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A REVIEW OF JUS AD BELLUM CRITERIA AND ITS APPLICATION TO THE KOREAN WAR

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Part I: A Review of Contemporary *jus ad bellum* Criteria

The political nature of war is a global phenomenon, observable in all regions of the world, throughout all history of mankind. Unlike the specific just war doctrine which finds its origins in Christian theology, the universal consensus on the philosophy of war is that it is, at its core, a political tool (Miller, 1964). In the West this philosophy has frequently manifested itself through the study of *bellum justum* or just war. Though just war doctrine specifically is historically a Western phenomenon, in the East there is also record of military philosophy dating back to Sun Tzu, who characterizes war as "an inherently political act" (Butler, 2003, pp.226). Thus, as Carl Von Clausewitz famously wrote, war "is merely the continuation of policy carried out by other means" (Butler, 2003, pp. 227 as quoted in Phillips, 1984). The core existence of war therefore lies in its political nature; in its use as a means to an end. The question then must be asked of who is using war as a means to an end and whether their reasons for doing so are just.

The answer to the first question is relatively simple; that is, political leaders. Put even more basically, it is those who have the power to declare and wage war. The answer to the

second question is much more complex, much more necessary, and the very subject that this paper attempts to address using the principles of the *jus ad bellum* criteria of just war doctrine. *Jus ad bellum,* or justice before war, provides a set of principles for determining whether one party is objectively right in waging a war. In other words it is criteria used to decide whether the war is a just war (Brough, 2007; Walzer 1977). Generally speaking the criteria is laid out as a set of three conditions, all of which must be satisfied to legitimize warfare: (1) just cause, (2) right intention, and (3) legitimate authority.

Given that Clausewitz, Sun Tzu, and the other preeminent thinkers throughout history are correct, and war is to some degree always politically motivated, applying the *jus ad bellum* criteria forces an examination of these political motives and holds those who make the decision to go to war accountable for violations of its principles. As Alex J. Bellamy (2006) writes, "*Jus ad bellum* asks questions of political leaders; *jus in bello* holds soldiers accountable" (pp.128). Examining the justice of a particular war using *jus ad bellum* criteria is then necessary for two main reasons.

First, analyzing a war in terms of the political motives of the actors involved in its initiation sets limits on the extent

to which technological, environmental, and other variable factors affect the determination of justice. Without such controls the injustice of many wars might easily be excused for one reason or another, such as a new technological advancement that drastically changes the nature of war, or a natural disaster that creates an exceptional circumstance. Indeed, many political actors have succeeded in justifying their actions in such a blameful way[1].

Second, and more importantly, it teaches our present political actors that unjust actions can and will be discerned, despite the façade of base rhetoric that may disguise them. There is no need to point to specific individuals or actions here, as the surplus of guilty actors would inevitably exclude some deserving individuals. It is sufficient to say that it is these political actors whose actions need to be scrutinized, as the conduct of the individuals who fight the war will inevitably be scrutinized harder, with greater implications for those individuals' personal liberties. There is therefore a moral requirement to examine whether actions are just under *jus ad bellum* criteria. The public that neglects this civic duty is as

[1] This should not be interpreted to mean that I do not believe that just war theory should be static. To the contrary, the majority of this paper concentrates on the dynamic between the theory and its actual application. What is cautioned against here is the use of just war as an ideological tool, used to justify war as a means toward any end, despite the environmental and political circumstances that surround the war's inceptions. More will be said on this abuse of just war theory a bit further in the paper.

culpable as the political actor who commits the action in the first place.

The most salient example of such inaction in modern warfare is the one that is the main topic of discussion in this paper. The Korean War, unfortunately dubbed "the forgotten war" is aptly described as such. Joseph Goulden has suggested that the Korean War's memorial in American history is so diminished because of America's guilty conscience. He writes that, "it has become a period in American history that most Americans have been very happy to see slip through the cracks of history" (in Edwards, 2000, pp.15). Indeed, the justifications for the Korean War are often glossed over as merely a culmination of unfortunate political circumstances and its conclusion in an Armistice is regarded as the same unfortunate convergence. In his definitive work of the Korean War, T.F. Fehrenbach writes, "The anguish of the United States Government, politically unable to win, strategically unable to withdraw, can be easily understood" (pp.22). With casualties trickling in and dwindling political support, the Armistice was thus the only mutually acceptable solution to the problem of battlefield stalemate. But what gave rise to this very scenario in the first place? Who should be held accountable for innocent blood shed and the

division of a nation? What were their reasons, and were those reasons just?

This paper begins with a literature review of *jus ad bellum* criteria which is intended to present a well-rounded examination of scholarly thought on the subject. This is followed by a discussion section in which the merits of certain scholarship on *jus ad bellum* criteria, and particularly contemporary criteria relevant to the time period of the Korean War, are disputed. The final section actually applies the *jus ad bellum* criteria to the Korean War and renders a judgment on the justice of the cause.

Though half a century of wrongs may never be made right, and certainly not within the scope of one paper, merely acknowledging a great injustice is a step in the right direction. As Michael Walzer writes, "war is hell," but this hell that mankind is forced to endure is always contingent upon his own choices, individually and collectively (Walzer, 1977, pp.22). The poor decisions made by desperate politicians in the Korean War deserve to be seen for what they were instead of justified as incidental, accidental, or inevitable. Indeed, if "war is hell" is to be taken literally, then the line that separates the northern half of Korea from the southern half of Korea and stands in memorial to lives lost, families torn, and

culture shattered, is literally hell on earth. Society must redeem itself and attempt to redress this wrong.

Further examination of *jus in bello* and *jus post bellum* criteria following this paper is highly recommended for even greater depth on the subject of *bellum justum* but unnecessary in this particular case. While the studies of just conduct during and after war are by no means pointless endeavors, they are naturally secondary to the events that precipitate a war, and therefore excluded in this paper[2].

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Operational Definitions

The term *justice* is used in this paper to mean the concept of giving people what is due to them and not giving people what is not due to them (Garvin, 1945; Waleder, 1966). In general writing the word *justice* is used liberally to describe all manner of things including political philosophy, administrative process, state of being, and even mythological figures (Curtis & Resnick, 1987; Swift, 2001). Within scholarly works, however, there has been some effort to distinguish between a concept of justice, as defined above, and a conception of justice (Ezcurdia, 1998; Higginbotham, 1997). As Jonathan Swift (2001) writes, the concept is, "the general structure, or perhaps the grammar," of the term, a conception is, "the particular

specification of that 'concept', obtained by filling out some of the detail" (p.11). I therefore make this same distinction and utilize an operational definition of *justice* in concurrence with current scholarly practice.

The term *war* is used in this paper to mean "the systematic use of military force by an organized social power to compel an enemy to submit to its will" (Evans, 2005, pp.14).

Literature Review

The just war tradition has been called "a two-thousand-year-old conversation about the legitimacy of war" (Bellamy, 2006). *Jus ad bellum* criteria is derived out of this ancient tradition. Given the rich history of the doctrine from which *jus ad bellum* criteria is taken, the task of applying the criteria to a historical event is no simple matter. Therefore, before approaching discussion on the merits of *jus ad bellum* criteria, it is first necessary to examine its historical origins in just war doctrine to identify the factors that caused its evolution.

The idea that just war theory is derived from normative law is agreed on by many. In ancient Greek society this normative law was manifested in the limited warfare that Greeks and Romans observed on certain holidays which evolved into thought on the justice of wars (Bellamy, 2006). Specific Greek traditions such

as Aristotelian thought, the Platonic virtues, and war literature such as Theucydides provide written record of this observation in practice, though the thought is aimed at the nature of justice in general, without any clear direction towards a cogent theory[3] (Johnson, 1973; Miller, 1964).

Without disagreeing that just war theory is itself a product of ancient Greek and Roman thought, some turn to even earlier, more geographically diverse civilizations to find examples of limited warfare in certain circumstances. Bellamy (2006) identifies, "the development of normative thinking about war" to be directly descended from Greek and Roman tradition around 700 to 450 B.C., though many earlier civilizations– Eastern and Western— including Hindu, Chinese, Aztec, Egyptian, and Hebrew cultures observed limited warfare in certain circumstances (pp.15).

Commented [O2]: Apply this as evidence of the doctrine in general's universal applicability (II.A.2.)

Within the Ancient Greek and Roman tradition three is some disagreement as to what constitutes the beginning of just war doctrine and how that is defined. There are some scholars who mark the beginning of just war theory with St. Augustine's (354

[3] In Arthur Nussbaum's 1943 analysis of just war doctrine and international law he also finds just war doctrine in ancient Greek and Roman history, though does not do so by citing their observation of limited war as shared examples of this. Instead, he claims an early distinction between Greeks who "occasionally" viewed the victorious war as the just war without any legal theory backing this rationale, and Romans whose juridical traditions indicate a "definite legal theory of just war" (pp.453-454). Further discussion of the importance of "legal tradition" within just war will be given in Part II of the paper.

B.C. - 430 B.C.) works, asserting that his mere identification of the foundations of just war thought constitutes the beginning of the theory. Eric Patterson (2005) accredits Augustine with "systematizing" the notion of justice in legal thought. Davis (in Brekke, 2006) accredits Augustine with using some primitive version of just war theory to legitimize the Christian Roman Empire's use of force and further cites Augustine's letter no. 189 to Boniface in 189 B.C. as evidence of *jus ad bellum* foreground in which he identifies that "war is waged in order to obtain peace" and urges Boniface to accept the idea that war and those who fight it are acceptable to God[4]. However, he explicitly accredits Aquinas with laying out specific considerations necessary to satisfy *jus ad bellum* criteria[5] (pp.4).

Commented [O3]: Review 189 B.C. date!!!

Indeed, others distinguish the beginning of just war doctrine based on more than mere just war rhetoric and instead argue that factors such as just war theory's chronological continuity or a clear distinction between *jus ad bellum* criteria and *jus in bello* criteria should demark the beginning of just war thought, usually deferring to St. Thomas Aquinas (1225 B.C.

[4]Davis writes, "Augustine exhorts him [Boniface] not to think 'that no one who serves as a soldier, using arms for warfare can be acceptable to God'" (pp.4).

[5] In this particular citation Davis (in Brekke, 2006) traces Aquinas back to Aristotle. He writes, "what makes the achievement of Aquinas so impressive is that his account of war and the use of force generally is informed by a systematic moral psychology and account of the virtues based on the work of Aristotle" (pp.6).

- 1274 B.C.) as the defining authority. James T. Johnson (1987) specifically argues that it is erroneous to place Augustine at the beginning of a "continuous" just war narrative because his work is neglected after the collapse after the Roman Empire thus creating a gap between his work and the next purported just war figurehead, St. Thomas Aquinas. Mark Evans (2005) also points to a "critical distinction" between *jus ad bellum* and *jus in bello* that is "far from fully worked out by St. Augustine" (pp.3). According to Evans, though Augustine's writings were the "most significant" part of this process, it is not until Grotius' secularization of just war theory in the late 16th Century that the distinction is fully indoctrinated into the theory and, more or less, the theory becomes recognizable as such (pp.2).

Regardless of who was responsible for authoring just war doctrine as a cogent theory scholars refer to both Aquinas and Augustine as classical just war theorists. Within classical just war theory j*us ad bellum* criteria is uniform in its three main tenets. L. Miller (1964), Butler (2003), Nussbaum (1943) and Brekke (2006) cite Aquinas's three conditions for a just war: (1) the declaration of war must be made by the legitimate authority, (2) there must be a just cause, which in Augustine's concept, could be found only in the fact that 'those against

whom war is being waged deserve this on account of some fault' (3) the belligerent must possess a just intention ' to do the good and avoid the evil' (pp.255). Johnson (1973) cites Paul Ramsey's reinterpreted criteria for classic just war doctrine: "(1) to gain vindication against an offense, (2) to retake something unjustly taken, and (3) to repel injury, *i.e.*, resist armed aggression" (pp.218).

Within classical theory, however, some believe that each criteria may have different weight depending on the theorist and the writers' analysis. Nussbaum (1943) argues that, depending on the school of classical theory, each criteria may have different weight. For example, the Thomist (Aquinas) theorist will hold the second criteria of just cause in greatest consideration, while the right intention principle is of little importance. Lang (2005) interprets Aquinas' writings to assert that legitimate authority is the central criteria in deciding the justice of cause to go to war. According to Lang, Aquinas emphasized the difference between *bellum* and *duellem;* the difference between "sovereign authorities waging war versus private vendettas between individual" (pp.62).

The interpretation of classic just war doctrine may also be assessed in terms of its paradigm. Davis cites three dominant paradigms for "the student of comparative ethics…: the legal

paradigm; the virtue, or character, paradigm; and the economic paradigm" though he cautions that it is erroneous to attach a certain label to a certain tradition. Most authors and traditions will possess features of all three paradigms(in Brekke, 2006, pp.18).

The most commonly cited paradigm is the legal(ist) paradigm which, greatly simplified, proposes that states should not intervene in the affairs of other states except in their defense (Rocheleau in Brough, Lango,& van der Linden, 2007). Some, however, find that the legal paradigm, which rests upon the idea of the sovereign nation-state and the mutually exclusive events of war and peace, is inappropriate for the contemporary nature of warfare. Stahn (2007) observes that while war and peace were once treated as mutually exclusive states of being they are now considered to be factual events without clear division. He writes, "the gradual outlawry of war as a legal institution in the 20th century has removed one fundamental prerequisite of the classical war/peace dichotomy, namely the recognition of war as a legitimate category of law. War is no longer treated as a legally accepted paradigm, but as a factual event regulated by (different bodies of) law" (pp.923). Thus, "there is no (longer a) dividing line between war and peace" (pp.923).

Though there is significant debate as to the whether the differentiation between *jus ad bellum* and *jus in bello* criteria marks the beginning of just war thought, that there is a consistent basis for distinction between *jus ad bellum* and *jus in bello* criteria is not debated (Stahn, 2007). This basis rests on the fundamental nature of the question posed. Where *jus ad bellum* asks questions of cause, directed toward politicians, *jus in bello* asks questions of conducted, directed toward soldiers. Beyond the succinct statement made by Bellamy in the introduction of this paper, the distinction may be phrased in a number of other ways. F.M. Kamm (2004) writes, "the *jus ad bellum* doctrine about standard war between nations deals with the issue of what injustices may be corrected by killing, even carried out in ways typically permitted by *jus in bello*" (pp.651). Adam Winkler (1999) states that while *jus ad bellum* is the justice "to" war, *jus in bello* is justice "in" war. He further cites two key points of *jus ad bellum* criteria, (1) the "just cause" principle which holds that three must be "a limited range of potential motivations behind the use of force," and (2) the "right intention" principle, which holds that war must only be used as a last resort with the ultimate goal of restoring peace (pp.140-144).

The basis for the distinction between *jus ad bellum* and *jus in bello is* generally agreed upon, but some scholars have utilized alternative perspectives to re-evaluate whether such a distinction can always be made. Stahn (2007) argues that the distinction between cases in which *jus ad bellum* criteria and *jus in bello* criteria are both required to assess the justice point to the necessity for a third body of criteria, *jus post bellum.* He writes that "there are cases in which findings under one body of law shape the applicability or interpretation of the other body of law" citing examples in which "egregious" violations of *jus in bello* could be the impetus for a new situation in which *jus ad bellum* would need to apply. Moreover, Stahn argues that the dualist conception of *jus ad bellum* as the body of law that governs the transition from peace to war, and *jus in bello* as the body of law that defines conduct, is oversimplified because it "is premised on the idea that the underlying period in time is governed by a specific body of law rather than by a multiplicity of subject-specific legal regimes originating from different sources of law" (pp.926). To Stahn it thus seems that sometimes the lines between *jus ad bellum* and *jus in bello should* be blurred instead of risk mischaracterizing both.

J. Joseph Miller (2004) evaluates the distinction between *jus ad bellum* and *jus in bello* in terms of responsibility. He writes, "Soldiers are held to be responsible for the actions that they commit during war; politicians are held to be responsible for the justice of the war itself" pointing out that within the first proposition there is a purported equality that all soldiers share (pp.457). Miller, however, takes issue with this assumption based on the implicit idea that soldiers are all equally culpable because they are all equally ignorant. Granting that determining *jus ad bellum* is "far more complicated" than determining *jus in bello*, Miller argues that "if we think privates can sometimes be held accountable for their ignorance amid the fog of war, then there does not seem to be any good reason why we cannot sometimes hold lieutenant colonels accountable for their ignorance amid the fog of propaganda" (pp.462). He then goes on to examine a soldier's moral responsibility to fight an unjust war and finds that a soldier does not necessarily have an obligation to fight an unjust war, if his reasons can be grounded in both positive and normative law, specifically citing the United Nations Charter. For Miller then, the issues that are generally viewed as *jus in bello* issues, pertaining primarily to the duties of combatants, are not necessarily so.

Anthony F. Lang evaluates *jus ad bellum* via the paradigm of the concept of punitive intervention, which he defines as "the use of military force across national boundaries to alter the internal affairs of a state that has violated international law or other widely recognized international norms" (in Evans, 2005, pp.50). Lang's paradigm is based on his observation that the use of military force by one state to punish another has recently gained general international acceptance, which constitutes "an important normative shift in the international system" (pp.51). Thus, because punitive intervention has roots in normative thought it should be evaluated by the two traditions of normative international law which are (1) international law, and (2) just war tradition. While international law ultimately rejects the idea of punishment as a justification for war, the second tradition of just war theory, which "helped create international law does provide some support for those who argue that force may justly be used to punish states that violate its standards" (pp.59). Lang conceptualization of *jus ad bellum* contains three criteria: (1) defense against attack, (2) retaking what has been unjustly taken, and (3) punishment[6].

[6] Lang's assertion of punishment's role in just war tradition is grounded in his interpretation of Grotius, who purportedly argues that "kings can punish in response to violations of natural law, that is, in situations where the

Moreover, there is an important historical division that needs to be noted regarding both *jus ad bellum* and *jus in bello* criteria. With regards to *jus in bello* as a judgment separate from that of *jus ad bellum*, there is a division between classical just war theorists and those post-twentieth century. Classical theorists believed the two issues to be inseparable. If there was no right to wage a war then the question of whether the conduct was just was irrelevant because the war was unjust at its inception. In other words, while classical theorists arranged *jus ad bellum* and *jus in bello* criteria hierarchically, contemporary theorists view the two issues independent of each other (Bellamy, 2006; Miller, 1964, pp.258).

The reasons for this shift in paradigm vary depending on the authority. Miller (1964) concludes that it is useless to speculate as to why the criteria for *jus ad bellum* fell into disrepute and became independent of, if not secondary to criteria for *jus in bello*. She marks this shift in dynamic at some point *during* the nineteenth century, thus opening up a new era in Just War doctrine at the beginning of the twentieth-century by the time of the First World War (pp.259). J. Johnson (1973) believes that this change may be attributed to the declining power of the Church and therefore its inability to

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king or state is not directly affected by a criminal…to defend the general peace and tranquility of international society" (pp.60).

geographically encompass all "relevant international intercourse" (pp.224).

Beyond a hierarchical shift, scholars observe a general shift in the dynamic between international law and just war theory. Many scholars observe this as a shift from normative law to positive law, within which a new conceptualization of just war theory and *jus ad bellum* was proposed. Miller (1964) points to the League of Nations Covenant specifically and the UN Charter to a lesser extent as key examples of this shift. She believes that the League of Nations Covenant and the United Nations Charter, while not derived in whole from just war tradition, may attribute some of their origin to the absence of just war doctrine from the international scene. She specifically identifies several ways that the two aforementioned documents differ from traditional just war theory, including (1) proscription against war when Covenant-provided substitutes were available, and (2) the creation of a community to provide for action in case the formula of *jus ad bellum* was not "self-executing" (pp.261).

Miller further points to the Kellogg-Briand treaty, sponsored under the League of Nations, which was a "more radical move to curtail recourse to war". It "shifted the nature of the attempt from the formulation of a *jus ad bellum* to what has been

called a *jus contra bellum*" from the positive to the negative side of the question, and marks the beginning of concerns of twentieth-century theorists with outlawing all forms of armed violence (pp.261). Though the Kellogg Pact was largely insignificant due to lack of application of sanctions from the League, it was significant because it was the first multilateral convention which provided genuine positive rules for the outlawry of aggressive war" (pp.262).

The impact of the United Nations Charter is not necessarily agreed upon by all scholars. While L. Miller (1964) believes that it represents and indoctrinates the final shift toward a *jus contra bellum* paradigm, Stahn includes both the United Nations Charter and the Kellogg-Briand Pact of 1928 as key factors in the outlawing of "the absolute power to resort to war by its prohibition of aggressive war" (Stahn, 2007, pp. 925) but does not go so far as to identify a distinctly different *jus contra bellum* paradigm.

In even greater disagreement, Taylor (2004) points out that while *jus in bello* has evolved greatly in positive law, *jus ad bellum* has seen significantly less change "due to the potential for abuse" (pp.57). Taylor (2004) specifically points to Article 51 of the Charter and its impact on *jus ad bellum*, writing, "Article 51 of the UN Charter codified this long-

established right as a *jus in bellum*, refining it in terms both of individual and collective self-defense. The article makes clear that the use of force in self-defense by an individual state does not have to await UN Security Council authorization to be legal" (Taylor, T., 2004, pp.59).

Finally, Article 2.4 of the United Nations Charter is sometimes identified with regard to its impact, or lack thereof, on *jus ad bellum* criteria. Ian Brownlie, argues that the expansion of *jus ad bellum*, specifically anticipatory use of force, has been misconstrued to be enumerated as a right in Article 2.4 (in Taylor, 2004). Brownlie identifies England and France's use of force on Egypt in 1956 as an example of the international community's rejection of this article's use in justifying anticipatory use of force. Though both states invoked language that repeated that in Article 2.4, Brownlie argues that if the history of the drafting of the article is taken into account it is clear that anticipatory force is only lawful "in the face of an actual armed attack" (pp.64). Thus, *jus ad bellum* appearance in positive law has been seen in many different lights by many different scholars, offering no definitive authority as to where, exactly *jus ad bellum* lies, or what it says, in contemporary international positive law.

Though not explicitly indoctrinated in positive law, Neta C. Crawford writes that the oft-cited *Caroline* case is used as a corollary to the *jus ad bellum* criteria of just war doctrine (in Evans, 2005). Taylor (2004) recognizes it as a precedent in international law. The 1837 *Caroline* case in which British forces attacked an American ship carrying supplies to anti-British rebels provides a set of guidelines and conditions for justified first strike. In this case the British justification of self-defense was rejected by the U.S. Secretary of State, Daniel Webster, who argued that preemptive attack could be legitimate only if the following conditions were met: (1) a case imminent threat, (2) the minimum force necessary for self defense is used, (3) the preemptive attack is a last resort, (4) must deal only with that threat that is imminent, and (5) must discriminate between combatants and noncombatants

Along with legal precedent, the theological component of just war doctrine has had a continuing influence on its conceptualization. The strength of this influence has been an issue of contention with regards to the doctrine in general, though infrequently with regards to *jus ad bellum* criteria in particular. Though Nussbaum (1943) argues that the strength of just war doctrine's theological roots have ultimately dictated its fate, most contend that there it has had some kind of

perpetual effect, which has frequently manifested itself in official religious rhetoric. Some have observed that the dynamic between just war doctrine and the religious authorities that once used has perpetually evolved. This dynamic too observed several shifts, sometimes concurrent with the trend in international law, sometimes not. Johnson (1973) reads Pope Pius XII doctrine to severely limit "the right of self-defense by use of force" as well as "all first use of force, whether the ends sought are justified or not" (pp.217).

Part II: Discussing the Existing Literature

As an intermediary step between the presentation of the literature on just war doctrine and applying it to the Korean War, there are several issues that must be addressed. Among them, whether just war doctrine is the most appropriate framework to apply to (1) war in general, and (2) the Korean War in particular; whether the just war doctrine can even be applied to a geographical area that does not share the tradition's historical background; and (3) what is really meant by *jus ad bellum* and the limits of its specific criteria.

It is difficult to limit the scope of discussion with regards to the existing literature review on *jus ad bellum* criteria within just war doctrine. Indeed, as the literature review enumerated, the distinction between just war doctrine and

international law is often hazy. In the case that is presented here in which *jus ad bellum* criteria is applied to a war in which the United Nations, the preeminent international legal authority , played such a major role, the distinction is even harder to discern. This discussion portion of the paper therefore attempts to analyze the issues that exist within scholarship on *jus ad bellum* criteria independent of the issues that exist within international law. Though some overlap is inevitable, the focus is intended to center upon *jus ad bellum* criteria rather than international law.

The first portion of the discussion therefore attacks the issue of whether it is international law or just war doctrine that should determine the justice of the cause to fight the Korean War. While the two studies share roots in Greek and Roman tradition, there are decisive differences between the two that may best be seen in their opposed paradigms of *jus contra bellum* and *jus ad bellum*. The timing of the Korean War intercepted a major evolution in international law and just war doctrine with the recent establishment of the United Nations as an international governing authority. As Lynn H. Miller and Carsten Stahn observed in the literature review, the Charter's Article 51 and (debatably) Article 2.4 implied major changes for both traditions. This section explores the advantages and

disadvantages of applying one tradition over the other at the time of the Korean War and concludes that it is the *jus ad bellum* criteria of the just war doctrine that must be used to assess the justice of the cause for war. Naturally, the nature of this argument entails mention of the similarities between international law and just war doctrine after which there should be minimal discussion regarding the overlap of the two fields of study.

The second portion of the discussion attacks the issue of the universal applicability of just war doctrine in general, and *jus ad bellum* criteria in particular. Given the doctrine's Christian theological roots, as well as its history as a political too, how can it be argued that the doctrine should be applied to a war centered in Eastern Asia, and without any inherent political predisposition? This portion of the paper finds that, despite the western theological traditions of just war doctrine, it is still highly applicable to the Korean War.

This section of the paper is not intended as a comprehensive application of *jus ad bellum* criteria to Korean War, but instead as an introduction to it. It considers those issues that would impede the criteria's application to the Korean War, disputes them, and proposes boundaries within which such an application could be maximized.

The boundaries between just war doctrine and international law are often disputed. Where international law may lay claim to jurisdiction over the issue of the justice of wars, just war doctrine also asserts itself as an authority. With regard to the reasons for going to war the specific paradigms that were enumerated in the literature review are *jus contra bellum* and *jus ad bellum,* respectively. As the ostensible disagreement between Lynn H. Miller and Carsten Stahn may have illustrated, there is significant debate on which paradigm should be actually be applied to determine this critical issue. Within the literature review Miller and Stahn dispute the meaning of these paradigms as they appear in the Kellogg-Briand Pact of 1928 and the United Nations Charter of 1945. Their disagreement rests primarily on the issue of whether *jus contra bellum* was fully established with the initiation of the Charter.

The debate between the jurisdiction of international law and just war doctrine as they apply to justice before war, however, extends well before the Kellogg-Briand Pact of 1928, and even before the Charter's predecessor, the League of Nations' Convention (1920). Arthur Nussbaum's article of 1943, *Just War: a Legal Concept?* analyzes this topic from a perspective that is ignorant of the events that have occurred since the Korean War and concludes that just war doctrine's

theological roots have and will ultimately preclude it from eclipsing international law as the prevailing authority on the justice of wars.

In presenting his argument Nussbaum presents a comprehensive history of just war doctrine and international law, pointing to the gradual displacement of the former by the latter. Beginning with the aforementioned split between Roman and Greek tradition that evolved into Christian pacifism and eventually an Augustinian doctrine, Nussbaum points to the somewhat antagonistic relationship between international law and just war doctrine. He ultimately finds that just war doctrine's theological roots make it inappropriate for application to the universal, secular world of international relations. Moreover, once its religious basis is secularized, just war doctrine is inconclusive and undecided within itself. Nussbaum particularly points to the struggle of classical theorists to determine whether a war may be just on both sides[7]. Nussbaum's analysis, however, is flawed for several reasons.

First, it fails to fully consider the changing nature of war and its impact on just war doctrine. Arguing on the inapplicability of a secularized just war doctrine for the

[7] This is interpreted to mean whether the *jus ad bellum* criteria may be satisfied by both parties in a conflict, since according to classical just war theorists, that would be the first and foremost criteria to be justified. If *jus ad bellum* could not be satisfied, then *jus in bello* would be a moot point.

twentieth century, Nussbaum himself fails to see the full scope of change in war during the twentieth century. Repeatedly citing the classical theorists' inability to decide whether both parties in a conflict could be just, Nussbaum ignores the fact that World War I involved multiple parties, each with varying degrees of justness of cause. Other writers have noted this same dilemma though they limit it to a dilemma held solely within classical just war theorists (L.H. Miller, 1964). He thus limits his analysis of just war doctrine to classical just war doctrine without acknowledging

Second, Nussbaum fails to address the instabilities of international law that far outweigh the theological roots of just war doctrine. The deterioration of the League of Nations was well on its way at the point at which Nussbaum published his article, having endured the massive failure of the World Disarmament Conference (Winkler, 1999). It is to his great disadvantage that Nussbaum fails to see that just war doctrine is the lesser of two evils. Indeed, as Evans (2005) writes, just war doctrine is certainly a non-ideal theory in that it "specifies moral requirements and guidelines for a world in which this fully realized ideal situation has not been, and perhaps cannot foreseeably be, achieved" (pp.9). International law, however, may rest on such idealized propositions that it

cannot stand alone without some incorporation of just war doctrine. So, while Nussbaum may assert the idea of international law over just war doctrine in the idealistic hope that international law may prevent war, just war doctrine will ultimately persist because of the inevitability of war.

Finally, Nussbaum's entire view, that just war doctrine and international law have evolved to become mutually exclusive, is inaccurate. While the *jus contra bellum* and *jus ad bellum* paradigms are mutually exclusive, international law in general and just war doctrine are not necessarily so. The Korean War itself illustrates this case, as the United Nations, an international legal body, was a party to the Korean War, which was ostensibly biased in its reasons for going to war. Indeed, while Nussbaum may insult just war doctrine's theological bias, the Korean War itself is example of an inherent caveat of international law.

Our discussion is further served by delineating between Nussbaum's analysis of classical just war doctrine and contemporary just war doctrine. As enumerated in the literature review, the classical theory of just war that is derived from Aquinas and Augustine, and generally considered to apply to all just war doctrine prior to the twentieth-century, has three criteria for *jus ad bellum*. The conditions o*f auctoritas*

principis (legitimate authority), *justa causa* as a result of *propter aliquam culpam* (just cause as a result of some wrong committed by the adversary), and *recta intentio* (intention to do what is morally right) are considered to be the cornerstones of classical *jus ad bellum*, though depending on the author's perspective, each criteria may have different weight.

The contemporary theory of just war doctrine is considered to begin somewhere during the twentieth-century, and has much less distinct criteria for *jus ad bellum*. Indeed, there is no cogent theory for contemporary just war doctrine that is substantially different from classical just war doctrine; only assessments of why the theory should be altered and examples of why.

In assessing this topic within this paper, it should be noted that a formulation of contemporary *jus ad bellum* should be made independent of reference to the Korean War. Because the war occurred on the cusp of the shift from classical to contemporary theory (scholars cite different dates but all approximate post-World War II) there may be an inclination to take this into account. However, if we are to assess classical just war doctrine as "classical" without regard to a certain point of time within that period, we should do the same for contemporary. Hence, writing from an early twenty-first century

standpoint, we should write from a perspective of proposing a contemporary paradigm that will persist indefinitely.

In determining this criteria, the natural course of action is to determine the bases on which the two differ. Relying on the literature review portion that compares classical and contemporary just war doctrine in Part I of the paper, it appears that the main bases for differentiation between two theories are (1) the changing nature of war, from isolated to global and (2) the changing nature of combat, from non-nuclear to nuclear.

This first basis for change really began with the First World War. Though little scholarship exists that specifically addresses the influence of World War I on classical just war doctrine, its effects may be seen in positive law, particularly the League of Nations Covenant of 1920 (Winkler, 1948). As Miller pointed out in the literature review, what was greatly significant about the Covenant with regards to *jus ad bellum* is that it attempted to provide positive law that pre-determined the justice of the cause to go to war, and in this manner to regulate the nature of warfare in general. The Covenant thus affected *jus ad bellum* criteria in two main ways.

First, where classical *jus ad bellum* criteria found sovereigns to be legitimate authorities, contemporary *jus ad bellum* criteria circa the 1920s asserted a non-sovereign, the

League of Nations and then its successor the United Nations, as legitimate authorities.

Second, where classical *jus ad bellum* criteria found a just cause to include acts of self-defense as well as self-preservation, contemporary *jus ad bellum* criteria found a just cause to be one that was explicitly enumerated within the Covenant. Given the ultimate failure of the Covenant, the rhetoric that was continued in the Kellogg-Briand Pact and the United Nations Charter echoed the same sentiment, prohibiting all wars of first strike, justifying use of force only in the case of second, defensive action (Miller, 1948; Stahn, 2007; Johnson, 1973).

Commented [O4]: Reject this change within contemporary jus ad bellum

The second basis for change was the invention of the atomic bomb that ended Japan's stake in World War II vastly changed the nature of war. It affects *jus ad bellum* criteria specifically by demanding a re-evaluation of the condition of imminence within the just cause criteria. The *Caroline* case, in which Webster declared imminence necessary for a legitimate preemptive attack, was based on the idea that it is possible to perceive an imminent threat to a state or its citizens' survival. Once this ability disappears however, imminent threats are everywhere; the smallest threat might easily be construed as imminent. Moreover, proponents of anticipatory self-defense have argued that in a nuclear age, such attacks can be justified (Taylor,

2004, pp.65). Thus, where classical *jus ad bellum* criteria construed imminence on a longer time scale of escalation, contemporary *jus ad bellum* criteria construed it on a much shorter time scale.

Commented [O5]: This too cannot be accepted for its surface value. Crawford's counterpoint, that few people actually, conclusively possess such weapons, is extremely true. To act on imminent threat on a nuclear basis there must be conclusive proof that the opposing party possess such weapons.

Michael Walzer is attributed with laying out definitive criteria with regard to just cause by drawing a distinction between preemptive military action, which is accepted as a legitimate just cause, and preventive war, which is still not accepted within the international community as satisfying just cause criteria of *jus ad bellum*. Where preemptive military action, "is undertaken to eliminate an *immediate* and *credible* threat of grievous harm," preventive war, "is undertaken when a state believes that war with a potential adversary is possible or likely at some future date and that, if it waits, it will lose important military advantages" (Crawford in Evans, 2005, pp.25-26)

There have been some individual attempts to re-write contemporary just war doctrine. In his 2005 article, Eric Patterson writes with the belief that just war doctrine has not yet been re-conceptualized in its two-thousand year history. He argues that the attacks of September 11, 2001 and the changes in war that they represent should provide the impetus for this change. Specifically, Patterson draws a six-point distinction between old wars and new wars.

He considers old wars to be those that occurred prior to the 21st century and defined by the following 6 criteria: (1) fought between legitimate authorities (2) generally based on a dispute over property and thus defined primarily in terms of land and its resources (3) fought by "combatants" (4) fought away from civilians (5) fought in (more or less) hand-to-hand or one-on-one combat (6) the majority of "old" wars (those fought before the 20th Century) could not be considered "global" (pp.120-121).

New wars therefore generally include those fought after the 21st century. Similar to contemporary *jus ad bellum* criteria, new wars are defined not necessarily by what they *are* but more or less by what they *aren't* new wars are: (1) *not* fought by states (e.g. *are* fought by terrorists who claim a "political and moral legitimacy" based on religion") (pp.122), (2) victory is not defined in terms of "this world" deserts but by an eschatological perspective of victory, (3) combatants do not follow the traditional conduct of combatants by not dressing in uniform or behaving like combatants, (4) combatants (terrorists) do not see distinction between combatants and noncombatants (5) therefore do not give the latter immunity, (6) use all weaponry available without regard to a hand-to-hand or one-on-one tactic (indeed, in spite of it), and (7) are all "global" wars.

Patterson then goes on to re-conceptualize *jus ad bellum* criteria based primarily on the concept of responsibility. He writes, "A doctrine of responsibility is thus at the intersection of practicality and ethics. It is the moral obligation of the state to take every reasonable step to protect the life, livelihood, and way of life of its populace. It is also pragmatic for states to be alert to threats, actual and potential, and consider appropriate action" (pp.124). This re-conceptualized contemporary theory takes legitimate authority not to mean authority of states, but is derived instead from the "legitimate right of self-defense" (pp.125).

Patterson's innovation here seems uninformed of contemporary just war thought that is based on the very criteria of a "new war" that Patterson identifies. Indeed, though Patterson erroneously classifies all just war thought prior to the twenty-first century as classical and therefore stagnant with regard to its conditions for legitimate authority, there is a recognized shift that occurs with the innovation of the global war. Considering the impact that war has on states beyond those directly involved in fighting, contemporary just war theorists argue that war must be justified to the international community that it affects. Naturally then, since all contemporary war is international war, the legitimate authorities to decide whether

or not it should be waged are international authorities, according to international positive and normative law (Rocheleau in Brough et al., 2007; Walzer, 1977).

Moreover, the consequences of Patterson's re-conceptualized theory are most certainly revolutionary, though perhaps not prudent. Of particular noteworthiness, the U.S.'s responsibility in the re-conceptualized *jus ad bellum* criteria is written a summary *carte blanche* for military action. Patterson writes:

> in order to protect its citizens and its way of life in the long run, at times the US will have to act against threats such as rogue states and international terrorist organizations, even if the threats only indirectly affect the US but directly challenge the security of our allies and partners. (pp. 126)

This conceptualization however, is ultimately flawed. In asserting that the U.S. must act to protect its interests "in the long run," Patterson either ignores the requirement of imminence of attack, or contends that the right intention criteria outweighs the just cause criteria. Both assertions are logically fallacious. Based on the former assertion the United States is written a *carte blanche* for all military activity that protects any interest whether economic, political, social,

environmental, or cultural, the ramifications of which are infinitely terrible. In other words, the United States would be entitled to preventive war despite its international rejection as a just cause. Based on the latter assertion the very definition of the right intention criteria is rewritten to mean "long term interests" and makes the question of just cause a moot point.

Crawford, in her 2005 article, addressed this very subject by analyzing the Bush Administration's post-9/11 rhetoric. The Administration's argument that preventive war could be justified based on the changing nature of war, represented by the attacks of 9/11, was ultimately rejected because of the logical inconsistencies of their argument and the unlimited possibilities that preventive war engenders.

Patterson's analysis is further flawed because, while he draws a distinction between old wars and new wars at the twentieth century, he does not do so for just war doctrine. In doing so he summarily ignores the fact that this changing nature of war generated renewed interest in just war doctrine itself, and its manifestation in international positive law.

Mark Evans (2004) also sets the following criteria for *jus ad bellum* at the Introduction of his book, in what is meant to be a neutral, objective observation of the tenets of *jus ad*

bellum. I take no issue with Evans' criteria as they are listed and present them as comparative criteria to that which I will generate. According to Evans, there are eight conditions that must be respected in order to have just cause:

(a) the cause is just;

(b) the justice of the cause is sufficiently great as to warrant warfare and does not negate countervailing values of equal or greater weight;

(c) on the basis of available knowledge and reasonable assessment of the situation, one must be as confident as reasonably can be of achieving one's just objective without yielding longer-term consequences that are worse than the status quo;

(d) warfare is genuinely a last resort: all peaceful alternatives which may also secure justice to a reasonable and sufficient degree have been exhausted;

(e) one's own moral standing is not decisively compromised with respect to the waging of war in this instance;

(f) even if the cause is just, the resort to war is actually motivated by that cause and not some other (hidden) reason;

Commented [O6]: Just cause

Commented [O7]: Right intention

(g) one is a legitimate, duly constituted authority with respect to the waging of war:

(h) one has the right to wage it

(i) one must publicly declare war and public defend that declaration on the basis of (a)-(g), and subsequently be prepared to be politically accountable for the conduct and aftermath of the war, based on the criteria of *jus in bello* and *jus post bellum*. (pp.12-13)

Commented [O8]: Legitimate authority

While Patterson's contemporary conceptualization of *jus ad bellum* is unnecessarily expansive, it is equally important to avoid too narrow of a conceptualization.

James T. Johnson's 1973 article examines the collective judgments made in international law circles regarding the legitimacy of first strike versus the legitimacy of second strike and finds that the historical judgment appears to be summary. Johnson proposes that, in considering whether the aggressor is always wrong and the defender is always right as the practice of international law seems to have preordained, the end-goal of justice itself has been forgotten. The legitimacy of *jus ad bellum* actions is thus no longer analyzed through a paradigm of justice but through a chronological microscope. To misconstrue *jus ad bellum* in such a way gives no consideration

to countries that may assert their pre-emptive will in a way that does not require physical force and therefore denies a comment of justice on those situations (Johnson, 1973).

Applying all of the following considerations to the existing literature on just war doctrine and *jus ad bellum* criteria, it seems that while *jus ad bellum* must evolve with the circumstances to which it is applied, it must retain core values that do not. The contemporary theory with the three main tenets of just cause, right intention, and legitimate authority is thus retained for contemporary application. However, in this application the contemporary circumstances must be taken into account when rendering a judgment.

The contemporary criteria for just cause should then consider both, Crawford's argument that preventive war can still not be justified (though preemptive can in certain circumstances), and Johnson's argument that a blanket prohibition of first strikes is also unjust. A prohibition against preventive war and an allowance for some first strikes is not an impossible scenario; to the contrary such a conceptualization of *jus ad bellum* seems that it would maximize justness of cause.

Just cause within contemporary just war doctrine is therefore generally limited to defense against an actual or

imminent attack on one's own nation or another nation with a possible exception being intervention to stop genocide perpetrated by a government against its own citizens, though such exception would usually necessitate the approval of the United Nations (Kamm, 2004). In sum, there may be a just cause for war in three cases: (1) of second strike self-defense, (2) in the case of preemptive attack, or (3) in the case of UN-approved interference.

My contemporary criteria for legitimate authority within contemporary just war doctrine must consider the merits of the classical just war doctrine versus the contemporary just war doctrine. While the classical deference to sovereign nation-states as the sole source of legitimate authority is undoubtedly outmoded, the contemporary inclusion of international legal bodies lacks a legitimacy that democratically elected leaders of nation-states have[8], and assumes a stable international rule of law which subverts, in large part, the authority of the legalist paradigm that forged just war doctrine.

I believe that these two legitimate authority paradigms are reconcilable, and are not necessarily mutually exclusive. The

[8] The question of legitimate authority with regard to the twenty-first century's new combatants (or terrorists, depending on who you ask) is a non-factor here. Without getting into a debate on whether just war doctrine may be applied to acts of terrorism, I find that those who act without democratic consent from those whom they purport to represent are not legitimate authorities, and therefore do not satisfy *jus ad bellum* criteria.

main contention that I have with contemporary just war thought on legitimate authority is that not all states are members of international legal authorities, and for varying reasons. Thus, I propose that the criteria for legitimate authority be contingent upon a nation-states' membership in the United Nations. If the nation-state is a member of the United Nations, then it must (1) act with the consent of the UN, and (2) act according to the UN's decision.

If however, a nation-state is not a member of the United Nations, its legitimate authority should be determined by a fusion of classical and contemporary just war doctrine. In the absence of membership in the United Nations, the criteria for legitimate authority should defer to the sovereignty of the nation-state. However, this legitimate authority should not be decided solely on the basis of sovereignty, but on the basis of its representatives that make the decisions of the nation-state. The representative, regardless of the nation-states membership in the international organization is still held accountable to the international community, which rejects the idea of authority based solely on state-sovereignty. I thus propose that legitimate authority in the case of a nation-state that is not a member of the United Nations be determined by whether (1) the representative(s) who makes the decision to go to war is

democratically elected, and (2) that they have the explicit power to wage war.

Before determining the conditions necessary for contemporary right intention criteria it is important to note that the right intention criteria rests significantly on the merits of the other two. Moreover, the subjectivity of right intention is immediately obvious and therefore requires no further commentary. That said, right intention may be met in two ways: (1) when a party acts with the primary interest of immediate self-preservation, and/or (2) with a reasonable interest in foreseeable peace, relative to that potential conflict.

In closing, I believe that a contemporary theory of just war doctrine and jus ad bellum should take into full account the universality of war since the 20th century. Most just war theory, even in contemporary theory speaks on the justice of one party versus another. But the global war is rarely a case of adversary vs. adversary. Thus, the final section of the paper attempts to apply this re-conceptualized, contemporary *jus ad bellum* criteria to the Korean War.

Part III: Application

Numbers can rarely convey the seriousness of war, for in every conflict there is a special set of circumstances; a

particularly heinous injustice. In the Korean War the approximately 260,000 Republic of Korea's Army ("ROKA") casualties and 520,000 North Korean People's Army ("NKPA" casualties decimated the population and culture of a people who were still reeling from a thirty-five year period of violent Japanese colonial rule (Oberdorfer, 2001). As I believe will become clear with further discussion of the causes of the Korean War, neither the North nor South can truly be held at fault for their actions preceding the war. The international hegemony that dominated the decision-making process ultimately decided the fate for the Koreans and destined them to circumstances not of their making. But, as reiterated in the introduction of the paper, excuses and justifications for just cause for war are always made, and sometimes allowed to persist. It is for this reason that we apply the criteria of *jus ad bellum* from the larger tradition of just war theory.

Just war doctrine has a reputation as a non-ideal theory that is based in practicality. Patterson (2005) extolled the theory's applicability, citing how certain of its criteria were applicable to all kinds of situations. The doctrine can make the unenviable task of ascertaining the conditions that might make a combatant's actions "more or less blameworthy" significantly easier (Bellamy, 2006, pp.3).Evans (2005) warned

of the theory's *mis*application in the case of not verifying a party's justification, and its *incomplete* application in appealing to "only selected criteria…on the assumption that these suffice to justify that war when in fact it requires that all the criteria be met before we say it is justified" (pp.7). These precautions are imperative to note in this portion of the paper, in which a reconceived, contemporary application of *jus ad bellum* criteria is attempted. I would like to note that I am not attempting to determine the justice or injustice of the entire Korean War. To do so would indeed be an incomplete application of just war doctrine. Instead, I am merely applying that criteria that has been narrowed to the Korean War and attempting to render a judgment solely on the justice of the cause of the war. As previously discussed, because *jus ad bellum* and *jus in bello* criteria are determined independent of each other according to contemporary just war doctrine, such an attempt may be made without being considered incomplete.

Furthermore, the scope of the parties to be judged in this portion of the paper is necessarily limited to those main actors in the Korean War. The first attack of the Korean War took place in the early morning of June 25, 1950, as the North Korean People's Army fired across the 38th Parallel, where the Republic of Korea Army was stationed. Three years later, in July of

1953, the Korean War Armistice was signed by representatives from the NKPA, the Chinese People's Volunteers, and the United Nations Command, to whom the ROKA had issued a *carte blanche* at the beginning of the war. One more party whose actual ground troops were never involved in the war but whose actions were certainly crucial in instigating the war was the USSR. In the same vein, the United States never officially entered into the war as the U.S. Army but under the banner of the United Nations Forces. Though the particular actions of all of the aforementioned parties will be examined in greater detail, for now it is sufficient to declare that it is these five nation-states whose actions will be judged.

Before we can truly assess just cause of the Korean War, it is important to have a historical timeframe in which to analyze the events that occurred. The Korean War was initiated on June 25, 1950, but the struggle for the Korean people began forty-five years prior in 1910 when Japan began its colonial occupation of the peninsula[9]. The period of Japanese occupation has been described as an attempt to eliminate Korean culture, depriving its citizens of education vital to perpetuating infrastructure independent of Japanese rule, and subverting the educated class' inherited property ownership and redistributing it among the peasants. These tools of social fragmentation

[9] See the 1910 Annexation Treaty

sowed seeds of discord among those who desired independence for Korea and those who wished thrived under Japanese rule (Fehrenbach, 2000).

Japan's defeat in World War II, facilitated by the atom bomb, was made official on August 15, 1945, via General Order 1, in which Washington ordered Japanese-occupied territories to be divided into zones of occupation that would ultimately be occupied by Allied forces (KIMH, 2000). This surrender ended Korea's lengthy period of suppression though with the false hope of self-government that was laid out in a series of conferences[10] among the Allied powers prior to the end of World War II. Indeed, by the time of Japanese surrender the Allied powers' proposed four-power trusteeship of Korea, including Britain, China, the Soviet Union, and the United States was abandoned because of Britain and China's inability to devote the proper resources. Instead, the Soviet declaration of war against Japan

[10] The four Allied Conferences occurred as follows: (1) The Cairo Conference from November 22-25, 1943, was attended by President Roosevelt of the United States, Prime Minister Churchill of Britain, and Generalissimo Chiang Kai-shek of China, and determined that those three nations, *"mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent"; (2)* The Tehran Conference from November 28-December 2, 1943 was attended by leaders from the U.S., Britain, and Soviet Union, brought Stalin's agreement to the terms laid out in Cairo, and reaffirmed the terms of the Cairo Declaration, which became the basis for the resolution of the Korean problem after World War II; (3) the Yalta Conference was held from February 4-11, 1945, and was attended by leaders of the U.S., Britain, and the Soviet Union, during which Roosevelt and Stalin agreed on a tentative plan for a 4-power trusteeship for Korea; (4) the Potsdam Conference was held from July 17 to August 2, 1945 and produced the Potsdam Declaration which officially reaffirmed the principles of the Cairo agreement and demanded Japan's immediate unconditional surrender

on August 8, 1945 was followed by rapid occupation of the northern portion of the Korean peninsula, which was answered in turn by a rapid occupation of the southern half of the peninsula by U.S. forces. The decision to divide the U.S. and Soviet zones of occupation at the 38th Parallel was hastily made in response to the potential for immediate warfare made possible by the rapid troop buildup within the respective zones of occupation. The political and religious divisions within the Korean people that were facilitated by the Japanese occupation further contributed to the tense mood on the peninsula (Fehrenbach, 2000; KIMH, 2000; Oberdorfer, 2001).

In the five years between the division of the peninsula and the breakout of fighting, activity above the 38th Parallel focused on the Soviet goal of establishing a Communist government in Korea that would protect its own security, as Korea's northern border left Soviet territory vulnerable. Soviet action was deliberate and carefully planned, paying lip service to Koreans who desired independence while at the same time placing in key positions those Koreans who fled to the Soviet Union during Japanese occupation and were ingratiated toward Soviet-Communist ideology and government. Below the 38th Parallel the U.S. government attempted to facilitate democratic government but found that the thirty-five years of Japanese

infrastructure had crippled Korea's ability to govern herself. Preferring those conservative parties who harbored deep Communist resentment, the United States deterred those more liberal parties who also vied for a stake in Korea's government. Thus, the United States' desire to form a democratic government in Korea served its own purpose of creating a counter point to the Soviet's vie for global domination (Halberstam, 2007).

With the backdrop for the initiation of the Korean War set, we must now consider whether each actor's reasons for military action were just. As decided in the previous portion of this paper, just cause is defined as a second-strike act of self-defense, or a preemptive attack which is "undertaken to eliminate an *immediate* and *credible* threat of grievous harm" (Crawford in Evans, 2005, pp.25).

To this day, North Korea contends that it was the South that attacked the North, despite the overwhelming literature to the contrary (Park, 2002). Deferring to the established authority on the sequence of events on the morning of July 25, 1950, I shall not argue whether this is true or not. However, it is necessary to note this contention as there is undoubtedly some degree of bias within certain literature. The isolation of the North from the rest of the world makes difficult ascertaining an accurate, objective account of historical

factors that are crucial in deciding whether the criteria for *jus ad bellum* are met.

As previously stated, the fact that the North struck first is widely agreed upon. The just cause of second-strike self-defense is therefore immediately ruled out. The only alternative legitimate justification of preemptive attack based on the need to eliminate an immediate and credible threat of grievous harm must then be examined.

It is difficult to know the degree of information that the Democratic People's Republic of Korea ("DPRK") had on the ROKA's ability to wage war. However, even if we believed that the North acted on the misinformation that the South intended to strike first, the argument for preemptive attack would still fail because the criteria for preemptive attack necessitates that the threat be *credible*.

Moreover, there is evidence that Kim Il Sung, in his capacity as Chairman of the DPRK, considered a first-strike attack on South Korea as early as March of 1949. It was Stalin who cautioned patience until the U.S. withdrew its troops and only then gave consent that was contingent upon approval of Mao Zedong (KIMH, 2000). Kim had already initiated guerilla attacks on the ROK through the organization, the Democratic Front for

the Unification of the Fatherland (DFUF) in June of 1949 (Halberstam, 2007).

Regarding South Korea's just cause for war, the justification of legitimate second-strike self-defense should be immediately obvious and requires no further analysis.

The United States' just cause for war, though acceptable within our criteria for just cause, deserves more attention. The ROK's reliance upon the United States prior to the initiation of war may be kindly characterized as a love-hate relationship. While the ROK realized that U.S. support was necessary to its survival, it chafed under any recommendations that crippled its autonomy. Syngman Rhee, the President of the new Republic of Korea[11], had a particularly antagonistic relationship with the United States. Rhee, however, authorized the United States in its capacity as the chief of the UN Command, to have full control over the ROK Army, which was trained by the U.S. out of necessity to keep Communist forces at bay.

[11]"The Constitution thus made it clear that the Republic of Korea (ROK) derived its political and historical legitimacy from the Provisional Government's struggle for independence. In accordance with the Constitution, the National Assembly elected Syngman Rhee and Lee Si Yong President and Vice President, respectively, and proclaimed the new Republic of Korea on August 15, 1948" (KIMH, 2000).

Given the ROK's nearly total reliance upon the U.S. that was a product of the United States' previous actions[12] U.S. abandonment at the outbreak of fighting would have been tantamount to first attack. The U.N. Resolutions of June 26 and 28 that authorized its entrance into the fray was thus morally required.

As the DPRK's chief collaborator and financial backer, the Soviet Union is automatically complicit in its failure to meet the criteria for just cause. Evidenced in the arms pact between Pyongyang and Moscow in March of 1949 the latter committed itself to supplement the North's growing military.

China is also complicit and lacks just cause for war. Neither the victim of first-strike aggression nor acting in a legitimate preemptive capacity, nor acting with authorization of the United Nations, China fails to meet this part of the *jus ad bellum* criteria.

The definition of legitimate authority as one who is democratically elected by those whom they purport to represent, and has express authorization from same individuals to declare war on their behalf entails answering several individual

Commented [O9]: Did the UN have legitimate authority because of Syngman Rhee's carte blanche? Can legit. Authority be transferred? Can it be transferred back?

[12] This distrust extends beyond the betrayal of the United States' reneging on its "due course" rhetoric. The United States issued a carte blanche to Japan in the 1945 Treaty of Portsmouth to take whatever actions regarding Korea that it deemed necessary to secure hold of the country. The U.S. had primary interest in securing hold of the Ryukyus that outweighed any interest in Korea's long-term security (KIMH, 2000).

questions. First, was the leader democratically elected by those whom they claim to represent, and second, do they have the explicitly enumerated power from same peoples to declare war?

With regard to North Korea, the question of which legitimate authority criteria to apply should be immediately obvious. Given their non-membership into the UN, the question of individual legitimate authority must be asked. As North Korean history will tell, Kim Il Sung was purportedly democratically elected. In mid-September of 1946 the North Korean Communists staged a Soviet-sponsored election in Pyongyang which officially established the Democratic People's Republic of Korea and chose Kim Il-sung as its premier (KIMH, 2000). Included in Kim Il Sung's powers as premier and therefore chairman of the National Defense Commission was the power to declare war, specifically enumerated in Articles 101-103 of the Constitution (KIMH, 2000). The limited literature on North Korea's elections of 1950 cannot completely refute the intuition that it was anything but democratic, but an analysis of the conditions at social conditions of the time reveals coercion, corruption, and purging of political opposition (KIMH, 2000; Oberdorfer, 2001). However, lacking this concrete evidence, the decision must remain inconclusive.

At the time of the war, the Republic of Korea was not a member of the United Nations either, turning our inquiry to Syngman Rhee's legitimate authority. Accordingly, elections in the South were reportedly "democratic" to the same degree as in the North. Coercion, extortion and bribery secured his victory in May 10, 1948, confirming him as president and therefore Supreme Commander of the armed forces of the Republic of Korea (KIMH, 2000). The President is given power to declare war under Article 73 of the Constitution (Millett, 2007). However, the retrospective legitimacy of Syngman Rhee is impossible to determine. The issue of legitimate authority is therefore as inconclusive in the South as it is in the North.

The issue of the United States' legitimate authority is slightly more difficult to determine. The United States was acting in its capacity as a member of the United Nations as well as an autonomous nation-state. It is therefore necessary to determine which capacity the United States was acting in its involvement in the war before deciding whether that capacity satisfies the legitimate authority requirement.

With regard to its own national powers, there is little to debate about whether the Congressional elections and presidential election at the time of the Korean War were democratic. Assuming that they were, Article I, Section 8 of

the U.S. Constitution gives only Congress the right to declare war (*Constitution of the United States, Art. I, Sec. 8)*. Thus, if the U.S. had been acting unilaterally in the Korean War, and was acting expending its own human and economic resources in pursuing a declared war, it would have required an act of Congress to satisfy the legitimate authority requirement.

The U.S., however, became involved in the Korean War under UN auspices, through President Truman's declaration that it was acting in its capacity as a member of the United Nations Security Council. On June 27, 1950, President Truman stated that the American military would lend assistance to the ROK Forces, declaring: "I have ordered United States air and sea forces to give the Korean Government troops cover and support," on the grounds that North Korea had defied the UNSC resolution of June 26, 1950, which called for the cessation of hostilities (KIMH, 2000). Because the United States' actions in the Korean War were only self-governing it had legitimate authority to act both as a representative of itself and as a member of the United Nations.

The Soviet Union was also an active member of the United Nations, joining the United States, Nationalist China, Britain, and France as the five permanent members of its Security Council. Unlike the United States, however, its involvement in

the Korean War was not under UN Auspices and counter to the UN resolutions passed on June 26 and 28, demanding North Korean cessation of hostilities (KIMH, 2000). The Soviet Union therefore lacked the legitimate authority to pursue war.

It is interesting that the very reason the UN Security Council's Resolution of June 26 passed without Soviet veto was due to the Soviet's boycott of the UNSC, based on its decision in January of 1950 not to replace the Nationalist China with Communist China (Millett, 2007). That said, it is clear that Communist China was not a member of the United Nations and therefore must be evaluated in terms of the legitimate authority of its chairman, Mao Zedong.

To meet the criteria for legitimate authority of a non-UN member, Mao Zedong must have been (1) democratically elected and (2) explicitly enumerated with the power to declare war. Mao's power however, rose not out of democratic elections, but through a bloody civil war that persisted until one month before the initiation of the Korean War. Indeed, Mao's self-proclamation of the newly minted People's Republic of China on October 1, 1949 underscores the illegitimacy of his claim to power.

Finally, the right intention criteria demands that a party to war acts with either the primary interest of immediate self-preservation, and/or with a reasonable interest in foreseeable

peace, relative to that potential conflict. As Lang and Nussbaum noted, not all criteria are created equal. Right intent with regard to the actions of South Korea is a prime example of this assertion. Because the ROK acted purely in self-defense, the question of whether their primary interest was in immediate self-preservation must be answered in the affirmative.

With regard to North Korea, the question is more difficult. The first question of immediate self-preservation mirrors the just cause criteria of imminence in the case of self-defense. However, it is different in that it requires an assessment of the circumstances at the time of war, and the reasonable belief that those circumstances would be substantially worse if no action was taken. In other words, action based on immediate self-preservation cannot satisfy the right intent criteria if action is taken with the intention of improving the circumstances.

Incorporating what has already been written about the North's ambitions for a preemptive strike it is unlikely that any stretch of "self-preservation" could be included in the North's first strike. Indeed, upon Mao's October 1 announcement of a Communist China, Kim Il Sung allegedly said: "Now time has come for the liberation of South Korea. Guerrillas can't solve the problem. I can't sleep when I think about liberating South

Korea" (KIMH, 2000, pp. 108). It thus seems that the right intention's criteria for self-preservation cannot be met.

The point is also moot with regard to a goal of foreseeable peace relative to the potential conflict. Because of North Korea's full knowledge of the South's inability to wage war and the withdrawal of U.S. and Soviet troops, any potential warfare would have been initiated by the North, eliminating the possibility of peace.

The United States' right intention is similarly difficult to analyze. Though the U.S. seems to have had a clear obligation to South Korea, it had other interests in obtaining victory against the Soviet Union. After the loss of the U.S.-backed Chinese Nationalist forces to the Soviet-backed Communist forces in the Chinese Civil War, a surrender of the Korean peninsula would have been costly to the United States' international prestige.

Moreover, its initial obligation to South Korea was always contingent on the value that it held for the United States. For example, the Mutual Defense Assistance Act of October 1949 was passed with the aim of providing resources for the United States' allies. However, the United States had many allies, most of which ranked higher in priority than Korea, until the ideological nature of the confrontation became apparent. By mid-June 1950 the South Korean army had adequate supplies to

sustain defensive operations for only fifteen days. The collective reluctant action of the United States ultimately cannot satisfy either the self-preservation aspect or the foreseeable peace aspect of the right intention criteria.

The Soviet Union's ideological interests in the Korean War were similar to those of the U.S. The Soviet Union was also motivated by its interest in securing the Korean border into the USSR. Though the argument may be made that the strategic interest satisfies the self-preservation criteria of right intention, the fact remains that the border was by no means critical to it. Moreover, as an accomplice to and backer of the instigator of the conflict, the argument cannot be made that Soviet action was initiated with the right intention of foreseeable peace.

Finally, the argument for Chinese right intention cannot be made. China's state at the initiation of the Korean War was such that nearly any alliance with other Communist regimes would have improved its state of affairs. The alliance with North Korea and the Soviet Union, especially with regard to the Korean War, provided ample opportunity for economic and cultural stimulation that would solidify Communist hold over China. This drastic improvement at the cost of war dramatically fails the self-preservation requirement that conditions cannot be significantly improved by going to war. With regard to the idea

of a foreseeable peace, the situation is the same as with the Soviet Union, in that any aggressive act of war would nearly eliminate the possibility of foreseeable peace.

The tragedy of the Korean War can never be emphasized enough. The depressing conclusion of my analysis of the *jus ad bellum* for all five parties to the Korean War is that just cause for war can rarely be satisfied. When it is satisfied that may be an even greater tragedy, because it merely proves the point that nation-states will act without regard to objective morality.

This somber conclusion, however, is not without a silver lining. The literature review portion of the paper proved that scholarship on just war doctrine will continue to evolve with the changing nature of war, to serve as a watchdog against unjust actions of belligerents. The discussion and analysis portions of this paper prove that just war doctrine *is* a practical theory that can be applied to scenarios, retrospectively, presently, and in the future.

I do not contend that my analysis is by any means a perfect one. There may be logical inconsistencies in my arguments and incorrect interpretations of other scholars' writings. Yet re-assessments of my arguments in this paper will ultimately contribute to the evolution of just war doctrine and to a more sophisticated understanding of processes of justice. Political

actors might one day have their actions examined as they commit them and be held culpable for them immediately, supplanting the need for just war doctrine at all. Thus, in an ideal world, the non-ideal theory of just war doctrine will prove to be self-defeating.

References

Bellamy, A.J. (2006). *Just Wars: From Cicero to Iraq.* Malden, MA: Polity Press.

Butler, M.J. (2003) *U.S. Military intervention in crisis, 1945-1994: An empirical inquiry of just war theory.* The Journal of Conflict Resolution, 47:2, 226-248.

Constitution of the United States, Art. I, Sec. 8. http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html.

Crawford, N. C. (2005). The justice of preemption and preventive war doctrines. In M. Evans *Just War Theory: Areappraisal* (pp.25-49). New York: Palgrave MacMillan.

Curtis. D.E., & Resnick, J. (1987). *Images of justice*. The Yale Law Journal, 96:8, 1727-1772.

Davis, G. S. (2006). Introduction. In T. Brekke *The Ethics of war in Asian civilizations* (pp.1-36). New York: Routledge Taylor & Francis Group.

Edwards, P. M. (2000). *To acknowledge a war: the Korean War in American memory.* Westport, CT: Greenwood Press.

Evans, M. (2005). In humanity's name: Democracy and the right to wage war. In M. Evans *Just War Theory: A reappraisal* (pp.71-89). New York: Palgrave MacMillan.

Fehrenbach, T. F. (2000). *This kind of war: The classic Korean War history (2nd ed.).* Dulles, VA: Brassey's.

Ezcurdia, M. (1998). *The Concept-conception distinction*. Philosophical Issues, 9, 187-192.

Garvin, L. (1945). *Retributive and distributive justice*. The Journal of Philosophy, 42:10, 270-277.

Halberstam, D. (2007). *The coldest winter : America and the Korean War.* New York: Hyperion.

Higginbotham, J. (1998). *Conceptual competence.* Philosophical Issues, 9, 149-162.

Johnson, J. T. (1973). *Ideology and the jus ad bellum: Justice at the initiation of war.* Journal of the American Academy of Religion, 41:2, 212-228.

Kamm, F.M. (2004). *Failures of just war theory: Terror, harm, and justice*. Ethics, 114:4, 650-692.

Korea Institute of Military History ("KIMH"). (2000). *The Korean War: Vol. 1.* Lincoln, NE: University of Nebraska Press.

Lang, A.F. (2005). Punitive intervention: Enforcing justice or generating conflict? In M. Evans *Just War Theory: Areappraisal* (pp.50-70). New York: Palgrave MacMillan.

Miller, J. J. (2004). *Jus ad bellum and an officer's moral obligations: Invincible ignorance, the Constitution, and Iraq.* Social Theory and Practice, 30:4, 457-484.

Miller, L.H. (1964) *The contemporary significance of the doctrine of just war.* World Politics, 16:2, 254-286.

Millett, A. R. (2007). *The Korean War.* Washington D.C.: Potomac Books.

Nussbaum, A. (1943). *Just war: A legal concept?* Michigan Law Review, 42:3, 453-479.

Oberdorfer, D. (2001). *The Two Koreas: A contemporary history*. Indianapolis: Basic Books.

Park, H.S. (2002*). North Korea: the Politics of Unconventional Wisdom*. New York: Lynne Rienner.

Patterson, E. (2005). *Just war in the 21st Century: Reconceptualizing just war theory after September 11*. International Politics, 52, 116-134.

Phillips, Robert L. 1984. *War and justice.* Norman: University of Oklahoma Press.

Rocheleau, J. (2007). Preventive war and lawful constraints on the use of force: An argument against international vigilantism. In Brough, Lango, & van der Linden *Rethinking the just war tradition* (pp.183-204). Albany, NY: State University of New York Press.

Stahn, C. (2007). *'Jus ad bellum', 'jus in bello'…'just post bellum'? – Rethinking the conception of the law of armed force.* The European Journal of International Law, 17:5, 921-943.

Swift, A. (2001). *Political philosophy : a beginners' guide for students and politicians*. Malden, MA: Polity Press.

Taylor, T. (2004). *The End of imminence?* Washington Quarterly, 27:4, 57-72.

Waleder, R. (1966). *The Concept of justice and the quest for a perfectly just society*. University of Pennsylvania Law Review, 115:1, 1-11.

Walzer, M. J. (1977). *Just and unjust wars: A moral argument with historical illustrations (3rd ed.)*. New York: Basic Books.

Winkler, A. (1999). *Just sanctions*. Human Rights Quarterly, 21:1, 133-155.