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Scepticism about *Jus Post Bellum*

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1. INTRODUCTION

The burgeoning literature on *jus post bellum* has repeatedly reaffirmed three positions that strike me as deeply implausible: that in the aftermath of wars, compensation should be a priority; that we should likewise prioritize punishing political leaders and war criminals even in the absence of legitimate multilateral institutions; and that when states justifiably launch armed humanitarian interventions, they become responsible for reconstructing the states into which they have intervened – the so called “Pottery Barn” dictum, “You break it, you own it.” Against these common positions, this chapter argues that compensation should be subordinate to reconstruction, with resources going where they are most needed and can do the most good, rather than to the most aggrieved. Just punishment, meanwhile, presupposes just multilateral institutions – the victor cannot be trusted to mete out punishment fairly. And just interveners, who have already taken on such a heavy burden, are entitled to expect the international community to contribute to reconstruction after they have made the first and vital steps. After presenting each of these objections in greater depth, the chapter proceeds to draw some tentative inferences from the threads running through each, and suggest that they illustrate a distinctive flaw in the way in which *jus post bellum*

is addressed by many just war theorists, who not only see the war as the grounds of *post bellum* duties, but also take it to specify their content: Specifically, they take the rights violations with which wars are imbued to be the basis for post-war action, but take the content of post-war duties to be focused on rectifying those rights violations, rather than the more forward-looking goal of establishing a lasting peace. This backward-looking orientation unduly confines these theorists to making attributions of fault, to a limited palette of normative concepts, and to a focus on the belligerents rather than the international community as a whole. Undoubtedly warfare creates a distinctive normative relationship between belligerent states (though we must question how much of this devolves to the citizens of those states). War does generate grounds for post-war duties – but there are other grounds for those duties too, moreover the grounds should not determine the content. It of course matters that the citizens of two states harmed one another in violation of their rights. But when the war is done, peacebuilding should be the priority, not raking over the wrongs of both sides. Sections 2–4 present the objections, Section 5 offers the tentative analysis and proposes a shift in focus toward an ethics of peacebuilding, and Section 6 concludes.

2. COMPENSATION

Perhaps the most common thread in recent literature on *jus post bellum* has been the importance of compensating the victims of warfare. Wars evidently involve inflicting great suffering and destruction on many people, and it is natural to suppose that, once

the war is over, this suffering and destruction must somehow be remedied. After all, in ordinary life when another harms me – either my property or my person – I can justifiably claim compensation either from the person responsible, or, in some cases, from the state. Principles of corrective justice are well established in ordinary life, so why should they not apply after war as well?

Three types of argument are commonly deployed to justify compensation. The most common is a simple fault-based attribution of liability to pay, which focuses on compensating harms that have been wrongfully suffered, and places the corresponding compensatory burdens on those who faultily brought them about – this generally means the state that failed to satisfy *jus ad bellum*, the unjust belligerent. On some accounts this is seen as another dimension of punishment.¹ Paying reparations is one aspect of the hard treatment to which those who have wrongfully harmed others should be subject. Grotius, for example, argued that “a nation engaging in an unjust war, the injustice of which she knows and ought to know, becomes liable to make good all the expenses and losses incurred, because she has been guilty of occasioning them.”² Of course, reparations payments often fall on whole communities, so risk punishing innocent people. Grotius and Suarez thought this a price worth paying, either because sovereigns are entitled to expropriate their subjects’ property to pay their debts (Grotius), or because “the innocent form a part of one iniquitous commonwealth; and on account of the fault of the whole, this part may be punished

even though it does not of itself share in the fault.”³ Contemporary theorists are understandably sceptical about collective punishment, and insist that only the culpable should be held liable.⁴

Other theorists justify compensation not on retributive grounds, but through a sort of localized distributive justice.⁵ The idea here is that these costs are now present, so somebody must bear them. On the (often undefended) assumption that it should be some among the belligerents who do so, it is natural to place the burden on those who acted wrongfully – again, the unjust belligerent.⁶ A final argument suggests that compensation is justified as a deterrent to other states considering aggression: “When a country wages an unjust war, it risks assuming economic restoration costs if it should lose the war.”⁷

Although there are interesting questions to ask here about the nature of corrective justice more generally, and about each of these theories in particular, the present chapter aims not to put forward an internal critique of their reasoning or premises, but instead to question whether the harms suffered in war should be treated under the corrective justice rubric at all. Appeals to corrective justice might make sense in peacetime, when the harms are of limited magnitude and the liable party can – with the aid of a careful judicial process – be ascertained. But in the aftermath of wars, when the suffering and wrongdoing are so widespread and general, a focus on compensation should be at best a subordinate goal to the overriding imperatives of

reconstruction and peacebuilding. Four objections are particularly salient: consistently pursued, rectificatory post-war policies would lead to crippling burdens on both just and unjust belligerents; compensation directs resources toward the wrong people after war; and it inevitably takes them from the wrong people as well; finally, assessing claims for compensation involves raking over the war's injustices, leading to further recriminations. Each will be presented in turn.

The first objection has two components: first, that pursuing compensation after war will quickly generate crippling burdens; second, that these burdens will not fall, as most of their advocates hope, on unjust belligerents alone.

The first point should be easy to see; on all three arguments for rectification just canvassed – fault-based, localized distributive justice, and deterrence-based – post-war compensation should focus on rectifying wrongful harms. Wars are so utterly imbued with so many and such severe wrongful harms, that the project of rectifying them will quickly become all-consuming. This is clear enough for unjust belligerents – besides infrastructural damage, most of the deaths they cause will have been wrongful, whether of combatants or noncombatants – since the combatants were fighting justifiably, killing them was impermissible. Compensating the estates of the deceased would be inordinately expensive; the least required would be lost earnings the dead would have made; payments should also acknowledge the suffering of both victims and their families. This would amount to millions of dollars per victim.⁸

Assuming there are thousands, even tens of thousands of victims to compensate for, we are immediately into billions of dollars in additional compensation, over and above the infrastructural damage done.

However, the problem is not only that compensation could become all-consuming for a defeated unjust belligerent, it is that just belligerents will have to bear a crippling compensatory burden too. On the most plausible accounts of corrective justice, compensation is owed not merely for all things considered wrongdoing, but for *pro tanto* wrongdoing as well, even when it is all things considered justified. Familiar examples include damaging a private jetty when rescuing a sailing crew in a storm or breaking into a log cabin to save oneself from exposure by burning the owner's furniture. In each case the agent justifiably breaches some duty and owes compensation as a result.

On this far more plausible account of liability, even just belligerents will be liable for significant amounts of compensation.⁹ Many of their victims suffer wrongful harms that, even if justified and all things considered, ground a legitimate complaint.¹⁰ This clearly applies to their noncombatant victims and to the incidental infrastructural damage that they cause, but is also true for many of the combatants they kill. I have argued elsewhere that to win justified wars combatants must breach duties not to kill innocent unjust combatants.¹¹ There seems to be little difference – at least as regards their rights – between a morally innocent noncombatant and a morally

innocent combatant, especially when, as is often the case, the combatant makes only marginal contributions to particular threats. Killing each is *pro tanto* wrongful – if noncombatants' deaths must be compensated, then so must combatants' deaths.

If we are going to demand compensation, then, we must compensate for the lives taken as well as the damage done, and we must demand it from both sides. Singling out only unjust belligerents, and only infrastructural damage, implies that these are the only liable parties and the only relevant wrongful harms, conveying indifference to the claims of those whom we exclude, as our selection implies that they have not really been wronged.

The second objection against prioritizing compensation is that pursuing compensation after war directs resources away from where they are most urgently needed and can be put to best use. This should be immediately obvious – focusing on compensation opens the floodgates to innumerable claims. Not only would paying these claims be prohibitively expensive, adjudicating and administering them is inordinately complex. This was already clear from the UN Compensation Commission, which only ceased adjudicating cases fourteen years after the first Gulf War, and made its last payments in 2007.¹² It would be still more costly and time consuming if we admitted, as consistency demands we must, all the additional claims just described.

This is a gross waste of resources. Moreover, if people must file claims for compensation, those best equipped to file claims are most likely to be compensated. Those who lack the education to plead their own case will either be ignored or bear additional costs and vulnerabilities in hiring representation. A complex compensation system privileges those who can work the system, who are unlikely to be the neediest. Additionally, compensation by definition aims to restore property rights that antedate the war. If those property rights were unjustly distributed, then our principle of *jus post bellum* is devoted to restoring injustice. More important still, the people who lost most will be those who had most to lose. An urban slum-dweller whose house was flattened by artillery has, in financial terms, lost little, while a rich landowner whose lands were destroyed has lost much. But if the slum-dweller is now homeless, at risk of starvation and disease, while the landowner retains his house, who is the more appropriate recipient of resources after war?

Here is the key point: Warfare leaves many of its victims in a position of absolute poverty and vulnerability. If we make compensation instead of vulnerability our guiding principle, then we will inevitably direct resources away from those who are neediest.¹³ This is wrong on two grounds. First, the benefits that a given quantum of resources can yield are far greater when they are directed to the most needy. Second, it is morally more important to help the neediest than to help those less vulnerable. This is the simple insight of prioritarian theories of distributive justice,

according to which the moral value of a given benefit increases in proportion to the absolute degree of disadvantage of the recipient.¹⁴ Compensation directs resources away from where they can be most efficiently used, and away from those who have the strongest claims to them. In peacetime, when we expect states to have institutions that protect the most vulnerable and ensure a minimally decent life for all, it is quite sensible to have refined systems for compensating for wrongful harms. In the aftermath of war, when the magnitude and dispersal of suffering are both so great, claims to compensation should be a distant second priority, behind these more forward-looking principles for fair and optimal distribution of resources.

The third objection is that, just as compensation directs resources to the wrong people, it almost certainly takes them from the wrong people as well. There is no practical way to exact the relevant magnitude of compensation from a state without its costs foreseeably falling on those who were at most minimally responsible for the unjust aggression. Political leaders are always able to pass the costs of reparations onto the innocent – thus in Iraq after the first Gulf war, Saddam Hussein allowed his population to suffer, as he refused to sell oil because of the UN Compensation Commission's thirty percent cut.¹⁵ But even when leaders do not hold their civilians to ransom, reparations can be exacted only through direct taxation or intercepting revenues from the sale of natural resources. Direct taxation, unless administered with an implausibly nuanced (and expensive) degree of differentiation, will affect everyone

to some degree, including the wholly innocent. Children, for example, will suffer as their parents are taxed; those who opposed the war will either have to pay taxes themselves or will suffer as their compatriots' resources are directed away from the provision of public goods that they used to enjoy. Where the debts are great, future generations will carry their weight – German citizens were still paying for the First World War until 2010.

The difficulties of exacting reparations through taxation – in particular, that this presupposes ongoing cooperation from the defeated state – might incline us toward focusing on resource extraction or taxing the sale of natural resources. But this is no better than a further indiscriminate tax on the whole population: Natural resources are the patrimony of all the citizens of a territory. Expropriating these, or taxing their sale, is no different from taxing all of those citizens, including those who would be excluded by a national income tax, such as children and the unemployed. And recall that the levels of compensation exacted, if the principle is consistently applied, will be punitive not only in justification but also in degree. Innocent people will inevitably pay a steep price for the crimes of others.

Of course, the standard response to this sort of worry is to seek more discriminating means of exacting compensation – focusing on the personal holdings of political leaders, for example. There may well be good grounds for this sort of expropriation, but in most cases the quantity expropriated will be derisory compared

to the suffering war has caused. Moreover, while sometimes political leaders do manage to acquire enormous personal fortunes through corruption and theft – but since these resources belong, in principle, to the citizens of the state from which they have stolen, expropriating them for the purposes of paying compensation to others remains a tax on those citizens. There is no way to effect the large-scale transfer of resources from one community to another, after war, that will not impose a heavy burden on people who are not liable to bear that cost.

Finally, adequately effecting compensation means revisiting both which side fought justly overall, and the circumstances of each incident – reopening questions that victory at least quieted, if not resolved. It must lead to accusation and counter-accusation, recrimination, and resentment. Even Grotius recognised this danger, as he qualified his other arguments more strongly in favor of punishment and compensation, arguing that:

The right to claim lands or goods of any kind, by way of punishment, is not of equal force with the above rules. For in transactions and treaties of that kind between kings and sovereign states, all claims of that kind seem and indeed ought to be relinquished, otherwise peace would be no peace, if the old and original causes of the war were allowed to remain and be revived.¹⁶

3. PUNISHMENT

Theorists of *jus post bellum* often place punishment alongside compensation as one of the key priorities in the aftermath of wars – indeed often the two are conflated and compensation seen as one dimension of inflicting punishment. One enthusiast argues that “meting out of punishment for crimes against humanity and war crimes, whether in international tribunals or in our own civil courts, courts-martial, or military tribunals, is in fact the natural, logical and morally indispensable end stage of Just War.”¹⁷ Interesting, as this quotation suggests, they seem content for political leaders and war criminals to be punished by the victor (provided the just belligerent has won). The idea that victorious states can permissibly punish their defeated adversaries has deep roots. Grotius, for example, argues that sovereigns may punish other sovereigns because they have no higher authority (besides God) to which they can appeal. They therefore regain their natural liberty to punish, which we lose only when we establish legitimate authorities to punish in our stead. States are like individuals on the high seas: “where no judicial remedy can be obtained,” “this natural liberty continues in force.”¹⁸ As with theories of punishment more generally, there are two dominant, sometimes complementary strands of argument – one oriented around retribution, the infliction of harm on those who, because of their wrongdoing, deserve to suffer;¹⁹ the other around punishing political leaders and soldiers to deter them and others from future wrongdoing.²⁰

The key problems here are continuous with the objections to prioritizing compensation: While these may be good arguments for punishment in domestic society, distinctive features of warfare should give us pause before we apply them wholesale. Three worries, again, suggest themselves – first on the plausibility of the deterrence-based argument; second, on the relative importance of retribution; and third, on the inevitability of victors’ justice.

Whether the punishment of political leaders and war criminals has any deterrent effect is of course an empirical question, and one imagines that there is insufficient data available to draw any authoritative conclusions. And yet there are reasons for prima facie doubts. After all, if a political leader is undeterred by the inordinate costs of war, then why should the prospect of trial and punishment halt his plans? Indeed, some seem to positively relish the stage that such events give them and the martyrdom they can claim where the punishments are severe.²¹ Of course, one might object that leaders are insulated from the costs of their wars – their citizens suffer, not them. This is undoubtedly sometimes true. But in this age of precision targeting, leaders surely know that to launch an aggressive war is to render themselves vulnerable to direct attack – as the recent bombing of the Libyan leader’s personal compound attests. Moreover, they know that they will face punishment only if they lose – that prospect therefore gives them two types of incentive: not to fight at all, or, if they fight, to be sure of victory (and not to yield till defeat is comprehensive).

What then of war criminals – does the prospect of punishment after war deter them from their crimes? We need to distinguish between a state punishing its own soldiers for violations of *jus in bello* and a victor punishing the soldiers of the defeated adversary. The former is wholly necessary and justified, and might even play some deterrent role. The latter seems much more epiphenomenal. If the soldier is not going to be punished by his own state for his crimes, then the prospect of punishment by the adversary merely gives him greater incentive to fight till the last, just as it does his leaders. Imagine a parallel in domestic society – if murderers knew that they would be punished only if they bungle their crimes, then there is some incentive, of course, not to commit the crime at all, but an equally strong incentive to ensure that if they do take that route, they do so with ruthless efficiency. Moreover, the distant prospect of punishment can surely not deter a soldier whose life is under ongoing and immediate threat. Ultimately the sheer scale and pervasiveness of death and destruction endemic to war, as well as the peculiar feature that victors will likely go unpunished, mean that deterrence arguments drawn from ordinary life are unlikely to have much purchase.

What then of retributive arguments? There are two distinct objections here. The first questions whether, in the aftermath of war, it is appropriate to direct resources and attention to bringing criminals to justice that could be directed at more forward-looking goals. How much does visiting his just deserts upon a political leader

responsible for an aggressive war matter when weighed against the suffering and sorrow wars inevitably leave behind? The objection, note, is not that there is no good reason to make guilty political leaders suffer for their crimes. Indeed, this suffering might be justified in its own right, moreover it might offer succor to the leaders' victims to know that their tormentor has been captured and punished. The objection is instead just how much that matters, relative to the other goals that should occupy us when wars are done. Much depends, of course, on what we take those goals to be and how important they are. Section 5 takes this up in greater detail. The aim here is simply to cast doubt on whether ensuring political leaders receive their just deserts is sufficiently important to be a primary concern in the aftermath of wars. We can get some purchase on its relative importance by thinking about amnesties in the termination of wars. Suppose our adversary will concede defeat only if we offer him an amnesty, allowing him to escape punishment. How much death and suffering can we justifiably inflict to avoid granting this amnesty? Suppose we know that tens, hundreds, or thousands more innocent people will die, would we still be justified in pursuing a victory comprehensive enough to encompass punishment? It may not be worth even one innocent person's life.

The second objection is more internal. Culpability-based attributions of liability to compensate, and impositions of punishment, raise serious questions of justice. The process can go wrong at five points (at least): identifying the culpable,

determining their degree of culpability, determining the degree of punishment/compensation, determining the method of punishment/compensation, and enforcing the punishment/compensation. Errors at each stage result in inflicting gross injustice on relevantly innocent people. Retribution is very difficult to do right.

Much then depends on process. Two types of impartiality are required. Judge, jury, and executioner must have nothing to gain from the trial's outcome, and they must have no prejudices about the plaintiffs. Some also think legitimate authority a prerequisite of justified punishment – either because legitimate authorities are more likely to be impartial or because something intrinsic about them makes them proper agents of punishment. At the very least, to punish without legitimate authority when there is a legitimate authority available is clearly impermissible. Moreover, if such authorities do not presently exist, knowing our frailties as judges, we are required to establish them.

Given this description, it seems clear that permitting victorious belligerents to exact compensation and impose punishment invites radical injustice.²² Where compensation is concerned, the victorious cannot be relevantly impartial – they are both judge and prospective beneficiary, and they have just ended a bloody war with the accused, which cannot but lead to resentment and prejudice. Victors' justice will always be tainted, however noble our aspirations. Moreover, if just victors are permitted to take these measures, it is certain that unjust belligerents will do so as

well, since they will believe themselves justified. Is this cost worth bearing to ensure that the just victorious get their winner's rights?

As well as being conducive to radical injustice, victors' justice is inherently bad for the prospects of peace. Even if, against expectation, the victor impartially attributes liability and fairly enforces compensation and punishment, citizens of the defeated state will almost certainly resent these additional impositions on their vulnerability. They are unlikely to believe the exactions just – either because they believe their side fought justly, or because they doubt the victorious side's implementation of justice on the reasonable assumption that victors' justice is almost always corrupt.

There is undoubtedly an important role for punishment in our account of the ethics of war and of international relations more generally. Certainly there are strong reasons to see political leaders brought to justice for their crimes of aggression, and soldiers held accountable for war crimes, though probably not on grounds of deterrence. But victorious belligerents – even those who satisfied *jus ad bellum* – should not be the agents of punishment. Even when their intentions are good, they are likely not only to punish unjustly, but also to stir up rancorous recrimination, which will foster further conflict, not forestall it. For egregious war crimes, and for the crime of aggression, the only proper agent of punishment must be legitimate global institutions.

4. RECONSTRUCTION AND INSTITUTIONAL COLLAPSE

The last topic before drawing these objections together is what to do when conflict leads to institutional collapse in one of the belligerent states: On whom does the responsibility fall to rebuild those institutions and to stand in their place while they are being rebuilt? Two common answers seem especially problematic. The first says that, where the unjust belligerent was victorious and their victory has led to institutional collapse in the defeated state, they must bear the cost of reconstruction, on the same fault-based liability grounds as they bear duties of compensation.²³ The second argues that even just belligerents ought to bear these costs, whether they were fighting wars of justified national defense, or justified humanitarian intervention, on strict liability grounds: “You break it, you own it.”²⁴ Instead, for both principled and pragmatic grounds, these responsibilities should fall more generally, on all members of the international community.

The idea that unjust belligerents should bear the costs of institutional collapse in their adversary states is undoubtedly intuitively plausible, for just the same reasons as ground imposing compensatory duties on them. But the same objections also apply: Imposing these costs on the state as a whole means visiting them not only on those morally responsible for the unjustified war, but also on their innocent compatriots. Perhaps more important, though, how could institutions established by an unjust aggressor possibly be legitimate and be regarded as legitimate by the citizens of the defeated state?²⁵ How can we trust unjust belligerents not to exploit this power?

Perhaps they should bear the financial costs of reconstruction – though see the objections to compensation arguments discussed earlier – but they cannot be allowed the attendant power.

What about when a state justifiably defends itself against an aggressor, causing the latter's institutions to collapse: Should the victorious just belligerent be required to bear the burden of reconstruction?²⁶ There are two arguments to support this conclusion. The most common is a simple idea of strict liability, which can swiftly be dismissed. Even in domestic contexts, strict liability is a controversial doctrine, and is best justified (if at all) as a means for distributing costs within a society, set in a broader theory of distributive justice. Moreover, all strict liability identifies is some type of causal contribution. Citizens of the victorious belligerent state might have made some causal contribution to the failure of the adversary state, but so have the citizens of the defeated state. And there may well be others whose actions have played causally relevant roles as well. These are thin and indeterminate grounds on which to base the distribution of such heavy burdens.

A more plausible argument is that even justified warfighting involves a great deal of *pro tanto* wrongdoing – perhaps this can ground just belligerents' liability to bear the costs of reconstruction. This argument is more attractive, and does seem to justify a distinct normative relationship between the citizens of the belligerent states. But even if it went through, it would justify imposing only the costs associated with

those *pro tanto* wrongdoings, not the whole burden of reconstruction. It would be at best incomplete.

Finally, ought just belligerents to bear the burden of reconstruction after humanitarian interventions? Again, there is the bond created by the reciprocal wrongdoing; moreover, invading creates an expectation among the beneficiary population, which it may be wrong to disappoint. But other states cannot be let off the hook by one state's decision to make the original invasion. We can see this in two ways. First, if intervention was morally required, then the duty to intervene fell on all people, and therefore all states. The state that acted on that duty did so, therefore, on behalf of all. They are the agent, but the international community is the principal. Any duties they acquire through their justified intervention fall on the principal, not the agent. Likewise, soldiers who defend their country are not individually liable for the damage they cause, rather liability falls to their community at large.

This argument is somewhat persuasive, but even if the principal/agent logic is rejected, the duty to help the stricken society rebuild should still be universal. The state that intervened has already borne a significant cost, and can justifiably demand others do their part. Suppose a child is drowning, and four of us are standing on the beach. We all have a duty to help, but I am the strongest swimmer, so I go. Braving the waves I bring him toward shore, battling a furious riptide. Before long I am exhausted, but within reach of the shore, provided you three wade out to help. You are

clearly required to do so – you could not justifiably object: “You voluntarily chose to save him, and raised his expectations, so you must finish the job.” That would be obviously wrong. Likewise if one state undergoes the struggle and risk involved in a just intervention, they can demand that other states that avoided those costs contribute to reconstruction.

5. THE GROUNDS AND CONTENT OF *POST BELLUM* DUTIES

There is a common thread to these separate objections to these strands within contemporary *jus post bellum* thinking. It will emerge when we consider what role these principles should play in our moral outlook. When we argue for principles of this sort, our aim is to identify standards that apply to a particular practice. This can clearly be seen with the other principles of just war theory – *jus ad bellum*, *jus in bello*, and *jus ex bello*, which govern the initiation, conduct, and termination of wars respectively. Each identifies principles to govern the practice of warfighting. Without the sense that these principles are indexed to a particular practice, there would be no need to draw on a particular subset of reasons, rather than simply apply the rest of our moral outlook. Moreover, how we understand the practice will be strongly determinative of how we understand the grounds and content of the duties that regulate it. The grounds of the duties are the reasons that justify imposing those duties; the content is the conduct (whether action or omission) that they enjoin.

Everything depends, then, on our understanding of the practice that the principles are supposed to regulate.

What practice do *jus post bellum* theorists offer principles to govern? One might uncharitably argue that they lack any clear answer to this question – often *jus post bellum* seems merely temporally defined. On a more generous interpretation, though, *jus post bellum* governs the practice of warfighting *ex post* – it holds fighters to account for their performance against the *ad bellum*, *in bello*, and *ex bello* standards. *Jus post bellum* then governs the *post mortem* examination of the war, and is parasitic on those other just war principles. Given this understanding, these theorists unsurprisingly take *ad bellum*, *in bello*, and *ex bello* standards to determine both the grounds and the content of our *post bellum* duties. Our responsibilities after war are grounded in our having met or breached those *ad bellum*, *in bello*, and *ex bello* standards. Their content is specified by those standards too: Our *post bellum* duties are to rectify the wrongs and harms done during the war and punish the perpetrators. This explains why *post bellum* theorists are so relentlessly backward-looking with such a narrow focus on the specific belligerents involved in the war.

There are some advantages to this tightly integrated account of how *post bellum* principles fit in with the rest of just war theory. But this particular conception of *jus post bellum* is not a necessary entailment of our other normative commitments. One could quite readily develop an account of *jus post bellum* that takes neither its

grounds nor its content from other just war principles, instead focusing on the imperatives of peacebuilding. Contemporary *jus post bellum* theorists who aim to make their other just war commitments determinative of the grounds and content of *post bellum* duties must defend that decision against a number of serious objections.

Instead of mounting a compelling defense of their decision to start with the other just war principles, contemporary *post bellum* theorists too often argue as though by sheer prepositional fiat, *jus post bellum* is an inevitable and necessary component of just war theory.²⁷ We have an account of *jus ad bellum* and *jus in bello* – why not then *jus post bellum*? Justice to war, in war, and after war? Of course a conceptual argument such as this cannot bear much weight – there is no special magic in prepositions; we could argue that just war theory needs an account of *jus ante bellum* on the same grounds. And yet if we must trade in these conceptual claims, it seems that the case against building *jus post bellum* into just war theory is stronger than the case for it, for at least two reasons. First, just war theory can be conceptually complete without referring to *jus post bellum*. Second, wars are states of exception, in which our moral reasons are polarized and telescoped; once wars are over (and indeed before they begin) we should draw on a broader palette of moral reasons.

What would it take for a theory of just war to be complete? This depends, again, on the practice it is supposed to justify and regulate: warfighting. It ought, then, to tell us how, why, and when we may permissibly start wars; how they should be

fought; and how, why, and when they should be brought to an end (the topic of *jus ex bello*, which has only recently been properly discussed). This would seem sufficient to offer a complete account of justified warfighting. Principles to govern the aftermath of wars are no more conceptually required than principles to govern individual and state relations before wars are joined. It is interesting to observe that there is no parallel for *jus post bellum* in our other accounts of the justified use of force – self-defense, for example.

Indeed, we might reasonably think that the aftermath of war demands quite different principles than are appropriate to its initiation, conduct, and termination. Wars are inevitably states of exception: They involve overriding some fundamental moral restrictions, which outside of these exceptional circumstances ought almost never to be breached.²⁸ When the stakes are this high, only the most fundamental moral reasons can play any serious role: War therefore telescopes morality, forcing us to focus on extreme cases and values. Outside that emergency context, it seems right to draw on a much wider set of moral reasons. To illustrate: Warfighting involves killing people. Many of those whom we kill will retain their rights not to be killed. That right is as compelling as any right can be. Fighting, then, can be justified only if it serves some extremely weighty goal. Now contrast this with the period after war. The killing has ceased (since the war is over; if it continues after one side's defeat, the war proper is still ongoing). What rights, then, are engaged? For the *post bellum*

theorists, the key rights after war are compensation for damages suffered. The right to compensation is considerably less weighty than the right to life. It can be overridden much more readily. When fighting wars, rights play an important role in constraining consequentialist reasoning (though not precluding it). In war's aftermath, lesser rights are engaged and they offer weaker constraints. There is more scope, then, for consequentialist reasoning.

These conceptual arguments suggest initial grounds for reconsidering the practice that *post bellum* principles are supposed to justify and regulate. Why assume that, after war, our first priority should be to conduct a *post mortem* on the war itself, assessing our adherence and rectifying the wrongs? Why should our moral principles be so relentlessly backward-looking? Three objections seem particularly salient.

First, these accounts of *jus post bellum* appear predicated on there being a just belligerent, and the just belligerent winning. If neither side satisfied *jus ad bellum*, or if one did, but was defeated, these theories appear inappropriate, or at least unduly narrow in focus. Principles that direct unjust victors to punish their own political leaders or pay compensation to their defeated adversaries are somewhat like principles enjoining ordinary criminals to castigate themselves and make good the losses of their victims. Perhaps a thief should apologize to the victim and return the stolen property. But given that the thief was not sufficiently concerned with the victim to forego stealing in the first place, there is something absurd and redundant about

enjoining a thief to apologize. Similarly, perhaps victorious unjust belligerents should adhere to these standards of *jus post bellum*, imposing the costs and punishment on themselves. But since they were sufficiently indifferent to their adversaries to initiate and fight an unjust war – with all the wrongdoing that involves – they will feel little compunction about aggravating their wrongdoing with a further failure to apologize.

The second objection is that, in many wars, the wrongdoing is so widespread and extensive that rectification is simply unachievable – moreover we could get lost forever unravelling all these wrongs. This worry stems in part from my broader view that all wars involve widespread rights violations on both sides – both in practice, and indeed in principle – because many of the people whom we kill, both intentionally and otherwise, will not be liable to die. But even those who believe that wars can in principle be fought without violating rights must surely concede that in all actually likely wars, accidents and abuses are endemic, however just your cause. If we consistently seek to identify the breaches of just war standards, and to rectify them, we will spend generations parsing and reparsing the minutiae of violence. This surely is not what we should be doing when the war is over.

This leads to the third and most fundamental objection: There are more important concerns that confront us in the aftermath of wars. Wars devastate communities, they destroy lives and infrastructure. They also generate powerful resentments, both justified and unjustified. Together these resentments and this

suffering form the seed bed of future conflict. Our overwhelming imperative in the aftermath of wars should be to ensure that the suffering is addressed and the resentments forestalled. Where just war theory identifies principles for the practice of warfighting, what we need in war's aftermath are principles for peacebuilding. *Jus post bellum* theorists are still too focused on warfighting – assessing our adherence to those standards, remedying the wrongs done, punishing us for breaches. It is merely the *ex post* application of those warfighting principles. But in the aftermath of war, peacebuilding should be our primary concern. Of course, on one Orwellian description warfighting too is about peacebuilding, but there is quite a difference between building peace by killing people and destroying things and the practices appropriate to the aftermath of this death and destruction.

If *jus post bellum* theorists misidentify the salient practice, then they probably also mistake both the grounds of our *post bellum* duties and their content. The latter point seems quite clear: If our goal should be relieving suffering and building peace, rather than rehashing the rights and wrongs of the conflict, then compensation and punishment should be of secondary significance. There may still be a place for both, but subordinate to this overarching goal, so that if their pursuit is inimical to relieving suffering and forestalling resentments, it should be postponed or abandoned.

Moreover, we should not restrict the grounds of *post bellum* duties to the interactions between belligerents. Again, those interactions are undoubtedly important

grounds: That they have engaged in mutual wrongdoing surely justifies a distinct normative relationship between the citizens of warring states. But this is not the whole story. The imperatives of peacebuilding – relieving suffering, avoiding resentment – fall also on outsiders to the original conflict. Where the suffering is great, we might all have relevant duties; where the ongoing resentments undermine international stability, all of our interests might be involved. The just war approach to *post bellum* duties obscures these important considerations, unduly narrowing our focus to the states that took part in the war.

Additionally, even where *post bellum* theorists get the grounds of duties right, they mistake their content: Citizens of formerly belligerent states may have special responsibilities to one another, but those responsibilities should be directed at alleviating suffering and avoiding resentments, not at revisiting and remedying the wrongs of war. And where they get the content right, they mistake their grounds: Undoubtedly punishment for the crime of aggression is morally important after war, but its grounds are universal, not particular to the just belligerent. Citizens of all states have reasons to punish political leaders who take their countries into unjust wars. Just as with crime in domestic society, the criminal wrongs not only his victim, but the rest of society as well, and we all have grounds to punish him.

Contemporary theorists of *jus post bellum* have too quickly applied the categories and standards of just war theory to the aftermath of war without reflecting

adequately on what it is that we need principles for. If we need an account of *jus post bellum* at all – and that is an open question – it should be a subordinate component in a broader ethics of peacebuilding, which should itself be far more inclusive in its sources than theories of *jus post bellum* have been. Just war theory cannot be its only, or even its primary source. Of course, it is quite possible for just war theorists to develop an ethics of peacebuilding under the sobriquet of *jus post bellum* – there is nothing in the concept that commits it to the erroneous path trodden by its contemporary proponents.

6. CONCLUSION

The normative resources of just war theory are indeed deep, but they are not fathomless. They offer a rich tradition of thinking about how to justify and regulate the practice of warfighting. But when the war is over, we need to think carefully about precisely what the goal of normative theorizing is – what the practice is for which we seek principles. If we simply carry over the logic of just war theory into the *post bellum* period, our account of this practice will be profoundly impoverished.

Compensation for wrongful harms is morally less important than alleviating extreme undeserved suffering, however it came about. Punishment is an appropriate goal, but only when carried out by legitimate international institutions, and seen as the province of the whole international community, not only the just belligerent. The burdens of reconstructing collapsed states after war should be distributed according to sound

principles of global justice – we should not simply assume that the only possible duty bearers are the belligerents themselves and infer from that assumption a doctrine of strict liability. Instead of confining ourselves to the *ex post* enforcement of just war principles, we should develop an ethics of peacebuilding, which might well draw on just war thinking, but should not be confined to it.

¹ See Robert E. Williams Jr. and Dan Caldwell, “*Jus Post Bellum*: Just War Theory and the Principles of Just Peace,” *International Studies Perspectives* 7 (2006): 309–20; D. McReady, “Ending the War Right: *Jus Post Bellum* and the Just War Tradition,” *Journal of Military Ethics* 8 (2009): 66–78: 73ff; Brian Orend, “Jus Post Bellum,” *Journal of Social Philosophy* 31:1 (2000): 117–37; Brian Orend, “Justice after War,” *Ethics and International Affairs* 16:1 (2002): 43–56: 47. Note that Orend directly equates reparations with punishment and grounds them in culpability: “Respect for discrimination entails taking a reasonable amount of compensation only from those sources that can afford it and that were materially linked to the aggression in a morally culpable way.” *ibid.*, 48. Also, “the commission of aggression, as a serious international crime, requires punishment in two forms: compensation to the victim for at least some of the costs incurred during the fight for its rights; and war crimes trials.” *ibid.*, 47.

² Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations*, trans. A. C. Campbell, Hyperion reprint edition (Westport, Conn: Hyperion Press, 1979), 3.I.iii.

³ Francisco Suárez, “Justice, Charity and War,” in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Oxford: Blackwell, 2006), 339–70: 364. Grotius, to be fair, does state that “It is not sufficient that by a sort of fiction the enemy may be conceived as forming a single body.” Hugo Grotius, “The Theory of Just War Systematized,” in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Oxford: Blackwell, 2006), 385–438: 432. And yet, both with respect to the voluntary law of nature, and with his principles derived from moderation, he does affirm that subjects can be made to bear the costs of remedying their leaders’ wrongs: “Although in the preceding observations there may be a great deal of truth, yet it is possible, and indeed appears actually to be the case, that the voluntary law of nations introduced the practice of rendering all the corporeal, and incorporeal property, belonging to the subjects of any state or sovereign, liable to the debts, which that state or sovereign may have incurred, either personally, or by refusing to make such reparation, as may be due for the injuries and aggressions, which they have committed.” Grotius, *Rights of War and Peace*, 3.II.ii. And: *ibid.*, 3.XIII.iii.: “The goods of subjects may be taken, and a

property acquired therein, not only in order to obtain payment of the ORIGINAL debt, which occasioned the war, but of OTHER debts also, to which the same war may have given birth.”

⁴ For example, Orend, “Justice after War,” 48. Although Bass thinks that this is the price we pay for sovereignty: Gary J. Bass, “Jus Post Bellum,” *Philosophy and Public Affairs* 32:4 (2004): 384–412: 408.

⁵ For a compelling statement of this approach to corrective justice more generally, see Stephen Perry, “The Moral Foundations of Tort Law,” *Iowa Law Review* 77 (1991–2): 449–514.

⁶ Bass, “Jus Post Bellum,” 408.

⁷ *Ibid.*, 411. See also Rosemary E. Libera, “Divide, Conquer, and Pay: Civil Compensation for Wartime Damages,” *Boston College International and Comparative Law Review* 24 (2000–1): 291–312.

⁸ For example, if a twenty-year-old soldier were killed, on a conservative estimate he has forty working years remaining when he could earn an average of \$25,000 per year, which amounts to \$1,000,000.

⁹ Indeed, this is already recognized by the U.S. military to some degree, as they make compensatory payments to the victims of collateral damage, albeit in a piecemeal way. Jonathan Tracy, “Responsibility to Pay: Compensating Civilian Casualties of War,” *Human Rights Brief* 15:1 (2007): 16–19.

¹⁰ Contra McReady, “Ending the War Right”: 71, who argues that the justified side in a war has nothing to repent.

¹¹ “For, as Tacitus says, ‘in the leisure hours of peace the merits and demerits of every case may be examined and weighed, but, in the tumult and confusion of war, the innocent must fall with the guilty’” Grotius, *Rights of War and Peace*, 3.IV.vii. Evans offers a nice quotation from Kant on a similar topic: “At the end of a war, when peace is concluded, it would not be inappropriate for a people to appoint a day of atonement after the festival of thanksgiving. Heaven would be invoked in the name of the state to forgive the human race for the great sin of which it continues to be guilty.” Quoted in Mark Evans, “Moral Responsibilities and the Conflicting Demands of *Jus Post Bellum*,” *Ethics and International Affairs* 23:2 (2009): 147–64: 154. See Seth Lazar, “War and Associative Duties” (D. Phil. Dissertation, University of Oxford, 2009); Seth Lazar, “Responsibility, Risk, and Killing in Self-Defense,” *Ethics* 119:4 (2009): 699–728; Seth Lazar, “The Responsibility Dilemma for *Killing in War*,” *Philosophy & Public Affairs* 38:2 (2010): 180–213.

¹² Libera, “Divide, Conquer, and Pay.”

¹³ Richard Vernon, “Against Restitution,” *Political Studies* 51 (2003): 542–57.

¹⁴ Derek Parfit, ‘Equality or Priority,’ in *The Ideal of Equality*, ed. Matthew Clayton and Andrew Williams (Basingstoke: Palgrave, 2000), 81–125.

¹⁵ Libera, “Divide, Conquer, and Pay.”

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- ¹⁶ Grotius, *Rights of War and Peace*, 3.XX.xvii.
- ¹⁷ Davida E. Kellogg, “The Importance of War Crimes Trials,” *Parameters* 32:3 (2002), 87–99: 88.
- ¹⁸ Grotius, *Rights of War and Peace*, 2.XX.viii. See also Alex J. Bellamy, “The Responsibilities of Victory: *Jus Post Bellum* and the Just War,” *Review of International Studies* 34 (2008), 601–25: 609–10.
- ¹⁹ See Williams Jr. and Caldwell, “*Jus Post Bellum*,” 318; McReady, “Ending the War Right,” 73ff; Orend, “*Jus Post Bellum*”; Orend, “Justice after War.”
- ²⁰ Bass, “*Jus Post Bellum*,” 405.
- ²¹ This seems to be true of Saddam Hussein and Slobodan Milosevic, for example.
- ²² Note that this also applies, indeed with even more force, to the inclusion of these demands in *jus ex bello*.
- ²³ Michael Walzer, *Arguing About War* (London: Yale University Press, 2004), 167. Bass adds that “If one has not convinced the world that one was acting according to *jus ad bellum*, then impeccable behaviour in terms of *jus post bellum* is all the more critical.” Bass, “*Jus Post Bellum*,” 408.
- ²⁴ “There is a broad consensus among theorists of *jus post bellum* that if a government falls as a result of a just war, then the victor acquires all the responsibilities of government.” Bellamy, “The Responsibilities of Victory,” 615.
- ²⁵ *Ibid.*

²⁶ Bass, “Jus Post Bellum”; Bellamy, “The Responsibilities of Victory,” 619.

²⁷ Bass, “Jus Post Bellum,” 384; Williams Jr. and Caldwell, “*Jus Post Bellum*,” 311–13; Darrel Mollendorf, “Jus Ex Bello,” *Journal of Political Philosophy* 16:2 (2008): 123–36; Orend, “Jus Post Bellum”; Orend, “Justice after War”; David Rodin, “Two Emerging Issues of *Jus Post Bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression,” in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann K. Kleffner (The Hague: T.M.C. Asser Press, 2008), 53–76.

²⁸ At least, so I argue in Lazar, “Responsibility, Risk”; Lazar, “Responsibility Dilemma”; Seth Lazar, “The Morality and Law of War,” in *Routledge Companion to the Philosophy of Law*, ed. Andrei Marmor (New York: Routledge, forthcoming); Seth Lazar, *War and Associative Duties* (Oxford: Oxford University Press, forthcoming).