

*Jus Ante Bellum*  
Principles of Pre-War Conduct

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In his brief talk at a 2010 New York University Law School conference, Steven Haines, a British “academic international lawyer”, relates how he accepted the invitation to speak on the topic of *jus ante bellum* despite having never encountered the term or the concept.<sup>1</sup> Nothing daunted, Haines tried researching the topic and found only a solitary citation of my then recently-published *Empowering our Military Conscience: Transforming Just War Theory and Military Moral Education*. That work is an anthology, partitioned with the labels *Jus Ad Bellum*, *Jus in Bello*, and *Jus Ante Bellum*. That third part is two essays by me.<sup>2</sup> After discovering nothing useful therein, Haines decided he “had no option” but to try to define the term on his own.

Haines stays silent why he “had no option” to ask his NYU host what (the host thought) the term meant. Nor does Haines evince any wonderment why on earth (a) NYU wanted him to talk on a topic that he knew nothing about, and (b) why NYU wanted someone to talk about something well-nigh no one had talked about. As for the latter, I’ve made inquiry of his host, but received no response. Absent testimony to the contrary, it seems a safe bet that the conference organizers somehow got wind of something in the air, a puff of the *zeitgeist*.

The puff was an unprecedented gale of publications and conversations during the first decade of the 21st century discussing matters of *jus ante bellum*, mostly without using that Latin name. Talk of war was transformed by the emergence of a single superpower wielding full spectrum dominance over an entire planet. The prior decade began with the whole world watching a 100-day demonstration that conventional war against the military the U.S. commands is asymmetric warfare with a doomed strategy. A dozen years later, that lesson was re-taught by televised devastation using

fewer allies and unprecedented destructive precision. Lesson learned, what remains to talk about are: (1) armed humanitarian interventions, responses to terrorism, and other forms of “irregular” (“unconventional”) warfare; and (2) the dominant powers' distortion and defiance of the rules of war, moral and legal, *jus ad bellum* (the justice of entering war), and *jus in bello* (the justice of conduct within a war). What has changed for all involved are the military strategies and policies that have reasonable prospects of success. What calls for reconsideration are the antecedent conditions of armed conflict.

The accelerating conversations about norms of pre-war conduct often intersected coincident accelerating conversations about norms of post-war conduct. Talk of *jus post bellum* took off at the start of the century,<sup>3</sup> and as the term gained acceptance as the name of a third subject of just war discourse, some idea of *jus ante bellum* and the name of it was bound to occur to someone. It is a signal fact of our history that as the decade progressed the term occurred to a noteworthy number of people utterly unbeknownst to one another.<sup>4</sup> Interest in the topic so grew that by 2011 a projected anthology on just war theory put out a call for papers on *jus ante bellum* along with the theory's new triad of established parts.<sup>5</sup>

The brief history of thought and talk about *jus ante bellum* makes a nice lens for looking at new directions in the just war tradition. As a bonus, the history has its amusing moments.

### **I. Constraining *Jus Ante Bellum***

Doubtless, NYU picked Haines to talk on *jus ante bellum* because he is an internationally recognized expert on the law governing the use of force and the conduct of military operations, and in particular on humanitarian interventions.<sup>6</sup> Yet Haines “had a nervous feeling that [he] had missed something substantial in the field,” and he wondered why. The evident answer is that the talk about matters of *jus ante bellum* was outside the literature produced and perused by the

practitioners and professors of international law, and Haines tells us, in so many words, that he does not read much outside his profession's literature.

The telling remark comes after Haines tries to give content to *jus ante bellum* by proposing a moral obligation states have regarding their pre-war conduct. Then, without criticizing his proposed principle, Haines dismisses the whole idea of *jus ante bellum*. He tells us that his proposed obligation (and presumably any other) could not merit being ranked with *jus ad bellum* and *jus in bello*, because, he says, the latter terms "are these days understood to be labels describing particular bodies of law." Ergo, the absence of international conventions regulating pre-war conduct entails the nonexistence of *jus ante bellum*. So, too, the paucity of post-war positive law moves Haines to question the concept of *jus post bellum* as well.

Now, as a lawyer addressing a law school audience (attendance "by invitation only"), Haines is entitled to rely on the linguistic practices of the legal profession. Still, the instructive fact here is that a widely respected expert on the laws of armed force declared himself unaware that during "these days" of the last decade the terms *jus ad bellum* and *jus in bello* were commonly used to refer to moral principles – norms that may or may not be recognized by any "bodies of law." In fact, the terms were being so used far more frequently than ever before in human history! If they weren't so commonly used, the terms, *jus post bellum*, and *jus ante bellum*, would not have seemed so natural and been so readily invented, understood and accepted.

Haines could learn the linguistic facts from my anthology's lead essay: Michael Walzer's "The Triumph of Just War Theory (and the Dangers of Success)". From the anthology's next essay (George Lucas' "Methodological Anarchism': Arguing about Preventive War") Haines could learn that he was not alone in his linguistic and conceptual isolation. Haines' talk merits attention if only for its stark confirmation of Lucas' thesis that what is called "just war discourse" has split into

separate conversations.<sup>7</sup> The original and recently reinvigorated conversation among Catholic, and, more broadly, Christian thinkers continues to work with the conceptual tools and constraints of Christian moral theology. The great legacy of that tradition is our international laws of armed force, but the legal discourse became a distinct conversation with the conceptual tools of juridical analysis and the constraints of the empirical contingencies of legal history. Most recently, a third dialectic emerged within the world of secular, academic philosophy due to the “school” that Walzer attended.<sup>8</sup> This upstart conversation retains the religious tradition's focus on moral principles, but it reads “JWT” as an acronym for “Just Walzer's Theses”. Just war discourse is now (at least) three conversations using the same terms with different referents or different conceptions of them, and yet, however difficult, with some mutual respect and charity, they can still communicate with and contribute to one another.

Recent history has been hard on all the traditional talk by forcing a focus on different occasions and forms of armed force (or its threat) that people have reason to use. Categories like *war* and *sovereignty* have become less clearly applicable and useful when evaluating the current urgent moral demands and live military options. The new orthodoxy is that the old orthodoxy is in trouble. The ruling platitude of this century is that the just war tradition is in crisis. It's said, with some exaggeration, that once upon a time the categories of just war thought were stable, well-defined and widely accepted, but now Babel has befallen.<sup>9</sup> Amidst this turmoil, and contributing to it, attention gets directed to previously under-appreciated moral concerns about both the aftermath of war, and also its antecedents. Inevitably, those concerns get formulated with the newly fashionable vocabulary of just war discourse.

Plainly, when people claim that that some alleged norm is a principle of *jus ante bellum* they mean to be making a substantive claim of some significance. They don't mean to be stipulating an

arbitrary verbal convention. They are confident that their new term is just like the old established terms. They rarely consider the differences.

Haines is surely right about one thing. If *jus ad bellum* and *jus in bello* did now describe only bodies of law, that would be a good (albeit not conclusive) reason for insisting that *jus ante bellum* and *jus post bellum* be used accordingly. Haines is also right about something further, though he takes it to extremes. While just war principles needn't be recognized by current international law, most of the modern talk about principles of *jus ad bellum*, *in bello*, and *post bellum* has centered on norms that *could* be and *should* be enforced by international conventions.<sup>10</sup> That's a good (albeit not conclusive) reason for requiring the same of any suggested principle of *jus ante bellum*.<sup>11</sup>

What's meant here by *could* and *should* is, roughly, that we may reasonably hope that eventually all or most states will commit themselves to the norm and agree to submit to sanctions for violations of it. The reasonableness of the hope requires a mutuality of the benefits from compliance with the rule. The mutuality means that a nation needn't directly benefit from its own compliance; rather, nations must benefit from the compliance of other nations.

Thus, traditional rules of *jus ad bellum* and *in bello* prohibit only wrongs to (the people of) other states, not wrongs to a state's own people. A derelict military commander might inflict on his subordinates much the same injustices as he might inflict on captive enemy combatants: starvation, torture, medical experimentation, religious conversion. *Jus in bello* rules prohibit only harms to the enemy. Wanton abuse of one's subordinates is not less egregious than a comparable abuse of enemy prisoners. It may well be more egregious. It may be so severe and on a scale as to warrant a humanitarian intervention. Still, it's not a violation of *jus in bello*.

Evidently, excluding some salutary moral prescription from the pot of just war principles is not a denigration of it or diminution of its importance. Nor is just war theory incomplete or

defective for “failing” to issue edicts outside its purview. One virtue of classical just war theorizing has been the modesty of its scope and ambitions. Another is its epistemic consistency. However derived, the justice of rules of war is best tested by their acceptability to potentially antagonistic states.<sup>12</sup>

My suggested conservative requirement on just war principles will be too conservative for many who have talked of *jus ante bellum*. They seem to have begun with some prescriptions they wanted to promote, and then thought the prescriptions could be better promoted by packaging them as principles of *jus ante bellum*, as though a norm inherited some heft by association with the prestigious norms of *jus ad bellum* and *in bello*. All of these writers intend to expand the content of just war theory. Some of them mean to transform the character of the just war tradition. Others don't recognize that their prescriptions have that consequence.

My conservative constraint on just war principles seems minimal, but it might possibly suffice to rule out any proposed *jus ante bellum* principle – and if it doesn't, possibly some further reasonable requirement would rule out the remainder. As things are, we really don't know whether there are any *jus ante bellum* principles, or if there are, what they are, or if there aren't, why there aren't. These are intelligible questions about matters of obvious significance. So, *jus ante bellum* may well be a subject of worthwhile study without there being any *jus ante bellum* principles. Still, the best introduction to the subject – and conceptions of the subject – may often be to examine proposed principles.

## II. Peacemaking

Some idea of *jus ante bellum* appears as far back as the Harvard political scientist, Stanley Hoffman's 1981 pronouncement that: “Today, in many instances, morality requires not only a *jus in bello* and a *jus ad bellum*, but a *jus* or rather a praxis -- *ante et contra bellum*.”<sup>13</sup> A quarter century later, Maureen O'Connell, a Fordham theologian, had a similar thought, but she wants to

call a praxis of peacemaking *jus ante bellum*. Her paradigm praxis is the “faith-based diplomacy” practiced by Douglas Johnston and the International Center for Religion and Diplomacy founded in 1999.<sup>14</sup>

Two Christian clergymen, Mark Allman and Tobias Winright, try to further O'Connell's ambition of strengthening the two competing, recently reinvigorated Christian traditions regarding war: the just war tradition and pacifism. They all hope to help both traditions by bridging the gap between their principles with a praxis of peacemaking under the name of *jus ante bellum*.<sup>15</sup> Allman and Winright welcome O'Connell's term as a label for the ten principles of the praxis of “just peacemaking” promoted by Glen Stassen since the 1980's.<sup>16</sup> Stassen's directives are a pragmatic program addressed more to individuals than nations. Some are attitudinal precepts. They are not designed to be international conventions.

Yet, some of Stassen's prescriptions resemble political principles proposed for *jus ante bellum* by secular thinkers. Like Christian pacifism and just war theory, Cosmopolitanism has recently been thriving, and, like Christianity, Cosmopolitanism is disposed to be drawn both to pacifism and just war theory. Not surprisingly, a couple Cosmopolitans, Garrett Wallace Brown and Alexandra Bohm, have proposed Stassen-like principles aimed at eradicating the structural socio-economic injustices that motivate violent conflict. This they call *jus ante bellum*.<sup>17</sup>

While the idea here may have special appeal to Christians and Cosmopolitans, the basic thought needs no distinctive assumptions. Whether you think that war is never justified or that it is justified only as a last resort, we might all agree that we'd best work to make and keep peace. Harry van der Linden, a secular academic moral philosopher, has elaborated and expanded this idea by examining the risks and costs of U.S. military hegemony. In a series of essays, he propounds six principles which define what he calls “just military preparedness”.<sup>18</sup> He also calls it *jus ante bellum*, and claims that it is a fourth part of a proper just war theory.<sup>19</sup>

Van der Linden's justifications of his principles are reasonable enough, but they don't argue for the reasonableness of including the principles in the Law of Armed Conflict or a comparable part of international law. That's partly because his conception of *jus ante bellum* focuses primarily on *intranational* matters. Consider his fifth principle: "The value of security (against the threat of massive human rights violations by armed force) and the resources committed to this value must be balanced against other human values (e.g., education and health) and the resources set aside for their realization." That seems sensible, indeed truisitic. Certainly, security must be balanced – properly, correctly balanced – against other goods, as the value of anything must be properly balanced against the value of other things. Notoriously, persons and peoples favor markedly different weightings. That is a common cause of conflict, within persons and between them, and within nations and between them. Van der Linden thinks, and I agree, that America's lexical prioritization of security is massively irrational. But, how, concretely, is that matter to be decided? Is the propriety of a nation's balancing of its security something sensibly left to a world court to decide? Is that a properly judiciable issue? It seems to be an irremediably political question best decided by a political process. Moreover, that process better be primarily intra-national. Nations and individuals have little sovereignty or autonomy when they aren't responsible for balancing their own values.

Similarly, van der Linden's first principle says, in effect: (1) a nation's basic defense structure should accord with its purpose of using military force only for a just cause, and (2) the only just cause for such force is "protecting people against massive human rights infringements caused by large-scale armed violence". That first condition is near truisitic. The second, the specification of just cause, is a controversial thesis of *jus ad bellum*.

Trouble comes with determining the application of this *jus ante bellum* principle. Consider a real, risible example. Michael Sean Winters is another independent inventor of the term *jus ante bellum* to refer to "conflict prevention."<sup>20</sup> He is persuaded that the U.S. wouldn't have invaded Iraq



if it had understood Iraqi culture better. So, his prime example of a *jus ante bellum* prescription is that the U.S. (a) provide tuition-free college education for students majoring in the culture and language of countries posing potential threats, like China, North Korea, and Pakistan, and (b) forgive the education loan debts of those who teach such subjects in American schools for a couple years. Now, never mind that the U.S. leaders got knowledgeable advice about Iraq from the area experts, but ignored it. And never mind that knowledge about one's enemies is a dangerous commodity prized by aggressors. The real question in this and every such case is: How is it determined whether the proposed practice would be part of a nation's defense structure that uses military force only for protection against human rights violations?

Van der Linden's first and fifth principle are not rules international courts are competent to apply. He implicitly agrees, for his last principle says that compliance with his other five principles is to be determined by a competent authority with right intention, and he means a competent authority within a community, not the authority of the international community, and further he means a legislative authority, not a judicial one. That is surely right, and that's some reason for disqualifying his principles from just war theory.

Van der Linden's *jus ante bellum* focuses more on intra-national relations. Cosmopolitan and Christian conceptions of *jus ante bellum* have focused more on international relations. They all face similar challenges formulating prescriptions of peacemaking suitable as just war principles. Well-defined prescriptions (like Winter's) may be plausible (unlike Winter's) but too particular to be suitable just war principles.

Prescriptions of sufficient generality may be plausible, but not operational rules. The basic directive is something like: *Make peace, not war*. That affirms a positive general duty to promote a kind of good. Such duties are fulfillable in various ways, no one of which is required. Monitoring and enforcing such duties is a dicey business.

The directive may be reformulated as a negative, “perfect” duty, but it can't be a blanket: *Don't endanger peace*. Peace may be secured by impoverishing a nation, depleting its capacity to battle, so peace may be endangered by enriching a nation. Prosperity may imperil peace. Like going to war, endangering peace is sometimes permissible, sometimes mandatory, and commonly controversial. But while there's considerable consensus on which events are wars, whether an act endangers peace is a common subject of political dispute – one which must be settled before its justice can be broached.

Endangering peace is a complex causal relation difficult to define and measure. Competition for scarce resources is a fact of life and ubiquitous source of conflict. Any act adversely affecting another country might displease it and endanger peace to some degree. Whether and to what extent it actually does depends on what other nations do. Generally, whether, on balance, an act or policy endangers peace to a dangerous degree is not reliably predictable. Whether it does so unjustly resists specification in operational terms.

Formulating general prescriptions of peacemaking – not mere hortatory principles, but rules suitable for enforcement by the international community – is not a simple task.

### **III. Force Other Than War**

In her 2010 dissertation, *A Rossian Just War Theory*, Patricia Steck applies W.D. Ross's conception of *prima facie* duties to “a new area of the just war tradition” she calls *jus ante bellum*.<sup>21</sup> The subject of Steck's *jus ante bellum* is the justice of activities she calls “pre-war coercion”: activities like embargoes, blockades, economic sanctions, trade restrictions, electronic warfare, targeted air strikes, and so forth.

Steck attributes her idea of this new area to a discussion with Michael Walzer in 2005 or 2006. Throughout she relies on the 1977, first edition of Walzer's *Just and Unjust Wars*. Blissfully or

not, she is plainly unaware that Walzer's 2006 "Preface to the Fourth Edition" discusses more briefly much the same activities of pre-war coercion under the headings of "measures-short-of-war", and, more narrowly, "force-short-of-war."

Walzer does not talk in terms of *jus ante bellum*, but he says "force-short-of-war obviously comes before war itself". Actually, on one natural reading that's obviously false. Wars often begin without any of the activities Walzer and Steck have in mind. Often such activities are initiated (if at all) only after war has begun, and are as much a part of the war effort as any pitched battle. Some of these activities are in themselves acts of war in international law. And sometimes they are used after a war to enforce and stabilize the peace.

Walzer and Steck may consider them pre-war acts because they consider only their use apart from war, not as part of a war. They regard them as peacemaking activities intended to preempt war by achieving some goal with less risk and cost. Walzer's immediate concern was with changing a regime that isn't awful enough to warrant an armed invasion, where some less violent measures might be justifiably tried. As peacemaking efforts, such acts precede the war they intend to preempt so they might be considered *pre-war* acts when they succeed and no war follows.

However, unlike the activities promoted by Stassen, O'Connell, van der Linden, *et. al.*, Walzer's and Steck's pre-war coercive forceful acts are *peacemaking* activities only *per accidens*. They are not themselves peaceful acts. They are ways of getting one's way by harming (or threatening to harm) another people. They may be used when they are (thought likely to be) less costly than other ways of getting one's way. Whatever their intent, they may endanger peace. They can start a fight. The response may be an escalation of conflict. These acts may be intended to preserve peace or to provoke a war. They may be intended to achieve all kinds of goals where the threat of war is too remote to factor in the planning. Such acts don't essentially involve any intentions about war.

Walzer says: “We urgently need a theory of just and unjust uses of force.” What sort of theory he is envisaging is left unexplained. He doesn't mention any of the large literature on international justice or the body of international law on blockades, embargoes and the like; no hint is given how all that is lacking. The little Walzer does say suggests that the principles of this theory would be basically the same as those of (some unspecified) just war theory, except that it would be somewhat more “permissive” regarding force-short-of-war. The latter sounds like a plausible generality, but Walzer makes it a nearly empty definitional truism by saying that “short-of-war means without war's unpredictable and often catastrophic consequences.”

Actually, war is like baggage: its constituents are very variable. Wars differ from blockades, embargoes, targeted air strikes, and other ways of harming others, not by being more unpredictable or devastating, but rather by *consisting of* any of the other ways of harming others. Walzer's forces-short-of-war are acts apart from war of a kind that can be parts of a war. They are *ante-bellum*, not temporally but ontologically, because any of them can occur independent of war, whereas war cannot occur without some of them.

Wars can't be put on the same scales as the kinds of force they may contain. A part cannot be as dangerous or devastating as the whole it belongs to -- but it may in itself be far more dangerous and devastating than other wholes.

Fifty years ago, the U.S. blockade of Cuba repelled, not a violent assault upon the U.S., but only a threat to the U.S. advantage in destructive capabilities. Kennedy's “quarantine” could have been the start of a war, and thus a part of a war. As it happens, it was an act of aggression but not a part of a war. Still, it ranks among the most dangerous military actions in human history, right up there with the bombing of Pearl Harbor and the Normandy invasion. The blockade's consequences were more unpredictable than the consequences of the war the blockade might have provoked. (That's because the consequences of that war are consequences of the blockade.) Those consequences could well have dwarfed the catastrophies of all previous wars combined. The

blockade was nearly bloodless, but nearly holocaustic. Doubtless the blockade was “more permissible” than a violent assault that would more certainly initiate a war. That's only because more harmful and risky means shouldn't be used before trying a less harmful and risky means with a good chance of succeeding. Still, could that blockade be justified if the war it almost sparked would not have been justified?

Again, that war might have dwarfed the devastation of all prior wars. Shouldn't that blockade need a justification weightier than that for other wars, for example, the Falklands War?

The 1990's Iraq embargo resulted in more civilian deaths than the wars preceding and succeeding it resulted in combatant deaths. Walzer thinks it was more permissible than they. He does not explain how the embargo could be more permissible despite being more deadly.

Walzer and Steck have some conception of an extension of just war theory consisting of the principles governing the use of force-other-than-war paralleling the principles of *jus ad bellum* and *jus in bello*. Steck calls this extension *jus ante bellum*. Walzer doesn't. And he'd likely dissociate himself from some of Steck's proposed *jus ante bellum* principles. Elsewhere Walzer has thought of just war principles as rules properly enforceable by the international community upon its members. Generally Steck's principles seem unenforceable by international law. For example, her “final requirement is that all persons involved in the coercion accept the fact that *war is not inevitable*.” More generally her principles are directives addressed to “everyone,” not specifically to rulers and their military agents.

Some Steck principles might be enforceable and acceptable to Walzer. They resemble familiar principles of *jus ad bellum* and *jus in bello*. Steck sees the resemblance as evidence of her principles' plausibility. She does not see how the resemblance threatens her conception of *jus ante bellum* as a new wing of just war theory.

Actually, that resemblance confirms what should be expected. Just war theory is a sub-theory, a proper part of a general theory of political justice whose basic principles apply to any instance of harming other peoples. Any harming of others should be necessary and not excessive. And the goods it begets better be enough to warrant the harm. And the harming should be discriminatory in its targeted effects. And have a rightful intention. And have reasonable prospects of achieving its legitimating goals by legitimate means. And be a last resort in that no lesser harm would meet these requirements. Further, many harms should be inflicted only by a legitimate authority. And many should be publicly declared.

War is special regarding the requisite just causes for it if only because a whole isn't justified unless its parts are, while any part might be justified when the whole is not. However, again, some acts of force-other-than-war have had far greater costs and risks than some wars, so their justification should have weightier reasons.

None of this suggests that the principles governing pre-war coercion are usefully understood as an extension of just war theory called *jus ante bellum*.

#### **IV. Professionalism**

My book which Haines mentions describes some of the moral conflicts and uncertainties within military professionalism, and claims that these observations contribute to a field of study properly called *jus ante bellum*. No definition of the field is suggested, and no suggestion is made that military professionalism is the only or primary subject within that field. The second of my two chapters is about conflicts and uncertainties within the mission of Professional Military Ethics Education (PMEE); the subject belongs to a subfield I call *jus in disciplina bellica* (the ethics of educating for warfare).<sup>22</sup>

Throughout I was intent, not on promoting some principle for the international community to enforce, but rather on describing some of the challenges of accommodating the ethos of professionalism with the organizational imperatives of a military. Professionalization has been a core project of Western militaries for two centuries. It is an ante-bellum activity, pursued in peacetime (often prompted by failings in a prior war) to improve proficiency in war. It is a world-historic alteration of the operational and moral character of the military that is not well understood. I meant to direct attention to unasked questions about the import of military professionalism for just warfare and a theory of it.

A theory of just warfare is centrally about a kind of conduct. It is incomplete without a conception of a kind of character, the just warrior. It should explain whether, when and how a just person can be a warrior. The (in)justice of a community's warring has attenuated significance if it doesn't argue for the (in)justice of its members' participation. If the injustice of a community's warring does not entail the injustice of an individual's participation, the theory should explain the discrepancy.

A theory of just *modern* warfare must explain when and how a *professional* can be a warrior. In the U.S. and elsewhere, the military's self-conception as professional is systematically institutionalized. Our military pride themselves on being professional. Their sense of propriety is filtered through their conception of professionalism. Their conscience harkens to worries about when service in war is unprofessional, and when refusal to serve is unprofessional. As things are, their professionalism is unequipped to answer such questions. The profession of arms is, metaphysically and morally, categorially unlike civilian professions.

The metaphysical contrast is stark. In civilian professions, membership is due to acquiring an expertise, an occupational skill set. Membership in the profession of arms is due to membership in an organization with an expertise that members contribute to but need not share. Military doctors, teachers, lawyers, chaplains, police, purchasing agents, etc. all belong to the same military profession

as the captain of a frigate and an infantry lieutenant. Their comradeship comes, not from a shared skill, but a subordination to a command structure.

Consequently, civilian and military professions have contrasting normative structures. The distinctive expertise of a civilian professional is fitted to serve a distinctive interest, like health, wealth, education, justice, etc. The special capabilities are designed to achieve some specific good, often an intrinsic good. Normally their exercise is benign; any harm to others is incidental or accidental. The profession's code of ethics is founded upon and framed by the moral propriety of its inherent ends and means.

The distinctive military capabilities are designed to serve a community's interest in defense against violent assaults – and, more generally, to serve *any* of a community's interests that may be furthered by violence, however legitimate the interests may be. The military is defined, not by some distinctive good it achieves, but by its (threat of) use of violence and lethal force to achieve whatever goals its commanders deem worth pursuing by these means. Whatever the warrior's ends, his forte is attaining them by threatening or inflicting great evils on others. The suffering wrought by warrior's work is not an incidental or accidental outcome. His acts are inherently grave wrongs of others unless redeemed by some weighty justification.

This is not an indictment or disparagement of the military. Military capabilities can serve benign and noble ends. So too, civilian professional skills can serve evil ends. Medical expertise may be used for undetectable murders. But that's a perversion of the medical profession. The excellence of a physician and her tools is measured by their proficiency in promoting health, not by an enhanced power to cause suffering and death. In contrast, the excellence of a warrior and her weapons is measured by a proficiency to cause incapacitation, destruction, and death, not by a power to promote well-being. That military proficiency is independent of the value and legitimacy of the ends it serve.

It's of the essence of the military profession that aggressors and defenders can be members of the same profession. Professional standing need not be jeopardized by the injustice of the cause served – except perhaps for extraordinary injustice. Our rules of *jus in bello* institutionalize this amorality: they are, and are intended to be, indifferent to the justice of a belligerent's cause.<sup>23</sup>



The plight of the warrior is a peculiar moral precariousness. Her job is to do god-awful things to other people. Sometimes that is justifiable. Sometimes it's not. Unlike civilian professions, the nature of her skill does not supply guidance about its proper use.

Whether the decision to war is justifiable is not the first thought that comes to the warrior. Unlike civilian professionals, military professionals are trained to obey. Unlike civilian professions, military success has been mainly a matter of size. Militaries are massive organizations with tightly regimented command structures to maintain discipline and rapidly execute complex, coordinated activities in the face of mortal peril. The mission of a military disposes it to be authoritarian. Members of a military are expected to obey authoritative orders because they are authoritative orders. This is expected of all military personnel, whatever their own expertise. They are military professionals because of their subordination in an organization impelled to prize obedience, loyalty, discipline. Such traits are not disparaged in civilian professionals, but they don't make the list of lead virtues in their codes of ethics.

The warrior's plight is exacerbated by professionalization. A military's organizational imperatives favor professionalism for its contributions to military proficiency and the success of the military's missions. Proficiency is specially prized in the military, for a failure of its military may be catastrophic for a community. Yet that increased proficiency threatens a subversion of authoritarianism. Professionalism has a progressive character that is prone to question arbitrary, unreasonable or ineffective policies, procedures, and directives. Professionalism compels recognition that blind obedience to authority can be disastrous. It questions traditions. It prizes free, independent thought.

Further, professionalism's concerns are not restricted to efficiency. It has an ethical edge. Increasingly, professionalism has been taking the tyranny out of the military. In the U.S. and elsewhere, gone (or closely confined) are the ancient traditions of abuse, humiliation and hazing in the training at boot camps and academies. The new model of leadership is managerial: effective authority leads, not by fear, but by respect down the line licensing loyalty and respect up the line.

All this is of a piece with the military professional's recognition that she remains an autonomous agent with ultimate responsibility for her own actions. No self-respecting professional can believe her hands clean because of a mythical "invincible ignorance" about the (in)justice of her nation's war: she confronts decisions with no less ignorance and uncertainty as a parent or spouse or commander in battle. Her obedience and loyalty is absolute and unquestioning only if she so chooses. So her professionalism puts moral pressure on her when she is commanded to contribute to grave injustices. But it doesn't answer the hard questions.

It may, however, limit those questions. When your status as professional derives from your subordination to a command structure, your professional ethos may permit or prescribe an absolute commitment to the organization. An ingrained military professionalism may make disobedience and disloyalty unthinkable. Civilian professionalism has no comparable tendency.

That tendency is mutually reinforced by another peculiarity of military professionalism, unparalleled by anything in civilian professions: the profession's commitment to its control by civilian authority. This conception of military professionalism may be most entrenched in the U.S., whose IMET (International Military Education and Training) program has been a four-decade fixture of U.S. foreign policy tasked to professionalize foreign militaries and proselytize this professionalism's commitment to civilian control. The program aims to reduce intranational instability and thereby reduce international instability. If that commitment to civilian control does indeed have such effects, it may be a moral imperative.

However, as with professionalism in general, what exactly civilian control of the military entails has been variously understood. That control may be considered an absolution of accountability for the evils the military inflicts. Instead or in addition, acceptance of that subordination to civil authority may be thought an abdication of responsibility. Actually, withdrawal from the community's process of deciding to war (except as technical advisers) does not straightaway entail a commitment do whatever is decided. Then too, if the professional's ultimate allegiance is to the nation and

Constitution, not to the current Administration, her responsibilities might include publication of her professional judgment even, or especially, when it is contrary to the Administration's.

More. Military professionalism might recognize that its commitment to civilian control is not a moral absolute. It might recognize that, like other laws and policies, that control has risks and costs. It might acknowledge that America's tradition of civilian control bears some responsibility for its catastrophic conquest of Iraq.

Currently, there is, I think, nothing near consensus on the specifics of the ethos of military professionalism. When it comes to the most basic moral decisions military professionals may confront, their professional conscience is highly personal, not collective. There is only a general, if not universal, recognition of what I call the moral singularity of military professionalism: knowingly contributing to a serious wrongs need not be unprofessional for those in military service. This may be conceded even by opponents of a war who fervently urge refusal of service. Despite roundly condemning the service, they may recoil from making pariahs of countrymen who serve. At the other extreme, many folk are quick to condemn and despise as unprofessional and dishonorable any refusal of service – except by an enemy warrior serving a leader whose injustices are more monstrous than their own leaders would ever contemplate.

All may agree on the bald generalities that military service in an unjust cause needn't be unprofessional, and that the shamefulness of service may vary with the severity of the injustice served. But military professionalism has no principles determining which injustices are beyond the pale. Current military professionalism recognizes that it must leave that determination to an individual's conscience. It cannot find within itself the resources for constructing a compelling answer to its most existential question.

Military professionalism's relation to justice is a question of *jus ante bellum* that has long been with us waiting to be asked. I have no answer. My essays don't hazard principles or solutions.<sup>24</sup> They are meant to present problems and topics for a theory of just warfare to address.

I did assert that a state has various legitimate interests in the moral education of its military officers that it lacks regarding other citizens. One interest is self-protection: “a state's last line of defense – its defense against its own defense force – is the honor and humility of its military leaders”. Additionally, a state may be morally obliged to morally educate its officers, for it may otherwise be doing an injustice to various parties (e.g., other peoples, military subordinates) who may be at the mercy of an officer's moral sense.

However, my analysis of PMEE provides reasons aplenty for skepticism about any international convention requiring states to morally educate their military officers. Here's one: we simply don't understand the requirement well enough to impose it. We can't sensibly require a nation to have programs developing its officers' moral character until we have some reliable means of determining which programs have which effects on moral character. Military academies have had the declared mission of developing leaders of high moral character, while having nothing like a metric with which to gauge (1) the character of those who enter an academy, (2) the character of academy graduates, (3) the character of entrants to officer training programs at civilian colleges, (4) the character of officers thusly commissioned. There's no shortage of confidence about which programs have which effects on character development, but those convictions owe little to scientifically respectable evidence. Nations may muddle along with their own earnest efforts at PMEE. They have little reason to cede to an international authority the determination of whether their efforts are appropriate and adequate. Walzer's seminal book has been required reading at all American military academies' required ethics courses. We're not ready for the UN to sanction a nation whose military syllabus omits Walzer.

If there comes a day when we have substantial knowledge how to measure character growth and decline, so we have substantial knowledge how to morally educate, it may become sensible for the international community to pressure its members to morally educate their military officers. If so, we might have a principle properly considered a norm of *jus in disciplina bellica*, and, more

generally, of *jus ante bellum*. My suggestion was only that whether there might be such a principle is properly a question of *jus ante bellum*.

## V. Preparation for Success

Haines has his own darkly entertaining conception of *jus ante bellum*. His talk is informal in tone. It's a "working paper", thrown together in a few weeks, "rambling", laced with reminiscences and repeated dramatic fretting whether he has accepted a "poison chalice" and disclaimers: "I am not a moral philosopher." It is indeed a neat bit of deadpan British wit.

The tip-off is his cleverly comical title: "*Jus Ante Bellum: Myth or Reality?*" Of course, the joke here is that, however erroneous or empty, one thing a new idea cannot be is mythical.

Haines was likely taking his cue from his hosts, who were honoring a 1977 publication with a conference, held in November, 2010, entitled: "The Enduring Legacy of *Just and Unjust Wars* -- 35 Years Later".

The talk begins with reminiscences, followed by a research report: an amusing abrupt dismissal of the only thing Haines read on a subject on which he professes utter ignorance.<sup>25</sup>

Haines then declares he must discover the nature of *jus ante bellum* on his own. He slowly builds to his punch line. His best effort to find some content in the concept of *jus ante bellum* is an earnestly straight-faced elaboration of a perfectly preposterous moral prescription.

Haines discovers a mandate of pre-war conduct implicit in the venerable *jus ad bellum* requirement (that recurs in *jus in bello*) that people engage in harming other people only if they have *a reasonable prospect of success* in achieving their legitimate goals at a reasonable expense. From this, Haines infers that each nation must have an *ante bellum* obligation to adequately prepare for war. That is, a nation has no right to war unless it has *adequately prepared* for it, prepared sufficiently to have a reasonable prospect of success.<sup>26</sup>

Haines would have us imagine an international legal order that would sanction a nation for violating the *ad bellum* prohibition of going to war without a reasonable prospect of success, and further sanction that nation for violating the *ante bellum* requirement to adequately prepare for war. That's a nasty double indemnity. It has got to be a joke.

Surely, compliance with an *ante bellum* requirement should be determinable prior to hostilities. Haines must be inviting us to imagine a UN commission monitoring the peacetime military preparedness of nations.

And, of course, being *adequately prepared for war* is a term without concrete content apart from some specification of the military preparedness of the enemy, along with other factors. The obligation must be something like a requirement to have reasonable prospects of success against any current likely threat. Each nation and its competitors are to be under that obligation. So they are all morally obligated to participate in a perpetual world-wide arms race!

Haines' principle is a deliciously ludicrous contribution to just war theory. It gets still darker and more deracinated. It says not merely that weak nations have no right to defend themselves against the strong. It says further that in peacetime the weak should be liable to sanctions for being weak and inadequately prepared to resist the strong.

Haines' vision of *jus ante bellum* is a rollicking *reductio ad absurdum* of a venerable just war commandment that denies a nation the right to resist when its prospects of prevailing are too poor. Whether applied *ad bellum*, *in bello* or *ante bellum*, the principle cannot be quite right. Yet there is surely some truth to it.

Requiring reasonable prospects of success can seem perfectly rational, both moral and prudential. After all, however just and righteous your cause, however awful the disaster you seek to avoid, you most likely will only make matters much worse when you fight without reasonable prospects of success. A government gravely wrongs its citizenry when it compels them to suffer a

catastrophe in a hopeless cause. And it may wrong innocent third parties if its futile resistance harms them, intentionally or unintentionally. And harming the assailants – many of whom may be blameless individuals – only adds to the totality of misery to no good effect.

Yet, despite all that, though it may do no good, adding to the misery needn't be an injustice. Sometimes, third parties aren't threatened. And a community may let everyone surrender who wishes to, so all resistance is voluntary. When all hope of victory is defeated, a victim might rightly abandon resistance, but assailants don't acquire a right to assail. Resistance may increase the suffering of resisters and assailants without wronging anyone.

Still, despite doing no one an injustice, futile resistance may be a senseless waste. Surrender can be graceful, maintaining dignity while submitting to defeat. Surrender may be morally permissible. It may be honorable and admirable. It may sometimes be morally mandatory.

But is surrender to overwhelming force always mandatory? Is it ever mandatory when no one is wronged by resistance? Can it be mandatory – or permissible – when it cannot be dignified, graceful, honorable? To my knowledge, just war theory has no good answers to such questions. Haines hints at none. Haines has no serious proposals about *jus ante bellum*, but he sets us thinking about a cluster of hard questions of *jus ad bellum* and *jus ante bellum*: When may we surrender? When must we?

Lest there be doubt of the tongue in his cheek, Haines clinches his intent by escaping his grim conclusions with a doubly comic maneuver. Recall his saying that his proposed principle is not on a par with *jus ad bellum* and *jus in bello* principles simply because it is not now a legal principle. That's a doubly funny reason. First off, if the only relevant reason Haines' principle doesn't rank with legally recognized principles is that it hasn't yet been recognized, then that seems reason enough for us to legally recognize it and correct this unfortunate shortcoming. Rather than disparaging his principle, Haines may be backhandedly urging enactment of it.

In the same breath Haines is also saying something far funnier. Recall that his talk is delivered at a conference honoring the “enduring legacy” of Michael Walzer's book, with Walzer as guest of honor. And now let's remember that its Preface declares the book's aim and earnest ambition to “rescue” the language of just war theory from the lawyers and restore its original use in our moral and political discourse. It is the success of that rescue that Walzer's essay (mentioned above) refers to as “The Triumph of Just War Theory.” To announce, at an occasion honoring the book's “enduring legacy”, that three decades after the book's publication the terms *jus ad bellum* and *jus in bello* have only legal reference, is to pronounce the book's legacy stillborn. That's a zinger with the ring of Don Rickles at a Friars Roast.

## NOTES



[1\[http://www.nyutikvah.org/events/docs/papers/Haines\\\_Jus\\\_Ante\\\_Bellum.pdf\]\(http://www.nyutikvah.org/events/docs/papers/Haines\_Jus\_Ante\_Bellum.pdf\)](http://www.nyutikvah.org/events/docs/papers/Haines_Jus_Ante_Bellum.pdf)

2See: “The Moral Singularity of Military Professionalism” and “The Morality of Military Ethics Education,” in Roger Wertheimer, ed., *Empowering our Military Conscience: Transforming Just War Theory and Military Moral Education* (London: Ashgate, 2010): 133-196.

3Michael J. Shuck’s “When the Shooting Stops: Missing Elements in Just War Theory,” *The Christian Century* (24 October 1994): 982-84, preceded Brian Orend’s essay, “*Jus Post Bellum*” (*Journal of Social Philosophy*, 31, no. 1 (Spring 2000): 117–137, and his book, *War and International Justice: A Kantian Perspective* (Waterloo, Ont.: Wilfrid Laurier University Press, 2000), but *jus post bellum* won recognition only after Orend’s publications.

4Haines aside, only two authors credit a prior use of the term (see below). Six authors credit no one. One or two of them might possibly have gotten the term from George Lucas or Michael Walzer (contributors to my anthology who vetted my own contributions), but I wouldn’t bet on it. Appearances to the contrary notwithstanding, this essay is not a brief for my originality. (I presume that no Nobel Peace Prize hangs in the balance.) What merits some musing is not who was “first” but why so many separate coinages coincided.

5The call appears to have been premature, as the term does not appear in the published anthology: Adam Henschke, Nick Evans, and Fritz Allhoff (eds.), *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century* (Oxford: Routledge, 2013).

6In 2009 Haines was elected to membership of the International Institute of Humanitarian Law (Sanremo, Italy), the pre-eminent institute concerned with international humanitarian law, membership to which is awarded as a distinction by the Institute.

7Lucas credits much of his analysis to predictions made two decades earlier by J. Bryan Hehir, “The Ethics of Intervention: Two Normative Traditions”, in Peter Brown and Douglas MacLean eds., *Human Rights and U.S. Foreign Policy* (Lexington, MA: Lexington Books, 1979): 121-39.

8Walzer's *Just and Unjust Wars* begins its “Acknowledgments” of its influences thusly: “Over the past nine years I have gone to school with the members of the Society for Ethical and Legal Philosophy ... [who] have collectively had a great deal to do with the writing of [this book]”. Few readers get a proper feel for Walzer's work without understanding that the SELF “school”, formed amidst the Vietnam war and urban and campus strife, was an exclusive, intensive, monthly, four-hour, good humored, ruthless dissection of a current project of one of its roughly seventeen members, who included Thomas Nagel (*The Possibility of Altruism*, 1970), John Rawls (*A Theory of Justice*, 1971), Judith Thomson (“A Defense of Abortion”, 1971), Robert Nozick (*Anarchy, State and Utopia*, 1974), Ronald Dworkin (*Taking Rights Seriously*, 1977), Gilbert Harman (*The Nature of Morality*, 1977), Michael Walzer (*Just and Unjust Wars*, 1977), Thomas Scanlon (“Contractualism and Utilitarianism”, 1982), Charles Fried (*Right and Wrong*, 1982), Derek Parfit (*Reasons and Persons*, 1984), and occasional invited visitors like Bernard Williams (*Problems of the Self*, 1973). The spirit of the school survives in the journal it founded in 1971, *Philosophy and Public Affairs*. The school's history and impact on moral, political, and legal thought needs to be written before many more of its members die off.

9In addition to Lucas’ account referenced above, see Alasdair MacIntyre’s depiction in this volume of this same sort of “crisis” in military professional ethics, framed along the lines of his previous analyses of the underlying linguistic incoherence in contemporary moral philosophy generally.

10The primary exception is that legal systems do not and should not make “right intention” a precondition of permissible conduct. Legal systems may properly make wrongful intention a precondition of a criminal act, but no sensible legal system

condemns an otherwise justified, rightful bit of behavior for its morally condemnable intention.

11Perhaps this should be otherwise. To date, just war theorizing has concentrated on international armed conflicts with little attention to civil wars. This may be a defect that needs rectifying. That might require some adjustments to the arguments of this paper, which focus on current conceptions of *jus ante bellum*, which all share the traditional focus on international war. The adjustments might be minor because civil wars might be best regulated by international agreements and impartial international tribunals. The adjustments might be major because each state might have responsibilities regarding the preconditions of its civil armed conflicts that no state has regarding the preconditions of international armed conflicts.

12Our best test is, per usual, fallible. Still, contractarian analysis is a more compelling indicator of the justice of international war conventions than any alternative like cost-benefit analysis or natural law. One sign of its superiority is that the dictates of contractarian reasoning about *jus in bello* diverge from our moral common sense about personal responsibility for peacetime assaults. I, for one, find myself possessed of markedly few confident immediate gut judgments about a combatant's moral responsibility for his involvement in wartime assaults. My own firmest intuition is that the circumstances of wartime assaults are morally unlike those of peacetime assaults. Evidently, in theory and practice, military combatants may feel no cause for animosity toward any individual antagonist intent on killing him and his comrades. Both sides may be (thought to be) just doing their job, filling their social role, and neither need have any ill-will or disrespect for the other. Their enmity may be impersonal. (Enemy soldiers have shared the fellowship of nighttime conversations across a stream, for example.)

13*Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse, NY: Syracuse University Press, 1981): 82. The line is approvingly quoted in David Hollenbach's "The Role of the Churches in the American Search for Peace", in George Weigel Jr. & John P. Langan, eds., *The American Search for Peace: Moral Reasoning, Religious Hope and National Security* (Washington, DC: Georgetown University Press, 1991): 253-4.

14"Jus Ante Bellum: Faith Based Diplomacy and Catholic Traditions on War and Peace", *Journal for Peace & Justice Studies* 21, no. 1 (2011). Originally presented at the 2007 annual conference of the Catholic Theological Society of America.

15*After the Smoke Clears: The Just War Tradition & Post War Justice* (Maryknoll, NY: Orbis Books, 2010); "The Growing Edge of Just War Theory: Jus Ante Bellum, Jus Post Bellum, and Imperfect Justice", *Journal of the Society of Christian Ethics* 32, no. 2 (2012): 173-191.

16Glen Stassen and David Gushee, *Kingdom Ethics: Following Jesus in Contemporary Context* (Downers Grove, IL: InterVarsity Press, 2003).

17"A Responsibility for the Symptom or the Cause: Jus ante Bellum and Reevaluating the Cosmopolitan Approach to Humanitarian Intervention" (2013): [http://www.sheffield.ac.uk/polopoly\\_fs/1.273729!/file/BrownandBohmIntervention.pdf](http://www.sheffield.ac.uk/polopoly_fs/1.273729!/file/BrownandBohmIntervention.pdf).

18The essays span 2007-2010. Assuming his latest statement to be his most well-considered, I rely on his 2010 "Just Military Preparedness and Irregular Warfare." Available at: <http://isme.tamu.edu/ISME10/Linden10.pdf>.

19Van der Linden also calls it *jus ad potentia bellum*, a term he gets from Mark Woods ["The Nature of War and Peace: Just War Thinking, Environmental Ethics, and Environmental Justice" in *Rethinking the Just War Tradition*. Eds. Michael W. Brough, John W. Lango, and Harry van der Linden (Albany, NY: State University of New York Press, 2007)]. Woods' term has not otherwise caught on. Like O'Connell, Brown and Bohm, van der Linden cites no source for his use of *jus ante bellum*.

20 *Left at the Altar: How the Democrats Lost the Catholics and How the Catholics Can Save the Democrats* (New York: Basic Books, 2008).

21 Philosophy Doctoral Dissertation, University of Nebraska-Lincoln.

22 I owe the term to Bonnie Kent, a specialist in Medieval philosophy.

23 Cf my original essays for responses to common objections to the civilian-military contrast: e.g., that legal expertise may also protect the guilty as well as the innocent.

24 Professionalism might itself be the subject of *jus ante bellum* principles. Consider: Might there be some injustice in a modern nation failing to professionalize its military? Might it be a principle of “just peacemaking” that a nation should professionalize its military and maintain civilian control of it? Might it be that the United Nations should (eventually) take over the U.S. mission and adopt measures promoting and prescribing military professionalization?

25 Haines can't be serious when he says my Part III on *jus ante bellum* “represents little more than a critique of American military academies...” That's something of an in-joke, a wildly absurd summation of the two essays described above. Only one essay mentions America's military academies, and that's mainly to illustrate conflicts inherent within the mission of PMEE. That essay became assigned reading at an Australian military academy.

26 More fully, Haines says adequate preparation is “the full range of preparations necessary to produce a competent and effective force capable of successfully delivering all of the phases of a just war”. (His inference is enthymatic. Presumably he assumes, plausibly enough, that a ruler has a duty to defend its subjects from aggression.) Haines adds to the silliness of his principle by seemingly suggesting that officers and subordinates are adequately equipped for the moral challenges of war by the training in the laws of war currently mandated by the laws of war.