulness and theoretical interests of international lawyers, which distinguishes them from many other types of lawyers. It is partly because some of their doctrines give philosophical jurisprudence a prominent part to play as actual sources of law (as in *opinio juris* in relation to customary international law and as in the role of natural law thinking in the discernment, articulation, and elaboration of the *jus*

5. ALBERICO GENTILI, DE IURE BELLI LIBRI TRES [ON THE LAW OF WAR AND PEACE: THREE BOOKS] (1612) reprinted in 2 THE CLASSICS OF INTERNATIONAL LAW (Div. Int'l Law, Carnegie Endowment for Int'l Peace, Publ'n No. 16, James Brown Scott ed., John C. Rolfe trans., Clarendon Press 1933).

6. *Id.* at 473, 493, 576, 649.

7. Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* Book IV, 429-506 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1883).

8. *Id.* at Book III, 291-428.

9. *Id.*

10. For the distinction between law and morality, see Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 729 n.33 (2004). See also *infra* § 8.

gentium).¹¹ It is also partly because the law's standing in the midst of armed conflict is precarious and constantly subject to political challenge, compelling international lawyers involved in the law of war to be especially self-conscious and reflective when articulating legal standards to regulate armed conflict and when figuring what the sources of such standards may be.¹² Constantly on the defense against international law skepticism, lawyers and jurists in this field repeatedly have to revert to first principles in their structural, formal, and substantive thinking. And while international law skepticism is probably not a good thing, this side effect of it certainly is.

§ 4. In this article, I want to consider some hypotheses about the relationship between *jus post bellum* and the other two bodies of law that constitute the law of armed conflict.

I am assuming that it is a good idea to have an integrated theory of the various aspects of the law of armed conflict, but certain connections must be carefully considered. For example, it has usually been thought—and I believe quite properly—that *jus in bello* should operate independently from *jus ad bellum*.¹³ By this I mean that the rights, protections, duties, and responsibilities of soldiers should be the same whether they are engaged in a just war (from a *jus ad bellum* point of view) or not.¹⁴ So for example, the principle that quarter may in no circumstances be denied should apply to the benefit of soldiers fighting an unjust war as much as to soldiers fighting a just war. One reason for this is that no country ever fights with an open acknowledgment that its own cause is unjust, and few countries fight without an insistence that their opponent's cause is unjust.¹⁵ It is important to avoid the situation in which the official position of both sides commits each to the

11. I have discussed this a little in Jeremy Waldron, Professor, N.Y.U. Sch. of Law, *Ius Gentium: A Defense of Gentili's Equation of the Law of Nature and the Law of Nations*, Address at Commemorative Alberico Gentili Conference (Mar. 15, 2008) (transcript on file with author).

12. Christopher Kutz, *The Difference Uniforms Make: Understanding the Regulation of Collective Violence in Criminal Law and the Law of War*, 11-12 (Boalt Working Papers in Public Law, Paper No. 122, 2004), available at http://works.bepress.com/christopher_kutz/4.

13. For a discussion on the separation of these two theories, see Kutz, *supra* note 12; MICHAEL WALZER, *JUST AND UNJUST WARS* 21 (Basic Books 2006), available at <http://ssrn.com/abstract=1280897> [hereinafter WALZER, *JUST AND UNJUST WARS*].

14. See the brief discussion in WALZER, *JUST AND UNJUST WARS*, *supra* note 13, at 124.

15. Kutz, *supra* note 12.

view that they are not bound by the rules of *jus in bello* in their treatment of their opponents.

Some philosophers have contested this idea. Chris Kutz, for example, has argued that soldiers fighting what they know is an unjust war should not be thought to have a privilege to kill soldiers who have justice on their side.¹⁶ He suggests—if I remember his argument correctly—that a determination that the former's cause is unjust must yield a conclusion that they are not entitled to kill anyone in pursuit of it.¹⁷

I do not find that persuasive. But even if one were persuaded by Kutz's argument, it might still be prudent to develop an integrated account of the laws relating to the initiation, conduct, and conclusion of armed conflict. But we should leave open the possibility that such integration includes an explanation of why it is important to establish certain firewalls between the various aspects of just war theory.

§ 5. In this article, I shall consider a couple of suggestions regarding the relationship between *jus post bellum* and other aspects of the laws of armed conflict.

In §§ 6-11, I shall consider and express some doubts about a hypothesis put forward by Michael Walzer on this subject. Walzer believes that the best account of some of the central doctrines of *jus in bello* is that they look forward to the viability of the situation *post bellum*: we refrain from killing civilians because there must be a people to make peace and prosper with after the cessation of hostilities. I shall contrast Walzer's position with a position taken by Jeff McMahan, which does not move from *jus in bello* to *jus post bellum* in this way.

In §§ 12-19, I shall consider a more ambitious hypothesis put forward by Oliver O'Donovan about the connection between *jus post bellum*, on the one hand, and *jus ad bellum* and *jus in bello*, on the other hand. O'Donovan shares some of Walzer's concerns. But O'Donovan also believes that the three aspects of just war theory are united by a central concept of judgment, as something which

16. *Id.* at 13. See also McMahan *supra* note 10, at 702.

17. This need not involve a wholesale abrogation of *jus in bello*. There might be a compromise position: the protections of *jus in bello* do not cease to apply—soldiers fighting in an unjust war may not be denied quarter nor massacred once they have been captured—but some of the privileges of *jus in bello* do not apply to soldiers in an unjust war.

distinguishes legitimate from illegitimate war-making and war-related activities at every stage of the process.

Neither of these hypotheses tells us much about occupation as a specific topic in *jus post bellum*,¹⁸ although I think that O'Donovan's framework does have serious implications—negative implications—for the kind of war-making that envisages occupation of the home territory of an adversary nation as a likely end to a just war.

On a wider front, O'Donovan points us towards an understanding of the continuity between the theory of *jus post bellum* (especially the law regarding the establishment of peace and normality in the wake of war) and political theory.¹⁹ If, for any reason, a victor state in a just war is to remain as an occupier of enemy territory for more than a very short period after the end of hostilities, the obvious priority is to establish some form of ordinary and minimally legitimate rule in the territory. No doubt such rule will eventually come under pressure from the principle of self-determination. But it would be wrong to think that there is no criterion of minimally good government apart from self-determination. Since the time of John Locke, political philosophers have understood that the fact that a political system has its historic roots in conquest does not affect the main constraints that it is under, as far as respect for person, liberty, property and the general welfare is concerned.²⁰ Nor, does it affect the regime's affirmative responsibilities of good government. O'Donovan's account, we shall see, has the advantage of understanding and embracing this continuity.²¹

18. As I understand it, occupation was the specific topic of this symposium.

19. OLIVER O'DONOVAN, *JUST WAR REVISITED* 109-123 (Cambridge Univ. Press 2003) [hereinafter O'DONOVAN, *JUST WAR REVISITED*].

20. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 16 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

21. For an essay considering Walzer and O'Donovan's work together with respect to the themes addressed here, see Daniel Bell, *Just War Engaged: Review Essay of Walzer and O'Donovan*, 22 *MODERN THEOLOGY* 295 (2006).

II. WALZER²²

§ 6. Like many theorists of the laws of armed conflict, Walzer has struggled to understand the leading principle of *jus in bello*, viz. the principle of civilian immunity.²³ The principle of civilian immunity (sometimes called “the principle of discrimination”) requires those engaged in armed conflict to discriminate between civilian and military targets and to refrain from deliberately attempting to kill or wound civilians.²⁴ The term “innocent civilians” is sometimes used, but unless “innocent” is understood in a strictly technical sense, the phrase is largely unhelpful.²⁵ When we fight a just war, we may suppose that the soldiers fighting against us are not innocent, in the sense that they are using deadly force to advance unjust aggression or injustice. But if the soldiers are fighting for an unjust cause, it is likely that the civilian leadership of their country set them on this course. Thus, many civilians are at least as guilty as their leadership, perhaps even more so, inasmuch as the civilians have choices which traditional accounts of the legitimate relation between civilian and military authorities deny to the latter.²⁶ And, if the civilian leaders are not innocent, in any moral sense, than no doubt the same is true of many of their supporters among the ordinary population. Yet, the traditional principle of discrimination requires us to refrain from targeting civilian supporters of the unjust war and maybe the civilian leadership as well.²⁷

§ 7. Some philosophers have argued, on these same grounds, that we should alter our understanding of the principle of discrimination.²⁸ In *The Ethics of Killing in War*,²⁹ Jeff McMahan argues that there is no moral justification for any absolute

22. Some of what follows is an adaptation and expansion of my review of Walzer's book. Jeremy Waldron, *When Is It Right to Invade?*, THE NEW YORK REVIEW OF BOOKS, Mar. 6, 2008. I have also drawn on an unpublished paper of mine. Jeremy Waldron, *Civilians, Terrorism, and Deadly Serious Conventions* (N.Y.U. Sch. of Law Pub. Law & Legal Research Paper Series, Working Paper No. 09-09, 2009), available at <http://ssrn.com/abstract=1346360>.

23. WALZER, JUST AND UNJUST WARS, *supra* note 13, at ch. 9.

24. McMahan *supra* note 10, at 725.

25. *Id.* at 695; Uwe Reinhardt, *Innocents in Uniform*, N.Y. TIMES, Mar. 22, 2003, at A11, available at <http://www.nytimes.com/2003/03/22/opinion/innocents-in-uniform.html>.

26. McMahan *supra* note 10, at 726-27.

27. *Id.*

28. *Id.* at 726-30.

29. *Id.*

prohibition on intentionally attacking civilians.³⁰ He thinks a moral case can be made for holding certain civilians liable to intentional attack.³¹ Civilians who share responsibility for an unjust war, for example, may be held liable to intentional attack. “It is moral responsibility for an unjust threat,” writes McMahan, “that is the principal basis of liability to [be the target] of defensive (or preservative) force.”³²

The requirement of discrimination should then hold that combatants must discriminate between those who are morally responsible for an unjust threat, or for a grievance that provides a just cause [for war], and those who are not. It should state that while it is permissible to attack the former, it is not permissible intentionally to attack the latter³³

According to McMahan, legitimate war-making requires a principle of discrimination.³⁴ But he does not think that morality can support the particular discrimination that results from the traditional principle of discrimination versus discrimination that would inevitably follow from McMahan’s own account in terms of responsibility for the injustice that led to war in the first place.³⁵

§ 8. Having said that, however, McMahan is careful to insist that the discussion quoted above proceeds at the level of philosophical justification—what he calls “the deep morality of war.”³⁶ He acknowledges that it would be a further step to argue that the laws of war should be reformed in accordance with his proposal.³⁷

The formulation of the laws of war is a wholly different task, one that I have not attempted and that has to be carried out with a view to the consequences of the adoption and enforcement of the laws or conventions. It is, indeed, entirely clear that the laws of war must diverge significantly from the deep morality of war as I have presented it.³⁸

Targeted assassinations of rogue political leaders might come to seem permissible. But we might be reluctant to embark on the

30. *Id.* at 723.

31. *Id.* at 726-30.

32. *Id.* at 722.

33. *Id.* at 722-23.

34. *Id.* at 694.

35. *Id.* at 719.

36. *Id.* at 730-31.

37. *Id.* at 731.

38. *Id.* at 730.

wholesale reconstruction of the principle of discrimination as a legal principle. “[T]he laws of war,” writes McMahan, “. . . are conventions established to mitigate the savagery of war.”³⁹ Their value in that regard is not exhausted by their ability to track the principle of responsibility; a principle that guides McMahan’s own deep moral account of the difference between legitimate and illegitimate targets.⁴⁰ It is not my intention to distort McMahan’s approach, but I am going to focus more or less exclusively on what he suggests is the importance of legal conventions. Furthermore, my aim here is not to evaluate McMahan’s *overall* position in any detail. The purpose is to explore a contrast between McMahan’s and Michael Walzer’s views regarding the general background value of the convention that protects civilians from attack.⁴¹

§ 9. It is unclear whether Walzer would agree with McMahan’s deep moral critique of the principle of discrimination.⁴² But interestingly, Walzer offers a different account of the general background value informing the use of the legal principle of discrimination as a *jus in bello* convention.⁴³ While McMahan understands the background value as being oriented to the character of warfare itself,—as being oriented towards a mitigation of its savagery⁴⁴—Walzer argues that the background value has to do with the postwar situation.⁴⁵ It is a general value associated with *jus post bellum* rather than *jus in bello*.⁴⁶ Walzer states:

Implicit in the theory of just war is a theory of just peace: whatever happens to these two armies, whichever one wins or loses, whatever the nature of the battles, or the extent of the casualties, the “peoples” on both sides must be accommodated at the end. The central principle of *jus in bello*, that civilians

39. *Id.* at 730.

40. *Id.* at 721-22.

41. A more comprehensive discussion of McMahan’s position would not lose sight of the dissonance between the detailed deep moral critique of the principle of discrimination and his general defense of it as a legal convention. By dissonance, I do not mean inconsistency; all I mean is that McMahan hopes that we could eventually develop new conventions truer to his deep moral account, which might serve the background value as well as the present (morally flawed) convention.

42. McMahan, *supra* note 10, at 718-29.

43. MICHAEL WALZER, THINKING POLITICALLY: ESSAYS IN POLITICAL THEORY 266 (2007).

44. McMahan, *supra* note 10, at 730.

45. WALZER, THINKING POLITICALLY, *supra* note 43, at 266.

46. For a general discussion of Walzer on *jus post bellum*, see Bell, *supra* note 21, at 298-300.

can't be targeted or deliberately killed, means that they will be—morally speaking, they have to be—present at the conclusion. This is the deepest meaning of noncombatant immunity: it doesn't only protect individual noncombatants; it also protects the group to which they belong.⁴⁷

Both accounts can differentiate between small-scale reformations of the principle of discrimination (that would allow targeted assassination) and large-scale reformations that would pose a wholesale threat to background values. Both have in mind and both recoil from the prospect of making general large-scale military attacks on civilian populations legitimate as part of just-war-making, even in cases where some responsibility for crimes against peace and for the initiation and continuation of unjust aggression can plausibly be attributed to the civilian populations en masse and not just to one or two individuals among them.⁴⁸ I believe that both theorists want to hold on to the condemnation of area bombing of civilian cities—like those directed against Japanese and German cities in the Second World War—and also to the condemnation of the use of weapons of mass destruction, such as nuclear weapons. They want to hold on to the legal conventions that stand between us and the horrific scale of death and destruction that these activities involve.

But, as we have seen, each theorist gives a different reason for doing so. For McMahan, the horrors themselves at the time they happen are what should give us pause; we should not lightly abandon conventions that offer a good chance of mitigating the immediate savagery of war. For Walzer, the point of sticking with these conventions is not to mitigate the horror of war itself, but to improve the character of the peace that we anticipate will eventually ensue. For McMahan, the *jus in bello* convention is oriented to an *in bello* objective; for Walzer the *jus in bello* convention is oriented to a *post bellum* objective.

§ 10. Here's another way of seeing the difference: Walzer's account is oriented ultimately to the continuing value of life, whereas McMahan's account is riveted by the immediate horror of killing.

Let me back up a little. We are talking about a convention that confers immunity upon civilians from the sort of attacks that soldiers may legitimately mount against each others' lives. It is

47. WALZER, THINKING POLITICALLY, *supra* note 43, at 266.

48. *Id.* at 300-01.

tempting to see civilian immunity as a sort of exception from a principle of legitimate wholesale slaughter that is typically characteristic of war. But that is a mistake. It is the soldier's right to attack other soldiers that is the exception. It is an exception to the all-important moral principle that in general, no one may deliberately attack another's life. In general, all such attacks count as murder or attempted murder. The soldier's right to use deadly force against other soldiers is a specially granted (Hohfeldian) privilege. He has permission to do what would otherwise count as murder, so long as he is only trying to kill other soldiers. In this light, the principle of civilian immunity is not an exception to the soldier's privilege, but a recognition of its limits. Civilians are not to be attacked because in general, no one is to be attacked. Civilians are not to be killed because, in general, murder is wrong. That is the default position. And combat of soldier upon soldier is the only exception, allowed in the laws of war.⁴⁹

We can restate McMahan's and Walzer's positions in the light of this point; both are concerned about what would happen if the general prohibition on homicide were relaxed in the context of war more than it is already. McMahan's point is that the savagery of war would be greatly enhanced if we were to relax the convention that protects civilians. Without an adequately worked out substitute, war would become in effect more *murderous* (in a loose informal sense of "murderous") than it already is, because we would have greatly expanded the conditions under what was previously murder was now treated as justifiable homicide. Walzer's point would be that, if this convention were relaxed, there would be fewer lives left to be lived at the end of hostilities — and that in and of itself would be a bad thing, quite apart from the savage murderousness of the way those lives were taken.

It's a bit like the difference between teleological and deontological accounts of the rule against killing. Some people see the rule against killing as a simple side-constraint on certain sorts of intentional actions. Others see it in a more teleological light: trying not to cause deaths, trying to keep as many people as possible alive. In most situations, the two coincide: one of the greatest contributions we can make to keeping as many people as

49. Not exactly the *only* exception. You can shoot spies and civilians bearing arms. And you can attack military targets in a way that may endanger civilian lives with the foresight or recklessness to know that there will be civilian casualties that may be considered murderous in ordinary peace-time circumstances.

possible alive is to not intentionally kill anyone. But sometimes they come apart, as the famous trolley problem illustrates.⁵⁰ The analogy is not perfect, but I hope it casts some light on the difference between the kind of rationale for the convention prohibiting attacks on civilians that McMahan offers and the kind of rationale for the convention that Walzer offers.

§ 11. Both sets of considerations are surely important and it is not my intention to suggest there is nothing to the connection that Walzer sees between *jus in bello* and *post bellum*. I think, however, McMahan's account is preferable. Although he would surely distinguish between a deep deontological rationale for the convention that prohibits attacks on civilians and the value that that convention upholds, I think he would say that our account of the latter must be true to the way the convention operates. The convention operates as though it were a deontological side-constraint: no civilian is to be attacked, even if (in some weird Kamm-like example) this would make it more likely that more lives would thrive in the *post bellum* phase. If McMahan is right in the critique noted in § 6, then there is nothing deeply deontological justifying the content of the surface deontology of the convention as it is presently formulated. But still, the value of mitigating the immediate savagery of war offers a better account of the surface deontology of its operation than Walzer's more teleological account.

III. O'DONOVAN

§ 12. Oliver O'Donovan's books on political judgment and just war are among the more interesting and original bodies of work to emerge in political philosophy in recent decades.⁵¹ But it is not easy to bring them into direct relation and comparison with other works in political philosophy.

O'Donovan is an Anglican theologian, perhaps the most prominent of modern-day political theologians.⁵² The Christian

50. Francis Myrna Kamm, *Harming Some to Save Others*, 57 *PHIL. STUD.* 227-60 (1989).

51. See, e.g., OLIVER O'DONOVAN, *THE WAYS OF JUDGMENT* (William B. Eerdmans Publ'g Co. 2005) [hereinafter O'DONOVAN, *THE WAYS OF JUDGMENT*]; OLIVER O'DONOVAN, *THE DESIRE OF THE NATIONS* (Cambridge Univ. Press 1996) [hereinafter O'DONOVAN, *THE DESIRE OF THE NATIONS*]; O'DONOVAN, *JUST WAR REVISITED*, *supra* note 19.

52. He is Professor of Christian Ethics and Practical Theology at the University of Edinburgh and formerly Regius Professor of Moral and Pastoral Theology at Oxford. The

substance of his work consists of much more than a few quotations from scripture or an occasional exhortation on Christian values. O'Donovan believes that there is a radical discontinuity of normative foundation between the political formations of antiquity (of the Greek city states, or ancient Israel, or Rome) and the political formations set up in the last two millennia.⁵³ Law, politics, and the state, he maintains, have to be understood in a wholly different way in the light of the resurrection and exaltation of Jesus Christ.⁵⁴ The detailed differences cannot be explored here, but the most important of them is that life on earth is no longer to be regarded as the *summum bonum* and the state is not to proceed as though it were. And as for the pursuit of the good life, that is now dealt directly by an authority higher than the state and by a separate set of institutions (the church or churches) set up by this higher authority.⁵⁵

The task remaining to political authority is simply the provisional doing of justice on earth in the time that is left to us before the final judgment of God in the world.⁵⁶ O'Donovan's thesis is that the authority of government is to be devoted to what he calls "judgment"—the upholding and vindicating right against wrong, just against unjust, in a world where many wrong and unjust actions are performed and wrong and unjust situations exist, and in respect of what it is morally necessary that right and justice be humanly vindicated.⁵⁷ Even apart from the disconcerting theological context, O'Donovan's position sounds conservative, for it seems to imply that all sorts of things that the government used to do or might be imagined to do are now no longer its concern.⁵⁸ O'Donovan actually seems to want to resist this impression. He writes that his account does not imply that,

[T]he whole operation of government is thinned down, as in some libertarian fantasy, to the operation of civil courts of

University of Edinburgh, School of Divinity New College, Prof. Oliver O'Donovan, <http://www.div.ed.ac.uk/donovan> (last visited Apr. 2, 2009).

53. O'DONOVAN, *THE WAYS OF JUDGMENT*, *supra* note 51, at 127.

54. *Id.* at 5.

55. *Id.* at 3-12.

56. *See id.* at 5.

57. *See id.* at 3-12.

58. "Other tasks that government *might* perform, and in ancient Israel *did* perform, . . . could have no interest in a world where God had conferred his sovereignty upon his Christ. The higher goods of mankind's social destiny have been looked after in the proclamation of Christ; only the lower goods of judgment need concern earthly princes." *Id.* at 4 (emphasis in original).

justice; it means that political authority in all its forms—lawmaking, war-making, welfare provision, education—is to be reconceived within this matrix and subject to the discipline of enacting right against wrong.⁵⁹

And a large part of his most recent book, *Ways of Judgment*, is devoted to reconceptualizing the traditional tasks of government along these lines.⁶⁰ Like the theology, the broader political philosophy does not concern us here. What does concern us is that O'Donovan wants to understand the waging of a just war in this light as well: to wage war justly is to use armed force to uphold the right and the just against the unjust or wrongful; it is to enter judgment forcibly and under arms in circumstances where institutions that might do justice properly are as a matter of fact, unavailable I think we should be interested in the implications that this reconceptualization of just-war-making has on the connection between *jus ad bellum* and *jus in bello*, on the one hand, and *jus post bellum*, on the other.

The remainder of this article will proceed as follows: after one or two more preliminary comments in §§ 13-14, I will state the core of O'Donovan's position about war and judgment in § 15 and then focus § 16 on the aspect of his conception of judgment that seems most promising for the connection that interests us. The connection itself will be explored in § 17, and its application to various *post bellum* issues will be considered in §§ 18-19.

§ 13. Our discussion of O'Donovan's view of the relation between *jus ad bellum* and *jus post bellum* is complicated in the first instance by his discomfort with the traditional division of the laws of armed conflict into these categories. He denies that the traditional distinction between *jus ad bellum* and *jus in bello* is (as he puts it) "a load-bearing distinction."⁶¹ The latter distinction conveys a sense that there is an isolable moment of going to war,

59. *Id.* at 4-5.

60. *See id.* at chs. 3-4.

61. O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 15. O'Donovan also says, of the Thomistic approach to these distinctions, with requirements or principles arrayed in lists under each heading: "Such attempts to reclaim the tradition have a disconcertingly legalist feel to them, ticking off the principles, as it were, one by one. But the train of thought involved in exploring judgment in armed combat is not reducible to a list" *Id.* at 14.

which determines whether or not a war is just and at that point, there is the separate issue of whether war is being waged justly.⁶²

Major historical events cannot be justified or criticized in one mouthful; they are concatenations and agglomerations of many separate actions and many varied results. One may justify or criticize acts of statesmen, acts of generals, acts of common soldiers or of civilians . . . but wars as such, like most large-scale historical phenomena, present only a great question mark, a continual invitation to reflect further on which decisions were, and which were not, justified at the time and in the circumstances.⁶³

Also, with regard to the specific issue that interests us—*jus post bellum*—O'Donovan observes that, just as we cannot mark a bright line where “moral rules ‘towards’ war end and moral rules ‘in’ war take over,” we should also not insist on being able to know too precisely where war ends and peace begins (and *jus post bellum* “kicks in”).⁶⁴ This last point seems particularly important in our discussion about occupation and continuing insurgency even after “mission accomplished” has been declared.

Although this seems to complicate our task, it will in fact help since the thesis of O'Donovan's that we want to explore is his overarching framework—war as armed judgment. This means that decisions made at or near the beginning of a war, as much as decisions made at or near its ending, have to be oriented to decisions faced (sometimes long after) after hostilities have ceased.

§ 14. In one respect, O'Donovan's position is like the position of Walzer that was considered in § 9. Walzer defended the principle that protects civilians on the ground that the life of people (even an unjust enemy people) must be permitted to go on after hostilities have ended.⁶⁵ O'Donovan says something similar about the rules *in bello* that protect civilian infrastructure:

If we were to deny our enemy the power to produce food, if we were to terrorize his marketplaces or flatten his residential suburbs, we might quite properly hamper his ability to pursue his wicked purposes against us; but such a route to victory is one we should deny ourselves, since it denies the right of

62. See also O'Donovan's subtle and useful discussion of the responsible decision-making of ordinary soldiers. *Id.* at 16-17.

63. *Id.* at 13.

64. *Id.* at 16.

65. WALZER, THINKING POLITICALLY, *supra* note 43, at 266.

peaceful social existence, a right in which we and our enemy both share.⁶⁶

I suspect it is more plausible to parse the rule protecting civilian infrastructure in this way, than it is to offer a similar parsing of the rule protecting civilian lives. Protecting civilian infrastructure does naturally have the sort of teleological aspect that was worried about (§§ 10-11) in the case of Walzer's account of the civilian right not to be killed.

§ 15. I have said that the key to Oliver O'Donovan's position on just-war-making is the idea of *armed judgment*, the forceful doing of justice.⁶⁷ O'Donovan takes his inspiration from the position of sixteenth century thinkers like Francisco Suarez, who said of war, "the only reason for it is that an act of punitive justice is indispensable to mankind, and that no more fitting means for it is forthcoming within the limits of nature and human action."⁶⁸

Suarez puts greater emphasis on the punitive aspect of judgment than O'Donovan does.⁶⁹ O'Donovan's conception of judgment, though it is supposed to be reactive in the sense of responding to something wrong or unjust that has happened, is more expansive and besides punishment, includes ideas about the vindication of property, territory or other wrongly abrogated rights, demands for return or reparation, the resolution of disputes, and so on.⁷⁰ Judgment may be simply like President Bush's response to the Iraqi invasion of Kuwait—"It won't stand"⁷¹—though it is important to understand that judgment, for

66. O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 39-40. See also O'Donovan's discussion of Deuteronomy 20:19. *Id.* at 41-42.

67. See O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 3-12.

68. *Id.* at 225; O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 18.

69. See also Benedict Kingsbury & Alexis Blane, Punishment and the Ius Post Bellum, Paper Presented at Commemorative Alberico Gentili Conference (Mar. 14, 2008). See, e.g., FRANCISCO SUAREZ, THE CLASSICS OF INTERNATIONAL LAW: SELECTIONS FROM THREE WORKS 253-57 (1964).

70. See O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 53. On the other hand, he does say that a penal element is necessary. *Id.* For the broader aspects of judgment in O'Donovan's political theory, see O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at chs. 3-4. In that account judgment can include legislative interventions, as well as various governmental social programs such as remedying past discrimination. See *id.* at 8-9, 62.

71. *Excerpts of News Conference by Bush on Budget and Gulf*, N.Y. TIMES, Aug. 15, 1990, at A21, available at <http://www.nytimes.com/1990/08/15/us/excerpts-of-news-conference-by-bush-on-budget-and-gulf.html?sec=&spon=&pagewanted=all> ("But I know that annexation, if this is what one calls this invasion of Kuwait, is unacceptable. And that is—it won't stand.")

O'Donovan, is emphatically not just a matter of words or rhetoric.⁷²

Punitive or not, the key to Suarez's position and O'Donovan's is that an act of justice is necessary and "no more fitting means for it is forthcoming."⁷³ Generally, in political theory we seek to establish institutions that will take responsibility for the doing of justice.⁷⁴ But in the case of injustice among nations or communities, such institutions may be non-existent or inadequate. Therefore, individual nations and coalitions must take informal responsibility for doing justice when justice is necessary.

What distinguishes the justified resort to armed conflict is the unavailability of ordinary means of judgement. Justice in war [stands] in relation to the exercise of domestic justice as an emergency operation, performed in a remote mountain-hut with a pen-knife stands to the same surgery performed under clinical conditions in a hospital. The reason for carrying the practice outside the ordinary institutions of government is simply the emergency.... Judgment in armed conflict is extraordinary, an adventure beyond the ordinary reach of law and order, hazarded upon God's providential provision.⁷⁵

Although war-making steps are outside the ordinary institutional context of judgment, O'Donovan's account still "affirms the logic of judgment by which such improvised action is disciplined."⁷⁶ A nation making war justly is "supposed to venture informally and with extraordinary means, the judgment that *would* be made by a formal court, *if* there were a competent one."⁷⁷

War may seem to be simply a duel, unmediated by judgment-giving authority. Or, at its most just, it may seem to be a matter of unmediated though justifiable self-defense. But O'Donovan rejects both these images. He rejects the image of the duel: "no Christian believes that opposition can in fact be unmediated."⁷⁸ More subtly, he insists on the element of judgment even in the situation of self-defense:

72. To expand this, we should have to venture into the vexed territory of the relation between O'Donovan's view of war and Christian pacifism, non-violence, and martyrdom. See O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 7-11.

73. *Id.* at 225.

74. See, e.g., O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 3-12.

75. O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 18-19.

76. O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 225.

77. *Id.* at 23; O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 23 (emphasis added).

78. O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 2.

In a state of war we face a threat which it falls outside the competence of any judiciary to control; the responsibility for improvising judgment falls back upon the first power of government. As in an emergency when a police officer confronts an armed and dangerous criminal, the situation is formally a duel, yet morally the triangular relation of judge to victim and assailant dictates the permissions that govern the proceedings.⁷⁹

In fact, the international arena is not utterly bereft of institutions that can provide some real mediation for judgment in the face of armed injustice. O'Donovan devotes some interesting discussion to the importance of the UN Security Council and its claim to have the sole right to authorize armed force against sovereign states other than that required for immediate self-defense.⁸⁰ For all its inadequacies, he believes that the existence of this framework casts a much greater burden of proof on any country purporting to make war in the name of justice unilaterally (using the Suarez formula).⁸¹

§ 16. What is judgment or the doing of justice according to O'Donovan? He proposes the following working definition: "judgment is an act of moral discrimination that pronounces upon a preceding act or existing state of affairs to establish a new public context."⁸² It has a backward-looking aspect inasmuch as it pronounces on some action that has taken place or on some existing state of affairs. It has a moral aspect inasmuch as it seeks to vindicate an objective standard of justice or right. And it has a forward-looking aspect, which, for our purposes in this article, is the most important. Judgment, he says,

[E]stablishes a public context, a practical context . . . in which succeeding acts, private or public, may be performed. The fact that an act must be by definition retrospective [as judgment must be] does not mean that it must be undertaken without a prospective object The prospective object of the act of judgment is the securing of a public moral context, the good

79. O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 225.

80. See O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 24-25, 54. See also the discussion of the Security Council crisis in relation to the American-led invasion of Iraq in 2003. *Id.* at 124-136.

81. *Id.* at 25.

82. O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 7 (emphasis in original).

order within which we may act and interact as members of a community.

An act of judgment may therefore be assessed by the success of its outcome, as well as by the truth of its pronouncement. . . . It achieves its goal only if a public moral context is established by the judgment and the public moral context is, in some respect, more just as a result.⁸³

In the domestic institutionalized doing of justice, we expect the decision of a court, not just to (say) punish an offender, exact compensation, return disputed property, or resolve a dispute, but also, by doing any of these, to make things clearer and firmer as a result—to remove some doubt about the rights on which one can rely or about the limits to which one can press a claim or an action. We expect the doing of justice to result in a situation that is more secure—not just because this offender has been punished and others deterred, but because certain norms that were in question have been considered, highlighted and given effect to, in a situation where there might otherwise have been some doubt about whether they were to be taken seriously any longer.

§.17. In the context of just-war-making, this forward-looking aspect of judgment helps unify what may otherwise be thought of as separable parts of the law of armed conflict.⁸⁴ Responding to aggression, for example, doesn't just involve reversing an invasion: "prosecuting an act of judgment in armed conflict means strengthening the conditions for justice in and among human communities."⁸⁵ War looks towards peace, and peace is to be understood as including "all that is comprised in a stable and settled political order, including the justice and law-governed character of relations established within it."⁸⁶ It may be hard to see through to peace as normality in this sense, particularly at the beginning of a war. From that perspective "the peace which any conflict aims at is still indeterminate, known only negatively as the correction of the grave injustice that afforded the cause."⁸⁷

83. *Id.* at 8 (emphasis in original).

84. But see § 13 *supra* for discussion of the doubts that O'Donovan had anyway about these separations.

85. O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 62.

86. *Id.* at 59.

87. *Id.*

Some have seen in this passage an unwarranted restriction on O'Donovan's *post bellum* perspective.⁸⁸ This, however, is a misunderstanding. O'Donovan describes the necessarily negative definition of peace as the correction of injustice as a "difficulty," and the challenge that his concept of judgment imposes is that we move beyond this purely negative perspective in the calculations that inform our war-making.⁸⁹ In *Ways of Judgment*, O'Donovan offers a slightly more nuanced version. He says that it is difficult for the forward-looking impact of judgment to be anything other than negative: as in the case of punishment, we reaffirm and strengthen the prohibition a criminal violates.⁹⁰ Even there, however, we gesture affirmatively towards the improved conditions of life under the newly reaffirmed prohibition. He goes on to say that "in other forms of political judgment we may point to the conditions of renewed life even less indirectly, as in a peace treaty."⁹¹ But even there, he adds that our determinations are negative: what we do explicitly is to make arrangements for a cessation of hostilities, thereby, reaffirming the conditions of security between the nations in question.⁹² What the life that develops subsequently within such renewed framework cannot be specified *ex ante*.⁹³ The treaty can only "clear a space for peace" in the affirmative sense.⁹⁴

As I understand it, it is part of O'Donovan's position that no nation is entitled to initiate hostilities unless it is prepared to take responsibility for this forward-looking aspect and—as part of the *jus ad bellum* requirement of effectiveness—unless it is reasonable for it to think that things can and will be improved in this regard by the sort of action it is undertaking.

An example may help here. Late in *Just War Revisited*, O'Donovan considers the use of sanctions (trade sanctions and economic embargoes) against a country.⁹⁵ Sanctions are often thought of as an alternative to war,⁹⁶ but O'Donovan views them

88. See Joseph Runzo, *The Importance of Defining 'War': Terrorism, Torture, Humanitarian Intervention and Private Military Companies*, 13 ILSA J. INT'L & COMP. L. 139, 143 (2006).

89. O'DONOVAN, *JUST WAR REVISITED*, *supra* note 19, at 59.

90. O'DONOVAN, *THE WAYS OF JUDGMENT*, *supra* note 51, at 87-88.

91. *Id.* at 87.

92. *Id.* at 88.

93. *Id.*

94. *Id.*

95. O'DONOVAN, *JUST WAR REVISITED*, *supra* note 19, at 95-108.

96. *Id.* at 97.

as “acts of war which do not involve the direct use of force.”⁹⁷ They are rather like a siege. Considered in this light, we might ask various questions about sanctions: for example, who bears the impact of their imposition (usually the most vulnerable members of the society we are targeting). One important issue is that sanctions can simply drag on, without any anticipated end game. If they are considered as constituting an act of judgment, that is unsatisfactory. An act of judgment must look beyond itself to the future and to the achieved state of greater or more secure justice that alone can justify it. On this basis, O’Donovan insists that,

A belligerent has a duty to bring warfare to a decisive conclusion. A besieging army may have to attempt to storm the garrison in order to end the privation and misery within it, even if it would suit its own purposes much better just to sit there until there was no one left alive. Similarly, those who impose economic sanctions must reckon with the possibility that other action may be needed to bring their own economic siege to an end.⁹⁸

Needless to say, it doesn’t follow that one may choose any means one likes (Hiroshima, for example) “to bring warfare to a decisive conclusion.”⁹⁹ Nor does it mean that it is necessarily desirable to replace sanctions with an invasion: the inconclusiveness of sanctions and their half-hearted implementation might reveal that no hostile action was justified against an enemy, not that invasion is justified.¹⁰⁰ The point is that the end—the *post bellum* stage—must be kept firmly in view in the decision to initiate hostilities of any sort, and on O’Donovan’s account, the view of the *post bellum* stage that does this work must be disciplined by the prospective aspect of judgment.

§ 18. In general, the prospective situation that armed international judgment looks toward is a clearer and more secure moral framework of action and interaction among the nations.¹⁰¹ But it also looks to the prospects for judgment and justice within the communities that have been at war as well.¹⁰²

97. “[E]veryone has a basic right of access to commerce with everyone else . . . and a general ban on trade with a given country, even if not illegal in law, is overtly hostile and ought to be considered as an offence, unless it is justified as an act of war.” *Id.* at 101.

98. *Id.* at 107-08.

99. *Id.* at 107.

100. *Id.*

101. *Id.* at 1-18.

102. *Id.*

In § 14 this article considered O'Donovan's version of Walzer's point that we must not wage war in a way that makes post-bellum life in the society we are fighting impossible or impossibly hard. The prospective aspect of judgment casts an important light on this as well, reinforcing the connection between *jus in bello* and *jus post bellum*:

An act of war . . . may be disproportionate even if it ensures victory, and even if nothing less would have ensured victory; for it may frustrate the very object for which conflict was joined in the first place.

This has obvious implications for methods of fighting and types of armament. Any mode of combat which is likely to inflict grave damage on a society's capacity—including the enemy's capacity—to return to a state of ordered justice falls under this general condemnation.¹⁰³

I believe that much the same can be said about war-making that does not look beyond the occupation of enemy territory as a successful outcome of hostilities. An occupation of few months is one thing, but occupation that goes on for years (as in the United States occupation of Iraq) or decades (as in the Israeli occupation of the West Bank after the Six Days War in 1967) leaves a territory and a population in terrible limbo so far as "ordered justice"¹⁰⁴ or "a public moral context, the good order within which [people] may act and interact as members of a community"¹⁰⁵ are concerned. Unless proper peacetime institutions are established and peacetime community is secured on a reasonable basis, it is not clear that hostilities have been brought properly to an end (again reading "properly" in terms of this prospective duty of justice). It will not be surprising if the response to occupation is some sort of insurgency which—however much its methods may be deplored—stakes a claim that hostilities have not properly been ended and insists on the extraordinarily unsatisfactory nature of the alleged *post bellum* settlement.

We have become accustomed to thinking of régime change as the *telos* of just war (as in the defeat of Germany and Japan in 1945, and the defeat of Saddam Hussein's Iraq in 2003);¹⁰⁶ we have

103. But see also *id.* at 62 for O'Donovan's acknowledgment that it is a matter of balance of victory for the enemy (e.g., "a Europe wholly subject to Nazism" would have made ordered justice *post bellum* even worse).

104. *Id.*

105. O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 122.

106. O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 109.

become accustomed to think of wars that end without régime change in the nation of a defeated aggressor as aberrations (like the defeat of Iraq in the First Gulf War in 1991).¹⁰⁷ Unconditional surrender followed by the complete dismantling of the aggressor's state structure and its rebuilding from scratch seems appropriate. As far as I can tell, O'Donovan opposes this as a general approach, though conceding it may be necessary in rare cases, as with Hitler's Third Reich.¹⁰⁸ War looks forward at its conclusion to the continuation (and hopefully the improvement) of ordinary government and ordinary justice and order in the defeated nation.¹⁰⁹ As I said, that *may* require fresh state-building if the aggressor regime has hopelessly compromised its domestic institutions as the Nazis did. But in other cases, we look forward to the continuation of the aggressor nation's ordinary political institutions after hostilities have been brought to a satisfactory conclusion. Certainly, those who oppose an aggressor with armed force should take care in the course of hostilities not to make things worse in this regard. Though they are fighting in a sense against the aggressor government, not all aspects of governance in the aggressor nation are fair game:

It is reasonable, perhaps, to presume a certain unity in the operations of government; yet pictures of the wrecked Ministries of Justice and local government in Baghdad in 1991 naturally provoked the question of what the rationale for attacking them had been. The administration of justice and of local government, though part of the state's operations, is not itself a threat to any other people.¹¹⁰

Not only is the act of war itself to be understood as an act of justice—looking forward to the vindication of standards of peaceful coexistence, security, and non-aggression,¹¹¹ but the judgment or the doing of justice is, however, to be understood as the central feature of peace as well, and war must not be initiated or waged in a way that is calculated to make that impossible.¹¹²

§ 19. When we hear the phrases “acts of judgment” and “the doing of justice” associated with the ending of hostilities, it is

107. *Id.*

108. *Id.* at 13, 62.

109. *Id.* at 58-61.

110. *Id.* at 40.

111. *Id.* at 58-59.

112. *Id.*

tempting to associate them with *post bellum* trials for war crimes and crimes against peace and humanity. O'Donovan's account has something to say on these topics too, but it is important to insist that his reconceptualization of war as armed judgment is not at all a reconceptualization of the *telos* of war in terms of such trials.¹¹³ War itself is to be regarded as judgment, not just as something paving the way for judgment. Or, if it does pave the way for judgment, it paves the way for the ordinary aspects of institutionalized domestic judgment that is a characteristic of a peaceful regime.

O'Donovan tries to link the two a little bit by arguing that it is desirable for each nation—including the defeated nation—to deal with most low- and mid-level offenses against the laws of war committed by its own soldiers under the auspices of their own codes of military justice.¹¹⁴ With regard to higher-level crimes, such as crimes against peace, the situation is more complicated. The relative success of the Nuremberg and Tokyo war crimes trials is due in part to the fact that “those trials were conducted under conditions of occupation, in which the normal responsibilities of government could be selectively assumed by the occupying powers.”¹¹⁵ But as we saw in the previous section, occupation (and the opportunities that it presents in this regard) should not be thought of as the normal or normative *post bellum* situation. Still, less should it be thought that the need for such trials is itself a ground for pursuing hostilities to the level of unconditional surrender and occupation. “It would be a disaster,” writes O'Donovan, “if the institutions of *post-bellum* justice created a political pressure to fight wars *à l'outrance* and to refuse moderate settlements in which each government remained intact.”¹¹⁶

A better model might be that of the International Criminal Tribunal for the Former Yugoslavia, which operated without an occupation of Serbia or other countries whose officials were alleged to have committed grave war crimes.¹¹⁷ The legality of such

113. *Id.* at 109-23.

114. *Id.* at 119; *but see id.* at 113. O'Donovan takes this position partly because he believes that international law is strengthened by being incorporated into municipal codes.

115. *Id.* at 114.

116. *Id.*

117. See O'Donovan's discussion of ICTY and the similar tribunal for the Rwandan genocide. *Id.* at 116.

tribunals may be a matter of challenge.¹¹⁸ But even in this case, when we have moved beyond the unavoidable impressions of partiality that are associated with war itself as armed judgment, there are going to be problems about the perceived impartiality of the tribunals:

[T]he introduction of war crimes tribunals, admirably intended to bring a range of the gravest crimes against international law within the scope of judicial enquiry and punishment, has had to prove itself against a series of skeptical questions: will they make peace-settlements more difficult to implement? can they proceed equitably? can they establish sufficient levels of proof to secure public confidence in their judgments? and so on.¹¹⁹

O'Donovan sees these practical-sounding questions as going to the heart of whether war crimes trials can be seen as legitimate acts of judgment.¹²⁰ The situation "is not that punishing war criminals is certainly just but only doubtfully prudent, but, rather, that if these questions cannot be answered satisfactorily, the tribunals will be a parody of justice."¹²¹

He ends the discussion of this aspect of judgment by insisting, as his theology dictates, on its unsatisfactory and provisional nature. "Humility is the first condition for any humane justice."¹²² After some horror, we tell ourselves that we should look for closure, for a decisive settlement, for justice that will be *done* in a definitive sense.

Such a project tempts us to imagine that we can make our justice complete, as God's judgment is complete. But how could any judgment by any court have expressed all that needed to be expressed about the bombing of Hiroshima, the massacre at My-Lai, or the destruction of Dubrovnik? All that a court can do is to set up a marker.¹²³

118. See James Crawford's account of the Tribunal's unsatisfactory response to some defendants challenging the basis of its establishment under the principle of legality. Hilary Charlesworth, *Comment*, 24 ADELAIDE L. REV. 13 (2003) (commenting on James Crawford, *International Law and the Rule of Law*, 24 ADELAIDE L. REV. 3 (2003)).

119. O'DONOVAN, *THE WAYS OF JUDGMENT*, *supra* note 51, at 119.

120. *Id.*

121. *Id.*

122. O'DONOVAN, *JUST WAR REVISITED*, *supra* note 19, at 119. For the relationship between this humility to mercy, see O'DONOVAN, *THE DESIRE OF THE NATIONS*, *supra* note 51, at 256; O'DONOVAN, *THE WAYS OF JUDGMENT*, *supra* note 51, at Ch. 6.

123. O'DONOVAN, *JUST WAR REVISITED*, *supra* note 19, at 123.

Understanding war as judgment does not involve an idealization of either: war is a terrible concatenation of terrible decisions and the judgment that it approximates, at its best, is but a crude, informal, and non-institutionalized version of ordinary human justice with all its foibles, let alone the judgment we are under by God.¹²⁴ The virtue of O'Donovan's account is that it recognizes these limitations while nevertheless insisting that the matrix of judgment offers the best way of understanding what there may be of justice in the initial conduct and conclusion of war.¹²⁵

§ 20. Michael Walzer and Oliver O'Donovan in their different ways look for connections between *jus post bellum* and *jus in bello*. The search for connectedness is laudable, so long as it does not have the effect of dismantling the important firewalls between different parts of the laws and customs of armed conflict. It is important, too—in a world where many nation-states have their origins in conquest, occupation, the aftermath of war, or the resolution of colonial possession—that *jus post bellum* should be understood at least as much in the light of our general theory of good governance as in light of laws relating specifically to warfare. In circumstances where occupation continues sometimes for decades, *jus post bellum* should be dominated by ordinary principles of political rights and responsibilities, not by norms that look for their application only in a state of “peace” consigned to an indefinite future. Generations may come and go in a land that is scarred by battle and under a political system that started life as a system of military administration. Since these generations deserve something better than the perpetual postponement of normal political community, it is this connection between *jus post bellum* and what we might call *jus ordinarium* that deserves our closest consideration.

124. O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 13-30; O'DONOVAN, JUST WAR REVISITED, *supra* note 19, at 18-32. See also the discussion on the general limitations of human judgment in O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 28-30.

125. O'DONOVAN, THE WAYS OF JUDGMENT, *supra* note 51, at 3-12.

