

The Reasonable Hope of Success as an Element in Jus ad Bellum Theory: Misplaced and Meaningless?
ROB McLAUGHLIN*

Hope, the comfort of danger, when such use it as have to spare, though it hurt them, yet it destroys them not. But to such as set their rest upon it (for it is a thing by nature prodigal), it at once by failing maketh itself known; and known leaveth no place for future caution.

- Thucydides, *The Melian Debate* -

Introduction

Karl von Clausewitz, defining the subject of his treatise *On War*, noted how "war is an act of force to compel the enemy to do our will ... Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it".¹ Yet by the time that Ian Brownlie's seminal *International Law and the Use of Force by States* was published in 1963, these "imperceptible limitations" had become such a dominant theme within the international system that lipservice- if not actual obeisance - was paid to their dictates by the vast majority of states. As Brownlie noted, this has led to the development of a "legal regime which has placed substantial limitations on the competence of states to resort to force".² This positivist, legalist position on Just War doctrine - to which Brownlie's book was a densely, thoroughly-argued testament - has thus come to dominate discourse on the issue. WM Reisman, for example, has seen fit to declare that

* BA (Hons) LLB (Hons) (UQ) MA (Brown). My thanks to Dr William Maley for his invaluable comments on an earlier draft of this article.

¹ Karl von Clausewitz, *On War*, edited and translated by Michael Howard and Peter Paret, (Princeton University Press: Princeton New Jersey, 1976) p 75. See also Michael Howard, "*Temperamenta Belli: Can War be Controlled?*" in Michael Howard (ed) *Restraints on War* (Oxford University Press: Oxford, 1979) pp 1-16 at 1.

² Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press: Oxford, 1963) p 424.

the question for jurists, then, is not "the non-use of force", but the assignment of competence to use force to appropriate agencies in the community and the determination of the contingencies, purposes, and procedures for the use of authoritative force.³

In a similar vein, William D Rogers has argued that modern debates "over whether the latest military event is justified revolve not around norms but around the facts",⁴ thereby confining ethics and morality, if not to Lenin's dustbin of history, then at least to the realist dustbin of superfluity. Perhaps Richard Krickus best sums up this predominant attitude to Just War theory when he notes that, to many international actors and policymakers, "just war is a fantasy of the innocent and idealistic".⁵ Furthermore, the limited vision which this narrow perspective has fostered has continued to evolve. David Scheffer, as recently as 1991, felt secure enough to declare in "a simple modern formula" that for many, "the just war is one consistent with the United Nations Charter, while the unjust war is one conducted in violation of the Charter".⁶ This view – a view indicative of a narrow interpretation as based solely upon the United Nations Charter and self-defence, and a view which is currently given to issues of use of force by states – really deserves only cautious acceptance as the inheritor of the just war tradition. For, as DP O'Connell has observed, this view is reflective of neither the history nor the depth of the concept of Just War: "The just war", O'Connell noted, "authorized war; 'self-defence' authorizes nothing more than 'self-defence'".⁷

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3. W Michael Reisman, "Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects" in Lori Fisler Damrosch and David J Scheffer (eds) *Law and Force in the New International Order* (Westview Press: Boulder, 1991) pp 26-48 at 26.
 4. William D Rogers, "The Principles of Force, The Force of Principles" in David J Scheffer, Louis Henkin et al (eds), *Might v Right* (2nd ed) (Council on Foreign Relations Press: New York, 1991) pp 95-108 at 100.
 5. Richard J Krickus, "On the Morality of Chemical/Biological War" in Malham M Wakin (ed) *War, Morality, and the Military Profession* (2nd ed) (Westview Press: Boulder, 1986) pp 410-424 at 411.
 6. David J Scheffer, "Use of Force After the Cold War: Panama, Iraq, and the New World Order" in Scheffer, Henkin et al (eds) op cit, pp 109-172 at 134.
 7. DP O'Connell, "Limited War at Sea Since 1945" in Howard (ed) op cit, pp 123-134 at 124.

Over the last two decades, however, a counterpoint to the predominance of this positivist, legalistic, United Nations Charter-focussed attitude to Just War theory has been emerging. Michael Walzer, in his book *Just and Unjust Wars* (1977), observed that ethical thinking on war had, since the late Eighteenth Century, been subverted by "lawyers" who had "constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in". He declared his aim as to "recapture the just war for political and moral theory".⁸ Jean Bethke Elshtain has recorded how "just war as a political theory received a new lease of life"⁹ with the publication of both Walzer's book, and James Turner Johnson's *Ideology, Reason, and the Limitation of War* (1975). Along with the works of two theologians— Paul Ramsey's *War and the Christian Conscience: How Shall Modern War be Conducted Justly* (1961)¹⁰ and William V O'Brien's *The Conduct of Just and Limited War* (1981)¹¹— these thinkers sought to reinvigorate debate and scholarship on the ethical, rather than the positivist, Just War tradition. And, in turn, this re-emergence of the philosophical has become not only an ethical, but a legal imperative for scholars such as David Rivkin. Rivkin is a thinker who argues strongly that "focussing solely on the fact that force is used without understanding why, is both morally myopic and legally insufficient"; he adds that "international law also has a moral dimension, a fact reflected in the common genesis and close connection between such areas of customary international law as *jus in bello* and *jus ad bellum*".¹² It is within this ethical revitalisation of the Just War concept that my study of the *Jus ad Bellum* tradition, and of the issue of "reasonable hope of success" as an element of it, is best located.

Outline

The aim of my study is to outline the substance of Just War theory and to examine one specific, and under-examined, aspect of the doctrine – the element of reasonable hope of success. I will ask both what the substance of this concept is, and whether it is misplaced and/or meaningless within the Just War tradition. In order to achieve this, I will generally limit the scope of my study to that part of the Just War tradition in which this element is located— the concept of *Jus ad Bellum*.

⁸ Michael Walzer, *Just and Unjust Wars* (Basic Books: New York, 1977) pp xiii-xiv.

⁹ Jean Bethke Elshtain, "Introduction" in Jean Bethke Elshtain (ed) *Just War Theory*, (New York University Press: New York, 1992) pp 1-7 at 2.

¹⁰ Paul Ramsey, *War and the Christian Conscience: How Shall Modern War be Conducted Justly?* (Duke University Press: Durham North Carolina, 1961).

¹¹ William V O'Brien, *The Conduct of Just and Limited War*, (Praeger: New York, 1981).

¹² David B Rivkin, "Commentary on Aggression and Self-Defence" in Damrosch and Scheffer (eds) op cit, pp 54-62 at 55.

This facet of Just War theory deals with the justice, and, in the theological tradition, the righteousness, of the decision to resort to the use of force. As such it has primarily "been the work of theologians, jurists, and in more recent years, of diplomats".¹³ *Jus ad Bellum* is to be distinguished from the concept of *Jus in Bello*, which is that part of the Just War tradition which concerns the actual conduct of the war and the justice of certain actions in the course of the fighting. This aspect of the Just War tradition – now reflected in the Geneva Conventions and in "international humanitarian law" – has primarily been developed by combatants and their political masters, and will be discussed only insofar as it impacts upon the primary focus of this study.

To achieve this outcome, I have adopted a two-part approach to the question. First, and in order to conceptualise and appreciate where the issue of reasonable hope of success sits within the Just War tradition, I will attempt to outline the development of the tradition by addressing three issues: the sources of, and influences upon, the tradition; the elements of modern *Jus ad Bellum*; and the question of how *Jus ad Bellum* theory is applied. With this basis laid, and some understanding of the concept and content of reasonable hope of success established, it will then be possible to examine my second primary question. This will begin with the issue of whether the concept is "misplaced" in being considered to be part of the *Jus ad Bellum* calculus. An examination of the similarities and differences between reasonable hope of success and the other elements of the calculus offers us one means of analysing this question. This will then progress, through a study of whether the term can be meaningfully applied within the *Jus ad Bellum* concept, to an examination of whether reasonable hope of success actually has any function or utility within modern Just War theory. It is my argument that reasonable hope of success is indeed misplaced in *Jus ad Bellum* theory, and ultimately meaningless within Just War doctrine.

¹³ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Bantam Books: New York, 1971) p 59; Walzer op cit, p 21.

PART I – The Development of Just War Theory and Jus ad Bellum

Sources and Influences

The work of St Augustine of Hippo (354-430), particularly his *The City of God*, is central to classical Just War doctrine, for as Robert Holmes has observed, "virtually every major just war theorist in the Western tradition builds upon his work".¹⁴ For Augustine, Just War theory was a theological construct which used "general ethical standards rather than the ambitions of rulers" as its source and reference point.¹⁵ His formulation of Just War theory centred upon his description of the circumstances in which a war could be characterised as "just". Just wars, Augustine believed

are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected to punish wrongs committed by its own citizens, or to restore what has been unjustly taken by it.¹⁶

It was, however, in the course of the Twelfth and Thirteenth Centuries that Just War theory – analysed by Gratian in his *Decretals* (1148) and St Thomas Aquinas (1225-1274) in his *Summa Theologia* – achieved what Johnson calls the "benchmark" in Just War doctrine.¹⁷ Aquinas, in particular, refined and expanded the Augustinian formulation,¹⁸ arriving at what is considered to be the classic statement of Just War doctrine:

¹⁴ Robert L Holmes "Can War be Morally Justified? The Just War Theory" in Elshstain (ed) op cit, pp 197-223 at 197.

¹⁵ Telford Taylor op cit, p 60. See also O'Brien op cit, p 4.

¹⁶ Augustine summarised in Taylor op cit, pp 60-61.

¹⁷ James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740* (Princeton University Press: Princeton New Jersey, 1975) pp 33-35. Other scholars, notably Jesuit Joseph C McKenna, SJ, also hold the expanded Just War doctrine of Aquinas to encapsulate the "classical" conception of Just War theory – see McKenna, "Ethics and War: A Catholic View" in *The American Political Science Review*, Vol 54, Issue 3 (Sep 1960); pp 647-658 at 649. Similarly, Paul Christopher believes that Gratian and Aquinas' works were "pivotal events" in the development of Just War theory – Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Prentice Hall: Englewood Cliffs New Jersey, 1994) pp 49-58.

¹⁸ Richard J Regan, *Just War: Principles and Cases* (The Catholic University of America Press: Washington DC, 1996) p 17.

In the first place, the authority of the Prince, by whose order the war is undertaken; for it does not belong to a private individual to make war, because, in order to obtain justice he can have recourse to the judgment of his superior ... But, since the care of the State is confided to princes ... it is to them that it belongs to bear the sword in combats for the defence of the State against external enemies ... In the second place, there must be a just cause; that is to say, those attacked must, by a fault, deserve to be attacked ... In the third place, it is necessary that the intention of those who fight should be right; that is to say, that they propose to themselves a good to be effected or an evil to be avoided ... those who wage wars justly have peace as the object of their intention.¹⁹

Ramsey and others generally believe that two significant new influences began to act upon Just War theory between Augustine and Aquinas. The first was the rise of *Jus Naturale*, or Natural Law, which altered understanding of the "nature of political community".²⁰ This development was arguably reflected in the addition of "Right Authority" as an element of *Jus ad Bellum* theory. The second influence was the increasing significance of chivalric codes and rules on the actual conduct of war.²¹ This influence found a predominantly theological expression within Just War theory as the element of "Right Intention",²² and in the developing conceptual separation between *Jus ad Bellum* and *Jus in Bello*.

The influence of natural law upon Just War theory grew in tandem with natural law's influence upon theology; by the Sixteenth Century, natural law had come to dominate the Just War doctrine. In their treatises, the Spanish theologians Francisco de Vittoria (1480-1546) and Francisco Suarez (1548-1617) both argued that "a just war may not be waged except for causes provided for in natural law".²³ This assertion implied a radical limitation on the scope of Just War doctrine because it was an express repudiation of the non-natural law notion of a "Just-Holy" war; the latter had previously been advocated and theologically justified by Augustine and

¹⁹ Aquinas quoted in Taylor op cit, p 61. Translations of this passage differ, but the essence is retained by most – See for example Thomas Aquinas, "Of War" in John A Vasquez (ed) *Classics of International Relations*, (Prentice Hall: Englewood Cliffs New Jersey, 1986) pp 9-13 at 9-10.

²⁰ Ramsey op cit, pp 32-33; Johnson op cit, p 57. O'Brien, however, makes a sound case for the argument that Just War theory has actually been grounded in Natural Law traditions from its Augustinian origins – see O'Brien op cit, p 4.

²¹ Ramsey op cit, pp 32-33.

²² Johnson op cit, pp 46-47. See also Howard, "*Temperamenta Belli*" in Howard (ed) op cit, pp 8-10.

²³ Johnson op cit, p 157; Taylor op cit, pp 62-63.

others.²⁴ Contemporaneously, the doctrine was also reacting to the development of *Jus Gentium* – the Law of Princes/Rulers. This Law advocated that the Prince could "of his own authority use the sword against internal or external disturbers of order" for the purposes of "the perfection of the state",²⁵ rather than the greater glory of God. These two developments effectively heralded the triumph of the growing secular tradition of Just War theory over the Holy War advocacy of the purely theological strand of the doctrine.²⁶ This in turn allowed Grotius, Vattel, and others, in furtherance of this secular and rationalist approach to Just War theory, to emphasise the legal-moral rather than the theological-moral aspects of Aquinas' three major Just War criteria.²⁷

Despite this modernising response, however, by the Eighteenth Century, Just War theory was in decline. Some writers see this devaluation of the doctrine as the logical outcome of the rise of the territorial state and nationalism. They note that "wars played a large part in this process", and observe how "a nation's record of victories and defeats began to be regarded as the major theme of its history".²⁸ One could indeed argue that this development actually saw the rebirth of the theological-Holy War tradition in Just War by substituting "nation" for "God", but most scholars tend to see this period in terms of the rise of "realism" in debates about the use of force by states. For another group of writers, the decline of Just War theory can be explained by the "destruction of the theological, and to a lesser extent the philosophical, unity that characterised Christendom", and which occurred in the course of the Reformation and the Renaissance. This condition was exacerbated by the advent of Colonialism and its tacit acceptance of the "Athenian"²⁹ proposition that the strong had the "right" to conquer the weak. This "right" was however

²⁴ See McKenna op cit, p 648. One example which McKenna, O'Brien, and others quote is Romans 13:4 – "But if thou dost what is evil, fear, for not without reason does it [the public power] carry the sword. For it is God's minister, an avenger to execute wrath on him who does evil".

²⁵ Johnson op cit, pp 53-54.

²⁶ Ibid at 8, 15-16. See also O'Brien op cit, pp 13-14.

²⁷ Holmes op cit, pp 201-202. Taylor and others also make a case for the impact of the Reformation and the rise of a Protestant tradition in Just War theory as a further significant milestone in this legalist secularisation of the doctrine. See Taylor op cit, pp 63-64.

²⁸ Taylor op cit, p 64.

²⁹ From the Melian Dialogue – "They that have odds of power exact as much as they can, and the weak yield to such conditions as they can get" – see Thucydides, "The Melian Debate" in John A Vasquez (ed) op cit, pp 22-26 at 23 (*90).

qualified – under the aegis of self-interest, it was disguised as civilising mission.³⁰ Regardless, however, of the precipitants to which one attributes this development, the results were the same – the eclipse of *Jus ad Bellum* and the rise of "realism" in thinking about war.

The rise of realism, described by Joseph Conrad as the "solemnly official recognition of the Earth as a House of Strife",³¹ compounded the grip of legal positivism on Just War theory. Realism advocated that war – "a fact of life"³² – must simply be accepted. WE Hall's famous *fin de siecle* analysis declared that:

International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they chose, and to busy itself only in regulating the effects of the relation.³³

This belief that "recourse to armed coercion is a perennial feature of the human condition"³⁴ was taken to its logical positivist conclusion in realism, evolving into the belief that the use of force – "always an instrument in somebody's policy"³⁵ – should simply be recognised as the sovereign right of all states. Nations, it was felt, would continue to possess force, and because the possession of force "is an incentive to employ it",³⁶ nations would naturally attempt to translate this potential into actual benefit and gain. An adjunct, however, of this shift away from the regulation of *whether* a state could or should resort to force (*Jus ad Bellum*) was an increasing emphasis upon the issue of *what* a state and its soldiers could actually do whilst employing this force (*Jus in Bello*).³⁷ This is evident, writes Geoffrey Best, when one considers how:

³⁰ See for example Johnson op cit, p 157.

³¹ In Geoffrey Best, "Restraints on Land War" in Lawrence Freedman (ed) *War* (Oxford University Press: Oxford, 1994) pp 266-270 at 268.

³² Taylor op cit, p 65.

³³ WE Hall quoted by J L Brierly in D J Harris, *Cases and Materials on International Law* (4th ed) (Sweet & Maxwell: London, 1991) p 817.

³⁴ O'Brien op cit, p 22; Walzer op cit, p 4.

³⁵ McKenna op cit, p 648.

³⁶ Rogers, "The Principles of Force" in Scheffer, Henkin et al (eds) op cit, p 99.

³⁷ James Turner Johnson, "Threats, Values, and Defense: Does the Defense of Values by Force Remain a Moral Possibility?" in Elshstain (ed) op cit, pp 55-77 at 55-57.

from the 1860's to the First World War it was almost possible, perhaps, to measure the extent of the hold which the idea of restraint *in* war had on the public mind of Europe by the volume of clamour alleging the breaking or neglect of it.³⁸

The Hague and other conventions, and the development of the ICRC, for example, bear witness to this realist pessimism that war was subject to political rather than ethical dictates, and that the best which could thus be hoped for was to regulate the brutality inherent in its actual prosecution.

The unprecedented level of destruction which characterised World War One was, for many observers and participants, the most striking manifestation of this philosophy of realism. This horror with war helped in turn to foster an environment renewing the consideration of the role of ethics in decisions to use force. The 1927 Kellogg-Briand Treaty on the Renunciation of War (the "Pact of Paris") encapsulated this horrified reaction to World War One in its "prohibition" of war as "an instrument of national policy".³⁹ However this ethically admirable, but untenable, attempt to rein in realism did not save the world from descent into an even more destructive and total war a decade later. It was really only in the aftermath of World War Two that the true essence of classical Just War theory – the ethical regulation, rather than prohibition, of the war decision – began to emerge from realism's long shadow.⁴⁰

As has been prefigured above, post-1945 Just War theory can generally be seen as an attempt to navigate a middle course between moral absolutism and realism.⁴¹

³⁸ Best, "Restraints on Land War" in Freedman op cit, p 267 (my italics).

³⁹ See Article I of the Treaty, in Harris op cit, p 819.

⁴⁰ See O'Brien op cit, p 3. It is interesting, as O'Brien seems to indicate, that the experience of total war did, to some extent, blind many to the fact that Clausewitz – a theorist of total war but a proponent of policy war – can also be appreciated as an advocate of the "Just War-Limited War" school of realism. This is particularly evident if one concentrates upon his dictates as to the controlling role of policy with respect to the decision on *whether* to use force, and his belief that, once battle is joined and its prosecution left to the military, war should be politically monitored to ensure that its *methods* conform with the policy bounds and aims desired. Clausewitz, for all his disdain of international law, custom, and Just War theory, could nonetheless be said to have utilised the '*Jus ad Bellum – Jus in Bello*' distinction as a definitive element of his theory.

⁴¹ William V O'Brien, "The Challenge of War: A Christian Realist Perspective" in Elshstain (ed) op cit, pp 169-196 at 171; McKenna op cit, p 658.

In other words, it is an attempt to distil "*practical* moral principles"⁴² from the complex "contradiction" which exists between

the assertion of a sovereign right to resort to war and to gain title by conquest on the one hand and a tendency in spite of this to provide theoretical and moral bases for resort to war on the other.⁴³

The realisation that ethics "dissociated from the world in which men live cannot give adequate moral guidance for man's living"⁴⁴ has formed the basis of "modern" Just War theory. This realisation has been variously described as the Idealist-Realist, Absolutist-Realist, Utilitarian-Absolutist,⁴⁵ Pacific-Realist, Deontological-Utilitarian,⁴⁶ or Legalist-Moralist⁴⁷ paradigm. Furthermore, the tension between two poles – howsoever labeled – continues to create significant interpretive differences within the Just War concept. At one end of the spectrum are the realist views of scholars such as Scheffer – who sees Just War theory and international law as a "shield" for the "sword" of armed force⁴⁸ – and to a lesser extent Rogers. Rogers believes that "damage to investment and financial interests abroad" rates alongside "moral considerations" in assessing whether to use force.⁴⁹ At the other end of the spectrum are the more theologically-founded views of Ramsey (of the Protestant tradition) and O'Brien and the United States Catholic Bishops' Conference (of the Catholic tradition) to whom religiously-grounded morality occupies centre place

⁴² H F Kuenning, "Small Wars and Morally Sound Strategy" in James C Gaston and Janis Bren Hietala (eds), *Ethics and National Defense* (National Defense University Press: Washington DC, 1993) pp 187-222 at 189 (my italics). See also Ramsey and O'Brien on the need for modern Just War theory to be a "practical body of moral guidelines applicable to real life, not a museum piece to be preserved for its own sake", and John Courtney Murray SJ, who calls Just War doctrine a "Grenzmoral" – a theological and social "Grundnorm" – an attempt to regulate, "on a minimal basis of reason a form of human action, the making of war, that remains always fundamentally irrational": Murray, quoted in O'Brien op cit, p 5.

⁴³ Brownlie op cit, pp 40-41.

⁴⁴ McKenna op cit, p 647.

⁴⁵ Thomas Nagel, "War and Massacre" in Malham M Wakin (ed) *War, Morality, and the Military Profession* (2nd ed) (Westview Press: Boulder, 1986) pp 297-316 at 298-299.

⁴⁶ Elshtain, "Introduction" in Elshtain (ed) op cit, pp 1-2.

⁴⁷ Walzer op cit, p xii.

⁴⁸ Scheffer, "Introduction" in Scheffer, Henkin et al (eds) op cit, pp 1-8 at 1.

⁴⁹ Rogers, "The Principles of Force" in Scheffer, Henkin et al (eds) op cit, p 99.

in Just War thought.⁵⁰ Ethicists such as Walzer – who orients his thinking around the competition between the values of Utilitarian and rights-based approaches to extreme situations⁵¹ – occupy varying positions between these two poles.

Similarly, evolution also continues within these various "communities" of Just War theory. Within the theological camp, the United States Bishops' statement on Just War, *The Challenge of Peace: God's Promise and Our Response – The Pastoral Letter on War and Peace* (1983), unleashed "a storm of protest" after its publication; as one scholar observed, in "shifting the focus of their discourse to *peace* above all, the Bishops changed the subject of just war, for just war does not locate peace as the highest value, as does pacifism".⁵² "Indeed the problem with the Bishops' approach", argues theologian O'Brien, "begins with the title. The subject should really be 'The Challenge of War'".⁵³ Similar debates are also evident within the realist "community", most notably between legalists and political realists. Louis Henkin, for instance, advocates an ethically-based, but nonetheless positivist and United Nations Charter-focussed approach to the use of force. This is evidenced in his belief that "international law provides no more basis for permitting the export of democracy by force than for permitting the export of socialism by force".⁵⁴ On the other hand, advocates⁵⁵ of both the "Regan Doctrine" and of John Stuart Mill's maxim that "intervention to enforce non-intervention is always rightful, always

⁵⁰. Promise and Our Response" in Elshtain (ed) op cit, pp 77-168.

⁵¹. Michael Walzer, *Emergency Ethics* (The Joseph A Reich Sr Distinguished Lecture on War, Morality, and the Military Profession, No 1, 21 November 1988: USAF Academy, Colorado) p 11; Walzer op cit, p xiii. Walzer's conception of "emergency ethics" is also partially attributable, as Holmes has observed, to his exploration of the relationship between *Jus ad Bellum* and *Jus in Bello*: Holmes, "Can War be Morally Justified?" in Elshtain (ed) op cit, p 217.

⁵². Elshtain, "Introduction" in Elshtain op cit, p 5.

⁵³. O'Brien, "The Challenge of War" in Elshtain (ed) op cit, p 169. Indeed, for O'Brien, it is "democracy" which is located at the centre of modern Just War theory. See for example O'Brien op cit, chapter 7.

⁵⁴. Louis Henkin, "The Use of Force: Law and United States Policy" in Scheffer, Henkin et al (eds) op cit, pp 37-70 at 56.

⁵⁵. Kirkpatrick and Gerson, "The Regan Doctrine, Human Rights, and International Law" in Scheffer, Henkin et al (eds) op cit, p 19.

moral, if not always prudent",⁵⁶ represent a more policy-political wing of the realist approach to modern Just War thought.

With this brief overview of the development of Just War theory, it is possible to begin a more detailed examination of the content of its most important aspect—*Jus ad Bellum* and the decision to go to war.

The Elements of Modern Jus ad Bellum Theory

It is generally accepted that the modern *Jus ad Bellum* calculus centres upon seven fundamental ethical questions, but the way in which these elements are formulated and inter-linked often varies between scholars. O'Brien, Johnson, and Kuenning, for example, describe four basic criteria with several sub-elements,⁵⁷ whereas Elshtain, Taylor and McKenna adopt a more straight-forward, seven-element approach.⁵⁸ Regardless of such formulations, however, the seven basic ethical issues are generally held to be: Just Cause; Right Authority; Right Intent and with the Aim of Peace; Last Resort; Comparative Justice; Proportionality; and Reasonable Hope of Success.⁵⁹

Just Cause

By the time that Augustine's original Just War doctrine had been modernised by Thomas Aquinas in the Twelfth Century, *Jus ad Bellum* recognised three types of "just" causes: wars against the enemies of the Church; wars of self-defence; and wars of restitution or punishment.⁶⁰ With the rise of *Jus Naturale* and *Jus Gentium*, and the influence of secular legalist thought in the Sixteenth Century, these categories of just cause further evolved. This evolution discarded "Just-Holy" war,

⁵⁶ This is from John Stuart Mill, "A Few Words on Non-Intervention", *Fraser's Magazine*, December 1859. See Jeanne J Kirkpatrick and Allan Gerson, "The Regan Doctrine, Human Rights, and International Law" in Scheffer, Henkin et al (eds) op cit, pp 19-36 at 19.

⁵⁷ O'Brien op cit, p 173; Johnson op cit, p 26; Kuenning, "Small Wars and Morally Sound Strategy" in Gaston and Hietala (eds) op cit, p 189.

⁵⁸ Elshtain, "Epilogue: Continuing Implications of the Just War Tradition" in Elshtain (ed) op cit, pp 323-333 at 324; McKenna op cit, pp 651-652.

⁵⁹ James Turner Johnson, *The Just War Idea and the Ethics of Intervention* (The Joseph A Reich Sr Distinguished Lecture on War, Morality, and the Military Profession, No 6, 17 November 1993: USAF Academy, Colorado) pp 22-23.

⁶⁰ Taylor op cit, p 60; Johnson op cit, 1975, pp 57-59. Elsewhere, Johnson has simplified these categories as: defence of the innocent; retaking what has been wrongly taken; punishing evil. See Johnson op cit, 1993, p 15.

but incorporated "preventive self-defence, the maintenance of rights, and the maintenance of the Balance of Power" in the process.⁶¹ Clearly, this shift towards positivist, statist interpretations of just cause laid many of the foundations upon which realism was built. And this shift led, paradoxically, to the Eighteenth Century eclipse of the concept of *Jus ad Bellum*. Even in the aftermath of World War One, and despite the re-emergence of the ethical consideration of *whether* to resort to force, the demonisation of "aggressive" war actually ensured that "just cause" contracted still further to eventually encompass only "defensive" wars. This perception that wars be defensive underpinned the Nuremberg Trials, and still significantly influences the post-1945 concept of just cause. This is evident in the emphasis given to "self-defence" in modern Just War theory, even to the extent that some writers argue that "the only just cause of modern times is self-defence".⁶² The United States Catholic Bishops' Conference however, have offered a wider, more balanced, and more historically-sensitive definition of modern just cause:

War is permissible only to confront "a real and certain danger"; ie, to protect innocent life, to preserve conditions necessary for decent human existence and to secure basic human rights.⁶³

Thus just cause, it can be argued, still remains a wider concept than mere self-defence. This is certainly anticipated in the approaches of O'Brien and James F Childress. Both theorists argue that the essence of the modern "just cause" criteria requires that the sum of the considerations advocating the use of force must be such that the sum is "sufficiently 'serious and weighty' to overcome the presumption against killing in general and war in particular".⁶⁴

⁶¹ Brownlie op cit, p 41. See also Johnson op cit, pp 213-233 on this simultaneous narrowing *and* expansion of "just" causes in the writings of Sutcliffe, Grotius, and Locke.

⁶² Scheffer, "Use of Force After the Cold War" in Scheffer, Henkin et al (eds) op cit, p 137.

⁶³ United States Catholic Bishops, "The Challenge of Peace" in Elshtain op cit, p 98.

⁶⁴ O'Brien op cit, p 20; James F Childress, "Just War Theories: The Bases, Interrelations, Priorities, and Functions of Their Criteria" in Wakin (ed) op cit, pp 256-276 at 262-263.

Right Authority

The criterion of "right", "competent" or "legitimate" authority states that "war cannot be declared arbitrarily or by the whim or fancy of a few".⁶⁵ Satisfaction of the criterion is only achieved if the decision to use force is taken by "those with responsibility for public order".⁶⁶ Most commonly this means the state. So closely has this criterion of right authority been associated with the co-emergent concept of the "state", that Grotius actually treated it as an element for discussion under the concept of "sovereignty" rather than as part of *Jus ad Bellum*.⁶⁷ But this seeming correlation between the two concepts is not absolute. Joseph McKenna, writing in 1960, declared that a true understanding of this element requires an acceptance of the fact that, in "choosing war and peace, the government of any state acts as surrogate for an unarticulated international authority", which could in turn exert "control" for "international purposes".⁶⁸ This theme has been taken up in the post-Cold War decade by David Scheffer, Ruth Gordon and others, and is readily apparent in the new emphasis being placed upon the United Nations as a, if not *the*, competent international authority.⁶⁹ Similarly, for scholars such as O'Brien, the issue of right authority can no longer simply be explained by analogy with the concept of "state sovereignty". This is particularly so where issues such as constitutional competence (for example, the differing roles and powers of the United States' Presidency and Congress with respect to use of force) and the problems posed by revolutionary insurgency have served to muddy the once clear waters of legitimacy.⁷⁰

⁶⁵ Edward A Malloy, *The Control of Violence, Foreign and Domestic: Some Ethical Lessons from Law Enforcement* (The Joseph A Reich Sr Distinguished Lecture on War, Morality, and the Military Profession, No 2, 22 March 1990: USAF Academy, Colorado) p 7.

⁶⁶ United States Catholic Bishops, "The Challenge of Peace" in Elshstain (ed) op cit, p 98.

⁶⁷ Johnson op cit, 1975, p 213.

⁶⁸ McKenna op cit, p 651. This prefiguring of, arguably, the United Nations as the new "Right Authority" was particularly prescient given the milieu in which he wrote.

⁶⁹ Scheffer, "Use of Force After the Cold War" in Scheffer, Henkin et al (eds) op cit, p 137; Ruth Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond" [1994] 15:2 *Michigan Journal of International Law* 519 at 520.

⁷⁰ O'Brien op cit, p 17. The "legitimacy" issue was further muddied when non Judeo-Christian perspectives on Just War, such as "Jihad", re-entered the international relations calculus.

Right Intent

The element of "right intent" was added to *Jus ad Bellum* by Aquinas⁷¹ and emphasises the motive of the agents of the state.⁷² The United States Catholic Bishops' Pastoral Letter defined right intention in terms of two aspects:

War can be legitimately intended only for the reasons set forth as a just cause. During the conflict, right intention means pursuit of peace and reconciliation, including avoiding unnecessarily destructive acts or imposing unreasonable conditions (eg, unconditional surrender).⁷³

Thus right intention, as Richard Regan and others indicate, is clearly a subjective criterion.⁷⁴ "The desire for harming, the cruelty of avenging, an unruly and implacable animosity, the rage of rebellion, the lust of domination and the like", as Augustine and Aquinas noted,⁷⁵ transform an otherwise just war into an unjust war. "Purity of soul and motivation", observes Holmes,⁷⁶ are required of the actors because, as McKenna agrees, "even good acts are morally perverted if they are done with immoral motives".⁷⁷ This criterion of right intention is further complicated by the fact that it operates on several levels. Not only must the intentions of the state corporately, and its rulers specifically, be "right", but so also must be the intentions of its military agents.⁷⁸ This aspect of right intention also serves to illustrate, quite starkly, the chasm that still exists between the practical moralist and realist communities in Just War theory. In terms of military directives,

⁷¹ Holmes, "Can War be Morally Justified?" in Elshtain (ed) op cit, p 199.

⁷² Jeffrie G Murphy, "The Killing of the Innocent" in Wakin (ed) op cit, pp 341-364 at 341-3.

⁷³ United States Catholic Bishops, "The Challenge of Peace" in Elshtain (ed) op cit, p 100.

⁷⁴ Regan op cit, p 84. David Scheffer, discussing the concept of right intention and the Gulf War, states that: "In any event, going to war to defend the economic lifeline of significant sectors of the world economy may be a justifiable use of force, particularly when the Security Council authorises it": Scheffer, "Use of Force After the Cold War" in Scheffer, Henkin et al (eds) op cit, pp 137-138. This approach, whilst accurate within its realist paradigm, probably actually subverts the original, intentional, ethical subjectivity of the criterion by substituting an interpretation of objective national interest in its stead.

⁷⁵ Johnson op cit, 1975, p 40.

⁷⁶ Holmes, "Can War be Morally Justified?" in Elshtain (ed) op cit, pp 199-200.

⁷⁷ McKenna op cit, p 652.

⁷⁸ O'Brien op cit, p 34. This interpretation of the element has significant ramifications, for example as to forms of propaganda, the mind-sets which they are designed to create, and the responses they aim to provoke.

orders, plans, and aims, it may be possible to ensure "purity of motive", but to expect that each individual combatant would also be free of "evil" intentions or bloodlust is extremely difficult to monitor on any but the most rudimentary level.

An important element of right intention⁷⁹ is that a just war must be "for the ends of peace". The titling of the United States Catholic Bishops' Pastoral Letter on War, *The Challenge of Peace*, clearly locates the aim of peace at the centre of right intention. Johnson has described the ends of peace as the requirement that a state's purpose in employing force shall not be "to serve some aggressive end but to establish or re-establish such goals as international order and respect for human rights".⁸⁰ Allied observations that "World War [Two] was just because it would lead to a new, more effective world order"⁸¹ seem to evidence one application of this concept in a way which Johnson believes to be in harmony with Just War theory. It is also clear that the aim of peace must be in the mind of not only the state as a corporate entity, but also of the "individual soldier" who does its bidding.⁸² This is clearly so with right intention generally.

Last Resort

The element of "last resort" requires that recourse to force be countenanced only when all alternative courses of action and attempts at "peaceful resolution of the crisis have been exhausted".⁸³ This criterion can be "troublesome", and nuances are significant in its interpretation. McKenna, for example, believes that this element *requires* a penultimate act before the actual use of force or, in other words, a "necessary prerequisite for military action". This penultimate act is the making of "an ultimatum or formal declaration of war", "since these are the last measures of persuasion short of force itself".⁸⁴ The 1984 "Weinberger Doctrine", however, placed a different emphasis upon the criterion – "last resort" was satisfied where alternative means of resolution have failed, or "have no prospect of success".⁸⁵ Regan takes this one step further still, declaring that in some situations, "negotiations may offer [only] a *reasonable* alternative to war". He goes on to note, however, that:

⁷⁹ This is designated as a stand-alone criterion by some scholars. See for example Johnson op cit, 1993 (The Reich Lecture).

⁸⁰ Ibid at 12.

⁸¹ Scheffer, "Use of Force After the Cold War" in Scheffer, Henkin et al (eds) op cit, 136.

⁸² Johnson op cit, 1993, 12.

⁸³ Scheffer, "Use of Force After the Cold War" in Scheffer, Henkin et al (eds) op cit, p 138.

⁸⁴ McKenna op cit, p 652.

⁸⁵ Johnson op cit, 1993, p 25.

The key word is *reasonable*, and negotiations will be a reasonable alternative to war only if nations wronged or about to be wronged have probable cause to believe that negotiations *will* lead to the prevention or rectification of the wrong, not merely that negotiations *may* do so.⁸⁶

Admittedly this interpretation is *prima facie* less onerous on decision makers. But this interpretation actually requires a deeper level of ethical consideration because it allows for the discarding of a non-force course of action on the basis of a *probably won't work* assessment rather than a *didn't work* conclusion. However, it is Johnson, I would argue, who offers us the most realistic, utilisable description of last resort in terms of modern *Jus ad Bellum* theory:

This criterion does not mean always postponing use of military force until after every possible means short of force has been tried. If one comes into a situation late in the day ... working this gradualist way might simply postpone what is necessary until still later, perhaps making the situation worse ... Rather, the just war understanding of last resort is that in every case a determination should be made as to the kind of action that should be taken, with military intervention subordinated to other forms of action if they will work instead. This determination settles whether a situation of last resort exists. Thus it may exist at the initial point of national or international involvement in a crisis.⁸⁷

Comparative Justice

The essence of the criterion of "comparative justice" has been distilled by the United States Catholic Bishops' Conference thus: "The question in its most basic form is this: do the rights and values involved justify killing?"⁸⁸ If *Jus ad Bellum* theory as a whole is viewed as being, in O'Brien's words, "in the nature of special pleadings to overcome the presumption against killing",⁸⁹ then the presence of comparative justice as an element indicates that the doctrine accepts that "there are greater evils than the physical death and destruction wrought in War. And there are human goods of so high an order that immense sacrifices may have to be borne in their defense".⁹⁰ Similarly, comparative justice also requires the assessing state to be on notice that "no state should act on the basis that it has 'absolute justice' on its side ... acknowledg[ing] the limits of its 'just cause' and the consequent

⁸⁶ Regan *op cit*, p 64 (my italics).

⁸⁷ Johnson *op cit*, 1993, p 12.

⁸⁸ United States Catholic Bishops, "The Challenge of Peace" in Elshstain (ed) *op cit*, p 99.

⁸⁹ O'Brien *op cit*, p 16.

⁹⁰ John Courtney Murray SJ, "Theology and Modern War" in William J Nagle (ed) *Morality and Modern Warfare* (Helicon: Baltimore, 1960) p 80.

requirement to use *only* limited means in pursuit of its objective".⁹¹ O'Brien subsumes the question of comparative justice under the element of just cause, and offers an example of how complex this question is in his "Red or dead" assessment:

Whether the negative goal of not being Red is sufficient to justify a war that may leave many dead and still not ensure a political-social order of very high quality (a continuing probability in most of the Third World) is a most difficult question ... Any just-war analysis that does not face the question of comparative justice and character of contending political-social orders is not offering responsible answers to the just-war ends/means dilemmas of the modern world.⁹²

Proportionality

The element of "proportionality" concerns "weighing the good and evil results of an action or policy in both the short and the long term",⁹³ and in terms of both "effectiveness" and "value".⁹⁴ Proportionality was implicit in Just War theory as formulated by Aquinas. And Locke, observes Johnson, was concerned that:

the innocent be allowed enough of the produce of the land to live on at least subsistence level. This implies no spoliation that would render a country uninhabitable for years after the end of the war, as well as a limit on the destruction that has effects only during the period of the war.⁹⁵

Yet despite this long pedigree, proportionality as a *Jus ad Bellum* as opposed to a *Jus in Bello* concept⁹⁶ has only begun to receive more detailed consideration since the experience of World War One and, more particularly, the advent of weapons of mass destruction in World War Two. In many ways, proportionality seems initially to be analogous to comparative justice. Ramsey, for example, in a passage ostensibly about proportionality but equally descriptive of comparative justice, writes that "resort to war, no matter how just the cause" will never be right:

⁹¹. United States Catholic Bishops, "The Challenge of Peace" in Elshtain (ed) op cit, p 99.

⁹². O'Brien op cit, p 21.

⁹³. Malloy op cit, p 16.

⁹⁴. Robert Tucker quoted in O'Brien op cit, p 30.

⁹⁵. Johnson op cit, 1975, p 252.

⁹⁶. See O'Brien op cit, p 39. "Proportionality" in *Jus in Bello* relates to the military ends achieved by a particular action, and as such needs to be differentiated from "proportionality" in *Jus ad Bellum* which concentrates upon the relationship between overall aims and allowable levels of force.

unless a *proportionality* can be established between military/political objectives and their price, or unless one has reason to believe that in the end more good will be done than undone or a greater measure of evil prevented.⁹⁷

The distinction between the proportionality and comparative justice becomes more defined if one accepts O'Connell's assertion that "the concept of proportion is the political and legal aspect of the tactical concept of graduated force. If the political goal is severely limited ... instantaneous resort to the higher and more lethal modes of weaponry will be ruled out".⁹⁸ Whilst McKenna would couch the criterion of proportionality more in terms of assessing "moral rather than material gains and losses",⁹⁹ the concept seems to be underwritten by a pre-war, ethical decision which benchmarks the levels of force allowed to be exercised in pursuit of the aims. This is a subtly but fundamentally different issue from comparative justice, which asks whether the aim is ethically right and valuable enough to permit war at all. Where comparative justice deals with proportionality of ends, proportionality refers to proportionality of means. This distinction indicates that the "comparative justice" question must therefore be answered in the affirmative before the "proportionality" element would even become an issue in the *Jus ad Bellum* calculus.¹⁰⁰

Reasonable Hope of Success

The element of reasonable hope of success, as added by Vittoria and Suarez in the Sixteenth Century,¹⁰¹ is the most recent component of *Jus ad Bellum* theory. It is also the least well-defined aspect of Just War doctrine. For example, there are significant differences amongst scholars as to the proper title of the criterion; the

⁹⁷ Quoted in Childress, "Just War Theories" in Wakin (ed) op cit, p 265 (my italics). Regan also makes no clear distinction between proportionality and comparative justice: Regan op cit, p 63.

⁹⁸ O'Connell, "Limited War at Sea Since 1945" in Howard (ed) op cit, p 130.

⁹⁹ McKenna op cit, p 651.

¹⁰⁰ It is also arguable that proportionality, viewed in this way, is more of a *how* than a *whether to* question, and as such might be more properly restricted to consideration under the aegis of *Jus in Bello*, where it is also an element. I would respond, however, that proportionality in the *Jus ad Bellum* contexts serves a different role – it ties acceptable levels of force, on a political and social basis, to pre-war aims and ethical considerations, whereas proportionality in its *Jus in Bello* context is more concerned with justified levels of response/reaction to the levels of force which one's opponent employs in the course of the conflict.

¹⁰¹ Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 8.

two most regularly-expressed titles are "reasonable hope of success", and "reasonable prospect of victory". These seemingly analogous descriptors actually entail fundamentally different considerations and implications. The late addition of reasonable hope of success to *Jus ad Bellum* doctrine is explicable, I would argue, in terms of the discarding of the "Just-Holy" war tradition of Just War theory in the Fifteenth and Sixteenth Centuries. This tradition had coaxed crusaders and armies forward with notions of pre-ordained, divinely inspired victory – victory assured because the prince and combatants were engaging in "God's work".¹⁰² Accounts of armies marching behind holy relics – the "True Cross of Christ" for example – and their consequent belief in righteous invincibility, are legion in histories of both the Eastern and Western Roman Empires.¹⁰³ In this theological, religio-political atmosphere, reasonable hope of success would have been considered not only superfluous, but possibly a blasphemous absurdity. It was not until the secular tradition of Just War theory had established its dominance that reasonable hope of success was appended to *Jus ad Bellum* doctrine.

Reasonable hope of success, as McKenna has observed, is the most "haunting" question in modern Just War theory.¹⁰⁴ This is particularly so in modern conflict given the ultimate consequences of which escalation is capable. Yet for all this importance, it is the least well-defined and certainly the least analysed aspect of Just War theory.¹⁰⁵ The United States Catholic Bishops' Pastoral Letter on War, for example, devotes five-and-a-half lines to the issue:

Probability of Success [:] This is [a] difficult criterion to apply, but its purpose is to prevent irrational resort to force or hopeless resistance when the outcome of either will clearly be disproportionate or futile. The determination includes a recognition that at times defense of key values, even against great odds, may be a 'proportionate' witness.¹⁰⁶

Whilst this statement tells us three things about reasonable hope of success – a purpose, an extremely wide exception, and an admission that it is "difficult" to apply – it offers us little in the way of solid definition, description, or guidance on application. Holmes, discussing the United States Catholic Bishops' description of

¹⁰² Paul Ramsey, "The Just War According to St Augustine" in Elshtain (ed) op cit, pp 8-22 at 16; Johnson op cit, 1975, p 27.

¹⁰³ See John Julius Norwich, *Byzantium, Volume I: The Early Centuries* (Penguin: London, 1990).

¹⁰⁴ McKenna op cit, p 654.

¹⁰⁵ Johnson op cit, 1993, p 12.

¹⁰⁶ United States Catholic Bishops, "The Challenge of Peace" in Elshtain (ed) op cit, pp 100-101.

the element, concedes that "this criterion is not precisely stated".¹⁰⁷ McKenna offers us little advance on the Bishops' formulation; he confirms only that self-defence can negate the influence of the criterion (as with Finland in 1939) and asserts an "extreme" example that "the moral value of national martyrdom may compensate for the material destruction of unsuccessful war, as with Belgium in 1914".¹⁰⁸ Murray's discussion similarly adds little to our understanding of the concept, except to say that "this condition of probable success is not, of course, simply the statesmen's classical political calculus of success. It is the moral calculus that is enjoyed in the traditional theory of rebellion against tyranny".¹⁰⁹ O'Brien's conclusion is that the element "is quite clear that a state with a real and serious grievance ought not to precipitate a war in which it had no chance of success (for example, Israel against the Soviet Union)".¹¹⁰ But this equally clearly contradicts the possibilities of "martyrdom" expressly provided for by McKenna and others. His conclusion leaves us no closer to clarity of understanding. In the same vein, Wakin's assessment that the concept simply states the obvious – "it would be irrational to engage in war if there were absolutely no possibility of winning"¹¹¹ – also leaves us short of a requirement that allows for hopeless, but righteous causes. Johnson believes reasonable hope of success to be so closely linked to proportionality and last resort as to be practically (rather than conceptually) indistinguishable from them;¹¹² he notes that Ramsey describes the concept as a weapon in *bellum contra bellum justum* ethics, where the elements of *Jus ad Bellum* are used to deny the possibility of a "Just War" at all.¹¹³ Perhaps Childress provides at least a partial accommodation of the prudential and the "martyrdom" poles of the concept:

If a war has no reasonable chance of success, it is clearly imprudent. But more than a dictate of prudence is involved in the demand for a reasonable hope of success. If none of the just and serious ends [of the state] ... could be realized, or fulfilled through the war, a nation should reconsider its policy.¹¹⁴

¹⁰⁷ Holmes, "Can War be Morally Justified?" in Elshtain (ed) op cit, p 213.

¹⁰⁸ McKenna op cit, p 651.

¹⁰⁹ Murray, "Theology and Modern War" in Nagle (ed) op cit, p 80.

¹¹⁰ O'Brien op cit, p 28.

¹¹¹ Malham M Wakin, "War and Morality: Introduction" in Wakin (ed) op cit, pp 219-225 at 220.

¹¹² Johnson op cit, 1993, p 17.

¹¹³ Ibid at 12-13.

¹¹⁴ Childress, "Just War Theories" in Wakin (ed) 1986; p 264; See also G I A D Draper, (continued...)

This formulation, I would argue, recognises the options of martyrdom for a righteous cause, and hopeless self-defence in the face of extinction of the polity. This clearly implies that the element of reasonable hope of success can, in some instances, be discarded as a consideration in the *Jus ad Bellum* decision.

Before proceeding with a more detailed analysis of the concept of reasonable hope of success, it is prudent to conclude this first part of the discussion with a brief examination of the debates with respect to the application of *Jus ad Bellum* theory.

The Application of Jus ad Bellum Theory

The first issue that confronts theorists in the application of *Jus ad Bellum* theory is the question of whether it is an exclusive and absolute concept. The question of whether only one side to a conflict can be engaged in a "Just War" is a complex one. Vittoria, whilst declaring that only one side can pursue a Just War, recognised one significant exception to this rule – ignorance:

Assuming demonstrable ignorance either of fact or of law, it may be that on the side where true justice is the war is just of itself, while on the other side the war is just in the sense of being excused from sin by reason of good faith, because invincible ignorance is a complete excuse.¹¹⁵

As Holmes points out in his discussion of Vittoria, this indicates that "although a prince may knowingly carry on an unjust war, his subjects may not know that the war is unjust and 'in this way the subjects on both sides may be doing what is lawful when they fight'".¹¹⁶ In modern, legalist, Just War thought that is tacitly recognised in the recent formulations of comparative justice outlined above, many scholars believe that one can "find just causes on both sides of a conflict under modern international law, and modern law [has] established no impartial, ultimate authority to render a final verdict on whose just cause was the worthiest".¹¹⁷

This debate leads us into a second, more significant issue concerning modern Just War doctrine – the question of form versus substance in interpretation. Ramsey traces this dualism back to Augustine's original formulation of *justitia* in *The City*

(...continued)

"Wars of National Liberation and War Criminality" in Howard (ed) op cit, pp 135-162.

¹¹⁵ Vittoria quoted in Johnson op cit, 1975, pp 192-193.

¹¹⁶ Holmes, "Can War be Morally Justified?" in Elshtain (ed) op cit, p 201.

¹¹⁷ Scheffer, "Use of Force After the Cold War" in Scheffer, Henkin et al (eds) op cit, pp 135-136.

of God.¹¹⁸ In rejecting contrary arguments, Ramsey outlines the tensions between interpreting *justitia* as "justice" or as "righteousness".¹¹⁹ He explains that the former point to a more procedural or "checklist" interpretation, whilst the latter requires a more substantive ethical exercise – that is, a "correct" decision to go to war as against a "right" decision, a "permissible" war as opposed to one that is "moral". Ramsey, as Childress observes, is a formalist in this sense, preferring

to translate *justum bellum* as "justified war" rather than "just war"... When a policy-maker raises these formal questions of the *jus ad bellum* and gets affirmative answers, resort to war is "justified" although we cannot say that it is "just". A procedural justification is possible even when we lack a substantive theory of justice.¹²⁰

This formalist rather than substantive approach is, however, antithetical to the positions of McKenna and many other theologians and ethicists, who require a more considered application of the criteria. These writers make the assessment of each criterion "a personal moral judgment" which cannot be merely abdicated to a corporate, "impersonal" entity – this entity is most often the state.¹²¹ The spectre of unlimited war resulting from an escalation which is itself the result of a decision to use force, and which is grounded in a simple "procedural" application of the *Jus ad Bellum* criteria, clearly informs this advocacy of the substantive interpretation. As Murray has argued, "the tinderbox nature of the international environment must be taken into account in pursuing even limited military engagements".¹²²

The third issue arising in this context relates to when the theory is to be applied. Murray holds that Just War theory fulfils three functions in its application: the condemnation of aggressive war; limiting the evil which war entails; and humanising the conduct of war where possible.¹²³ Given these functions, it seems self-evident that the conditions for *Jus ad Bellum* must be met both at the time of the decision to use force, and during the period of prosecution. As McKenna has written:

¹¹⁸ Ramsey, "The Just War According to St Augustine" in Elshtain (ed) op cit, p 10.

¹¹⁹ Ibid at p 13.

¹²⁰ Childress, "Just War Theories" in Wakin (ed) op cit, p 270.

¹²¹ McKenna op cit, p 653.

¹²² Quoted in Krickus, "On the Morality of Chemical/Biological War" in Wakin (ed) op cit, p 412.

¹²³ Ibid.

A war which is otherwise just becomes immoral if it is waged out of hatred. A war of self-defence becomes immoral if, in its course, it becomes an instrument of expansion. A war to vindicate justice becomes immoral if, as it goes on, it becomes a means of aggrandizement.¹²⁴

This seems to be the most logical, and coherent, reading of the issue, given the following: the emphasis upon purity of motivation and the ends of peace in "right intent"; the importance of continuing "right authority"; and the limitations inherent in the element of "just cause". What it is unresolved, however, is a mechanism for reconciling actions which are justified during war under the terms of *Jus in Bello*, with the possibly stricter, more limited scales set down in the still-applicable, pre-war decisions made under the aegis of *Jus ad Bellum*.

The final question – a question closely related to the form versus substance debate – is the issue of how the criteria are to be applied. First, do all, or only most, of the elements have to be satisfied? Given the weight of the "presumption against killing", O'Brien is of the opinion that "all of the conditions must be met".¹²⁵ One flaw with this approach, as foreshadowed above, lies with the element of reasonable hope of success – many argue that it can be discounted or ignored when dealing with self-defence, emergency, or an issue of such fundamental importance and righteousness that "martyrdom" in its cause is justified. Second, must the satisfaction of *Jus ad Bellum* be, in Childress' words, a "more or less" meeting or approximation of the criteria?¹²⁶ Or must it be a more rigorous adherence to each discrete requirement independent of the others? As attractive as the flexibility of the first option might be to the pure policy-realist, it does scant justice to the seriousness of the subject matter. This is particularly so when one considers the ultimate consequences of escalation. Third, is there a set order in which the criteria must be applied? Theorists have not generally examined this issue, but it seems arguable that there are indeed primary and subsequent aspects to the process. As outlined previously, it is nonsensical to deal with the issue of proportionality (that is, what levels of force will be allowed in the prosecution of the aims) until the issue of comparative justice (that is, whether our goods and evils, as compared with opponents' goods and evils, even justify going to war at all) has been settled. Similarly, it is arguable that the issue of whether a decision is made with right intent is unknowable until the justice of the cause has been established. Further, the criterion of last resort is itself meaningless until all other factors have been accounted as militating for war. Finally, there seems to have been no discussion regarding timing of the reasonable hope of success consideration. The answer to

¹²⁴ McKenna op cit, p 652.

¹²⁵ O'Brien op cit, p 35.

¹²⁶ Childress, "Just War Theories" in Wakin (ed) op cit, p 269.

this question would be significant in deciding whether it is either the "trump" criterion that requires a positive response in order to make analysis of the remaining factors relevant, or whether it is merely the final "reality check" in the process of ethical reasoning within the *Jus ad Bellum* calculus.

The first part of this paper has centred upon an attempt to contextualise *Jus ad Bellum* theory by describing the development of the Just War tradition, and by outlining what the theory entails. This aim has been pursued through an examination of the theory's history and elements (including the reasonable hope of success), and a brief discussion of some issues which surround its application. With these theoretical foundations laid, the element of reasonable hope of success can be examined in finer detail. This will establish, first, whether reasonable hope of success rests easily within the *Jus ad Bellum* concept, and second, whether it makes a meaningful contribution to the understanding and application of modern Just War theory.

PART II – The Reasonable Hope of Success – Misplaced and Meaningless?

Reasonable Hope of Success as Non-Sequitur in Jus ad Bellum Theory

As has been noted in Part I of this paper, reasonable hope of success is a relatively new addition to Just War theory. Its genesis as a replacement for the theological certainty which imbued the discarded concept of "Just-Holy" war is clearly discernible in its character. Moreover, reasonable hope of success is more a prudential than a categorical concept – an intellectual child of rationalist, rather than religious, tradition. I would contend, however, that the distinctions between this and the remaining elements of *Jus ad Bellum* theory are more fundamental than mere chronology – they extend in several cases as far as irreconcilability. To substantiate this claim, I will discuss three aspects of the relationship between reasonable hope of success and the remaining elements of the doctrine. This will hopefully serve to display the differing foundations, and indeed incompatibilities, which complicate that relationship. These issues are: the question of pre-settlement, prediction and unilateral assessment; the concept of restraint and control; and the distinctions between categorical and prudential considerations in the doctrine.

Pre-settlement, Prediction, and Accounting for "The Other"

When outlining the requirements which apply to individuals assessing *Jus ad Bellum* against the "facts", Johnson noted how Suarez, Vittoria and others declared that "it is emphatically the *subject's* responsibility to dispel any doubt that may

confront him regarding the war in which he is commanded to take part".¹²⁷ This wholly individual responsibility also regulates consideration by states of the *Jus ad Bellum* criteria – it requires that each state settle for itself, independent of its prospective opponent, the "rightness" of a decision to use force. This is especially true of the "form" approach to the calculus; this allows that war becomes authorised so long as the state's individual decision is "accompanied by appropriate formalities".¹²⁸ Indeed Taylor argues that the provision for "unilateral determinations" is a "fatal flaw"¹²⁹ inherent within *Jus ad Bellum* doctrine. The implications of this are two-fold. The first implication is that the unilateral nature of the assessment process necessitates independent satisfaction by each state of *Jus ad Bellum* criteria. The second implication is that this allows, and in fact requires, *Jus ad Bellum* to be a pre-determined and settled issue before the resort to force is made. Reasonable hope of success, however, adheres to neither implication, and this distinction is best displayed through an examination of how these two implications interact with each element of *Jus ad Bellum* doctrine.

Just Cause

As noted in Part I above, the concept of just cause requires that an issue be sufficiently "serious and weighty" as to overcome the presumption against killing and to make the use of force permissible. Clearly, although unstated, this means "serious and weighty" to the entity which is applying the doctrine as part of its decision-making process regarding war. Even within the modern paradigm of "collective action" by a group of states in a United Nations or other internationally-sanctioned mobilisation of military force, this feature of unilateralism is extant; it requires no assessment of the prospective opponents' cause. And *because* it is an independent ethical consideration which can lead to a unilateral decision, it is not only logical but also necessary that this issue be determined and settled *before* force is employed. Just cause as a consideration requires no interaction with, or input from, the opponent.

Right Authority

As with just cause, the element of "right", "legitimate" or "proper" authority is determined unilaterally by the state. Even if one argues that there are "external" inputs into the assessment of this criteria (for example, customary international law, definitions of "statehood" and "government" as per Article I of *The Montevideo Convention on Rights and Duties of States* (1933)), these are of secondary or

¹²⁷ Johnson op cit, 1975, p 183.

¹²⁸ Holmes, "Can War be Morally Justified?" in Elstain op cit, pp 207-208.

¹²⁹ Taylor op cit, p 68.

explanatory influence only.¹³⁰ Clearly, this does not compromise the unilateral nature of the assessment and the conclusion of right authority; it certainly does not countenance or recognise input from the prospective opponent. Indeed, recognition of such input would be antithetical to the assessing state, given that the prospective opponent would generally attempt to deny the legitimacy of the assessing state's authority as one part of the "phoney war".¹³¹ Similarly, the fundamentally prescriptive nature of the criteria necessitates that it be settled before force is employed. The issue becomes quite complicated, as O'Brien observes, when revolutionary and civil wars are involved.¹³² Notwithstanding, this still does not compromise the fundamentally unilateral nature of the element and of each entity's assessment of their satisfaction of it.

Right Intention

The requirements of right intention are also unilateral. Reaction to provocation, or to the opportunism inherent in exploiting an opponent's stumble, can actually transform a war which was originally embarked upon with the aims of peace and a just cause, and with "purity of motivation" upper-most in the collective and

¹³⁰ In Harris op cit, p 102.

¹³¹ See for example proclamations by the United States/United Nations regarding the "legitimacy" of the Hussein regime, or the Cedras-Biamby junta which overthrew president Jean-Bertrand Aristide's Haitian government in September 1991: Fernando R Teson, "Collective Humanitarian Intervention" (1996) 17 *Michigan Journal of International Law*, 323 at 355-356; Danesh Sarooshi, *Humanitarian Intervention and International Humanitarian Assistance: Law and Practice*, Wilton Park Paper 86, November 1993, pp 14-15. Such declarations could, for example, be characterised as attempts to defeat – in the public mind – any sympathy for opposition arguments of "just war". By arguing that the Iraqi/Haitian regimes could never claim to be fighting a Just War *because* they failed the legitimacy test, the United States/United Nations – on an ethical level at any rate – might effectively have removed any justification for either regime to resist. Indeed, in this view, resistance by the Haitian junta for example, could not properly even be called "self-defence" because this option implies legitimacy, and is only available to legitimate authorities. But this does not alter the fact that such regimes in (and if!) assessing the *Jus ad Bellum* criteria, would not account for the opinions of their prospective opponents in their assessment of their own legitimacy, no state would. And given that there is (as noted in Part I) no international or trans-state body capable of, or willing to, adjudicate on either the "correctness" or "righteousness" of each state's Just War calculation, the issue must remain a unilateral consideration regardless of its susceptibility for use in negative propaganda by one's opponent.

¹³² O'Brien op cit, chapter 7.

individual minds, into an "evil", "immoral" or "aggressive" war.¹³³ Arguably, right intention specifically *prohibits* any consideration of the prospective opponent's actions, because it is prescriptive in nature, requiring unilateral adherence even in the face of provocation and opportunity. As O'Brien points out, "the enemy may have behaved abominably, engendering righteous indignation amounting to hatred, but the actions of the just belligerent must be based on charity".¹³⁴ Similarly, the issue of right intention must be entirely settled before the commencement of war, not only because it is a pre-condition for justified recourse to war (as with just cause and right authority), but also because it acts as a continuing, pre-determined, ethical benchmark against which the prosecution of the war is measured. Consequently, true adherence to *Jus ad Bellum* doctrine would view the vagaries of war as remaining strictly governed and regulated according to pre-settled intention, rather than as allowing intention to shift with developments on the ground. An example of the former might be seen in the Coalition's decision to abide by its authorised aims in the Gulf War rather than to exploit the opportunity, afforded by the rout of Iraqi forces, to push further towards Baghdad.¹³⁵ An example of the latter is found, I believe, in World War One, when political control was abdicated to narrow military strategy, and where original war aims were obscured by tactical and operational level considerations. As Roy Jenkins noted of HH Asquith's Premiership during the first part of that war, "the role of the politician ceased to be that of looking for strategical alternatives and became concentrated upon supplying men and munitions for the slaughter".¹³⁶ Asquith, as AJP Taylor wrote,

did not understand the great issues which the conduct of the war provoked. Though resolved on victory, he supposed that the only contribution that statesmen could make was to keep out of the way, while free enterprise supplied the arms with which generals would win the battles.¹³⁷

¹³³ As discussed in Part I of McKenna op cit, p 652; United States Catholic Bishops, "The Challenge of Peace" in Elshtain op cit, p 100.

¹³⁴ O'Brien op cit, pp 34-35.

¹³⁵ Christopher op cit, p 90.

¹³⁶ Roy Jenkins quoted in Gordon Craig, "The Political Leader as Strategist" in Peter Paret (ed) *Makers of Modern Strategy: From Machiavelli to the Nuclear Age* (Princeton University Press: Princeton New Jersey, 1986) pp 481-509 at 486. See also Roy Jenkins, *Asquith* (Fontana: London, 1967) chapters XXI-XXIV for a detailed account of Asquith's relations with his military commanders.

¹³⁷ Quoted in Craig op cit, pp 485-486.

This point, as will be discussed below, has significant ramifications for the reconciliation of reasonable hope of success with the other elements of *Jus ad Bellum* theory.

Last Resort

The element of last resort, although "troublesome", must be satisfied before recourse to war is made. This criterion is met by attempting but failing to employ alternatives to force, or by discounting them as of little or no prospect of success. The conclusion that an alternative course has failed or is unlikely to succeed is made, however, on the basis of an independent, unilateral assessment, and in terms of the assessing state's own perceptions and values. Any "input" which the prospective opponent is said to have in the process is deceptive. Absolute last resort – where every alternative has been attempted and every permutation between interests, parties, and third parties exhausted – is, as with Clausewitz's "Absolute War", a solely theoretical construct. Every state will, at some stage in a dispute, define its limits and effectively declare alternatives on the untested side of that limit to be hopeless or as holding no reasonable prospect of success. Thus, it is not rejection of terms by an opponent which defines last resort, but rather the unilateral decision by the assessing state that further alternatives will afford no progress, or may require unacceptable compromises or result in the situation worsening. Second, it is a logical necessity of *Jus ad Bellum* theory that last resort be established before recourse to force is justified; force, as the most extreme measure available to a state, must be held in reserve as the final instrument of policy or justice.

Comparative Justice

As noted in Part I, the essence of the concept of comparative justice is the question of whether "the rights and values involved justify killing".¹³⁸ Comparative justice is a "what if" – a counterfactual question. But the three variables of comparative justice – the ethical values or weight of the cause, the imperative against killing, and the probable result of not acting – are viewed entirely from the assessing state's perspective. Comparative justice requires a unilateral decision as to the ethical consequences of killing and (possibly) of achieving one's aim; this must be weighed against not killing and allowing the wrong to continue. It is an assessment made from the assessor's perspective, which is steeped in that perspective, and which is about the values within that perspective. Thus, the probable opponent does not enter the consideration. Similarly, because comparative justice is concerned with the relationship between the assessor's values, cause or aims, and the general prohibition on killing, it is used to determine whether the ethical balance between

¹³⁸ United States Catholic Bishops, "The Challenge of Peace" in Elshstain (ed) op cit, p 99.

the two permits or justifies the employment of force. The end result of this assessment informs the assessor as to whether it is permissible, on the balance of goods and evils, to kill for the cause and must, consequently, be settled before the first strike is made.

Proportionality

Of all the elements of *Jus ad Bellum* theory, it is proportionality which initially seems most closely to resemble the element of reasonable hope of success in its intellectual foundations. Malloy, for example, describes proportionality in a way that seems to incorporate reasonable hope of success – "common sense dictates that we should not enter a war we cannot win".¹³⁹ However, this correlation is misleading because these two elements are founded in different approaches to assessment. Proportionality is fully coherent with the other elements discussed above, both in terms of its unilateral nature, and the requirement of pre-determination. So when discussing William Ames, the early Puritan theologian, Johnson notes the use of the phrase "just manner of waging [war]"¹⁴⁰ – this is noteworthy because it is vital to understanding the impact of the concept of proportionality upon *Jus ad Bellum* theory. Clearly, proportionality operates to tie levels of force to *aims*, not to the opponent's actions. The justness of the cause, the comparative justice assessment and other factors, all combine within the issue of proportionality; force correlates to the ethical value of the aim in itself, not to its achievement. A limited aim – that is, an aim with a moderate ethical "weight" – will justify only a limited scale of force being used in its pursuit. This consideration is effectively the unilateral benchmarking of a level beyond which a state will not escalate force; it is based upon the ethical weight attributed to the aim and requires independent consideration. The opponent is superfluous in the assessment and formulation of the benchmarks for proportionality. Similarly in order to rein in, in a preventive fashion, the escalatory tendencies inherent in the reciprocity of military action, this tying of levels of force to the ethical weight of aims must be settled prior to the use of force.

Reasonable Hope of Success

As prefigured above, I believe that reasonable hope of success requires the use of a fundamentally different assessment process from that utilised by the other criteria of *Jus ad Bellum*. As O'Brien observes of the Korean War:

¹³⁹ Malloy op cit, p 8.

¹⁴⁰ Johnson op cit, 1975, pp 171-172.

all estimates [of reasonable hope of success] turned on the prospects for intervention by either the Communist Chinese or the Soviets or both. The United States decision to intervene was based on the assumption that by fighting a careful, limited war, the intervention of the Red Chinese or the Soviets could be avoided.¹⁴¹

Similarly, with respect to the Vietnam War, O'Brien concludes that:

Estimating the probability of success for South Vietnam and the United States proved to be the downfall of the American decision-makers ... the United States underestimated the will and staying power of the North Vietnamese and Vietcong leadership and the loyalty and durability of their rank and file.¹⁴²

The distinction between reasonable hope of success and all other elements of *Jus ad Bellum* doctrine is, in these terms, stark. First, the element of reasonable hope of success not only accepts substantive input from the opponent, it *requires* it. In assessing the other elements, determinations are made unilaterally, based upon the assessing state's independent evaluation of the justice and ethical weight of its cause, and of the relationship between this cause and planned levels of force. Assessment of reasonable hope of success necessitates input from the opponent. This is particularly so as regards the strength with which the opponent believes in its own cause, and the levels of force it is prepared to "justify" in its pursuit. Reasonable hope of success cannot be determined unilaterally *precisely because* it entails a reactive rather than pro-active assessment, one which cannot be made until the opponent's *Jus ad Bellum* calculation – as manifested in the levels of force it is willing to employ – becomes evident.

Second, reasonable hope of success is at best predictive rather than pre-determined. Because it is a reactive concept, reasonable hope of success is unascertainable until the opponent responds. As such, it cannot be settled prior to the use of force. Walzer, in discussing Clausewitz's analysis of "reciprocal action", notes Clausewitz's maxim that "each of the adversaries forces the hand of the other",¹⁴³ which in turn leads to escalation. Reasonable hope of success cannot, therefore, be a settled issue – it will alter and evolve with the vagaries (such as escalation) inherent in the application of force. Proportionality, if strictly applied, is actually antithetical to reasonable hope of success in this respect – proportionality consigns the achievement of aims to improbability at the outset. By restraining the ability to react, a "just" state may increase the odds against its hopes of success. Reasonable hope of success, it can thus be argued, is assessed in a

¹⁴¹. O'Brien op cit, p 89.

¹⁴². Ibid at 93-94.

¹⁴³. Walzer op cit, p 23. See for example Clausewitz, *On War* op cit, Book I, Chapters 1-2.

fundamentally different manner to all other *Jus ad Bellum* considerations. This is because it requires the "interaction" of the opponent and is incapable of pre-determination. It is consequently distinguishable from, and occasionally antithetical to, the general ethical thrust which all the other *Jus ad Bellum* elements evidence.

The Imperatives of Control and Restraint

The second way in which reasonable hope of success can be distinguished from the other elements of *Jus ad Bellum* theory is by examining the place of control and restraint in the doctrine. "The state of war", observes Howard, "involves at every level of government and society the imposition of authoritative control".¹⁴⁴ The application of force is a deliberate, authoritative act because "military activity ... carries an intrinsic imperative towards control; an imperative derived from the need to maintain order ... to conserve both moral and material forces and ensure that these are always responsive to direction".¹⁴⁵ Krickus, analysing biological weapons in terms of Just War theory, concluded that "under just war, biological weapons are deemed immoral because they are inherently *uncontrollable*".¹⁴⁶ This further illustrates the centrality of control and restraint to the doctrine. This preoccupation is reflected in the elements of *Jus ad Bellum*, the purpose of which, in the final analysis, is to control recourse to war by imposing upon it strict requirements for its ethical justification. As Johnson notes, it is a "characteristic" of the Just War tradition that "limitation always accompanies justification".¹⁴⁷

This promotion of control, under which "the belligerents practise restraint by deliberately shackling military power which is mobilised or readily available to them",¹⁴⁸ is fundamental to any appreciation of *Jus ad Bellum*. This influence is further evidenced by reference to the specific components of the doctrine. For example, the scope of what constitutes a just cause is limited in order to control and restrict the situations in which recourse to force is permissible. The necessity of right authority exists to ensure political control of force. Right intention is required of the state and its actors in order to control aims and to restrain vindictiveness and unwarranted harm. Last resort operates to control the possibility of hasty, but intemperate, action which may arise out of initial passion and anger over the harm

¹⁴⁴. Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 2.

¹⁴⁵. Ibid at 3-4.

¹⁴⁶. Krickus, "On the Morality of Chemical/Biological War" in Wakin (ed) op cit, p 424 (my italics).

¹⁴⁷. Johnson, "Threats, Values and Defense" in Elshtain (ed) op cit, p 56.

¹⁴⁸. John C Garnett, "Limited 'Conventional' War in the Nuclear Age" in Howard (ed) op cit, pp 79-102 at 82.

sustained. Similarly comparative justice – the need to ensure that the values and aims to be pursued are sufficiently serious and weighty as to overcome the presumption against killing – has control at its core. And proportionality – the correlation of acceptable levels of force to the weight of the values and aims at stake – exists to build pre-set restraints into war. Reasonable hope of success, however, is neither underpinned by, nor amenable to, control and restraint. Reasonable hope of success, as discussed above, is reactive and unsettled, absolutely sensitive to the opponent's actions and thus positively controlled by nothing but the "haunting" prospect of escalation. Where an opponent's escalation is unanswered, or remains un-neutralised or not countered (politically or militarily), the hope of success tends to dim. Arguably, control and restraint are antithetical to the concept of reasonable hope of success rather than (as is the case with the other elements of *Jus ad Bellum*) its central, fundamental imperatives.

Categorical and Prudential Considerations

The elements of *Jus ad Bellum* theory are unashamedly categorical-ethical in their construction.¹⁴⁹ The implication of this, as Taylor has observed,¹⁵⁰ is that, unlike the elements of *Jus in Bello*, they are not prudential-ethical in nature. This is reflected in all elements of *Jus ad Bellum* save reasonable hope of success. Just cause and right intention are categorical, both in a political-ethical sense (the "right" of self-defence) and a deontological-ethical sense (the "duty" of the state to protect those who give it legitimacy).¹⁵¹ Right authority, in modern Just War theory, is a categorical (predominantly legal) issue. Last resort is also categorical in two senses – the political (have all reasonable alternatives been exhausted?) and the deontological (has the entity, in good faith, tried everything to engender a peaceful solution?). Comparative justice and proportionality likewise share political and deontological categorical dimensions, depending upon one's position between the realist and theological poles of Just War theory. Reasonable hope of success, however, is inexplicable in any terms other than the prudentially (particularly the militarily) ethical. If success is to be characterised as the achievement of aims, a state which "accepts limitations on the use of force beyond those required by law of war treaties" as *Jus ad Bellum* clearly advocates, "does so at its peril. A less-

¹⁴⁹. Howard, "*Temperamenta Belli*" in Howard (ed) op cit, pp 3-5.

¹⁵⁰. Taylor op cit, p 54.

¹⁵¹. United States Catholic Bishops, "The Just War and Non-Violence Positions" in Wakin (ed) op cit, pp 226-238 at 241-242.

moral nation will take advantage of its opponent's constraint".¹⁵² Johnson specifically describes reasonable hope of success as a "prudential" rather than "deontological" test,¹⁵³ further underscoring this distinction between it and the remaining elements of *Jus ad Bellum* theory.

A complex question which arises in this context is that of "preventing a great evil by producing a lesser",¹⁵⁴ or the doing of a "criminal" act in order to save the future from a greater criminality.¹⁵⁵ It is this issue, possibly more than any other, which exposes the non-sequitur nature of the ethical relationship between reasonable hope of success and *Jus ad Bellum* generally. What becomes of the entity that meets all of the categorical-ethical requirements of *Jus ad Bellum*, but which has "little chance of success without fighting the war unjustly and unfairly"?¹⁵⁶ In other words, it has little chance without violating *Jus in Bello* criteria. If reasonable hope of success is given the status of "equal", or even "trump" criterion in the doctrine, subject to categorical-ethical considerations, it can frustrate an otherwise justified use of force. First, not only does this produce a possibly unsatisfactory outcome in terms of "justice", but it can actually act to *subvert* the rationale of the entire Just War tradition. By rewarding "might" (through the unwillingness of the assessing state to face an opponent who *may* use excessive force in the pursuit of its aims) at the expense of "right" (as represented by the satisfaction of the categorical elements of the doctrine), the whole purpose behind the application of *Jus ad Bellum* is inverted. Second, it seems hard to recognise in reasonable hope of success the status of an "equal" ethical consideration when the doctrine expressly provides that it be ignored or dispensed with to varying degrees, in situations of self-defence or in defence of a significant "good".

Reasonable hope of success should properly be viewed as a prudential, military-ethical consideration. The "lesser" evil inherent in going beyond the ethical, self-imposed constraints of proportionality is impossible to countenance at the categorical level without frustrating the entire *Jus ad Bellum* process, but can be rationalised in prudential terms. It is only in these terms that reasonable hope of success can be meaningful in the face of the "greater" evil (which is, ultimately, exactly what the Just War was originally instituted to combat). Thus, if reasonable

¹⁵² W Hays Parks, "Teaching the Law of War" in Gaston and Hietala (eds) op cit, pp 145-168 at 146.

¹⁵³ Johnson op cit, 1993, p 12.

¹⁵⁴ Nagle, "War and Massacre" in Wakin (ed) op cit, p 299.

¹⁵⁵ Walzer op cit, p 260.

¹⁵⁶ Childress, "Just War Theories" in Wakin (ed) op cit, p 271.

hope of success is to make any sense at all, it can only be founded in military-ethical considerations; these considerations will distinguish it from the other elements of *Jus ad Bellum*, and further emphasise its fundamentally different nature.¹⁵⁷

Reasonable hope of success as a concept is quite distinct from its fellows in *Jus ad Bellum* doctrine. Where the general thrust of *Jus ad Bellum* doctrine is for unilateral pre-determination of issues, reasonable hope of success cannot be assessed in this way. Where the imperatives of restraint and control are the foundations of *Jus ad Bellum* criteria, these imperatives are antithetical to reasonable hope of success. Where the elements of the doctrine can be characterised as categorical-ethical in nature and content, reasonable hope of success only makes sense if viewed in prudential-ethical terms. Reasonable hope of success is the product of fundamentally different considerations from those that inform *Jus ad Bellum* generally. It embraces, of necessity, Clausewitz's "friction",¹⁵⁸ representing one of Howard's "gross inversions of logic"¹⁵⁹ – that is, its realisation requires that "ends" be slave to "means", rather than that the parameters of means be dictated by ethical ends. It is certainly arguable that reasonable hope of success – a non-sequitur in *Jus ad Bellum* – might be more intellectually comfortable amongst the prudential elements (necessity, and proportionality of response) of *Jus in Bello*. But such reorganisation may be superfluous when an even more fundamental issue is considered – if reasonable hope of success is misplaced, and even dispensable within *Jus ad Bellum* doctrine, can it be said to actually be meaningful within Just War theory at all?

Reasonable Hope of Success as Meaningless within Just War Theory

The decision as to whether reasonable hope of success has any real utility for modern Just War theory centres upon its meaning within the context of the doctrine. This difficulty in attributing meaning to the concept is perhaps best understood by reference to two possible approaches to the characterisation of "success". The first approach entails examination of how the "content" of success can be characterised; the second requires analysis of how success can be characterised by measurement. It is on the basis of a combination of these two definitional elements that a conclusion as to the meaning, and indeed meaningfulness, of reasonable hope of success with respect to Just War doctrine can be reached.

¹⁵⁷ This, however, still does not help us escape the prospect and ultimate consequences of escalation.

¹⁵⁸ Clausewitz op cit, Book I, Chapter 7.

¹⁵⁹ Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 8.

The Characterisation of "Success" by Content

Michael Howard has argued that the analysis of causes and aims in war can "be grouped under two heads":¹⁶⁰ the "prudential considerations", which are a generally utilitarian cost/benefit analyses in terms of material, tangible, foreseeable socio-political resources and effects; and "categorical imperatives", which are informed and inspired by more esoteric, value-laden considerations. Whilst there is often intersection and compatibility between these two spheres, conflict is equally frequent. This makes the content of success – "defined" for each individual situation – an imprecise, elastic issue. This is apparent, for example, in Dean Acheson's account of the Cuban Missile Crisis of October 1962, where he observed that:

A respected colleague advised me that it would be better that our nation and people should perish rather than be party to a course so evil as producing ... [a thermonuclear] weapon. I told him that on the Day of Judgment his view might be confirmed and that he was free to go forth and preach the necessity for salvation. It was not, however, a view which I would entertain as a public servant.¹⁶¹

It is instructive to examine these two spheres more closely.

Prudential Considerations

Prudential considerations, which Howard believes have become the predominant issue in the nuclear era,¹⁶² can be divided, I believe, into two categories. The first is "national interest", or the interests of the political community which comprises the state, as against the rest of the world. This community, using Edmund Burke's definition, includes "those who are living, those who are dead, and those who are yet to be born".¹⁶³ Johnson does not clearly define "national interests" but notes that "concerns to protect American nationals" and "support of American law" (citing Grenada and Panama as examples) may come under the aegis of national interests as justifications for use of force.¹⁶⁴ But, in stating that "modern war resolves itself

¹⁶⁰ Ibid at 4.

¹⁶¹ Quoted in Richard Wasserstrom, "On the Morality of War: A Preliminary Inquiry" in Wakin (ed) op cit, pp 317-340 at 318.

¹⁶² Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 12.

¹⁶³ Quoted in Walzer, *Emergency Ethics* (The Joseph A Reich Sr Distinguished Lecture on War, Morality, and the Military Profession, No 1, 21 November 1988: USAF Academy, Colorado) p 13.

¹⁶⁴ Johnson op cit, 1993, p 6.

into an attempt to throttle national life",¹⁶⁵ Howard implies an even wider definition of national interest, as would encompass the total of political, social, economic and national continuity considerations. It is arguable, particularly in the post-Cold War system, that such a definition of national interest by reference to domestic impacts and in domestic terms, is decreasingly functional given the current tendency towards the dissolution of national boundaries,¹⁶⁶ and the increasing internationalisation of a state's domestic activity, policies, and aims.¹⁶⁷

The second category of prudential considerations is that of domestic policy, or policy for internal consumption rather than for assertion against the rest of the world. "The overriding concern" of governments, says Howard, is "for the maintenance of social and political stability, and a capacity to maintain that stability within their own domestic systems".¹⁶⁸ This concern becomes a prudential consideration in the characterisation of success because, quite logically, success must ultimately have a domestic translation. Thus the bombing of North Vietnam, noted Garnett, served a fundamentally "political, not a military purpose";¹⁶⁹ the 1983 invasion of Grenada, "accepted by the majority of Americans as a welcome victory", did more to "reestablish American self-esteem and sense of potency than any single international act since ... Kennedy's successful facedown of the Soviets in the Cuban missile crisis two decades earlier".¹⁷⁰ Similarly, it is often noted that the French reinforcement of defeat at Dien Bien Phu, or the British response to the Argentine invasion of the Falkland Islands, were as much about domestic politics and aims as they were about national interests as against the rest of the world.¹⁷¹

^{165.} Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 10.

^{166.} Here, I use the term "boundaries" in a wide sense, rather than in simple territorial or geographic terms.

^{167.} See Rogers, "The Principles of Force" in Scheffer, Henkin et al (eds) op cit, p 102; Anne Orford, "Locating the International: Military and Monetary Interventions After the Cold War" [1997] 38 *Harvard International Law Journal* 443.

^{168.} Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 6.

^{169.} Garnett, "Limited 'Conventional' War in the Nuclear Age" in Howard (ed) op cit, p 86.

^{170.} John Temple Swing, "Foreword" in Scheffer, Henkin et al (eds) op cit, pp vii-xii at viii.

^{171.} As Edward Luttwak observes, "[O]riginally meant as a strictly practical operation, whose modest aim was to oppose Vietminh infiltration into Laos, the Dien Bien Phu lodgment instead absorbed a ruinously disproportionate effort, which could not be interrupted because the place had become the symbol of French military capacity in the domestic opinion of France and the assembly of its politicians": Edward N Luttwak, *Strategy: The Logic of War and Peace* (Belknap Press: Cambridge Massachusetts, 1987)

(continued...)

Categorical Imperatives

In distinguishing United States involvement in the Gulf War from involvement in Grenada and Panama, Johnson offers "internationalist" and "humanitarian" arguments for action.¹⁷² These two categories, I would argue, best sum up the emphasis of this sphere of success definition. Internationalist imperatives are those required by world citizenship, and include compliance with, and the definition of acts by reference to, international law.¹⁷³ As Scheffer notes, "a nation's power is derived not only from its armaments, but also from its reputation, the kind of legitimacy it can find in support of the things it does ... and the degree to which it is viewed in a different light from that of its principal adversaries".¹⁷⁴ One result of the increasing importance of this characterisation of success is the internationalisation of the "content" of success. Taylor observes that "presumably, according to his own standards, Hitler believed his own wars to be 'just';¹⁷⁵ it is the internationalisation of "just", and thus the content of success, which has been significant since 1945. This has most recently been evident in the demonisation of Iraqi and Serbian claims to "recovery" of lost provinces or historical "cradles of culture, and rising internationalism with respect to human rights issues".¹⁷⁶

Humanitarian imperatives are present in "appeals to universal considerations of human rights and common humanity".¹⁷⁷ They deserve separate recognition because some state practices and several international instruments

are imbued with humanitarian principles and reject any idea of their unequal application based upon the legality or illegality of the 'cause' [ie internationalist imperative] for which the belligerents have resorted to armed conflict.¹⁷⁸

(...continued)

p 49. For comments on the Falklands issue, see Max Hastings and Simon Jenkins, *The Battle for the Falklands* (Pan Books: London, 1983) pp 379-384.

¹⁷². Johnson op cit, 1993, p 6.

¹⁷³. Ibid at 6-7.

¹⁷⁴. Scheffer, "Introduction" in Scheffer, Henkin et al (eds) op cit, p 12.

¹⁷⁵. Taylor op cit, p 74.

¹⁷⁶. Antonio Cassese quoted in Philip Alston and Henry J Steiner (eds) *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press: Oxford, 1996) p 155.

¹⁷⁷. Johnson op cit, 1993, p 6.

¹⁷⁸. G I A D Draper, "Wars of National Liberation and War Criminality" in Howard (ed) op cit, pp 135-162 at 138-139.

Henkin believes humanitarian intervention might even be an "exception" to the all pervasive self-defence perspective of the United Nations Charter,¹⁷⁹ while Kirkpatrick and Gerson specifically argue that prohibitions on the use of force for purposes other than self-defence are effectively subject to international guarantees of human rights.¹⁸⁰

The Characterisation of "Success" by Measurement

"Success", observes Childress, "may be broader than victory".¹⁸¹ This is of fundamental importance in assessing or measuring the achievement of success in any of the spheres outlined above. Victory, I would argue, is primarily a military or adversarial concept, implying defeat of one's opponent.¹⁸² Success implies achievement of aims, which is a somewhat different concept.¹⁸³ Victory at Malaplaquet for the British entailed such casualties and fatigue that they sued for a neutral peace, unable to advance their aims further. Victory in World War One similarly brought with it such destruction, exhaustion and turmoil that success is hardly a term useful in describing the outcome. A similar argument can be made of United States involvement in Vietnam, where the "war was not lost in Vietnam, but was lost in the United States where an increasingly hostile public opinion forced the American Government to abandon even its limited objectives".¹⁸⁴ Where victory is a finite military concept to be established by reference to military outcomes, success is a much longer term and less well-refined idea. Clausewitz noted that no *strategic development* (as opposed to victory) is final.¹⁸⁵ It is in these terms that success needs to be understood. "Victory", believes McKenna,

¹⁷⁹ Henkin, "The Use of Force" in Scheffer, Henkin et al (eds) op cit, p 41.

¹⁸⁰ Kirkpatrick and Gerson, "The Regan Doctrine, Human Rights, and International Law" in Scheffer, Henkin et al (eds) op cit, p 25.

¹⁸¹ Childress, "Just War Theories" in Wakin (ed) op cit, p 265.

¹⁸² See Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 13.

¹⁸³ Walzer notes this, I think, when he says that the moral reality of war is fixed not by the "actual activities of soldiers" who would view it in terms of force correlations, of imposed and sustained gain/loss, and of "victory", but by "the opinions of mankind" who tend to place more emphasis upon the relative and long term issue of overall resultant benefit. See Walzer op cit, p 15.

¹⁸⁴ Garnett, "Limited 'Conventional' War in the Nuclear Age" in Howard (ed) op cit, p 87.

¹⁸⁵ Clausewitz op cit, p 80: "Even the ultimate outcome of a war is not always to be regarded as final. The defeated state often considers the outcome merely as a transitory evil".

cannot mean now, if it ever did, the categorical imposition of the winning side's will upon the loser. The erosion of the victor's comparative advantage vis-à-vis the vanquished in both World Wars demonstrates this; even after an atomic clash, the co-operation of the defeated country will be worth bargaining for. *Success* can then mean, at best, the accomplishment of limited objectives.¹⁸⁶

Thus, just as success is not a synonym for victory, neither is victory a necessary precondition for success. "In fact", writes John Garnett, "in a limited conventional conflict, 'winning' is an inappropriate and dangerous goal" because it can prompt escalation and loss of sight of original aims and causes – these are the very benchmarks against which success is measured. "A state", he continues, "which finds itself close to [victory] should immediately begin to practice restraint".¹⁸⁷ This is sage advice: it is precisely because victory-focus can escalate conflict and obscure, if not defeat, the original aims of the use of force, that victory as an aim in itself can actually be antithetical to success. Arguably, success can have a predominantly *negative* or even *inverse* relationship to force for two reasons. First, as noted above, the drive for victory can actually make the achievement of original aims so impossible or disproportionately expensive that success becomes *conceptually* meaningless when viewed in terms of the use of force. Further, victory may be secured at such destructive cost that a party's resolve to frustrate its opponent's aims or to exact revenge regardless of the ultimate cost, makes the victory pyrrhic indeed. Second, if the aim, and thus the success to be achieved, is so limited as to allow for only very limited scales of force, success becomes *substantively* meaningless in situations where any higher level of response by the opponent would require an "unjustifiable" and consequently unpursued, escalation. When this prospect of escalation forces backdown or abandonment of even limited aims, nothing is achieved. If escalation is responded to, however, then the spectre of conceptual meaninglessness again arises.

This argument for the essential meaninglessness of reasonable hope of success in Just War calculation is subject to its ultimate negation when the issue of "survival" is considered. The stark choice between "holocaust or humiliation"¹⁸⁸ which survival as a state may entail, arguably proves that reasonable hope of success – often meaningless in limited scenarios – is absolutely meaningless in extreme situations. When Brownlie discusses the parallelism between self-preservation and necessity, asserting that "analytically ... [there is] no distinction

^{186.} McKenna op cit, p 652.

^{187.} Garnett, "Limited 'Conventional' War in the Nuclear Age" in Howard (ed) op cit, p 84.

^{188.} Laurence Martin, "Limited Nuclear War" in Howard (ed) op cit, pp 103-122 at 104.

between the two",¹⁸⁹ he arguably makes a legal case for national martyrdom. Just cause in the modern world, O'Brien agrees, "often has to do with the survival of a way of life",¹⁹⁰ indicating that self-defence ultimately permits reasonable hope of success to be ignored or waived as an issue.¹⁹¹ Howard, who believes that nuclear weapons are "incompatible" with any criterion of necessity, also implies that the ultimate theoretical consequences of modern war make considerations of reasonable hope of success superfluous and nonsensical.¹⁹² Walzer argues that a "supreme emergency", as defined by the "imminence" and "nature" of the danger faced,¹⁹³ exists when "our deepest values and our collective survival" are in immediate danger¹⁹⁴ – that is, when the "ongoing-ness of the community" or "communal death" is at stake.¹⁹⁵ In such situations, necessity makes "means" ethically limitless, and hope of success superfluous.¹⁹⁶ The imperative of survival requires potentially hopeless wars to be fought regardless of reasonable hope of success, rendering the consideration both conceptually and substantively meaningless.

Success, as I have attempted to outline above, can be described in terms of characterisation (as prudential and categorical) and measurement (as limited and absolute). The interaction between these definitional aspects is complex. Where a conflict arises over prudential concerns, such as access to natural resources,¹⁹⁷ success can be such a limited concept that it is essentially meaningless through insignificance. Similarly, where limited aims actually restrict a response to escalation, reasonable hope of success is meaningless through the retreat on the aims. Alternatively, where response is made, success can become meaningless as a result of escalation. Further, where a categorical imperative is at issue, such as the "immeasurable evil of Nazi victory",¹⁹⁸ or the need to uphold a "good" even in the

¹⁸⁹. Brownlie op cit, p 42.

¹⁹⁰. O'Brien op cit, p 21.

¹⁹¹. O'Brien op cit, pp 22, 129.

¹⁹². Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 8. See also Johnson, "Threats, Values, and Defense" in Elshtain (ed) op cit, p 69.

¹⁹³. Walzer op cit, p 25.

¹⁹⁴. Ibid at 6.

¹⁹⁵. Ibid at 16.

¹⁹⁶. O'Brien op cit, pp 6, 33-34; Holmes, "Can War be Morally Justified?" in Elshtain (ed) op cit, p 221.

¹⁹⁷. O'Connell, "Limited War at Sea Since 1945" in Howard (ed) op cit, p 130.

¹⁹⁸. Hadley Arkes, *The Mission of the Military and the Question of the "Regime"* (The (continued...))

face of great cost, reasonable hope of success is meaningless because it is ethically superfluous to the calculation. Three conclusions flow from this analysis. First, military victory is not synonymous with the achievement of aims. Second, self-defence makes reasonable hope of success a discretionary, discardable consideration. Third, in situations of extreme emergency, reasonable hope of success does not operate because the "zero sum" nature¹⁹⁹ of survival – the ultimate just cause – makes success meaningless, and even antithetical to the Just War assessment. Reasonable hope of success is simply "not sensible"²⁰⁰ in modern Just War theory, and ultimately adds nothing substantive to the doctrine. Its status as a dispensable criterion within the theory simply serves to confirm that this meaningfulness is both conceptual and substantive in nature.

Conclusion

Just War theory has a long philosophical heritage in Western thought. It is not an alien concept imposed upon princes and states from the outside; it is rather an integral part of the Western political and legal tradition, simultaneously reflective of, and evolving within, that tradition. Just War theory gives voice to a long-understood but frequently-overlooked realisation that war must be regulated if anyone is to gain from it.²⁰¹ Despite this seeming truism, however, in the century of total war²⁰² – when "wars can be irreversible in their consequences"²⁰³ – regulation remains an ambivalent phenomenon. Regulation is ethically essential, but also is an ethical obstacle. Ethically, the regulation which Just War theory offers is essential because it correlates *Jus ad Bellum* with "permissible war" – that is, the idea that "recourse to war is an exceptional prerogative that has to be justified, not a right readily available to those who consider themselves just".²⁰⁴ Practically however, this regulation can also act as an obstacle to achieving "just" outcomes. This is because, to paraphrase Howard, to submit to restraints which initially prejudice one's chances of victory when "fighting in a righteous cause" is

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Joseph A Reich Sr Distinguished Lecture on War, Morality, and the Military Profession, No 7, 20 March, 1997: USAF Academy, Colorado) pp 7-8.

¹⁹⁹ Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 6.

²⁰⁰ Krickus, "On the Morality of Chemical/Biological War" in Wakin (ed) op cit, p 413.

²⁰¹ Best, "Restraints on War by Land Before 1945" in Howard (ed) op cit, pp 33-34.

²⁰² O'Brien op cit, pp 7, 29.

²⁰³ Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 6.

²⁰⁴ O'Brien op cit, p 14.

a "paradox which few warring communities, then or since, [find] easy to accept".²⁰⁵ What *Jus ad Bellum* theory attempts to do is to navigate a middle, moderating, practical, ethical path between the two alternatives, a framework through which the realities of warfare can be made to conform with, rather than dictate to, the demands of ethics.²⁰⁶ In short, what it attempts to provide, as Krickus has noted, are "some ethical standards upon which national decision makers may reflect and act in an imperfect world".²⁰⁷ Thus, if *Jus ad Bellum* theory – that part of the Just War tradition which regulates the central decision of whether to go to war at all – is to have any real meaning, it must account for reality by *maintaining* its own internal ethical coherence, rather than by departing from it. It is in this light that the contribution of reasonable hope of success, as an element to *Jus ad Bellum* theory as a whole, must be assessed. The place within a theory of an element which seems to disrupt and subvert that theory's fundamental ethical coherence should be subject to question; such reassessment has been the aim of this study.

My examination began with the observation that reasonable hope of success is the most recent criterion to be added to *Jus ad Bellum* theory, a response to rising rationalist thought. In many ways its very character as a prudential, realist *non-sequitur* amongst an otherwise categorical collection of elements is explicable by these rationalist, secular origins. Until Just War theory as a whole escaped its original, generally theological appreciation, reasonable hope of success was an arguably superfluous concept. It was in response to the rise of *Jus Naturale*, *Jus Gentium*, the modern state, and the consequent assumption of ethical responsibility for war by the state, that reasonable hope of success was added to *Jus ad Bellum* theory. Just cause, right authority, right intention, last resort and the aim of peace, comparative justice, and proportionality were all concepts which lent themselves to relatively easy translation from a predominantly theological appreciation, to a more widely categorical appreciation. This allowed the overall ethical cohesion of the theory to be maintained in the process. Reasonable hope of success, however, was added as a response to realism and has no firm categorical foundations.²⁰⁸

^{205.} Howard, "*Temperamenta Belli*" in Howard (ed) op cit, p 5. Howard is alluding to the requirements of *Jus in Bello* here, but the observation is equally applicable to the restraining function inherent in *Jus ad Bellum* also.

^{206.} See Richard Wasserstrom, "The Laws of War" in Wakin (ed) op cit, pp 391-409 at 407.

^{207.} Krickus, "On the Morality of Chemical/Biological War" in Wakin (ed) op cit, p 412.

^{208.} It might even be argued that this late inclusion of reasonable hope of success within *Jus ad Bellum* doctrine so disrupted its internal coherence – opening the "gates" to the "barbarian" theory of realism – that it was actually a significant causal factor in the eclipse of Just War theory by realism in the Eighteenth and Nineteenth Centuries. But

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Reasonable hope of success, I believe, was grafted onto, rather than incorporated into, *Jus ad Bellum* theory, and has never fully cohered with it. This may be one reason why this particular criterion still remains the least understood, and consequently least examined, aspect of the doctrine.

This general uneasiness with the place and role of reasonable hope of success within *Jus ad Bellum* is compounded when one examines the fundamental ways in which the criterion differs from the other elements of the doctrine. First, reasonable hope of success is a reactive concept – it is not amenable to unilateral determination and is unable to be pre-determined. Second, reasonable hope of success is neither underpinned by, nor even coherent with, control and restraint. Third, reasonable hope of success is primarily a prudential consideration rather than a categorical ethical issue. It is clear, on these grounds at least, that the criterion of reasonable hope of success is both philosophically and methodologically misplaced as an element of *Jus ad Bellum* theory. The reasons for this misplacement range from intellectual incoherence through to fundamental difference, even incompatibility, in the way it is assessed.

It is arguable that this non-sequitur nature of reasonable hope of success makes it more likely to find methodological relevance under the aegis of *Jus in Bello*, but even this proposition becomes improbable if the element of reasonable hope of success is assessed to be meaningless within Just War theory as a whole. In evaluating whether reasonable hope of success actually adds anything to Just War theory, its imprecise and poorly defined nature is significant. First, success is a problematic concept capable of characterisation in a myriad of prudential and categorical forms. Second, because it is such an amorphous concept, success should not be equated with mere victory, thus making it difficult to measure in either chronological, prudential, or categorical terms. Third, this overall *conceptual* meaninglessness is further exacerbated by the *substantive* meaninglessness which becomes apparent when one attempts to apply reasonable hope of success to Just War theory generally. In extreme situations, reasonable hope of success becomes irrelevant because survival is at stake. In less extreme situations, reasonable hope

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that is an argument to be made at another time. Another argument for another time is the question of whether the development of the "rights of man" thesis provides a further rationalist, but 'non-state focussed' reason for the introduction of the element into the doctrine. This argument could examine the degree to which an appreciation of the privations imposed on the individual by war were an ethical consideration in *Jus ad Bellum* (for example, responses to the seemingly inconclusive destruction involved in the Hundred Years War). I would argue, however, that this is an issue encompassed and governed by comparative justice rather than reasonable hope of success.

of success is discardable when acting in self-defence. Further, when fighting for a "significant" good which, whilst not threatening to survival, holds deep categorical importance, reasonable hope of success is again prone to be discarded as a requirement. Finally, in very limited situations, reasonable hope of success is substantively meaningless because it can actually obscure or subvert the achievement of limited aims. It is thus arguable that, apart from being misplaced as part of *Jus ad Bellum* theory specifically, reasonable hope of success as a discrete concept actually adds nothing to Just War theory generally.

It is my conclusion that the concept of reasonable hope of success is of no theoretical or practical value to Just War theory. All other elements of *Jus ad Bellum* doctrine contribute to our understanding of the ethical issues involved in a decision to resort to force; they provide a coherent ethical process to be applied as part of that decision. However, reasonable hope of success is either discardable from, meaningless to, or subversive of this assessment process. Given that the concept, at best, adds nothing to and, at worst, actually hinders this navigation of a practical, meaningful path between ethics and realism, it seems that a reassessment by policy-makers of the place and value of reasonable hope of success within Just War theory is warranted.