

## THE CONVERGENCE OF TRADITIONAL THEORY AND MODERN REALITY: JUST WAR DOCTRINE AND TYRANNICAL REGIMES

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*He, then, who prefers what is right to what is wrong, and what is well-ordered to what is perverted, sees that the peace of unjust men is not worthy to be called peace in comparison with the peace of the just. . . . To be innocent, we must not only do harm to no man, but also restrain him from sin or punish his sin, so that either the man himself who is punished may profit by his experience, or others be warned by his example.*<sup>1</sup>

- St. Augustine

*We will not find peace at home by closing our ears when someone is attacked and crying at our doorstep. Our children will have no peace if no one stops the neighborhood bully. We make peace happen when we remove the threat to peace.*<sup>2</sup>

- Archbishop Ryan

### INTRODUCTION

There is a lesson to be learned at Dachau, Auschwitz, and Buchenwald. It rests in the cold graves of Siberia and muddy pits

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1. SAINT AUGUSTINE, *THE CITY OF GOD*, BOOK XIX, ch. 12, 16 (Marcus Dods trans., Modern Library ed., Random House 1993).

2. Michael N. Schmitt, *The Confluence of Law and Morality: Thoughts on Just War*, 3 U.S. A.F. ACAD. J. LEGAL STUD. 91, 103 (1992) (quoting Archbishop J. Ryan, Pastoral Letter in Time of War (1991)).

filled to the brim with Chinese citizens. It is buried beneath the killing fields of Cambodia. Democide, the intentional killing by a government of its own people within its own borders, has consumed millions of innocent human lives. In fact, it has taken more than all the international wars of the twentieth century. The rise of the modern tyranny and its proclivity to kill its own citizens has shown that the view of peace defined solely in light of external hostilities can no longer satisfy the demands of justice and human rights. This changed understanding of what constitutes true peace requires a critical review of the current international legal system and the traditional just war doctrine underlying it. Yet, far from calling for the abandonment of traditional notions of just war, the solution to democide demands a refined application of this venerable doctrine to meet a heretofore unconsidered circumstance: regime change in the context of just war.

This article will review just war theory and then address new empirical findings which clearly demonstrate that regimes of a certain type are responsible not only for almost all of the aggressive international wars launched in the last century, but are guilty of a much larger, and more deadly phenomenon—democide—which has claimed *four times* more victims than war. The threat posed by democide and the clearly identifiable regime types which perpetrate it, call for an application of just war theory to the only problem more deadly than war. That these same types of regimes are the state supporters of terrorism, and have the weakest institutional safeguards against the use of weapons of mass destruction, makes this application all the more urgent.

Part I of this article examines the relationship between international law and just war in respect to the goal of peace. Key to this discussion is an understanding of “true peace.” This is not the mere cessation of external hostilities, but a *tranquilitatis ordinis* of justice and freedom. Part II lays out and individually examines the principles of the just war theory, including those underlying the *jus ad bellum* and *jus in bello*. This includes some historical discussion of the theory, but will mainly focus on a recent articulation in *The Challenge of Peace* and the writings of Professor Michael Schmitt. Part III addresses the distinct attributes of democratic regimes, the absence of which help demarcate a tyrannical regime with a proclivity for democide. Part IV deals with a necessary inference of the conclusion that all regimes are not equal, namely, that a strict moral equivalency cannot always exist in international relations. Despite

the concerns of some, this position seems to follow inevitably from the distinction between regimes. Part V analyzes Bishop Wilton Gregory's letter to President Bush on the eve of the war in Iraq. Particular attention is paid to this letter's just war analysis, especially in light of this article's findings on democide, regime change, and just war.

## I. INTERNATIONAL LAW, MORALITY, AND PEACE

"Ultimately," Professor Michael Schmitt writes, "international law is about morality."<sup>3</sup> The intellectual foundation for the morality, and international law, of the resort to violence is the just war doctrine. George Weigel described the doctrine: "[T]he just war tradition is best understood as a sustained intellectual effort to relate the morally legitimate use of proportionate and discriminate military force to morally worthy political ends."<sup>4</sup> Another just war thinker, likewise, lists the constituent parts:

[T]he just war doctrine today can be summarized in five main points. For *jus ad bellum* (the ideas connected with going to war), there must first be a just cause to go to war; second, the decision to go to war must be made by legitimate authority; third, force must be resorted to with right intention; fourth, the use of force must "pass four prudential tests: it must (a) be expected to produce a preponderance of good over evil, (b) have a reasonable hope of success, (c) be a last resort, and (d) have peace as its expected outcome." For the *jus in bello* (the ideas connected with proper behavior in war), the use of force must be proportionate and discriminate.<sup>5</sup>

The proper application of the just war doctrine depends first and foremost on a proper understanding of the word "peace." Often used, but seldom analyzed with any academic rigor, it is the desired end state of the just war doctrine, and its maintenance, broadly understood, is the only morally sufficient justification for war.

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3. Schmitt, *supra* note 2, at 103.

4. George Weigel, *Pope John XXIII Lecture: The Just War Tradition and the World After September 11*, 51 CATH. U. L. REV. 689, 700 (2002).

5. Joshua Raines, *Osama, Augustine, and Assassination: The Just War Doctrine and Targeted Killings*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 217, 224-25 (2002) (quoting James Turner Johnson, *Just Cause Revisited*, in CLOSE CALLS: INTERVENTION, TERRORISM, MISSILE DEFENSE, AND 'JUST WAR' TODAY 3, 3 (Elliot Abrams ed., 1998) (footnote omitted)).

Therefore, a clear understanding of “peace” is literally a matter of life and death.

Weigel expounds on the fundamental distinction between “peace” as colloquially used, and the *tranquillitatis ordinis*,

[T]his peace of *tranquillitas ordinis* is composed of justice and freedom. The peace of order, as the Catholic Church understands it, is not the eerily quiet and sullen “peace” of a well-run authoritarian regime; it is a peace built on foundations of constitutional, commutative, and social justice. . . . The defense of basic human rights is thus an integral component of “work for peace.”

This is the peace that has been achieved in and among the developed democracies.<sup>6</sup>

Tyranny and terrorism are the threats to this peace *par excellence*, their very nature, rather than the specific weapons they wield, setting them at odds with the *tranquillitatis ordinis*.<sup>7</sup> While certain categories of weapons draw a great deal of attention as being inherently threatening (firearms domestically, and nuclear weapons internationally), the threat is due less to the weapon itself than the moral nature of the one who wields it. Domestically, a 9mm pistol in the hands of a criminal is far more threatening than an entire police department equipped with the same 9mm pistol. Similarly, hundreds or even thousands of nuclear weapons (the only remaining lawful weapon of mass destruction) under the control of a democracy are far less threatening than a single such weapon in the hands of a terrorist or tyrant. As Weigel explains,

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6. Weigel, *supra* note 4, at 705-06 (footnote omitted).

7. Weigel connects the theoretical demands of the *tranquillitas ordinis* to modern international behavior in an unambiguously direct way:

International terrorism of the sort we have seen since the late 1960s, and of which we have had a direct national experience on September 11, is a deliberate assault, through the murder of innocents, on the very possibility of order in world affairs. That is why the terror networks must be dismantled or destroyed. The peace of order is also under grave threat when vicious, aggressive regimes acquire weapons of mass destruction which we must assume, on the basis of their treatment of their own citizens, they will not hesitate to use against others. That is why there is a moral *obligation* to ensure that this lethal combination of irrational and aggressive regimes, weapons of mass destruction, and credible delivery systems does not go unchallenged. That is why there is a moral *obligation* to rid the world of this threat to the peace and security of all. Peace, rightly understood, demands it.

*Id.* at 706.

The “regime factor” is crucial in the moral analysis, for weapons of mass destruction are clearly not aggression-waiting-to-happen when they are possessed by stable, law-abiding states. No Frenchman goes to bed nervous about Great Britain’s nuclear weapons, and no sane Mexican or Canadian worries about a pre-emptive nuclear attack from the United States. Every sane Israeli, on the other hand, is deeply concerned about the possibility of an Iraq or Iran with nuclear weapons and medium-range ballistic missiles.<sup>8</sup>

Such sharpened focus upon the moral disposition of a regime and its respect, or lack thereof, for human rights has altered the understanding of regime change under international law. The moral and legal constraints of the emerging doctrine of humanitarian intervention are now being informed by a new understanding that many of the problems justifying intervention—threats to nationals abroad, ethnic violence or “cleansing,” state support for terrorism, even famine—are derivative of illegitimate government, opaque to public scrutiny and invulnerable to public action, and that efforts to treat symptoms while the cause remains in place will condemn thousands to unnecessary suffering. In those cases where large-scale and widespread killing may be directly and empirically linked to the specific actions of specific dictatorships, then “regime change” becomes not merely permissible, but compulsory under current international law.

A clear understanding of the types of regimes that perpetrate these actions will remove the debate from the arena of political wilfulness, replacing the extremes of never intervening (permitting all forms of intra-state violence to run their course until no victims remain) and the other extreme of unprincipled intervention, sending in cruise missiles or troops as an exercise of sheer will for domestic political advantage. As ideologically comfortable and intellectually undemanding as each of these extremes is, those not committed to them must perform a good faith legal and moral analysis, balancing the cost of just war against the evil it would seek to remedy. Only then will it be possible to advance a principled determination of who should be rescued, and who should not. The first step toward reaching such a principled determination is to present the tenets of the just war doctrine.

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8. *Id.* at 707-08.

## II. JUST WAR THEORY AND APPLICATION

St. Thomas Aquinas laid out the three core requirements of just war theory: legitimate authority,<sup>9</sup> just cause,<sup>10</sup> and right intention.<sup>11</sup> The Pew Forum on Religion and Public Life has addressed the just war doctrine at some length,<sup>12</sup> and after identifying the contributions of Augustine, Aquinas, and later thinkers, has presented a distilled analysis of eight just war principles: legitimate authority, just cause, right intention, last resort, reasonable chance of success, and proportionality from the *jus ad bellum*, and noncombatant immunity and proportionate means from the *jus in bello*.<sup>13</sup>

Professor Schmitt, a graduate of Yale and a student of that school's close linkage of law and policy, finds the just war theory of Augustine and Aquinas to be anything but anachronistic,

The ideas forwarded by advocates of just war analysis are compelling and appealing. In particular, it is very much a policy-oriented approach. Though it offers a rough normative checklist against which to measure the legality (morality) of a particular use of force, that checklist is always understood contextually and interpreted in light of the ultimate purpose of the doctrine—peace

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9. Aquinas wrote:

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers. . . . [S]o too, it is their business to have recourse to the sword of war in defending the common weal against external enemies.

THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part II-II, Question 40, Article 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911). Aquinas goes on to quote St. Augustine: "The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority." *Id.*

10. "Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault." *Id.*

11. "Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil." *Id.*

12. See The Pew Forum on Religion & Public Life, *Just War Tradition*, at <http://pewforum.org/just-war> (on file with the Ave Maria Law Review).

13. *Id.*

through the maintenance of justice. . . . [I]n my opinion, the principles and norms of the doctrine closely approximate those underlying current international law.<sup>14</sup>

For a recent example of just war reasoning, Schmitt cites *The Challenge of Peace: God's Promise and Our Response*,<sup>15</sup> a 1983 pastoral letter written in response to President Reagan's military buildup.<sup>16</sup> The letter was written with the political goal of opposing the deployment of nuclear weapons, but it does provide an authoritative statement of the modern principles of just war doctrine. Narrowly construed, the five core principles enunciated in the letter are dispositive of current Catholic just war thought,

- 1) Catholic teaching begins in every case with a presumption against war and for peaceful settlement of disputes. In exceptional cases, determined by the moral principles of the just-war tradition, some uses of force are permitted.
- 2) Every nation has a right and duty to defend itself against unjust aggression.
- 3) Offensive war of any kind is not morally justifiable.
- 4) It is never permitted to direct nuclear or conventional weapons to "the indiscriminate destruction of whole cities or vast areas with their populations. . . ." The intentional killing of innocent civilians or noncombatants is always wrong.
- 5) Even defensive response to unjust attack can cause destruction which violates the principle of proportionality, going far beyond the limits of legitimate defense. . . . No defensive strategy, nuclear or conventional, which exceeds the limits of proportionality is morally permissible.<sup>17</sup>

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14. Schmitt, *supra* note 2, at 92.

15. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE: A PASTORAL LETTER ON WAR AND PEACE* ¶ 83 (1983) [hereinafter *CHALLENGE OF PEACE*].

16. Schmitt, *supra* note 2, at 93.

17. *CHALLENGE OF PEACE*, *supra* note 15, Summary (quoting Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 80 (1965), reprinted in *THE SIXTEEN DOCUMENTS OF VATICAN II* 513, 601 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967)). *But see* Weigel, *supra* note 4, at 701-04. Regarding the presumption against war detailed in the first principle, Weigel notes that a central theme of just war doctrine

Schmitt addresses the moribund nature of the United Nations military apparatus through his analysis of *The Challenge*,

[The Bishops] perceptively note that in the absence of a centralized and authoritative enforcement mechanism in the world arena, states must necessarily have the right to engage in self-defense once peaceful means of dispute resolution have been exhausted. This contextual understanding of interstate relations has much to offer international law. Most importantly, focusing on the absence of a centralized authority permits a fuller understanding of the United Nations Charter prohibition on the resort to force. Since the Charter was promulgated at a time in which the universal enforcement mechanism set forth in Chapter VII was expected to soon become operative, it made sense to read the prohibition on resort to force (Article 2(4)) broadly and the right to engage in self-defense (Article 51) quite narrowly. Given the failure of the envisioned enforcement procedure . . . such a reading is unsupportable today.<sup>18</sup>

Perhaps the most important insight provided by *The Challenge* is the affirmative duty to oppose unjust aggression. The Bishops wrote: "The Christian has no choice but to defend peace, properly understood, against aggression. This is an inalienable obligation."<sup>19</sup>

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is that a presumption in favor of "peace" be a presumption in favor of a just peace, and not merely the absence of hostilities. *Id.* at 705-07. Weigel states, "The leading Anglophone scholar of the just war tradition, James Turner Johnson, has flatly denied that the tradition begins with a 'presumption against violence.'" *Id.* at 703.

18. Schmitt, *supra* note 2, at 93-94 (footnote omitted).

19. CHALLENGE OF PEACE, *supra* note 15, ¶ 73. The Bishops excerpt the 1948 Christmas message of Pope Pius XII, addressing a world with a painfully vivid memory of evil unconfrosted:

*A people threatened with an unjust aggression, or already its victim, may not remain passively indifferent, if it would think and act as befits a Christian. All the more does the solidarity of the family of nations forbid others to behave as mere spectators, in any attitude of apathetic neutrality. Who will ever measure the harm already caused in the past by such indifference to war of aggression, which is quite alien to the Christian instinct? How much more keenly has it brought any advantage in recompense? On the contrary, it has only reassured and encouraged the authors and formentors of aggression, while it obliges the several peoples, left to themselves, to increase their armaments indefinitely. . . . Among (the) goods (of humanity) some are of such importance for society, that it is perfectly lawful to defend them against unjust aggression. Their defense is even an obligation for the nations as a whole, who have a duty not to abandon a nation that is attacked.*

*Id.* ¶ 76 (quoting Pius XII, 1948 Christmas message).

*The Challenge* also outlines nine requirements of the just war doctrine, seven in the *jus ad bellum* (guiding the resort to force),<sup>20</sup> and two in the *jus in bello* (governing the employment of force in wartime). The seven in the *jus ad bellum* are just cause, competent authority, last resort, comparative justice, probability of success, proportionality, and right intention.<sup>21</sup> Of these seven that govern *jus ad bellum*, proportionality carries over to the *jus in bello* and there functions with discrimination, which simply prohibits the directly intended targeting of civilians and non-military targets.<sup>22</sup>

#### A. *Just Cause*

In seeking to limit the ambit of permissible violence, *The Challenge of Peace* actually gives broader scope to moral action than mere response-to-invasion: "War is permissible only to confront 'a real and certain danger,' i.e., to protect innocent life, to preserve conditions necessary for decent human existence, and to secure basic human rights."<sup>23</sup>

Schmitt cites four bases for just cause: individual and collective self-defense, humanitarian intervention, retribution, and holy war.<sup>24</sup> The latter two play no role in the conduct of civilized nations today, but the former two provide equal moral bases for action. International law has long favored individual and collective self-defense, and continues to do so under the UN Charter paradigm. Humanitarian intervention, however, is only now acquiring a legal acceptance to match its moral status.

In classical Church teachings, states had a duty to intervene on behalf of innocents who were subjected to mistreatment by their rulers. . . .

. . . Surely it cannot be moral, nor Christian, to sit idly by as gross and systematic human rights violations are committed when a

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20. *But see* Weigel, *supra* note 4, at 703 (listing only six: "just cause, right intention, competent authority, reasonable chance of success, proportionality of ends, and last resort").

21. CHALLENGE OF PEACE, *supra* note 15, ¶¶ 85-100.

22. *Id.* ¶¶ 101-10.

23. *Id.* ¶ 86.

24. Schmitt, *supra* note 2, at 95-96.

military action that comports with all the just war criteria could put an end to the suffering.<sup>25</sup>

This point, the opportunity cost of not forcefully confronting those responsible for suffering and death, is a continuing difficulty for those who advocate a retreat from arms at all costs.

### B. *Competent Authority*

There are at least three facets to this just war requirement. First, throughout the twentieth century, the concept of “competent authority” has become more and more closely linked with that of legitimacy. An illegitimate government would not be competent to initiate a just war merely because it is the *de facto* regime of a nation; just war theory requires more than mere theft of power by coup or assassination. As Schmitt explains,

These views are premised on the idea that in the 20th century sovereignty resides not in the organs of government, but rather in the people. Thus, when the government acts, it does so on behalf of the people in a sort of modified agency relationship. Should the government breach the terms of the agency, the relationship dies and the government is held liable.<sup>26</sup>

For him the problem is teleological.

[T]he purpose of the just war doctrine is to bring peace to the world through the enhancement of justice. Therefore, a proper understanding of competent authority is one in which authority is exercised in a fashion that fosters justice. When a government acts in the *just* interests of its population, or chooses not to act at all (and its failure to do so does not harm the citizens), it possesses authority. Conversely, when it acts contrary to its citizens’ just interests it does not. . . .

. . . [I]f a government is oppressing its own people, i.e., violating *their* human rights, it forfeits any authority it may have back to the

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25. *Id.* at 95 (footnote omitted).

26. *Id.* at 98 (footnote omitted).

population, which can, in turn, exercise that authority to overthrow the illegitimized government.<sup>27</sup>

The second facet of competent authority is the democratic aspect. Within a democracy, the proper constitutional process must be undertaken before initiating a defensive yet still discretionary use of force. No inferior officer of the executive may commit the country to any sustained violence, and even targeted killings of individual terrorists must be authorized at the highest levels. This ensures that the final decision will be made by a person that is highly visible and highly accountable to the electorate, and that that official will make decisions with that political deterrent firmly in mind. The related checks of Congressional oversight and Judicial sanction also serve to limit the Executive to constitutional primacy only in those areas requiring speed, secrecy, and unanimity.<sup>28</sup>

The third and final aspect of competent authority has to do with the apparent tension between just war theory and pacifism. In differentiating the two, just war thinker Keith Pavlischek makes a frequently overlooked point,

[T]he fundamental distinction between classic pacifism and classic just war thought was not over whether or not public authorities were authorized to punish evildoers by death and waging war if necessary. The Biblical witness was simply too perspicuous for them to doubt this. The issue between them and both the magisterial Reformers and Roman Catholicism was more precisely over whether Christians may legitimately hold a political office. That political authority could legitimately employ lethal force and coercion was simply acknowledged and accepted.<sup>29</sup>

Once again, the legitimacy of the authority determines the legitimacy of the force employed.

### C. *Last Resort*

While attractive in the abstract, the requirement that all nonviolent alternatives be exhausted before resorting to violence has become problematic. Specifically, the problem is an application of the

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27. *Id.* at 97-98.

28. See Raines, *supra* note 5, at 234.

29. Kevin Pavlischek, *Just War and Counterterrorism* (Sept. 24, 2001), at [http://www.cpjustice.org/stories/storyReader\\$595](http://www.cpjustice.org/stories/storyReader$595) (on file with the Ave Maria Law Review).

criterion which considers it an absolute to be pursued at all costs, with the end state of war as worse than any achievable *status quo* short of war. Empirical research into the nature of democide has shown us that four times as many men, women, and children have been killed in non-war settings than in all the civil and international wars of history.<sup>30</sup> Clearly, war is not the worst evil to be avoided.

What is required is a more sophisticated approach, balancing the potential harm of military operations (fought under just war standards) against the harm of inaction. Diplomatically, it will always be possible to send one more note, hold one more press conference, extend one more deadline, or accede to one more demand. A principled endpoint to these efforts must be the tipping point, unique to every set of facts, at which the reasonably foreseeable harm of fighting is outweighed by the harm already suffered, and likely to be suffered, by those not rescued. Schmitt concurs, "[T]here is a point at which the futility of peaceful efforts becomes glaringly apparent. To require senseless continuation of those efforts risks ultimate success in achieving just objectives and unnecessarily subjects the actual or potential victims of the wrongful aggression to further harm."<sup>31</sup>

Weigel believes that the imminence requirement of the current *jus ad bellum* lies somewhere short of receiving the first blow from an aggressor armed with weapons of mass destruction,

Some states, because of the regime's aggressive intent and the lack of effective internal political controls [and external deterrence] on giving lethal effect to that intent, cannot be permitted to acquire weapons of mass destruction. . . . Until such point as the international political community has evolved to the degree that international organizations can effectively disarm such regimes, the responsibility for the defense of order in these extreme circumstances will lie elsewhere.<sup>32</sup>

Intimately related is the question of timing; specifically, the requirement for the pretext of a physical violation to justify a defensive response. Until the middle of the twentieth century, armies relied more on mass than on precision, forces took days and weeks to mobilize, and they moved scarcely faster than a man could walk. This

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30. Gerald W. Scully, *Murder by the State* (Sept. 1997), at <http://www.ncpa.org/studies/s211/s211.html> (on file with the Ave Maria Law Review).

31. Schmitt, *supra* note 2, at 100.

32. Weigel, *supra* note 4, at 713.

allowed a doctrine of absorbing the first blow, accepting enough damage to make clear to the public the identity of the aggressor, and then to mobilize defensively. Democracies, in particular, seem prone to this model, mirror-imaging their peaceful intentions and nonviolent methods on an opponent until they are literally struck.

Those days ended well before September 11, 2001, but popular opinion awoke to the new reality on that date. No longer would large, highly visible armies spend weeks massing on borders. Attacks in the War on Terror could occur at anytime, against anyone, and in any place. The amount of damage which may be done to innocents, particularly by an enemy armed with weapons of mass destruction, does not permit treating the doctrine of “last resort” as an absolute right up until the time of the attack.<sup>33</sup> Schmitt argues,

[L]ast resort should not be interpreted as ruling out anticipatory self-defense; there is no requirement that the victim state suffer the first blow. Many scholars of international law dispute this contention, though in my view they evaluate the law from an overly narrow perspective in which the goals of international law are given insufficient weight. The Christian focus on the need to protect innocents directly conflicts with this interpretation.<sup>34</sup>

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33. The White House, recognizing the international law governing preemptive self-defense and articulating United States policy based upon that understanding, said,

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an . . . imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. . . .

. . . The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf> (on file with the Ave Maria Law Review).

34. Schmitt, *supra* note 2, at 100 (footnote omitted). Schmitt continues,

Surely, if an international dispute can be resolved without violence then it should be. But once it becomes reasonably clear that attack is inevitable, the potential victim should respond when it can effectively do so and there is the least danger to innocents. This may mean that it will anticipatorily attack prior to completion of the

Balancing the harms of action and inaction requires a more subtle approach to morality than simply asking who threw the first punch, but the just war doctrine was created with an eye toward justice, not simplicity.

#### D. *Additional Factors*

Probability of success, proportionality, and right intention are three of the less controversial aspects of the just war doctrine. Schmitt quickly disposes of the first two, “[T]he success criterion is designed to discourage futile efforts; proportionality to discourage excessive ones.”<sup>35</sup>

Right intention is the subjective aspect of objectively right action.<sup>36</sup> Schmitt finds this the least compelling portion of just war thinking, “The difficulty of establishing intent aside, it must be asked whether it is morally appropriate to sacrifice just causes over a concern that states may be motivated by less than noble objectives.”<sup>37</sup> Viewed practically, of course the most interested nation will act to right an international wrong, i.e., a former colonial power stepping in to a less-civilized region, due to continuing economic ties, a shared cultural bond, and perhaps a residual sense of duty. Another power may act to stop ethnic cleansing in a tyrannical neighbor in part to stem a catastrophically disruptive tide of refugees. Yet another country may liberate an entire nation from a theocratic dictatorship, in part out of a sense of justice, and in part to drain a metaphorical swamp which breeds international terrorism. In any situation in which incentives operate, the most interested party will act soonest and most forcefully to remedy the problem at hand. Providing all other just war criteria are met, the absence of this criterion has little effect on the good done in the real world.

The existence of requirements to be met before engaging in a just war does create a presumption of peace, but this presumption is widely misunderstood and often employed mechanically as a presumption against resisting oppression. Professor Jean Bethke

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aggressor’s preparations. Properly understood, then, the moment of last resort is ascertained by balancing the human benefits of acting earlier, rather than later, against any remaining possibility that hostilities can be averted.

*Id.* at 101.

35. *Id.* at 102.

36. See Raines, *supra* note 5, at 226.

37. Schmitt, *supra* note 2, at 102.

Elshtain, one of the leading scholars in the just war field, has said, "Within the just war tradition, there is a common moral presumption *for* justice as well as a recognition that all war is terrible. But there are times when justice demands the use of force as a response to violence, hatred, and injustice."<sup>38</sup>

The sovereignty of the nation-state is not an absolute bar to humanitarian intervention, up to and including changing a regime if nothing short of that will accomplish the lawful end of protecting innocents. Elshtain writes,

[J]ust war demands that we see a sovereign state as an actor that either does what states are supposed to do—provide basic civic peace, rule of law, and security for citizens—or does not. When a state destroys or is prepared to destroy its own citizens and to propel its violence outside its own borders, it becomes a criminal entity. Under just war theory, states themselves must often come under severe moral scrutiny.

In other words, a state's right to direct its own affairs is not, and never has been, absolute. It may forfeit that right if it commits aggression against another state (as Saddam did against Kuwait), or if it harms in substantial and grave ways its own people or a group of its own people (as Saddam did when he used chemical weapons against the Iraqi Kurds), or if it provides substantial and essential material support to others who wish to inflict such harms (as Saddam allegedly did by supporting Osama bin Laden, whose "fatwas" call for the murder of all Americans, wherever they are found).<sup>39</sup>

Another just war thinker, Neta Crawford, eloquently expands upon the purely biological dimension of self-defense: "[O]ur 'self' is expressed not only by mere existence but also by our free and prosperous existence. Even if a tyrant would allow us to live, but not under institutions of our own choosing, we may justly fight to free ourselves from political oppression."<sup>40</sup> The transitive nature of defense of others or collective self-defense extends this understanding from any given victim to any given liberator. Crawford herself quotes just war theorist James Turner Johnson: "[W]e do not have to be able

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38. Jean Bethke Elshtain, *A Just War?*, BOSTON GLOBE, Oct. 6, 2002, at H1.

39. *Id.*

40. Neta C. Crawford, *Just War Theory and the U.S. Counterterror War*, 1 PERSP. ON POL. 5, 14 (2003).

to give an extensive and comprehensive listing of all values that may be protected and in what ranking in order to know *that there are* such values; they will be apparent when they are violated or threatened with violation."<sup>41</sup> An essential component of the just war analysis determining when intervention is appropriate or not grows out of an understanding that certain types of regimes are more hostile than others to fundamental values of the international community.

### III. THE RULE OF LAW AND REGIME TYPES

Current research into the nature of regime types has yielded startling data on the relative peacefulness of tyrannies and democracies, and the systemic qualities of each that account for those differences. Although worthy of a fuller-length treatment, it is still possible to outline the conclusions of this research in the present article.

The first conclusion is that not all governments are morally equivalent. They are differentiated by the rule of law, specifically those few qualities of democracies that permit efficient government action while effectively checking its dangerous and often life-threatening excesses.<sup>42</sup> The rule of law is a broad concept subject to various interpretations, but certain core principles are common to most comprehensive descriptions, among these core principles are the following:

[T]he authorized governance of at least basic social relations between citizens and between citizens and their government so far as feasible through published formal rules congruently interpreted and applied, with the officialdom itself subject to rules defining the manner and limits of their activity, and with sanctions or other redress against citizens and officials for departures from rules being imposed only by impartial and independent courts or by similar tribunals, after due notice and opportunity for hearing.<sup>43</sup>

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41. *Id.* at 20 (quoting James Turner Johnson, *Threats, Values, and Defense: Does the Defense of Values by Force Remain a Moral Possibility?*, in *JUST WAR THEORY* 55, 64 (Jean Bethke Elshtain ed., 1992)).

42. "[T]he rule of law and political liberty [are] the world's[] only resource in the struggle with truly homicidal obsessions." ROBERT CONQUEST, *REFLECTIONS ON A RAVAGED CENTURY*, at xiii (2000).

43. Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 *RATIO JURIS* 127, 129 (1993).

Professor John Norton Moore has made the list somewhat more precise,<sup>44</sup> and so from his work it is possible to formulate a short list of those specific qualities which distinguish democracies from tyrannies:

- Free, fair, and regular elections<sup>45</sup>
- *de facto* horizontal separation of powers (executive, legislative, and judiciary)<sup>46</sup>
- in large or ethnically diverse countries, vertical separation of powers (federalism)
- civilian control of the military
- secular control of the government, with an attendant guarantee of the freedom of conscience<sup>47</sup>

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44. Moore provides his definitive list of the components of the rule of law, taken from "The Rule of Law: An Overview," a paper Moore presented to the Seminar on the Rule of Law in Moscow in March, 1990:

The "rule of law" collectively symbolizes the most important features of democratic governance. Its core meaning is that governmental decisions must be rooted in the consent of the governed, acting only through structures and procedures designed to prevent individual oppression or governmental tyranny, which protect fundamental rights and freedoms, and which are subject to appraisal by an independent judiciary rendering judgments based on law. It stands in contrast to decisions based on naked power, arbitrary fiat, political expediency or personal gain. But most meaningfully, it encompasses much more than simply the opposite of these negative images. Individual judgments differ as to the core underpinnings of the rule of law, but I believe there are at least five principal tenets—each with a number of fundamental sub-tenets. These five highest-level tenets are:

- government of the people, by the people, and for the people;
- separation of powers and checks and balances;
- representative democracy and procedural and substantive limits on governmental action against the individual (the protection of human freedom and dignity);
- limited government and federalism; and
- review by an independent judiciary as a central mechanism for constitutional enforcement.

John Norton Moore, *Morality and the Rule of Law in the Foreign Policy of the Democracies*, in *MORALITY AND EXPEDIENCY IN INTERNATIONAL AND CORPORATE RELATIONS* 125, 134-35 (W. Lawson Taitte ed., 1992) (citations omitted).

45. Elections are necessary, but not sufficient in themselves, to guarantee a true democracy.

46. The requirement for an independent judiciary is subsumed within this separation of powers, as is the *de facto* adversary relationship between the government and parliament in parliamentary democracies, even though both are *de jure* members of the same institution.

- enforced guarantees of certain inalienable human rights, even in the face of a contrary electoral majority<sup>48</sup>
- a free, competitive press, rendering the government more transparent, and
- property rights through which the government provides a secure and predictable environment for the development of a free market economy

Each of these requirements may be further reduced to specific, empirically-verifiable subquestions, allowing a more principled determination of the nature of a regime.<sup>49</sup> Furthermore, they accord

47. Properly implemented, such a separation preserves both individual freedom of conscience and freedom from theocratic control over the secular, temporal government.

48. The United States Bill of Rights is perhaps the most representative and comprehensive list of these core political rights. U.S. CONST. amends. I-X. This requirement would *not* include unenforced or aspirational rights (such as a “right to leisure”), but only those of an individual *vis-à-vis* his government or a majority of his fellow citizens.

49. Professor Moore provides a mirror-image list of the attributes of the archetypical radical regime:

- 1) a single-party political process, usually totalitarian, in which there are no free elections and in which the party is merged with the state in key respects;
- 2) massive denial of human rights and political freedoms at home, coupled with a pervasive and repressive internal security apparatus, a large number of political prisoners, and frequently even a denial of the right to emigrate;
- 3) a judicial system that in key respects is subordinate to the party and ruling elites;
- 4) hostility to collective organization and bargaining by labor;
- 5) national chauvinism, prejudice against minority religious or national groups, and frequently anti-Semitism;
- 6) a “cult of personality” surrounding current national leaders;
- 7) a high degree of militarization of society;
- 8) pervasive political indoctrination at home through state control of schools, youth and other organizations, and the media;
- 9) a belief in system expansion through force and a willingness to subsidize and promote terrorism and indirect attack;
- 10) hostility to pluralist democracy;
- 11) an effort to establish thoroughgoing state centrist economic management and a disdain for the private sector or private property as part of human freedom; and
- 12) a failed economy, with economic development lagging behind that of comparable regional states that have relatively free markets.

with U.S. national policy, enunciated in the wake of the September 11 attacks.<sup>50</sup> What can be readily seen is that a country which possesses the attributes on this list contrasts sharply with tyrannies that lack them—a fact to which the twentieth century attests.

The dichotomy between democracies and tyrannies is more than just academic. The lion's share of international pathologies which the United States and the other civilized nations of the world have consistently opposed correlate almost perfectly with tyranny. The best known of these pathologies is war itself, and the concept of the democratic peace—that democracies do not attack each other and attack non-democracies only when mortally threatened—has received broad acceptance in academic and government circles, and holds up well under close statistical scrutiny. Although the research on the topic is voluminous, one example provides a clear snapshot. In a recent lecture, Professor Moore cited research categorizing the twenty-eight wars (more than 1,000 casualties) in the twentieth century, finding twenty-five started by tyrants, two ambiguous cases (India versus Bangladesh and Turkey versus Cyprus), and one started by democracies (France versus Britain in the Suez, 1956).<sup>51</sup> The author disagrees with the last, in that the conflict was precipitated by Nasser and his seizure of the Suez Canal. The two ambiguous cases are likewise poor counterexamples, in that they reflect the actions of immature proto- or pseudo-democracies. In any case, even this study found that 99.6 percent of casualties in twentieth century war were the result of tyrant-initiated conflicts.<sup>52</sup>

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John Norton Moore, *Low-Intensity Conflict and the International Legal System*, in *LOW-INTENSITY CONFLICT: OLD THREATS IN A NEW WORLD* 276, 285 n.1 (Edwin G. Corr & Stephen Sloan eds., 1992) [hereinafter *Low-Intensity Conflict*] (adapted from JOHN NORTON MOORE, *THE SECRET WAR IN CENTRAL AMERICA: SANDINISTA ASSAULT ON WORLD ORDER* 153-54 n.2 (1987)). I would add that all too frequently another element of radical regimes is a massive killing of perceived opponents or disfavored groups within the State, an atrocity that has been termed "democide." This "democide" may be carried out through gulags or "reeducation camps" or, as in Pol Pot's Cambodia, simply by direct massive killing.

50. On January 29, 2002, U.S. President George W. Bush delivered his first wartime State of the Union address to Congress. GEORGE W. BUSH, *STATE OF THE UNION MESSAGE* (Jan. 29, 2002), in H.R. DOC. NO. 107-157 (2002), *reprinted in* 2002 U.S.C.C.A.N. D3. In it, he outlined what he called "the non-negotiable demands of human dignity." *Id.* at 7. These are "the rule of law . . . limits on the power of the state . . . respect for women . . . private property . . . free speech . . . equal justice . . . and religious tolerance." *Id.* "No nation owns these aspirations, and no nation is exempt from them." *Id.*

51. John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, Lecture at the Fairfax County Government Center (Jan. 31, 2003), *available at* [http://www.virginia.edu/facultysenate/speakers/etm\\_2002\\_03/moore.html](http://www.virginia.edu/facultysenate/speakers/etm_2002_03/moore.html).

52. *Id.*

This regime-centric approach, though well supported in current scholarship, is a departure from the various academic enthusiasms of the past. Though none correlated strongly with the actual cause of twentieth century wars, a long list of the “causes” of war has been developed over time,<sup>53</sup> as has the list of largely unsuccessful modalities for preventing war.<sup>54</sup> If the nature of the regime in question is the key to its behavior, then it is absolutely vital to distinguish democracies from tyrannies, and treat each accordingly. Two political theorists argue the broad point,

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53. Professor Moore’s accounting, probably the most complete, includes the following:

- Specific Disputes Among Nations
- Absence of Dispute Settlement Mechanisms
- Ideological Disputes
- Ethnic and Religious Differences
- Communications Failures
- Proliferation of Weapons and Arms Races
- Social and Economic Injustice
- Imbalance of Power
- Competition for Resources or Other Values
- Incidents, Accidents, and Miscalculations
- Violence in the Nature of Man
- Aggressive National Leaders
- Economic Determinism (Marxist Theories)

*Id.*

54. Professor Moore again has the most comprehensive listing:

- Diplomacy
- Balance of Power
- Third Party Dispute Settlement
- Collective Security
- Arms Control
- Functionalism
- World Federalism
- Rationalism
- Pacifism and Nonviolent Sanctions
- Second Track Diplomacy
- Resolving Underlying Causes:
  - Poverty
  - Racism
  - Ethnic Differences
  - Colonialism/Imperialism
  - Commercial Exploitation
  - Mercantilism
  - Globalism

*Id.*

A mechanically equal assessment of U.S. actions in Grenada and Panama and Soviet actions in Hungary, Czechoslovakia, and Afghanistan ignores objective and consequence which is what politics, morals, and law are all about. It is like equating a mugger's knifing of a citizen on the street with a surgeon's removal of a tumor from that ailing citizen, because both actions involve one human being's putting a knife into another.<sup>55</sup>

Acting against such regimes may be the solution to war prevention, but an even greater problem, worthy of extensive analysis, exists. Just war doctrine and its application in the realm of regime change matters most greatly in the prevention of democide.

Democide, as defined above, is the intentional killing by a government of its own people within its own borders, usually during "peacetime."<sup>56</sup> Where there are no effective limitations on such a government, it will kill until the "rational" limits of killing—purely utilitarian constraints on terror—slow its progress.<sup>57</sup> The six million

55. W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* 75 (1992).

56. Gerald Scully explains,

At least 170 million people—and perhaps as many as 360 million—have been murdered by their own governments in this century. This is more than four times the 42 million deaths from civil and international wars. When a state murders some of the general population, it is called *democide*; when it murders minorities, the term is *genocide*. Thus genocide is one type of democide.

Scully, *supra* note 30. See also JAMES ROBERT HUNTLEY, *PAX DEMOCRATICA: A STRATEGY FOR THE 21ST CENTURY*, xii (1998) ("Apart from the staggering war deaths in [the twentieth] century, an additional multiple of three to five times more civilians have been exterminated illegally by governments."). Huntley continues:

Authoritarian regimes, answerable to no one but a single strongman or handful of bosses, are largely responsible not only for the atrocious slaughter of modern wars but also for the illegal and arbitrary murder of defenseless [sic] civilians on a vast scale under government authority. This kind of killing is *democide*, which has taken even more lives in this century than war. Priority should now go not just to stopping dictatorships but to their replacement by democratic regimes.

*Id.* at 3.

57. Scully describes the "rational" limits to a democidal tyrant,

A rational dictator or ruling group will practice democide or genocide up to the point at which the marginal benefit equals the marginal cost. In other words, the dictator or ruling group will weigh the incremental benefit of continued rule and a share in the "rents" that are generated through centralized political and economic control (plus any "pleasure" obtained from inflicting terror) against the "cost"—the incremental national output lost from the killing.

Scully, *supra* note 30.

Jews killed by Hitler's regime is perhaps the best documented and most widely known instance of democide; less well known are the vast numbers killed by Stalin, Mao, Pol Pot, and others. As records become more accessible, these estimates, already horrifying, are more often revised upward than downward.<sup>58</sup> Since the overwhelming majority of these killings were perpetrated outside the context of an international or even civil war, a legal and moral system which begins to operate only after the first tank has crashed across an international border leaves much to be desired. If the 80 percent of victims of tyranny who are not victims of war are not to be merely written off, then an application of the just war doctrine toward the change of such regimes is in order. The balancing of the costs of war against the benefits of liberation should include these heretofore under-represented victims of a faulty conception of "peace."

The deep-rooted just war doctrine, which has been shown to underlie much of international law, offers a principled way to achieve this "peace" without offering a mere pretextual license for any nation to intervene in the affairs of another. It furnishes regulations without loss of efficacy and achieves the desired goal without compromising worthy principles. Despite the tendency to view all nations as morally equivalent, the necessity of such distinctions is becoming increasingly clear.

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58. Daniel Southerland reported on the upward revision of the death count in communist China,

[N]ew evidence shows that the number of people who died in more than a dozen repressive, often violent political campaigns between 1950 and 1976—especially the Great Leap Forward and the chaotic 1966-76 Cultural Revolution to create a new society—is millions higher than previously thought. . . .

. . . An article appearing last year in the Shanghai University journal *Society* stated that at least 40 million died from 1959 to 1961. Previous estimates have ranged from 10 million to 30 million. The article noted a mistake in government population statistics for 1960 that led to an underestimation of "unnatural deaths." Authorities later banned this issue of the journal and withdrew it from circulation. . . .

Chen Yizi of Princeton University's Center for Modern China did research for years in China, first as a student and then as a government official, and determined that 43 million had died in the famine, a figure recently matched by a report from a think tank in Shanghai. According to Chen, this made the total number of Chinese who died as a result of Mao's policies 80 million.

Daniel Southerland, *Repression's Higher Toll: New Evidence Shows Famine, Violence Spared Few*, WASH. POST, July 17, 1994, at A1.

## V. MORALITY AND POWER

Empirical verification and vivid anecdotal evidence have shown that not all regimes are morally equivalent, and that the splitting of differences is always the morally superior position in international affairs. Cold War scholar John Lewis Gaddis makes the point that America's world leadership is more palatable because of this. He writes,

Bush suggested two explanations in his West Point speech, both of which most political scientists—not all—would find plausible. The first is that other great powers *prefer* management of the international system by a single hegemon as long as it's a relatively benign one. When there's only one superpower, there's no point for anyone else to try to compete with it in military capabilities. International conflict shifts to trade rivalries and other relatively minor quarrels, none of them worth fighting about. Compared with what great powers have done to one another in the past, this state of affairs is no bad thing.

U.S. hegemony is also acceptable because it's linked with certain values that all states and cultures—if not all terrorists and tyrants—share. As the NSS [National Security Strategy] puts it: "No people on earth yearn to be oppressed, aspire to servitude, or eagerly await the midnight knock of the secret police."<sup>59</sup>

Others, however, are worried by this trend away from moral equivalence in international affairs. Neta Crawford, for one, is concerned that if one side assumes moral supremacy, the subsequent dehumanization and demonization of the enemy diminishes "the estimation of the other side as a potential interlocutor."<sup>60</sup> Crawford is correct, as long as the opponents are in the realm of splittable differences: a trade dispute, a good faith disagreement over the precise location of a border, or perhaps the diversion of a river in one country affecting riparian rights in another downstream. However, when there is an aggressor and a defender, a criminal and a victim, then moral equivalence yields a suboptimal result.

As Professor Moore has convincingly argued, system-wide deterrence as a method of war prevention or termination is successful

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59. John Lewis Gaddis, *A Grand Strategy of Transformation*, FOREIGN POL'Y, Nov. / Dec. 2002, at 50, 52 (quoting NATIONAL SECURITY COUNCIL, *supra* note 33).

60. Crawford, *supra* note 40, at 15.

precisely to the degree that it *does* treat the violator and the violated differently.<sup>61</sup> Just as splitting the difference between a mugger and his victim, or negotiating a settlement between a rapist and his victim, are practically absurd and morally abhorrent to us, it is vital, therefore, to differentiate between situations in which the actors are morally equivalent and those in which they are not. Crawford disapprovingly cites President Bush's address to a Joint Session of Congress ten days after the September 11 attack as indicative of this morally-differential thinking: "Freedom and fear, justice and cruelty have always been at war. And we know that God is not neutral between them."<sup>62</sup> Moore does not share Crawford's concerns,<sup>63</sup> and

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61. Professor Moore cites the crucial importance of not treating all uses of force as morally and legally identical,

It is largely the differential between the treatment of aggression and the treatment of defense that measures the effectiveness of the legal system in deterring aggression—not the degree to which the use of force is outlawed. If an aggressor knows that a potential victim state or its allies will be condemned as much as the aggressor, if not more, for a defensive response against an aggressive attack, then the real-world legal system that sends that signal is simply irrelevant as a factor in war avoidance; or even worse, it may encourage conflict. This point is so important, and so pervasively misunderstood in much of the legal literature, that I will repeat it with emphasis: *It is largely the differential between the treatment of aggression and the treatment of defense that measures the effectiveness of the legal system in contributing to the deterrence of aggression—not the degree to which the use of force is outlawed.*

*Low-Intensity Conflict*, *supra* note 49, at 279.

62. Crawford, *supra* note 40, at 15 (quoting Address Before a Joint Session of the Congress on the United States' Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1351 (Sept. 24, 2001)). Crawford also quotes the West Point speech, noting its assumption of a moral differential between the antagonists,

Different circumstances require different methods, but not different moralities. Moral truth is the same in every culture, in every time, and in every place. Targeting innocent civilians for murder is always and everywhere wrong. Brutality against women is always and everywhere wrong. There can be no neutrality between justice and cruelty, between the innocent and the guilty. We are in a conflict between good and evil, and America will call evil by its name. By confronting evil and lawless regimes, we do not create a problem, we reveal a problem. And we will lead the world in opposing it.

Crawford, *supra* note 40, at 15 (quoting Commencement Address at the United States Military Academy in West Point, New York, 38 WEEKLY COMP. PRES. DOC. 944, 947 (June 10, 2002)). However, to the extent there is a moral difference between the two sides in the War on Terror, it would appear that President Bush's approach, being closer in accord with Professor Moore's observation, would be the more accurate assessment and would yield the more successful outcome.

63. Professor Moore addresses the apparent tension between morality and realism in foreign policy,

the Council on Foreign Relations seems to take a similar position.<sup>64</sup> A dispassionate just war analysis will reveal the identity of the aggressor and the victim, and provide a principled basis for the differential action necessary to stop internal or external aggression with speed and finality.

## VI. APPLICATION OF JUST WAR TO REGIME CHANGE

Recent events offer the possibility of analyzing an attempt to apply just war to a modern situation, an attempt to be noted for its failure to include the notion of regime change. Bishop Wilton Gregory, writing on behalf of the United States Conference of Catholic Bishops to President Bush on the eve of the war in Iraq, cited five just war criteria: just cause, right authority, probability of success, proportionality, and noncombatant immunity.<sup>65</sup> Marshalling an

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George Kennan's now infamous phrase also reflects this view:

"Morality, then, as the channel to individual self-fulfillment—yes. Morality as the foundation of civic virtue, and accordingly as a condition precedent to successful democracy—yes. Morality in governmental method, as a matter of conscience and preference on the part of our people—yes. But morality as a general criterion for the determination of the behavior of states and above all as a criterion for measuring and comparing the behavior of different states—no. Here other criteria, sadder, more limited, more practical, must be allowed to prevail."

Today we know that this view was wrong in many different ways. First, as Professors Myres McDougal and David Little, and many others, have shown, for foreign affairs—of all mankind's activities—to be freed from moral or legal appraisal has never been remotely sensible.

Moore, *supra* note 44, at 127 (internal citations omitted).

64. The factors which internally check the power of tyrants and externally deter them from launching aggressive international war represent the best in American values and strongly advance U.S. foreign policy goals. In a recent report, the Council on Foreign Relations noted that these two concepts were not in tension,

[A] distinction between "interests" and "values" that, in practice, amounts to a false dichotomy. Not only is it very much in the U.S. national interest to foster an international environment that is compatible with our values—including democratic norms, human rights, and free markets—but from a purely pragmatic perspective, our moral authority is an indispensable element of American leadership and influence.

Arnold Kanter, *Memorandum to the President, in* COUNCIL ON FOREIGN RELATIONS, HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE: THREE OPTIONS PRESENTED AS MEMORANDA TO THE PRESIDENT 1, 7 (Alton Frye ed., 2000). Furthermore, "[t]his moral imperative should not be seen as separate from, competitive with, or antithetical to other American interests." *Id.* at 21.

65. Letter from Bishop Wilton D. Gregory, President, U.S. Conference of Catholic Bishops, to George W. Bush, President of the United States (Sept. 13, 2002), *in* 32 ORIGINS 16 (2002).

argument critical of the Administration's policy, it did not mention the requirement for right intention.<sup>66</sup>

The Bishop's letter first addresses just cause, suggesting that the doctrine applies to defense against regimes whose aggression is "lasting, grave, and certain."<sup>67</sup> The Bishop clearly assumed the minimalist position of resisting only external aggression, and then only after it has commenced. There is no mention in his interpretation of a place in just cause thinking for humanitarian intervention or the liberation of those being oppressed within their own borders by their own government. Furthermore, the Bishop called for a distinction between "efforts to change unacceptable behavior of a government and efforts to end that government's existence."<sup>68</sup> This latter suggestion assumes both the legitimacy of the existing government, and its malleability in the face of nonviolent coercion.

The Bishop then turns to competent authority. He cites the importance of compliance with domestic constitutional process (such as the President receiving the support of Congress, with no significant challenge in the courts), broad popular support (though he is unclear as to whether this must be spontaneous, or may be the result of moral suasion and leadership, such as that engendered by Abraham Lincoln in the face of stiff popular resistance to recognizing abolition as a legitimate aim of the Civil War, or by Winston Churchill, who led popular opinion to recognize the evil inherent in Nazi Germany, and the need to confront it, even before the invasion of Poland). He also asserts the need for some form of international sanction, preferably from the United Nations.<sup>69</sup>

Here the Bishop seems to focus on a Security Council resolution authorizing all necessary means to enforce compliance, and not with

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66. *Id.*

67. *Id.* (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2309 (2d ed. 1997)).

68. Gregory, *supra* note 65, at 263.

69. The inefficacy of the United Nations in stopping military aggression, democide, the transfer of weapons of mass destruction, or terrorism counsels against placing a sole reliance on it in the future. Huntley quotes a perceptive British historian: "A few years after the UN's inception, Arnold Toynbee wrote: 'The UN is not, in fact, a political community, it is a political forum . . .'" HUNTLEY, *supra* note 56, at 29 (footnote omitted). More important than its structural deficiencies are its substantive ones: "Because the UN is not based on democratic principles, a good 40 percent of its members (all non-democracies) pay only lip-service, if that, to its Charter of Human Rights." *Id.* at 132. For these reasons, "[t]he world is dissatisfied with its 50-year experiment with the United Nations, a body with which we cannot dispense, but the main inadequacies of which we cannot correct any time soon." *Id.* at 172.

the previous line of resolutions characterizing the previous Iraqi regime as one in violation of almost every norm espoused in the Charter. While the Bishop emphasizes the importance of Chapter VII authorization to enforce the existing resolutions, he does not mention Article 51 of the UN Charter, permitting self-defense and defense of others until the Security Council has taken effective steps to end the hostilities. Defense of others is the principal legal justification for the emerging doctrine of humanitarian intervention, and allows a nation able to protect another to do so in the face of indifference or active hostility from veto-holding members of the UN Security Council. Finally, the Bishop used the word "unilateral" to describe any non-Security Council sanctioned effort.<sup>70</sup> Properly speaking, the addition of proportionally significant military contingents from many democracies rendered the operation multilateral.

The Bishop reminds the President that any lawful use of force should have a reasonable chance of success and not inflict damage greater than the evil to be displaced.<sup>71</sup> These, obviously, are judgment calls, but that judgment must be informed by a full understanding not just of the evils already perpetrated by the regime in question, but the opportunity cost of foregoing an intervention. Something very much like the Bishop's logic was applied at the end of the first Persian Gulf War, when the desire to avoid several thousand additional casualties led several key decision makers to stop the successful response at the Kuwaiti border.<sup>72</sup> In the months which followed, several hundred thousand Kurds, Shiite Marsh Arabs, and others were killed as the regime, pleasantly surprised by its own continued existence, moved to crush any possible basis for domestic uprising.<sup>73</sup> It is obviously unfair to blame the leaders of the time for their failure to foresee these specific killings, but enough tyrants have behaved similarly for the

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70. Gregory, *supra* note 65, at 263.

71. *Id.*

72. See John M. Goshko, *U.N. Nears Accord on Iraqi Killings: Bush Defends Hands-Off Policy*, WASH. POST, Apr. 5, 1991, at A1 (detailing the decision-making process undertaken by world leaders); see also William F. Buckley, Jr., *Opinion, Does Blame for Kurds' Travail Rest on Bush?: The Critical Point is the Impossibility of Predicting Saddam Hussein*, L.A. TIMES, Apr. 21, 1991, at M5 (editorial considering the possibility that President Bush is responsible for the "1 million Kurds [that] are homeless and thousands of them [that] are dying.").

73. See Associated Press, *After the War: Iraqis Bear Down on Kurdish Revolt*, N.Y. TIMES, Mar. 31, 1991, at 8; Michael R. Gordon, *A Shield for the Shiites: The Use of U.S. Air Power in Southern Iraq Can Protect Rebels, With a Nod to Politics*, N.Y. TIMES, Aug. 20, 1992, at A1 (detailing violations against the Shiites); David A. Korn, *Opinion, Genocide of the Kurds*, CHRISTIAN SCI. MONITOR, Mar. 13, 1992, at 18 (detailing violations against the Kurds).

pattern to be gleaned from history. In any case, those contemplating the liberation of Iraq twelve years later did have the lessons of the first war's errors from which to draw.

Finally, the Bishop addresses the *jus in bello* aspects of just war doctrine, stating that "the use of massive military force" would have "incalculable consequences" for the people of Iraq.<sup>74</sup> It is precisely because of this that the four customary principles of the law of armed conflict were developed by warriors and codified by academics, and why they are followed even in the face of a foe who recognizes no law beyond his own appetites. The modern doctrines of discrimination, necessity, proportionality, and chivalry, practiced by all civilized nations in warfare, is one of the triumphs of the just war intellectual tradition. To the extent that uncivilized nations do not meet these minimum standards of humane conduct in war, they are war criminals and the moral equivalence which councils against resisting them is weakened by precisely that amount.

The Bishop concludes his letter with a call for peaceful alternatives to forceful intervention.<sup>75</sup> What makes this call somewhat less than compelling is that these options, politically preferable to more morally demanding alternatives, are consistently the first to be applied, and frequently kept in effect long after their empirically demonstrated failure.

On the whole the Bishop's letter presents too narrow a view of just war. Particularly, the notion of "peace" as a thing considered only in the cessation of external hostilities. This fails to satisfy the demands of the true *tranquillitatis ordinis*—a concept reflecting the importance not merely of national sovereignty, but also of fundamental human rights and the relative legitimacy of various governments.

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74. Gregory, *supra* note 65, at 264.

75. *Id.* at 264. The means specifically called for included:

[C]ontinued diplomatic efforts aimed, in part, at resuming rigorous, meaningful inspections; effective enforcement of the military embargo; maintenance of political sanctions and much more carefully-focused economic sanctions which do not threaten the lives of innocent Iraqi civilians; non-military support for those in Iraq who offer genuine democratic alternatives; and other legitimate ways to contain and deter aggressive Iraqi actions.

*Id.* The Bishop may have been unaware that genuine democratic activity was not encouraged, or even permitted, by the previous Iraqi regime, and that non-military support to democrats in such an environment would have been morally and practically comparable to providing non-military support to the democratic opposition to the Nazi rule of France in the early 1940s.

## CONCLUSION

Protestant theologian Martin Luther addressed the moral duty to fight to prevent injustices greater than war,

[A] war is only a very brief lack of peace which prevents an everlasting and immeasurable lack of peace, a small misfortune that prevents a great misfortune. . . .

What men write about war, saying that it is a great plague, is all true. But they should also consider how great the plague is that war prevents. If people were good and wanted peace, war would be the greatest plague on earth. But what are you going to do about the fact that people will not keep the peace, but rob, steal, kill, outrage women and children, and take away property and honor? The small lack of peace called war or the sword must set a limit to this universal, worldwide lack of peace which would destroy everyone.<sup>76</sup>

Just war theory in this context is more relevant today than it has ever been, due largely to the rapidly-changing nature of war and the threats faced by civilized nations. This is true not only because of the increased threat of harm posed by the buildup of weapons of mass destruction, but also because new evidence has revealed both the magnitude of democide in the modern era and identified the types of regimes that perpetrate it. These new empirical findings about the nature of war, democide, and the regimes which incite them, have challenged the traditional notions of peace as the mere cessation of external hostilities. This absence of large-scale military action, as desirable as it is, is insufficient to ensure the well-being, or even survival, of most victims of tyranny.

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76. Martin Luther, *Whether Soldiers, Too, Can be Saved*, in 46 LUTHER'S WORKS: THE CHRISTIAN IN SOCIETY III, at 93, 96 (Robert C. Schultz ed., 1967). Luther went on to compare a just warrior to a surgeon:

[W]e must, in thinking about a soldier's office, not concentrate on the killing, burning, striking, hitting, seizing, etc. This is what children with their limited and restricted vision see when they regard a doctor as a sawbones who amputates, but do not see that he does this only to save the whole body. So, too, we must look at the office of the soldier, or the sword, with the eyes of an adult and see why this office slays and acts so cruelly. Then it will prove itself to be an office which, in itself, is godly and as needful and useful to the world as eating and drinking or any other work.

A truly effective response to these findings will require a return to first principles—specifically, to the just war doctrine—for the moral framework which must be the basis of any legitimate use of force. This doctrine, reflecting the conclusions reached by many societies in many ages, fits hand in glove with what we now know about the regimes responsible for most unnatural deaths in the world. Distinguishing between aggressor and victim, setting firm limitations on the exercise of moral violence, establishing standards of behavior more demanding than mere well-meaning, and accepting the conclusion that there are times when it is immoral *not* to fight, are the inevitable outcome of applying just war analysis to the topics of tyranny, democracy, and regime change.

The principles enunciated by Augustine and Aquinas, even in an age of terrorism, weapons of mass destruction, and democide, still provide an intellectually coherent and morally robust means of dealing with the new and unknown. As Weigel has stated,

[T]he line separating good and evil does not run between one society and another, much less between one religion and another; ultimately that line runs through the middle of every human heart. . . .

. . . [R]eason and careful moral reflection also teach us that there are times when the first and most important reply to evil is to stop it. There are times when waging war is not only morally permitted, but morally necessary. . . .<sup>77</sup>

The just war doctrine, as old as Western civilization but consonant with our most recent knowledge on the nature of tyranny, provides us with the foundations of a moral and effective response to well-armed evil.

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77. Weigel, *supra* note 4, at 699. See generally Raines, *supra* note 5 (providing an outstanding introduction to just war theory and its application to targeting regime elites).