The discourses surrounding the development of the just war tradition and the discourse surrounding the development of international criminal law have long influenced one another. Walzer reminds us that Grotius and Pufendorf deliberately incorporated just war theory into international law. Still, the international criminal law and just war discourses are conceptually and practically very distinct, and few participants in either discourse directly utilize the terms of the other. In what follows, I argue that each discourse needs the other. Recent rapid developments in the field of international criminal law have the potential to remake the just war tradition by institutionalizing criminal accountability for the most egregious violators of just war norms. That is only possible, however, to the extent that international criminal law tends to codify norms that reflect the moral principles of the just war tradition.

The classical debates in the just war tradition about nature of proper authority for waging a just war will now need to cope with the reality that judges also have a role as the proper authorities not for waging war, but for determining whether or not particular decisions by war makers and war conductors were legal and ultimately moral ones. International criminal court judges now have an institutionalized authority that will reverberate back and impact discussions about the nature of just war. Viewed from the other side, the community of international criminal law experts and state leaders now engaged in the process of fleshing out the new institution of the International Criminal Court (ICC) could benefit tremendously
from revisiting the major teachings of the just war tradition. For instance, the ICC member governments must address the issue of the crime of aggression. The just war tradition has long recognized that even just wars could be fought unjustly, but there is no just way to fight an unjust war. Accordingly, it is a central pillar of the just war tradition that aggression is the foremost international law crime.4

Some potentially disturbing trends have emerged in the early work of the ICC and the ad hoc tribunals, suggesting that war crimes prosecutions may serve only to sanitize or “make more humane” the business of war fighting, while not fundamentally challenging the practice of war fighting, particularly when it serves the political ends of established states. The treatment of non-state actors by international criminal courts is a crucial concern for the overall ethical and legal legitimacy of the war crimes trial movement. This is true because thus far, the majority of investigations at the permanent ICC have focused on non-state actors, including militia groups from the civil wars in the Democratic Republic of the Congo (DRC), and the Lord’s Resistance Army (LRA) that has been at war with the Government of Uganda. Indeed, one of most compelling reasons to work toward an effective definition of the crime of aggression is to ensure that individuals who commit crimes on behalf of states can be brought to face international criminal justice as readily as non-state war fighters. In the traditional view of customary international law, aggression is almost always thought of as a crime committed by states, and not by non-state actors.5 But what should we make of a case where a state sponsors a non-state group to undertake acts of violence that constitute aggression, or if such non-state groups act on their own? Certainly state leaders should not be able to avoid charges of aggression by delegating to non-state actors. Consider the case of Sudan’s government sponsoring attacks by the Janjaweed militia that reach across international boundaries into Chad or the Central African Republic. If in all other respects, these attacks qualify as aggression, the fact that non-state groups acting at the behest of the Sudanese state committed them should not relieve the leadership in Khartoum from criminal liability.

In fact, both international criminal law and the just war tradition of moral reasoning about the use of force in war are critiqued by some, particularly by pacifists, as consciously or unconsciously legitimizing war fighting in a way that is counterproductive to the broader goal of delegitimizing war altogether.6 In what follows I will focus on two trends in the contemporary implementation of international law, which, if allowed to continue, could put the international criminal legal system in sharp conflict with the moral precepts of the just war tradition. Each trend has