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The responsibilities of victory: *Jus Post Bellum* and the Just War

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Abstract. Recent years have seen a growing interest in questions about justice after war (jus post bellum), fuelled in large part by moral questions about coalition operations in Afghanistan and Iraq. As a result, it has become common to argue that *jus post bellum* is a third strand of Just War thinking. This article evaluates this position. It argues that that there are broadly two ways of understanding moral requirements after war: a minimalist position which holds that moral principles derived largely from *jus ad bellum* and *jus in bello* concerns should constrain what victors are entitled to do after war and a maximalist position which holds that victors acquire additional responsibilities that are grounded more in liberalism and international law than in Just War thinking. Finding problems with both approaches, the article argues that it is premature to include *jus post bellum* as a third element of Just War thinking and concludes by setting out six principles to guide future thinking in this area.

Recent years have seen a proliferation of work on *jus post bellum* – justice after war.[1] Spawned partly by developments within Just War thinking itself and partly by the ethical and prudential questions raised by international attempts to rebuild war-torn societies[2] and the US-led occupation of Iraq,[3] it is now widely, if not universally, accepted that the legitimacy of war depends on the satisfaction of three sets of criteria: the traditional *jus ad bellum* and *jus in bello* criteria framing judgments about to decision to use force and the conduct of war respectively, and *jus post bellum* criteria concerning the legitimacy of the peace that follows it.[4] Advocates of *jus post*

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[1] *Inter alia* Brian Orend, 'Justice after War', *Ethics and International Affairs*, 16:1 (2002); Michael Walzer, 'Just and Unjust Occupations', *Dissent*, Winter 2004, Davida E. Kellogg, 'Jus Post Bellum: The Importance of War Crimes Trials', *Parameters*, 32:3 (2002), pp. 87–99, Louis V. Iasiello, 'Jus Post Bellum: The Moral Responsibilities if Victors in War', *Naval War College Review*, 57:3/4 (2004), and Gary Bass, 'Jus Post Bellum', *Philosophy and Public Affairs* 32:4 (2004).

[2] Most notably, Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004), Simon Chesterman, *You, the People: The United Nations, Transitional Administration and State-Building* (Oxford: Oxford University Press, 2004) and Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (Oxford: Oxford University Press, 2005).

[3] Especially Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton; Princeton University Press, 2006) and forthcoming special section of *Ethics and International Affairs*.

[4] For instance, Carsten Stahn, '*Jus ad bellum – Jus in bello . . . Jus post bellum*: Towards a Tripartite Conception of Armed Conflict', *Florence Agora Papers*, 2005.

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bellum insist that if, as Augustine argued, war is only legitimate to the extent that it is fought to preserve a just peace, then it stands to reason that combatants be held to account for the way in which the war is concluded and peace managed.[5] Indeed, at least one prominent commentator argued that the 2003 Iraq war could not be considered a humanitarian intervention because the allies failed to provide for the post-war reconstruction of Iraq.[6] The general acceptance of the place of *jus post bellum* in shaping the legitimacy of war has, however, masked significant unanswered questions. In particular, problems remain in relation to the different philosophical foundations and scope of *jus post bellum*, its relationship to the other elements of Just War thinking, and the extent to which the responsibilities of *jus post bellum* apply after every type of war.[7]

The purpose of this article is twofold. First, I aim to map current thinking about the *jus post bellum*. In the interests of parsimony, we can identify two quite distinct positions though it is important to bear in mind that most writers oscillate between them. Minimalists envisage *jus post bellum* as a series of restraints on what it is permissible for victors to do once the war is over. By contrast, maximalists argue that victors acquire certain additional responsibilities that must be fulfilled for the war as a whole to be considered just. Although the minimalist position is more coherent than the maximalist, there are important problems with both. As such, I argue that it is premature to label *jus post bellum* a third component of the Just War tradition. After outlining the two approaches and the problems associated with them, the article sets out and defends six principles that ought to shape future thinking about *jus post bellum*.

The minimalist approach

The minimalist approach holds that the principle purpose of *jus post bellum* is to prevent excesses by victors through limiting what they are entitled to do. Drawing upon the quasi-judicial concept of the just war evident in the work of jurists such as Grotius and Vattel as well as philosophers such as Kant (who was otherwise deeply critical of the jurists, whom he labelled 'sorry comforters'[8]), minimalists tend to view just wars in terms of rights vindication and argue that combatants are entitled to wage war only to the point at which their rights are vindicated.[9] Because the minimalist account of *jus post bellum* draws its authority from direct reference to particular elements of the Just War tradition, it is worth beginning our account by

[5] Augustine, *The City of God*, trans. H. Bettenson (London: Penguin, 1972), p. 866; and see Brian Orend, 'Justice after War', *Ethics and International Affairs*, 16:1 (2002), p. 43.

[6] Kenneth Roth, 'Was the War in Iraq a Humanitarian Intervention?', *Journal of Military Ethics*, 5:2 (2006).

[7] One of the few voices of scepticism about *jus post bellum* aired to date is Nicholas Rengger, 'The Judgment of War: On the Idea of Legitimate Force in World Politics', *Review of International Studies*, 31:5 (2005), p. .

[8] Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (1795) trans. M. Campbell Smith (London: Simon Sonnenschein & Co., 1903), p. 131.

[9] This is the most common position. See Orend, 'Justice After War', Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 119 – though more recently Walzer advocated a more maximalist position, see Michael Walzer, 'Judging War', 2003, available at: ⟨www.boell.de/downloads/verfassung/michaelwalzer.pdf⟩.

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briefly considering those ideas.[10] According to Vattel, 'when a sovereign has been forced to go to war from just and weighty reasons, he may continue the operations of the war until he has attained the lawful object of it, which is to obtain justice and to put himself in a state of security'.[11] If the victors enforce a peace that goes beyond the legitimate vindication of rights, they potentially create grounds for a just war to be waged against them, if the other *jus ad bellum* criteria are satisfied.[12]

The conception of legitimate war as a quasi-judicial activity involving rights vindication has long been a staple of just war thinking and became prominent after the tradition's turn towards legal positivism in the sixteenth century.[13] Gentili argued that no war was just unless it was absolutely necessary and insisted that war became necessary only when every other avenue for resolving a conflict had been explored and there was no means of arbitration. A reluctance to submit to impartial arbitration, he argued, exposed a sovereign's doubts about the justice of his own case.[14] Grotius also defined just war in quasi-judicial terms. The only just cause for war, he argued, was an injury received in a context where tribunals were either ineffective or without jurisdiction.[15] Grotius thus conceived three 'images' of just war: war as judicial act; war as litigation; and war as defence of the common good.[16] In short, justified war was a means of protecting or enforcing rights in an international anarchy where there was no possibility of authoritative arbitration.

What are these rights that states can enforce through war and where do they come from? Unsurprisingly, the writers cited above each articulated subtly different lists and founded them on different grounds. To an extent, each schema depended on a mixture of positive or volitional law and natural law with the Vattelians emphasising the former and Grotians the latter, but both incorporating the two types.[17] In contemporary international society, these rights are tempered in important respects by positive law – almost entirely neglected by advocates of *jus post bellum* – which insists that there are only two types of lawful war: wars of self-defence and collective

[10] The idea of Just War as a tradition which contemporary thinkers draw upon as authority to validate contemporary arguments is set out most clearly by Nicholas Rengger, 'On the Just War Tradition in the Twenty-First Century', *International Affairs*, 78:2 (2002), pp. 353–63 and developing in, *inter alia*, Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006).

[11] Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and the Affairs of Nations and of Sovereigns*, trans. Charles G. Fenwick (Washington DC: Carnegie Institution of Washington, 1916), vol. III, p. 344.

[12] Orend argues that it may create a 'just cause'. Orend, 'Justice After War', p. 56. This idea was first put forward by Balthazar Ayala in the sixteenth century. See H. Duchhardt, 'War and International Law in Europe: Sixteenth to Eighteenth Centuries' in Philippe Contamine (ed.), *War and Competition Between States* (Oxford: Clarendon Press, 2000), p. 286.

[13] Writing in the early sixteenth century, Vitoria viewed war as a quasi-judicial activity properly resorted to in order to right a prior wrong in cases where there was no authoritative judge to adjudicate disputes. Francisco de Vitoria, 'On the Laws of War' in A. Pagden and J. Lawrence (eds), *Vitoria: Political Writings* (Cambridge: Cambridge University Press, 1991), p. 303.

[14] G. H. J. Van Der Molen, *Alberico Gentili and the Development of International Law: His Life, Work and Times*, 2nd revised edn (Leyden: A. W. Sijthoff, 1968), pp. 116–17.

[15] See W. S. M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925), p. 196.

[16] Benedict Kingsbury and Adam Roberts, 'Introduction: Grotian Thought in International Relations', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds); *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1992), p. 16.

[17] The distinction between Vattelian and Grotian conceptions of the law is borrowed from Jason Ralph, *America and the International Criminal Court: An International Society Perspective* (Oxford: Oxford University Press, 2007).

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enforcement authorised by the UN Security Council.[18] For the purposes of illustration, I will briefly focus here on Grotius and Vattel themselves before discussing what has been described as 'the UN Charter paradigm'.[19]

Grotius identified four specific just causes for war and like some of his predecessors rejected the legitimacy of both 'divinely commanded' war and war to enforce religious orthodoxy. Two of Grotius' just causes were grounded in natural law: the right of self-defence (grounded in the principle of self-preservation) and the right to punish wrongdoers. The right of self-defence included a limited right of pre-emption in situations where there was a clear, specific and imminent threat but like Gentili, Grotius argued that a generalised fear of some future threat did not provide grounds for war. In cases where 'an attack by violence is made on one's person, endangering life, and no other way of escape is open, under such circumstances war is permissible, even though it involve the slaying of the assailant'.[20] This right, however, was limited to cases where the threat was 'immediate and imminent'.[21] The right to punish wrongdoers, which for Grotius was grounded in natural law, pertained only to circumstances where the wrong committed was 'unambiguously destructive' of society. The other two just causes were grounded in human/volitional law: the enforcement of legal rights and the reparation of injuries where no other avenue was available.

Vattel's system was predicated on the view that nations were free, independent and equal in nature. From this he drew the idea that separate nations should be considered sovereign and that such entities ought to be considered equal.[22] International law, he understood as 'the science of the rights which exist between Nations or States, and of the obligations corresponding to those rights'.[23] Vattel insisted that sovereigns had an inherent right to wage war and agreed with the Grotian premise that the *jus ad bellum* was a largely procedural matter dependent on the satisfaction of the rightful authority and prior declaration criteria, though this did not entirely exonerate sovereigns from their culpability under natural law.[24] Vattel considered both defensive and offensive wars to be potentially legitimate with the key criteria being that 'the cause of every just war is an injury either already received, or threatened'.[25] Reiterating the classic Just War doctrine on just cause, Vattel argued

[18] The relationship between law and morality and the nature of the Just War tradition forms one of the most profound debates in contemporary just war thinking. Many ethicists argue that 'Just War' thinking should be divorced from legal concerns (and privileged) on account of its historical authority and concern with justice. See, for instance, Oliver O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003) and James Turner Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict* (Lanham: Rowman and Littlefield, 2005). Some lawyers, however, argue that law, not ethics, is the normative currency in relation to war, on the grounds that it is legal concerns rather than ethical concerns that animate decision-makers. See Michael Byers, *War Law: Understanding International Law and Armed Conflict* (London: Atlantic Books, 2005). Following Ian Clark, however, I argue that judgments about the legitimacy of war and peace comprise elements of both a legal and ethical nature – a point that I will elaborate on later.

[19] By Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993).

[20] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. F. W. Kelsey (Washington, DC: Carnegie Council, 1925), p. 172.

[21] Grotius, *De Jure Belli*, p. 173.

[22] Vattel, *Law of Nations*, p. 11.

[23] Ibid., p. 3.

[24] Ibid., p. 235.

[25] Ibid., p. 236.

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that there were three such causes: claiming rightfully owned property, punishing the aggressor or offender, and self-defence.[26]

For proponents of a minimalist approach to *jus post bellum*, then, victors are entitled to protect themselves, recover that which was illicitly taken, punish the perpetrators and – in the Grotian but not the Vattelian schema – prevent, halt, and/or punish those who gravely violate natural law by, for instance, committing genocide against their own people.[27] This may involve the military occupation of territory but minimalism draws a sharp distinction between occupation and the full assumption of the reigns of government, particularly if the latter involves imposing a particular form of government on the vanquished.[28] Drawing on positive law, minimalism insists that the occupying powers have two important sets of relations that require regulation. The first are relations with the occupied population, principally governed by the relevant sections of the 1907 Hague Regulations and 1949 Geneva Conventions and subsequent Protocols (1977, all discussed below). The second are relations with the sovereign authority of the vanquished state, which persists even after a particular government has collapsed. According to one interpretation of the Conventions, the occupying powers are only entitled to assume the role of *de facto* administrators and 'unwarranted interference in the domestic affairs of the occupied territory' is incompatible with the law of occupation.[29] The limit of what constitutes 'unwarranted interference' was set out more clearly in the 1907 Hague Regulations which insisted that the occupying power respect the laws in force in the country 'unless absolutely prevented' from doing so.[30] This duty, however, was subject to the limitations and responsibilities imposed by international human rights standards.[31]

Linking the victors' rights to the just causes for war begs the further question of whether states are only entitled to restore the *status quo ante*? Most advocates of *jus post bellum* are adamant that just belligerents are entitled to do more than simply restore the *status quo*. Indeed, Orend and Walzer strongly imply that they are *required* to do more. The reason for this is straightforward. By very definition, the pre-war *status quo* contained within it the seeds of future conflict and the Augustinian idea that wars are fought in order to preserve the peace means that the victors are certainly entitled and possibly obliged to remove those seeds of potential future war in order to satisfy *jus post bellum* – because a peace that contains the seeds of future war cannot, by this account, be considered just.[32] The problem, as Orend sees it, is

[26] Ibid., p. 236.

[27] As Orend puts it, therefore, *jus post bellum* permits the just victor to (1) roll back the aggression, (2) punish the wrongdoers in the shape of war crimes trials and reparations and (3) require some form of demobilisation and/or political rehabilitation. Orend, 'Justice After War', p. 47.

[28] See Conor McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq', *Journal of Conflict and Security Law* 10:1 (2005), pp. 49–51.

[29] Jean Pictet, *Commentary on Geneva Conventions of 1949*, vol. IV (Geneva: ICRC, 1958), p. 273.

[30] Article 43 of the Hague Regulations (1907).

[31] Otherwise, the occupying allies would have been expected to uphold Nazi racial discrimination laws. See Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', *European Journal of International Law*, 16:4 (2005), pp. 665–7 and Adam Roberts, 'What is a Military Occupation?', *British Yearbook of International Law 1984* (Oxford: Oxford University Press, 1985).

[32] Citing Liddell Hart, Walzer argues that '[t]he object in war is a better peace', continuing '*better* within the confines of the argument for justice, means more secure than the *status quo ante bellum*, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determination'. Walzer, *Just and Unjust Wars*, pp. 122–3. Or, as Orend puts it, 'one ought not

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exacerbated by the fact that war itself is so destructive and changes so much that the purpose must be a more secure peace. Thus, Orend argues that the aim of a just war must be 'a *more secure possession of our rights*, both individual and collective. The aim of the just and lawful war is the resistance of aggression and the vindication of the fundamental rights of political communities'.[33] Both Orend and Walzer's language here implies a degree of obligation that sits uncomfortably with minimalist *jus post bellum*. With that in mind, therefore, I suggest (following Vattel) that according to the minimalist version of *jus post bellum* the victor *may* prosecute the war 'to obtain justice and to put himself in a state of security' but is entitled to choose not to, and decide instead to settle for the restoration of the *status-quo*.[34]

Matters are made more complex, however, because contemporary international law relating to just cause is at variance with both the Grotian and Vattelian conceptions utilised to greater or lesser extent by advocates of the minimalist version of *jus post bellum*. According to most readings of the law, the United Nations Charter expressly prohibits the threat or use of force in international relations (Article 2[4]) except when used in self-defence (Article 51) or when authorised by the UN Security Council for the purpose of maintaining international peace and security (Article 39). In essence, initiating war for whatever purpose without the authorisation of the UN Security Council is illegal, so states using force would have to prove either that they acted in self-defence or with the approval of the host government. More recently, some states have preferred to use the alternative type of permissible justification by claiming that their recourse to force was implicitly authorised by the Security Council, a strategy used by some NATO members in relation to Kosovo and the US, UK and Australia in relation to Iraq.[35]

Clearly, this poses a problem for the minimalist approach because it suggests a much more limited list of rights that can be legally vindicated. Which version of rights should provide the basis for a minimalist conception of *jus post bellum?* Both Just War writers and legal theorists have attempted to get around this, and similar problems associated with other aspects of the legitimacy of war, by insisting upon a radical separation of international law and the Just War tradition. Some prominent contemporary Just War thinkers have tended to criticise the UN Charter system for forbidding aggressive war and downplaying the role of justice in determining a war's legitimacy. According to Johnson, labelling a war as 'aggressive' does not resolve the question of whether or not it is just, yet, he argues, the UN Charter makes precisely that presumption.[36] On the other hand, legal theorists tend to draw a rigid distinction

to want the literal restoration of the *status quo ante bellum* because that situation was precisely what led to armed conflict in the first place'. Brian Orend, 'Jus Post Bellum', *Journal of Social Philosophy*, 31:1 (2000), p. 122.

[33] Orend, 'Justice After War', p. 45.

[34] Vattel, *Law of Nations*, p. 344.

[35] See Michael Byers, *War Law: International Law and Armed Conflict* (London: Atlantic Books, 2005), pp. 40–50.

[36] James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), p. 57. This type of argument gathered momentum after September 11. Thus, for instance, Oliver O'Donovan argued that the legalism predominant in *jus ad bellum* be replaced by a 'praxis of judgment' that would permit war to end or prevent grave injustice regardless of its legal status, granting the Just War tradition a 'natural law rather than positive law orientation'. More pointedly, Elshtain called for a revived Augustinian account of the just war, permitting punishment (by war) of wrongdoers and perceiving the question of just cause in more or less objective terms. Oliver O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), p. 23,

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between law and ethics either on the grounds that they are fundamentally different modes of reasoning or, rather more questionably, that states feel bound to justify themselves by reference to the law not by reference to the Just War tradition.[37]

There are a number of problems with this way around the issue. First and foremost, it does not help us ascertain whether a minimalist conception of *jus post bellum* should be predicated on the Grotian and Vattelian suites of rights or the positive legal rights and duties afforded states. Without an answer to this question, it is impossible for us know what victors are entitled to do after war. Second, in practice individual ethical and legal arguments provide only part of the broader justifications for recourse to war and the justice of peace. Third, separating positive law from the wider just war tradition does a historical disservice to the tradition. From Cicero until the twentieth century, the 'law' of war comprised both positive law *and* ethics. Indeed, the Martens principle, first enunciated in the 1899 Hague Convention, draws a clear link between ethical concerns and contemporary positive law.[38]

An alternative way of thinking about this problem is to follow Ian Clark in suggesting that legitimacy judgments are shaped by the balance between the ethical, legal and political. According to Clark, legitimacy claims are articulated and assessed by reference to three subordinate sets of norms, none of which is permanently prioritised over the others. Clark describes these as legality, morality and constitutionality. The meaning of the first two is self-evident. Constitutionality refers to the interplay of power and interests in political relations. At the core of constitutionality 'are political sensibilities about what can properly be done, and how affairs should be conducted'.[39] Constitutionality therefore points towards the political aspects of legitimacy judgments. Thus, for Clark:

> Legitimacy is a composite of, and an accommodation between, a number of other norms, both procedural and substantive, and does not possess its own independent standard against which actions can be measured. For that reason, it is never in direct tension with other norms: it is amongst those norms that any tension exists . . . From this point of view, legitimacy denotes a combination of values, and represents some balance amongst them, when these individual normative standards might tend to pull in opposite directions.[40]

According to this perspective, what rights may be legitimately vindicated in a particular case depends upon the appropriate balance between legality, morality and constitutionality at any given time or place. Although some just war theorists will no doubt be critical of this view because of the secondary role afforded to justice, if the

and Jean Bethke Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (New Jersey: Basic Books, 2003).

[37] As an example of the former see Friedreich V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989), p. 42. On the latter see Byers, *War Law*, p. 2.

[38] Accredited to the Russian delegate F. F. de Martens at the 1899 Hague peace conference, the Martens clause stipulates that: 'Until a more complete code of the laws of war is issued, the High Contracting parties [to the 1899 Hague Convention] declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience'. Cited in Theodore Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', *American Journal of International Law*, 94:1 (2000), p. 79.

[39] Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), p. 220.

[40] Clark, *Legitimacy*, pp. 207–8.

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minimalist approach is to be politically and intellectually coherent it is necessary to avoid drawing up comprehensive lists of rights that may be vindicated by the peace. In their place remains the basic minimalist view that the *jus post bellum* be limited to the vindication of those rights that gave just cause for war in the first place. Of course, this opens the door to the argument that minimalism makes *jus post bellum* itself redundant because it is based on rights and limits already covered by traditional Just War thinking.[41]

There remain three further problems associated with the application of *jus post bellum*. First, if positive law is to play a part in shaping judgments about the peace, it is imperative that the (rather extensive) law relating to occupation – almost entirely ignored by *jus post bellum* writers[42] – be placed firmly within the minimalist account. Second, if the vindication of just causes constitutes the limit of acceptable behaviour after wars, how do we evaluate the legitimacy of the peace when the justness of the cause is contested? Finally, the minimalist schema rests on a set of assumptions about the nature of war that are increasingly untenable. I will briefly discuss each of these issues in turn.

Minimalism and the Law of Occupation

The 1949 Geneva Convention on the Protection of Civilians (Convention IV) devoted the bulk of its attention to providing a comprehensive system of protection for non-combatants in occupied territories, spending only a small amount of time on blanket provisions for non-combatants in general.[43] It shared the minimalist interest in restraining the victors after war. As Geoffrey Best explained, the Convention's primary concern was to set limits upon what occupying forces could do to civilians in occupied territories.[44] However, the Geneva Convention was not the first attempt to protect people in occupied territories. The 1899 Hague Regulations insisted that occupiers may not 'forcibly transport or deport civilians' (Article 49) or compel civilians in occupied territories to work (Article 51), and were obliged to ensure that civilians enjoyed adequate food and medical supplies (Article 55). Needless to say, all of these restrictions were breached during the Second World War. The debate at Geneva was framed largely by that experience. Representatives of formerly occupied states called for wide-ranging rights for the inhabitants of occupied territories, including a right to launch insurgencies against the occupiers. Others, particularly the US and UK – occupiers themselves in the postwar world – and recently decolonised states, argued that placing too many restrictions on occupiers would provide succour to guerrillas, terrorists and rioters and make it impossible to govern effectively.[45]

[41] See Rengger, 'Judgment of War'.
[42] It is worth noting that neither Bass, Walzer nor Orend specifically refer to the laws of occupation in their discussion of how occupations be conducted.
[43] See Alwyn V. Freeman, 'War Crimes by Enemy Nationals Administering Justice in Occupied Territory', *American Journal of International Law*, 41:3 (1947), p. 581.
[44] Best, *Law and War*, p. 117. It is worth noting that proposals for a maximalist position, which would have required occupiers to make life pleasant, were levelled by both the victims of occupation in the Second World War and humanitarian agencies but were rejected.
[45] See Raymond T. Yingling and Robert W. Ginnance, 'The Geneva Conventions of 1949', *American Journal of International Law*, 46:3 (1952), p. 395.

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Together the 1949 Convention and 1977 Additional Protocols constitute a comprehensive set of regulations limiting what the victors are entitled to do to civilians in occupied territories. There is no space here to comprehensively cover these regulations[46] but it is worth mentioning the key principles as collated into a single body of law by the British Ministry of Defence.[47] Among many other things, the law insists that all persons be treated humanely, and specifically prohibits murder, torture, corporal punishment and mutilation, the taking of hostages, collective punishments, humiliating and degrading treatment and threats to commit any of these acts (paras 9.3 and 9.4). Civilians enjoy a wide range of rights relating to trial and punishment, including basic rights to fair trials and legal representation (para 9.6). Women and children are to receive special respect and care (paras 9.8 and 9.9) and humanitarian agencies must be granted free passage (paras 9.12 and 9.13). Given that these legal regulations share a basic starting point with the minimalist approach to *jus post bellum* (constraining the victors) it is fair to surmise that whatever other acts may be justified by reference to the just cause for war, it is impermissible to breach these legal requirements.

Just Peace after Unjust or Indeterminately Just Wars

In response to the question of how we evaluate the legitimacy of a peace following an unjust war, Walzer puts forward a position close to the one I set out at the beginning of the article – that the legitimacy of the war and that of the peace be regarded as two separate questions. He argues that whilst an unjust peace may undermine an otherwise just war, an unjust war cannot be legitimated by instituting a just peace.[48] Moreover, Walzer argues that manifestly unjust wars waged for conquest or economic aggrandisement are unlikely to foster a just peace since both these types of wars involve acts of theft. Nevertheless, with one eye clearly on Iraq, he argues that it is possible that a premature act of pre-emption or a misguided military intervention might topple a tyrannical regime. In such circumstances, although the war itself would remain unjust, and a just peace would not retrospectively change its normative status, the peace might still be just in itself.[49] Whilst this argument certainly answers the question of the unjust victor by positing a separate *jus post bellum* test, it does so at the risk of harming the initial rationale of the minimalist approach – of unifying the legitimacy of war and the peace on the grounds that just wars are wars waged to secure a just peace.

If we accept this move, the problem for the minimalist then becomes one of where the criteria for evaluating the peace come from. Recall that for minimalists, the scope of the *jus post bellum* is set by the just cause for war. If we deny in a particular instance that there was a just cause for war, minimalists are left bereft of criteria. Indeed, Walzer cannot make his argument without moving away from minimalism

[46] They span forty pages of the UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2005), pp. 215–55.
[47] The following discussion draws extensively on MoD, *Manual*. Unless otherwise stated, the following in-text references refer to paragraphs in the manual.
[48] Walzer, 'Just and Unjust Occupations', p. 61.
[49] Ibid., p. 61.

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and importing two maximalist propositions: that victors have a responsibility to guarantee the security of people in occupied lands that goes beyond the legal duty to do no harm to civilians in occupied territories and to begin the political and economic reconstruction of the vanquished country.[50] This takes *jus post bellum* beyond the rights vindication endorsed by minimalists. For Walzer, the roots of this proposition come from democratic political theory, which he argues ought to provide the 'central principles' for *jus post bellum*. As Walzer explains, 'we want wars to end with governments in power in the defeated states that are chosen by the people they rule – or, at least, recognised by them as legitimate – and that are visibly committed to the welfare of those same people (all of them)'.[51] Thus, whilst Walzer frames his theory of the peace around the idea of rights vindication and security, he cannot avoid making a maximalist argument – that is, importing criteria from outside the just causes of war – to get around the problem of unjust wars.

There is evidently more than a hint of fixation on Iraq in the shift in Walzer's argument. Having earlier concluded that the invasion was not justifiable, Walzer faces the choice of either insisting that every allied action in Iraq must be necessarily unjust or of importing criteria from outside minimalism and Just War thinking. We do not need to follow Walzer wholly down this path in order to articulate a minimalist response to this problem, however, because earlier we identified criteria that sat outside the just causes of war but that could be accommodated within the minimalist account: international law governing occupation. After an unjust war, the victor remains obliged to treat civilians in accordance with the Geneva Conventions and Additional Protocols. But this legislation is partial, only covering the treatment of civilians in occupied territories. It says nothing about self-determination or economic restitution. On these wider matters, one cannot set forth criteria for just peace without stepping beyond the vindication of rights. If a war is manifestly unjust, therefore, the minimalist approach to *jus post bellum* offers no way of distinguishing better from worse beyond judgments about the treatment of civilians at the hands of the victorious soldiers; a not unimportant issue but nevertheless far from comprehensive.

The minimalist position is better able to deal with the question of indeterminacy – cases where a war may appear just or unjust on both sides. Although barely discussed today, the idea that just causes are often indeterminate was a core component of the Just War tradition prior to the World Wars. It was manifested in the legal proposition that sovereigns had an inherent right to wage war which was borne from the idea that it was difficult to determine which belligerent had justice on its side. If a belligerent's claim to just cause is uncertain, as perhaps it was in relation to Iraq, what is it entitled to do after a war in terms of rights vindication? Vattel offered a relatively straightforward resolution to this problem, arguing that 'if the cause is doubtful, the just object of the war can only be to bring the enemy to a fair compromise and consequently it cannot be continued longer than that. As soon as the enemy offers or consents to come to a compromise, the war must be discontinued'.[52] The suggestion that belligerents offer one another a 'fair compromise' in cases where the just cause for war is doubtful sounds reasonable, but it is a reasonable fiction because it requires some measure of recognition that the cause for war was

[50] Ibid., p. 61.
[51] Ibid., p. 61.
[52] Vattel, *Law of Nations*, p. 344.

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doubtful and that one's enemy may have a degree of justice on its side. Although these ideas are core components of classic just war thinking, since the age of nationalism at least states and societies have been resolutely unwilling to admit uncertainty about the legitimacy of their cause.[53] As David Welch convincingly demonstrated, modern states wage war when they believe they have justice on their side and seldom doubt the justice of their cause.[54]

The nature of war

There is at least one further problem associated with the minimalist perspective as it has been set out to date: it is predicated on a singular understanding of war. Minimalists assume Clausewitzian war between states waged over territory, economic rights or some other types of dispute. Although not yet obsolete,[55] these wars are the exception rather than the rule today. Across the board, the overall number of wars has declined, by one count from over fifty in 1992 to below thirty ten years later.[56] Furthermore, the proportion of these wars that were 'internal' increased from sixty-one percent in 1988 to eighty-three percent in 1999.[57] Indeed, the number of wars since 1975 that fit the mould assumed by the minimalist perspective on *jus post bellum* has barely ever reached beyond ten percent of the total.[58] The point, then, is that minimalism has little to say about the great majority of wars, which occur within states and where the peace is mediated by outside bodies and often overseen by peacekeepers.

The minimalist perspective is predicated on the assumption that victors will seek to exploit the vanquished as far as possible for their own benefit, a not unreasonable assumption given warfare's long history of sacked cities, annexed territories and forcibly acquired riches. Although philosophically coherent inasmuch as the legitimacy of the peace is tied to the original grounds for war, the minimalist position suffers from two major problems. First, it can only provide a partial account of *jus post bellum* after just wars. Because its criteria are drawn from the just causes for war, it cannot provide a framework for evaluating a peace produced by unjust war without importing external criteria and thereby undermining its philosophical coherence. Second, the minimalist perspective is in danger of becoming anachronistic in an age where wars of conquest are all but obsolete and where the material costs of occupation and exploitation seem to far outweigh the potential benefits, not least because of the institutionalisation of norms governing the right to self-determination (understood as the absence of foreign occupation) and prohibiting the abuse of non-combatants.[59]

[53] A shift that Morgenthau used to explain the deterioration of the power of international law to constrain behaviour. Hans J. Morgenthau, 'The Twilight of International Morality', *Ethics*, 58:2 (1948).
[54] David Welch, *Justice and the Genesis of War* (Cambridge: Cambridge University Press, 1995).
[55] As John Mueller insisted they were. See John Mueller, *Retreat from Doomsday: The Obsolescence of Major War* (New York: Basic Books, 1990).
[56] Human Security Centre (University of British Columbia), *Human Security Report 2005: War and Peace in the Twenty-First Century* (New York: Oxford University Press, 2005), p. 23.
[57] Colin McInnes, 'Spectator Sport Warfare', *Contemporary Security Policy*, 20:3 (1999), p. 152.
[58] Human Security Centre, *Human Security Report*, p. 23.
[59] See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004). The idea that norm breaking behaviour

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Maximalist *Jus Post Bellum*: the responsibilities of victory

In contrast to minimalism, the maximalist approach to *jus post bellum* begins from the proposition that there is a 'presumption against war' in just war thinking and that the victors acquire special responsibilities towards the vanquished that go above and beyond the responsibility not to exact more from the foe than is necessary to restore and secure the rights whose violation necessitated war in the first place.[60] According to the maximalist position, *jus post bellum* places additional burdens on combatants irrespective of the justness of their cause. Maximalists require that war crimes trials be held to punish those guilty of war crimes (formalising the quasi-judicial function of war),[61] that the victors take responsibility for governing the vanquished in cases where the latter's government collapses as a result of war (a position endorsed by the 1949 Geneva Conventions),[62] and that they take active measures to avoid sowing the seeds of future war by, for instance, assisting in the long-term economic reconstruction of the vanquished as the United States did with both Germany and Japan after 1945. As I noted earlier, the maximalist position offers a way of evaluating the peace after an unjust war because it does not tie its criteria singularly to the just causes for war, implicitly reinforcing the view that the legitimacy of war and peace be considered separately.

Punishment of war crimes

The idea that there are some crimes so heinous that they fall under a universal jurisdiction and that individuals, including sovereigns, should be held criminally responsible for acts committed during wartime is not new. Even before the Tokyo and Nuremberg trials after the Second World War, liberal states tried to uphold these two ideas along with the notion that the most appropriate way of dealing with war criminals should be 'legalist' rather than purely politically expedient. That is, liberal states have consistently held the view that war criminals should be put on trial – and given a fair trial at that – rather than summarily executed.[63] Before Tokyo and Nuremberg, states attempted to deal with the vanquished Napoleon and the defeated German Kaiser and his lieutenants through judicial proceedings.[64] Both attempts were, by and large, unsuccessful because the legal process could not be imposed on defeated states that were left unoccupied. The post Second World War trials were much more successful in their own terms.[65] In the wake of these trials, the UN

incurs costs (political, military and economic) is a mainstay of constructivism. See Christian Reus-Smit, *American Power and World Order* (Cambridge: Polity, 2005).

[60] See Michael J. Schuck, 'When the Shooting Stops: Missing Elements in Just War Theory', *The Christian Century*, 26 October 1994. The idea of the 'presumption against war' is described as a 'distortion' of classical just war thinking by James Turner Johnson. See James Turner Johnson, *The War to Oust Saddam Hussein*.

[61] Davida E. Kellogg, 'Jus Post Bellum: The Importance of War Crimes Trials', *Parameters*, 32:3 (2002), pp. 87–99.

[62] Walzer, 'Judging War', p. 15.

[63] Though Churchill, of course, famously argued that the Nazis be summarily shot in the aftermath of the Second World War.

[64] See Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).

[65] See R. H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), and Robert H. Jackson, *The Nurnberg Case as Presented by Robert H. Jackson* (New York: Cooper Square Publishers, 1971).

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established an International Legal Commission (ILC) with the task of creating a global war crimes court. Along with many others among the UN's early aspirations the idea of a universal court fell victim to the Cold War. Nevertheless, states were able to agree in the 1948 Genocide Convention, that genocide constituted a universally punishable crime. Although no executive instruments were created to address that crime, individual states have invoked this universal jurisdiction. For instance, Israel claimed universal jurisdiction for the crime of genocide when it forcibly extradited and tried Nazi war criminal Adolf Eichmann and the British Law Lords recognised the principal of universal jurisdiction in its ruling on the Pinochet case.[66] Nevertheless, such prosecutions remained highly selective. No states claimed a universal right to put genocidal leaders like Idi Amin and Pol Pot on trial, creating a culture of impunity amongst states and non-state groups who commit crimes that shock the conscience of humanity.

This culture of impunity became even more evident in the uncivil wars of the 1990s.[67] Having failed to halt or ameliorate the bloodshed in Rwanda and the former Yugoslavia, the Security Council sought to punish the perpetrators by creating two ad hoc war crimes tribunals. Both tribunals (ICTY for Yugoslavia and ICTR for Rwanda) got off to very slow starts. There were accusations of obstructionism by the Security Council, whose members seemed to place a higher value on *realpolitik* than on international justice.[68] Nevertheless, both tribunals have taken on momentum and have contributed to the development of international legal and political norms, not least through the arrest and trial of Slobodan Milosevic.[69] The process culminated in the creation of the International Criminal Court (ICC), which came into being in 2002, which is empowered to prosecute individuals for genocide, war crimes and crimes against humanity in circumstances where the host nation is either unable or unwilling to investigate complaints.[70]

In short, therefore, the idea of prosecuting war criminals as opposed to shooting them or releasing them is hardly new, but in the service of the maximalist approach to *jus post bellum* it has assumed the status of a post-war duty. Whilst the concept of punishment usually involves both retribution and rehabilitation, some maximalists have tended to emphasise one or other. Kellogg, for instance, emphasises retribution. Accordingly, 'the 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*'.[71] For Kellogg, defining legitimate war as one that aims to right a wrong

[66] On Eichmann see Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2001), p. 30. On Pinochet see Marc Weller, 'On the Hazards of Foreign Travel for Dictators and other International Criminals', *International Affairs*, 75:3 (1999), pp. 599–617.

[67] In Bosnia, Rwanda and elsewhere. See, *inter alia*, on impunity Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000), on Bosnia Jan-Willem Honig, *Srebrenica: Record of a War* Crime (London: Penguin, 1988), and on Rwanda Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000).

[68] Most notably Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000).

[69] See Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford: Oxford University Press, 2004), esp. pp. 115–46.

[70] See William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), pp. 21–70.

[71] Emphasis added, Kellogg, 'Jus Post Bellum', p. 88.

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creates an obligation to try those guilty of various crimes. She argues that there at least two reasons why this must be. First, it makes 'no strategic sense' to wage (presumably) just war yet stop short of prosecuting war criminals. If war is only waged to right a wrong, the wrong cannot be considered wholly righted if those responsible are not held to account. Second, Kellogg offers a robust moral defence of retribution, insisting that '[d]eclining to do full justice for those who have been most grievously wronged by aggression . . . leads to the perpetration of further moral injustice on both the victims of war crimes and on innocents'. Such an outcome would produce 'illegal and immoral outcomes to Just War'.[72] Although it corresponds with the minimalist view that just wars should aim at doing more than merely restoring the status quo, the elevation of one-sided retribution to a core determinant of a war's legitimacy inherent in this approach presumes certainty in relation to *jus ad bellum* and forgoes the possibility of compromise proposed by Vattel. Moreover, there is a danger that an approach based solely on the punitive element, especially if the process is one-sided, could become a licence for revenge, which 'is strictly ruled out as an animating force' according to Orend.[73]

The alternative approach to war crimes trials views them as part of a process of rehabilitation. Gary Bass, for instance, argues that after the most extreme cases of genocide there is a 'compelling argument' that the interveners have a responsibility to reconstruct the defeated state.[74] This responsibility, Bass argues, 'is not a matter of vengeance; it must be pedagogical or reformist, not simply retributive'.[75] From this perspective, a process of war crimes trials encourages both a reckoning with the deeds committed in war and draws a line under future retribution. The guilty are forced to confront their crimes, and those who were not guilty of specific crimes are entitled to enjoy protection from the forced assumption of collective responsibility. This process might also help foster a culture of reconciliation.[76]

Governance and reconstruction

The recent cases of Afghanistan and Iraq have brought the question of the responsibility of the victors to assume the reigns of government to the fore. As I mentioned earlier, some critics of the 2003 invasion of Iraq argued that it was the United States' failure to properly prepare for the peace that undermined the war's legitimacy. Certainly, there is something to be said for the claim that the numerous insurgencies that have confronted allied forces would have been lessened had the allies proven more successful in rapidly improving the lives of ordinary Iraqis. Instead, across a range of indicators, including security and economic, the standard of living in Iraq five years after the invasion is as bad, if not worse in some areas, than it was under Saddam's tyranny.[77]

[72] Kellogg, 'Jus Post Bellum', p. 88.
[73] Brian Orend, *War and International Justice: A Kantian Perspective* (Waterloo, Ontario: Wilford Laurier University Press, 2000), p. 232.
[74] Bass, 'Jus Post Bellum', p. 396.
[75] Ibid., p. 396.
[76] Louis V. Iasiello, 'Jus Post Bellum: The Moral Responsibilities if Victors in War', *Naval War College Review*, 57:3/4 (2004), p. 48.
[77] See Paul Rogers, *Iraq and the War on Terror: Twelve Months of Insurgency* (London: I. B. Tauris, 2005).

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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. Some, such as Bass, limit this requirement to cases where a war has been waged to end genocide, primarily because in such cases a failure to commit to reconstruction is indicative of an absence of genuine humanitarian intent behind the original intervention.[78] This position is broadly endorsed by Wheeler, who insists that it is an intervention's humanitarian outcomes, not its motivations, that primarily shape its legitimacy.[79] This idea also finds voice in the International Commission on Intervention and State Sovereignty's notion of a 'responsibility to rebuild' after armed intervention.[80]

An alternative perspective holds that the responsibility to assume the responsibilities of government is grounded in the changing nature of peacemaking. According to Stahn, at the outset of the twentieth century wars were normally resolved either by bilateral or multilateral negotiation or were produced by the capitulation of one or more of the belligerents, resulting in conquest or occupation.[81] Where wars were settled by negotiation, such negotiations usually focused on the redistribution of territories, financial payments for damages and the future control of armaments. Since 1945, however, both types of war-ending have become rarer. On the one hand, a significant body of law has developed prohibiting both the alteration of borders by force (*uti posseditis*) and foreign rule, the latter under the commonly accepted norm that sovereignty derives from the will of the people.[82] On the other hand, various international institutions, ad hoc coalitions and individual states have intervened as peacemakers with greater frequency. What might be labelled 'new peacemaking' goes beyond measures designed to help belligerents reach compromise and includes building political structures that respect human rights, permit self-determination, punish wrongdoers and promote social, economic and legal reconstruction.[83] This perspective, which is implicitly founded on the view that peace should be understood positively as the acquisition of certain societal goods (such as the fulfilment of basic needs and rights, mechanisms for non-violent conflict resolution, an inclusive

[78] Bass, 'Jus Post Bellum', pp. 400–1. The importance of intentions (as opposed to motives or outcomes) in adducing the morality of humanitarian intervention is outlined in Alex J. Bellamy, 'Motives, Outcomes, Intentions and the Legitimacy of Humanitarian Intervention', *Journal of Military Ethics*, 3:3 (2004), and Fernando Tesón, 'Eight Principles of Humanitarian Intervention', *Journal of Military Ethics*, 5:2 (2006).

[79] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000). Wheeler differs from Bellamy and Tesón in arguing that outcomes are important in and of themselves, whereas Bellamy and Tesón suggest that they are important because the degree of investment and preparation for the peace is indicative of an actor's intentions.

[80] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: ICISS, 2002).

[81] Stahn, '*Jus ad bellum* . . .', p. 1.

[82] A norm encapsulated in Article 23 of the Universal Declaration of Human Rights. As Brad Roth points out, the 'will of the people' is a particularly indeterminate phrase that democracies and non-democracies alike can, and do, point to in order to legitimate sovereign rule. The norm does, however, prohibit two types of government: rule by ethnic minorities (e.g. white Rhodesia and apartheid South Africa) and rule by foreign occupiers. See Brad R. Roth, *Government Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), pp. 37–41.

[83] See, *inter alia*, W. Michael Reisman, 'Stopping Wars and Making Peace: Reflections on the Ideology of Conflict Termination in Contemporary World Politics', *Tulane Journal of International and Comparative Law* 6:5 (1998), Roland Paris, *At War's End*; Richard Caplan, *International Governance*; and Simon Chesterman, *You, the Peoples*.

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political and economic order), insists that those who set themselves up as peacemakers acquire the responsibility to help build positive peace. As with the case of genocidal states, this broader image of the responsibility to assume the reigns of government finds support in the *Responsibility to Protect*'s notion of the responsibility to rebuild.[84] Furthermore, there are grounds for suggesting that this conception is in the process of being adopted by international society's peak bodies for peace and security matters. One of the few elements of the UN's 2005 reform negotiations to win almost universal consensus was the idea of creating a peacebuilding commission to oversee and coordinate the UN's role in post-war reconstruction.[85] Although the UN has developed a track record of running transitional governments, dating back to the trusteeships of the 1950s, the creation of a Peacebuilding Commission goes some way towards formalising the idea that international society bears a collective responsibility for rebuilding states and societies after war.[86] Significantly, recent evidence from Iraq (and to a lesser extent Afghanistan) suggests that international society may acquire those responsibilities even if its peace and security institutions played no part in initiating, or intervening, in the war that precipitated the need for transitional government.[87] This reinforces the view that the legitimacy of the peace and that of the war should be scrutinised separately, a point I will return to in the following section.

A third way of approaching the question of transitional government from a maximalist perspective is to argue that the distinction between occupation and the assumption of government based on the 1907 Hague regulations, so crucial to the minimalist case, is obsolete. Benvenisti argues that there are three reasons why this is so.[88] First, the expansion of the modern state and collective expectations of the state's role in society and the economy make it difficult to distinguish areas of administration that should remain beyond the scope of the authority bestowed upon the occupier.[89] Indeed, some commentators argue that even under the Hague regulations, occupiers were entitled to define almost any area of public policy as necessary for the maintenance of public order, in practice enabling them to legislate in any area they wished to intervene in.[90] In practice, by defining 'public order' broadly, occupiers

[84] ICISS, *Responsibility to Protect*.

[85] See Richard Ponzio, 'The Creation and Funding of the UN Peacebuilding Commission', *Saferworld*, November 2005.

[86] Though in practice, that responsibility can be subcontracted to regional organisations and coalitions of the willing, as the Security Council has done in relation to Afghanistan and Iraq.

[87] In relation to Iraq, in Resolution 1483, the Security Council felt the need to endorse and authorise the allied transitional authority – and just as significantly, the US felt the need to request such endorsement.

[88] The basic propositions come from Eyal Benvenisti, 'The Security Council and the Law on Occupation: Resolution 1483 in Historical Perspective', *Israel Defence Forces Law Review*, 19:1 (2003), pp. 23–7. Benvenisti actually identifies four problems, but the second ('lack of neutrality') and fourth 'avoidance' amount to much the same thing – the idea that – despite the Nuremberg court's insistence otherwise – the Hague regulations did not become customary law principally because they were never actually practised.

[89] Myers McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: Transnational Coercion and World Public Order* (Dordrecht: Martinus Nijhoff, 1994), p. 746.

[90] See Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 2004), pp. 59–106. As McDougal and Feliciano put it, 'occupants did in fact intervene in and subject to regulation practically every aspect of life in a modern state which legitimate sovereigns themselves are wont to regulate'. McDougal and Feliciano, *Law and Minimum World Public Order*, p. 747.

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went well beyond simply tempering respect for the domestic law of the vanquished with international standards.

Second, Benvenisti argues that in practice occupiers have never behaved neutrally to the population of vanquished states, as appears to be required by minimalism. He argues that both prior to and during the Second World War, all the major belligerents eschewed the Hague Regulations. Britain, for example, used three sets of arguments to dismiss the regulations' applicability: recognition of governments other than the one wielding administrative authority, the conclusion of separate agreements with 'local elements' and legalised claims to sovereign authority (obtained through 'unconditional surrender') in vanquished enemy states.[91] This suggests to Benvenisti that the Hague Regulations did not attain the status of customary law and should not therefore guide reflection on the legitimacy of the peace.[92]

The third problem with the distinction between occupation and government so central to the minimalist approach lies in its assumption that the protection of the civilian population involves the preservation of sovereign authority in its pre-war condition. The minimalist approach itself seems to suggest that this assumption cannot be an absolute, for – as we saw earlier – it permits the removal of a government and transformation of a state and society in cases where the nature of the state and/or society themselves gave just cause for war. A narrow reading of the Hague Regulations suggests, however, that if the will of the people and sovereign authority of the people collide, then the occupier is duty bound to protect the latter and not the former. This idea had its roots in colonial politics as Great Powers amassed at The Hague shared an interest in legitimating colonial rule.[93] Hence, they agreed that if an enemy state is entirely extinguished, sovereign authority passes to the victor with no regard for the will of the people. This argument, Benvenisti shows, was also used to justify colonial reoccupation in the latter stages of the Second World War.

If the distinction between occupation and the assumption of the reins of government is untenable but it is still agreed that occupying forces have a responsibility to protect civilians in their care, then it follows that victors have a responsibility to assume transitional authority. This shift, Benvenisti argues, is evident in the differences between the Hague regulations and the fourth Geneva Convention, though the distinction between Hague law and Geneva law is not a clear proxy for the distinction between minimalism and maximalism. First, he argues that the Convention places the protection of the civilian population ahead of the preservation of sovereign authority, pointing as evidence to Article 47 which insists that the occupants of occupied territories must not be deprived of their rights. The meaning of this distinction is contested and could be read as supporting either the minimalist view (it restrains the victors from violating rights) or maximalist case (it creates positive duties to assume transitional government). Second, he argues that the Convention affords occupiers many more duties and rights than the Regulations. Whilst many of these stipulations (such as the duty to treat people humanely, Article

[91] Benvenisti, 'The Security Council and the Law', p. 25.

[92] For this argument to carry the weight that Benvenisti gives it would require a conception of legitimacy that gave overriding weight to legal legitimacy, which for reasons I discussed earlier this essay refuses to do.

[93] Benvenisti, 'The Security Council and the Law', p. 26. The connection between the Great Powers' interest in legitimating colonial rule and international law governing occupation and legitimate combatancy in discussed in detail by Karma Nablusi, *Traditions of War: Occupation, Resistance and the Law* (Oxford: Oxford University Press, 2002).

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27) could be read in support of either perspective, others – in particular the duty to facilitate the care for and education of children (Article 51), the duty to ensure medical and food supplies (Article 56) and the obligation to enable relief schemes (Article 59) – create duties that go beyond the duty to restrain the behaviour of victorious soldiers towards civilian populations. Whilst a minimalist case could no doubt be made for each of these additional duties (for example, arguing that words like 'enable' and 'facilitate' simply mean not taking measures to prevent the distribution of these goods rather than creating a duty to provide them), the overall intention behind them is to create duties beyond the duty to limit postwar policy to rights vindication within the bounds of commonly accepted human rights. There are at least two reasons for thinking this. First, the Convention itself contains a mechanism authorising the occupying power to repeal or suspend the law of the occupied territory if it constitutes a 'threat to security' or undermines the Convention's application (Article 64). This article alone suggests that the Convention means its provisions to be read as positive ('a responsibility to') not negative ('a responsibility not to inhibit') duties. Second, the *traveaux preparatoires* demonstrate that these additional responsibilities were understood at the time as positive duties and were deeply controversial because of it. For instance, reflecting on these clauses, the chair of the US experts' delegation to the 1947 conference that laid the foundations for the Convention, Albert Clattenberg, complained that:

> The state of mind of the delegates of the liberated countries described above led in the first place to the making of wholly impractical suggestions almost as though it were believed that legislation could make the lot of conquered peoples and other victims pleasant . . .; as a Chinese Red Cross delegate is reputed to have said the previous summer, the cure for all China's problems would be to have new conventions along these lines and then to persuade some other powers to occupy the entire country.[94]

The point here is that a maximalist case can be made by reference to the prevailing law of occupation which, by this reading, insists that victors are obliged to do more than simply refrain from unduly harming the vanquished.

In summary, the maximalist case begins from the position that because war always produces bad consequences, victors have a moral and legal obligation to do more than merely satisfy their own rights afterwards. They must also remove the seeds of potential future war by punishing those guilty of initiating aggressive war and positively assisting the civilian population in the building of legitimate and peaceful government institutions and in the rebuilding of the domestic economy. Whilst some variants of maximalism suggest that these additional duties only accrue after certain types of war (such as war against a genocidal state), other variants insist that the responsibilities inhere after all types of war when the government has collapsed. This begs the additional question of what responsibilities a victor has towards enemy civilians if the vanquished state does not collapse, especially in cases where the vanquished state was both the cause of war and a persistent violator of its citizens rights. Iraq 1991 is a case in point. For some commentators at the time, the US-led coalition had a moral responsibility to overthrow Saddam's regime in order to both remove a threat to regional security and protect the rights of Iraqi citizens.[95]

[94] Cited in Best, *Law and War*, p. 118.

[95] William Shawcross, for instance, argued that 'Saddam should have been removed in 1991', William Shawcross, 'After Iraq: America and Europe', 2003 Harkness Lecture, King's College London, 27 March 2003.

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Problems with the maximalist approach

Whilst normatively appealing, there are at least five problems with maximalism, which limit its applicability. First, and perhaps most importantly, maximalism lacks a justification of *why* the victors acquire extra responsibilities in every type of war. Because its overall case rests on the claim that war always produces large-scale harm and therefore those who initiate war acquire certain additional responsibilities, maximalism has difficulty accounting for cases where either the victor did not choose the war (it fought only because it was unjustly attacked) or where the war actually reduced the overall amount of immediate evil (such as a war to rescue a people from extermination). It therefore only makes sense to award maximalist responsibilities to the victors of two types of war, both of them aggressive to a certain extent. First, aggressive wars aimed at effecting regime change, much like the 2003 war in Iraq. In cases like Iraq where war is ostensibly waged to enhance regional peace and security by removing a regime that, by its very nature, threatens that peace and/or rescue the state's citizens from tyranny, it stands to reason that the aggressors ought to satisfy maximalist responsibilities. Such aggressive wars override the 'presumption against aggressive war' that lies at the heart of the contemporary normative order in relation to force.[96] Absent Security Council authorisation, justifying regime change within this normative order involves an insistence that the justice of the cause is so convincing that the prevailing legal rules order should be overridden. In other words, and bearing in mind the account of legitimacy offered earlier, such wars might be 'illegal but legitimate' only if the moral case for war is strong enough to overcome the legal objections.[97] It stands to reason, therefore, that by initiating war the (justified) aggressors acquire *jus post bellum* responsibilities that go beyond minimalist constraints because it is precisely the achievement of ends related to maximalist responsibilities (creation of legitimate governments, punishment of tyrants etc.) that provided the grounds for war in the first place. This line of reasoning also applies to the second type of aggressive war that sits comfortably within the maximalist framework, third party intervention in a humanitarian catastrophe or civil war.

The problem for the maximalist account comes in relation to non-aggressive wars. Although states that are unjustly attacked by their neighbour may certainly prefer to effect regime change in order to prevent future attacks, there are no good reasons for *obliging* them to do so even if the aggressor state's government collapses as a result of the war. What if the just defender is so exhausted by war that it can ill-afford to occupy the defeated state, maintain law and order there and assist with reconstruction? What if it chooses to negotiate a truce that leaves it considerably short of vindicating its rights for similar prudential reasons? Finally, what if parties representing the victims of ethnic cleansing in a civil war decided not to pursue war crimes

[96] A common starting point for debate on intervention is the view that the prevailing normative order is based on just such a presumption. See, *inter alia*, Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), and Michael J. Smith, 'Humanitarian Intervention: An Overview of the Ethical Issues', *Ethics and International Affairs*, 12:1 (1998).

[97] The Independent International Commission on Kosovo found NATO's intervention to be 'illegal but legitimate' on precisely these grounds. See Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), p. 4.

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suspects because they fear that such pursuit might endanger a fragile peace? By the maximalist account, such choices would cast doubt on the morality of the defensive war. Not only is this a counter-intuitive proposition, it is one for which there are no grounds within either the Just War tradition or international law. Why should the victim of aggression expend blood and treasure trying to reconstruct the former aggressor? There are strategic reasons as to why it might *want to* but no good reasons why it is *morally obliged* to as the maximalist position suggests.

One way around this problem might be to argue that the minimalist and maximalist accounts of *jus post bellum* should be married into a single approach that awarded belligerents different types of responsibilities depending upon the type of war they waged. Those waging defensive wars would only be required to follow the strictures of the minimalist account, whilst those waging (justified) aggressive wars would be required to also fulfil the maximalist requirements. The one potential problem with this view is that – like minimalism – it assumes that the justice of war is uncontested. If the justice of an aggressive war (such as Iraq 2003) is contested, efforts to fulfil the maximalist peace might only compound the wrong in the minds of many (though not all) of those who disputed the grounds for war. Divorcing questions about the justice of the war from those concerning the justice of the peace can obviate this problem. Arguably, this is precisely what has happened in relation to the world's response to Iraq whereby many (this author included) who opposed the war, also oppose early withdrawal on the grounds that by launching the war and effecting regime change the allies have acquired certain responsibilities to the Iraqi people.[98] This position is logically untenable if one asserts that *jus post bellum* is linked to *jus ad bellum*[99] and that the Iraq war was unjust, because the peace that coalition forces are trying to create must, by its very nature, be an unjust peace.

The second problem with maximalism is closely linked to this latter point. The maximalist position is uncertain about the relationship between *jus post bellum* and the overall legitimacy of different types of war. For instance, does a war to rescue victims of genocide become unjust if the intervener does not assume the reins of government afterwards? Recall that earlier we pointed to the idea that in cases such as this a commitment to reconstruct should serve as a *proxy* for measuring the interveners' intentions. A lack of commitment to building the peace can be read as a lack of intention to wage war to create such a peace and might point to self-interested intentions. Thus, as noted earlier, Kenneth Roth argued that the invasion of Iraq could not be considered a humanitarian intervention because the US failed to plan for, and subsequently invest in, the peace. The problem with this view is that it assumes either than every intervener has the wherewithal to fulfil maximalist obligations or that only those that do should intervene. This latter proposition

[98] Other notable examples include – Kenneth Roth, 'The Right Exit', *New Statesman*, 15 March 2004. Gareth Evans' International Crisis Group argued that any withdrawal should be gradual and only take place as the security situation improved. See International Crisis Group, 'Iraq: Insurgency and Sectarianism', 14 February 2006.

[99] Unless one shares McMahon's view that a war that is initially unjust can later become just, a position that is inconsistent with the prevailing view of the Just War tradition and international law. In effect, war involves taking measures that are generally proscribed (i.e. killing people in peacetime is murder). Those measures are legitimate in war because warriors obtain a 'licence' to conduct them by virtue of the *jus ad bellum*. See Jeff McMahon, 'Just Causes for War', *Ethics and International Affairs*, 20:1 (2006).

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dramatically reduces the number of potential agents who might save strangers in urgent peril. In the dark days of the Rwandan genocide, would it not have been better had Rwanda's neighbours intervened militarily to stop the killing even though they might not have been able to make a long-term commitment to building the peace? This suggests another exception to maximalist obligations: supreme, and supreme humanitarian, emergencies.[100] In other words, where the use of military force is the only way to end the mass killing of non-combatants, or where the defeat of a belligerent is likely to lead to such killing, aggressive war may be regarded as legitimate irrespective of the aggressor's commitment to maximalist *jus post bellum*. In these cases, Wheeler's less stringent test that interveners in such cases should choose strategies that do not undermine the achievement of positive humanitarian outcomes is more apt.[101]

Third, although maximalism is an addition to minimalism not a replacement, there is the possibility that a maximalist approach might violate the requirements of minimalism. To take a recent example, if we accept that a just cause for war in Iraq can be found in the formal legal claim to be fulfilling the terms of the 1991 Security Council Resolution (687) that ended the first Gulf War, it could be argued that doing this by imposing liberal democracy on Iraq is going well beyond the scope of activity permitted by the just cause for war. By this line of argument, once the threat of Iraqi WMD proliferation had been removed and reparations for damages caused by Iraq extracted, then the minimalist requirements of *jus post bellum* would have demanded a withdrawal from Iraq. The specifics of the example are certainly debateable but it helpfully illustrates the tension between the two conceptions.

The final two problems cast doubt on maximalist precepts themselves. The fourth problem is that maximalist ideas are almost utterly alien to classical Just War considerations. Whereas the minimalist approach is securely grounded in the classical Just War tradition, there is no sense either within that tradition or within international law more broadly that belligerents are morally or legally required to perform all the tasks expected by maximalists.

Finally, the maximalist approach assumes a general consensus on the most appropriate form of post-conflict society whereas it could be plausibly argued that no such consensus exists. Absent such a consensus, it could be argued – echoing EH Carr's attitude towards the idea of international harmony – that the maximalist perspective is little other than the interests of the powerful masquerading as universal consensus.[102] It is not self-evident that individuals *do* have fundamental rights that create commensurate obligations for the victors in war other than the obligation to minimise direct harm. Bhikhu Parekh, for example, argues that liberal rights cannot provide the basis for a theory of humanitarian intervention because liberalism itself is rejected in many parts of the world.[103] In short, these final two criticisms suggest that maximalist responsibilities inhere only when there is consensus about what those responsibilities are and upon which actors they rest.

[100] I deliberately mean to refer both to Walzer's 'supreme emergencies' and Wheeler's 'supreme humanitarian emergencies'.
[101] Wheeler, *Saving Strangers*.
[102] E. H. Carr, *The Twenty Years' Crisis 1919–1939* (Basingstoke: Macmillan, 1946), pp. 75–85.
[103] Parekh, 'Rethinking Humanitarian Intervention', *International Political Science Review*, 18:1 (1997), pp. 54–5.

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Rethinking *Jus Post Bellum*

The addition of a third element to just war thinking is much more problematic than has hitherto been acknowledged. As yet unresolved questions about its connection to the other just war criteria, their applicability in different types of war, their impact upon broader judgments about legitimacy, and relationship with the indeterminacy of the *jus ad bellum* criteria, suggest that it is premature to insist that *jus post bellum* has become a third component of the Just War tradition. Throughout, I have pointed towards different ways of overcoming some of these problems and forging a more coherent and defensible account of *jus post bellum*. Instead of a conclusion, therefore, I will end by outlining six points which should play a key role in framing future debate about the nature and scope of *jus post bellum*.

1. The justice of the peace should be evaluated independently of the justice of the war.

Jus post bellum should not be considered a third element of Just War thinking but should pose a test of legitimacy in its own right for at least four reasons. First, maintaining the link makes it impossible to use *jus post bellum* to evaluate the aftermath of wars perceived to be unjust because if we remove the *jus ad bellum* licence to wage war then the victors have no licence to forge a peace. This produces counter-intuitive outcomes. As mentioned earlier, it would mean that for those who opposed the invasion of Iraq, the only just course of action would be the immediate withdrawal of allied forces. Second, if the link were maintained, indeterminacy in relation to *jus ad bellum* would make judgments about the peace indeterminate, irrespective of the merits of the peace itself. Third, maintaining the link makes it much more difficult to import ideas and concepts alien to the Just War tradition without doing a disservice to the tradition itself. Finally, arguing that a war to rescue non-combatants from genocide would be unjust if the party that intervened was unable to rebuild the state it was intervening in reduces the number of actors who we could look to for intervention and therefore the likelihood of rescue itself. As I demonstrated earlier, a full account of minimalism and maximalism require the importation of ideas from outside the Just War tradition. This is not to downplay the importance of holding peace settlements to normative scrutiny. Just the opposite. The argument here is that the justice of the peace should be assessed independently of the war. Thus, if one accepts maximalist propositions, it would be legitimate to argue that a state did wrong because after fighting a just war it withdrew too early and without assisting adequately in the reconstruction without having then to insist that this casts doubt on the legitimacy of the war itself. Those judgments would also, of course, be framed by the war's causes and the victor's ability to contribute to the peace.

2. The responsibility to uphold the jus post bellum *is collective.*

Because the rights and commensurate obligations associated with *jus post bellum* are universal, international society – through its most appropriate institutions – has a

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duty to oversee *jus post bellum*. Furthermore, as I argued earlier, the only way to legitimise the peace after an unjust war or a war whose justice is indeterminate is to permit international institutions to either oversee and authorise a particular peace or assume responsibility for the peace themselves.[104] This involves two sets of duties. First, through the UN Security Council especially, international society has a duty to ensure that victors do not go beyond the limits set by minimalism in the punishment and restructuring they exact on the vanquished. Although states that are unjustly attacked have a right to remove the threat of future war by reconstituting the aggressor, they do not have an inherent right to restructure a state however they see fit. On the one hand, it is a commonly established norm that the system of government reflect the 'will of the people' in one way or another. On the other hand, the Security Council enjoys primary responsibility for international peace and security and, as history has repeatedly demonstrated, the treatment of a state after war is of pivotal importance to international security more broadly. This is not to say that the Council is a perfect and representative body, but insisting on collective oversight reduces the likelihood of abuse and self-interested restructuring whilst increasing that likelihood that the 'will of the people' and needs of international order will be taken into consideration. The second element of collective responsibility relates to cases where a just victor lacks the material capability or political will (in cases where the just party has either been attacked or intervened to halt a genocide). As discussed earlier, it is problematic to rule out the use of force in circumstances where force could do good but where the relevant actor is unable to build the peace. In such circumstances, once again, those charged with global responsibilities for international peace and security ought to acquire a responsibility to help rebuild after war, thus helping to remove the seeds of future conflict.[105]

3. Different responsibilities emerge from different types of war.

It stands to reason that the responsibilities accrued by war are related to the type of war waged – a key component of the minimalist approach. However, certain obligations (negative duties) are universal and inhere regardless of the type of war. In particular, the obligation not to directly harm non-combatants or impede the delivery of vital services to non-combatants holds irrespective, because the commission of harm in these circumstances is today regarded as a universal crime. Many of the positive duties discussed in the preceding pages, however, ought to be related to the type of war waged. By this account, states that wage an unjust war have a responsibility not only to fulfil the minimalist requirements but also maximalist requirements, if there is a clear consensus about the latter in a particular case.[106] In cases where the war was clearly unjust or where the justice is contested, that responsibility is best taken up by the word's key institutions dealing with peace and security (the UN Security Council), war crimes (the ICC) and economic reconstruction (the World Bank and IMF). States forced to fight defensive wars acquire none

[104] As happened in Iraq, where the US-created transitional authority received the blessing of the UN Security Council.
[105] A position put forward by the ICISS, *Responsibility to Protect*.
[106] And as noted above, international institutions have a special role to play in such cases.

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of the maximalist responsibilities. Instead, they are required only to desist from prosecuting the war beyond the secure vindication of their rights and to conduct themselves in accordance with commonly established rules. The same holds, I argued earlier, for states who intervene to rescue non-combatants facing extermination. In these cases, the responsibility to rebuild falls upon international society in general and its key institutions in particular. Maximalist responsibilities are produced when states intervene to remove tyrants but more often than not, instances of this type of intervention whose legitimacy is relatively uncontested are rare and normally collective.

4. Rights vindication is a vital constraint but is already a component of jus ad bellum *and* jus in bello.

Although rights vindication constitutes an important brake on what a victor is entitled to do, there are grounds for scepticism as to whether this alone adds anything to the Just War tradition. In other words, as I noted earlier, for Vattel among others limiting the peace to the vindication of rights is already embedded within the Just War framework (in *jus ad bellum*). If, therefore, it is decided to limit the *jus post bellum* to rights vindication, there are serious grounds for doubting whether this necessitates the addition of a third pillar to the Just War tradition. They key contribution of *jus post bellum* thinking, however, is that the nature of the rights that might be justly vindicated is different in different types of war and – as I argued earlier – should be informed by an appropriate balance of legal, moral and political considerations.

5. There is an important difference between entitlement and obligation.

By this reading, both the minimalist and maximalist approaches include entitlements and obligations and it is important to distinguish between the two. Entitlements are things that the victors may choose to do, but are not committing a wrong if they choose not to. It is hard to see why a state that is unjustly attacked does wrong if, after defending itself, it chooses not to prosecute suspected war criminals (absent a global process), reconstitute the enemy's government, or contribute to economic rebuilding. The accounts offered here suggest that there may be good grounds for *permitting* such activities but not for obligating them. However, within this schema there are certain obligations as I outlined earlier.

6. Beyond rights vindication, elements of jus post bellum *must be developed through consensus.*

It is difficult to maintain a coherent account of *jus post bellum* in either its minimalist or maximalist variant without importing criteria from outside the Just War tradition. To date, theorists have been content to import basically liberal ideas relating to the

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rule of law, human rights, governance and the economy. As I noted earlier, however, this presumes a far greater degree of global consensus on such matters than many observers and governments would admit to. This lack of consensus casts doubt of the authoritativeness of *jus post bellum*. Whilst it may guide the ethicists pen, without a degree of authoritativeness there is no reason to think that politicians and soldiers will feel obliged to act in accordance with the new rules. As I indicated earlier, legitimacy derives from a consensus about agreed moral principles and political judgments about how they ought to be applied in specific cases. In order to secure a degree of authority for maximalist precepts, therefore, it is important to build a global consensus on the nature of good governance, human rights and economic reconstruction. Such an approach to thinking about post-conflict reconstruction is emerging within, for example, the UN's new Peacebuilding Commission. Whatever the outcome of that initiative, criteria beyond rights vindication should be incorporated into the *jus post bellum* only once a consensus has emerged.

It is premature, therefore, to assume that the Just War tradition has a third component dealing with the justice of the peace. Far too many questions and inconsistencies remain unresolved for that. Nevertheless, scholarship on *jus post bellum* has generated useful criteria for holding post-war settlements to account. In the immediate term, it is imperative that the search for just peace is not hijacked by the Iraq experience. In the longer term, it is important to interrogate the questions of where the authority to define the peace lies and the impact of *post bellum* judgments on *ad bellum* and *in bello* considerations.

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