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What should be done after war? This book deals with the timely and important topic of post war justice, or *jus post bellum*. Just war theory is a thriving part of legal and political philosophy, and the leading normative theory on issues of war and peace. Traditional just war theory consists of two branches: *jus ad bellum* and *jus in bello*. Aside from regulating the initiation of war and the conduct in war, there is now a growing interest in regulating the aftermath of war. As a result, *jus post bellum* is the welcomed third branch of just war theory. The aim of this book is twofold. First, to analyze the concept of *jus post bellum* and contribute to an adequate understanding of this new branch. Second, to critically assess and further develop *jus post bellum*.

This book delves into the historical roots of *jus post bellum*, the question of responsibility, the distinction between minimalist and maximalist positions, and the nature of peace as the overall goal of just war theory. Ultimately, the book pleads for modesty in post war justice. What should be aimed for after war is a decent peace; a peace that is ‘just enough’ instead of perfectly just. A medium conception of *jus post bellum* that emphasizes responsible duty bearers is the best way to achieve that. Medium *jus post bellum* wants to create a decent and safe society after war, is concerned with fundamental human rights, and includes limited political reconstruction and provisions such as food and shelter. As opposed to minimalist and maximalist understandings of *jus post bellum*, it is argued that medium *jus post bellum* improves just war theory, does not exceed its limited character, is internally coherent, and above all, is most effective in limiting the horrible effects of war.
Jus Post Bellum and the Nature of Peace

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Your will ought to aim at peace; war should be waged only as a necessity, and waged only that God may set us free from necessity and preserve us in peace. For we do not seek peace in order to stir up war, but we wage war in order to acquire peace. Be, therefore, a peacemaker even in war in order that by conquering you might bring the benefits of peace to those whom you fight.


Hermocrates says, *The glorious thing is, not to conquer, but to use victory with clemency and moderation*. In order to make a right use of victory, the saying of Tacitus ought always to be remembered, that *We cannot finish a war in a more happy and glorious manner than by pardoning the vanquished*. Julius Cesar, in a letter he wrote when dictator, says, *Let this be the new way of conquering, to secure ourselves with mercy and liberality*.


All of us who argue about the rights and wrongs of war agree that justice in the strong sense, the sense that it has in domestic society and everyday life, is lost as soon as the fighting begins. War is a zone of radical coercion, in which justice is always under a cloud.

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Preface

When the war is over, that’s when
the real war will begin.
When everyone else has forgotten
there was a war, when the news is talking
about other wars. When the war is over
there will be the war of remembering
and forgetting, the war
of trying to sleep and trying to awaken, the war
of standing each morning at the window
where the sunlight still enters and floods the room,
and looking outside
one more day at all
that is not there to return to.¹

Since I began my studies at Radboud University – and as a result of my many
travels – I have been interested in various global issues. After Thomas Mertens’
inspiring course on Michael Walzer’s Just and Unjust Wars, the morality of war
and peace stuck in my mind. For quite some years now, I have been working on
this subject as I prepared my doctoral thesis about jus post bellum; justice after
war. With mixed feelings, I must admit. On the one hand, this subject is as
interesting to me as ever before. Never during the course of my research have I
found my topic to be dull or did I feel as if I could not go on (as plenty of PhD
candidates seem to experience). Justice after war is an important topic, both
theoretically under-examined, and extremely relevant given our current reality.
The news broadcasts from around the world show us the moral dilemmas and
practical complexities of warfare and peace building. There are many examples
in which it truly seems that, as the poem above expresses, the real war only
began when the official war was over. It felt rewarding to work on the topic of
post war justice; a topic of genuine significance. On the other hand, it is an
indisputably grave topic and there were moments when I struggled with this. At
times, I was intensely sad in the realization of the horrific things that happen in
war, and the devastation, grief and regret that reign in war’s aftermath. The
poem also reflects that human side of war. And although this research is

¹ Anita Barrows, ‘Poem in Time of War, 2006 (Lebanon, Palestine)’, in: Ontario Review
2014, 68/16, p. 76.
theoretical, I always realized that it deals with real and intense suffering of people like me, my children, family and friends, that happen to live in one of the world’s many (former) warzones.

In spite of such mixed feelings, I feel very fortunate for having had the opportunity to write this doctoral thesis. Writing this would not have been possible without help, and it gives me enormous pleasure to thank those people who supported me. It was (and is!) wonderful to work at the Law Faculty of the Radboud University. My gratitude goes out to Thomas Mertens, whose enthusiasm in teaching the various courses in the field of philosophy of law was contagious. He had confidence in me and my capability to write a doctoral thesis (more than I had in myself at the time), helped me set up the research proposal, supervised my work, and continued to demonstrate this confidence and support throughout the research project. I very much appreciate the bond that we have developed in these years, and would like thank him for his ongoing support. A special thanks also goes out to Ronald Tinnevelt. Since the moment that I felt confident enough to actually let him read my work, he has been a tremendous help in the writing process. Top-notch when it comes to analytical thinking, he was always critical, but helped me structure my thoughts and getting my line of argument more coherent. His door is always open for silly (and sometimes rather bold) jokes or serious discussions (although the earplugs might be a sign to the contrary).

Additionally, I would like to thank my other (former) colleagues of the Philosophy of Law section: Peter Bal, Eric Boot, Edith Brugmans, Edwin van Dijk, Thea van den Dobbelsteen, Sebastiaan Garvelink, Sylvie Loriaux, Mathijs Notermans, Maria Stadelman, Pol van de Wiel, Robert Jan Witpaard, Petra van Valkenburg, and Derk Venema. Although there is quite a high turnover, the sense of comradery in our department remains strong, including enjoyable informal dinners and excursions in the past years. Many at the Law Faculty know my guilty pleasure: DE Café’s ‘Tre Montane’ (strong coffee with an excessive helping of real whipped cream). Thanks to Janine van Dinther, Patty Emaus, Saskia Hillegers, Mirjam Krommendijk, Maarten Kuipers, and Ellen Nissen for our great coffee breaks. Thanks to Ricky van Oers, Naima Qoubbane, Janine and Saskia for all the fun evenings with our ‘book club’ (actually a glorified excuse to enjoy some good food and wine) over the past 8 years. I would also like to express my gratitude to Joseph Fleuren, who always makes time for small discussions and questions, both theoretical and practical dissertation issues. My gratitude also goes out to Eva Rieter, who found time in
her extremely busy schedule to read a chapter of this book and offered very useful comments on the legal aspects. Thanks to Leon Trapman for helping me put everything together into one book.

When the doctoral thesis was finished (if such work is ever actually ‘finished’) and Thomas Mertens gave his approval, a reading committee was formed. I am extremely honored that Ybo Buruma, Brian Orend, Bart Raymaekers, Carsten Stahn, and Ronald Tinnevelt were willing to be part of the reading committee. I would like to thank them for taking time to read the manuscript, sending their reports filled with insightful comments, and above all, for approving the thesis. Thanks to Marcel Becker for his willingness, along with the members of the reading committee, to be part of the Doctoral Examination Board. Not in the least, I want to extend my gratitude to the NWO, the Nederlandse Organisatie voor Wetenschappelijk Onderzoek. After a nerve-wracking trip to The Hague shortly after my graduation, they generously rewarded my research proposal with a Toptalent Grant. Although I always felt uncomfortable with this label, I am greatly indebted for their financial support.

There are some amazing people in my personal life as well. For over 20 years (!), I have been fortunate to be part of a group of friends. I do not know if they all ever fully grasped what I was doing: “What is it that you do in your office at the university all day?” And although (or perhaps especially because) we hardly ever talk about work, they are a source of much joy, laughter, and distraction, which was a delightful balance to the discipline needed for my research. Those who did understand and who were always interested are my good friends: Femke Derks (even verstand op nul) and Mar Huiskamp-Robillard. Mar read the majority of this book, was always in the mood for a good debate about the material, and – being an ‘American girl’ – helped me enormously on the language front during the first years of this project (and occasionally still today). My fellow villager Deirdre Angenent and former classmate Mark Coolen are other dear friends who were always interested and supportive, for which I want to thank them. Many thanks to Sjaan Dennissen en Bep de Man for their heartfelt care.

The people in my life that I am most grateful for are my mom and dad, Maria and Jack, for their love and for always being there for me. My brother Koen who, despite the fact that he lives in Singapore, is very close to me. My sister Saskia, who really is my soulmate. I am very proud to have her and Mar as my paranimfen; to be there right behind me at the moment suprême. I could not be any happier with the family that I grew up in, and for the bond that we still have.
today. Jos, for his love and everlasting support, who managed, in the last stressful year of this doctoral thesis, to work a little less so that I could work a little more. Lastly and most importantly, my children: Lila, Nolan and Jade. The lights of my life. I am deeply grateful for the fact that they grow up in peace.
1. Justice after War

1.1 Introduction

6 July 2016: The Iraq Inquiry report finds that UK planning and preparation for post-war Iraq were “wholly inadequate”.\(^1\) Although it took less than a month to remove Saddam Hussein, the UK – and this equally counts for its coalition partners – were unprepared for the subsequent task of peace building.\(^2\) There was no proper plan for postwar administration, security and reconstruction.\(^3\) Tony Blair declared during the Inquiry, “(... with hindsight, we now see that the military campaign to defeat Saddam was relatively easy; it was the aftermath that was hard”\(^4\). But according to the Inquiry, hindsight was not required. Before the invasion in 2003, Blair was warned for the significance of the post war phase as the strategically decisive phase of the military operation. And at the same time, serious risks existed regarding the likelihood of internal conflict in Iraq and political disintegration, the potential scale of the political, social, economic and security challenges, the need for a comparison of the benefits of the operation and the burdens of protracted and costly peace and nation building, and the scarcity of international partners willing to assist.

As is well-known, these risks materialized. Lawlessness broke out in Iraq as soon as the regime fell: widespread looting in Basra, Baghdad and other places in the absence of Iraqi police forces and criminal justice system, and a following crime wave that could not be brought under control.\(^5\) As expected, the UN did not step in and the UK and US became joint Occupying Powers in control of the Coalition Provisional Authority, and responsible for reconstruction and political development.\(^6\) In effect, de-Ba’athification of the political system and the dissolving of the army lead to a power vacuum which was not properly addressed. Security deteriorated, sectarian divisions heightened, food shortages

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4 Iraq Inquiry, Executive Summary 2016, p. 83.

5 Iraq Inquiry, Executive Summary 2016, p. 86-88.

increased and essential services such as electricity and water failed. Together with the lack of political progress, the hopes of the population for better life soon evaporated. Furthermore, as a result of disagreements between the UK and US (and Blair’s apparent lack of influence), oil revenues were not (as was planned) used for the benefit of Iraq. News on the abhorrent abuse of prisoners by US militaries in Abu Ghraib prison only fueled resentment against the coalition partners. The following years saw an increase in violence in Iraq: attacks on the coalition forces, IED’s, attacks on civilians by Islamic extremists, and the rise of Islamic State – amounting to a full scale civil war. To date, the security situation in Iraq is dramatic. On the day the Iraq Inquiry report was released – 13 years after the invasion – a terrorist attack on a market in Bagdad killed dozens, and one week earlier 300 people were killed in a busy shopping street. Although Iraq is a democracy, as was planned by the coalition partners, it is one of the most corrupt states in the world.

Iraq is not the only example of a war with a disastrous aftermath; Kosovo, Afghanistan and Libya also demonstrate the importance and complexities of post war peace building. These situations raise three crucial questions: What do we want to do after war? What can we do? And what should we do? The first is a matter of hopes and ideals, the second a matter of strategy, and the third is a matter of post war justice. Post war justice has come to the forefront of contemporary debates in the last decade, and the increased attention can be explained by three factors. First is the growing significance of the post war phase for military operations. Many argue that the character of war has changed. The conventional picture of war as international war of aggression and self-defense between two state armies, formally declared and ending with a peace treaty, is not representative for today’s political reality. Contemporary international wars are waged to e.g. change an oppressive regime, to protect the population of another country against grave human rights violations, or to stabilize so-called ‘failed states’. Humanitarian considerations and individual human rights protection have become increasingly important. This means that

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7 Iraq Inquiry, Executive Summary 2016, p. 93.
8 Iraq Inquiry, Executive Summary 2016, p. 89.
the situation after the war is part of the end of the war itself, and a return to the *status quo ante bellum* is often impossible, undesirable or both.

The second factor is the complexity of peace building. The aftermath of war is often extremely complex and poses a variety of more specific issues and moral dilemmas. What are legitimate goals after war? Providing peace and security for civilians, securing human rights, creating democracy? And how can we achieve that? Through occupation, purging state institutions of members of the previous regime, setting up a transitional government? How should we balance the sovereignty of states with the protection of individual human rights? Who are ‘we’, i.e. who is responsible for realizing these goals; the victor, other states, the UN? Additionally, who should benefit from post war action, the vanquished citizens or the victor’s companies? To complicate things even more, the reality on the ground is almost certain to be obstinate, confusing and difficult. As the situation in Iraq shows, the (ambitious) goals that are set prove extremely difficult to realize in practice, due to the messy reality of war and the different and competing interests at play.

And third, there is a lack of guidance on the morally right course of action after war. Just war theory is a thriving part of political and legal philosophy, and is a leading normative theory on issues of war and peace. Traditional just war theory consists of two sets of norms: *jus ad bellum* and *jus in bello*. Satisfaction of the first justifies a certain war as a whole, and satisfaction of the second justifies the different acts that compose a war. The theory is premised upon the conventional conception of war between two states. The paradigmatic ‘just war’ is self-defense against unjustified military aggression. After a repulsion of the aggression and restoration of territorial boundaries, the just cause is considered effectuated, and that means the end of it. This implies that traditional just war theory paid hardly any attention to the aftermath of war, with the exception of criminal justice, i.e. the prosecution and punishment of violations of *jus ad bellum* and *jus in bello*. A return to the *status quo ante bellum* was long considered the just end of war – something no longer sufficient today.

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12 For what that peace might mean, see chapter 7.
13 Anthony Coady rightly notes that just war theory might be thought of as premised upon conventional state versus state wars, but that this is not essential to the operation of just war theory, for the system of nation states is a relatively modern invention, which is predated by just war theory by many centuries. Anthony Coady, *Morality and Political Violence*, Cambridge: Cambridge University Press 2008, p. 4. However, the modern revival of just war theory after the Second World War – ‘traditional’ just war theory – is state-centered and premised on international wars.
Hence, the situation in Iraq clearly shows the relevance of post war justice and illustrates a bigger picture: the changing character of war and the significance of its aftermath, coupled with the complexities of post war peace building (the first two factors). As James Turner Johnson argues: “perhaps the most difficult problem posed by contemporary warfare (...) is the difficulty of achieving a stable, secure ending to it”.\textsuperscript{14} Given these two factors, the lack of guidance in traditional just war theory on the aftermath of war (the third factor) is now seen as a problem. Because of the urgent need for a coherent and effective body of norms governing the situation after war, just war theorists note that the theory is incomplete.\textsuperscript{15} Integrating an additional branch that provides the needed guidance is seen as a solution to (some of those) post war challenges. This has led to a newcomer in just war theory: \textit{jus post bellum}. This third branch is supposed to offer similar norms for the complex aftermath of war; satisfaction justifies the peace after war. That is the subject of this research: post war justice in just war theory, or \textit{jus post bellum}.

\subsection*{1.2 Jus Post Bellum}

\textit{Jus post bellum} is welcomed today as part of the solution to post war challenges such as those in Iraq, and at first eye this is perfectly understandable.\textsuperscript{16} The first proposal for \textit{jus post bellum} dates from 1994 and since around 2004 there is a steady trickle of publications on this new branch.\textsuperscript{17} In general, \textit{jus post bellum}

\begin{itemize}
\item \textsuperscript{15}E.g. Walzer 2004, p. xiii.
\item \textsuperscript{16}As one of the earliest advocates of \textit{jus post bellum}, Brian Orend made a “case for having, and not ignoring, \textit{jus post bellum}”. The arguments for that claim are that: this branch conceptually completes just war theory by regulating the end phase of war, next to the beginning and middle phases; it would enable just war theory to consider war in a sufficiently deep and systematic way; considering the justness of a war as a whole must include the justness of its aftermath; to fail in achieving a just peace after the war undermines good results from the war, even if the war itself can be called just; and being a practical guidance, just war theory must offer an ethical exit strategy, prohibiting unconstrained war termination and victor’s justice and limiting the negative effects of war by reducing the likelihood of internal chaos, failing of the state or the start of a civil war. See: Brian Orend, ‘Jus Post Bellum. A Just War Theory Perspective’, in: Carsten Stahn & Jann Kleffner, \textit{Jus Post Bellum. Towards a Law of Transition From Conflict to Peace}, The Hague: TMC Asser Press 2008, p. 35-37.
determines permissible action after war, and consists of norms that can roughly be divided into different categories: safety and security; political justice; criminal justice; restitutions, reparations and compensation; general reconstruction; and reconciliation. But despite that important theorizing, there remains a problem in *jus post bellum* and the reflection thereon. As this third branch of just war theory is relatively new, it is not fully constructed or crystallized and there remains substantial vagueness e.g. on the conceptual consistency with just war theory, the content and scope of these norms and the relevant duty bearers. Furthermore, it is well-established that the goal of just war theory is a just peace, but it is far from clear what that exactly is. As *jus post bellum* regulates the transition to peace, it is crucial to have a better grip on the concept of a ‘just peace’ in addition to the concept of a ‘just war’. Ergo, although *jus post bellum* is embraced by the majority of just war theorists, it is not yet quite mature as a full-fledged body of norms.


19 Mark Evans argues that we might try to trace back the origins of *jus post bellum* into distant reaches of just war theory, as I will do in the third chapter, but “as a substantive field of moral inquiry in its own right, it is still maturing”. Mark Evans, ‘At War’s End. Time to Turn to Jus Post Bellum?’, in: Carsten Stahn, Jennifer Easterday & Jens Iverson (eds.), *Jus Post Bellum. Mapping the Normative Foundations*, Oxford: Oxford University Press 2014, p. 26.
The central problem that this research addresses is *jus post bellum*’s vagueness and lack of clarity. This leads to the following central question: How to clarify and develop the concept of *jus post bellum*? This general question results in more specific sub questions: How do we apply just war theory’s norms on specific wars? What was the status of (what is now called) *jus post bellum* throughout the history of just war theory? Would *jus post bellum* conceptually fit into the contemporary theory? Who are the relevant duty bearers? What is the content and scope of *jus post bellum*? What are the strengths and weaknesses of the main positions? And what is the ultimate goal of just war theory and *jus post bellum*? These questions demand serious attention.

The aim of this research is twofold. The first aim is to flesh out the concept of *jus post bellum*. That way, this book reduces vagueness and aims to contribute to a good understanding of *just post bellum*. As a part of this analytical part of the research, the research topic is contextualized and pays attention to just war theory’s challenges (shortly discussed below). The second aim is a more critical assessment of *jus post bellum*. In order to really improve the theory, *jus post bellum* should be consistent with just war theory as a whole, form a coherent body of norms, should be well tailored for the political reality of today and effective in limiting the negative effects of war. This is the normative part of this research. This book ultimately pleads for modesty in post war justice, and defends a moderate understanding of *jus post bellum*, emphasizing the importance of allocating post war duties to responsible duty bearers. As such, this book contributes to the development of a consistent, coherent and effective *jus post bellum*.

This book builds mainly on existing literature concerning just war theory and *jus post bellum*. The debate on *jus post bellum* is mapped and analyzed, key concepts, arguments and positions are systemized, and aspects of general just war theory (e.g. the goal and foundations of just war theory) and political and legal philosophy more generally (e.g. on responsibility and feasibility) are applied to questions of post war justice as a way to address unresolved issues or dilemma’s. At different points, it is shown that apparent dichotomies should be nuanced. Instead of opposing positions or distinct concepts, certain positions (e.g. on *jus post bellum*) or concepts (e.g. different types of peace) are better understood as related, to be located on a sliding scale or continuum with merely gradual differences. This results in a better insight in the concept of *jus post bellum*. 
1.3 Just War Theory

As this research approaches the topic of post war justice from the perspective of just war theory, a general outline of this theoretical framework is in order. Just war theory is a connected body of norms governing the different phases of war.\(^\text{20}\) It takes a sensible middle position between the extreme conclusions of realism – ‘all is fair in love and war’ and pacifism – war is never justified.\(^\text{21}\) Just war theory begins with a strong presumption against war, but determines that it can be justified to override this presumption in exceptional circumstances.\(^\text{22}\) In these cases, war remains an evil, but it is the lesser of two evils that is justified because it halts or prevents something worse. According to Steven Lee: “In its most general form, the basic moral issue lying behind just war theory is: what is a state permitted to do through the use of military force to those outside its borders?”\(^\text{23}\)

There is a large ‘overlapping consensus’ on the basic ideas of just war theory, as the correct account of the morality of war and peace.\(^\text{24}\) The theory dates back to Greek and Roman antiquity and while it temporarily remained under the radar, there was a strong revival of just war theory after the Second World War. And particularly since the Vietnam War, just war theory became an academic

\(^{20}\) Chapter 4 addresses this temporal conceptualization of just war theory.

\(^{21}\) As nicely formulated by Inis Claude: “The issue of the justifiability of international war can be examined with reference to three logically possible positions. The first is the position that war is always justified, morally or legally, on both sides, which is to say that resort to violence requires no justification. The second position is that war is never justified, on either side; it can have no justification. The third, falling between the first two, holds that war is sometimes justified, on one side or the other and conceivably, though improbably, on both sides. It argues that, in short, war does require and can have a justification.” Inis Claude, ‘Just War. Doctrines and Institutions’, in: *Political Science Quarterly* 1980, 95/1, p. 84.

\(^{22}\) Not all just war theorists agree with that starting point, e.g. James Turner Johnson opposes such restrictive view on just war theory and argues that pacifism begins with a presumption against war, while just war theory is about correcting injustice and hence begins with the presumption against injustice. See: James Turner Johnson, ‘Comment’, in: *The Journal of Religious Ethics* 1998, 26/1, p. 221-222.


subject again.25 Michael Walzer consolidated the revival of just war theory in modern times with his seminal work Just and Unjust Wars in 1977. In the words of another well-known just war theorist, Brian Orend, just war theory is “the most comprehensive consideration of the ethics of war”.26 Its norms appeal to moral intuitions widely held by many around the world. Walzer even argues that just war is the theoretical version of ideas of our common heritage.27 The basic ideas of just war theory are not only accepted by many theorists28 – the theory is widely taught in universities and military academies alike – political leaders also use its criteria to argue whether or not to undertake military action. Just war vocabulary is widely used in public debates. An example of the prominent role of just war theory is Barack Obama’s 2009 Nobel Peace Prize lecture, in which he invokes just war theory and states: “that all nations – strong and weak alike – must adhere to standards that govern the use of force.”29

Just war theory has had a tremendous impact on international law. Its norms have been codified to a large extent, e.g. the UN Charter echoes the paradigmatic just cause for war and allows self-defense against an armed attack. The Geneva Conventions codify jus in bello norms such as the discrimination principle, which stipulate that a distinction must be made between combatants and civilians, and that the latter cannot be directly targeted. In essence, just war theory offers the moral foundations for the laws of war. Whenever there are gaps in international law, just war theory has a role in filling in these gaps. In this way, just war theory can also set a certain course for the development of international law. Hence, while they are certainly not identical, there is a strong relation between the moral and legal framework.

Perhaps the strongest value of just war theory is its practical guidance for the real world. While realism and pacifism do not regulate war because they either allow all wars which benefit national interests or prohibit war categorically, just war theory attempts to restrict war and warfare. This way, just war theory is a

27 Walzer 2004, p. x.
29 In this speech, Obama defends just war theory and invokes its norms to explain the United States defense policy. See: http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.
balance between political realism and the pacifist idealism; it is founded on
fundamental ethical values, usually a combination of collective and individual rights,
but at the same time it remains realistic about the possibilities of realizing these
values in the midst of war. Accordingly, to be most effective in limiting war(fare), just war theory is a compromise between prudential considerations
and such values: its norms do not want to diverge too much from realistic
possibilities and national interests, because demanding the impossible will
render the norms irrelevant. By proscribing realistically attainable norms, just
war theory has the best chance in limiting the suffering of war and preventing
the worst excesses. As such, just war theory is a balance between the desiderata
of desirability and feasibility.

Nevertheless, just war theory is neither perfect nor unproblematic. Three
challenges are raised in this book, because they have an impact on jus post bellum
as well. First, there are epistemic problems and risks of misuse. While there may
be general consensus on the abstract norms constituting just war theory, applying these norms to the messy reality of war is difficult. The norms are
open to interpretation, which means that there is a serious risk that the norms
are manipulated or misused. Second, as noted above, the character of war has
changed. Traditionally, just war theory is premised upon a conception of war as
conflict between two state armies, but now the question is raised whether just
war theory is relevant for the current political climate. As was pointed out, jus post bellum can be a partial solution to this particular challenge. Third, the
reigning traditional (Walzerian/ orthodox/ conventional) just war theory is
today challenged by so called revisionists as Jeff McMahan, David Rodin and
Cecile Fabre. Revisionists depart from the foundation of just war theory in
individual human rights, and question its state centric perspective, which leads

30 To be more precise, two distinct continua are combined here: just war theory is both
the middle between the conclusions of political realism and pacifism (allowing or
prohibiting war), and the middle between the theoretical doctrines of realism and
idealisim. These continua generally come together, as e.g. most pacifists reject war on
the basis of certain moral principles and an ideal (not necessarily utopian) conception
of a peaceful world. Nevertheless, one could imagine that these continua come apart,
e.g. when a political realist defends the pacifist conclusion not based on moral
principles but because that is the best way to further the national interests of states.

31 See e.g. Coady 2008, p. 4-5.

32 E.g. Jeff McMahan, Killing in War, Oxford: Oxford University Press 2009; David
Rodin, War and Self-Defense, Oxford: Clarendon Press 2003; Cecile Fabre,
Cosmopolitan War, Oxford: Oxford University Press 2012. See further e.g. the
excellent Stanford entry on War by Seth Lazar: http://plato.stanford.edu/entries/war/.
to different conclusions on the relation between and content of norms of *jus ad bellum* and *jus in bello*.

### 1.4 Limitations

As the research topic is quite broad and expansive, it needs to be limited in certain respects. The attention for post war justice manifests itself in other areas and disciplines as well: e.g. theoretical debates on transitional justice, restorative justice, the political promise of the responsibility to rebuild, the foundation of the Peace Building Commission in 2005, and the international policy strategy based on the three D’s: Diplomacy, Defense and Development. This research leaves these areas aside and operates instead, as noted earlier, within the confines of just war theory. This research does not address the broader discussions within political and legal philosophy, but nevertheless uses some elements of these discussions to the extent that they are helpful in clarifying the concept of *jus post bellum* within the framework of just war theory. Furthermore, this research confines itself to the moral framework on war, and so it leaves out positive international law on just war theory and *jus post bellum*. There is also a vast literature on the specific categories of *jus post bellum*. For example, there is an extensive debate on criminal justice; its instruments, the balance between achieving peace or criminal justice, and the legitimacy of amnesties. These subjects will not be taken on board; this research focuses on the branch of *jus post bellum* in general without delving into the specifics of these categories.

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33 In Leiden, Prof. Carsten Stahn leads a comprehensive legal *jus post bellum* project parallel to this research. See e.g. Stahn & Kleffner (eds.) 2008 and Stahn, Easterday & Iverson (eds.) 2014.

An important note on the starting position of this research. Despite the revisionist challenge, which is undisputedly to be taken seriously, Walzerian just war theory still remains the default position in just war theory today. As this research aims to develop the concept of *jus post bellum*, it starts from this default position. To decide otherwise would have meant reconstructing just war theory as a whole before turning to *jus post bellum*. In order to start with this subject right away, the choice is made to remain within the existing framework. Yet, the revisionist challenge is recognized, and this book contributes to the adjustment of existing just war theory so that it is hopefully better equipped to meet that challenge. Furthermore, this choice expresses the wish of just war theory (as action guiding theory) to strike a balance between political realism and moral idealism. Overall, traditional just war theory tends to be practically focused and wants to be in line with international law.

This starting position entails several premises: traditional just war theory focuses on international wars and has a statist perspective; its foundation is based on a combination of collective and individual human rights; it uses historical examples (as opposed to abstract simplified situations such as the ‘trolley problem’ and the ‘fat man’); and it is based on exceptionalism: war is considered an exceptional moral domain that cannot be judged using ‘normal’ morality, i.e. norms that regulate interpersonal relations. This starting position does not mean that the Walzerian perspective is fully defended here, but rather that it takes this as the best platform from which to launch the present exploration of the concept of *jus post bellum*.

1.5 Structure

This research consists of four published articles and four additional chapters. Most of these articles are – qua substance – included in their original version in this book. All the articles are adapted qua form; one article is translated from Dutch into English, the abstracts are omitted, the style and citations are made consistent, the reference system is unified, and the separate bibliographies are combined into one. Unnecessary repetitions are omitted, but some repetition

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unfortunately remains, mainly for reasons of readability of the separate chapters.

The book moves from a general to a specific level, and ultimately connects these two levels. This means that it begins with just war theory and then focuses more and more on its third branch. Towards the end *jus post bellum* is reconnected with general just war theory through peace as its end. After this introduction, the second chapter discusses just war theory in general, including an application of its norms to a particular war, and raises two challenges: the epistemic problems and the complex reality on the ground.\(^{36}\) It is argued that just war theory offers the most important building blocks for discussions about particular wars. The alternatives of pacifism and realism are presented and rejected in favor of just war theory. Moral principles are applicable to the issue of war, and they can help us judge a particular war. The norms of *jus ad bellum, jus in bello* and *jus post bellum* are discussed in more detail, and these norms are subsequently applied to the Gaza war in 2008/2009. The debate on the justice of that war is considered, which shows the problematic character of just war theory’s norms: the application of these abstract norms to the complex reality of today proves to be quite difficult. Since they are very general, their application depends to a certain extent on a reading of the facts and on political preferences. In other words, while norms such as self-defense, proportionality, and non-combatant immunity are widely used in the public debate, one should realize that their application is often contested, and that they are susceptible to manipulation.

The third chapter provides an historical overview of just war theory. It outlines four major periods in the history of just war theory: classic just war theory; the transition to the law of nations; the heyday of positivism; and the revival of just war theory. The goal of this chapter is threefold: first, it provides the historical context for just war theory. Second, it demonstrates how the revival of just war theory in general – its doctrinal changes and the reappearance of familiar moral principles – created space for a revival of the third branch. And third, while it might be true that a comprehensive theory on *jus post bellum* did not exist two decades ago, this historical overview shows that *jus post bellum* is not quite new, but is rooted in the classic just war theory. This yields some valuable leads for a modern *jus post bellum*; e.g. Vitoria’s and

\(^{36}\) Thomas Mertens & Lonneke Peerkamp, ‘Inter Arma Silent Leges? Over de Moeizame Verhouding van het Recht tot Oorlog’, in: *Ars Aequi* 2009, 7/8. I have translated and considerably revised this article.
Grotius’ principle of moderation is an inspiration for the perspective on peace as the goal of just war theory defended in this book. This historical contextualization with a focus on the research topic, marks the beginning of a more specific focus on *jus post bellum*.37

The general question as to whether just war theory needs to be extended is answered in chapter 4.38 As noted above, a challenge to just war theory consists in the theory’s struggle to keep up with the new political reality: the changed character of war(fare), and the often blurry boundaries between war and peace. One solution for this is an extension of the bipartite conception of the theory. A branch called *jus ante bellum*, preventive peacemaking, is sometimes suggested to precede *jus ad bellum*. And *jus post bellum*, justice after the war, is the welcomed branch that could provide guidance after war. This chapter explores what it means to integrate these branches. It is presumed that it would benefit the goal of just war theory that Saint Augustine already pointed at: limiting war and realizing a ‘just and durable peace’. However, here it is argued that there are several reasons why we should be hesitant to include these arguably important issues within the parameters of just war theory. This chapter concludes that only a certain form of *jus post bellum* conceptually fits into the just war framework.

Chapter 5 focuses exclusively on *jus post bellum* and raises a question that is often overlooked in the debate: after war, how should post war duties be distributed?39 This question deserves attention, because uncertainty about specific duty bearers might lead to a situation in which no one will properly acquit these duties, and the critique could be raised that *jus post bellum* is in fact merely empty rhetoric. This chapter aims to answer that question by directly addressing the foundation for responsibility after war, using David Miller’s and H.L.A. Hart’s theories on responsibility, with an eye to developing a system for assigning post war duties in concrete situations. After an analysis of Miller’s theory on remedial and outcome responsibility, the conditions he suggests for

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37 As this book is a collection of articles, it might be noted that chapters 2 and 3 were prepared in the earlier stages of this research. Although these chapters map the field, I do not claim originality or groundbreaking relevance here. They are rather included as contextualization of the research topic and as a stepping stone for the following chapters.


assigning remedial responsibility are analyzed in light of their potential role as foundation for post war duties. One additional condition is explained through Hart’s concept of role responsibility. The next step is determining how to weigh these conditions when they clash or when they point to different actors. In applying a hierarchy between the different conditions, a step is made towards developing a system for assigning post war duties. Only with such a system in place is there a realistic prospect that *jus post bellum* can function as a useful tool in the creation of a just and stable peace.

Chapter 6 addresses the substance of *jus post bellum*. While it seems possible and desirable to integrate *jus post bellum* in just war theory, there is no agreement on the content and scope of these norms. Often, the debate on *jus post bellum* is presented as debate between so-called ‘minimalists’ and ‘maximalists’. This chapter analyzes these main positions and the supposed differences between them, and argues that this distinction is no longer relevant. No clear opposition between two positions can be upheld, but there are mere gradual variations qua content and scope of *jus post bellum*. In order to pinpoint these variations, a larger perspective is chosen. It is shown that the content and scope of post war norms depend on two factors: the particular situation to which just war theory applies and the general perspective on just war theory and international relations that is adopted. These factors explain the general shift towards a maximalist understanding of *jus post bellum*. However, a critical assessment of this shift requires more clarity on the concept of peace.

This task is taken up in chapter 7. By delving into the concept of peace, *jus post bellum* and just war theory are reconnected. As *jus post bellum* regulates the transition from war back to peace, it is crucial to have a thorough understanding of what that peace – as the normative goal of just war theory – should look like. But because just war theorists rarely explore the goal of peace and its implications, there are fundamental disagreements on what exactly constitutes the ‘just and lasting peace’ that they all endorse. This chapter offers a general sketch of the nature of peace. This is the basis for the construction of a continuum of five concepts of political peace, ranging – qua character – from purely negative to fully positive. After determining which concepts of peace can be a part of just war theory, this conceptual tool kit is used to map the debate, reveal and characterize implicit disagreements, and demonstrate a shift in just war theorizing towards a more positive concept of peace. Based on just war

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theory’s role as practical guidance for real world problems, its limited nature as applicable to specific domain of war, and the risk for moral imperialism, this chapter defends a modest understanding of a ‘just and lasting peace’.

In a short conclusion, the last chapter returns to the three general challenges to just war theory. Some of these challenges remain serious areas of concern, and key areas of future research are pointed out. Most importantly, the conclusion evaluates the concept of *jus post bellum* and takes stock of the analysis in this book. Based on the arguments made throughout the different chapters, the shift to a more positive understanding of peace as normative goal and correspondingly to a maximalist *jus post bellum* is followed to a certain extent, but this book opposes a too radical shift. In the same way as just war theory itself seeks the middle ground between political realism and moral idealism, balancing feasibility and desirability, this middle ground is chosen when it comes to the most appropriate form of *jus post bellum*. This is in line with an important lesson drawn by the Iraq Inquiry, that it is better to have objectives which are realistic and if necessary limited, rather than idealistic and based on overly optimistic assumptions.\(^{41}\) This third branch can be part of the solution to the challenges that just war theory copes with; and is a consistent, coherent and effective body of norms if it is understood as moderate *jus post bellum*.

2. *Inter Arma Silent Leges? About the Law's Problematic Relationship to War*

2.1 Introduction

Heikelien Verrijn Stuart’s contribution to the Dutch legal journal *Nederlands Juristenblad* regarding the Gaza war in 2008/2009, expressed not only criticism of Israel’s war in Gaza, but also of the Dutch government.¹ In her view, politicians in The Hague have the tendency to place politics above the law. A cynical government official, confronted with the occupation of Jordan’s West Bank, noted the total absence of law seeing only ‘realpolitik’. According to Verrijn Stuart, the reactions to the war in Gaza were covered in political rationalizations and deliberations, and allowed little to no room for law. One could however disagree with her conclusion that the ‘law’ played merely an insignificant role in the government’s assessment of that situation. After all, the fundamental criteria that were used to judge both Israel and Hamas, namely: self-defense, proportionality and discrimination (otherwise known as non-combatant immunity), are all based in just war theory that could be said to form the basis of modern international law. Therefore, those who wish to debate the Gaza war cannot suffice with taking up Machiavelli without considering this normative framework.²

This chapter provides an introduction to just war theory, highlights certain problematic aspects of (the application of) its norms, and raises some important questions. The following section briefly outlines two main alternatives to just war theory, pacifism and realism. The third section sketches just war theory’s three branches and the norms that compose these branches. These norms are subsequently applied to the Gaza War, of which the basic facts are described in section 4. In the next section the debate on the justness of that war is taken under consideration, which shows the problematic character of just war theory’s norms: the application of abstract norms to the complex reality of

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² While the term ‘war’ is commonly used in philosophical debates, I am aware that it has been abandoned in legal terminology; ‘armed conflict’ and ‘the use of force’ are the appropriate legal terms (see also chapter 3). In this chapter (as in the rest of the book) I mostly use the term ‘war’ except when referring to legal norms.
today proves to be quite difficult. Additionally, they are very general and their application depends on a certain reading of the facts and on political preferences. Still, these considerations do not mean that one's assessment would be substantially different from Verrijn Stuart’s judgment of events during the days in which the war was waged and what happened prior to this, but it does increase the dilemma’s that we are confronted with in times of war. After all, the problem is not between politics and the law, but lies within the law itself and the application thereof: international law (that is to a large extent based on just war theory) must be applied to complex situations in the real world and allows for multiple interpretations, depending on political preferences.

2.2 The Morality of War

The main modern representative of this theory, Michael Walzer, spoke of “the triumph of just war theory”. He himself contributed significantly to this triumph with the publication of his very influential *Just and Unjust Wars*. Nowadays the moral concepts of this theory dominate the way many people think about war and peace, because it is an attractive alternative for political realism without resorting to the equally unattractive pacifism.

Pacifism takes the moral prohibition on killing – especially in conflicts between political communities – so seriously, that it rejects war. Although a broad range of views fall under the heading of pacifism, the best known version is absolute principled pacifism: the categorical rejection of violence under any circumstances, at least the collective violence of war. More than in the interpersonal context, there is a great risk that violence escalates in the

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4 Walzer 2004, p. 11-12.


collective political context. Pacifists are usually, but not exclusively, inspired by Jesus’ teachings from the New Testament: ‘those who use the sword, will die by the sword’ and ‘if anyone slaps you on the right cheek, turn to them the other cheek also’. Furthermore, there is a tendency to emphasize the negative effects of war. Erasmus for example, states that peace can actually never be so unjust that people need to opt for war. “War always brings about the wreck of everything that is good, and the tide of war overflows with everything that is worst.” That means, as prescribed by Gandhi and Martin Luther King Jr. in the 20th century, that one must always seek nonviolent measures to address injustice. There are, however, few who accept such principles of nonviolence. Sometimes people are forced to use violence for self-defense or the defense of others, as noted by Augustine. Moreover, one cannot generalize all forms of violence (in wars), according to Thomas Aquinas. Pacifism fails to make morally relevant distinctions. It really does make a difference whether violence is used for self-defense or takes the form of genocide and terror.

For a similar reason, the school of so-called realism does not suffice. Realists reject the idea that moral principles are altogether applicable to international affairs. By stating that moral distinctions do not matter, violence is reduced to some unavoidable aspect of human nature, not held in check by anyone’s free will. Consequently, the international arena is characterized by struggle and power; and war is simply a part of this political reality. This resembles Machiavelli’s impression of political history as a combination of virtu and

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11 Thomas Aquinas, Summa Theologica, New York: Benzinger Brothers 1947 (1265, translated by Fathers of the English Dominican Province), question 64, art. 7.
fortuna, over which people have little control. Some, like Hobbes, believe that violence between men can only be tamed to a certain degree through repression in the hands of a ‘Leviathan’, but this is not possible between sovereign nations. Here, all that matters are national interests; the raison d’Etat. This position is also unpersuasive, since it disregards the significance of moral dimensions in war, as war is clearly continuously presented as either just or unjust. Moreover, moral arguments seem to influence the course of battle. According to Walzer, the Vietnam War debate was held in the vocabulary of just war theory, namely by appealing to just or unjust causes and to certain military strategies and means of warfare which were considered either just or unjust. In a recent interview, the former Prime Minister of Israel, Ehud Olmert, declared that in times of war public opinion on the justness of war is of the greatest importance.

2.3 The Elements of a Just War

According to just war theory, moral principles are applicable to the international realm. The issue of war is therefore subjected to morality, contrary to the premise of realism. But, contrary to pacifism, the application of moral principles to the issue of war does not mean that war is never justified. Although war is morally problematic for both pacifists and just war theorists, and the latter are reluctant to approve of war, they do acknowledge that there are exceptional situations in which a war can be justified. At times, a war is simply a necessary evil in order to prevent a greater evil. That is why it is justified to wage a war in such circumstances. Furthermore, it is important that the war is conducted in accordance with certain moral criteria; after all, not all violence is allowed in war. Only under these conditions can one speak of a justly waged war. Lastly, just war theory acknowledges that peace needs to be reestablished after the war. Hence, three branches today compose just war theory: jus ad bellum, jus in bello and jus post bellum.

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15 It must be noted here that there is no unanimity on the precise contents of just war theory. Throughout history, the meaning of all of just war theory’s norms is debated.
First, the criteria that determine whether waging a war is justified need to be specified. These criteria are: just cause; legitimate authority; right intention; last resort; reasonable chance for success; and proportionality. The just cause criterion is considered the most important element of *jus ad bellum*. Surely, war is a morally tricky and sensitive undertaking and arms should be taken up only for very serious reasons. Throughout the history of just war theory, various causes have been granted such importance. In Thomas Aquinas’ age, freeing the Holy Land; later, standing up for the rights of oppressed fellow Christians or fellow nationals outside territorial borders; securing commercial interests abroad or the principle of the open sea; but what always counted was the protection of territorial integrity and political independence of a political community. To this day, responding to aggression is seen as a just cause for war.\(^{16}\) Aggression is a violation of the ‘law’ – that is, both international law and morality – and is thus an evil that can justifiably be addressed by war as a way of righting the wrong.

Regarding the criterion of legitimate authority: a decision on something as serious as initiating war can only be taken by the highest, legitimate power. Of course the question who this highest power is, has long been debated within just war theory. In the medieval context of feudal, vertical division of power, many claimed that highest power: royalty and bishops, counts and kings. Since the rise of nation states in the modern era and the resulting horizontal division of sovereignty, the answer for the question on legitimate authority seems to have been found in the (nation) state. Each state is sovereign, which means that it is not subject to outside powers.\(^{17}\) Being the highest power would grant each state the authority to declare war. However, an international legal order has developed in the meantime. According to the Charter of the United Nations, the use of force can be justified only in two ways, i.e. in accordance with the Security Council’s authority and as a self-defensive response to an armed attack from another state.\(^{18}\)

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\(^{16}\) Article 51 UN Charter and e.g. Walzer 2000, p. 51-73.

\(^{17}\) The concept of political sovereignty is complex and controversial; this will be addressed in more detail in chapter 5.

\(^{18}\) The question whether the right to national self-defense can be seen as parallel to personal self-defense will not be addressed here. For a powerful piece against this so-called ‘domestic analogy’ see e.g.: David Rodin, *War and Self-Defence*, Oxford:
The other just war criteria are also important.\textsuperscript{19} They determine that a war can only be initiated with the right intention. The intention behind the use of force must lie in repairing injustice, i.e. addressing the just cause for war, and not in private gain, revenge or the seeking of glory. Those who want to wage a just war, must do so with pure intentions. Furthermore, waging war is only justified when all other alternatives for repairing the injustice have been exhausted. War is an \textit{ultimum remedium}: all non-violent methods to right the wrong must be exhausted. Precisely because of the risk of escalation once war is unleashed, and the high amount and severity of the damage, destruction and deprivation it causes, the instrument of war can only be used as a last resort. The final two criteria are strongly linked. The use of military force is only justified when there is a reasonable chance that the war will be a success. Pointless wars and mass violence are a waste of human lives and resources, and are therefore prohibited. Moreover, the damage that a war will cause must be weighed against the future benefits of war. In other words, the costs of waging the war need to be outweighed by the benefits it will achieve. This criterion is also known as ‘macro’ proportionality. In theory, it should not be easy to meet these criteria. War is a heavy instrument that should be used restrictively and with extreme caution.

Secondly, one can debate whether a war has or has not been justly waged. Based on \textit{jus in bello}, maximal efforts must be made to minimize the violence of war as much as possible. Three criteria fall under \textit{jus in bello}: necessity, proportionality and discrimination.\textsuperscript{20} The necessity criterion generally implies that a specific military action can only be employed when it is useful and necessary from a strategic perspective. No more violence may be used than necessary to achieve the goal, for example gaining military advantage or


\textsuperscript{20} Chapter 3 shortly highlights the historical roots of these principles.
winning a certain battle. In addition, proportionality demands that the consequences of a specific military action must be weighed against the objective that it will achieve. Proportionality, in this case, is applied at a ‘micro’ level. The criteria of necessity and proportionality are closely related: they are consequentialist motivations for limiting the violence of war, and so the number of casualties and the level of destruction. They determine that the use, amount and sort of the military violence are in accordance with its objective. Neutralizing a small battalion of rebels only justifies the use of violence that is necessary and proportional to do just that.

The principle of discrimination determines that a distinction must be made between legitimate and illegitimate targets; i.e. between combatants and non-combatants. Since civilians (or non-combatants) are ‘innocent’, their immunity from the violence of war must be respected. That is why the principle of discrimination is also referred to as non-combatant immunity. This involves a deontological limitation of violence: the parties waging the war must distinguish sharply between those who are and those who are not involved in battle, i.e. those who are ‘innocent’ and those who are not. Hence, non-combatants are immune even if such an attack could have strategic benefits. Just war theorists usually argue that combatants are considered to have renounced their right not to be killed when they join the army, bear arms and pose a threat to other combatants. This way, combatants enter an alternative moral domain when deployed in which they can be targeted and potentially hurt or killed. The acts of violence in war are therefore limited to tactical-military targets; war should be an affair restricted to soldiers and may not be extended to the civilian population or civilian targets.

Hence, *jus in bello* determines that targets can only be deemed legitimate if they truly contribute to the military operation and ensure minimum hindrance to civilians. However, it is impossible to completely avoid civilians and civilian targets in war and accordingly, categorically prohibiting civilian casualties

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would make war impossible to wage. Just war theory is ‘realistic’ enough to acknowledge this and accepts an exception to the non-combatant immunity. Sometimes ‘collateral damage’ is unavoidable and to a certain extent civilian casualties and destruction of civilian objects is the price that must be paid in a just war. The recognition of such unavoidable collateral damage does not make it acceptable to directly (intentionally) attack the civilian population. Such damage is only allowed when it is an ‘indirect effect’ of a certain necessary and proportional military act.

The third branch of just war theory is *jus post bellum*, which offers criteria that prevent the occurrence of ‘victor’s justice’. It so contributes to limiting the negative effects of war, by proscribing that efforts are made to avoid e.g. taking economic advantage of the defeated enemy, installing a puppet regime, or generally imposing unjust and punitive peace terms. While *jus post bellum* existed in classic just war theory, it is a relative newcomer in contemporary just war theory. Therefore, its criteria are not fully crystallized. Nevertheless, often considered essential for *jus post bellum* are: creating safety and security in the war affected area, achieving some form of reconstruction, compensation and reparations for the damage of war, and pursuing criminal justice for crimes that have been committed both before and in the war. In conclusion, these criteria of *jus ad bellum*, *jus in bello* and *jus post bellum* create an image of a just war that is initiated by one of the parties with just cause, waged by both parties in a limited fashion, and which ends with a just and lasting peace.

Finally, it is important to emphasize that according to most just war theorists, the criteria of the branches are generally independently valid. As such, it is possible that a war is started without meeting the *jus ad bellum* criteria, but waged in accordance with *jus in bello* and *jus post bellum*. Similarly, it is possible that a just war, waged in accordance with *jus ad bellum* and *jus in bello* nevertheless violates *jus post bellum* etcetera. The demands of each branch exist separately from each other and there are good reasons for this. In principle, a war cannot be just from both sides; there is likely to be at least one just and one unjust party. If *jus in bello* and *jus post bellum* would depend on the *jus ad bellum*, there would be a more serious risk of noncompliance (of the unjust party) with the laws of war. Moreover, the combatants fighting the war

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24 Lee 2012, p. 173-175.
25 In general, this ‘independence thesis’ is today challenged by the revisionists as Jeff McMahan.
are usually not able to determine whether the cause they are fighting for is just or not. They are merely ordered to engage in battle. The best way to ensure that the war does not escalate, is by regarding the branches as independent.26 The warring parties will be more inclined to comply with the rules of military necessity, proportionality and discrimination and the rules of *jus post bellum* after the war when the independence of these branches is emphasized.

### 2.4 Course of the Gaza war

Before examining the debate triggered by this war, a basic rendering of the facts is provided.27 The war started on December 19, 2008 when the six-month truce between Hamas and Israel ended. Both parties blamed each other for violating the conditions of this truce: Israel was accused of not (sufficiently) re-opening the border and of launching a military attack into Gaza territory on November 4,28 and Hamas was accused of failing to stop rocket attacks on Israel. After an increase in the numbers of (now more sophisticated) rocket attacks on Israel after the end of the truce, Israel launched ‘Operation Cast Lead’ on December 27, with air attacks on Gaza.29 On January 3, 2009 a ground offensive was dispatched: Israeli troops crossed the border. The war lasted for about three weeks. Although discussion remains regarding the exact number of victims, it is clear that the fighting resulted in over 1300 Palestinian and 13 Israeli deaths.30

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27 Unfortunately, a substantive simplification of the complexity of the situation is inevitable here.

28 Due to Israel adopting the controversial ‘targeted killings’ policy, there were regular attacks throughout, see e.g.: Thomas Mertens, ‘De Hoornen van het Altaar. Het Hoog Gerechtshof van Israël over “Doelgericht Doden”’, in: Olaf Tans et al. (eds.), *De Grenzen van het Goede Leven*, Nijmegen: Ars Aequi Libri 2009, p. 117-126.


30 Israel’s position is that there were 1166 Palestinian deaths. According to the OCHA
On January 17 and 18, Israel and Hamas respectively declared a unilateral ceasefire. Israel was evidently the ‘victorious party’, and achieved its goal of destroying the military capability of Hamas and reducing rocket attacks into Israeli territory. In addition to the casualties and many more people that were otherwise injured, houses, government buildings, factories, roads and health facilities were destroyed (e.g. nearly half of the health facilities in the Gaza Strip). 31 Around 51,000 Gazans were left homeless. 32 Hence, the following humanitarian crisis in Gaza was the direct result of the three week war. 33 Due to the continued blockade, international organizations encountered major difficulties in delivering humanitarian assistance, despite the fact that international organizations and over fifty states donated money to provide such assistance.

The violence between Israel and Hamas immediately led to a series of reactions, in which the language of just war theory was regularly used. The Secretary-General of the United Nations, Ban Ki Moon, condemned both Israel’s ‘excessive violence’ which victimized civilians and Palestinian militants’ constant rocket attacks. The Security Council drafted Resolution 1860 that dictated, amongst other things, an immediate ceasefire and Israel's withdrawal...
from Gaza.34 The United States abstained from voting on the Resolution, as former President Bush blamed Hamas for causing the conflict and recognized Israel's appeal to self-defense.35 Many other nations called for an immediate end to the violence and international legal scholars were critical of Israel's claim to self-defense.36

United Nations Special Rapporteur on Palestinian human rights, Richard Falk, sharply accused Israel, particularly in his final report on February 11, 2009.37 Although Falk's position was controversial, since some accused him of being biased against Israel, many of his findings were later confirmed by the United Nations Fact Finding Mission on the Gaza Conflict lead by Richard Goldstone.38 Falk's legal arguments can easily be translated into just war language. According to Falk there were no just grounds for the Israeli attack on Gaza; the *jus ad bellum* was violated. He based this conclusion on the following considerations: first of all, the war was not a “last resort” and Israel was the initial aggressor because of the earlier military intervention in November 2008.39 Secondly, there was no just cause and thus a *casus belli* lacked. The truce was reasonably successful: for the most part, Hamas kept to the agreement to stop rocket attacks, in spite of the fact that Israel did not fulfill its commitment to open trade zones to Gaza. Falk furthermore states that being an occupying

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34 United Nations Security Council Resolution, UN Doc. SC/9567 (2009). This is a strong indication of the illegality of operation ‘Cast Lead’, as “it is generally accepted that a condemnation (by the General Assembly or Security Council) of a use of force is strong evidence of its illegality”. Gray 2014, p. 620.

35 For example, see: www.washingtonpost.com/wp-dyn/content/article/2009/ 01/05/AR2009010501150.html?wprrss=rss_world.

36 In the US for example, a group of international lawyers and academics, among them e.g. Ian Brownlie, stated in a letter to the Sunday Times that they “categorically reject” Israel's claim to self-defense as recognized in article 51 UN Charter. Reprinted e.g. at: http://www.juancole.com/2009/01/this-letter-of-attorneys-and-academics.html.


power makes Israel’s claim to self-defense problematic.\textsuperscript{40} Third, the war was “grossly disproportionate” both at the macro and micro level.\textsuperscript{41} Because of the difficulty to discriminate between civilians and combatants in the densely populated Gaza and sealing off Gaza’s borders so that civilians could not flee the war zone, it is well possible that Israel’s bombardments were ‘inherently illegal’.\textsuperscript{42} Hereby, Falk suggests – and that is not self-evident – that \textit{jus ad bellum} fails when the war cannot be waged in accordance with \textit{jus in bello}.

\section*{2.5 The Debate on the Justness}

The language of just war theory also resounds in the Dutch debate on Israel’s military operation in Gaza and revolved mainly on the elements of self-defense, proportionality and non-combatant immunity. This section shows that these criteria can be used either to claim that the war was just, or to claim that it was unjust. Here lies the problematic nature of the just war criteria: they are very general, are applied to extremely complex situations, \textit{and} that application depends on how facts and circumstances are evaluated.

Former Prime Minister Balkenende called the conflict a difficult issue, but he still attributed the breakdown of the truce to Hamas’ rocket attacks.\textsuperscript{43} In a letter to the House of Representatives, the former Minister of Foreign Affairs wrote that Israel was certainly attacked by rockets and mortars prior to the military actions in Gaza. Israel had the right to use military action to defend itself.\textsuperscript{44} As far as the Netherlands was concerned, Israel had met the most important \textit{jus ad bellum} criterion of a just cause. Furthermore, proportionality played a major role in the Dutch government’s reaction and the public debate. The former Prime Minister was adamant in not calling Israel’s actions disproportional, even

\textsuperscript{40} “There exists here a complex and unresolved issue as to whether an occupying Power can claim self-defense in relation to an occupied society”. Falk Report 2009, p. 14.
\textsuperscript{41} Falk argues that “it would appear that the air, ground and sea attacks by Israel were grossly and intentionally disproportionate when measured against either the threat posed or harm done, as well as with respect to the disconnect between the high level of violence relied upon and the specific security goals being pursued”. Falk Report 2009, p. 10.
\textsuperscript{42} Which would constitute “a war crime of the greatest magnitude under international law”. Falk Report 2009, p. 6.
\textsuperscript{43} NOS interview with the Prime Minister on January, 9 2009: www.minaz.nl/Actueel/Radio__en_televisieteksten/2009/ Januari/Minister__president _Balkenende__over_de_situatie_in_de_Gazastrook.
\textsuperscript{44} Kamerstukken II 2008/09, 23 432, nr. 266, p. 5.
though he acknowledged that certain images were “painful to watch”. Still, the government generally refrained from concrete comments and wanted to await a formal investigation. In general, the reactions of various Dutch ministers suggest that the war was considered self-defense against Hamas’ aggression and that the violence was not directly aimed at the population in Gaza. Ergo, the Gaza war could be considered a just war.

As Falk’s Report indicates, the position taken by the Dutch government is not self-evident. The exceptional relationship between the two political communities involved implies that this is not a typical case of one state defending itself against another state’s aggression. Palestine/Gaza is not an independent sovereign state, but was occupied territory at least until 2005. This raises the question whether it is possible for Israel to invoke ‘self’-defense against Gaza? The right to self-defense in the UN Charter is directed at states engaged in international armed conflicts. As the relationship between Israel and Gaza is not between two independent states, it can easily be interpreted differently: as a relationship between the occupier and the occupied, or between the besieger and the besieged. According to the International Court of Justice in

45 NOS interview 2009.
46 Kamerstukken II 2008/09, 23 432, nr. 266, p. 5.
47 Verrijn Stuart 2009; Despite the fact that Israel had announced, both before and after the Gaza War, its willingness to use disproportional violence. Former Prime Minister Ehud Olmert himself supposedly declared that: “The government’s position was from the outset that if there is shooting at the residents of the south, there will be a harsh Israeli response that will be disproportionate.” See: http://www.reuters.com/article/idUSL1506825._CH_.2400.
48 See also Marko Milanovic’s comments on the jus ad bellum of ‘Operation Cast Lead’: http://www.ejiltalk.org/?s=gaza+milanovic.
49 There are developments in this respect. Since 2012, Palestine appears to be a de jure sovereign state based on its status of a non-member ‘observer state’ in the United Nations, and is a party to various human rights and laws of war treaties. The topic remains however controversial. One could question whether this de jure statehood now implies the right to self-defense for Palestine under the UN Charter. The armed wing of Hamas can also be considered a non-state actor, and then the relevant question is to what extent its actions can be attributed to Palestine.
50 According to the Israel Ministry of Foreign Affairs: “there is no question that Israel was legally justified in resorting to the use of force against Hamas”. See: http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/FAQ-Operation_in_Gaza-Legal_Aspects.aspx.
51 Gray 2014, p. 620.
its Wall Opinion, Israel occupied Gaza.\textsuperscript{52} Admittedly, Israel denies any such occupation since its unilateral withdrawal from the Gaza Strip in 2005. However, according to various declarations from the UN since 2005, Israel remained the occupying power because access to Gaza and all aspects of life there remained under Israeli control.\textsuperscript{53} Gaza was \textit{de facto} occupied by Israel.\textsuperscript{54} Does an occupying power have the right to go to war in order to defend itself against an attack that originates from its occupied territory? It rather appears as if the law of belligerent occupation would apply.\textsuperscript{55}

Even if one would claim that Israel is no (longer) occupying the Gaza Strip, the self-defense argument is still questionable: can a state invoke this argument when it is being attacked by non-state actors, such as the armed wing of Hamas? Although the International Court of Justice confirms that the right to self-defense cannot be invoked against non-state actors, individual opinions within the Court differed and neither is there consensus among international law scholars.\textsuperscript{56} For this reason, is it not surprising that Israel invoked the term

\textsuperscript{52} “Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories (…) have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.” \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories}, \textit{Advisory Opinion}, \textit{ICJ Reports} 2004, par. 165-167.


\textsuperscript{55} One can also qualify the situation as a blockade or a siege. Israel controlled practically all of the Gaza territory’s access points. It would be in violation with what certain just war theorists hold, namely that the party who lays sieges may only do so from three sides so that civilians can escape. For example Walzer 2000, p. 163.

\textsuperscript{56} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories}, \textit{Advisory Opinion}, \textit{ICJ Reports} 2004, par 193-194. This opinion was controversial, and the ICJ was criticized because of its failure to accommodate the impact of international terrorism on international law. Individual judges placed question marks: the separate opinions of judges Higgins, Kooijmans and Owada pointed to the problems inherent in
terrorism. Developments since the 9/11 terrorist attacks seem to point to an expansion of the notion of an armed attack to cover attacks by terrorist organization, even without substantial state involvement.\textsuperscript{57} State practice appears to be accepting the possibility of self-defense against an armed attack by a terrorist organization.\textsuperscript{58} And does any armed attack suffice as a just cause, or need it be of a certain scale and seriousness? The International Court of Justice distinguishes between an armed attack and “a mere frontier incident”.\textsuperscript{59} Only the most grave forms of the use of force amount to an armed attack as required by article 51 of the UN Charter.\textsuperscript{60} It is questionable whether the rocket attacks from Gaza constitute a sufficiently grave armed attack.

If Israel had a just cause for the Gaza War, the war needs to be proportional. As discussed earlier, proportionality has two sides. As a \textit{jus ad bellum} criterion, macro proportionality determines that the negative and positives effects of waging war should be weighed against each other before a war is initiated. This criterion is related to the criteria of last resort and likelihood of success; these criteria played no role in the Dutch government’s reaction. However, was it self-evident that the offensive into Gaza was proportional? Surely, the rocket attacks were illegitimate and had seriously damaging effects, but was the threat posed by these rockets serious enough to provoke war? Special Rapporteur Falk’s statistics show that merely 11 rockets were fired in a four-month period. Henry Siegman reports that Hamas was in part to thank for stopping suicide attacks and for an unprecedented level of law and order that had been achieved in Gaza.\textsuperscript{61} Israel could however argue that these rocket attacks were not only a threat in itself, but that they posed an existential threat to Israel, a threat which appears to allow a much firmer response.

\textsuperscript{57} Gray 2014, p. 629, 631-633. E.g. the UN expressed the right of self-defense in resolutions following the 9/11 terrorist attacks.
\textsuperscript{58} See: SC Res 1368 (12 September 2001) and SC Res 1373 (28 September 2001). However, the ICJ did not allow self-defense in response to terrorists attacks from the occupied West Bank.
\textsuperscript{59} Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, ICJ Reports, 1986 ICJ 14, 181.
\textsuperscript{60} Cumulative acts, such as the rockets attacks from Gaza, neither have to amount to an ‘armed attack’. Oil Platforms (Islamic Republic of Iran v. United States of America), ICJ Reports 2003.
Micro proportionality regarding the justness of the violence in war was widely debated. International humanitarian law prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.\textsuperscript{62} The idea that proportionality in war could be evaluated by comparing numbers and ‘types’ of victims – a comparison that would not be in Israel’s favor – was rejected by the former Prime Minister: assessing proportionality should not be a matter of calculation.\textsuperscript{63} Others went a step further: Harvard Law Professor Dershowitz, known for his defense of torture warrants,\textsuperscript{64} claims that Israel’s actions were ‘perfectly proportional’.\textsuperscript{65} It is not about numbers: the laws of war allow neutralizing random numbers of combatants in order to prevent the murder of innocent civilians.

Walzer also refuses to understand micro proportionality as a matter of a simple calculation; it is not ‘tit for tat’. Proportionality in war boils down to a comparison between the damage done and the thereby averted future damage, which is always an estimation because one can never be sure of the future.\textsuperscript{66} Proportionality is therefore to a certain extent a subjective matter; military generals could argue that destroying a particular rocket installation is militarily so valuable that it justifies a large number of civilian casualties as collateral damage; others could argue that even a small amount of civilian casualties is disproportionate compared to such military goal.\textsuperscript{67} These are serious epistemic problems. Walzer therefore argues the question should rather be about ‘responsibility’. Blame can only be assigned based on responsibilities.\textsuperscript{68}

\textsuperscript{62} Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions.
\textsuperscript{63} NOS interview 2009.
\textsuperscript{65} See: http://online.wsj.com/article/SB123085925621747981.html.
\textsuperscript{66} This was posed by Walzer in his 2007 Thomas More lecture; for this lecture and Mertens’ reaction, see: Michael Walzer et al., Oorlog en Dood, Budel: Damon 2008. See also: http://www.nybooks.com/articles/2009/05/14/israel-civilians-combatants/.
This is all the more pressing in asymmetric wars such as the Gaza War, in which there is an imbalance of military strength between the belligerents. In the complexities of such contemporary conflicts, applying the principles of proportionality and discrimination are usually not simple. An important characteristic of these conflicts is that distinguishing combatants from non-combatants is difficult: insurgents operate from within the civilian population; they easily shift from being a civilian (e.g. in daytime) to an insurgent (e.g. at night); and they launch attacks from within civilian objects. If attacks in war need to be discriminating and proportionate, it almost seems that asymmetric wars can never be fought. According to Walzer therefore, a criterion of responsibly is more appropriate than a calculation of proportionality. Responsibility requires that an attacker makes a serious effort to minimize the risks for enemy civilians and this includes the requirement that combatants take risks for themselves in order to achieve that.69 Echoing Walzer’s criterion of responsibility, the Dutch government expected from Israel that it would make genuine efforts to prevent civilian causalities during their military actions. Causing civilian causalities must be avoided as much as possible.70

Although the Dutch ministers were reluctant to prematurely comment on the war, the Minister of Foreign Affairs was certain – without a shadow of a doubt – that Hamas’ rocket attacks qualified as war crimes.71 Israel claimed that these rockets from Gaza were consistently launched from urban areas and that civilians were used a ‘human shields’.72 That was allegedly also the case in the attack on the United Nations school.73 Nevertheless, many others regarded Israel’s large-scale military attack as an action against a community of one-and-half-million people, especially civilians, who could barely defend themselves or escape the battlefield.

Crucial questions must be answered. Were civilians intentionally exposed to the dangers of war by Hamas, supposedly the defensive party? Did the supposedly attacking party, Israel, make serious efforts to minimize civilian

69 Walzer 2014.
70 Kamerstukken II 2008/09, 23 432, nr. 266, p. 4.
71 Appendix Handelingen II 2008/09, nr. 2236.
72 For example: http://news.bbc.co.uk/2/hi/middle_east/7818122.stm. A similar defense was used by Israel in connection to the many victims during the war in Lebanon. This defense was disregarded by Human Rights Watch, see: http://news.bbc.co.uk/2/hi/middle_east/6981557.stm.
causalities? It seemed that the Minister of Foreign Affairs already knew the answer: the large number of Palestinian civilian causalities\textsuperscript{74} is “partially the result” of the fact that “Hamas intentionally positioned and concealed its military installations and weapons amongst the people of Gaza”.\textsuperscript{75} Thus Hamas was deemed responsible for the large number of causalities. Still, how important is the general duty to avoid civilian casualties? \textsuperscript{76} Is hiding amongst the civilian population already a violation of that duty? Margalit and Walzer reject the argument that the duty to avoid civilian causalities might be less pressing in a war on terror. Using civilians as a ‘human shield’ is certainly a violation of the laws of war, but that fact does not diminish the duty to respect non-combatant immunity on the other side.\textsuperscript{77} It is important to determine who is responsible for blurring the boundaries between combatants and non-combatants, but this is still no excuse for parties to violate their legal and moral responsibility. It seems unlikely that Hamas can be blamed entirely for the large number of civilian causalities; Israel's duty to avoid civilian risks as much as possible is unconditional.

Indeed, Special Rapporteur Falk suggests that this duty is so important that Israel should have never started the attack because of the impossibility to respect the principle of discrimination. However, the view that the impossibility to respect \textit{jus in bello} might make \textit{jus ad bellum} impossible, is not uncontested. Some, including Walzer, maintain that under extreme circumstances, the \textit{jus in bello} can be put aside by \textit{jus ad bellum} considerations. In its 1996 Advisory Opinion, the International Court of Justice addressed the issue of the legitimacy of the threat or use of nuclear arms.\textsuperscript{78} Can nuclear weapons, since they \textit{eo ipso} violate \textit{jus in bello}, be used even when conditions of

\begin{itemize}
\item There is also debate about these numbers. According to Israel, 709 of the 1166 Palestinian victims qualify as ‘terrorists’. According to B’Tselem, of the 1387 Palestinian casualties, 330 took part in the hostilities, and 248 were police officers. Falk concludes that 235 of the 1434 casualties were combatants and 239 police officers. According to this report, there were approximately 960 civilian causalities. See respectively: \url{http://www.jpost.com/Israel/IDF-releases-Cast-Lead-casualty-numbers}; \url{B’Tselem’s Investigation of Fatalities in Operation Cast Lead 2009}; and Falk Report 2009, p. 6. Again, see further the Goldstone Report 2009, p. 90-92.
\item Kamerstukken II 2008/09, 23 432, nr. 266, p. 6.
\item Lee calls this the ‘duty of due care’. Lee 2012, p. 213.
\item \textit{Legality of the Threat or Use of Nuclear Weapons}, Advisory Opinion, ICJ Reports 1996, par. 95-97.
\end{itemize}
**INTER ARMA SILENT LEGES?**

**ABOUT THE LAW’S PROBLEMATIC RELATIONSHIP TO WAR**

*jus ad bellum* are fulfilled? The Court did not confirm that international law categorically prohibits the use of nuclear weapons in extreme situations. The question whether it is legally possible to use nuclear weapons for self-defense where the existence of a state is at stake was left unanswered. It remains questionable whether the impossibility to comply with *jus in bello* can invalidate the fundamental right to self-defense.

Given the amount and scale of the damage, destruction and deprivation in Gaza, one can question who is under the obligation to rebuild Gaza. This is a typical issue of *jus post bellum*. Because of the humanitarian crisis, Hamas and the Gazan population were incapable of rebuilding the Gaza Strip. There is a strong moral presumption to attribute the duty to remedy certain damage to the one who caused that damage; whoever ‘breaks it, owns it’.

79 Walzer states: “once we have acted in ways that have significant negative consequences for other people, (...) we cannot just walk away.”

80 And while it is not entirely clear what sort of legal obligations exist regarding post war reconstruction, a judgment of the Israeli High Court of Justice on the supply of electricity in Gaza suggests that Israel is indeed obligated under international humanitarian law to allow into the Gaza Strip “those goods necessary to meet the vital humanitarian needs of the civilian population”. The fact that Israel *de facto* occupied Gaza and controlled its borders, air space and sea access, creates more responsibilities towards the Gazan population than would be the case after war between two sovereign states.

Nevertheless, Israel did not rebuild Gaza after the war, but quite to the contrary, it even blocked the import of reconstruction materials (such as cement) on the grounds that they can be used to make new tunnels used by Hamas to smuggle illegal goods and weapons. As a result, many of the relief programs set up by international organizations and funded by states like the Netherlands could not be executed.

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<th>79 Chapter 5 explores the issue of responsibility for <em>jus post bellum</em>.</th>
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<td>82 Jaber Al-Basyouni Ahmad et al. v. The Prime Minister et al., 2007, HCJ 9132/07.</td>
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16 organizations, among them Amnesty UK and Oxfam International, stated that only 41 trucks of reconstruction materials were allowed into Gaza one year after the initiation of operation ‘Cast Lead’. As thousands of truckloads were in fact needed for repairing the damage, most of the houses, government buildings and factories were not rebuilt and many people remained homeless. It thus appears that Israel did not fulfill the minimal post bellum duty to reconstruct and provide security for the population in the war affected area.

2.6 Conclusion

This chapter shows that various elements in the just war theory played a role in the debate on the Gaza War. It, however, also demonstrates two problematic aspects of that theory. First, the application of the just war criteria to the complex reality of today proves to be more difficult than it might appear at first sight. While depicted as a clear cut case of aggression and self-defense, the Gaza war and the particular relationship between two political communities involved show that matters are complicated: can Israel claim to defend ‘itself’ against occupied territory, against a non-state actor, and in response to this type of aggression? With regard to jus in bello, can norms of proportionality and discrimination be stretched in order to make waging certain types of war possible? Walzer suggests that Israel must make serious efforts to minimize civilian casualties, but that Hamas is responsible too for civilian deaths because it intentionally blurs the distinction between combatants and non-combatants, e.g. by launching rocket attacks from a school building. Does his replacement of the proportionality criterion with a ‘responsibility’ criterion mean that in bello norms are relaxed? That would immediately introduce a dangerous slippery slope.

The final question concerns jus post bellum: how should post war obligations be distributed? It seems that the one who ‘broke it’ is responsible for the reconstruction of the defeated state. The special occupational relationship between Israel and Gaza would yield even more responsibilities for Israel than would be the case after a war between two sovereign states. Hamas lacked the material resources and Israel blocked the import of reconstruction materials

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into Gaza, which resulted in ongoing suffering after ‘Operation Cast Lead’. This shows the difficulties regarding the distribution of *post bellum* duties.

Second, the analysis of the debate makes clear that the application of these criteria to the complex reality depends on a certain interpretation – often politically motivated – of the facts. The application of just war criteria is susceptible to manipulation and abuse. Owing to the ‘flexibility’ of the criteria, different conclusions can be reached: why not argue that self-defense is based on the value of political self-determination, and that in the case of the people of Gaza this value was largely compromised by Israel’s policy of a *de facto* blockade and occupation?85 Should not the Gazans invoke the right to self-defense in pursuit of self-determination?86 Just war theory is all about the rights and duties of a political community to affirm itself, i.e. not just Israel’s position is at risk, but also the population in Gaza. For this reason, Falk states that the safety of Israel and the Palestinian right to self-determination are fundamentally connected. In other words, the Gaza war cannot be separated from its context: the history of the Israel Palestinian Conflict.87 It does not suffice to blame only those who fired the rockets for causing the war. By ignoring parts of international law, from Security Council Resolution 242 to the International Court of Justice opinion on the so-called ‘security wall’, Israel forms part of a much larger problem.88 And although a simple ‘body count’ might not do, a war that killed at least 1300 Palestinians – including many civilians – as a reaction to

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86 Christine Gray argues that the legal question as to whether force can be used in pursuit of self-determination became less practically significant after the decolonization. It remains however extremely significant with regard to the Palestinian struggle for self-determination against the illegal occupation by Israel. But even in this context, she argues, there was little debate on this issue with regard to the Gaza War in 2008/2009. Gray 2014, p. 623.


88 UN Doc. S/RES/242 (1967) and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Reports 2004. In that advice the Court found by an overwhelming majority that: “The construction of a wall built by Israel, the occupying power, in the Occupied Palestinian Territory ... [is] contrary to international law.”
these moderately harmful rocket attacks, does really give the impression of a disproportional and indiscriminate use of force.
3. Just War Theory in Historical Perspective and the Roots of Jus Post Bellum

3.1 Introduction

Today’s armed conflicts, such as in Iraq and Afghanistan but also in Gaza, show the need for a branch of norms governing the aftermath of war.¹ Therefore, jus post bellum is welcomed as ‘new’ part of just war theory. However, while it appears to be a modern invention, some theorists have rightly pointed out that this branch is not quite so new.² This chapter consists of a short historical overview of just war theory, with an eye to jus post bellum. It outlines four major periods: classic just war theory; the transition to the law of nations; the heyday of positivism; and the present revival of just war theory. Through this overview, this chapter provides a historical contextualization of just war theory and places the general research topic in perspective. In order to evaluate the contemporary concept of jus post bellum, it is useful to indicate its historical roots. As will be shown, this third branch is indeed not entirely new; there certainly was attention for post war justice in the history of just war theory.

Additionally, in support of the emergence of contemporary jus post bellum, this chapter shows that the revival of just war theory created the conceptual space for this third branch. While attention was given to post war justice in the first two periods, it evaporated nearly completely during the subsequent period. Only after the revival of just war theory post First and Second World War, war became anew a matter of moral judgment. During this period, the theory’s first branches, jus ad bellum and jus in bello, were largely codified in international law. And although jus post bellum was not codified to the same extent, the doctrinal

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changes and the reappearance of the moral principles of just war theory created space for a similar revival of the theory’s third branch.³

3.2 Classic Just War Theory

3.2.1 Cicero

Throughout history, just war theorists tried to formulate the circumstances in which war – despite its inherent evil – is justified. In ancient Greece, Aristotle (384-322 BC) already considered the types of wars that he thought of as legitimate. Furthermore, war should always be waged for the sake of peace.⁴ A more comprehensive account of the idea of a just war, based on universal natural law, was developed by the Roman statesman and philosopher Cicero (106-43 BC). While war is wrong in principle according to Cicero, the brute violence of war can be justified by the end of war, which is peace. He thus connects *jus ad bellum* with the situation after the war, in which the cause for the war should be removed. This shows the teleological character of war: war as a means to achieve a certain end. It is precisely this end that justifies the often brutal occurrence of warfare.

This conception of war implicates that the victor is only entitled to stop the aggressor from wrongdoing, but not more than that. As such, the *jus ad bellum* limits what can be done after war. When the war is over, the situation that existed before the war – the situation *quo ante bellum* – must be restored. Cicero furthermore argues that consideration for the conquered people is required, and that those who behaved humanely during warfare should be spared.⁵ These requirements points to a spirit of benevolence on the side of the victor. Finally, Cicero identifies an important and central idea of just war theory, namely that the normal state of affairs is peace, and that war forms the exception that can only be justified as an instrument to protect or reestablish that peace.⁶

³ Hence, this chapter’s goals are modest; it opens the field by outlining the general historical lines, for which I gratefully made use of Stephen Neff, *War and the Law of Nations. A General History*, Cambridge: Cambridge University Press 2005.
⁶ Neff 2005, p. 29-34.
3.2.2 Augustine

In the early centuries of the Christian era, pacifism gained the upper hand, primarily based on the teachings of Jesus of Nazareth in the New Testament. Early Christian church fathers like Tertullian preached absolute nonviolence. The Christian commitment to pacifism changed in the fourth century AD. The church acclaimed political power and the pacifist rejection of war formed an obstacle to these new political aspirations. Saint Augustine (354-430) can, together with Cicero, be seen as one of the first proper just war theorists. He attempted to unite the Christian pacifist tradition with the wish to accommodate military force. He thereto interpreted the gospels in a way that allowed for both defensive wars protecting the Christian community and offensive wars punishing evil.

As Cicero, Augustine emphasizes that peace is the ultimate end of war, confirming that war must be perceived as a goal directed activity. All people are by nature focused on peace; even men who wage war do not do so because they desire war itself, but because they desire peace with glory, writes Augustine. Defensive wars are justified because of the necessity to protect peace. Offensive wars are sometimes justified because some forms of peace are not worthy of the name ‘peace’ and can therefore rightly be replaced with a better form of peace in which a particular wrong is avenged. Peace is not a neutral concept for Augustine, referring merely to the absence of collective violence. True peace is the tranquility of order; peace characterized by order and justice.

It must be noted that there is much discussion on Jesus’ perceived ideas on war and violence. There are theologians that reject the idea that Jesus took a pacifist position, based on other quotations from the New Testament which seem to suggest permissibility of violence. Most scholars however seem to believe that Jesus did advocate nonviolence, but among them there is no agreement on which kind of pacifism Jesus preached. See further: Peter Brock, Varieties of Pacifism. A Survey from Antiquity to the Outset of the Twentieth Century, New York: Syracuse University Press 1998, p. 3-4.


“It comes to this, then; a man who has learnt to prefer right to wrong and the rightly ordered to the perverted, sees the peace of the unjust, compared with the peace of the
3.2.3 Aquinas

Thomas Aquinas (1224-1274), the famous just war theorist of the late Middle Ages, regularly refers to Augustine in the *Summa Theologica.* Indeed even those who seek war desire peace; they want to replace a ‘defective peace’, in which they are at peace on terms contrary to their desires, in order to achieve a ‘more perfect peace’. For Aquinas however, a ‘true peace’ is not merely the contingent harmony between people; true peace “is only in good men and about good things”. Securing true peace should be the object of a just war, and so the one waging a just war must have the intention to promote the good and to avoid evil. This requirement of right intention is part of his *jus ad bellum* criteria, alongside of the requirements that war must be waged on the command of an authority and for a just cause. For Aquinas, a just cause for war is present when a wrong is committed by the opposing actor, in which case punishment and restoration after the war is permitted. Aquinas therewith allows for both defensive and offensive wars.

In the Middle Ages, war was seen as a matter of right versus wrong and good versus evil. War was justified to right a wrong, more specifically, when it was necessary to protect a population from external enemies and to punish any wrongdoing. The blame for the violence was placed on the side of the unjust actor. As a result, Stephen Neff concludes that the waging of war was considered as a form of law enforcement. This law enforcement character of war in traditional just war theory had implications for the *post bellum* phase. For just, is not worthy even of the name of peace.” Augustine, *City of God* 1887, p. 932. See also James Turner Johnson, ‘Moral Responsibility After Conflict. The Idea of *Jus Post Bellum* for the Twenty-First Century’ in: Eric Patterson (ed.), *Ethics beyond War’s End,* Washington D.C.: Georgetown University Press 2012, p. 21. The concept of peace is explored in chapter 7.


“… There is no peace when a man concords with another man counter to what he would prefer. Consequently, men seek by means of war to break this concord, because it is a defective peace, in order that they may obtain peace, where nothing is contrary to their will.” Aquinas, *Summa Theologica* 2007, p. 1308 (question 29, art. 1).


Except his clear *jus ad bellum* criteria, Aquinas discusses important *jus in bello* norms as well, such as the non-combatant immunity, the idea of double effect, and the obligation to accept surrender. See: Orend 2006, p. 15.
one, it means that in a system like that, all actors, both the just and unjust side of the conflict, maintain their normal legal rights during periods of war. All are seen as members of the international community and subject to the (same) universal law of nature. They maintain their basic rights in the same way criminals remain members of the community despite their criminal acts.

Furthermore, the law enforcement system limits the measures that any victor could impose on a wrongdoer. The just cause requirement implicates that it was considered the right of the just actor to avenge the wrong for which the war was waged, but that the war never gave rise to new rights or entitlements. The reason for war was the re-enforcement of legal rights that already existed, such as the taking back of an occupied territory. After repelling the aggression, punishing the wrongful act and extracting compensation for the damage done, the situation *quo ante bellum* was restored and an unjust actor resumed its normal standing in the international society. Postwar measures were restricted and should – already according to Augustine – be imposed in a spirit of benevolence and fairness. In conclusion, we can say that *jus post bellum* was present in this phase, but while *jus post bellum* is indeed not quite ‘new’ in just war theory, the *post bellum* norms were still quite general, implied in the other two categories of the just war framework. This changed with the theory of Francisco de Vitoria (1480-1546).

### 3.2.4 Vitoria

Vitoria provides a comprehensive and clear account of all three branches of just war theory. He confirms the law enforcement character of war. To Vitoria,

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17 Neff 2005, p. 57-58.
22 Vitoria was also the first to have a truly universal conception of just war theory; the right to wage war with a just cause applied to the Spanish as well as the Native Americans. Anthony Pagden and Jeremy Lawrance (eds.), *Vitória. Political Writings*, Cambridge: Cambridge University Press 2001.
there is only one basis for a just war, namely, a wrong that has been done.\textsuperscript{23} With Augustine and Aquinas, he holds that the purpose of such a just war consists in avenging a wrong. There has to be, in other words, a preceding fault and guilt, since “(...) we may not use the sword against those who have not harmed us, to kill the innocent is prohibited by natural law”.\textsuperscript{24} The decision to go to war can only legitimately be taken by a proper authority. Because of the severity of the evils inflicted in war, this authority should only wage war when the preceding wrongfulness is of a certain degree.\textsuperscript{25} In other words, not all wrongful acts are sufficient reasons for war; the heavy instrument of war has to be proportionate to the wrong it means to right.\textsuperscript{26} Vitoria also considers the proper behavior during war. He stresses the importance of non-combatant immunity, and states that the deliberate killing of innocents in war is, in principle, unlawful.\textsuperscript{27} But he acknowledges that sometimes, the circumstances leave no other option than to violate this principle and to attack innocent people.\textsuperscript{28}

His account of \textit{jus post bellum} is in line with the earlier theorists of the Middle Ages, but unlike his predecessors, Vitoria was quite specific on obligations after war. The war should not ruin the people of the wrongdoing state, and the victor is limited to regaining pre-existing rights, defending the country, and establishing peace and security.\textsuperscript{29} For Vitoria – like Alberico Gentili (1552-1608) a few years later\textsuperscript{30} – moderation after the war is needed, as well as humility and proportionality. The victor can apply these principles by understanding himself as “a judge sitting in judgment between two

\begin{itemize}
\item \textsuperscript{24} Vitoria \textit{On the Law of War}, 2001, p. 304 (question 1, art. 3, par. 13).
\item \textsuperscript{25} In chapter 2 this is called ‘macro proportionality’.
\item \textsuperscript{26} Vitoria \textit{On the Law of War}, 2001, p. 304 (question 1, art. 3, par. 14).
\item \textsuperscript{27} Vitoria \textit{On the Law of War}, 2001, p. 314-315 (question 3, art. 1, par. 34-36).
\item \textsuperscript{28} This exception builds on the concept of double effect that Augustine’s introduced in his analysis of \textit{jus in bello} norms. Vitoria \textit{On the Law of War}, 2001, p. 315-316 (question 3, art. 1, par. 37).
\item \textsuperscript{29} Vitoria \textit{On the Law of War}, 2001, p. 327 (second canon). Additionally, Vitoria discusses other \textit{jus in bello} norms, regarding the legitimate targets in war and the treatment of enemy soldiers.
\end{itemize}
commonwealths, one the injured party and the other the offender; he must not pass sentence as the prosecutor, but as a judge”. 31 Gentili agreed that the victor should take the role of judge whose job it is to ensure that justice is done. 32

On top of these general post bellum principles – moderation, humility and proportionality – Vitoria mentions three other aspects of jus post bellum: compensation and punishment; treatment of hostages and captives; and regime change. Firstly, the just victor is entitled to recover the violated rights and – because the blame is placed with the wrongdoing enemy – to extract compensation for the damages and the expenses of the war. 33 All that is captured in a just war becomes property of the just actor. Even if this exceeds compensation, objects or territory rightfully taken or occupied in war by the just actor do not need to be returned, according to Vitoria. 34 This is justified by the right to punish the wrongdoer. When the just actor cannot regain its rights, for example what was wrongfully taken does no longer exist, it can extract compensation for the damage from every person in the vanquished state, irrespective of him being a soldier or civilian, guilty or innocent. 35

Secondly, the proper way to deal with hostages and captives after victory according to Vitoria, is that those guilty may be killed as punishment for the wrongs committed and as prevention of future dangers. This is subject to the proportionality principle and should be applied without cruelty and inhumanity. 36 If however, the soldiers of the unjust actor sincerely assumed that they fought for a just cause – if they entered the strife in good faith – they should not be killed after the war. 37 Thirdly, on the issue of forcible regime change after war, Vitoria holds that this is not permitted for a just actor. To violate the sovereignty in such a manner is an inhumane measure. It would exceed the degree and nature of the offence. 38 However, there can be situations

32 Neff 2008, p. 79.
34 Vitoria On the Law of War, 2001, p. 322 (question 3, art.7, par. 51).
36 “We ought, then, to take into account the nature of the wrong done by the enemy and of the damage they have caused and of their other offenses, and from that standpoint to move to our revenge and punishment, without any cruelty and inhumanity.” Vitoria On the Law of War, 2001, p. 320-321 (question 3, art. 6, par. 47).
37 The difficulty for combatants to assess the justness of ‘their’ war is part of the epistemic problems addressed in this book.
38 Vitoria On the Law of War, 2001, p. 325 (question 3, art. 9, par. 58).
in which a wrongful act is so severe, or the peace and security so jeopardized, that the disposition of the authority and regime change is legitimate.\textsuperscript{39} Vitoria’s account of obligations in the postwar phase confirms that war is a matter of right and wrong. His just war theory embodies very much the law enforcement character of war. As was pointed out, this conception of war limits what the victor can do post war: only righting the received wrong and restoring the situation that existed before the wrong was committed was allowed.

### 3.3 Transition to the Law of Nations

A clear shift in theorizing about war and peace took place after the brutal religious wars in Europe. The Peace of Westphalia gave rise to modern nation-states. These sovereign states needed to regulate their external affairs, which led to the development of certain customs and to the codification of international rules: the so-called law of nations. This newly developing law of nations differed in important respects from the moral norms of the law of nature as discussed by earlier theorists. Hugo Grotius (1583-1645) marks the difference between traditional natural law and the law of nations \textit{(jus gentium)}, the latter being international law based on the will of independent nations.\textsuperscript{40} Grotius’ \textit{The Rights of War and Peace} (1625) quickly became, and still is, one of the classic writings in just war theory.\textsuperscript{41} Worried by the atrocities during the brutal warfare in his days, especially during the Thirty Years War, the goal of his theory of war and peace was to minimize that brutality and lawlessness.\textsuperscript{42} Therefore, Grotius’ point of departure was that the situation of war should be governed by the law.\textsuperscript{43}

\textsuperscript{39} Vitoria \textit{On the Law of War}, 2001, p. 326 (question 3, art. 9, par. 59).

\textsuperscript{40} Being the most famous theorist to draw that distinction, but certainly not the first. See further Stephen Neff, \textit{Hugo Grotius. On the Law of War and Peace. Student Edition}, Cambridge: Cambridge University Press 2012, p. xxxiv.


\textsuperscript{42} See for example Arthur Eyffinger & Ben Vermeulen, \textit{Hugo de Groot. Denken over oorlog en vrede}, Baarn: Ambo 1991, p. 17. It will become clear later in this section that this goal, in relation to his construction of the law of nations based on state practice, brings Grotius in a difficult position.

\textsuperscript{43} “If ‘laws are silent among arms’, this is true only of civil laws and of laws relating to the judiciary and the practices of peacetime, and not of the other laws which are perpetual
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THE ROOTS OF JUS POST BELLUM

In the new ‘dualist’ system, the law of nature is distinct from the law of
nations.\textsuperscript{44} The law of nature consists of eternal and universal principles that are
unchangeable. The law of nations consists of manmade, legal, often formalistic
principles dealing with practical matters that are based on state practice.\textsuperscript{45} As
the outcome of the free will of those states Grotius calls it ‘volitional law’
(referred to as ‘voluntary law’ by later theorists). Since these norms are based
on the will of states, they can be changed accordingly. “As the law of nations
permits many things, (…) which are not permitted by the law of nature, so it
prohibits some things which the law of nature allows.”\textsuperscript{46} The law of nations is
used by Grotius to fill in the blanks left by natural law but natural law is also
used as a moral correction or adaptation of the law of nations. While the law of
nations plays an important role in governing the external relations between
states, the natural law remains highest in Grotius’ hierarchy of norms.\textsuperscript{47}

It should be noted however, that this system of norms is not simply a dichotomy.
Natural law is subdivided into the secular natural law derived from the rational
and social nature of men and the divine volitional law based on God’s will.\textsuperscript{48}
The divine law has its own function next to the secular natural law, applicable
only to Christians and representing high moral ideals. The law of nations can
further be subdivided into the law of nations based on state custom, deriving its
validity from consent between them,\textsuperscript{49} and Roman law \textit{jus gentium}, which arose
out of unilateral enactments by states.\textsuperscript{50}

\textsuperscript{44} E.g. Nussbaum 1962, p. 109 and Neff 2005, p 98.
\textsuperscript{45} On the difference between the law of nature and of nations see the Prolegomena to
\textsuperscript{46} Grotius 2005, p. 1290.
\textsuperscript{47} Neff 2005, p. 98-99.
\textsuperscript{48} See further Tanaka Tadashi, ‘Grotius’ Concept of Law’, in: Yasuaki Onuma (ed.), \textit{A
Press 2001. This is in accordance with the categorization of the types of law made in
\textsuperscript{49} Tanashi 2001, p. 17 and G.I.A.D. Draper, ‘Grotius’ Place in the Development of Legal
Ideas about War’, in: Hedley Bull, Benedict Kingsbury & Adam Roberts (eds.), \textit{Hugo
\textsuperscript{50} Neff 2012, p. xxxii. Hence there are three types of volitional law. The separation
between the different norms is not always clear; it is not always obvious to what type of
Grotius starts from the assumption – in line with classic just war theory – that the state of peace is the normal state of affairs. In exceptional circumstances when certain rights are violated, a war is justified. Regarding \textit{jus ad bellum}, the focus is on natural law and several just causes are accepted: defense against (the threat of) aggression; the recovery of what is due to the state (restitution of a possession, executing contractual agreements or compensation of an injury); and the punishment of a wrong committed.\footnote{Grotius 2005, p. 389-420. See for example also: Eyffinger & Vermeulen 1991, p. 18 or – formulated slightly different – Neff 2005, p. 97 and Neff 2012, p. xxv. Pufendorf confirmed these just causes a few years later. Samuel Pufendorf, \textit{On the Law of Nature and Nations} (vol. 2, 8 books), Oxford: Clarendon Press 1934 (\textit{De Jure Naturae et Gentium Libri Octo}, 1672, translated by Charles Oldfather and William Oldfather).}

Additionally, Grotius considered it necessary that there be a reasonable chance of winning (now called the probability of success criterion). New is that a war can also be ‘just’ according to Grotius in another sense, namely, when the codified principles of the law of nations are fulfilled – for example when states follow the formal requirements like issuing a declaration of war.\footnote{E.g. Grotius 2005, p. 1253.} Interestingly, the result is that a war can be just and unjust at the same time: just or unjust according to natural law, and just or unjust – perhaps better called ‘legal’ or ‘illegal’ – according to the law of nations. These two levels of argumentation seem independent.\footnote{Nussbaum 1962, p. 110.}

Since it was Grotius’ goal to minimize the negative effects of war, he emphasized that the belligerents follow the same rules. This ‘indiscriminateness’ of the \textit{jus in bello} is considered one of Grotius’ most important contributions to international law. It demarcates the transition from the classic conception of just war theory to this new period. According to Grotius, \textit{jus in bello} is based on the volitional law of nations, and belligerents have an equal right to harm and kill enemy combatants. While according to natural law it is unjust for unjust combatants to kill just combatants, this practice is ‘legal’ according to the law of nations.\footnote{That this is morally speaking problematic is pointed out by Jeff McMahan.} Hence, \textit{jus in bello} becomes independent from \textit{jus ad bellum}. Soldiers committing legal acts are immune from punishment, because the acts have so called ‘external effects’: they bring about consequences that are to be respected by others.\footnote{See further Tadashi 2001, p. 45. Grotius 2005, p. 1360.}

As a result of this shift

\footnote{Grotius 2005, p. 1366-1373.}
towards volitional law to create an indiscriminate *jus in bello*, Grotius seems to leave belligerents virtually unrestrained and to permit cruelty and brutality. Yet, at the same time, he stresses the need for moderation, which leads him to correct and restrain these agreed principles in the light of natural law and divine law principles.\(^{56}\) Both just and unjust combatants are bound, writes Grotius, by the moral principle of moderation in warfare.\(^{57}\) While any citizen of the enemy may be killed, this principle implicates that women, children and old men should be spared.\(^{58}\) In general, all combat which does not contribute to justice or the reestablishment of peace, is contrary to the duties of Christians.\(^{59}\)

What does Grotius offer in terms of *jus post bellum*? At first glance, the situation after the war is governed by the law of nations and the broad legal *jus in bello* entitlements have an important impact on the *jus post bellum*. It seems that there are few legal restraints on belligerents: goods, territory, people and sovereignty can be acquired and belligerents are equally entitled to harm each other’s people and country. Similar to the *jus in bello*, the *jus post bellum* hardly imposes any restrictions after the war. It is left to the discretion of the former belligerents to arrange all sorts of issues in bilateral peace treaties. The power of consolidating the peace rests with the authority who has also the power to start a war, for example the king of a monarchy.\(^{60}\) This victorious ruler is permitted to take the radical decision to renounce the complete or partial sovereignty of its territory in concluding the peace. The moral principles based on natural law only come into play when difficulties arise regarding the interpretation of peace

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\(^{56}\) “I must now reflect, and take away from those that make war almost all the rights, which I may seem to have granted them; which yet in reality I have not. For when I first undertook to explain this part of the law of nations, I then declared, that many things are said to be of right and lawful, because they escape punishment, and partly because courts of justice have given them their authority, tho’ they are contrary to the rules, either of justice properly so called, or of other virtues, or at least those, who abstain from such things, act in a manner more honest and more commendable in the opinion of good men.” Grotius 2005, p. 1411. See further Draper 2002, p. 198.

\(^{57}\) Nussbaum 1962, p. 110-111.


\(^{59}\) Grotius 2005, p. 1456 and further Tadashi 2001, p. 284. A similar argumentation is followed regarding moderation in the spoiling of the land of the enemy. While spoiling and wasting their land and property is legal according to the law of nations, it should only be done when it results in some advantage for the other actor, for example when it quickly enforces the peace. In order for it to be a justified action, it should be necessary; a satisfaction for a debt owed; or should be a punishment for an injury. See: Grotius 2005, p. 1457-1458.

\(^{60}\) Grotius 2005, p. 1551-1552.
treaties. For example, an ambiguous treaty should be interpreted in such a manner that the just actor regains the rights he had before the war, and recovers his costs and damages according to natural law principle that everyone is restored his own possessions.\(^{61}\)

However, Grotius realizes that the *jus ad bellum* is often disputed due to what we would now call ‘epistemic problems’. In case there is doubt on the justness of the war, it is better to “make the balance even on both sides; which is generally done two ways”.\(^{62}\) However, Grotius definitely breaks with the traditional idea that war cannot be a source of new rights. The war is in his view no longer aimed at the restoration of the situation *quo ante bellum*, but can now lead to a radically different situation. This is what it may take to build and consolidate the peace. The goal of peace often requires, from a practical point of view, holding onto the law of nations. As practical solution, it is important to avoid future disagreement and to accept the *status quo* after the war.\(^{63}\)

It would seem that these broad *post bellum* entitlements conflict with Grotius’ other important goal: avoiding cruel measures and suffering. But, Grotius also stresses that *jus post bellum* should further be limited by natural law. An example is the case of an unconditional surrender. When the people of the defeated actor surrender unconditionally, the law of nations would allow the victor to do virtually everything he wants. According to Grotius, the victor should however be guided by the moral principles of moderation and clemency.\(^ {64}\) The same counts for the treatment of hostages: according to the law of nations they may be killed, but not according to considerations of what Grotius calls ‘internal justice’. In general, it is essential to keep in mind the prospect of peace in the midst of a war, and therefore to let considerations of

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\(^{61}\) Here it is clear, as also in many other issues, that in the law of nature, the different branches of just war theory are strongly connected. In many ways, the *jus ad bellum* determines both the *jus in bello* obligations as well as the postwar obligations. In the law of nations however, these branches are strictly separated which results for example in the indiscriminate character of the *jus in bello*. In this case, regarding the damages done in the war, the just actor to the conflict can justly destroy property of the enemy by way of punishment. On the other hand, the state that is engaged in an unjust war is responsible for the losses of the war, and based on natural law obligated to compensate them.

\(^{62}\) And consequently, the possessions and land legally acquired in war according to the law of nations will remain in place. Grotius 2005, p. 1558-1560.

\(^{63}\) This presumption counts for many issues that come up during the post war phase. See further: Grotius 2005, p. 1558-1567.

\(^{64}\) Grotius 2005, p. 1585-1586.
humanity govern the hostilities and the period after the war.\textsuperscript{65} Thus, moral principles are invoked to restrict the permissive and potentially cruel implications of the law of nations and of arrangements made in peace treaties.

Evidently, the new political order of independent nation states and the trend towards secularization in the 17\textsuperscript{th} and 18\textsuperscript{th} century set the stage for a different way of theorizing about war. The work of Grotius marks the development of the law of nations as distinct from the law of nature. But he never lets natural law out of sight. The principle of moderation plays an important role in Grotius’ understanding of \textit{jus in bello} and \textit{jus post bellum}.\textsuperscript{66} In the 18\textsuperscript{th} century we find a further development, continuing the shift towards a voluntary law of nations which then becomes the dominant framework concerning issues of war and peace.\textsuperscript{67}

3.4 The Heyday of Positivism

The shift towards the voluntary law of nations led to a view on international law as purely legal, separated from theology and moral philosophy. That positivism led to major legal codifications, and the validity of these norms was considered to be derived exclusively from the will of states. Questions of war and peace were seen from this purely legal framework and classic just war theory became marginalized.\textsuperscript{68} Regarding \textit{jus ad bellum}, war became an accepted instrument of states in the pursuit of their national policy goals.\textsuperscript{69} This instrumentalist view on war is evident in the theory of Carl von Clausewitz (1780-1831).\textsuperscript{70} The acceptance of war as a national policy instrument turned it into a mechanism subject to rational cost-benefit analysis.\textsuperscript{71} This led to a picture of the international arena as composed of independent states, solely concerned with

\textsuperscript{65} Grotius 2005, p. 1638-1644.
\textsuperscript{66} Neff 2008, p. 81.
\textsuperscript{67} See further Neff 2005, p. 86-87.
\textsuperscript{68} Neff 2005, p. 171.
\textsuperscript{69} After Napoleon was defeated, a new political order needed to be established at the Congress of Vienna in 1814 and 1815. The Vienna Congress and its Final Act are an important milestone in the development of codified international law. The practice of international slave trade was prohibited and it arranged for the free navigation on international rivers and certain diplomatic issues. See: Oppenheim 1905, p. 65.
\textsuperscript{71} Therefore Neff states that such positivism has a “powerfully utilitarian aura” about it. Neff 2005, p. 161-163.
their national interests. Peace became a matter of (a balance of) power. Consequently, war was seen as a ‘normal’ condition in international relations, in sharp contrast with the traditional assumption that peace is the normal state of affairs.72

What does this mean for jus post bellum? Since jus ad bellum considerations were hardly relevant anymore, the limitations for the post bellum phase inherent in the law enforcement paradigm became absent during this period. War was considered to be a legitimate source of new rights.73 In the words of Neff, “the era of ‘victor’s justice’ had well and truly arrived”.74 Restricting post war rights by principles such as benevolence, moderation, humility and proportionality were hardly taken serious during this period of positivism. Peace treaties were seen as a normal way to consolidate a new situation, as the outcome of unequally positioned former belligerents. The victor’s prerogative after the war seemed unlimited. The heyday of positivism set the stage for modern positive international law, which led to an enormous growth of codified legal rules, especially with regard to jus in bello. Yet, its contribution to moral theorizing on war and peace was meager, especially with regard to post war justice.

3.5 The Era of International Organizations

It could be argued that the outbreak of the First World War marks the beginning of a new period in the history of just war theory because of the establishment of international organizations such as the League of Nations and its later successor the United Nations. War became a matter of legal and moral consideration again. Traditional just war principles regained relevance. Since then, both legal norms and norms derived from just war theory are invoked in discussions on war and peace.75 Certain key principles of traditional just war theory reappear, such as just cause, and space is opened for (the revival of) jus post bellum. Gradually, war is rejected as a normal instrument in the hands of states; war is now rather perceived as a matter of global concern.

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72 Neff 2005, p. 177.
73 Neff 2005, p. 198-199.
74 Neff 2008, p. 83.
75 The precise relationship between the legal and moral norms of just war theory is of a complex nature, to which these brief remarks do not do justice.
The first step towards this new era is perhaps best located in the Treaty of Versailles.\textsuperscript{76} It imposed far-reaching ‘peace’ terms on Germany, because Germany supposedly imposed the war upon the Allies.\textsuperscript{77} Remarkable here is the reemergence of the vocabulary of just war theory: Germany was considered the ‘unjust enemy’. The treaty also entailed provisions on the individual criminal responsibility of German leaders, especially the former German Emperor, for violations of \textit{jus ad bellum} and \textit{jus in bello}.\textsuperscript{78} Furthermore, the treaty dealt with issues now considered part of \textit{jus post bellum}, although principles like benevolence, moderation, humility and proportionality were largely absent. The peace created by the Treaty of Versailles is therefore regularly called the prime example of an ‘unjust peace’.\textsuperscript{79}

The emergence of just war theory also became evident in the establishment of the League of Nations.\textsuperscript{80} Article 10 of the League Covenant obliges states to respect each other’s territorial integrity and political independence, on the basis of the general principle that the use of force by one state against another is unlawful.\textsuperscript{81} While the perception of war as a legitimate policy instrument was not radically abolished by the League of Nations, it definitely lost its credibility.\textsuperscript{82} The traditional idea that peace, and not war, is the normal state of international affairs reemerged. The Covenant further determined that any war, or the threat thereof, was a matter of concern for the whole League.\textsuperscript{83} Thus, war became a matter of relevance to the international community as a whole. This important notion did not exist in the previous century.\textsuperscript{84} If the prohibition on war was violated, the Covenant allowed for sanctions against the ‘aggressor’. Even though this mechanism did not work properly, it signifies the reappearance of the law enforcement character of war.\textsuperscript{85}

\begin{footnotesize}
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\item[76] http://avalon.law.yale.edu/subject_menus/versailles_menu.asp
\item[77] Treaty of Versailles, part 8, article 231.
\item[78] Treaty of Versailles, part 7, article 227-230.
\item[80] Treaty of Versailles, Part 1.
\item[82] E.g. article 15.7 Covenant of the League of Nations, and Brownlie 1963, p. 56.
\item[83] Article 11 League Covenant.
\item[84] Neff 2005, p. 290.
\item[85] Article 16 League Covenant. As many other provisions in the Covenant, this did not work exactly as intended by the drafters. See further: Brownlie 1963, p. 58-59.
\end{itemize}
\end{footnotesize}
Although these developments are important, they do not constitute a full return of *jus ad bellum*. The Covenant provides only a rather vague general prohibition on war. It seems that it merely restricted war instead of outlawing it. The option of war remained open once certain procedural conditions were met. Another important weakness of the League system lies in its terminology, using the term ‘war’, whereas states often qualified their military actions otherwise (e.g. as ‘reprisal’). The resulting restriction of war had therefore only a limited impact. Many types of military force were not covered by the Covenant, and it was relatively easy for states to evade the prohibition on war. Without a substantive *jus ad bellum*, the *jus post bellum* was limited as well. A further step was made by the ‘Locarno Treaties’ (1925), in which France, Germany and Belgium declared to refrain from aggression against each other, even though the Locarno Treaties still refer to self-defense as a just cause. Article 2 states that the prohibition on war does not apply in case of a legitimate self-defense. A few years later, the ‘Pact of Paris’ (otherwise known as

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86 See e.g. Malcolm Shaw, *International Law*, Cambridge: Cambridge University Press 2008, p. 1121-1122 and Brownlie 1963, p. 56-58. Brownlie claims in this respect, that the Covenant derogates from the customary rule that was already established at that time, entailing a general prohibition on the use of force except in cases of aggression and self-defense.

87 Neff 2005, p. 292-293. He rightly states that in the medieval just war doctrine, there needed to be a valid substantive ground for waging war, the *jus ad bellum* thus was a positive concept. In the League system, the *jus ad bellum* was merely a negative concept, because it still allows war after the peaceful means of dispute settlement are exhausted.

88 These variety of military actions that were not defined by states as ‘war’, generally fall under the heading of the so-called ‘measures short of war’. For example, military operations were said to be a situation of aggression and self-defense instead of war. See further: Neff 2005, p. 291-292.


90 See for example online: http://avalon.law.yale.edu/20th_century/locarno_001.asp. The 1930 war between Japan and Manchuria lead to a confirmation of a principle logically following from the prohibition on war: the Stimson Doctrine of Nonrecognition. This principle is important for the *jus post bellum*. After Japan invaded Manchuria in 1931, the American Secretary of State, Henry Stimson, stated that the United States would not recognize the legality of a situation, in this case the annexation of territory, established by aggression. The principle means, in other words, that actions illegal according to international law cannot lead to new legal rights. E.g. available online at: http://courses.knox.edu/hist285schneid/stimsondoctrine.html. This doctrine was confirmed by a resolution of the League Assembly and a Declaration on the Chaco War between several American states later that year. See further Brownlie 1963, p. 92-93.
‘Kellogg Briand Pact’\textsuperscript{91}, was concluded. It reiterated the rejection of war as a permitted national policy instrument,\textsuperscript{92} thus strengthening the Covenant’s restriction of war and putting into place a more firm general prohibition, which is still valid today.\textsuperscript{93}

The League of Nations was unable to prevent the Second World War. After the Second World War, the League of Nations was succeeded by a new and improved coalition of states, the United Nations. Under the United Nations system, the restriction of war was further strengthened. The Charter confirms the prohibition, codified in the Pact of Paris, of the use of military force. It specifically required from all its members to refrain from “the threat or use of force against the territorial integrity or political independence of a state”.\textsuperscript{94} The United Nations does not solely focus on the restriction of war, but also stresses the development of friendly relations between states and the need to establish international co-operation and to promote human rights.\textsuperscript{95} The United Nations system consolidated not only (the revival of) \textit{jus ad bellum}, but was also important for \textit{jus post bellum}. Now that war is seen as a problem for the entire international community of states, peace building too is no longer seen as a ‘private’ matter. The spirit of an international community did not only inform \textit{jus ad bellum}, but is also relevant for the aftermath of war. The way states act after war is no longer a matter of discretion of the states involved.\textsuperscript{96} The emphasis on \textit{jus ad bellum} and \textit{jus post bellum} indicate that in the system of the UN Charter, peace has (again) become the normal ‘default’ state of affairs.\textsuperscript{97}

\textbf{3.6 Conclusion}

It goes without saying that the UN Charter's \textit{jus ad bellum} system is far from perfect. The right to self-defense is easily invoked and the Security Council has turned out to be a highly politicized body. Nevertheless, the United Nations plays an increasingly important role in post war peace building. Its focus on a

\textsuperscript{91} The General Treaty for the Renunciation of War, available online for example at: http://www.yale.edu/lawweb/avalon/imt/kbpact.htm.

\textsuperscript{92} Nussbaum 1962, p. 254.

\textsuperscript{93} Shaw 2008, p. 1122.

\textsuperscript{94} Article 2.4 UN Charter.

\textsuperscript{95} Article 1 UN Charter.

\textsuperscript{96} See further on this argument Neff 2008, p. 85-87.

\textsuperscript{97} In this system war again became a matter of right versus wrong. Shaw 2008, p. 1235-1266.
durable peace after a war led to the 1995 ‘Agenda for Peace’ and the 2005 ‘responsibility to protect’ doctrine. A Peace Building Commission was established to help states in the transition from war to a durable peace. These developments show the contemporary emphasis on postwar justice.

According to classic just war theory, *jus post bellum* depended on *jus ad bellum*. This meant that *jus post bellum* had a limited character. Today such a limited understanding of *jus post bellum* has been left behind. *Jus post bellum* now entails broader post war duties, such as the ‘responsibility to rebuild’ as part of the ‘responsibility to protect’, involving a “genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development”. The UN Charter’s emphasis on cooperation between states to ensure international peace and security and the growing emphasis on human rights protection suggests that contemporary *jus post bellum* becomes a more independent branch of just war theory. Now that norms of *jus ad bellum* and *jus in bello* are increasingly codified, it seems time to do the same for *jus post bellum*. In order to do so, clarity of its underlying norms and objectives is needed.

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100 Brian Orend pleads for a new post war Geneva Convention. Carsten Stahn notes however that contemporary international law already contains many norms that belong to the body of *jus post bellum*. “The substantive components of peace-making (...) are governed by certain norms and standards of international law derived from different fields of law and legal practice.” See Stahn 2008(2), p. 104.
4. The Blurry Boundaries between War and Peace. Do We Need to Extend Just War Theory?

4.1 Introduction

Just war theory is often said to be the leading position on the morality of war. The previous chapter shows that theory dates back to Greek and Roman antiquity and remains popular up to date. One can safely argue that this theory is significant and has proven sustainable.\(^1\) Its criteria appeal to moral intuitions widely held by many around the world. In the words of Michael Walzer, the leading contemporary just war theorist, just war is the theoretical version of ideas of our common heritage, “designed to help us resolve, or at least to think clearly about, the problems of definition and application”.\(^2\) Many theorists today accept the basic premises of just war theory.\(^3\)

Located in between the two ‘extreme’ conclusions of pacifism and realism,\(^4\) just war theory provides principles with which to judge war. Contrary to realists, just war theorists believe that war is subjected to moral principles. As pacifists, they argue that this means that war is principally immoral, mainly because of the wrongfulness of the intentional taking of human life – the killing of non-combatants in particular. But while just war theorists are reluctant to approve of war, they do think, contrary to pacifists, that there are situations in which a war can nevertheless be justifiable.\(^5\) To avenge a greater wrong, it is possible that the ends justify the means. In that case, war is perceived as the ‘lesser’ of two evils.\(^6\) But while it is – at least theoretically\(^7\) – considered possible

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1. According to Larry May “It has stood the test of time.” See: Larry May, Eric Rovie & Steve Viner (eds.), *The Morality of War. Classical and Contemporary Readings*, Upper Saddle River: Pearson Education 2006, p. ix. Although the previous chapter also showed that this does not mean that the theory was always popular to the same extent as today.
4. Which were highlighted in chapter 2.
5. Which does not mean that in general for just war theorists, war is considered as something good or properly just; in war, “justice is always under a cloud”. Walzer 2004, p. x.
that a war is justified, the general goal of just war theory is a just and durable peace.\textsuperscript{8} It means that just war theorists are concerned with limiting the occurrence of war, and when it does occur, with ensuring that the conduct of war is as humane as possible.\textsuperscript{9} These concerns correspond with the two main branches of just war theory: \textit{jus ad bellum}, determining under which conditions war is justified, and the \textit{jus in bello}, determining what the proper behavior is during a war.

But while this theory might remain the leading position on the morality of war, there is another side to that story. Just war theory is in fact struggling to keep up with the changing international reality. It is premised upon a certain conception of war – as armed conflict between two states – and on a clear demarcation line between the situation of war and the situation of peace. And this seems no longer typical for the political reality. Many agree that war itself and the way in which it is waged are different today as compared to earlier in history.\textsuperscript{10} It is claimed that particularly since the end of the Cold War, the character of war has changed significantly. There is a large body of literature on this subject, an important part of which revolves around the debate on the so-called ‘old and new wars’.\textsuperscript{11} An important trend is that the number of wars between the armies of two states have declined since the Second World War,

\begin{footnotes}


\footnotetext[9]{Bellamy 2006, p. 4.}

\footnotetext[10]{For an overview of the nature of war throughout history see e.g. John Keegan, \textit{A History of Warfare}, New York: Vintage Books 1993.}


\end{footnotes}
particularlly since the early 1990s. These so-called ‘conventional wars’, commencing with a declaration of war, fought between two professional armies, and ending with a peace treaty, almost seem to have become a thing of the past.

In many situations, it is not even clear whether something qualifies as war. The situation in Afghanistan, is that still a war? The operation in Mali? The drone attacks in Pakistan? The Russian presence in the Ukraine? In legal terminology, the term ‘war’ is abandoned. And contemporary wars (or armed conflicts; acts of war; or military actions) have many shapes and sizes: peace enforcement operations, military occupation, the ‘war against terror’, airstrikes outside areas of war, guerrilla attacks and targeted killings. Obviously, it has become difficult to separate the paradigm of war and the paradigm of peace. More often than not, we find ourselves in a grey area.

The decline of these conventional wars also means that there are different actors in contemporary wars, who play different roles and have different interests (e.g. financial, or control and power). The actors in wars are both state actors as well as non-state ‘belligerents’ such as war lords, militias, mercenaries and private military companies. The result is that some wars can be characterized as asymmetric, meaning that there is an imbalance of military strength between the belligerents, e.g. when non-state militias are fighting a guerrilla war against a national army. The growing involvement of non-state actors in war makes it less likely that wars start after an official declaration made by state representatives at a given point in time. It is well possible that a period of civil unrest or rebellion develops – more fluently – into a situation that can qualify as war or armed conflict. And if the war starts with a political decision, who makes this decision? Political representatives of the state, or of a different political entity, military leaders, a war lord? It appears that today’s wars are more likely to develop from the bottom, instead of top-down. The asymmetric character of contemporary wars and the fact that war is more and more commercialized – making it a potentially profitable endeavor for belligerents and other actors – furthermore means that the war can drag on (at a

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13 The activities of these non-state actors blur the line between soldiers and civilians. See further: Kaldor 2007, p. 9.
high or low intensity) for a long time.\textsuperscript{15} This also indicates that fewer wars have a clear beginning and end today.

This political reality, the changed character of war(fare), and the often blurry boundaries between war and peace, pose serious challenges to just war theory. More specifically, it raises questions of relevance and applicability. Is just war theory still tailored for the ‘new’ political reality?\textsuperscript{16} Can we apply just war principles to contemporary armed conflicts? Do they still offer the required moral guidance?\textsuperscript{17} And perhaps most importantly, are they able to advance the goal of a just and durable peace? Being pessimistic, one could argue that these developments mean that just war theory is outdated and should be discarded. But it is worth exploring potential solutions to these challenges.

This chapter analyzes one solution: an extension of the bipartite conception of just war theory. It is plausible that in the contemporary reality, just war theory has become incomplete. The principles of the two existing branches are no longer sufficient to provide moral guidance and to realize the goal of a just and durable peace. Therefore, in order to keep up with changing circumstances, many argue that just war theory needs to be extended beyond the familiar \textit{jus ad bellum} and \textit{jus in bello}. In the last decade, arguments for incorporating one or two additional branches to complete just war theory are heard.\textsuperscript{18} There are other

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\begin{itemize}
\item \textsuperscript{15} Münkler 2004, p. 19-20.
\item \textsuperscript{16} This critique is heard before at several points in history, for example during the proliferation of weapons of mass destruction, when the risk of a ‘total war’ which could not be limited in any way became a serious threat. As Evans points out, many thinkers thought this to be the end of just war theory because it was considered hopelessly outmoded and irrelevant. Mark Evans (ed.), \textit{Just War Theory. A Reappraisal}, Edinburgh: Edinburgh University Press 2005, p. 5-6.
\item \textsuperscript{17} For example, as discussed briefly in chapter 2, the discrimination principle means that in war, there is a morally relevant distinction between soldiers and civilians; combatants and non-combatants. In principle, non-combatants enjoy immunity; which means they must be spared from the violence of war. It is easy to understand that the application of this principle has become problematic in wars where it is difficult to make that distinction – e.g. when a national army fights irregular militias, who refrain from wearing uniforms and attack from within densely populated areas. Michael Walzer argues that the responsibility to discriminate and protect civilians can no longer fully be put on the national army fighting these militias. See further Walzer’s Thomas More Lecture, ‘War and Death. Reflections on the Just War Theory Today’, in: Michael Walzer et al., \textit{Oorlog en dood}, Budel: Damon 2008.
\item \textsuperscript{18} Arguments for several additional branches are made. For example: Darrel Moellendorf and David Rodin argue that just war theory should consist of \textit{jus ad bellum}, \textit{jus in bello}, \textit{jus ex bello} (governing the process of war termination and agreement on the terms of peace), and \textit{jus post bellum} (governing the situations after the termination of the war);
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important issues, so it is argued, that should also be regulated by just war theory. Issues that are vital in limiting war and realizing a just and durable peace.

The most common argument is that just war theory must be completed with a branch called *jus post bellum*. This branch could provide the required guidance after the end of war. As Brian Orend argues: “Conceptually, war has three phases: beginning, middle and end.” Just war theory is therefore only complete when we include *jus post bellum* in the theory. But if ‘justice after war’ must be included, should we then not consider ‘justice before the war’ as well? Just war theory can namely be extended both ways: at the end and at the beginning. A branch called *jus ante bellum* is sometimes suggested to precede *jus ad bellum*. This first additional branch is discussed in the third section. The second

Mark Allman and Tobias Winright claim that the theory should consist of *jus ante bellum* (preventive peacemaking), *jus ad bellum*, *jus in bello* and *jus post bellum*; and Steven Lee argues that the theory should consist of *jus in abolitione belli* (the abolition of war altogether, overlapping with *jus ante bellum*), *jus ad bellum*, *jus in bello*, *jus extendere bellum* (the justice of the continuation of the war, overlapping partly with *jus ex bello*), and *jus post bellum*. In this chapter, I will focus on two common, and in light of the outlined changing circumstances the most relevant additional branches: *jus ante bellum* and *jus post bellum*. I must acknowledge that *jus ex bello* would also be interesting to explore, however, that is not undertaken in this chapter. See further: Darrel Moellendorf, ‘Jus Ex Bello’, in: *Journal of Political Philosophy* 2008, 16/2; Mark Allman & Tobias Winright, *After the Smoke Clears. The Just War Tradition and Post War Justice*, New York: Orbis Books 2010; David Rodin, ‘Ending War’, in: *Ethics and International Affairs* 2011, 25/3; Steven Lee, *Ethics and War. An Introduction*, Cambridge: Cambridge University Press 2012; and Cecile Fabre, *Cosmopolitan Peace*, Oxford: Oxford University Press 2016.


20 Orend 2008, p. 36.

additional branch, *jus post bellum*, is discussed in the fourth section. This chapter explores what it would mean to integrate these branches in just war theory. What can an extension of the theory bring us? An important advantage is that it is likely to benefit the general goal of just war theory: limiting war and realizing a just and durable peace. But is an extension really a good idea? We have to critically consider the question as to what should fall under the scope of just war theory. It will appear that there are several reasons why we should be careful to regard these arguably important issues within the parameters of just war theory.

### 4.2 Jus Ante Bellum

The first potential branch regulates the situation prior to war and is often named *jus ante bellum*. Its norms apply in peacetime, in the absence of a particular war or threat of war. It that sense, it precedes *jus ad bellum*, which applies to the start of war. The content of what is proposed for this branch varies; *jus ante bellum* is proposed in order to train the armed forces and prepare for war in general; or it is proposed in order to prevent war from occurring at all. This latter conception of *jus ante bellum* is also referred to as *jus in abolitione belli* or ‘just peacemaking’. It is remarkable that this additional branch, often titled *jus ante bellum*, is used to argue for the realization of two seemingly contrary goals: the preparation or prevention of war.

*Jus ante bellum* is used in the preparatory sense to describe a branch of norms that regulate the general preparation for war. It deals with military policy and action before war, such as the maintenance of the armed forces, longer-term preparation for war and education and training of combatants. George Lucas argues that, together with *jus post bellum*, this branch completes just war theory. *Jus ante bellum* as he understands it “encompasses the appropriation of resources for military preparedness, training, and education of troops; provisions to develop requisite military leadership; appropriate management and oversight of military and defense apparatus; and the general preparedness for future war”. These are practical issues to do with the development and

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maintenance of a functioning defense system. According to Lucas such norms complete the conceptual circle because *jus ante bellum* also involves the planning of post war behavior. Leaders should prepare for war, including a proper consideration of the implications of war and the exit-strategy. And similarly, combatants are trained both to ensure that they fight justly, and also that they conclude the war justly. When lessons are learned from the aftermath of war, which in turn infest considerations of *jus ante bellum*, the circle is complete.²⁴

What remains rather unclear in Lucas’ discussion of pre-war justice is the substance of this branch. Which type of norms are to govern these preparatory activities? It seems wise to properly consider the maintenance, education and training of the military. If wars occur, the soldiers that are deployed should be thoroughly informed and trained on the rules of war, just behavior in its aftermath, and the protection of human rights. However, it seems that what Lucas’ understands to be preparatory *jus ante bellum* are simply practical guidelines that flow from *jus in bello*. The obligations of *jus in bello* namely demand commitment not only in war, but also before war, or even in the absence of a particular war. Military personnel is not educated and trained ‘on the spot’, but must be generally prepared for war in order to comply with *jus in bello* norms when they are deployed. For instance, the principle of discrimination requires that military personnel is educated on the rules of war, trained to distinguish military from civilian targets, and that they have weapons at their disposal with which they are able to make the distinction. This way, *jus in bello* norms require preparations for war in general during times of peace. These issues are therefore – in a sense – already part of just war theory’s moral framework. These preparatory activities entail nothing essentially different than the existing *jus in bello* responsibilities. This consequently means that *jus ante bellum* in the preparatory sense need not constitute an independent branch of just war theory.

Others argue that *jus ad bellum* must be preceded by norms on preventive peacemaking – in an effort to prevent all war. Instead of preparing for war when there is a particular occasion for war at hand, Allman and Winright state that *jus ante bellum* is concerned with reducing the chance that wars break out in

²⁴ Lucas 2012, p. 58-60. And with the completion of this conceptual circle, the cycle of perpetual violence and war can be broken, according to Lucas. It appears that this way, his understanding of preparatory *jus ante bellum* tends towards preventive *jus ante bellum*. However, I find it hard to understand how he concludes that the cycle of war can be broken based on the presented reasoning.
the first place. This can be done by addressing the root causes of potential conflicts in the period before war. According to them, the two branches of *jus ante bellum* and *just post bellum* complete the ‘equation’ of just war theory. This understanding of justice before the war is similar to Steven Lee’s proposal for an additional branch, which he titles *jus in abolitione belli*. He uses this term to refer to a branch of just war theory aimed at the prevention of all wars by formulating the right methods to abolish war. Lee proposes the following three maxims for *jus in abolitione belli*: “maximize feasible non-military alternatives to achieving justice”, “bring greater legitimacy to international institutions”, and “accept national sovereignty as a necessary moral fiction”.

The ‘just peacemaking ethic’, which forms the basis of preventive *jus ante bellum*, is more elaborate and provides us with ten practices of preventive peacemaking: “support nonviolent direct action”, “take independent initiatives to reduce threat”, “use cooperative conflict resolution”, “acknowledge responsibility for conflict and injustice and seek repentance and forgiveness”, “advance democracy, human rights, and religious liberty”, “foster just and sustainable economic development”, “work with emerging cooperative forces in the international system”, “strengthen the United Nations and international efforts for cooperation and human rights”, “reduce offensive weapons and weapons trade”, and “encourage grassroots peacemaking groups and voluntary associations”.

Would it be possible to incorporate preventive *jus ante bellum* in just war theory? As preparatory *jus ante bellum*, preventive *jus ante bellum* is related to the other criteria of just war theory. It flows from the *jus ad bellum* criteria of last resort and right intention; criteria which are particularly aimed at the limitation of war, and meant as a blockade against starting war. The above makes clear

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26 Allman & Winright 2010, p. 10.
27 Lee 2012, p. 300.
29 This ‘just peacemaking ethic’ can be integrated in just war theory as an additional branch, but can also be part of the pacifist position (depending on the position on what to do when peacemaking fails; can it be justified to wage war or is the nonviolence proscription absolute?), and it is also presented as alternative to pacifism and just war theory; i.e. as another paradigm. See further one of the most important spokesmen of this position: Glenn Stassen (ed.), *Just Peacemaking. the New Paradigm for the Ethics of War and Peace*, Cleveland: Pilgrim Press 1998.
30 Stassen 1998 and online at: http://justpeacemaking.org/the-practices/.
what type of norms are considered part of preventive *jus ante bellum*. And while they are related to other just war criteria, they are not simply the concrete and practical guidelines to fulfill such criteria. Rather, they constitute a broad strategy to realize the abolition of war. As such, they entail something different than what is already part of just war theory.

Furthermore, unlike the two established branches of just war theory, *jus ante bellum* does not apply to a particular war. This might be a problem when trying to incorporate this branch in the theory. Namely, the central idea to just war theory, dating back to Cicero, is that the ‘normal’ state of affairs is peace, and that war is an exception to that.\(^{31}\) In this exceptional state of affairs when the war is raging – this state of emergency – some of our most important moral principles are on hold. The premise of just war theory is that even this exceptional state of war is governed by certain moral norms, protecting the most essential values. However, *jus ante bellum* does not apply in this exceptional state of war. It applies in peacetime, dealing with the general practice of preventing war. But this problem might not be as serious as it appears. The introduction namely showed that today, it is not easy to separate the war- and peace paradigm. The line between war and peace is often blurry in our contemporary world. Therefore, it might be might not be necessary to hold onto this strict temporal conceptualization of just war theory.\(^{32}\)

And lastly, it is obvious that *jus ante bellum* is very much in line with just war theory, as it is particularly focused on the theory’s general goal: limiting war and realizing a just and durable peace. It therefore makes the achievement of this goal more likely and efforts to support this goal and realize the abolition of war from the world must be praised. These three reasons: the relationship with other branches; the blurry boundaries between war and peace, making the peacetime application less problematic; and the focus on the just war theory’s goal, constitute rather compelling arguments to integrate *jus ante bellum* in the theory.

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32 It will however appear later in this chapter that this does in fact constitute a problem when trying to integrate *jus ante bellum*. 
4.3 Jus Post Bellum

The second additional branch that is proposed is *jus post bellum*, ‘justice after war’. *Jus post bellum* should function as a moral framework regulating the situation after the war. *Jus post bellum* is used to refer to a either a body of legal or moral norms, or both, aimed at regulating the transition from war back to a ‘normal’ state of peace. As such, it provides a framework guiding political and military action, and it forms a standard which can be used to evaluate and judge particular post war situations. While many agree on the importance of a branch of *jus post bellum* in just war theory, there is no agreement on the content of such a branch. Often, the debate on *jus post bellum* is presented as a debate between two opposing positions: minimalism and maximalism. Minimalists, as Michael Walzer, are said to endorse a restricted version of *jus post bellum*, as they are particularly concerned with respect for the sovereignty of states and limiting what victors are allowed to do after war. Maximalists, as Mark Evans, are concerned that victors will do too little after war. Consequently, they propose broader and more comprehensive obligations.

The norms that are proposed could be roughly divided into different categories: safety and security; political justice; criminal justice; reparations and compensation; general reconstruction; and reconciliation. The first and foremost priority after war, acknowledged in all accounts of *jus post bellum*, is halting the aggression and ensuring safety and security in the war affected area. This has two components: guaranteeing international peace and security, through the consolidation of peace and the prevention of future external aggression; as well as guaranteeing the security of the citizens of the defeated state itself, which means the prevention of future internal aggression. This requires disarmament, arms control and the reintegration of soldiers in the society.

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In this chapter, I will focus on three theorists, which also represent distinct positions on the subject: Michael Walzer (minimalism); Brian Orend (‘in between’); and Mark Evans (maximalism). The distinction between so-called minimalism and maximalism is further explored in chapter 5.

The priority of these goals is highly dependent on the nature of the war or conflict. In case of a classic self-defensive war the focus will be on international peace and security. In case of a civil war, the people of that war torn state form the main concern. But international security issues, like migration, international crime, and destabilization of the region, do demand attention in civil wars as well.

Political justice encompasses norms regarding the influence on the political system of the defeated state. Post war activities in this category are: institutional reform; legislative reform; reformation of the security sector; the realization of human rights; and replacement of (members of) the prior regime. In all proposals for *jus post bellum*, political justice is part of *jus post bellum*. However, as pointed out earlier, there is considerable disagreement on the proper scope of political justice after a war. The central question is: when and to what extent is coercive political change justified? There are different values which are at stake here: on the one hand international security and the protection of human rights, and on the other hand sovereignty of states and self-determination of peoples. It appears as if the character of the defeated regime determines when one set of values can overrule the other. This is true for most authors: the more unjust the regime, the more likely it is that political reconstruction is justified. However, the turning point is different for all, and is dependent on the value that is attached to each of those values. E.g., for the ‘minimalist’ Walzer, sovereignty and self-determination are so important that political reconstruction of the defeated state is only allowed in case of inherently aggressive and murderous regimes.\(^{36}\) Orend, tending more towards maximalism, disagrees with Walzer. He does not attribute the same value to sovereignty and consequently, the turning point appears in an earlier stadium, namely, when a state fails to be ‘minimally’ just.\(^{37}\) As result, political reconstruction of the defeated state is considered a post war obligation in a wider range of situations.

The category of criminal justice entails norms on how to deal with international crimes that have occurred before and/or during the war. Criminal justice can serve a variety of more specific goals, as retribution, deterrence of future crimes, closure for the victims, fostering reconciliation; and symbolically reclaiming values. There are different instruments to establish individual criminal responsibility: e.g. through national trials, international criminal tribunals, the International Criminal Court, and truth and reconciliation processes.

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37 Orend defines that as: “A minimally just community makes every reasonable effort to: (i) avoid violating the rights of other minimally just communities; (ii) gain recognition as being legitimate in the eyes of the international community and its own people; and (iii) realize the human rights of all its individual members.” Orend 2008, p. 43.
commissions. Again, there are different values at stake here, and that potentially makes this operation difficult. On one hand, the value of criminal justice – punishing the guilty – and the achievement of the above mentioned goals, and on the other hand the value of national and international peace and security. To put it shortly, this means that in some situations, a conflict can arise between justice and peace. While criminal justice is widely considered part of *jus post bellum*, disagreement exists on the question of how to deal with such a conflict: should the value of justice be sacrificed when necessary in order to achieve peace?

The proportionality principle, well-known in just war theory, is invoked by some authors to determine the operation of norms within this category. According to Walzer and Orend, the punishment of international crimes is subjected to such a proportionality test. This means that prosecution should be reconsidered if it extends the war, increases the casualties or endangers the peace. Walzer states: “sometimes security might require amnesties and public forgetfulness”. But other theorists argue that proportionality cannot function as a mediating factor here. The realization of criminal justice is valued so highly that responsible individuals should always be held accountable in war crimes trials.

Reparations and compensation constitute the next category of *jus post bellum* norms. The specific goals here are both economic redistribution, which seeks to materially compensate the victims of aggression for inflicted damage, as well as psychological reparation, aimed at righting past wrongs in order to support the mental transformation and to provide closure. Post war instruments falling in this category are the restitution of confiscated property, the extraction and payment of compensations, and formal apologies. The principle of proportionality can reappear here to determine the scope of reparations. When it does, it proscribes that the extracted reparations should not be overly punitive. Responsible people and/or the state must be realistically capable of paying the reparations.

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38 There is an extensive debate in the literature on this issue. I will only highlight the controversy here, and analyze the opinions of the discussed authors regarding this question in relation to *jus post bellum* only.


40 Walzer 2012, p. 45.


Sometimes it is perfectly clear who should return the property or who is responsible for compensation of that lost property or other inflicted damage. But it is not always easy to determine who is responsible and liable for damage done. And who then should pay for the reparations? Walzer and Orend disagree on this matter. According to Orend, we should discriminate when extracting reparations: only those who were responsible for the aggression should pay. Walzer however, argues that these reparations can be extracted from the citizens of the former aggressor state through a tax system. In that view, the people bear collective responsibility for the damage done by the aggression.43 Unlike the previous categories of *jus post bellum*, reparations and compensation are not an established part of *jus post bellum*. While that appeared to be so, in recent years some theorists, as ‘maximalist’ Mark Evans, argue that instead of extracting compensation, the victor must invest in the defeated state in order to foster reconstruction.44 In fact, Orend now also seems to oppose compensation, and instead focuses more on economic reconstruction. As a result the victor cannot extract reparations for damages done by the war, but must instead invest in the defeated country, rebuilding its economy.45

The next category of *jus post bellum* is put forward particularly by so-called maximalists. While safety and security; political justice (to a certain extent), and criminal justice (balanced in a certain way) seem to make up what can be called the ‘core’ of *jus post bellum*, general reconstruction consists of norms that are broader and more comprehensive. Therefore, they are often said to be part of maximalist *jus post bellum*. The category of general reconstruction entails obligations regarding economic reconstruction and development,46 rebuilding infrastructure like road, rails and electrical grids,47 and cleaning up the environment. The fact that Orend and Evans stress the importance of economic reconstruction, and the related duty of the victor to take responsibility for their share of the material burdens, explain the rejection of compensation on the part of the defeated highlighted above.

43 Walzer 2012, p. 42.
The last category is also characteristic for the maximalist position. Forgiveness and reconciliation is not specifically recognized by minimalist accounts of *jus post bellum*. However, Evans argues that repairing the relationships between former enemies is an extremely important aspect of post war justice.\(^48\) Therefore, part of Evans’ *jus post bellum* is the obligation to “take full and proactive part in the ethical and socio-cultural processes of forgiveness and reconciliation that are central to the construction of a just and stable peace”.\(^49\) Because the obligation to achieve forgiveness and reconciliation seems very demanding, Evans argues that these concepts should be understood in thin, narrow terms: reconciliation “refers only to the business of developing means by which former enemies can live on the same planet without fighting each other”.\(^50\) More theorists recognize the importance of reconciliation as part of *jus post bellum*. And while Evans interprets these obligations in a limited way, further reaching obligations are recognized by others.\(^51\)

Would it be possible to incorporate *jus post bellum* in just war theory? As preparatory *jus ante bellum*, *jus post bellum* is connected to the other criteria of just war theory. There are many ways in which the norms of *jus post bellum* are related to other just war norms. The category of criminal justice for example, directly flows from other *justum bellum* obligations. It determines how to deal with those guilty of violating *jus ad bellum* and those guilty of war crimes – violating *jus in bello*.\(^52\) And these activities, the investigation of crimes, prosecution and punishment of individuals is usually something turned to when the war is over. Furthermore, there are theorists that argue that *jus post bellum* in general is strongly related to just war theory. Walzer claims that failing to

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\(^49\) Evans 2012, p. 208.
\(^50\) Evans 2012, p. 211.
\(^51\) Mark Allman and Tobias Winright for example, argue even stronger that reconciliation is a vital part of *jus post bellum*. They present a richer religious understanding of reconciliation. The main goal of reconciliation is not only to make sure former enemies can continue to live on the same planet together, but to create relationships of respect, trust and friendship. “The reconciliation phase seeks to turn enemies into friends and to bring emotional healing to the victims of war.” They stress that reconciliation is not about forgive-and-forget, but is instead is about true reconciliation between people, for which the truth is essential. Allman & Winright 2012, p. 102.

\(^52\) As Walzer states, if there was aggression, there must be aggressors and if war crimes were committed, there are war criminals. Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (second edition, or. 1977), New York: Basic Books 2000, p. 287-288.
achieving a just peace after the war undermines good results from the war, even if the war itself can be called just (meaning that an unjust peace can undermine an otherwise just war). Thus, although there is no agreement on the exact influence, it is clear that there is a connection between *jus post bellum* and the other two branches.

Furthermore, like preparatory *jus ante bellum*, *jus post bellum* applies in peacetime; not in the exceptional state of war but after the war. However, as noted above, that obstacle seems to have become quite irrelevant because of today’s blurry boundaries between war and peace. And this new political reality, in which the paradigm of war and peace can no longer be separated easily and the character of war has changed, in fact shows the value of a branch of *jus post bellum*. Today, international military action is – more often than before – employed to protect the population of another state against grave human rights violations; to change an oppressive regime (and create a democracy); to stabilize so-called ‘failed states’; or a combination of such reasons. These considerations are different, and more comprehensive than was often the case earlier in history, or so it is argued. An important consequence of these comprehensive aims is that a particular situation has to be realized after the war, and the bipartite conception of just war theory does not offer much guidance on this matter. Return to the *status quo ante bellum* as post war principle, which was part of classic just war theory, is not sufficient anymore. This shows why just war theory needs, now more than before, an additional branch of norms that apply after the war.

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53 Orend agrees that there is a strong connection between the branches. He however points to something else, arguing that violating *jus ad bellum* automatically results in a failure to achieve *jus post bellum*. An unjust cause infects the conclusion of the war according to Orend. Walzer disagrees and states that after a debatable war (a premature pre-emption or misguided military intervention that topples tyrannical regime) the war would remain unjust, but nevertheless, a just peace can be created *post bellum*. See: Walzer 2004, p. 163 and Frowe 2016, p. 241.

54 Michael Walzer argues that the reconstruction of Germany and Japan after the Second World War was something new in the history of war. And also in the decennia after the Second World War, the goals of war were more limited than today. He mentions the example of the Gulf War: the war ended with the removal of Iraqi troops from Kuwait’s territory, and thus the restoration of the *status quo ante bellum*. No attempt was made to change the regime in place. Today’s wars, he argues, and especially humanitarian interventions, require something more after the war than the restoration of the situation that existed prior to the outbreak of the war. Walzer 2004, p. 18-20.
And lastly, similar to *jus ante bellum*, *jus post bellum* would probably benefit the general goal of limiting war and ensuring a just and durable peace. A lack of post war norms could allow for *ad hoc* policy and measures, with the danger a so-called ‘victor’s justice’, in which the victor determines justice in his advantage. This leaves room for the political interests of the victorious state to determine post war conduct and to profit economically from the benefits of war. These activities are not helpful for the transition to a state of peace. In general, it seems that failure to plan a just post war situation can prolong the war, or lead to internal chaos after the war, failing of the state or the start of a civil war. These scenarios mean that the damage and casualties are increased. Planning an exit strategy based on norms of *jus post bellum* therefore means better prospects for a just peace.

### 4.4 A Four Partite Just War Theory?

What do we envision for just war theory? If we acknowledge its value and refuse to discard just war theory altogether, it is worth trying to adapt just war theory so that it fits in with contemporary circumstances. When reflecting upon this ‘new’ political reality, in which just war theory needs to realize its goal – limiting war and realizing a just and durable peace – it appears as if an extension of just war theory is a sensible way to ‘modernize’ just war theory. A *prima facie* case for a four partite just war theory was presented in the third and fourth section of this chapter. Both *jus ante bellum* and *jus post bellum* turned out to be related to the other branches of the theory, even though these additional branches do not simply consist of practical guidelines to realize these existing principles. Rather, they flow from traditional just war theory, but nevertheless constitute independent criteria. Furthermore, while they apply in peacetime, and are in that sense at odds with *jus ad bellum* and *jus in bello*, this might not pose a serious problem precisely in light of today’s blurry boundaries between war and peace. Since a clear demarcation between those two paradigms can rarely be made, it is no longer necessary to strictly adhere to this distinction.

Also, the general goal of just war theory could greatly benefit from an extension of just war theory. Although *jus ante bellum* and *jus post bellum* apply in peacetime, all four branches aim to limit war: *jus ante bellum* aims at general prevention, *jus ad bellum* limits the number wars, *jus in bello* limits the damage, and *jus post bellum* aims at peacemaking, reconstruction and prevention. While *jus ante bellum* is strictly forward looking in character, *jus post bellum* is mainly
backward looking, since it deals with things that happened right before and during the war. In some respects, the latter is also forward looking, as e.g. political reconstruction and the prevention of future wars are essential for *jus post bellum*. We could indeed say that these four branches are not neatly separated. Rather, each of them flows into the next. When *jus post bellum* deals with peacemaking, reconstruction and prevention, it eventually flows into *jus ante bellum*, indeed closing the circle.

However, despite these arguments, and the praiseworthy efforts to integrate norms on preventive peacemaking and post war reconstruction and peacemaking into just war theory, difficulties will come up when trying to integrate these additional branches. These difficulties relate to various elements: the character of the norms; the addressees/duty bearers; the content; and the foundation. Before welcoming these new branches, we must seriously consider these – at the very least.

First, the character of *jus post bellum* is – to a certain extent – similar to the two established branches. While it deals with rather concrete areas of post war justice, the norms that are put forward are not entirely different from the traditional ones. For a large part, *jus post bellum* consists of moral norms regulating a particular post war situation. For example, if *jus in bello* insists on upholding certain rules, violations of these rules must be prosecuted, although the value of justice and the value of peace must be balanced using the proportionality principle, well-known in just war theory. The character of *jus ante bellum* however, seems different from the other branches. The proposed norms are not abstract moral norms or principles but this branch consists rather of general strategies to prevent war. *Jus ante bellum* reflects the best methods and practices to prevent wars from breaking out, such as strengthening international organizations and reducing weapons trade.

The second difficulty that needs to be considered regards the addressees of the additional branches. Who are the duty bearers? Similar to *jus ad bellum* and *jus in bello* norms, which are addressed to the (would be) belligerents – the parties that are involved in the war – *jus post bellum* primarily addresses the (former) belligerents. *Post bellum* obligations are generally assigned to the states that took part in that war. On these states, the obligation rests to fulfill these

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55 This is addressed in the following chapter.

56 There is some disagreement on the distribution of these responsibilities between the victorious and the vanquished. Some argue that the *post bellum* norms apply differently
duties, such as the creation of a certain level of safety, the responsibility to reconstruct a war torn society and the achievement of criminal justice, even though admittedly, this branch need not be exclusively directed at the belligerents. While the first and foremost responsibility to fulfill *jus post bellum* rests on the former belligerents, it is plausible that other parties – states that were not directly involved in the war or international organizations – assist in *post bellum* activities. Walzer e.g. strongly argues that the burdens of reconstruction need to be wider distributed, for example in the situation of Iraq.\(^{57}\) And Walzer is not the only one arguing that *post bellum* obligations are not exclusively assigned to the belligerents, but that this branch is characterized by collective, international obligations, assigned e.g. according to the ability to fulfill these obligations.\(^{58}\) Still, *jus post bellum* remains primarily focused on the parties that were involved in the war.

This is not true for *jus ante bellum*; those duties cannot be addressed at discernible actors. Rather, it seems that the international community in general would be responsible for realizing this branch. The problem that arises here is that *jus ante bellum* duties, as well as potentially some *jus post bellum* duties, are considerably less determinate than *jus ad bellum* and *jus in bello* duties. The specific duty bearers are namely hard to identify. The fact that there is less agreement on the specific norms of these additional branches, than these of *jus ad bellum* and *jus in bello*, only reinforces that. Which state or international organization should take up the responsibility to comply with these rather indeterminate duties? Compliance is already a serious concern for just war theory’s established branches, but this problem is only increased by integrating such indeterminate norms. Walzer acknowledges this concern, referring in this context to the ‘collective action problem’. When we might be inclined to think that *post bellum* justice is better served by multilateralism (even if the *ad bellum* decision was unilateral) it is still questionable that *post bellum* obligations are better fulfilled when taken up collectively.\(^{59}\) As a result, integrating these additional branches into the theory, especially *jus ante bellum*, brings with it problems of indeterminacy which decreases its clarity and consistency, and

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59 Walzer 2012, p. 41-42.
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DO WE NEED TO EXTEND JUST WAR THEORY?

therewith its feasibility. This makes it really difficult to identify *jus ante bellum* as a viable part of just war theory.

Third, the content of *jus ante bellum* is different from the content of the other branches of just war theory. This becomes clear when we examine the application of modern just war theory. Earlier in this chapter, it appeared that it is not problematic that *jus ante bellum* and *jus post bellum* actually apply in peacetime, because the line between war and peace is often blurry in our contemporary world. In the grey zone between war and peace it can be hard to determine whether a particular situation qualifies as ‘war’; and when this war began and ended. Therefore, it was argued, just war theory should cover the whole of such situations. However, with this difficulty to demarcate the time of war from the time of peace arises the difficulty to determine which branch of just war theory is applicable. It could be argued that in situations like this, we should be flexible in the application of just war theory, e.g. using just war theory without there being an ‘official war’, or applying two branches at the same time. For example, it would seem useful to apply *jus in bello* norms together with norms of *jus post bellum* when the war is ‘officially’ over, but large scale violence remains.

For this reason, we could assume that the strict temporal conceptualization of just war theory is no longer the best way to understand the operation of modern just war theory. We should change our perspective and understand just war theory as applicable to the exceptional practice of war, not to the time of war.\(^60\) It is the activities that need to be justified. The branches do not regulate specific periods in time, but rather war related activities. And while these activities do usually take place during a certain period, they are not confined to them. This conceptualization of just war theory, that Jann Kleffner dubs the ‘functional conceptualization’,\(^61\) creates room for the required flexible and overlapping application of *justum bellum* norms. But what activities are

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\(^{61}\) ‘In such a conceptualization (with functionality as the leitmotiv), it would be the facts on the ground that determine whether and to what extent *jus post bellum* starts or ceases to apply, and which of its constituent elements.’ Jann Kleffner, ‘Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum’, in: Carsten Stahn, Jennifer Easterday & Jens Iverson (eds.), *Jus Post Bellum. Mapping the Normative Foundations*, Oxford: Oxford University Press 2014, p. 296.
regulated by the additional branches? When assessing their content, it is clear that while *jus post bellum* indeed deals with war related activities, *jus ante bellum* does not. On the contrary, *jus ante bellum* does not have anything to do with the issue of war, as it arises not in the context of a particular war but offers a strategy to foster peace. This functional conceptualization of just war theory therefore reveals that while the content of *jus post bellum* matches the theory, the content of *jus ante bellum* is entirely different.

A fourth difficulty for both *jus ante bellum* and *jus post bellum* is that, although they are both related to the other branches, it is questionable whether their foundation can be located in just war theory. Because *jus ad bellum* and *jus in bello* apply in that exceptional state of war, it is governed by certain moral norms, protecting the most essential values. This ‘core’ of fundamental norms is the radically dressed down version of what could be simply called our ‘normal morality’. For example, while the intentional killing of other human beings is almost universally considered morally wrong, this can be justified in times of war. And while it can be justified as inherent part of war, just war theory tries to regulate this by proscribing that attacks must be proportional to the military goal aimed for, and by proscribing that only deliberate attacks on combatants are justified.

Now the fact that *jus ante bellum* and *jus post bellum* apply to future and past activities in peacetime – outside that emergency situation – suggests that it is inadequate to ground the norms in the limited moral framework of just war theory, determined by the exceptional state of war. The foundation of the norms is located in that ‘normal morality’, consisting of general principles of justice based on e.g. global justice, international political morality, cosmopolitanism and/or human rights. Walzer argues that: “Democratic political theory, which plays a relatively small part in our arguments about *jus ad bellum* and *in bello*, provides the central principles of this account (post war justice). They include self-determination, popular legitimacy, civil rights, and the idea of a common good.”

Seth Lazar makes a similar, rather convincing argument against integrating

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62 In this, I disagree with Seth Lazar, who argues that *jus post bellum* does not regulate the same aspects as *jus ad bellum* and *jus in bello*, but the practice of peace building. On the contrary, I am inclined to think that *jus post bellum* applies to war related activities, since most issues that are regulated are direct consequences of the war, for example criminal prosecution, compensation and political reconstruction.

63 Walzer 2004, p. 164.
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*jus ante bellum* and *jus post bellum*. He claims that: “In the period before a threat is raised, we should follow the full gamut of moral reasons, not this polarized set.”64 Indeed, *jus ante bellum* cannot be reduced to the moral framework of just war theory. It is obvious that its limited framework is not sufficient as foundation for duties as: “advance democracy, human rights, and religious liberty”; “foster just and sustainable economic development”; and “strengthen the United Nations and international efforts for cooperation and human rights”.65 This is only partially true for *jus post bellum*. *Jus post bellum* is mainly backward looking as most of its duties are related to (a violation of) *jus ad bellum* and *jus in bello* norms, as the example of criminal justice proves: these norms are backward looking in that they are directly related to crimes committed before and in the war. Also, reparations and compensation are directly related to the war; they are owed when e.g. property is seized or destroyed in war. Since a substantial part of the *post bellum* norms and duties directly flow from the war, it is plausible that its norms are grounded in just war theory’s moral framework.

However, this framework is an insufficient foundation to guide the more extensive, forward looking *post bellum* norms. For example, general principles of justice come into play when considering comprehensive political reconstruction, as Walzer and Lazar rightly argue. The broader and more comprehensive post war obligations are understood, and thus the more maximalist the interpretation of *jus post bellum* is, the more obvious the shift to general principles of justice is and the connection to just war theory is loosened. The broad post war activities of economic reconstruction; rebuilding infrastructure; and fostering reconciliation cannot be grounded in the limited moral framework of just war theory. These activities are therefore inevitably guided by the full range of moral reasons, however those are understood.66 If these additional branches are meant to be fully integrated, just war theory can no longer be separated from general theories of justice.67 And when general principles of global justice, international political morality, cosmopolitanism and/or human rights are integrated into the theory, the indeterminacy is complete.

64 Lazar 2010, p. 22.
65 http://justpeacemaking.org/the-practices/
66 Lazar 2010, p. 22.
67 This does not constitute a problem for Cecile Fabre. She notes that this would only make just war theory ‘richer’, which opens the way for including maximalist *jus post bellum*. Cecile Fabre, ‘War’s Aftermath and the Ethics of War’, in: Helen Frowe and Seth Lazar (eds.), *The Oxford Handbook of Ethics and War*, Oxford: Oxford University Press 2016.
4.5 Conclusion

We can conclude that while arguments for an extension of just war theory into a four partite conception appear strong, we should reconsider adopting these two additional branches. Conceptually, *jus ante bellum* does not fit into just war theory, as it is a general strategy consisting of guidelines as opposed to moral norms; the regulated activities and the addressees deviate from the established branches; and the foundation must be located entirely outside just war theory. While it was expected that the general goal of just war theory – realizing a just and durable peace – would benefit from an integration of *jus ante bellum*, the contrary would be true. While *jus ante bellum* provides praiseworthy guidelines in an effort to prevent wars from breaking out, they seem to be too indeterminate, idealistic and demanding compared to traditional just war theory. *Jus ante bellum*, as it is now understood, could therefore hardly be perceived as realistically attainable part of just war theory. And aside from the conceptual difficulties and the infeasibility, adopting *jus ante bellum* would run the general risk of inflating just war theory as a whole. Integrating norms on preventive peacemaking entails a substantial expansion of the theory. And the more issues are integrated, the more drastic and fundamental this expansion will be. The risk of inflating just war theory, with a considerate devaluation of the theory as a whole as result, is significant and must be acknowledged.

These arguments against integrating *jus ante bellum* are not entirely valid for *jus post bellum*. *Jus post bellum* fits better into the concept of just war theory. The character and the content of the norms is similar; the addressees are primarily those who took part in the war (while an involvement of other states or organizations is also possible); and the foundation can be located in just war theory, although general principles of justice creep in. *Jus post bellum* seems to have one foot in just war theory and one foot out. What turns out to be relevant here is the way how *jus post bellum* is interpreted. A minimalist *jus post bellum* is more tightly connected to just war theory than a maximalist *jus post bellum*. The more comprehensive post bellum norms are considered to be, the further this branch conceptually drifts away from the just war paradigm, and the less realistically attainable it appears to be. Therefore, the idea of integrating only a limited, minimalist account of *jus post bellum* into the theory sounds convincing. This way, just war theory is more ‘complete’ in offering the required moral guidance in the contemporary political reality while at the same time conceptually leaving just war theory intact, and minimizing the risk of inflating
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and devaluing the theory. This by no means reduces the importance of the issues regulated by *jus ante bellum* and maximalist *jus post bellum*. It merely means that these issues should not be regarded within the parameters of just war theory but rather, should be perceived from the wider perspective of global justice or an ‘ethics of peace building’.
5. On the Duty to Reconstruct after War. Who is Responsible for 
Jus Post Bellum?

5.1 Introduction

War can easily be classified as the most destructive of all human activity. After the smoke clears, one side of the coin might be a picture of parades and smiling faces. However, the other side of the coin is likely to be a picture of damage, destruction and deprivation. As the following chapter makes clear in more detail, the exact tasks and scope of norms proposed under the heading of *jus post bellum* vary and have changed in the course of its relatively short existence. In traditional just war theory, the conception of (what is now called) *jus post bellum* was limited. This ‘minimalist’ *jus post bellum* was premised upon the idea that just wars are conservative in character.¹ The restoration of the situation *quo ante bellum* is the just outcome of war.² As such, norms of such *just post bellum* are primarily backward looking, focusing on the former belligerents, particularly limiting what victors are allowed to do after war.

This conception of *jus post bellum* has changed and today, there is a general tendency towards a ‘maximalist’ conception of *jus post bellum*. This means that the body of *jus post bellum* has grown; more tasks are taken up under this heading.³ As a result, the scope of *jus post bellum* can be quite comprehensive, *post bellum* tasks require a fairly long timeframe, and involve a broad set of positive duties. Norms of maximalist *jus post bellum* are therefore no longer mainly backward, but also forward looking: not aimed at restoring the previous situation, but rather aimed at improving the situation of deprivation in the defeated state. Correspondingly, it is not exclusively addressed to the former belligerents.

This short assessment leads to an important question which has not received sufficient attention in the *jus post bellum* literature: After war, how should we distribute post war duties and how can we assign them to the appropriate

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³ The distinction between minimalism and maximalism is further explored in the following chapter.
actors? In other words, who are the addressees of *jus post bellum* – the duty bearers? The development regarding *jus post bellum*’s content and scope brings to light a very serious problem: it is far from clear who is responsible for realizing *jus post bellum*. This uncertainty about specific duty bearers might lead to a situation in which no one will properly acquit these duties, and the critique could be raised that *jus post bellum* is in fact merely empty rhetoric.\(^4\) If responsibility for the duty to reconstruct cannot be assigned, does this third branch of just war theory exist? For the theory to be action guiding and effective, it is crucial that it is possible to determine who is responsible after war.

It appears that this question is not to be answered easily. While it is clear that the (would be) belligerents are the addressees of *jus ad bellum* and *jus in bello* norms, this seems different for the third branch of just war theory. The general shift towards maximalist *jus post bellum* means that this branch entails positive duties, is both backward and forward looking, and that post war reconstruction is of the essence for building a just and lasting peace. In light of the interest of all states in a lasting peace, it seems inappropriate to address only former belligerents for *jus post bellum* based on the fact that they were engaged in this war. Rather, it seems that the contemporary maximalist view on *jus post bellum* entails that the international community as a whole is responsible for post war reconstruction. But in that case, how do we determine more precisely who the specific duty bearers are?

In the contemporary debate on *jus post bellum*, responsibility is assigned to different actors, based on different moral or prudential arguments. Two main positions can be distinguished. The first position holds that *post bellum* duties should be assigned to the states that took part in the war: the former belligerents. Michael Walzer is an important representative of what James Pattison calls the ‘belligerents rebuild thesis’;\(^5\) Walzer holds that the just victor is primarily responsible for *jus post bellum*. Analogue to individuals who do good in the world and as result have more obligations than people who do nothing, states who do the right thing also acquire more responsibilities, so Walzer argues.\(^6\) The *jus ad bellum* decision entails positive post war duties that

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\(^5\) Pattison 2015, p. 636.

\(^6\) Walzer 2012, p. 40.
need to be fulfilled. On top of that, unilateral action of the victors is most effective in this respect, particularly if regulated by an international organization.\(^7\) Brian Orend agrees that \textit{post bellum} duties are implied in the cause for war and puts forward another important argument for this position: the just victor is responsible based on the Pottery Barn Rule: ‘you break it, you own it’.\(^8\) Walzer urges that we are sensitive to the needs and sentiments of the local population, which means that we have to involve the population of the defeated state to gain legitimacy.\(^9\)

Among others, Pattison rejects the ‘belligerents rebuild thesis’, because assigning \textit{post bellum} duties to belligerents leads to unfair and imprudent outcomes, e.g., that humanitarian interveners should rebuild; that belligerents are often not the most appropriate actors to fulfill these tasks; that belligerents can cease to exist; that it might be difficult to distribute duties between belligerents; and that they can refuse to fulfill them.\(^10\) The concern that belligerents might not be the most appropriate actors to reconstruct the war torn state is voiced more often. This can be the result of a lack of political will or a lack of material capacity of belligerents.\(^11\) Seth Lazar argues that in general, assigning \textit{post bellum} duties (solely) to the just victor would place a too heavy burden on them.\(^12\) Therefore, these theorists defend the second position, namely that the international community as a whole is responsible. One might call this the ‘universal rebuild thesis’, since it is argued here that \textit{post bellum}

\begin{footnotes}
\footnote{\textsuperscript{7} Walzer 2012, p. 41.}
\footnote{\textsuperscript{9} Walzer 2012, p. 43-44.}
\footnote{\textsuperscript{10} Pattison 2015, p. 638-641.}
\footnote{\textsuperscript{11} The potential lack of political will and material capacity of just victors is also mentioned by Alex Bellamy. See: Alex Bellamy, ‘The responsibilities of victory. \textit{Jus Post Bellum} and the Just War’, in: \textit{Review of International Studies} 2008, 34/4, p. 623; George Clifford similarly argues: “Nations that win a war may not have the resources, political will, or acceptability required to build a just peace unilaterally.” George Clifford, ‘\textit{Jus post bellum}. Foundational principles and a proposed model’, in: \textit{Journal of Military Ethics} 2012, 11/1, p. 44; Gheciu and Welsh further explain why belligerents might not be the most appropriate actors: they generally have high stakes; can be biased; and might not be in the best position to act. See: Gheciu & Welsh 2009, p. 134, 136.}
\end{footnotes}
duties are universal. This position would then reflect contemporary international practice, in which states are considered to hold a shared responsibility for human security. E.g., part of the ‘responsibility to protect’, now widely endorsed, is the ‘responsibility to rebuild’ after war. It is argued that “peacemaking has become an international affair”.

It is clear that there is disagreement in the current debate and that the two main positions resemble a more limited and a more extensive understanding of *jus post bellum*. Different and often competing arguments are used as foundation for post war responsibility, often without an elaborate explanation. For the first position, assigning responsibility seems to be fairly straightforward: post war duties are implied in the just cause of war; whoever ‘breaks’ something for a just cause is responsible for repairing what has been broken. But this is not as simple as it appears. Whereas the just victor might indeed, so to say, have broken something which consequently needs repairing, it is the unjust belligerent who is the prime ‘breaker’. How should we distribute responsibility between just and unjust belligerents? And what if either or both of these belligerents are not willing or able to effectively reconstruct after war? The second position raises questions on the distribution of responsibility as well and even more profoundly. If the international community as a whole is indeed responsible, then there need to be certain conditions that can distribute specific duties (e.g. to reconstruct) to specific actors. This means that we need a comprehensive theory on responsibility for *jus post bellum*.

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13 Lazar argues that in case of a humanitarian intervention, the duty to reconstruct is universal, since the original intervention was a universal duty and everyone should help one in need. Lazar 2012, p. 216.


16 Larry May argues that the burdens of *jus post bellum* should be shared between belligerents. They have to work together to reestablish the rule of law and secure that just and lasting peace. The condition of proportionality is helpful in distributing responsibility between former belligerents. Larry May, *After War End. A Philosophical Perspective*, Cambridge: Cambridge University Press 2012.
Alexandra Gheciu and Jennifer Welsh encountered this theoretical lacuna. They mapped and analyzed the various ethical imperatives that are put forward in the public debate by international actors that set out to rebuild war torn states. It appears that these imperatives entail problematic dilemmas, and that the underlying principles have the potential to clash in particular situations. For example, regional states could have special obligations due to their proximity, but they might not be in the best position to act due to the nature of existing relationships. These authors do not resolve these dilemmas, since that “would require arguments that present a compelling case for privileging one guiding principle over others”. James Pattison builds on this and attempts to theorize responsibility for jus post bellum in such a way that it is possible to privilege one specific guiding principle. He claims that jus post bellum is characterized by collective, international obligations, which should be assigned according to the ability to fulfill these obligations. Because belligerents are often not the most capable actors, he even argues that there should be a “presumption against belligerents rebuilding”. While these two analyses are important steps in closing the theoretic lacuna regarding post war responsibility, Gheciu and Welsh leave the way open for further development, and Pattison’s thought provoking argumentation leads to an unsatisfying conclusion, in which capacity and efficiency essentially determine who bears the duty to reconstruct.

Therefore, while the debate on the content and scope of jus post bellum is far from settled, this chapter explores the issue of responsibility, which deserves more attention than it has received so far. Jus post bellum can only be considered a full-fledged third branch of just war theory if it is clear who bears the responsibility for it, i.e. if it is clear who is addressed by the duties under jus post bellum. This means that at least two main questions need answering. First:

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17 Gheciu & Welsh 2009, p. 121-123.
18 Gheciu & Welsh 2009, p. 143.
19 Pattison 2015, p. 635.
20 Pattison 2015, p. 658.
21 Pattison raises justified concerns against the ‘belligerents rebuild thesis’. However, his main argument against this thesis is its supposed relation to the ‘dependence approach’, according to which the justness of the war is dependent on jus post bellum. And as Pattison rightly rejects the latter approach, he rejects the ‘belligerents rebuild thesis’ as well. I am not convinced by this line of argument, particularly because of that supposed relation. Aside from Gary Bass, most theorists defending the ‘belligerents rebuild thesis’ do not rely on the ‘dependence approach’ but use other arguments. His argumentation does not therefore invalidate the claim that former belligerents are the prime duty bearers after war.
Which conditions can serve as the foundation for post war duties? Second: How to weigh these conditions when they clash or when they point to different actors? This chapter directly addresses the foundation for responsibility after war with an eye to developing a system for assigning post war duties in concrete situations. The focus is mostly on the duty of post war reconstruction, as arguably the most comprehensive task after war and widely acknowledged as essential for contemporary *jus post bellum*.²²

In the following section, David Miller’s theory on responsibility is taken as a proper venue to address the questions mentioned, since the question on how to assign the duty to reconstruct is essentially a question about collective remedial responsibility, the issue that is central in Miller’s approach. Section 3 analyzes the conditions that Miller distinguishes for assigning remedial responsibility and apply them to post war situations. This will bring out the strengths and weaknesses of these conditions as foundation for *jus post bellum* duties. A condition that is not prominent in Miller’s taxonomy, and which can be approached through Hart’s concept of role responsibility, is explored in section 4. Obviously, it is most important to take stock of the value of the various conditions, and to try and determine how they should be applied in real life. Section 5 takes up this task. The goal is to contribute to developing a system for assigning the duty to reconstruct to specific actors that can claim general agreement. This requires that a hierarchy is set up which enables us to balance these conditions in particular post war situations. Only with such a system in place is there a realistic prospect that *jus post bellum* functions as a useful tool in the creation of (somewhat resembling) a just and lasting peace.

### 5.2 Miller’s Collective Remedial Responsibility

The duty to reconstruct after war is a matter of collective remedial responsibility: it is argued that a certain actor, e.g. the victorious state, is collectively responsible for remedying post war deprivation. But while just war theorists usually assume that states can bear duties, collective responsibility is not undisputed. The problem of collective responsibility not only arises with regard to postwar situations; this issue has been raised with regard to problems

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²² I am aware that there are major differences among theorist about what is part of reconstruction and what the appropriate scope of reconstruction must be. In this chapter however, I want to leave this matter aside and delve into the issue of responsibility instead.
of global justice, and a promising solution in this regard is provided by David Miller.\footnote{David Miller, \textit{National Responsibility and Global Justice}, Oxford: Oxford University Press 2007. Miller’s study on national responsibility is well constructed and complex, and unfortunately I can only discuss parts of his argument in this chapter.}

In general, Miller defends the idea of national responsibility in the sense that individuals have special duties towards fellow nationals, but that they have also duties of global justice beyond those resulting from violations of the rights of others. Put simply, Miller eloquently defends a position in the global justice debate similar to that of John Rawls, in which special duties to one’s community are asserted but in which at the same time duties of justice towards the global community are defended. It is an alternative to both cosmopolitan egalitarianism such as defended by Simon Caney which denies the relevance of national borders,\footnote{Simon Caney, \textit{Justice beyond Borders}, Oxford: Oxford University Press 2005.} and nationalism such as defended by Thomas Nagel, who distinguishes duties of justice for fellow citizens and much weaker global duties of charity or humanity.\footnote{Thomas Nagel, ‘The Problem of Global Justice’, in: \textit{Philosophy and Public Affairs}, 2005, 33/2. For an extensive discussion of the difference between duties of justice and duties of charity see: Allen Buchanan, ‘Justice and Charity’, in: \textit{Ethics} 1987, 97/3, p. 558-575. Miller positions himself in the global justice debate as ‘social liberalist’, following the terminology of Charles Beitz. This position is contrasted with cosmopolitan liberalism on the one hand and laissez-faire liberalism on the other. Miller 2007, p. 20-21.} Despite contemporary developments in our globalized world, Miller argues that there remain significant differences between the national and international context. Therefore, national principles of social justice cannot extend to global relations: the nation state remains the privileged context for social justice.\footnote{Miller 2007, p. 15-16.} But this does not mean that no strong duties exist beyond the boundaries of the nation state. These \textit{are} duties of justice and not merely duties of charity or humanity, and they go beyond those resulting from the violation of the rights of others. These duties of global justice are generated by basic human rights. It means that for Miller, human deprivation and suffering is something that cannot be tolerated; it requires collective efforts and thus collective responsibility.

David Miller’s theory on responsibility, developed in the context of the global justice debate, can help us theorize the issue of responsibility in other situations: i.e. after war. His concept of remedial responsibility as opposed to outcome responsibility, and the concept of collective responsibility as opposed
to individual responsibility are particularly useful. Miller explains the first
distinction by using an example in which a teacher returns to an overturned
classroom.\textsuperscript{27} The teacher might want to know who is responsible for producing
the mess, but also who is responsible for clearing up that mess. The first
question refers to the agent producing the outcome (outcome responsibility),
the other question to the agent who has the duty to put the bad situation right
(remedial responsibility). Both these concepts can be applied in individual
contexts such as Miller's example of the classroom, but also in collective
contexts: the second important distinction Miller makes is between individual
and collective responsibility. In so far as the concepts of outcome and remedial
responsibility are applicable to collectives, they can be used for our
understanding of just war theory, which deals primarily with collective
responsibilities.\textsuperscript{28} There are good reasons to take Miller's perspective when
considering the issue of responsibility for \textit{jus post bellum}. These reasons and the
two preliminary issues are briefly discussed below: Miller's conceptions of
outcome and remedial responsibility and that of collective responsibility.

5.2.1 Outcome versus Remedial Responsibility

For Miller, the conceptual difference between outcome responsibility and
remedial responsibility is essential. The first type, outcome responsibility, refers
to the person that produced the outcome, e.g. who made the mess in the
classroom. It is the responsibility that a person bears for his own decisions and
actions.\textsuperscript{29} This type of responsibility is backward looking and answers the
question who is responsible for a certain problem. Outcome responsibility has
a strong causal component but cannot be identified with causality: causal
responsibility questions why something has happened, whereas outcome
responsibility properly questions “whether a particular agent can be credited or
debited with a particular outcome – a gain or a loss, either to the agent herself or
to other parties”.\textsuperscript{30} Usually, when an individual is responsible for a certain

\textsuperscript{27} Miller 2007, p. 83-84.
\textsuperscript{28} At least in the \textit{ad bellum} phase just war theory deals with collective responsibilities, but
even violations of the \textit{in bello} rules might point at collective responsibilities, when, e.g.,
the army does not provide sufficient training for its soldiers in Geneva rules or, worse,
actively encourages brutalities.
\textsuperscript{29} Miller 2007, p. 81.
\textsuperscript{30} Miller 2007, p. 87.
outcome, we feel that the gains and losses that fall upon that actor should stay where they are, whereas gains and losses that fall upon others should be shifted, e.g. compensated. In general, there is a presumption that agents are permitted to enjoy the benefits of their actions, as well as bear the burdens of those actions.  

The second type is remedial responsibility, which refers to the person that has the duty to remedy a certain problem. It is thus forward looking and questions at whom fixing the problem can be attributed; who is in that sense responsible. The focus is on the problem that needs remedy. As such, remedial responsibility is the responsibly that a person may have to help those who are in need of our help, although the person who is supposed to help did not necessarily bring about the need. Solving the problem is often connected to outcome responsibility since outcome responsibility is in many circumstances the most obvious basis for remedial responsibility. This means that the person who was responsible for the outcome, is also remedially responsible.

However, actors can be remedially responsible even when they are not outcome responsible for the deprivation, and then their responsibility is based on other conditions. Miller argues that when global problems occur, initially, “there is a moral requirement that falls on everybody else to provide the help or the resources that are needed.” But how do we distribute such a duty? It is important to single out some particular actor (or actors) who is obligated to put the bad situation right. This is what it means to be remedially responsible: there is a special responsibility to remedy a problem that is not equally shared with all agents, and this agent is liable to sanction if the responsibility is not properly discharged. Thus, this meaning of responsibility is concerned with remedying a problematic situation, and therefore it is important to single out the actor (or actors) that has a special responsibility to end this problematic situation, e.g. of deprivation. To do that, Miller proposes a taxonomy of six different conditions which are relevant when distributing remedial responsibility. As this type of responsibility is precisely what we need for jus

31 Miller 2007, p. 87.
32 Miller 2007, p. 98.
34 This sanction is not necessarily punishment but can entail blame as well. Miller 2007, p. 98-99.
post bellum, Miller’s taxonomy might serve as a base for the development of a system for assigning the specific duty to reconstruct after war.

5.2.2 Individual versus Collective Responsibility

Next to the distinction between outcome and remedial responsibility, Miller distinguishes between individual and collective responsibility. Whereas individual responsibility might not pose too many problems, collective responsibility is more contested. Miller defends the idea of collective responsibility; he holds that different collectives might be responsible, but he focuses on the nation state who he considers either collectively outcome and/or collectively remedially responsible. This nationalistic position would help us enormously with understanding just war theory in general, and jus post bellum in particular. Most just war theorists presume such a collective perspective when they consider states, nations, or armies as the addressees of just war theory, who consequently bear the related duties. International organizations also

35 There is an extensive and extremely interesting debate on collective responsibility. However, in this chapter I want to shed light on responsibility for jus post bellum, rather than fully defend the issue of collective responsibility as such. This is not to deny that there are other positions that are eloquently defended, focusing on individuals and individual responsibly, also for the issue of war (e.g. Cecile Fabre, Cosmopolitan War, Oxford: Oxford University Press 2012). For Miller’s defense of national responsibility based on the ‘like-minded group model’ and the ‘cooperative practice model’ see Miller 2007, p. 111-134, for critique, e.g., Roland Pierik, ‘Collective Responsibility and National Responsibility’, in: Helder de Schutter & Ronald Tinnevelt (eds.), Nationalism and Global Justice. David Miller and his Critics, New York/London: Routledge 2011, and for a defense against criticism David Miller, ‘Collective Responsibility and Global Poverty’, in: Ethical Perspectives 2012, 19/4, p. 631-635. For the purpose of this chapter, I assume that there is something like collective responsibility, or that it is at least a useful fiction, and that as such, nations and states can be responsible actors.

36 According to Thom Brooks, we can widen Miller’s focus and extend remedial responsibilities to other groups with a shared identity such as religious groups. Thom Brooks, ‘Remedial Responsibilities beyond Nations’, in: Journal of Global Ethics 2014, 10/2, p. 156, 166.

37 One might think in this context of the recent revisionist turn in just war theory, initiated by theorists such as Jeff McMahan, which is based on an individualist account of the theory as opposed to the traditional statist account. This challenges mainly the traditional account of jus in bello, as it argues that combatants are not morally equal, but that their individual moral standing depends on the justness of ‘their’ war. Space precludes me from elaborating further on this topic. See, e.g. Jeff McMahan, Killing in War, Oxford: Oxford University Press 2009; David Rodin, War and Self-Defense, Oxford: Clarendon Press 2003; Frowe 2016, p. 31-51, 123-145.
play a role in just war thinking, particularly the United Nations. However, it
must be noted that the United Nations do not act as a genuine collective body
but rather via the medium of its member states.

Adopting the perspective of collective responsibility as conceived by Miller
is useful in developing an account of *jus post bellum* which might work in
practice. The international arena consists indeed of sovereign (nation) states
that decide upon matters such as war, peace building and development aid. As
such, this perspective is ‘reality based’ and might improve the existing global
realm by attributing responsibility to these collective actors. When we want to
consider post war duties in a world without a world state, and without the
United Nations which can robustly impose responsibilities and enforce
compliance, (nation) states remain the prime international actors. Given our
present purpose, namely to develop an account of responsibility for *jus post
bellum*, it is assumed that there is something like collective responsibility.

This is not to say, however, that no difficulties exist as it comes to assigning
collective responsibility in concrete cases, which is readily acknowledged by
Miller. Accepting collective responsibility in the abstract is one thing and
distributing it in the concrete an entirely other thing. Miller foresees problems
when attributing collective responsibility to individuals for the policy and
actions of a specific nation state, because of their role in the decision making
process. Therefore, collectively responsibility can be attributed to individuals
who represent that collectivity, to varying extents. In other words, collective
responsibility is a matter of degree, depending on what Miller calls the ‘control
dimension’ and the ‘constraint dimension’.

The first dimension looks at the degree of control individuals have over the
policy of their collective, i.e. the nation. Obviously, the claim that all citizens
share in national responsibility is difficult to uphold when the state is as
authoritarian in nature as North Korea, where the population has hardly any
influence over state policy. Here responsibility resides only with the ruling elite.
In democratic states and in authoritarian states which enjoy popular support, its
members do share in the collective national responsibility. The more
democratic the state is, the more it makes sense to identify acts by the state as
genuine national acts, and to spread responsibility among the population.38

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38 Margaret Moore, ‘Global Justice, Climate Change and Miller’s Theory of
Responsibility’, in: Helder de Schutter & Ronald Tinnevelt (eds.), *Nationalism and
The second dimension, the constraint dimension, takes into account the external environment of the nation. Is the nation able to execute the policy of their choice and to what extent is it constrained by its external environment, e.g. by a lack of natural resources or by being small and thus not very influential? With regards to problems of global justice, Miller follows Rawls in arguing that external and physical factors – constraints so to speak – do influence the economic wellbeing of the nation, but domestic factors – the economic and political system and the national cultural values – have by far the most significant impact. Therefore, the constraint factor never fully takes away collective (here national) responsibility although national responsibly is always a matter of degree. Therefore, national responsibility is the norm rather than the exception, and individuals share in this national responsibility by virtue of their membership of nations.39

A special difficulty with collective responsibility, which is particularly relevant for *jus post bellum*, arises with the distinction between states and nations. Miller seems to refer deliberately to the nation state as main collective actor, but that obscures the obvious problem that not all international actors are nation states. The terms state and country refer to legal and political entities that are sovereign, internationally recognized, and self-governing over a certain territory (noting that the geographic location is emphasized with the term ‘country’).40 A nation on the other hand refers to a large group of people that share a culture, language, religion and/ or history. When a state encompasses such a unity, it is referred to as a nation state. But, as is well known, there is a plurality of cases in which state and nation do not coincide: there are stateless nations (e.g. the Kurdish nation) and multinational states (e.g. the former Yugoslavia, Canada, and Iraq).

Miller defines a nation state in a similar matter: “The people who belong to it are subject to a common set of coercively imposed laws; they are engaged in a co-operative practice regulated by a common set of economic and social


40 The definition of statehood in international law is described as follows: “The state as a person of international law should possess the following qualifications: a permanent population; a defined territory; government; and capacity to enter into relations with the other states.” Article 1 Convention on the Rights and Duties of States 1933 (Montevideo Convention, entered into force 26 December 1933), online: http://www.cfr.org/sovereignty/montervideo-convention-rights-duties-states/p15897.
institutions; and they share a common national identity.”

This enables Miller to focus on nation states as bearers of collective responsibility, but it seems more fair, especially for jus post bellum purposes, to keep in mind both entities. The state as institution is usually the actor that formally decides on international matters. As such, it will be mainly (nation) states that are outcome responsible for war and post war deprivation. States can also formally accept outcome responsibility for a particular situation. However, nations can be held responsible in this respect as well; Miller agrees when stateless nations “carry out a form of ethnic cleansing precisely in order to constitute a territorial state of their own”. One might also think of Islamic State, perhaps best viewed as stateless nation despite its self-chosen name, as being responsible.

Considering remedial responsibility, it is relatively easy to assign remedial responsibility to states in terms of identification, and indeed states are the prime actors to discharge remedial responsibilities. However, this might well mean that we assign responsibility vicariously, according to Miller. Think of the responsibility of the German Nazi state as distinct from the responsibility of the German people. Miller admits that this matter remains somewhat opaque: “it may not be clear which of the two relationships – citizenship or nationality – is doing the work when arguments about the importance of the nation state are being advanced”.

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42 This has to do with Miller’s foundation for collective responsibility, which are both the ‘like-minded group model’ and the ‘cooperative practice model’. Together, they can serve as foundation for the responsibility of nations and nation states, however, the foundation of mere state responsibility would rely solely on the ‘cooperative practice model’ which Miller considers fragile. David Miller, ‘David Owen on Global Justice, national responsibility and transnational power: a reply’, in: Review of International Studies 2011, 37/4, p. 2030.
43 This might be somewhat different for the problem of global poverty. Miller argues that nations are often outcome responsible for global poverty, since “it is not states, but peoples, who deforest land or deplete fish stocks, for example”. Miller 2012, p. 643.
44 Miller 2012, p. 643.
45 Miller 2011, p. 2030.
46 Miller 2012, p. 644.
47 Miller 2011, p. 2029. Similarly, when Miller considers the difference between compatriots and citizens in the nation-state, he states that while “there is much to be said for making nation-states the primary bearers of global responsibilities, even here
Miller’s analysis is highly relevant for the topic of post war justice, both because of his distinction between outcome and remedial responsibility and for his emphasis on collective (national) responsibility for global problems, arguing that even when actors were not involved in bringing about a problem, they might nonetheless be responsible for solving it. This is extremely helpful: it became clear that *jus post bellum* faces a serious problem, not only because formerly warring parties might not be the best placed to discharge post war duties, but also because of the uncertainty regarding the distribution of responsibility among other actors. To simply state that the just victor must rebuild while it clearly lacks the mental or the material capacity, or to state that the responsibility for *jus post bellum* falls indeterminately on ‘the international community’, does not bring us further; “(…) an undistributed duty such as this to which everybody is subject is likely to be discharged by nobody”.48

Remedying the post war damage, the war’s destruction and deprivation and the building up of a just and durable peace should be the main concern after war. Analogue to Miller’s example of the teacher returning to an overturned classroom, that consequently needs to be cleared up, the war torn state needs to be ‘cleared up’ as well.49 Since it is urgent to have a theory of responsibility for *jus post bellum*, it is adamant to apply Miller’s theory to *jus post bellum*, and to come up with a system that provides the conditions for assigning *post bellum* remedial responsibility. In the next section, an effort is made analyze Miller’s taxonomy in the context of post war situations.

### 5.3 The Foundation of Post War Duties

To address global problems in general, Miller holds, firstly, the concept of remedial responsibility to be central (because global problems need to be addressed in any case) and proposes, secondly, what he calls a connection theory of remedial responsibility: the nation that is connected in one or more ways to global problems, say deprivation, can be held responsible for remedying or improving that situation. Given that it is intolerable to leave deprivation and suffering to continue, it is the aim of the theory to come up

the fit between the group that is collectively responsible and the institution to which responsibility is assigned will be imperfect”. Miller 2012, p. 648.


with a proper way to assign responsibility to at least one actor. This leads Miller to propose six conditions which can constitute the foundation for remedial responsibility: moral responsibility, outcome responsibility, causal responsibility, benefit, capacity, and community. All these conditions are considered equally important and they need to be balanced against each other in concrete situations by using moral intuition, according to Miller: “We have to rely on our intuitions about the relative importance of different sources of connection.” In short: the various links that these conditions establish between an actor and a particular situation should be considered in distributing remedial responsibility.

It will become clear that the arguments for assigning post war duties to certain duty bearers, put forward by just war theorists, largely correspond with these conditions. It is therefore useful to analyze these six conditions and so help our thinking about the distribution of duties after war. It is argued that in this particular context some conditions do seem to weigh stronger than others, and that there are specific difficulties involved in using these conditions as a foundation for post bellum responsibilities. Three types of cases are used to explain how these conditions could work: self- or other-defense, humanitarian intervention, and ‘debated wars’, wars of which the justness is contested.

5.3.1 Moral Responsibility

The first condition Miller discusses is ‘moral responsibility’, When applied to post war situations, this condition is an intuitively strong argument for assigning responsibility. While it might be difficult in the case of global problems such as poverty to appoint a particular agent that is to blame, this seems to be easier in the case of war. In general, war is prohibited: modern just war theory holds that war is principally immoral, but can be justified in exceptional circumstances, and there is a legal prohibition on the use of force by states. Therefore, something has clearly gone wrong if war does occur. This means that usually, there will be at least one unjustified aggressor bearing the moral guilt for the war and subsequent deprivation. As in individual situations of responsibility, it makes sense to hold remedially responsible the actor that

51 Miller 2007, p. 100.
52 Article 2.4 United Nations Charter.
was at fault for the war. This restores the moral balance between the ‘aggressor’ and the ‘victim’. In a case of an unjustified attack and legitimate self- or other defense, such as the first Gulf War, the aggressor, Iraq, was morally responsible for the war and subsequent deprivation in Kuwait. As they were unjustified in their attempt to annex Kuwait, they are morally to blame for the damage. Based thereon, Iraq appears a likely candidate for being remediably responsible for deprivation in Kuwait.

How does this first condition work for the deprivation resulting from a humanitarian intervention? The situation which leads to a humanitarian intervention is characterized by internal instead of external aggression. Here, we stumble upon the difficulties that were foreseen by Miller when addressing collective responsibility. These type of cases involves a humanitarian catastrophe (or the imminent threat thereof) due to aggression usually performed by the state, i.e. governmental elites in power, against (parts of) the population, such as occurred in Cambodia or Libya. Clearly, the Khmer Rouge and the Ghaddafi clan were morally responsible for the severe harm inflicted on the population. In these cases however, it is difficult to hold the nation or the population collectively responsible for the deprivation and suffering. We could assess the extent to which the population had control over the national policy and its collective action (could the Cambodians have prevented the uprising of the Khmer Rouge in some way?), but in both situations, it would give rise to a minimal degree of collective responsibility at best. Therefore, it is rather difficult to use the condition of moral responsibility to pin down remedial responsibility after humanitarian interventions: while the state was (presumably) morally responsible, the morally responsible elites will – after the intervention – no longer make up that state; and the population of, say, Cambodia bears no (or minimal) collective national responsibility for the deprivation.

The third type of case shows another difficulty with using moral responsibility as foundation for remedial responsibility: can we always determine who bears moral guilt? While it might on some occasions be clear who was to blame for the war – i.e. who violated *jus ad bellum* – that is often not the case. In many cases, the justness of wars is debated and it takes years to determine who was justified *ad bellum* and who was the aggressor, if ever. We need only to bear in mind the disagreement on the justness of the Iraq or

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53 Miller 2007, p. 100.
Afghanistan war to illustrate this point. Clearly, Al Qaida was responsible for the terrorist attack on the USA, and there was a connection between Al Qaida and the Afghan Taliban regime. But was that enough to justify war? Obviously, it is not quite easy to determine who is morally responsible for the war and destruction in Afghanistan and thus to assign remedial responsibility using that condition. Nevertheless, also for debated wars, moral responsibility is presented as strong argument for assigning post war duties to belligerents. As such, its intuitive appeal is why opponents of the 2003 Iraq war are of the opinion that the USA and its coalition partners, having unjustly invaded Iraq, are responsible for reconstructing that state.

5.3.2 Outcome Responsibility

The second backward looking condition is ‘outcome responsibility’. Obviously the actor that is morally responsible for a particular outcome is also outcome responsible. However, other actors can also be outcome responsible even though they are not at the same time morally responsible. This condition enables us to bring many other actors into the picture, which is especially useful with regard to post bellum situations. Namely, not only the unjust aggressor but both (or all) of the belligerents are outcome responsible for the damage to a certain extent. Considering the first Gulf War, Iraq was morally and outcome responsible for the post war deprivation in Kuwait, but the USA and its coalition partners were outcome responsible as well. While they were justified in defending Kuwait against Iraqi aggression, damage was caused while doing that. Therefore, Kuwait’s deprivation is partly a side effect of the USA’s otherwise justified intervention, making it outcome responsible to some degree.

This way, responsibility can be assigned to the ‘other defender’ (here also the just victor) as many theorists do. The war was justified but still, it remains the lesser of two evils, i.e.: it is an evil for which the actor is responsible. We could even assess whether Kuwait is partly outcome responsible itself as well.

54 Pattison rightly points out that: “non-belligerents may have also been culpable for the war, such as those that finance the war and provide military equipment.” Pattison 2015, p. 639.
55 Miller 2007, p. 89.
Kuwait’s actions prior to August 1990, such as not respecting the oil quota, were an important reason for Iraq to attack Kuwait. Iraq made no secret of its plans for the military attack. Kuwait could have foreseen this outcome and by not adjusting its policy, it could be argued that although it is not morally responsible for the war, it is nevertheless (partly) outcome responsible since it contributed to that particular course of events. This way, the ‘just defender’ itself, which is also the ‘victim’ can be held responsible.

This condition of outcome responsibility works similarly for humanitarian interventions: while Vietnam was arguably justified in intervening in Cambodia to stop Khmer Rouge’s massacre, forcing them back to jungle rebellion, it attributed to the damage nonetheless. While the Cambodian state, by way of Khmer Rouge’s representatives, was both morally and outcome responsible for many deaths, damage, destruction and deprivation, Vietnam is outcome responsible as well because it intervened. As such, this condition can serve as a foundation for assigning remedial responsibility to the humanitarian intervener.

As we have seen, outcome responsibility (which is broader than moral responsibility) and remedial responsibility are often connected when the former is the basis for the latter. In the context of war, this condition can also be used as a foundation to hold belligerents responsible for reconstruction after war, based on their contribution to that particular outcome, whether their actions were justified or not. This is what it means to be responsible based on the adage ‘you break it, you own it’. Being in the Pottery Barn, the one who caused the damage and created the problem is responsible for putting it right, even if the person breaks something by accident.\textsuperscript{57} Therefore, outcome responsibility is particularly useful for debated wars such as Iraq and Afghanistan, because it does not presuppose moral guilt for the war. Rather, the actor’s share in producing the outcome – the post war situation – is used to attribute responsibility.

\textsuperscript{57} A metaphor often accredited to Secretary of State Colin Powell, who supposedly warned President George Bush that he would ‘own’ all Iraq’s problems after the invasion. See e.g. Bob Woodward, \textit{Plan of Attack}, New York: Simon & Schuster 2004. In reality, the retail chain of home furnishing stores Pottery Barn does not have such a rule. Additionally, it should be noted that contrary to Pattison’s reference to this motto, it seems not to refer to moral guilt for damage as basis for the obligation to put it right (Colin Powell did not think at that point that the US would be the unjust aggressor), but rather to outcome responsibility for certain damage. Pattison 2015, p. 637-639.
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This, of course, does not decide to what degree belligerents are responsible. It would appear that states who are morally responsible for the war are often largely responsible for the outcome as well, whereas other belligerents who are merely outcome responsible, are so to a lesser extent. We could question whether, since they were ad bellum justified, their share in causing the particular outcome is large enough to serve as foundation for assigning remedial responsibility. It seems odd to hold the ‘just defender’ responsible for the damage done in defending itself, since it was both justified in doing so, and it had no choice.\textsuperscript{58} The ‘other defender’ and ‘humanitarian intervener’ were justified also, but made a deliberate choice to intervene, knowing that it would cause damage despite its expected positive effects. It was, so to say, a ‘war of choice’. Nevertheless, such war of choice is one that is aimed at helping others (so we assume), which is why some argue that, since they already helped others by intervening, to require them to reconstruct after war is overly demanding or even unfair.\textsuperscript{59}

5.3.3 Causality

Next to these two backward looking conditions for assigning post war responsibility, causality is the third and final backward looking foundation. ‘Causality’ constitutes an important element of the previous two conditions, but it is introduced as an independent condition by Miller.\textsuperscript{60} While outcome responsibility is in many respects broader than moral responsibility, pure causality is even broader.\textsuperscript{61} As such, it is possible that causal responsibility brings more actors into the picture than solely those who are morally and/or outcome responsible. However, this condition can function independently as a foundation for remedial responsibility only in exceptional circumstances.

\textsuperscript{58} Assuming here that letting an aggressor annex the victim’s state is not a viable option.


\textsuperscript{60} Although Miller rightly acknowledges that it can be difficult to separate pure causal responsibility from relationships of outcome and/or moral responsibility. Miller 2007, p. 102.

\textsuperscript{61} This progressive scale is an oversimplification, think, e.g., of the type of moral responsibility that results from an omission to act, which I will elaborate upon in the next section. Miller 2001, p. 456.
Miller describes the example of someone who acts under coercion: “B says he will kill P, unless A first punches her in the face.”62 Also, one can think of rare occasions when the causal link between an action and a result is so unpredictable that it would be unreasonable to hold that actor outcome responsible.63 Suppose that Iraq did not openly threaten to attack Kuwait, and suppose the attack was a totally unforeseen reaction to the aforementioned Kuwaiti policy. Kuwait was not morally or outcome responsible, but could be perceived as partly causally responsible for the damage done in the war. Also, it is possible to imagine a situation in which a just intervener prevents a genocide in state A, while this unexpectedly causes a civil war to erupt in state B. Nevertheless, while this might be possible in theory, causality does not constitute a serious independent condition for the duty to reconstruct.

Taken together, these three backward looking conditions for attributing post war duties are based on what Gheciu and Welsh call a ‘compensation rationale’, i.e. the strong moral intuition that one has to compensate for the consequences of one’s actions and to ensure the well-being of those affected by them.64 As backward looking conditions – and consequently focused on the former belligerents – difficulties are nonetheless encountered when using these conditions as foundation for post war responsibility. Here one has to mention, first, the problem of assigning national responsibility insofar as it is collectively owed by the state and the individual members of the population. Some states are so organized that it is unfair to hold the population collectively responsible. Second, serious epistemic problems exist with regard to the indeterminacy of moral guilt. While initially, it seemed relatively easy to determine the actor that is morally blameworthy, the reality shows many debated wars: war is often not a situation of the ‘good guys’ against the ‘bad guys’. Both sides usually claim to be justified ad bellum. But who is? 65 It is well possible that insufficient information is available to make such judgment, both before, in and after the war – and it is possible that both (or all) actors have some justness on their side.66 Therefore in practice, moral guilt is likely to be a matter of degree.67

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64 Gheciu & Welsh 2009, p. 124.
An important third difficulty exists with regard to distributing post war duties solely on the basis of backward looking conditions. Gheciu and Welsh rightly argue that: “Backward looking ideas of causal responsibility relate imperfectly to the forward looking task of addressing a problem, since the actor who caused another actor to be in danger is not always best placed to rectify the situation.” In other words, it is not at all clear that former belligerents are adequate duty bearers in the sense that the problem of post war deprivation gets solved. Former belligerents can have high stakes in terms of their own interests and can also be seen as biased. Many Kosovars, to mention just one example, “remain suspicious of the motives and likely effectiveness of EU peace building”. Obviously, the way the population in a post war situation perceives the actor that is willing to reconstruct is important for the effectiveness thereof. This is why Walzer argues that the just victor should always seek the consent of the defeated. Furthermore, belligerents might not be best placed to remedy post war deprivation because they simply lack the capacity to do so. This means that, despite the powerful intuitive appeal of these backward looking conditions as foundation for post war duties, they are probably not sufficient to solve the problem of distributing responsibility for *jus post bellum*.

### 5.3.4 Benefit

Therefore, it is important to present the other conditions for remedial responsibility. Miller’s fourth condition, ‘benefit’, combines backward and forward looking elements. Applied to the issue of war, it points to actors that benefited from the war. Belligerents might have benefited from the war, but there might also be actors who are not morally, outcome or causally responsible for the war or subsequent deprivation, but who have nonetheless benefited from that process – the so called ‘innocent beneficiaries’. Benefit can thus serve as an additional as well as independent condition for assigning remedial

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67 These two difficulties are equally valid for outcome and causal responsibility; the actors’ share in a certain outcome can be difficult to trace back or to determine: it is nearly impossible to accurately determine the exact degree of responsibility. See further, e.g., Pattison 2015, p. 638-641.


69 Gheciu & Welsh 2009, p. 135.

70 Miller mentions e.g., that it is possible that A played no causal role but nevertheless benefited from the process that led to P’s deprivation because “resources that would otherwise have gone to P have been allotted to A”. Miller 2007, p. 102-103.
responsibility as it points to belligerents or outsiders who are the beneficiaries of the action or policy that caused harm. In case of the Iraq war, the USA is considered by many morally and outcome responsible for the war, and on top of that, it benefited from the war in terms of securing their oil interests and in terms of acquiring profitable oil contracts for US corporations.

Considering non-belligerents, one could even argue that not merely those who have benefitted are responsible, but also those who would benefit from the remedy in the longer run. Some just war theorists argue that the results of a particular war can bring wider benefits than for those directly involved in terms of national and international security.\(^{71}\) For example, a stable non-Taliban Afghanistan – not yet realized at this point – which is no breeding ground for international terrorism is in everybody’s interest. In this line, reconstructing states – preferably as democracies that respect basic rights – as a strategy in the fight against terrorism, brings wide benefits so that everyone might be considered as responsible for bringing about this result. The reconstruction of failed states is “something fundamental to the pursuit of regional and international security”.\(^{72}\) Obviously, in case of a humanitarian catastrophe, the deprived nation is itself the main beneficiary of an intervention,\(^{73}\) but the surrounding states also benefit from this reconstruction, e.g., from establishing a stable state and halting refugee flows. It could be argued that the international community as a whole benefits from reconstruction of a failed state after a humanitarian intervention; left in chaos, a collapsed or failing state destabilizes its environment and constitutes a potential breeding ground for international terrorism. What remains difficult here as well, is to determine the precise amount of benefit: which benefits weigh strong enough for attributing to those beneficiaries the duty to reconstruct?

Gheciu and Welsh describe such considerations under the heading of ‘benefit’ as the ‘defense of society rationale’, based on a broad understanding of national interests. They present Kosovo as the example to show that international actors taking up their responsibility can build institutions based

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\(^{73}\) Which is why Helen Frowe argues that they should bear the burdens of reconstructing as well. “So, if an intervening state inflicts collateral harms in the course of a humanitarian war, we might think that the burden of making good those harms falls to those who are the beneficiaries of the intervention, and not to the intervening state.” Frowe 2016, p. 244.
on democratic values, respect for human rights and a market based economy and that therewith international security is advanced.\textsuperscript{74} This condition seems to be a weaker foundation for assigning remedial responsibility than the backward looking conditions. Furthermore, Gheciu and Welsh point to two disadvantages when applying this condition in order to establish remedial responsibility to reconstruct. First, since it is difficult to calculate the benefits and their value for any state’s national interest and since this benefit might change over time, there is the danger of inconsistency. The foundation for the duty to reconstruct could cease to exist during the course of the reconstruction efforts. Second, if the duty to reconstruct is based on the actor’s national interests, it might lead to a lowering of standards.\textsuperscript{75} For example, it is questionable whether making sure that Afghanistan is no breeding ground for international terrorism requires the same degree of reconstruction as ensuring that the Afghan people can lead a minimally decent life.

5.3.5 Capability

The fifth condition for attributing remedial responsibility is fully forward looking: the ‘capability’ of a future duty bearer. Who would practically be capable of remedying the post war deprivation?\textsuperscript{76} The underlying moral principle is well-known and says: who can help should help. A contemporary and often used example is Singer’s example of the child that is almost drowning in the pond. Whoever is present when this happens, is remedially responsible to save the child. Obviously, since the goal is reconstruction of the war-torn state in order to remedy the deprivation and achieve a just and lasting peace, capacity to actually perform that task is essential.\textsuperscript{77} This is a consequentialist condition which focuses both on the desired result and the actor (or actors) that is most likely to achieve that aim. Whereas in an individual situation, it is possible that only one actor is capable to provide a remedy (e.g. when one person is close

\textsuperscript{74} Gheciu & Welsh 2009, p. 130.
\textsuperscript{75} Gheciu & Welsh 2009, p. 139-140.
\textsuperscript{76} Miller 2007, p. 130.
\textsuperscript{77} According to Pattison, this foundation trumps the other foundations for assigning the duty to reconstruct. This consideration is more important than the other factors, because they relate to less morally urgent concerns. Namely, the goal is to properly rebuild the war torn state and protect the population’s basic rights. Pattison 2015, p. 656. He therewith disagrees with Miller, who claims there is no hierarchy between the discussed variables.
enough to prevent someone from falling from a steep cliff or when one person is able the save the child from drowning), which makes him alone remediably responsible, in post war situations there will be many ‘capable’ actors. Therefore, this condition requires an assessment of the capability of actors of reconstructing after war, given the particular circumstances. This probably entails balancing capability, effectiveness and costs and as such, it requires an analysis of, e.g. financial costs and resources, and knowledge of the local situation and experience in reconstruction missions.

Using capacity as a foundation for assigning remediial responsibility in postwar situations has strong intuitive plausibility. We do not tend to hold an actor remediably responsible when this is unrealistic or overly demanding in terms of capability. Suppose Tanzania would have intervened in Rwanda to stop Hutu extremists from further executing their plan. However, they would not have the financial and material means to effectively reconstruct Rwanda afterwards. It seems imprudent to assign remedial responsibility to Tanzania, because it could not effectively remedy the deprivation, but it is also unreasonable since they already taken up the task of intervening and additional duties would bring too much costs for themselves.

This condition is presented by Miller as one among the six conditions for assigning remedial responsibility. Nonetheless, it seems that this condition is of a different order. We have already encountered several difficulties when applying the previous conditions as foundation for remedial responsibility and noted as an important problem precisely this requirement of capacity. A state might be linked in several ways with post war deprivation, e.g. it is both morally and outcome responsible, and may have benefited from the war. But despite these strong links, if it does not have any capacity to fulfill such duty, remedial responsibility cannot be assigned to that state. In those situations, moral and outcome responsibility do not lead to the duty to make it right. In such cases, Miller argues that “since the whole purpose of identifying remedial responsibilities is to get help to P, picking the agent who is actually able to provide that help makes obvious sense”.

Thom Brooks too argues that “the ability to provide a remedy is central to the possibility of possessing a remedial responsibility.” This means that the condition of capability works as a

78 Miller 2007, p. 103.
precondition for assigning remedial responsibility, rather than as one among the other conditions. Despite Miller's insistence on there not being a hierarchy between the six conditions, he writes that: “we have no alternative but to consider each of the agents (...) able to provide a remedy and then to assess how strongly each is connected to the impoverished group”.\(^{80}\)

### 5.3.6 Community

The final condition for assigning *post bellum* duties is ‘community’. Some states are located within the same region as the war torn state, or states may share the same religion or culture with the war torn state. Therefore, they are linked in such a way so that remedial responsibility can be assigned to these states. It seems convincing that relations based on shared communities give rise to special obligations. For example, it would seem right that other states in the region, but also Belgium, are more responsible than others to contribute to the building up of Rwanda after the Rwandan genocide. Sharing a geographical region or a history together generates shared responsibilities, in this case towards post war Rwanda.\(^{81}\) Gheciu and Welsh argue in a similar vein that the shared identity of European countries with the Balkans was used as foundation for Europe to have a special duty to reconstruct this area.\(^{82}\)

### 5.4 Role Responsibility

Miller’s taxonomy helps us gain insight into the foundation for remedial responsibility after war. However, the reasons just war theorists give for assigning the remedial duty to reconstruct to certain actors are not completely explained by the above analysis. An important issue is still absent: a special type of moral responsibility which can be approached through Hart’s concept of role responsibility. Hart explains role responsibility in the context of his comprehensive account of individual responsibility in the national legal system. His famous example of the drunken captain who lost his ship at sea with all aboard serves as an illustration of the fact that responsibility can refer to “a wide

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81 Miller 2001, p. 462.
82 Gheciu & Welsh 2009, p. 126.
range of different, though connected, ideas”.83 One of these types of responsibility is role responsibility: the responsibility that is based on the fulfillment of a specific role, in this case, that of a captain who is responsible for the safety of the passengers. By getting drunk and not making the required effort, he is violating his role responsibility and thus responsible for the loss of the ship and passengers. In short, with a certain role come specific duties, e.g. for captains to ensure the safety of the passengers and to deliver the cargo, or for parents to bring up their children. Hart has a rather broad understanding of role responsibility, as it also involves duties that come with temporary tasks, assigned to someone by agreement or otherwise.84

Because of the importance of role responsibility for *jus post bellum*, as distinct from moral responsibility discussed above, it is necessary to present it as a separate seventh condition. The above shows that the most obvious reason for moral responsibility in post war situations is the moral guilt for the war itself – the moral responsibility related to unjustified aggression. However, an actor can also be morally responsible based on either an omission to act in accordance with a certain formal role, or based on an (usually more informal) *ad bellum* assumed role. As such, role responsibility is a subspecies of moral responsibility. Miller states that one can be morally responsible for failing to fulfill a pre-existing obligation.85 And although Miller does not discuss this type of moral responsibility in detail, he mentions an example which resembles the type of responsibility that is meant here: a dad takes two kids to the park, where one breaks the other’s arm by accident, while he reads a newspaper. Dad is not causally responsible but he is morally responsible because he failed in his duty to take care of the kids, something that he assumed when he offered to take them to the park.86 He did not himself inflict the damage, but this specific role as supervisor comes with duties which he is bound to fulfill.

This concept of moral role responsibility must serve as an additional condition for assigning the duty to reconstruct in two ways. First, actors might have duties attached to a specific formal role and be role responsible when they fail to discharge the attached duties *ad bellum* or *in bello*. Consider again the Rwandan genocide: clearly, Hutu extremists were morally responsible for the

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85 Miller 2007, p. 100.
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deads and damage in 1994. However, Belgium and other members of the UNAMIR mission were present at the time. Despite their initial limited mandate, they were formally assigned the duty to protect the Rwandan population. As is painfully known, they withdrew after the first Belgian soldiers were killed, and manifestly failed in their mission because of this omission to act when it was necessary to do so. They are role responsible for failing to prevent the genocide, while they were not responsible in a causal way. Similarly, European countries intervened in the Balkans and took on the role of protecting the population. Their failing to properly discharge that responsibility during the war creates a strong foundation for remedial responsibility.

Second is the responsibility that lies entailed in jus ad bellum. Actors can be morally responsible not only because of their violation of jus ad bellum, or because of their omission to act in accordance with a certain role, but also based on a role that they self-adopted through a public ad bellum ‘promise’. Suppose that a state justifies its ad bellum decision to go to war, and that it makes promises about the post war situation as part of its just cause and chance of success. In that case it (informally) adopts a certain role which entails specific duties. Examples would be the wars in Afghanistan and Iraq: they were originally waged as self-defensive wars but humanitarian considerations were invoked as well in the justification for those wars. Particularly during the Iraq war, the emphasis shifted more and more towards ending the human rights violations and promoting democracy as main causes for war. By such a public statement, the state makes a promise with which it takes upon itself a distinct role that creates responsibility. It is then obligated to fulfill that role and the

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87 Of course the UN itself was in the end responsible for failing to provide the necessary political authorization, manpower and material for effective military action.

88 Although if we trace causality further back, we could argue that Belgium was causally responsible since they institutionalized the ethnic division between Hutu’s and Tutsi’s, which played a role in the animosity and subsequent aggression between the two groups.

89 Gheciu and Welsh argue that: “The European Union’s current responsibility to rebuild in the Balkans stems from a dual source: perceived special duties vis-à-vis fellow Europeans, and the additional responsibility incurred by recent negligence in fulfilling those duties.” Gheciu & Welsh 2009, p. 126.

90 George Bush declared “The goal in Iraq and Afghanistan is for there to be democratic and free countries who are allies in the war on terror. That’s the goal. (…) we will stay there to get the job done.” See: George Bush, Public Papers of the Presidents of the United States, Book 2, July 1 to September 30, 2004, p. 1715.
duties that are attached to it; in other words, it is responsible for achieving the promised goal. Actors can also try avoid such moral role responsibility by refusing to make such a promise. When a coalition of states intervened in Libya in 2011, leaders were, contrary to the wars in Afghanistan and Iraq, anxious to stress the limited nature of the intervention. Barack Obama stated that the focus of the mission was to protect Libyan civilians, not regime change. This strategy of emphasizing the limited *casus belli* is aimed at limiting Western responsibilities after the war.

In short: with specific commitments and the assuming of a certain role comes moral role responsibility. This last condition further explains our intuitions on how to distribute responsibly after war. It clarifies why we tend to hold the just victor remedially responsible after humanitarian interventions, or after debated pre-emptive wars that are aimed at regime change and protection of the population. That is not only because of moral and/or outcome responsibility. Also, these states are responsible for post war reconstruction because of the adopted role and the promise of achieving certain results, which creates legitimate expectations.

### 5.5 A System for Assigning Post War Duties

The goal of this chapter was twofold: to shed light on the foundation for responsibility after war and to develop a system for assigning the duty to reconstruct to specific actors. In the above, various conditions were analyzed and an insight into the foundation for responsibility was given. As we have seen, most just war theorists pick one or more of these conditions to assign post war responsibility. For example, Orend argues that the victor is mainly responsible because if ‘you break it, you own it’. Pattison argues for a presumption against belligerents rebuilding, and claims that the most capable rebuilders is remedially responsible instead.

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92 Pattison 2008, p. 49.

93 Given that this actor also has the ‘right’ to rebuild, which is so when there is a just cause for rebuilding and the effort is likely to be effective. Pattison 2015, p. 652. Pattison further argues that the UN Security Council should generally carry out the rebuilding
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However, it seems overly simplistic to rely on one condition and expect that this singles out the appropriate duty bearer in all situations, as these authors do. Neither of these conditions is decisive by itself. Given the international reality of today, and the contemporary view on jus post bellum, there is a need for a system that combines both backward and forward looking conditions. It seems right for a comprehensive system to both do justice to the morally relevant considerations, while at the same time remaining focused on the aim of halting post war deprivation. Regarding international problems in general, Miller holds that all six conditions are relevant for remedial responsibility and that they must be balanced in concrete situations. These conditions are relevant for post war deprivation as well, supplemented by the seventh condition that is added to Miller’s taxonomy. However, when these conditions are balanced in concrete post war situations, it would nevertheless be helpful if we could say something about their relative weight. Therefore, an attempt is made to systemize them.

5.5.1 Step One

What would a system for distributing the duty to reconstruct look like? For jus post bellum, it became clear that these conditions are not of equal weight and it seems therefore possible to attain a certain hierarchy between them. The condition of capability has the special function of precondition for assigning remedial responsibility. In order to achieve a just and lasting peace – the axiomatic goal of jus post bellum – it is prerequisite that an actor is capable to achieve (part) of this goal. The condition of capability preselects which actors are potential duty bearers and which are not. An actor cannot be held

process after war, an argument of which I am rather skeptical since contemporary reality forces us to be modest in our expectations of existing global institutions. While the UN might be generally perceived as a legitimate actor in the eyes of the deprived nation, it is questionable whether it is indeed the most capable actor to carry out reconstruction. Surely, when the UN and the Peace Building Commission would work as envisioned, they are in a good position to at least oversee post war duties. Exploring this line of global institutional reform would require however more space than is available in this chapter. Pattison 2015, p. 656-659.

94 E.g. Evans 2009, p. 149.
95 Thom Brooks similarly argues that Miller should correct his connection theory of remedial responsibility. He argues that his system is better understood as a ‘two-tiered procedure’ asking different questions: “The first tier would ask which nations possess capacity.” Thereafter, we should “select a nation or nations from this pool of nations
remediably responsible for reconstruction if it is not capable of achieving that result, even if this actor is connected in other ways with the deprived war torn state. On that basis many poor states are excluded from post bellum duties. How do we determine which particular states are excluded? In Miller’s perspective on global justice, duties are generated by basic human rights, which constitute a certain ‘minimum’. Some essential human rights must be fulfilled “if a person is to have a minimally decent life in the society to which he or she belongs”.96 It seems that this could function as threshold for duties regarding *jus post bellum*: whenever a state is not capable of reconstructing the war torn state without (further) infringing its own citizens’ minimally decent lives, they are not required to do so.

This precondition will thus exclude certain actors from post war duties, but it then obviously also determines the remaining actors as potential duty bearers. Should we try to determine who is most capable and then assume that any state that has the most resources and knowledge is remediably responsible for post war reconstruction? This would seem unlikely. Merely assigning post war duties to the most capable state(s) would not work; capacity cannot function as the sole foundation for assigning remedial responsibility after war, as Pattison suggests. It would mean that the same actors – presumably the richest and most developed states – are always remediably responsible for post war reconstruction around the world. Capacity is the necessary condition, but not the sufficient or decisive condition. For answering the question of which states capable of assuming post war duties should be picked out in a particular case, one has to look at the other conditions.

### 5.5.2 Step Two

War is a human activity involving intentional and collectively inflicted destruction, and because of this great evil of war, moral and outcome responsibility must remain important considerations when assigning the duty to reconstruct. In individual situations, we are considered to be responsible for the consequences of our actions. This means that when we do damage to others, we are liable for that damage. Hart writes: “He is thus liable to be ‘made capable of being remediably responsibly according to Miller’s conditions.” Consequently, “there is an algorithm after all.” Brooks 2011, p. 200-201.

to pay’ for what he has done.”97 There is a presumption that actors bear the burdens of their own actions.98 As we have seen, aggressive states are both morally and outcome responsible for post war deprivation, but just belligerents nonetheless bear responsibility for the outcome as well. This means that there is a presumption that belligerents are themselves responsible for post war reconstruction.

What about the relative value of these two conditions? It appears that being merely outcome responsible constitutes a weaker foundation for the duty to reconstruct than being both outcome and morally responsible. Damage and destruction as a result of actions that are justified – and which thus results in outcome responsibility only – are less blameworthy than damage and destruction as a result of evil or unjustified actions – resulting in moral responsibility as well. In the former case, the damage might be foreseen, but it is the side-effect of actions that are in themselves justified. Furthermore, the strength of outcome responsibility depends on whether a war was a ‘matter of choice’ or not: the outcome responsibility of an actor that had no choice but to defend itself is weaker than that of the other defender or humanitarian intervener that chose to get involved and was able to consider the implications of that act, despite their possible good intentions.

But while moral and outcome responsibility could serve as foundation for post war duties, the precondition of capability might stand in the way. Considering moral responsibility first; while it might be clear who is morally responsible after a self-defense against aggression,99 that aggressor might not be capable of successfully reconstructing after war, either because of a lack of resources and knowledge, or because the hostility between the former belligerents hinders effective reconstruction. We can imagine, to mention an example, that Kuwaitis would not ravish at the prospect of Iraq being assigned the duty to reconstruct after the 1990 war.100 After a humanitarian intervention, it might also be difficult to use this condition for the distribution

98 Miller 2007, p. 87.
99 While this is the case in our example of the first Gulf War, it is surely not always easy to determine whether a self-defense is indeed a legitimate self-defense. Consider e.g., preemptive or preventive self-defenses: the distinction between a legitimate self-defense, a defense before its time, and a war of aggression is not always easy to make.
100 It should be noted that this does not mean that Iraq cannot be held liable for financially compensating Kuwait. But this is a question that is separated from the question as to who is responsible for halting the deprivation and reconstructing the war torn area.
of responsibility. Here the aggressor was the regime that targeted its own population. That population does not have a share in the collective responsibility of the state, for reasons addressed by Miller. And the responsible regime itself was presumably removed by the intervention and unable to bear the duty to reconstruct. As we have seen, while moral responsibility is an intuitively-strong foundation for post war duties, it will be difficult to use it to pin down duty bearers in practice.

Turning to outcome responsibility brings other belligerents into the picture, and as such, it can be used to assign the duty to reconstruct to the ‘other defender’ and the ‘humanitarian intervener’. Presuming that these just belligerents have sufficient resources, they are the likely candidates for bearing the duty to reconstruct because they are partly responsibility for that particular outcome. Against the argument that it is unfair or overly demanding to assign reconstruction to these actors, one might argue that this (heavy) burden could and should (under the *ad bellum* condition of reasonable chance of success) have been foreseen in advance. States are indeed required to carefully consider the weight of this burden before they embark on war or intervention. If they are not willing to fulfill their post war duties, the war should not have been undertaken. In this way, it is indeed possible that states who perform morally good actions acquire more responsibilities than they would have had otherwise, as Walzer argues.\(^{101}\)

Finally, Hart’s concept of role responsibility is an important condition for assigning the remedial duty to reconstruct. This type of responsibility follows either from an *ad bellum* or *in bello* omission to act in accordance with a certain role, or from an *ad bellum* promise that shapes a special role. Moral role responsibility does not exist in all situations of war, for example when a self-defense is merely aimed at repelling an aggression. Furthermore, the strength of role responsibility depends on the nature of the promise made: was it made once or repeatedly, was it publicly announced and recorded in official documents, addressed at the actor’s population, and/ or at the population of the war torn state directly? The stronger the commitment, the stronger the role responsibility.

Again, role responsibility is particularly strong in case of a humanitarian intervention, where the intervener assumes the role of rescuer. Inherent in the just cause of the intervener is the adoption of a humanitarian role: the duty to

\(^{101}\) Walzer 2012, p. 40.
indeed halt the catastrophe and to remedy the deprivation. Provided the humanitarian intervener is capable to help reconstruct after the intervention, which they are whenever they can do so without infringing its own citizens' minimally decent lives, outcome and role responsibility constitute a strong foundation for remedial responsibility.\textsuperscript{102} However, when a state is willing but not capable of post war reconstruction, it seems that it should nevertheless be able to justly intervene to prevent or stop a humanitarian catastrophe. Alex Bellamy rightly argues that to claim otherwise “dramatically reduces the number of potential agents who might save strangers in urgent peril”.\textsuperscript{103} For that reason, humanitarian emergencies are an exception to obligations to build the peace afterwards, according to Bellamy.\textsuperscript{104} States can legitimately intervene despite them not having the means to reconstruct after the war. If this should be the case, the intervening state should prevent the creation of legitimate expectations by making statements about their limited aims.

5.6 Conclusion

Some steps are made towards developing a comprehensive system of conditions that can serve as foundation for the duty to reconstruct as part of \textit{jus post bellum}. This chapter argues in favor of a system that combines both backward and forward looking conditions, wherein forward looking capability functions as a precondition. Backward looking moral, outcome and role responsibility function then as the most important conditions, and finally the conditions of causality, benefit and community further help in the distribution of the duty to reconstruct after war. This system thus presumes that belligerents are responsible for reconstruction after war. But while the conditions seem to

\textsuperscript{102} It seems to me that when a state is willing but not capable of post war reconstruction, it can nevertheless justly intervene to prevent or stop a humanitarian catastrophe. Alex Bellamy rightly argues that to claim otherwise “dramatically reduces the number of potential agents who might save strangers in urgent peril”. Therefore, humanitarian emergencies are an exception to obligations to build the peace afterwards, according to Bellamy. Bellamy 2008, p. 620-621. If this should be the case, the intervening state should prevent the creation of legitimate expectations by making statements about their limited aims, thereby limiting their role responsibility.

\textsuperscript{103} In general, Alex Bellamy points to the danger inherent in requiring humanitarian interveners to bear the duty to reconstruct after the intervention: not every intervener has the means to fulfill that duty. Bellamy 2008, p. 620-621.

\textsuperscript{104} Bellamy 2008, p. 620-621.
work quite straightforwardly in theory, real world scenarios are always complex, making it difficult to pin down remedial responsibility to belligerents in practice. Recalling Miller’s claim that it is morally unacceptable for people to be left in a deprived situation, “there is a moral requirement that falls on everybody else to provide the help or the resources that are needed”.105 Along with the shift towards a maximalist *jus post bellum*, this means that in concrete situations, the aim of halting post war deprivation and building a just and durable peace compels us to widen the scope of responsibility beyond the belligerents.

The ‘belligerents rebuilt thesis’ must therefore be understood in a more nuanced way than it initially appeared: belligerents are not solely responsible.106 If they cannot bear the duty to reconstruct themselves, other actors are remedially responsible instead. In that case, the duty to remedy post war deprivation does not shift to an indeterminate ‘everybody else’ or ‘international community’. Rather, the various conditions can be used to assign the duty to reconstruct to other specific actors. One can think of a humanitarian intervention in which the aggressive regime is toppled, while the intervener is not capable of reconstructing the state and securing a just peace (alone). Other states must be assigned the duty to reconstruct based on, e.g. their share in the moral guilt (e.g. by indirectly supporting the aggressive regime), their proximity and received past or future benefits. Ideally, the United Nations and organizations such as the Peace Building Commission have a distinct role in reconstruction after war, mainly one of coordination and overview.

Unfortunately, there are still reasons to be skeptical about the effectiveness of *jus post bellum*. Whereas just war theories’ principles, both *jus ad bellum* and *jus in bello*, are codified in international law to some extent, *jus post bellum* remains essentially a mere moral theory. One can be sympathetic towards Orend’s vivid plea for a new Geneva Convention, but the development of international law takes much time and effort and a new *jus post bellum* treaty is not expected in the near future.107 Furthermore, even if such treaty would be created, an authority – a ‘global teacher’ – to assign remedial responsibility and enforce compliance is absent in the international context. Pattison’s plea for

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105 Miller 2007, p. 98.
106 In other words: the ‘belligerents rebuild thesis’ is the first right answer, but is it by itself an incomplete answer to questions of responsibility for *jus post bellum*. See further also Pattison 2015, p. 641.
building a stronger UN system so that the responsibility to rebuild can be properly realized is therefore also welcomed.¹⁰⁸ Institutional reform is most urgent. An institutional framework for distributing remedial responsibility would be highly valuable for *jus post bellum*. However, neither is expected in the near future. The reality is that, despite the fact that *jus post bellum* is welcomed as part of just war theory, international law and global institutions fall behind the moral theory. As a result, it remains somewhat noncommittal and duty bearers can ignore their post war responsibility.

Nevertheless, *jus post bellum* can fulfill a useful role as moral framework. And precisely this current absence of a *jus post bellum* Geneva Convention and a capable global teacher makes it even more important to have a well-considered system (of which this sketch is merely the beginning) to assign remedial responsibility that can invoke general agreement. But could there be some sort of agreement on who bears the duty to reconstruct and if so, to what extent? As was pointed out, when it comes to real wars and post war situations, with all their nuances, complexities and ambiguities, things become complicated. Due to epistemological difficulties, it can often be difficult to determine the exact value of the various conditions for remedial responsibility. Given these inherent difficulties, it will not be easy to reach agreement between actors on who bears the duty to reconstruct. It is to be expected that the system developed here will not produce clear, self-evident results in concrete situations. Rather, these conditions can be used to ‘build a moral case’ to form an argument based on which the duty to reconstruct is assigned to specific actors. It is unlikely that one might indisputably determine who is responsible after war, but a case for a certain distribution of responsibility can be made, based on the hierarchy of conditions that is developed here. This means that the existence of *jus post bellum* is not quite secure. Yet, having a better grip on responsibility for *jus post bellum* is certainly helpful, and a necessary tool in the creation of a just and stable peace.

¹⁰⁸ Pattison 2015, p. 659.
6. *Jus Post Bellum*. A Case of Minimalism versus Maximalism?

6.1 Introduction

“Mission accomplished.” Former President George W. Bush’s famous speech, given on the aircraft carrier USS Abraham Lincoln in 2003, is now infamous. The message to the world was clear: the major combat operations had ended, Saddam Hussein was removed from his post and the Iraqi people were free. It quickly became apparent that the message was, to say the least, premature. Numerous points of critique have been formulated regarding the justness of this war, an important one being the absence of a conscientious ‘exit-strategy’. There was no clear answer to the question: what needs to be done after the regime has been removed? In general, contemporary post war situations seem to pose new challenges. What responsibilities and obligations arise after war? *Jus post bellum* is the welcomed ‘new’ part of just war theory that aims to answer questions of post war justice, that have become so pressing in today’s political reality.¹ In very general terms, *jus post bellum* aims at a just peace after war. But while many argue for this extension of just war theory, there is no agreement on the content and scope of *jus post bellum*.

Often, the current debate on *jus post bellum* is presented as a debate between two opposing camps: the so-called ‘minimalists’ versus the ‘maximalists’.² Some

¹ Not everyone however welcomes *jus post bellum*. There are few authors who criticize this new branch of just war theory. Alex Bellamy, e.g., argues that we should be careful to insist that *jus post bellum* has become a third branch of just war theory, since its incorporation is by no means unproblematic. “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.” Alex Bellamy, ‘The Responsibilities of Victory. *Jus Post Bellum* and the Just War’, in: *Review of International Studies* 2008, 34/4, p. 622. Seth Lazar is also skeptical and argues that we do not need *jus post bellum* as part of just war theory, because the issues it regulates are better perceived in the broader ethics of peace building. *Jus post bellum* needs to look forward to the task of peace building and is therefore grounded in a broader ethics of peace building instead of flowing from just war theory. Seth Lazar, ‘Endings and Aftermath in the Ethics of War’, CSSJ Working paper series 2010. Online at: http://www.politics.ox.ac.uk/cssj/working-papers.html.

however, have stated that these positions make up two consecutive phases in the debate on *jus post bellum*.\(^3\) How are these two positions characterized and what is the difference between them? The minimalistic or restricted position on *jus post bellum* supposedly aims to restrict post war behavior and, therefore, consists mainly of negative moral imperatives.\(^4\) For example, there is a presumption against reconstruction of the defeated state.\(^5\) Post war activities should be focused on “redressing the worst effects of military action, ensuring that enough resources and capability remain in place for the country to reconstruct itself”.\(^6\) Victors are permitted to secure the cause that justified the war, but nothing more than that. This stems from the wish to prevent excesses by victors acting out of self-interest.\(^7\) This restricted understanding of post war norms means that they are relevant during a fairly short time-span: they apply to the end of war and in its immediate aftermath.\(^8\)

The maximalist or extended position on *jus post bellum* seems much more ambitious. *Jus post bellum* is said to consist mainly of positive obligations, determining what actors are allowed or even obliged to do after war. Instead of fear for victors taking advantage of the defeated party after war, thus doing too much, maximalists fear that victors will leave having done too little.\(^9\) Maximalist *jus post bellum* therefore goes beyond addressing the injustice that was the reason for the war and thus securing the cause.\(^10\) Certain post war norms, such as political reconstruction, are more broadly interpreted. Also additional, different sorts of norms are identified as part of *jus post bellum*. They entail for example the achievement of forgiveness and reconciliation, reconstruction of infrastructure,\(^11\) economic development,\(^12\) and compensation for environmental damage. According to Alex Bellamy, the obligation to punish perpetrators of

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war crimes through organizing trials is also a requirement typical for maximalists. As a consequence of these broad and varied commitments, more time will be needed for the acquittal of these obligations. Therefore, maximalist *jus post bellum* continues to be applicable for a longer period of time after the end of the war.

This chapter critically examines this commonly made distinction. Thereto, the general picture is painted in the second section by analyzing representatives of both positions, as well as Brian Orend’s position that might be situated ‘in between’. Despite the clean-cut characterization of the debate on *jus post bellum* in a minimalist and maximalist camp, it will quickly become clear that making this distinction is not as easy as it appears. More often than not, contributions to the debate can hardly be labeled as either minimalist or maximalist. The third section of this chapter returns to the common characterization of the two positions. It appears that the difficulty of distinguishing minimalism and maximalism results from the fact that this characterization is not entirely accurate. Which of the supposed features indeed differentiate the two positions, and which fail to do so? And can we then rightly present the debate on *jus post bellum* as opposition between minimalists and maximalists? This chapter argues that today, this division is no longer relevant. However, there are differences between the main positions. In order to pinpoint these differences regarding the content and scope of *jus post bellum*, a larger perspective is taken in the fourth section of this chapter. It then appears that these differences are in fact gradual variations which are determined by two factors: the particular situation to which just war theory applies; and the general view on just war theory and international relations that is adopted. These factors explain the general shift towards a maximalist understanding of *jus post bellum*.

### 6.2 Positions on *Jus Post Bellum*

#### 6.2.1 Minimalism

The most prominent representative of the minimalist conception of *jus post bellum* is Michael Walzer. When reviving moral just war theory in his classic *Just

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and Unjust Wars a few decades ago, Michael Walzer did not pay much attention to *jus post bellum*. However, some of his ideas evolved through the years, which he states is due to developments in the world since 1977, when his book first appeared. Together with his gradual acceptance of humanitarian interventions and long-term military operations, he now acknowledges *jus post bellum* as the third branch of just war theory. Another representative of the minimalist position is Gary Bass, who has taken upon himself the task of creating an important place for *jus post bellum* within Walzer’s theory. Bass stresses the importance of restraining conquest and argues that after war, there is a presumption against political reconstruction.

Walzer’s and Bass’ minimalist accounts of *jus post bellum* are determined by the great value they put on sovereignty of states and the self-determination of peoples. A theory on the end of wars is shaped, Walzer states, by the same principles that apply *ad bellum*: the right to continued national existence and nationality. Just wars are conservative in character. What follows is what Walzer calls the ‘classic view’ on *jus post bellum*, which we could title ‘minimalism proper’. When an aggressor breaks the normal order, that order has to be repaired. Consequently, in this view the restoration of the situation that existed prior to the war is the just outcome. But contrary to traditional just war theory, this does not need to be taken literally according to Walzer: the goal of war is a ‘better state of peace’. It means that it is not necessarily the exact status *quo ante bellum* that must be restored, but victors should aim for a situation that is more secure, less vulnerable to territorial expansion and safer than it used to be for civilians. It follows that, from this point of view, after typical ‘just wars’ of self-defense, “resistance, restoration, [and] reasonable prevention” is allowed. Obviously, post war justice permits repelling aggression and some form of demilitarization and arms control.

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16 Walzer 2000, p. 121.
20 Walzer 2000, p. 121.
21 Walzer 2000, p. 121.
22 Walzer 2000, p. 121.
Jus Post Bellum. A Case of Minimalism versus Maximalism?

prevent that from happening in the near future. Lastly, it includes the right to extract reparations from the aggressor, following from the aggressor’s duty to restore and repair the damage done to victims. In principle, post war justice does not allow for political reconstruction.24

However, the current political reality – in which few wars are purely self-defensive – poses situations that minimalism proper does not account for. That leads to the question: Is this framework still appropriate today? Already in 1977, Walzer discussed an exception to that minimalist view. The exception is a Nazi-like regime, which threatens core international values and stands affront the conscience of mankind. The regime Walzer had in mind is extremely aggressive and genocidal, justifying an imposed political reconstruction.25 Bass argues that regarding these defeated genocidal states, there is no right but even a duty to reconstruct its political structure. Because of the extreme character of the regime, it loses its claim to be respected as state and therefore, imposed reconstruction does not constitute a violation of its sovereignty.26

It is clear that today’s humanitarian interventions or wars against terrorism do not necessarily involve ‘Nazi-like’ regimes, but nevertheless political reconstruction is often aimed for after these wars, which can be accompanied by short or longer term occupation. That new political reality seems to have made Walzer broaden the type of regime qualifying for the exception: he states that “the classic view of post bellum justice is now subject to revision whenever we encounter inherently aggressive and murderous regimes”.27 After humanitarian interventions or interventions in order to stop inherently aggressive regimes more generally, a new regime must be created in order to halt the taking of human lives and to prevent it from happening in the near future.28 Obviously, it will be subject to debate which regimes qualify as such. Probably, Idi Amin’s Uganda would have qualified, as would have Slobodan Milosevic’s Yugoslavia. But was Saddam Hussein’s Iraq sufficiently aggressive and murderous? There are many situations in which it is unclear whether the

24 In self-defensive wars, Bass argues, there is little justification for reshaping a defeated society: Bass 2004, p. 393.
28 An excellent article on Walzer’s understanding of humanitarian intervention was recently published in the European Journal of International Law, see: Terry Nardin, ‘From Right to Intervene to Duty to Protect. Michael Walzer on Humanitarian Intervention’, in: European Journal of International Law 2013, 24/1.
regime’s character justified imposed political reconstruction.

But let us assume that some regimes are inherently aggressive and murderous. What does this revision of that view on *jus post bellum* – minimalism proper – entail? Which other rights and obligations arise after wars with these regimes? According to Walzer, ‘provision’ is the primary obligation for victors. That entails the provision of immediate necessities for the people in the aggressor state, such as “law and order, food and shelter, schools and jobs”, provided together with local partners as much as possible. Next to the immediate provision of primary needs, post war justice requires political reconstruction, which is necessary to prevent further aggression in the future. The minimalistic nature of Walzer’s view on *jus post bellum* is clearly illustrated by the limitations he puts on political reconstruction. “The goal of reconstruction is a sovereign state, legitimate in the eyes of its own citizens, and an equal member of the international society of states.” The legitimacy restrains reconstruction efforts: they must be in strong accord with local partners in order to safeguard and embed the prevailing national values. Walzer is concerned about states imposing their own ideologies on foreign countries. Bass is equally concerned with imperialism and consequently states that reconstruction efforts should always seek the consent of the defeated. A minimal conception of human rights is another factor determining reconstruction efforts. While a democratic government is preferred in light of individual human rights protection, post war justice must be conceived in the minimal sense: the goal is the creation of a safe and decent society.

The final norm of minimalist *jus post bellum* regards criminal justice. Contrary to what seems to be Bellamy’s view, the emphasis on criminal justice and therefore the organization of trials after a war is not reserved for maximalists. In practically all accounts of *jus post bellum* – including Walzer’s and Bass’ conceptions of *just post bellum* – it is argued that after a war, some

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29 Walzer 2012, p. 43-44.
30 Walzer 2012, p. 44.
31 The justness of an occupation is determined by the political direction and the distribution of benefits provided by the occupation, Walzer claims in Michael Walzer, ‘Just and Unjust Occupations’, in: *Dissent* 2006, 51/1. He criticizes the Bush administration for profiting and making money on the Iraqi occupation. This, according to Walzer, undermines the legitimacy of the occupation.
33 Walzer 2012, p. 43.
34 Walzer 2012, p. 45.
35 Bellamy 2008, p. 612; Muirhead 2012, p. 156.
form of criminal justice must be achieved. “There can be no justice in war if there are not, ultimately, responsible men and women”, Walzer argued as early as 1977. If there was aggression, there must be aggressors and if war crimes were committed, there are war criminals. It is usually after the war that these persons, those guilty of the human rights violation(s) that started the war – violating *jus ad bellum*; and those guilty of war crimes – violating *jus in bello*, can be prosecuted, held accountable and punished.

There are numerous reasons for prosecuting and punishing violations of *jus ad bellum* and *jus in bello*: retribution for committed crimes; prevention of future crimes; re-establishing the status of victims; fostering reconciliation; and symbolically reclaiming moral values, to summarize a few. For these reasons, it is widely argued that criminal justice forms an important part of *jus post bellum*. But to categorically demand that those responsible be punished is too easy. Aside from the moral importance of punishing the guilty, the realization of peace is important as well. And most theorists acknowledge that this value of peace sometimes collides with the value of criminal justice. In those situations, these values can be weighed against each other and, unsurprisingly, there is no general agreement on what must be the outcome. Bass however argues that the duty of peace has priority over the duty of justice. And more often, theorists allow that sometimes it is justified to grant amnesties to perpetrators in order to come closer to the goal of reconciliation and peace. Walzer argues that the first priority after war is to create a secure peace for the people living in the war affected area. Therefore, “sometimes security might require amnesties and public forgetfulness”.

To summarize, Walzer’s ‘classic view’ on *jus post bellum* – minimalism proper – is thus revised. Minimalist *jus post bellum*, as it is usually understood, includes different moral norms. It is allowed to draw back aggression and take measures in order to ensure that it does not happen again in the near future. It is also allowed to extract reparations from an aggressor in order to repair the damage done to victims. Furthermore, political reconstruction is allowed or even obligated after war with inherently aggressive and murderous regimes, including, but broader than Nazi-like regimes. In these situations, there are other positive obligations, that Walzer summarizes under ‘provision’. Bass adds

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38 Walzer 2012, p. 45.
39 Walzer 2012, p. 45.
that these obligations of political reconstruction and provision of basic needs for the population, also arise after wars which leave a state in chaos. It is well possible that after a just war, the old regime (not inherently aggressive and murderous) no longer functions properly while the population lacks the power to establish new political structures. In those situations, Bass argues, the victors should assist in the reconstruction of the state. Finally, the establishment of criminal responsibility for violators of jus ad bellum and jus in bello constitutes the last norm of jus post bellum.

6.2.2 The Middle Ground?

In addition to Walzer and Bass, Brian Orend is presented as minimalist. Orend, as one of the most prominent spokesmen of jus post bellum, argues that such norms must be codified into a new Geneva Convention. At first glance, it is easy to understand why Orend is put in the minimalist camp. But while Orend is presented as minimalist, an analysis of his account of jus post bellum sheds doubt on that claim. Orend is, to a large extent, influenced by Walzer. Indeed in 2001, Orend’s account of jus post bellum was very much in line with Walzer, offering a clear checklist of jus post bellum norms, which remained largely the same in his writings in the following years. That checklist is widely quoted by other authors on jus post bellum. However, Orend’s position changes over time. While the checklist seems to remain the same, Orend becomes more willing to allow for political reconstruction. Consequently, it becomes more and more implausible that he is a typical minimalist. If we hold on to the

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40 Bass 2004, p. 402. This form of reconstruction is limited: Bass draws on the Rawlsian category of well-ordered peoples. There is no obligation to create a liberal democracy. Walzer similarly states that jus post bellum is about justice in the minimal sense: the creation of a safe and decent society. Walzer 2012, p. 45.
41 Mark Evans, Alexandra Gheciu and Jennifer Welsh and Alex Bellamy refer to Orend as being a minimalist in the jus post bellum debate: Evans 2008, p. 539; Gheciu & Welsh 2009, p. 117; Bellamy 2008, p. 605-606. While Frowe also cites Orend when explaining minimalism, she takes Orend’s account of jus post bellum as example for the maximalist position: Frowe 2016, p. 239.
minimalism-maximalism division, Orend’s position is at least halfway on the sliding scale towards the maximalist conception of *jus post bellum*. And his recent article shows definitively that Orend cannot be characterized minimalist any longer.\(^45\) Because Orend is one of the most quoted authors on *jus post bellum*, and because his position illustrates the difficulty of framing the debate in terms of minimalism and maximalism, it is useful to present his position here.

The main reason why Orend is often seen as minimalist, is his concern that victors will do too much after the end of war, leading to so-called ‘victors’ justice’. He thus limits what can be done after war, which characterizes the minimalist position. The aim of a just war, he states, “is the vindication of those rights whose violation grounded the resort to war in the first place”\(^46\). After the vindication of these rights, for example when the aggression is repelled and the rights to life, self-determination and the state’s right to sovereignty are restored, the war must end. And as unconstrained fighting beyond the vindication of those rights, demanding unconditional surrender after war is prohibited as well.\(^47\)

Orend’s checklist of *post bellum* norms appears thus, in terms of content, to be rather similar to Walzer’s and Bass’ accounts of *jus post bellum*. He proposes the following norms: 1) rights vindication; 2) proportionality and publicity; 3) discrimination; 4) punishment; 5) compensation; and 6) rehabilitation.\(^48\) These are three different types of post war norms. The first norm of rights vindication is arguably central, as it limits *jus post bellum* in general. It implies that the cause of the war determines when the war must come to an end, and what can be aimed for after the war. Secondly, proportionality and discrimination are general norms, which function in different ways. They determine the nature of several other *post bellum* obligations. With the second norm of proportionality, Orend states that post war arrangements must be reasonable – which thus excludes e.g. unconditional surrender – and publicly announced and communicated. These arrangements can have the form of a peace treaty, but this is not absolutely necessary, since the legitimacy of the arrangement is not derived from a formal treaty.\(^49\)

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\(^{48}\) Orend 2008, p. 40-42.

of the aggressor state. According to Orend, the population of that state must be excluded from punitive measures.\textsuperscript{50}

The following norms: punishment, compensation, and rehabilitation make up the third type of norms, because they represent concrete areas of post war justice. As in Walzer’s and Bass’ theories, criminal justice forms an important part of Orend’s \textit{jus post bellum}. This norm deals with the punishment of both the leaders of the aggressor regime, as well as soldiers of both sides who committed war crimes.\textsuperscript{51} While Orend stresses the importance of criminal justice, he adds that “care should be taken” to balance the goal of retribution with the negative results of prosecuting former leaders, implying that punishment should be reconsidered when it endangers the peace.\textsuperscript{52} Proportionality – Orend’s second norm – plays a role here in balancing the values of peace and criminal justice.\textsuperscript{53} Also, the victims of aggression should be compensated for the damaged caused by the war. This norm deals with another concrete area of post war justice. The amount of compensation that is due and the distribution of costs are determined by the principles of proportionality and discrimination. Following these principles, compensations should only be extracted to the extent that is realistically feasible, and only from actors who were responsible for the aggression. Orend excludes the civilian population from contributing to these payments. At this point, he disagrees with Walzer, who argues that reparations can be paid through a general taxation of the population of the aggressor state.\textsuperscript{54}

Finally, rehabilitation is a norm that concerns a specific area of post war justice. Orend’s interpretation of this last norm is particularly susceptible to periodic changes, in which he distances himself from Walzer’s position. Rehabilitation for Orend involves a broad range of activities such as disarmament, institutional reform, political reconstruction, rebuilding infrastructure, but also official apologies. The concept of rehabilitation is thus broader than political reconstruction alone. Some of these activities are

\textsuperscript{50} Orend 2008, p. 40-41.
\textsuperscript{51} Orend 2008, p. 41.
\textsuperscript{52} Orend 2002, p. 52-54. Negative effects resulting from prosecuting former leaders will arise especially when the accused remain popular among the local population. This can lead to destabilization and that is why Orend claims the advance of criminal justice is subject to the proportionality principle.
\textsuperscript{53} Orend 2002, p. 53.
\textsuperscript{54} Orend 2002, p. 47-49. In 2012, Orend totally rejects compensation as norm of \textit{jus post bellum}.
prescribed by Walzer as well, for example when disarmament is needed in the prevention of future aggression. But while Walzer argues that we should be very stringent in allowing coercive political reconstruction of other states, Orend thinks that Walzer is too cautious here. Instead of allowing rehabilitation only in case of inherently aggressive and murderous regimes, Orend suggests that “there should be a presumption in favor of permitting rehabilitative measures in the domestic political structure of a defeated aggressor”. However, regime change and full-fledged political reconstruction are not always allowed; the scope of rehabilitation – in Orend’s broad understanding – must be dependent on the character of the prior regime, and is subject to proportionality. But in all former aggressive states, reconstruction is allowed to a certain extent.

The important question arises: in which cases is regime change and full political reconstruction allowed? To answer this question, we must first look at Orend’s concept of the ‘minimally just community’: “A minimally just community makes every reasonable effort to: (i) avoid violating the rights of other minimally just communities; (ii) gain recognition as being legitimate in the eyes of the international community and its own people; and (iii) realize the human rights of all its individual members.” In other words, it is a nonaggressive, internationally and internally legitimate, and rights respecting regime.

Now the answer to the question as to the cases of legitimate regime change and imposed political reconstruction changes over the years. In 2002, he adds to the presumption in favor of permitting rehabilitative measures, that the further away a state is from being a ‘minimally just’ state, the more extensive the reconstruction may be. This clearly is a sliding scale. Total reconstruction is positioned at the very end of the scale and, as in Walzer’s theory, is only allowed in extreme cases. However, a few years later, Orend seems more willing to allow imposed regime change and political reconstruction, allowing it not only in extreme cases. A state that is not minimally just, he argues, can be forced to adopt a new minimally just regime through coercive political reconstruction

55 It should be noted that when Orend formulated his disagreement with Walzer on this, at that time, Walzer was even more cautious than in his later writings, reserving political reconstruction for ‘extreme cases’. This is discussed in the previous section. However, I think that his criticism would still be valid against Walzer’s current position.
57 Orend 2008, p. 43.
after a just war. Clearly, Orend herewith creates much room for imposed regime change and political reconstruction. Especially the last criterion of ‘realizing human rights’ seems to allow broad reconstruction. And which human rights is he referring to?\(^{58}\) He justifies political reconstruction with the argument that states who are not minimally just are not legitimate and therefore have no right to govern.\(^{59}\) And even if the people as a whole has the right to self-determination, this collective right is only valid insofar as it results in such a minimally just society.\(^{60}\)

Orend’s last article on *jus post bellum* confirms the conclusion that he leaves much room for coercive political reconstruction. Here, Orend does not mention his earlier checklist of *jus post bellum* norms. Instead, he presents us two models for post war justice: the ‘revenge model’ and the ‘rehabilitation model’.\(^{61}\) As to be expected, he opts for the rehabilitation model, which leads to *post bellum* norms that are quite different from his earlier checklist. There is no longer any mention of the essential and limiting norm of rights vindication. Instead, Orend argues that the goal of post war justice is the construction of a minimally just regime in any defeated aggressor.\(^{62}\) He now openly argues that political reconstruction is the goal of post war justice in general.\(^{63}\) Therewith, political reconstruction has moved from being one of many aspects of *jus post bellum*, towards being central. After a just war, the defeated state must always be politically reconstructed. It seems that Orend now supposes that unjust defeated aggressors are never minimally just and thus ‘need’ political reconstruction in order to become so.

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\(^{58}\) Which human rights does Orend mean? A few years earlier, he defined the rights which are satisfied by minimally just communities as the right to security, subsistence, liberty, equality and recognition. See: Brian Orend, *The Morality of War* (first edition), Peterborough: Broadview Press 2006, p. 163. In his last article, he argues that these five rights to him are the major objects of human rights claims. From these objects, concrete rights can be derived such as those in the Universal Declaration of Human Rights. See: Orend 2012, p. 187-188. To me, this does not make entirely clear what Orend demands for the minimally just regime (i.e. that it respects at least these five rights or objects of human rights claims or that it respects the full range of particular human rights).

\(^{59}\) Orend 2008, p. 43-44. Orend refers also to Immanuel Kant’s short reflection on *jus post bellum* and regime change in *The Metaphysics of Morals* to show that states failing minimal justice forfeit rights of existence.

\(^{60}\) Orend 2008, p. 44.

\(^{61}\) Orend 2012, p. 179-186.


\(^{63}\) Orend 2012, p. 187.
Another significant change in his position is the rejection of compensation for victims. While he was always cautious on this point, subjecting this norm to the principles of proportionality and discrimination, his fear of harming civilians was the reason that he left this norm out of his proposal for a new Geneva Convention. Instead, the focus now lies on investing in the defeated state in order to aid its rebuilding.\footnote{Orend 2012, p. 183.} It is clear that Orend’s position changed throughout the years. Now Orend occupies the middle ground in the minimalism versus maximalism debate. He clearly moved from leaning towards minimalism and Walzer’s cautious understanding of \textit{jus post bellum} towards leaning more in the direction of maximalism.

\footnote{Mark Allman & Tobias Winright, \textit{After the Smoke Clears. The Just War Tradition and Post War Justice}, New York: Orbis Books 2010.}

### 6.2.3 Maximalism

Although the minimalism-maximalism dichotomy is at the forefront of the \textit{jus post bellum} debate, not many authors are clear about their position. Mark Evans is one of the few who explicitly endorse the maximalist position, using the terminology ‘restricted’ and ‘extended’. According to Evans there are clear circumstances in which the minimalist position offers too little. He argues that the norms of minimalist \textit{jus post bellum} are always applicable after war, but that in some cases, the scope of \textit{jus post bellum} needs to be extended.\footnote{Evans 2008, p. 540-541. Evans gives several reasons why he thinks that minimalism offers too little in the current political reality: 1) in occupation situations minimalist \textit{jus post bellum} does not provide guidance on matters that are relevant; 2) if \textit{jus post bellum} is to provide a moral foundation for – and work with – international law, it must acknowledge the legal obligations established under the ‘responsibility to protect’; and 3) the fact that war is a great evil, in terms of its inherent destruction, deaths and suffering, constitutes a moral argument for \textit{post bellum} obligations, next to the familiar ‘pottery barn’ argument. See: Evans 2009, p. 150-155.} Mark Allman and Tobias Winright also implicitly endorse maximalism, as in their account of \textit{jus post bellum} several characteristics of that position can be recognized.\footnote{Mark Allman & Tobias Winright, \textit{After the Smoke Clears. The Just War Tradition and Post War Justice}, New York: Orbis Books 2010.} Although Evans and Allman and Winright acknowledge their dependence on Orend, they take his theory a step further and they will therefore be taken as representatives to discuss the maximalist position.

What exactly does this extended or maximalist version of \textit{jus post bellum} entail? Interestingly, Evans explains his position by demarcating it from Orend’s supposed minimalist checklist of \textit{post bellum} norms. Sometimes, Evans
argues, this checklist offers all the relevant post war rights and obligations. However, in other situations, *jus post bellum* will need to go “beyond the immediate aftermath of war”.  

Especially in case of an occupation after a just war, *post bellum* norms must be extended, meaning that more sorts of norms come into play and that they can only be achieved in ‘the long run’. In Evans’ theory, the scope of *jus post bellum* is dependent on the type of war that was waged and the question whether or not it is followed by an occupation. This resembles Walzer’s argument that the scope and type of *jus post bellum* obligations depend on the particular situation.

What other norms are identified by ‘maximalists’ as part of *jus post bellum*? Evans refers specifically to three more extensive obligations: reconstruction of the physical infrastructure; redistribution of material resources; and reestablishment of socio-cultural institutions, practices and relationships.

But this ‘extension’ is not as significant as Evans wants us to believe. First, the reconstruction of the infrastructure in the defeated state is presented as an additional obligation of maximalist *jus post bellum*. Allman and Winright similarly argue that investments in “infrastructure reconstruction and development, including roads, ports, rail lines, electrical grids (...) is necessary for post war peace”. However, this obligation was already identified by Orend under the heading of rehabilitation.

Secondly, the obligation to redistribute material resources is equally presented as a norm of maximalist *jus post bellum*. Evans states that victors must take responsibility for their fair share of the material burdens. He argues that the victor should not extract the total costs of the war from the former enemy. Allman and Winright agree that reconstruction of the economy of the defeated state is essential, and that the victor has thereto an important responsibility. Yet again, the obligation to redistribute material resources and reconstruct the defeated state’s economy is found also in Orend’s theory, particularly in his most recent account of *jus post bellum*. According to Orend, the victor cannot extract reparations for damages done by the war, but must instead invest in the

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67 Although I doubt that Walzer or Orend would disagree with that, but this will become clear in the following section.
71 Evans 2012, p. 208.
72 Evans 2008, p. 541.
defeated country, rebuilding its economy. These two broad, so-called additional norms of *jus post bellum* – reconstructing infrastructure and assisting the defeated state financially – are thus also recognized by Orend.

The third obligation that Evans thinks is part of *jus post bellum*, is indeed an extended addition. What the reestablishment of socio-cultural institutions, practices and relationships entails is not exactly clear, but forgiveness and reconciliation seem to make up the most important aspect of it. According to Evans, Orend’s and the so-called minimalist accounts of *jus post bellum* fail to acknowledge the importance of repairing the relationships between former enemies. Evans argues that this would be a “potentially serious deficiency”. Therefore, part of Evans *jus post bellum* is the obligation to “take full and proactive part in the ethical and socio-cultural processes of forgiveness and reconciliation that are central to the construction of a just and stable peace”. Because the obligation to achieve forgiveness and reconciliation seems very demanding, Evans argues that these concepts should be understood in thin, minimal terms: reconciliation “refers only to the business of developing means by which former enemies can live on the same planet without fighting each other”.

Allman and Winright argue even stronger that reconciliation is a vital part of *jus post bellum*. They present a richer religious understanding of reconciliation. The main goal of reconciliation is not only to make sure former enemies can continue to live on the same planet together, but to create relationships of respect, trust and friendship. “The reconciliation phase seeks to turn enemies into friends and to bring emotional healing to the victims of war.” They stress that reconciliation is not about forgive-and-forget, but is instead about true reconciliation between people, for which the truth is essential.

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74 Orend 2012, p. 188.
75 Generally however, they are not found in minimalists positions. At least, they are no explicit part of Walzer’s and Bass’ accounts of *jus post bellum*. It might however be argued that in some cases, such measures are part of what Walzer calls ‘provision’ in the defeated state.
77 Evans 2012, p. 208.
78 Evans 2012, p. 211.
80 They identify six areas important for a practical *post bellum* reconciliation: 1) the immediate post conflict period, in which the cease-fire is obviously a prerogative, and
Finally, extensive political reconstruction is often seen as norm of maximalist *jus post bellum*. Allman and Winright argue that the goal of *post bellum* regime change is more demanding than the realization of a minimally just state, as Orend holds.\footnote{Allman & Winright 2010, p. 152-160.} Based on the Christian tradition, they argue in favor of additional duties. Not only individual human rights, but the ‘common good’ is the state’s responsibility. After war, the victor has the responsibility to ensure that a government is in place which protects and guarantees human rights and pursues the common good. Consequently, they state that “a Christian understanding of *post bellum* regime change would aim for a just and lasting peace, inclusive of robust human rights, political sovereignty, and territorial integrity as well as social, political, economic, religious, and cultural conditions that allow citizens to flourish, to pursue lives that are meaningful and worthy of creatures made in the image and likeness of God.”\footnote{Allman & Winright 2010, p. 159.} Obviously, this requirement imposes broad obligations on victors of war.

In general, what does an analysis of these positions – the minimalist position of Walzer and Bass, the middle-ground of Orend, and the maximalist positions of Evans and Allman and Winright – tell us? Evidently there are differences, but the positions are not as clearly separated as it appears. And since it is not easy to categorize them as either minimalist or maximalist, there is no agreement on what the most common position on *jus post bellum* is.\footnote{For Bellamy, minimalism, with Brian Orend and Michel Walzer as most important spokesmen, is the most common position. See: Bellamy 2008, p. 602. Frowe argues that maximalism is ‘the dominant view of the role of victors’ and she discusses Orend’s account of *jus post bellum* as example. See: Frowe 2016, p. 240.}

### 6.3 The Opposition between Minimalism and Maximalism

To summarize where we stand so far: the supposed differences between minimalist and maximalist *jus post bellum* boil down to: 1) a short versus long...
timeframe; 2) negative versus positive obligations; 3) a limited array of norms versus a large array of norms (limited or extensive norms); 4) the just cause as an end versus achieving more than that. The difficulty in distinguishing the positions results from the fact that this characterization was certainly appropriate for explaining the difference between minimalism proper and maximalism, but that it is less appropriate to explain contemporary positions on *jus post bellum*. It seems no longer useful to characterize the debate on *jus post bellum* in minimalism versus maximalism. This becomes evident when looking at the differences.

The first characteristic that needs to be modified is the variation in timeframe. It is argued that minimalism focuses on the short term – the end of war and immediate aftermath – and that maximalism focuses on the long term. However, according to the recent positions of Walzer and Bass, post war activities can be stretched beyond the war’s immediate aftermath. Indeed, drawing back aggression and extracting reparations can be short term activities. However, the prevention of aggression; reconstruction of inherently aggressive regimes; and provision for the affected population are activities that will presumably need time. Also, it is doubtful whether criminal justice, which is an important requirement in of all proposals for *jus post bellum*, is something that can be restricted to the immediate aftermath. Experiences with national justice systems after war, as well as with international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia and hybrid courts such as the Extraordinary Chambers in the Courts of Cambodia, show that the organization and working of such courts often cost a large amount of time. The same goes for other mechanisms to deal with a violent past, such as truth and reconciliation committees. Since it is hard to claim that minimalist *jus post bellum* proposals exclude such provisions, the relevance of the short versus long timeframe becomes less important.

The second characterization is the type of norms that are proposed. It is argued that minimalism consists of negative obligations and maximalism of positive obligations. In general, this is true. Minimalism is more concerned with restricting what victors can do after a war, as a result of fear for exploitation the defeated state, and the imposition of foreign values. It is, according to minimalists, prohibited to forcefully impose political reconstruction. But, as seen, situations that involve inherently aggressive regimes or states left in chaos, are exceptions. After wars involving such states, according to minimalists, victors do have responsibilities regarding post war reconstruction. For Walzer
e.g., the imperative to provide provision means that the victor must reconstruct that state politically, realize a safe environment, provide food and shelter for the population, and create education and employment possibilities. These imperatives obviously are positive obligations. Additionally, achieving some form of criminal justice also entails a positive obligation. Therefore, both minimalists and maximalists propose positive obligations. The difference between minimalism and maximalism cannot be that minimalist *jus post bellum* exclusively consists of negative and maximalist *jus post bellum* of positive obligations. The difference is merely a matter of degree: minimalists focus on negative obligations and positive obligations; maximalists, on the other hand, focus mainly on positive obligations.

This leads us to the third – related – characteristic. It is argued that the array of norms is larger for maximalists than for minimalists. Still, there are some *post bellum* norms that we find in practically all proposals. This is the ‘core’ of *jus post bellum*. Halting aggression and creating safety and security; (assistance with the) reconstruction of the defeated state; and establishing some form of criminal justice seem to be essential parts of any proposal of *jus post bellum*. We should be careful to include the right to extract reparation payments from the former aggressor in this list, because that norm is part of minimalist accounts of *jus post bellum*, but not of all maximalist accounts. Evans and the later Orend in fact even turn this requirement around, arguing that victors should invest in the economy of the defeated state in order to rebuild its economy instead of demanding compensation. This means that debts due because of the war should be acquitted instead of claimed.

Reconstruction in general is always part of *jus post bellum*, only the scope of reconstruction is debated. Theorists differ with regard to the extent to which reconstruction is necessary. Maximalists indeed argue for more obligations in this context: rebuilding infrastructure, cleaning up the environment and generally investing more in the economy of the defeated state are considered required after war. Another additional ‘maximalist’ norm of *jus post bellum* is the requirement of reconciliation. An evaluation of these first three characteristics shows that the most profound difference between the main positions on *jus post bellum* lies in the specific scope and content. Maximalist *jus post bellum* proposes additional norms, generally positive obligations.

The fourth characteristic seems in accordance with that difference regarding scope and content: minimalists are said to restrict post war activities to achieving the just cause, and maximalists go beyond that. But again, the
minimalism maximalism dichotomy is not that obvious here. Both positions
namely argue that the just cause works as a general constraint after war. Like
Walzer, Allman and Winright state that the just cause for the war limits
legitimate actions when the war is over.\textsuperscript{84} The war must end and the
sovereignty of the enemy state restored when the cause for war is achieved, and
thus the previously stated objectives are realized.\textsuperscript{85} Evans also argues that the
sovereignty of the defeated state must be restored “as soon as is reasonably
possible”.\textsuperscript{86} This requirement constitutes one of the five proposed criteria of \textit{jus post bellum}.\textsuperscript{87}

At the same time, both minimalists and maximalists agree that post war
activities usually go beyond simply realizing the just cause. \textit{jus post bellum}
requires something more than a realization of that cause, e.g. halting the
internal or external aggression, and a restoration of the status \textit{quo ante bellum}.\textsuperscript{88}
It requires ‘a better state of peace’. A tension exists between those two claims,
something which Evans acknowledges.\textsuperscript{89} There is a wish to restrict post war
behavior and restore sovereignty as soon as possible, and yet positive \textit{post
bellum} norms are proposed in order to create that better state of peace.

Exactly how much better that peace must be, and what it entails, are
important questions that are addressed in the following section and chapter. In
short, while it is clear that both positions in fact aim higher than achieving the
just cause, the way that this goal is conceived marks an essential difference.
Maximalists are more ambitious in their understanding of the goal of a just war.
To illustrate this, Allman and Winright formulate: “Minimally, the goal of a just
war must be to establish social, political, and economic conditions that are
substantially more stable, more just, and less prone to chaos than what existed
prior to the fighting. Maximally, it means a social political and economic

\textsuperscript{84} Allman & Winright 2010, p. 87-90.
\textsuperscript{85} While they argue, in accordance with Orend, that the just cause works as a restraint
after war, Allman & Winright criticize Orend for conflating the just cause and the right
intention criteria. For them, the right intention criterion is important for \textit{jus post bellum}
in its own right, as it broadens and nuances the just cause principle. See: Allman &
\textsuperscript{86} Evans 2008, p. 157.
\textsuperscript{87} Brian Orend similarly argues that ‘the principle of rights vindication forbids the
continuation of the war after the relevant rights have, in fact, been vindicated’. He
stresses as the essence of justice after war, that there are firm limits and constraints
upon its aims and conduct. See: Orend 2007, p. 579.
\textsuperscript{88} Walzer 2000, p. 121-122; Orend 2007, p. 578-579; Allman & Winright 2010, p. 42.
\textsuperscript{89} Evans 2008, p. 157-160.
environment that allows citizens to pursue lives of meaning and enables humans to flourish."\footnote{Allman & Winright 2010, p. 86.}

Clearly, this last characteristic also fails to differentiate minimalism and maximalism in the way one would expect. It does show that both positions are confronted with a tension between two different requirements: limiting post bellum activities on the one hand, and achieving something better than simply a restoration of the status quo ante bellum on the other. There is no agreement on the definition of ‘something better’. It seems that the more comprehensive the goal is, the broader the content and scope of the proposed norms are, and the stronger the tension with the limitation of post war activities. Therefore, while this tension exists in both minimalist and maximalist proposals for jus post bellum, it seems to pose a more serious problem for maximalists.

All in all, it is not hard to understand why it is difficult to distinguish minimalism and maximalism. Minimalism proper – aiming at the restoration of the previous situation, allowing resistance and prevention of aggression and extracting reparations – can indeed be characterized by the features that are mentioned. Minimalism proper and maximalism reflect opposing standpoints. The general characterization of the debate on jus post bellum as a conflict between two opposing camps, as presented in the introduction, is based on that distinction. Today however, one of those positions seems to have been abandoned, and consequently, that characterization has lost its usefulness. Contemporary so-called minimalists have clearly moved towards maximalism, and therefore current positions can no longer easily be divided in two opposing camps. In essence, all contemporary accounts of jus post bellum are maximalist – at least to a certain extent. Therefore, the conclusion is that maximalism is indeed the new standard of normative thinking about jus post bellum. But when we have to leave the minimalist versus maximalist distinction behind, how should we then characterize the contemporary debate on jus post bellum? What can explain the debate on the content and scope of post bellum norms?

6.4 Jus Post Bellum in a Larger Perspective

We came to the conclusion that the minimalist versus maximalist divide is no longer relevant; all contemporary contributions are in fact maximalist. There nevertheless seems to be a gradual difference in terms of content and scope of post bellum norms. So the question arises: what determines the content and
scope of *jus post bellum*? And can we pinpoint these gradual variations? In order to answer these questions, it is clarifying to take a step back and create a larger perspective. So far *jus post bellum* is considered in relative isolation. However, the discussion of the last characteristic already indicated that the goal of just war theory is important. The following section takes a closer look at the connection between *jus post bellum* and just war theory in general. It is argued that the way *jus post bellum* is defined is particularly influenced by two factors: 1) the concrete situation to which the *justum bellum* applies; and 2) the general perspective on international relations. Those factors – one concrete and the other abstract – determine the content and scope of *jus post bellum*.

### 6.4.1 Situation

The first factor that influences the interpretation of *just post bellum* is the concrete situation in which the question of post war justice arises. The content and scope of *jus post bellum* depend in all proposals on the situation. Evans states this most clearly, when he argues that today’s post war situations contribute to the fact that *jus post bellum* now needs to entail more than what was originally envisaged.\(^{91}\) The relevant aspects of the situation are: the type of war and the nature of the involved state. For example, in case of a classic situation of attack and self-defense, *jus post bellum* is usually limited, and focuses on stopping the aggression and preventing it from happening again.\(^{92}\) The ‘core’ of *jus post bellum*, in other words, is usually sufficient in such situations. But in the case of a humanitarian intervention, the aim is to stop internal aggression and protect the local population against its oppressive regime, which then leads to more elaborate responsibilities. This can be recognized in Walzer’s theory.

Yet, this analysis is not confirmed by Orend, who argues that broad positive obligations – e.g. those regarding political reconstruction – apply irrespective of the type of war that was waged. And Allman and Winright too seem to argue for similar broad obligations after every type of war. Therefore it is plausible that not only the first, but also the second aspect is important. *Jus post bellum*

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91 Evans 2008, p. 540-541. What aspects of those cases referred to by Evans exactly are relevant to determine the content and scope of *jus post bellum* are not made clear. He only refers specifically to the situation of occupation, in which minimalist *jus post bellum* is not sufficient.

92 Although, as we have discussed earlier, for all proponents of *jus post bellum* this involves more than a restoration of the status *quo ante bellum*. 
depends on the nature of the state involved. That appears to be a common element shared by the various positions. Walzer for example, argues that even in case of self-deference there can be extensive positive obligations, namely, in the case of self-defense against an inherently aggressive regime. Bass points to the chaotic situation, e.g. when a regime has become dysfunctional. Such situations produce positive obligations regarding political reconstruction for the victors. According to Orend, political reconstruction is required whenever the state involved is not minimally just. And Allman and Winright claim that broad reformative activities are necessary whenever states are not able to promote the common good and provide their people with public services such as education, health care and electricity.\textsuperscript{93} It seems therefore, that the nature of the defeated state determines the content and scope of post war obligations. Here we can distinguish between three specific determinants: the nature of the state when it gets involved in the war (e.g. inherently aggressive?); the nature of that state as it comes out of the war (e.g. internal chaos?), and especially, the (foreseen) nature of that state in the future.

This last determinant, the view on the nature of the state when \textit{post bellum} activities end, seems to be an important determining factor. Look at the example of Iraq. Putting aside the justness of the war, \textit{ad bellum} arguments especially focused on the aggressive nature of Saddam Hussein’s regime, leading to its removal and subsequent power vacuum. Apart from these facts, \textit{post bellum} activities are determined by the question: what type of state does the coalition aim to realize? This aim can be modest, requiring the creation of a certain level of safety for the citizens after the overthrow of the regime, but leaving the task of political reconstruction to the people itself. Or the goal can be more ambitious, requiring that the Iraqi people are left with a democratic, stable regime that respects human rights.

The higher the aspirations with regard to the nature of the defeated state, the more elaborate \textit{jus post bellum} activities are. According to proponents of \textit{jus post bellum}, victors must ensure that the state loses its inherently aggressive nature; that the state becomes minimally just as well, securing human rights; or that it becomes a state which secures human rights and pursues the common good. For Walzer, the goal of \textit{jus post bellum} is not the restoration of the situation \textit{quo ante bellum}, but the creation of a ‘safe and decent society’. This implies that some crucial human rights must be guaranteed in the defeated state, but it is not, according to Walzer, the task of the victor to establish democracy. Whether

\textsuperscript{93} Allman & Winright 2012, p. 15.
or not a democracy is realized in a post war situation is up to the people of the involved state themselves. With regard to Iraq, Walzer argues in this line that the most important requirement of *jus post bellum* is that “the post-Saddam regime be a government of, by, and for the Iraqi people”. And while Walzer assumes that a fully democratic Iraq is a utopia, something better than the Baath regime, which is politically decent, must be aimed at. As we have seen, Orend’s goal for *jus post bellum* is the construction of a minimally just regime in any defeated aggressor. Victors must ensure that the nature of the defeated state is nonaggressive, internationally and internally legitimate, and rights respecting. This view on the nature of the state in the future means that, compared to Walzer, more elaborate *post bellum* norms are required to achieve this. The same counts for Evans’ account of *jus post bellum*, which incorporates elements of a ‘just society’ in which democracy is promoted.

6.4.2 Perspective on International Relations

Those aspirations regarding the nature of the state bring us to the second, related factor that influences *jus post bellum*: the perspective on international relations. Traditional just war theory is based on a certain view of the international community as a system of independent sovereign states. This sovereign state system is often referred to as the ‘Westphalian system’. One could call this the classic regime of sovereignty, which is based on principles such as territorial sovereignty, equality of states and non-intervention in other states’ domestic affairs. The emphasis on sovereignty means that just wars are particularly conceived as defensive wars against foreign aggression and *jus post bellum* as the return to the previous situation.

96 Assumed that the state is cannot already be qualified as minimally just, which shows that it depends on the situation as well. See: Orend 2012, p. 187.
97 Evans 2008, p. 545.
However, this view on the international community is changing in the past decennia, and thus just war theory as well. The Westphalian system and its concept of sovereignty are eroding. The general claim is that the world order moves more and more into the direction of a world community, in which states are connected in many ways, instead of being independent.\(^9\) Some important features of this new world order are the ongoing process of globalization; the increased emphasis on the value of individuals instead of states; and the proliferation of international legal norms (including human rights) and institutions. Due to these developments, the current international system is characterized by growing interdependence and mutual responsibilities. Of course, that has implications for the concept of sovereignty as well. Today, sovereignty is no longer perceived as unlimited state power. Instead, the idea that sovereignty carries with it responsibility is gaining ground. Sovereignty is seen as something conditional; the state’s right to represent its people is conditional upon the respect for their vital interests. States who disrespect those vital interests – often explained in terms of human rights – violate international standards and consequently forfeit their claim to sovereignty.\(^10\)

This argumentation is the foundation for the well-known responsibility to protect.\(^1\)

The question arises as to what substitutes the view on the international community as a system of independent nation states? Many argue that cosmopolitanism is emerging as the new conceptualization of international relations.\(^2\) According to Cecile Fabre, the central tenets of this new paradigm are: “a) individuals are the fundamental units of moral concern and ought to be regarded as one another’s moral equals; b) whatever rights and privileges states have, they have them only in so far as they thereby serve individuals’ fundamental interests; c) states are not under a greater obligation to respect

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10. An interesting comparison could be made with Aquinas’ disobedience to an unjust ruler and his allowance of regicide. See his *Commentary on the Sentences*, 2, Distinction 44, question 2, article 2, ‘Whether Christians are bound to obey secular powers, especially tyrants’. Available online: http://dhspriory.org/thomas/Sent2d44q2a2.htm.


their own individual members’ fundamental rights than to respect the fundamental rights of foreigners”. Undoubtedly, the traditional concept of sovereignty is changing, states’ interdependence is growing and the emphasis on individual human rights as central focus of international relations is growing.

The impact of these contemporary developments and the eroding Westphalian system on just war theory is evident. The emergence of an alternative changes the perspective on the role of the use of force as well. It means that the jus ad bellum is expanding beyond self-defense. Humanitarian intervention to protect foreign individuals against grave harms is now by many accepted as cause for war. Additionally, some argue that preventive wars can be necessary to eliminate threats for the international peace, e.g. regarding weapons of mass destruction or the dangers of terrorist organizations. This theoretical development can be recognized in the way contemporary wars are justified. It is not only the safety of the own state that is stressed, but the safety of the world population as well. Often, wars are initiated to protect a foreign population against grave human rights violations; to change an oppressive regime; to stabilize so-called ‘failed states’; or a combination of such reasons. In general, humanitarian arguments are becoming more and more important. As a result, and as highlighted earlier, just war theory now applies to different situations than earlier in history.

This changing view on international relations explains the general shift towards a more comprehensive jus post bellum. When Walzer developed his

105 The war in Afghanistan for example, was originally waged as a self-defensive action, launched by the USA and the UK in response to the 9/11 terrorist attacks against Afghanistan for its connections with the terrorist network Al Qaeda. But aside from the reason of self-defense, humanitarian considerations were claimed to be important as well: the people of Afghanistan had to be ‘freed’ from their repressive regime. To that end, the regime had to be removed. See further e.g. Theodor Meron, The Humanization of International Law, Leiden: Martinus Nijhoff Publishers 2006.
106 Matthew Shadle wrote an interesting book on the origins of war, in which he compares Catholic thought on war and the establishment of peace with international relations theory. He argues that while Catholic ideas on war and peace in essence converged with liberal theory, constructivism in fact better harmonies with the theological
just war theory, the Westphalian system and its conception of sovereignty formed the cornerstone of his theory. *Just and Unjust Wars* reflects the international community as composed of independent sovereign states: aggression is forbidden, and if it does occur, states are allowed to repel the aggression and restore their sovereignty. The war of self-defense is consequently the typical ‘just war’. And after a just war, states are allowed to restore the pre-existing order, the situation *quo ante bellum*, and not much more. In this paradigm, there is no need for extensive post war norms. As a result of changing circumstances, Walzer’s view of international relations gradually changed. Sovereignty is no longer the cornerstone of his theory. When the situation is serious enough, sovereignty can be temporarily set aside. Consequently, the post war situation entails more than what was originally envisaged. We have seen that as a result, contemporary proponents of *jus post bellum* cannot be called minimalist, not even Walzer. Having left the old paradigm behind, moving slightly towards a new paradigm in which the international order is viewed as a world community, we can call Walzer’s current position as ‘limited maximalist’.

### 6.4.3 The Various Degrees of Maximalist *Jus Post Bellum*

Those two factors: the situation – the type of war and the nature of the defeated state – and the perspective on international relations clearly influence the content and scope of *jus post bellum*. As a result of the changed international landscape and new ideas on the role of the use of force and the concept of sovereignty, *jus post bellum* has become richer. This shift towards maximalism thus coincides with the rise of a cosmopolitan morality, according to which all human beings have the right to the freedoms and resources they need to for their well-being and to live a flourishing life. Also, this development concurs with what was highlighted earlier: proponents of *jus post bellum* agree that the goal of a just war is not the restoration of the situation *quo ante bellum*, but a better state of peace.

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107 Bass follows this line of reasoning. He now also endorses the concept of conditional sovereignty, and argues that extremely unjust states lose their ‘normal’ rights as state and cannot claim full sovereignty. And if sovereignty is temporarily forfeited, *jus post bellum* will need to become richer.

The way that this peace is defined further determines the variations regarding content and scope of *jus post bellum*. When one assumes a more demanding and extensive goal regarding the nature of the peace, *jus post bellum* is necessarily more comprehensive. It then involves a larger array of positive obligations to achieve that goal. Walzer can be called ‘limited maximalist’, because he still understands peace in a limited, or negative way. Safety and security are essential and of the highest priority after the awfulness of war, as are the most basic human rights. For him, the sort of peace that is demanded by *jus post bellum* is a negative peace, particularly understood as the absence of the collective violence of war. In other words, the goal of a just war remains modest: a seizure of the violence of war and a state which is stable and no longer aggressive. And while this is a better state of peace, or a ‘decent peace’, it is not necessarily a just peace.\(^{109}\) For ‘full maximalists’ such as Evans and Allman and Winright, this is not enough. They aim for a positive peace. Democracy and respect for a wide range of human rights are considered essential for the establishment of peace. But other aspects of the peace are regarded as equally essential in this position. As we have seen, the two most important additional aspects are: a healthy economy in the defeated state; and forgiveness and friendly relationships between former enemies. Therefore, reconciliation is deemed a necessary requirement in *jus post bellum*, in order to transform relationships into respectful relationships, and to heal the emotional wounds of the parties of the war.\(^{110}\)

### 6.5 Conclusion

This way, discussing *jus post bellum* leads towards a reflection on the goal of just war theory. In most contributions to the debate, that goal is described as ‘a just and durable peace’.\(^{111}\) And while this is generally accepted as axiomatic, the discussion of *just post bellum* sheds doubt on that claim. At least, the suggestion is made that this goal of just war theory demands more attention from

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\(^{109}\) Walzer 2012, p. 37. Walzer refers to Avishai Margalit’s concept as a ‘decent peace’, who argues that this is all that can be demanded as responsibility for the victor after war. Walzer asks the questions whether victors should aim at ‘just any peace’. He argues that the connection between peace and justice is strong but minimalist, meaning that “peace itself is a value at which we can justly aim and sometimes live with, even if it is unjust”.

\(^{110}\) Allman & Winright 2010, p. 102.

\(^{111}\) E.g. Evans 2009, p. 149.
proponents of *jus post bellum*. And more specifically the question: What is the nature of the peace we aim to realize after the war? Realizing merely peace, understood as the absence of collective violence of war and a certain level of security for the population, has proven to be difficult enough in practice. Should we indeed be modest and aim for a decent peace? Furthermore, the restriction of post war behavior and restoration of the sovereignty of the defeated state as soon as (reasonably) possible is best secured by a limited maximalist *jus post bellum*, focusing on a negative conception of peace. These are good reasons to argue that a limited conception of peace is worthwhile pursuing.

But does that mean that we must settle for just any peace? While this limited conception of peace as goal for just war theory might be realistic and attainable, it could be too modest in the world we now live in. A fully maximalist understanding of *jus post bellum*, determined by a positive conception of peace – a just and lasting peace – accommodates the developments in the globalized world, and our contemporary conception of it, best. The effect of this position, as was pointed out, is that it becomes more difficult to restrict post war activities and restore sovereignty quickly, which in turn increases the danger of exploitation and so-called ‘victor’s justice’. Perhaps however, that requirement, while it is still widely endorsed, is a remnant of the previous paradigm which does no longer fit in the new paradigm. As we have seen, the new perspective on international relations includes a new view on the role of force and the concept of sovereignty. When one fully adopts that new perspective, arguing that force can be used as a vector for human rights and good governance, and that sovereignty is conditional upon the discharge of responsibilities set out in the ‘responsibility to protect’, one must also embrace a broad and comprehensive *jus post bellum*, despite that inherent danger.

What then remains is the practical attainability of such a lofty goal. That difficulty is recognized by both Evans and Allman and Winright, and it means that they must compromise this idea of a ‘just and durable peace’: it does not necessarily need to be perfectly just, they state. Evans argues that in practice,

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112 This is taken up in chapter 7.

113 Evans makes this argument in support of his ‘extended’ version of *jus post bellum*. See: Evans 2008, p. 151.

114 E.g. by leaving more room for the political interests of the victorious state to determine post war conduct, and allowing the victor to profit economically from the benefits of war.

115 I would like to thank an anonymous reviewer of *Ethical Perspectives* for suggesting this.
occupiers must be prepared to settle for a ‘suboptimal acceptable peace’. Allman and Winright agree and state that in some occasions, we must indeed settle for a “tolerably just or ‘suboptimal acceptable’ post bellum peace”. The question comes to mind whether in effect, this lofty goal is any different from the sort of ‘decent peace’ Walzer has in mind.

117 Allman & Winright 2010, p. 96.
7. A Just and Lasting Peace after War

7.1 Introduction

Wars are waged for the sake of peace. It is generally assumed that war has a teleological character; it not valued in itself but seen as an instrument to achieve a certain end.¹ This instrumental conception of war is not only firmly entrenched in history, but is also one of the pillars of just war theory. Just war theory is premised upon the idea that war, given the scale of overall destruction and death it causes, is a great evil. In an ideal world, there would never be war. However, just war theory is pre-eminently a non-ideal theory which recognizes that in the real world, war might sometimes be necessary and justified in exceptional circumstances. And although some essential moral principles are set aside in times of war, morality does apply. This way, just war theory occupies the middle ground between political realism and moral idealism, and is a balance between the desiderata of feasibility and desirability. It sets a moral standard for war, in order to limit its negative consequences as much as possible. More specifically, *jus ad bellum* restricts the number of wars; *jus in bello* restricts the sort and scale of the violence, and *jus post bellum* is the relatively new branch that regulates the transition from war back to peace. The axiomatic goal of just war theory is a ‘just and lasting peace’.

Strangely enough however, it is far from clear what a ‘just and lasting peace’ actually is. Peace is a complex and multifaceted concept, which cannot be defined in a straightforward way.² Even so, just war theorists rarely explore the goal of peace and its implications.³ Consequently, as Mark Evans points out,

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¹ Exceptions who justify war for values as honor, courage and chivalry set aside.
they might readily “disagree once they begin to spell the specifics of what they understand by it”. This is a fundamental problem: peace is central to just war theory, but is not explored in depth and remains therefore implicit and vague. What makes this problem even more pressing, is that developments in just war theorizing result in a shift towards a more comprehensive and demanding peace, which encompasses positive values such as a realization of human rights, reconciliation, and economic equity. But while that sounds attractive at first glimpse, it might be asked whether endorsing such comprehensive peace as normative goal is indeed a good idea.

To consider this, a thorough analysis is required. As Evans argues, “we need to inspect further the concept of a “just peace” itself”. That task is taken up here. The central question is: how should a just war theorist understand peace, insofar that peace is the goal of just war theory, taking into account the theory’s middle position between political realism and moral idealism? To answer this question, this chapter takes a step back and explores the concept of peace in depth. With the conceptual tool kit here developed, we can map the contemporary debate, make the implicit positions on peace explicit, demonstrate the recent shift in understanding peace, and reveal crucial differences that have remained off the radar. Ultimately, a certain understanding of a ‘just and lasting peace’ is defended. This analysis of the concept of peace – both in general and as goal of just war theory – hopes to contribute to a better understand just war theory, and might also help forward the debate on jus post bellum.

This chapter consists of three main parts. The first part addresses the general nature of peace and answers the following sub questions: What is the nature of peace? And what concepts of political peace can be distinguished? The following section presents a preliminary framework outlining the general nature of peace, distinguishing different facets: the spatial element, including the dimensions of peace (inner versus outer), the temporal element (temporary versus eternal), and the character of peace (negative versus positive). This framework provides the building blocks for the analysis in section three, which will focus on one form of outer peace: political peace. Five concepts of political

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5 Evans 2014, p. 28, 42.
6 Or, as I posed in chapter 6: “What is the nature of the peace we aim to realize after war?”
peace are sketched and placed on a continuum determined primarily by the
character of the peace. As it will appear, the character can range from a purely
negative peace, e.g. the unjust peace of a brutal robber, to a fully positive peace:
a lofty and comprehensive ideal of harmonious relations.

The second part of this chapter analyzes peace as the normative goal of just
war theory, and answers the following sub questions: Which of those concepts
of political peace can function as the goal just war theory? And, having a better
grasp of the concept of peace, can we now make more sense of the implicit
positions on peace in the contemporary debate? The fourth section evaluates
the peace continuum from the perspective of just war theory. A parallel is
drawn between the peace continuum and David Estlund’s continuum of
normative theorizing in political philosophy. This highlights just war theory’s
position in between strict political realism and moral idealism, and
consequently enables an elimination of two concepts of peace, and a
comparative assessment of the remaining three concepts.

A map of the contemporary debate and an assessment of various positions
on peace (Michael Walzer, Anthony Coady, Brian Orend, Mark Evans, Mark
Allman & Tobias Winright and Cecile Fabre) constitutes the fifth section.
Although most theorists declare that a ‘just and lasting peace’ is the goal of just
war theory, they in fact fundamentally disagree on what constitutes such a just
peace. This section reveals these differences, and shows that the level of
idealization (concessive or aspirational), the scope of just war theory (restrictive
or permissive) and the balance between collective and individual rights
determines how a particular just war theorist understands of peace. A shift in
just war theorizing marks an accompanying shift towards a more positive
concept of peace. The question is, how far should this shift go?

The central question – How should a just war theorist understand peace? –
is answered in the third part of this chapter. Given the underlying factors that
determine how theorists understand peace, this is not a question answered
easily. It namely involves passing judgment on the appropriate level of
idealization in just war theory, the proper scope of just war theory, and the right
balance between collective and individual rights. Before an attempt to answer
the central question, it is noted that the differences between the two main
positions on what constitutes a ‘just and durable peace’ (a decent or positive
peace) are smaller than they appear. Nevertheless, these differences cannot be
dismissed entirely. Based on just war theory’s role as practical guidance for real
world problems, its limited nature as applicable to specific domain of war, and
the risk for moral imperialism, this section argues that a ‘just and lasting peace’ must be understood as a decent peace. Hence, this chapter warns for a too radical shift in just war theory. The conclusion takes stock and assesses the implications for *jus post bellum*. Shaped as it is by the goal of a modest just and lasting peace, it is suggested that *jus post bellum* is best considered in a similar modest way.

7.2 The Nature of Peace

7.2.1 Temporal Element

Since peace is a complex and multifaceted concept, it can be understood in a variety of ways. In this section, three of these facets are discussed: the temporal element of peace, the spatial element of peace, and the character of peace. The first facet is the temporal element of peace, which regards the durability of the peace. The main distinction to be made here is between a temporary and a permanent peace. In a permanent peace, which is eternal and everlasting, the threat of war disappears completely. Contrary to permanent peace, temporary peace comes in many gradations. It might be a very short term peace, e.g. a truce or a seize fire, in which there is no stability but only a temporary seizure of the violence of war. This is a fragile peace in which the war can break out again at any minute. According to Thomas Hobbes, such fragile, temporary peace with the threat of war does not even constitute ‘peace’. Hobbes’ weather analogy nicely illustrates his claim: “For as the nature of foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many days together: So the nature of war, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is peace.”

But a temporary peace might also be a stable long term peace. The variations in between those two extremes are determined by the degree of stability and durability, and the question on if and how the underlying problems that gave rise to the war are solved. The less disposition to fight and the more harmony and reconciliation between former enemies, the more stable and durable the peace is. This also means that the more stable the peace, the more secure people are, and the more relieved from the fear of the violence of war. As will appear

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later in this section, the degree of stability is often connected with the character of the peace. Usually, but not always, a positive peace is also more stable and durable.

7.2.2 Spatial Element

The second facet of peace regards the spatial element, and this entails the different dimensions of peace. The main distinction here is between inner and outer peace, and there are various forms of the latter. Inner peace is the personal dimension of peace. It deals with the mental and emotional life of individuals - their psychological wellbeing. Inner peace means tranquility, freedom from disturbance and ‘peace of mind’. Augustine points to the harmony between knowledge and action, in which an individual's action is guided by his intellect, in which he is neither “molested by pain, nor disturbed by desire”. The opposite state of inner peace is inner conflict, unhappiness and misery. Inner peace is opposed to outer peace, peace outside the individual person; i.e. between people.

Outer peace can be subdivided into interpersonal peace and political peace. The interpersonal dimension of peace regards peace between individual people. This is referred to by Augustine as social peace, an example of which is “domestic peace” between the members of a family. The political dimension of peace regards peace between groups of people. It can be defined as “the more or less lasting suspension of violent modes of rivalry between political units.” A political peace can again be subdivided; it exists within states, between particular states, or between all states. National or domestic peace is the peace between political groups and the state, international peace is the peace between states or political groups outside territorial boundaries and universal or world peace exists worldwide between all states. Political peace is often explained dialectically as the opposite of violent conflict or war, and so refers to a

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8 Webel & Galtung 2007, p. 6.
10 Webel & Galtung 2007, p. 6.
11 Augustine, *City of God* 1887, p. 933.

This means that peace can have a personal, interpersonal and political dimension, but given our concern with just war theory, the focus in this chapter is on political peace after a specific war. In the traditional theory, the focus has been on one type of political peace; peace between two (or more) states after an international war. However, contemporary political reality shows many different sorts of war, not fitting the conventional symmetrical conception of war as taking place between two equal state armies. Conventional wars between two states are declining, whereas other sorts of war e.g. (internationalized) civil wars, asymmetric wars, humanitarian interventions and peace enforcement operations are increasing.\footnote{14}{I have discussed the debate on ‘old’ versus ‘new’ wars in a little more detail in chapter four.} Furthermore, the distinction between national and international wars is not always easy to make. Internationalized civil wars are one example, but additionally, a humanitarian intervention is an international war in which the national dimension is very important. The current political circumstances and the question on how just war theory can adept to current political circumstances is a serious challenge.\footnote{15}{Examples would be the applicability of just war theory on non-state actors. This subject needs further attention.}

Ideally, just war theory provides guidance for various sorts of war. This chapter remains focused, as traditional just war theory, on international wars, but includes unconventional wars such as humanitarian interventions.\footnote{16}{Hence without directly addressing the issue of the specific application of jus post bellum on civil wars. This issue certainly demands more attention and is an interesting subject for further research.}

Despite this focus on political peace, there are outspoken connections between the different dimensions of peace. Inner peace is helpful to achieve outer peace, and it might even be considered to be an essential requirement. As a famous quote of Confucius illustrates: “To put the world in order, we must first put the nation in order; to put the nation in order, we must put the family in order; to put the family in order, we must cultivate our personal life; and to cultivate our personal life, we must first set our hearts right.”\footnote{17}{Popular quote credited to Confucius, see e.g. http://www.values.com/inspirational-quotes/7086-to-put-the-world-right-in-order-we-must-first.}
Augustine, inner and outer peace are connected since peace on the smaller scale is a requirement for peace on a larger scale. For example, the peace in a household bears reference to the integrity of the whole of which it is an element, and as such “domestic peace has a relation to civic peace”. But also the other way around, whilst outer peace is not strictly necessary to achieve inner peace, it would be difficult for individuals to be at peace when they do not live in peace. Outer peace is a precondition for individual wellbeing, and it consequently enables people to experience inner peace. As Webel argues: “Personal survival is the absolutely necessary condition, the sine qua non, for peace at the personal level. And national security, or the collective survival of a culture, people or national state, has in modern times become the macroscopic extension of individual defensive struggles (…)”.

7.2.3 Character

The third facet regards the character of peace, and the main distinction here is between a negative and positive concept of peace. In his ‘Letter from a Birmingham Jail’, Martin Luther King referred to “a negative peace which is the absence of tension to a positive peace which is the presence of justice”. This important distinction is usually credited to Johan Galtung, the so called ‘founder’ of the field of peace studies. Applying this distinction to the different dimensions of peace shows more precisely what this distinction means. Negative inner peace refers to the freedom from inner conflict and disturbing thoughts or emotions. Positive inner peace is defined as psychological wellbeing or “calmness of mind and heart”. Negative outer peace refers merely to the absence of interpersonal conflict or war, while positive outer peace refers to a richer and more comprehensive concept of peace, in which desirable values and social structures are present.

Focusing on political peace, Galtung holds that positive political peace is characterized by certain desirable values; it entails not only an absence of direct
violence (as in a negative peace) but also an absence of structural violence, by which he means the sort of indirect violence that can be embedded in the structure of (domestic or international) society, for example as during South Africa’s Apartheid. Such violence “(…) is built into the structure and shows up as unequal power and consequently as unequal life chances.”

So what are these desirable values and social structures? Usually, a positive political peace is characterized by harmonious relationships and solidarity, economic equity and political justice, satisfaction of needs, and a lack of economic exploitation or political repression. This is also the way in which peace is defined in contemporary peace studies: “not just as the absence of war, but also the presence of the conditions for a just and sustainable peace, including access to food and clean drinking water, education for women and children, security from physical harm, and other inviolable human rights”.

In essence, these desirable values can be explained in terms of human rights.

War and peace are often presented as dichotomy: e.g. Hugo Grotius stated that there is either war or peace; there is nothing in between. But it rather appears here again that there is no clear demarcation line between war and peace – particularly not today. Mary Kaldor has famously shown that nowadays, the distinction between war and peace is often blurred. As noted above, there are a variety of different sorts of war and peace, and these are located on a continuum, ranging from total war to perfect peace.

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24 Galtung 1969, p. 171.
25 Peace defined by the renowned Kroc Institute of Peace Studies at the University of Notre Dame. Online at: http://kroc.nd.edu/about-us/what-peace-studies
26 This is in line with the different characteristics of the peace which are mentioned by just war theorists: the realization of human rights, the nature of the political regime in the defeated state, general reconstruction, and distributive justice and economic measures. Also mentioned are stability and reconciliation between former enemies, which fall under the temporal element of peace in my general framework.
29 Pierre Allan makes a similar international ethical scale, in which the destruction of mankind is one extreme, and agape paradise the other extreme. Allan & Keller 2008, p. 95-100.
direct large scale violence, but given the blurred lines there is a large grey area. Different variations of peace can be distinguished on the ‘peace side’ of the continuum, ranging from a purely negative peace to a fully positive peace. The more positive qualities are embedded in a certain concept of peace, explained in terms of human rights, the richer it is, and the more it shifts from a negative to a positive concept. As the national context is the prime area where human rights can be secured, the national context becomes more relevant when the peace becomes more positive. This framework, outlining the facets of peace, contextualizing international political peace and explaining its character in terms of human rights, provides the building blocks for the subsequent political peace continuum.30

7.3 Five Concepts of Peace

With this insight in the elements of peace, we can sketch a continuum of five concepts of political peace. They are distinguished here as separate concepts: purely negative peace, largely negative peace, decent peace, largely positive peace, and fully positive peace. Obviously, there are variations within those concepts and they might also overlap in certain respects. But while admittedly this division is somewhat simplistic, a distinction such as this is useful to further clarify and analyze the subject of peace.

7.3.1 Purely Negative Peace

Let us look, first, at the concept of a purely negative peace. On the continuum, this concept is right at the tipping point from war to peace. It can be defined as peace, as there is no longer national or international war. But aside from the

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absence of war, this concept of peace entails no positive characteristics. An example is the sort of unjust repressive peace that is imposed after a (unconditional) surrender. It is a forced peace which entails, on the part of the vanquished, a submission to the power of the victor. Here, the direct violence of war is replaced with a system of structural violence, in which injustice is widespread and embedded in the political structure. One can think of annexed territory or a civil war that ends with a totalitarian regime in place which represses (parts of) the population, violating peoples basic human rights. While there is no war, individual insecurity remains.

Theorizing the concept of a purely negative peace, it appears that it can be related to the perception that war, and not peace, is the normal state of affairs in international relations. In the time of Plato and Aristotle, war was seen as inherent in the human condition and warfare was a normal characteristic of daily life. Therefore, although Aristotle claimed that peace is the goal of war, such a situation of peace was only a temporary interruption of war. International relations were characterized by direct or indirect strive and hostilities. In one of Plato’s dialogues, the Cretan politician Clinias considers that: “For what most humans call peace he (the lawgiver of the Cretans) held to be only a name; in fact, for everyone there always exists by nature an undeclared war among all cities.”

For the Romans, war was the normal state of affairs as well. Although war was indeed aimed at peace, international peace (as opposed to peace within the city state or empire) was regarded as a negative concept. The Pax Romana remains the typical example of such peace to date: a period of relative peace through repressive order and unity, essentially a Roman hegemony over other nations. Pax then referred not to a positive peace but to the condition prevailing after victory. And after victory, the peace that was installed could entail unconditional surrender, slavery, and suppression of the vanquished. A vivid illustration of this conception of peace is Calgacus’ comments on the

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31 E.g. as eloquently described in 1984 by George Orwell, but the situation in Gaza that was analyzed in chapter 2 also comes to mind here.
35 Neff 2005, p. 31.
Romans preceding the Battle of Mons Graupius: “To ravage, to slaughter, to usurp under false titles, they (the Romans) call empire; and where they make a desert, they call it peace.” Therefore, although the *telos* of war was peace, this concept was primarily a situation that was advantageous for the victor, but far from just.

During the development of just war theory, the perspective of war as the normal state of affairs changed: peace was now considered the normal condition of humanity. Christian just war theorists understood war to be part of earthly life, but tried to reconcile it with Christian pacifism – which teaches nonviolence and rejects the evil of war. This has led to just war theorists’ attempt to regulate war: war is an exception that can only be justified when necessary to protect or reestablish that peace. As one of the founders of just war theory, Augustine considers various concepts of peace. While he values positive concepts over the negative concept of peace, all are considered valuable in itself. Negative peace is characterized by an absence of collective violence and a certain order. It is a way to achieve political goals, it can be imposed by the victor, and can be unjust, but must nevertheless count as peace according to Augustine. As an example, Augustine states that even the brutal robber values peace with his associates, so “that they may with greater effect and greater safety invade the peace of other men.” At home this robber imposes peace on his family because “their prompt obedience to his every look is a source of pleasure to him.”

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37 Neff 2005, p. 38.
39 Neff 2005, p. 29-34.
40 Augustine’s just war theory is part of an expansive and complex theological doctrine. It is impossible in this chapter to do justice to Augustine’s work, and I acknowledge that I do not attempt to do so. Rather than giving a thorough analysis of his philosophy, some elements of his arguments are used in this chapter to serve the purpose of analyzing concepts of peace. See further on the various conceptions of peace in Augustine’s theory the interesting analysis in: Anthony Coady, *Morality and Political Violence*, Cambridge: Cambridge University Press 2008.
41 Augustine, *City of God* 1887, p. 930.
imposing his will. This reflects a realist perspective on peace; the contribution to self-interest makes the robber value such peace.

This purely negative peace, based on the idea that ‘might makes right’, is close to the kind of international peace the Greeks and Romans had in mind. The value of this ‘victor’s peace’ is based on the satisfaction of personal or national interests. It is a matter of prudence: the victor has an interest in its national security, and therefore aims at the peace that benefits these national interests, if necessary at the expense of others. It means that this concept of a purely negative peace is characterized by the absence of war only, that the most basic human rights, e.g. to life, can be violated as national interest is what matters, and that the national context is not relevant aside from there being no war. Often, this purely negative peace will be unstable since there is no reconciliation between former enemies. However, a negative peace is not necessarily merely temporary and unstable. There can be purely negative, i.e. an extremely unjust peace, which is nevertheless relatively stable because of the oppression.

7.3.2 Largely Negative Peace

Let us secondly, move further on the continuum. There we find a concept of peace that we can call a largely negative peace. This concept of peace in not purely negative, since it is characterized by an absence of war, but also by an absence of an inhumane regime that violates the most fundamental human rights (e.g. to life). Like the preceding concept of peace, largely negative peace does not entail any form of reconciliation, but there is usually a certain level of (imposed) stability. The requirement that the political regime is humane means that the national context of the former enemy, usually the aggressor, comes into play here. In a largely negative peace, the new or remaining regime in place does not commit crimes against humanity; there is no systematic and large scale violation of the most fundamental human rights.

Avishai Margalit’s theory of peace, justice and compromises is helpful in further outlining a largely negative conception of peace which sets a low threshold regarding realization of human rights and the nature of the political regime. Margalit argues that realism compels us to seek ‘just a peace’ instead of ‘a just peace’. The urgency to establish peace prevails over the pursuit of justice, from which he draws that peace can be justified also if it is unjust.

Primarily for the sake of stability - a somewhat stable peace as opposed to a mere cease fire - it is justified to accept some injustices, Margalit argues. However, not just any peace is justified: the exception for Margalit is peace based on a rotten compromise. A post war compromise which results in a situation where the political system is characterized by cruelty and humiliation is unacceptable. After war, the regime in place must – at least – treat people as human beings.

The foundation for Margalit’s argument is his Kantian appeal to shared humanity; not respecting people as human beings would “erode the foundation of morality”. But despite the Kantian human dignity and shared humanity as foundation for his theory, what Margalit has in mind is a very limited minimum, as he invokes examples as Hitler’s third Reich, South African Apartheid or King Leopold the Second’s reign in Congo – i.e. crimes against humanity – as unacceptable. Aside from that required bare minimum, “everything else is negotiable” for Margalit. Clearly, this concept of peace excludes only the most extreme institutionalized injustices, i.e. large scale violations of the most fundamental human rights. Peace is still primarily seen as the absence of violence, but does usually entail a certain stability and a humane regime, which is not characterized by Galtung’s structural political violence to the extent that the regime is barbarous, cruel and humiliating towards its own population or the former enemies’ population.

7.3.3 Decent Peace

The third concept of decent peace moves further on the continuum towards a positive conception of peace, as it encompasses more positive characteristics than the concept of negative peace. It is likely that there is more stability in a decent peace. The underlying causes that gave rise to the war are solved to a large extent or at least a satisfactory status quo is reached. This means that the peace might not be everlasting, but it is expectedly durable or sustainable for a substantial period of time. Furthermore, in moving further on the continuum, the national dimension become more important. In a decent peace, the political system that is in place is not only humane, but respects the basic human rights

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45 Margalit 2005, p. 223.
of its citizens. This includes the requirement that the first necessities of life are secured and that people are not below a minimal standard of living due to the deprivation of war.

This concept of peace can be further sketched by making use of Rawls' theory of international justice. Securing certain important basic human rights for all people is one of the distinguishing marks of Rawls’ theory. This also limits internal political sovereignty of states and the reasons for war. Based on these important basic rights combined with the value of tolerance among peoples, Rawls holds that both liberal and decent peoples must be equally respected as members of the societies of peoples. A regime is decent when it is not aggressive in its external relations, it has (at least) a decent consultation hierarchy (its citizens are consulted in some way, but not necessarily through a democracy), and it respects the following basic human rights: the right to life, freedom and equality for the law.46 A part of the right to life is the right to a minimum of means of subsistence. These human rights represent for Rawls a special class of urgent rights that constitutes the threshold for decent political institutions.47

As is well known, in the non-ideal theory, Rawls proscribes how to deal with other peoples: the outlaw states and burdened societies. In the ‘law of peoples’, and largely coinciding with just war theory’s just causes, there is a prohibition on war with the exception of self-defense against aggression (of outlaw states) and humanitarian intervention to rescue a people from grave violations of human rights. “The aim of a just war waged by a just well-ordered people is a just and lasting peace among peoples, and especially with the people’s present enemy.”48 More specifically, the goal is to make peoples comply with the law of nations, and to bring all peoples within the society of peoples, which is determined by this criterion of ‘decency’. Also, there is a duty to assist peoples who are living under unfavorable circumstances. This duty is not aimed at improving the economic standard of living, but is aimed at helping a people building just or decent institutions of their own, so that the national government can itself protect human rights.49 Freedom, equality and a people’s right to self-determination are essential, and paternalism should be avoided.

Rawls’ reasons for proscribing to respect decent peoples, and prohibiting

47 Freeman 2007, p. 435.
48 Rawls 1999, p. 94.
the forced transformation into liberal democratic peoples (in general or after war) comes from a sense of realism.\textsuperscript{50} Rawls wants his theory to be action guiding, which is why it must remain relatively close to the political reality, not being overly idealistic. It must not exceed what is normally seen as the boundary of practical political possibility.\textsuperscript{51} At the same time, the law of peoples he proposes is not merely descriptive of the political reality; in order to be action guiding, it must set the bar a little higher. His theory is a realistic utopia: it is idealistic but remains realistic and is therefore ambitious in a limited way.\textsuperscript{52} But also, Rawls wants to avoid the critique of being ethnocentric. As opposed to the full spectrum of human rights as e.g. codified in the Universal Declaration of Human Rights, these basic human rights can, according to Rawls, be accepted by both liberal and decent peoples. Rawls theory of international justice shows us how can be thought of a concept of decent peace. After a self-defense or after a humanitarian intervention, the decent peace that shapes the aftermath is modest in the sense that it is focused on preventing future aggression and creating stability, helping a people or state build its own just or decent political institutions (i.e. not imposing), and securing the most basic human rights. Similar to the duty of assistance, economic redistribution beyond what is urgently needed after the war to protect the right to an adequate standard of living, is not a part of a decent peace after war.

\textbf{7.3.4 Largely Positive Peace}

Let us look now at the fourth conception of peace, in which there is a robust connection between peace and justice, not only at the institutional level, but also

\textsuperscript{50} And not so much by relativism, as he does not argue that it is justified that decent peoples do not reform their institutions in order to become liberal democratic. Rather, he departs from the acknowledgment of the imperfect international order that consists of a plurality of peoples. See further Freeman 2007, p. 426.

\textsuperscript{51} Rawls 1999, p. 7-8. This can also be called the principle of tolerable divergence: the idea that morality can only offer practical guidance if the gap between the demands of morality and prudence is tolerable. Just war theory follows this principle as it does not proscribe norms of ideal justice, but it takes into account the ever difficult reality of war and as such, has incorporated some of the realists’ arguments. Just war theory occupies the territory between realism and idealism. From this perspective, it is very clear that just war theory is always, as Walzer puts it, justice under a cloud. See further: Steven Lee, \textit{Ethics and War. An Introduction}, Cambridge: Cambridge University Press 2012, p. 21-22.

\textsuperscript{52} Rawls 1999, p. 6.
at the interpersonal level.53 The concept of a largely positive peace entails the realization of a comprehensive set of human rights, with a strong emphasis on the national political structure of the former enemies. Historically, this concept of peace comes from a theological perspective. As we have seen, while Augustine argues that a purely negative peace, despite being flawed, nevertheless constitutes a sort of peace that is valuable, there is another sort of peace that is more valuable. Only the ‘peace of the just’ is truly worthy of the name peace. “He, then, who prefers what is right to what is wrong, and what is well-ordered to what is perverted, sees that the peace of unjust men is not worthy to be called peace in comparison with peace of the just”.54

Regularly quoted among just war theorists, such a largely positive peace is the *tranquillitas ordinis* for Augustine; peace characterized by order and justice.55 It has the form of a well-ordered concord; this again reflects the idea of peace being a compromise between the various interests of the people.56 The earthly city seeks an earthly peace, “and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men’s wills to attain the things which are helpful to this life”.57 This is the highest attainable goal in the early realm, and must be distinguished from the perfect eternal peace in the spiritual realm discussed hereafter.58 More specifically, the compromise between individual interests that constitutes the tranquility of order means: “that a man, in the first place, injure no one, and, in the second, do good to everyone he can reach”.59 As is clear, the interpersonal dimension of peace reappears here, as the relations between individuals are important for this concept of peace.

The perception of peace as tranquility of order was brought up to date by the encyclical of Pope John XXII, *Pacem in Terris*, which is called the “magna charta of the Catholic Church’s position on human rights and natural law”.60 The tranquility of order in a society rests on four pillars: “Its foundation is truth, and it must be brought into effect by justice; it needs to be animated and

53 Or in the terminology of Evans, this concept of positive peace means that justice is secured both at the society wide macro-level but also at the micro-level of the society in individual relationships. Evans 2014, p. 29-30.
54 Augustine, *City of God* 1887, p. 932.
56 See also Coady 2008, p. 268.
57 Augustine, *City of God* 1887, p. 940.
59 Augustine, *City of God* 1887, p. 935.
60 Hittinger 2003, p. 39.
perfected by men’s love for one another, and, while preserving freedom intact, it must make for an equilibrium in society which is increasingly more human in character.”  

This means that peace is understood as a rich positive concept in the Catholic tradition, based on the values of truth, justice, love for one’s neighbor and freedom, and which supports the universal common good.

Unlike Margalit, who argues that peace and justice are not complementary as fish and chips but rather competing like tea and coffee, the Catholic tradition holds that “the harvest of justice is sown in peace”. Peace and justice are strongly connected and the realization of human rights is central to this conception of peace. Human rights are founded in human nature and the dignity of individual persons. All individuals are interdependent and part of the global human community. Furthermore, regarding social justice and stability, instead of remaining hostilities or a balance of power, the just peace involves mutual respect and collaboration between former enemies. The underlying causes for the war are solved and former enemies are reconciled. This means that this peace is a “peace by satisfaction”; instead of hostility there is consent and mutual confidence, and former enemies are satisfied with the status quo. Therefore, a largely positive peace is likely to be a lasting peace.

In this fourth concept of peace, the various dimensions of outer peace come together. Up until now, we have focused on the international dimension of peace, but in a largely positive peace the interpersonal dimension is also important. Furthermore, the universal dimension of peace arises here as well.

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61 *Pacem in Terris* 1963, par 37.
Namely, the Catholic tradition focuses not only on the regulation of national and international war, but also (and particularly, some might claim) on the abolition of war in general: the creation of universal peace. While one does not necessarily exclude the other, these goals reflect the two main strands of thinking on the ethics of war and peace within the Catholic tradition: just war theory and pacifism.

The pacifist perspective can be used to further sketch a secular version of a largely positive peace. Institutional pacifism, as found in Immanuel Kant’s and Hans Kelsen’s proposals, aims to realize universal peace through the development of international law and institutions. This approach is primarily focused on the universal dimension and the temporal element of peace (i.e. the total and everlasting abolition of war) rather than focusing on the character of the peace. However, some interpretations of Kant can be used for a concept of a positive peace that is comprehensive qua character, using the democratic peace thesis. Based on Kant’s essay *Perpetual Peace*, the democratic peace thesis holds – in short – that democracies do not go to war with each other. Based on that empirical fact, it is argued that the key to a tranquil international order is a Kantian liberal democracy. For the concept of positive peace, this would mean that the requirements regarding the national context are quite comprehensive.

According to Michael Doyle, a liberal democracy requires a political regime that respects the individual freedom of its citizens. This means that three sets of human rights are realized: the liberal freedoms rights such as the freedom of thought, opinion and expression, religion, and private property, the social and economic rights as the right to work, social protection and an adequate standard of living, and the political rights of democratic participation. Given the emphasis on individual freedom and property, the capitalist system of a market economy based on supply and demand is the economic system that fits the liberal democracy. Some recent theorists have taken on this democratic peace thesis, arguing that a stable international order can be realized by individual freedom and the market economy.

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69 I absolutely realize that this interpretation of Kant’s theory is not shared by everyone, e.g. Howard Williams vigorously opposes such an extensive interpretation of Kant, and opposes that Kant would be a just war theorist. Thomas Mertens also points out the considerable distance between Kant and the just war theory. See: Thomas Mertens, ‘Kant and the Just War Tradition’, in: Heinz-Gerard Justenhoven & William Barbieri Jr. (eds.), *From Just War to Modern Peace Ethics*, Berlin: De Gruyter 2012.

intervening – waging war – and realizing a broad spectrum of human rights in other states.\textsuperscript{71}

### 7.3.5 Fully Positive Peace

And lastly, on the far end of the continuum there is the fully positive peace. This sort of perfect ideal peace is often but not exclusively connected to a theological world view. This concept of peace further builds on the preceding concept of positive peace and one could say that all the facets of the general concept of peace come together here: the peace is eternal and everlasting, inner and outer dimensions are united, and it is perfectly just. For example, the Confucian system distinguishes three stages which represent a system of social political progress or improvement in the world. The first stage is the ‘disorderly stage’, the second is the ‘small tranquility’ or ‘advancing peace stage’, and the third is the ‘great similarity’ or ‘extreme peace stage’.\textsuperscript{72} In this latter concept, inner peace, interpersonal peace and political peace come together. More specifically, the inner peace of individuals is perfected, the character of mankind is on the highest possible level, and everyone is happy. There is harmony between people, they treat each other lovingly and respectful. Additionally, there is eternal political peace; the world is one, national states are abolished, and war does no longer exist. In this extreme peace, all races have unified into one race, and people are truly equal.\textsuperscript{73} This utopian ideal is the final aim, “the golden age of Confucianism”.\textsuperscript{74} As Confucius is believed to have stated: “When the great principle prevails, the whole world is bent upon the common good. The virtuous and able are honored, sincerity is praised, and harmony is cultivated.”\textsuperscript{75} It is a situation based upon cosmopolitanism and communism.

A similar conception of harmonious peace can be found in Augustine’s

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\textsuperscript{73} Dawson 2005, p. 301-302. This ideal of a world state is further developed by K’ang Yu-Wei. Aside from there being no more sovereign states, it also means that the institution of family is abolished. See further K’ang Yu-Wei 2005, p. 37-48.

\textsuperscript{74} K’ang Yu-Wei 2005, p. 301.

\textsuperscript{75} Quoted in: K’ang Yu-Wei 2005, p. 28. See also: Dawson 2005, p. 303.
theory. The only true peace for Augustine, *pax*, comes from God and can be achieved only spiritual realm.\(^7^6\) This perfect and eternal peace is the supreme good of the City of God. It is a situation of religious salvation as well as full justice: “the peace of freedom from all evil”.\(^7^7\) This peace of heaven, “is the perfectly ordered and harmonious enjoyment of God and of one another in God”.\(^7^8\) As in the Confucian system, the dimensions of peace are united: the inner peace of individuals (harmony of body and soul), peace between individuals and God (following the law of God), and peace between individuals (both in the household and within the political community) and kingdoms.\(^7^9\) This concept of peace clearly transcends the political dimension, as it is built upon inner peace which is extended to outer peace. As Confucianism has shown, the world can only be orderly and in peace and order if the inner peace is first developed, and our hearts are set right. The Dalai Lama emphasizes this individual spiritual transformation and agrees that peace should be developed within an individual first. Once fundamental qualities as love, compassion and altruism are developed within an individual, this person can create an atmosphere of peace and harmony, and that atmosphere can be extended “from the individual to his family, from the family to the community and eventually to the whole world”.\(^8^0\)

As one might argue, this divine perfect peace describes a paradisiacal situation, an ideal but imaginary peace which occurs only in the non-human world.\(^8^1\) It is therefore only worthwhile to explore a perfect eternal peace for the earthly realm. Recently, such perspective on peace coming from a pacifist perspective is proposed by philosopher Matthew Fox.\(^8^2\) His proposal illustrates the radical difference compared to the purely negative conception of peace. The concept of peace he describes is based on cooperation, compassion and harmony.\(^8^3\) Inner peace and outer peace are strongly connected, as the latter is built upon the former. Necessary for the achievement of eternal peace is the development of the better side of human nature, and the human capacity to love

\(^{76}\) Johnson 2012, p. 21.
\(^{78}\) Augustine, *City of God* 1887, p. 941.
\(^{81}\) Allan & Keller 2008, p. 98.
\(^{83}\) Fox 2014, p. 279.
one another, therewith creating a culture of peace. In this context, he sees a prominent role for peace education.

More in general, people have to develop a ‘global outlook’, based on the ideals of cosmopolitanism, pacifism, global ethics and world government. Fox sees human rights as an important framework for this concept of peace, and argues that peace must be built upon the respect for human rights as the fundamental moral standard. He endorses a broad idea of human rights, including the so called third generation rights as e.g. the right to subsistence and the right to peace, but he includes also rights of animals and respect for the environment. This is unmistakably a fully positive peace, in which many desirable values are present: it is characterized by the realization of inner peace, the full spectrum of human and animal rights, and ideals of cosmopolitanism and world government.

7.4 Peace as Goal of Just War Theory

The previous section analyzed five main concepts of peace along a continuum. But which of these concepts can function as (normative) goal of just war theory? To answer that question, this section places the peace continuum in a lively debate in political philosophy on the role of feasibility constraints in normative theory. A systematization of the main positions in this debate made by David Estlund enables us first to eliminate two concepts of peace and hence expose the outside boundaries of the peace continuum for just war theory. It enables us second to make a comparative assessment of the remaining concepts of peace as potential goal of just war theory. It is demonstrated that a largely negative peace coincides with a concessive approach to normative theory that leans towards political realism, and a largely positive peace coincides with an aspirational approach to normative theory that leans towards moral idealism.

7.4.1 Feasibility and Desirability

Should political philosophy be able to offer practical guidance for the here and now? And to what extent do real world facts constrain normative theory? These questions are central to the idea of feasibility and the debate on non-ideal or realistic theory and ideal or utopian theory. Many contributors to this debate take Rawls’ idea of a ‘realistic utopia’ as their starting point. As Rawls argues, there are two desiderata that must be satisfied by a normative political theory: it must demand desirable ‘arrangements’ which can help to critically examine the status quo, but must at the same time be feasible. Feasibility takes the practical possibilities into consideration, and thus questions whether the implementation of ‘arrangements’ or the compliance with norms is realistically possible. Specific feasibility constraints that influence the realization of normative theory are e.g. logical, biological (human nature), institutional, cultural, and psychological including motivational constraints. These constraints can be subdivided into strong and weak constraints, the former making the implementation of a certain arrangement impossible, the second making the implementation more difficult or costly but not impossible.

Seeking a middle position in this debate, Rawls has attracted criticism from both sides: Some theorists have criticized Rawls’ theory for giving in too much to political realism and being uncritical, while others have argued that Rawls is not realistic and fact sensitive enough, accusing him of naïve moralism. Estlund offers a helpful systematization of the positions in this debate, and he

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86 In a very insightful article, Laura Valentini argues that the debate on ideal and non-ideal theory should in fact be separated into three distinct meanings: 1. Full-compliance versus partial compliance theory, 2. Utopian/idealistic versus realistic theory, and 3. end-state theory versus transitional theory. My concern here is primarily with the second and third meanings. Valentini 2012, p. 654.


89 Gilabert & Lawford-Smith 2012, p. 813.

places these on a continuum: the two extreme positions are strict (political) realism and moral idealism (as utopianism), and in between are non-ideal theories that make moral demands that are possible to meet in theory, which are called concessive or aspirational. These gradually differ to the extent that concessions that are made regarding feasibility constraints, and hence which are more or less realistic, and more or less idealistic.

7.4.2 Elimination: the Outside Boundaries of the Peace Continuum

This debate sheds light on our peace continuum. While the continua cannot be simply taken together, a parallel can be drawn. As pointed out in the introduction, just war theory is an action guiding, non-ideal theory that occupies the middle ground between the extremes of political realism and moral idealism. Just war theory, in other words, reflects this balance between feasibility and desirability. Estlund’s systematization first shows that the purely negative and purely positive concepts of peace cannot be the goal of just war theory. As we have seen, the universal desire for peace means that wars are waged for the sake of peace. This claim can easily be accepted realizing that there are many different conceptions of peace. Even Augustine’s brutal robber desires peaceful relations with his associates and family. On this side of the continuum, when peace is understood as the mere absence of war – purely negative – it is essentially an empty concept lacking normative prescriptions, and indeed the most brutal aggressor aims for peace. Such peace is merely the self-interested realization of political goals by way of war, in other words, a ‘victor’s peace’. This coincides with strict political realism that sets no moral standard and consequently prescribes no change to the status quo. It does not

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91 I do not strictly follow Estlund's terminology. Estlund's term for moral utopian is moral idealism, and in between are non-ideal theories. I think it makes more sense to refer to moral utopianism as the extreme position that does not factor in feasibility constraints, as the theories in between all propose a certain level of idealization, i.e. are not non-ideal. See further David Estlund, Democratic Authority, Princeton: Princeton University Press 2008 and David Estlund, ‘Utopophobia’, in: Philosophy and Public Affairs 2014, 42/2.

92 A pacifist idealist accepts an unjust peace because that is always better as war (Erasmus), however not as a normative principle, and a political realist could propose e.g. a decent peace if that is the best way to create stability and secure national interests.

93 Augustine, City of God 1887, p. 930.

94 This is the standard characterization of political realism, but does not come close to doing justice to the many different and more sophisticated versions of political realism.
prevent or limit war, and places no limits on what can be done after war. In the same way as states have the right to wage war, they have the right to create for themselves the most beneficial peace.

This immediately indicates that a purely negative peace cannot be the goal of just war theory. Contrary to political realism, just war theory does hold that war is regulated by morality and it sets a moral standard in an attempt to limit the horrors of war. War can only be justified in exceptional circumstances – external aggression and extreme internal aggression, i.e. a humanitarian catastrophe – which means that some sorts of ‘peace’ are so unjust that they should not be accepted or can be replaced with a better, more positive peace. In a purely negative peace, individual wellbeing is severely compromised, and large scale human suffering and insecurity will remain even though the war has ended. This sort of peace replaces the violence of war with a ‘peace’ characterized by Galtung’s structural political violence to the extent that the regime violates the most fundamental human rights, and is cruel and humiliating towards its own population. This can in itself be a just cause for war, i.e. is the sort of peace that can justifiably be replaced with a ‘better’ peace. Clearly, when considering the concept of peace from the perspective of just war theory, there must be something more to peace than the mere absence of violence. This means that there must be some connection between peace and justice; the peace after war must at least be minimally just. Hence, a purely negative peace falls outside the confines of just war theory.

On the other side of the peace continuum, the concept of a fully positive peace also falls outside the confines of just war theory. Evidently the divine paradisiacal concept of peace cannot be realized in this world. A heavenly peace as Augustine’s pax might be a possibility in the City of God, but not in the City of Man. But neither can the ideal positive peace as described by Fox. This concept of a fully positive peace coincides with moral idealism, i.e. utopian normative theorizing that does not take any feasibility constraints into account. As became clear, a fully positive peace can be achieved through a connection between the different dimensions of peace; inner, interpersonal and political peace, and involves harmony and compassion. The infeasibility of such a world peace that is built upon the inner peace of the citizens of the world hardly needs an explanation. Given that human nature is not purely peaceful and altruistic, a

See e.g. Little and MacDonald’s recent article on so-called new realist approaches. Adrian Little & Terry Macdonald, ‘Introduction to special issue: Real-world justice and international migration’, in: European Journal of Political Theory 2015, 14/4.
fully positive world peace is a state of affairs that cannot be brought about. This way, it sets an impossible standard. As it is generally assumed that ‘ought implies can’, many assume that a theory that sets a moral standard of which is it impossible to live up to, is in fact a false standard.

But whether a fully positive peace can function as a standard or not, the concept is certainly too idealistic and utopian to function as the goal of just war theory. In order for just war theory to be action-guiding and effective in limiting war, it must take at least some feasibility constraints into account and set a moral standard of which it is (at least theoretically) possible to live up to. Furthermore, just war theory has a limited scope: it is a normative theory that is specifically designed to regulate war. This means that the peace that is envisioned by just war theory is primarily the peace between states (or political groups) after a particular war. Just war theory is not concerned with establishing a perfectly just and eternal world peace, nor with the inner peace of individuals.

Seeing just war theory as the middle between strict political realism and moral idealism exposes the outside boundaries of the peace continuum. As a result, the purely negative and the fully positive concepts of peace must be eliminated as goal of just war theory, since they are compatible with strict realist or moral idealist normative theories, but incompatible with just war theory. Peace as the goal of just war theory is connected to justice, but it is not about perfect justice. As a result of this elimination, the three middle concepts on the peace continuum remain as potential goal of just war theory.

7.4.3 Comparative Assessment

Let us now turn to the comparative assessment of the remaining concepts of peace. All three concepts of peace are idealistic to the extent that they set a

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95 Properly considering strong and weak feasibility constraints requires complex empirical analysis and estimates, a task that I cannot pursue here.

96 This way, inability refutes a moral requirement. See e.g. further Estlund 2014, p. 116-117.

97 A note can be made here: first, it would be interesting to see whether there can be a fruitful just war theory that ignores inner peace. For example in South-Africa, would it be possible to create peace institutionally, without addressing the feelings of hatred living within people, which create tensions between people on the personal level? Problems can be expected if institutional reconciliation is not accompanied with personal reconciliation and forgiveness. The question whether just war theory is a coherent theory if inner peace is ignored would be interesting to resolve.
moral standard, but they take feasibility constraints into account: they do not demand the impossible. The balance between the two desiderata of feasibility and desirability, and hence the level of idealization, explain the gradual differences between them. A largely negative peace as normative principle coincides with a concessive approach since a relatively large concession is made to the desideratum of feasibility. Various feasibly constraints are taken into account, including weak constraints that have to do with the psychological motivation to realize peace. E.g. the fact that many states are (at least in part) concerned with their national interests is taken into account when setting the moral standard. When a normative principle poses a large obstacle to the state’s pursuit of its national interests, it is likely to be ignored. This can be a reason to state that the divergence between what is morally required and what is feasible must not be too big. This is what Steven Lee calls the ‘principle of tolerable divergence’.

In order for just war theory to have a practical impact, it needs to take the way that states are likely to behave into account.

Whereas the concept of a largely negative peace is a concessive goal, a largely positive peace is an aspirational goal that goes less far in making concessions to feasibility constraints. Here, it is assumed that the fact that a normative principle is unlikely to be followed does not influence its validity. Since the realization of a largely positive peace is possible in theory, it can be required as a goal of just war theory, despite the fact that, given e.g. empirical circumstances or motivation, it is unlikely that it will be realized. In other words, the strong feasibility constraints are taken into account, but not the weak constraints. The decent peace in between those two concepts is a more even balance between the two desiderata of feasibility and desirability.

7.5 What Peace?

With the conceptual tool kit developed in the previous sections, we can now shed light on the contemporary debate in just war theory and make the implicit positions on peace explicit. As such, this section shows how just war theorists understand peace, how they balance feasibility and desirability, and demonstrates that there is a shift in theorizing on peace in just war theory. As it appears, there are fundamental disagreements between what a ‘just and lasting peace’ entails, and those different understandings of peace are determined by three factors. The previous assessment indicates that concessive just war

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98 Lee 2012, p. 21, 22.
 theorists endorse a negative peace in which the balance inclines towards feasibility, and aspirational just war theorists will endorse a positive peace in which the balance inclines towards desirability. Aside from the level of idealization, the scope of just war theory is related and important as well. Some theorists are more restrictive and some more permissive on the just causes for war. Since the just cause influences the subsequent peace, it is expected that restrictive just war theorists endorse a minimal peace and permissive just war theorists endorse a just peace as the goal of just war theory.

And lastly, the foundation of just war theory is important for the concept of peace. As we have seen, peace is such an important value because it is the precondition for general human wellbeing. This human wellbeing and war’s negative impact on it also underlies just war theory. There are various moral underpinnings for just war theory – e.g. natural law, human rights, Kantianism, or utilitarianism – but many just war theorists simply avoid the question of the normative foundation, refer to our ‘commonsense morality’ or restrict themselves to some brief remarks. Nevertheless, the foundation of modern just war theory is often explained by a theory of rights. The historic idea of natural rights is replaced by the idea of universal human rights, both collective and individual. State-centered just war theorists that emphasize collective rights as national self-determination would likely endorse a negative peace, whereas cosmopolitan theorists that emphasize individual human rights would likely endorse a positive peace in which a full spectrum of human rights is realized. In the following, these factors are used to show that the remaining three concepts of peace can be allocated to various just war theorists. The early Walzer and Yossi Beilin endorse a largely negative peace, current Walzer and Anthony Coady a decent peace, current Brian Orend moves towards a largely positive peace, and Mark Evans, Mark Allman & Tobias Winright and Cecile Fabre endorse a largely positive peace.

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99 According to Nigel Dower: “an absence of overt conflict is a precondition for the pursuit of most human activities, or at least their more effective pursuit.” Dower 2009, p. 143.
7.5.1 Walzer’s Largely Negative Peace

Just war theory’s balance between feasibility and desirability is vivid in Walzer’s authoritative book *Just and Unjust Wars*. As a theory of practical morality and a limitation of war, *justum bellum* norms need to be feasible in order to be effective. Arguments of prudence and realism have an important place in Walzer’s theory: “Just wars are limited wars; there are moral reasons for statesmen and soldiers who fight to be prudent and realistic.”\(^{102}\) This counts for a theory of ends in war as well; concessions are made to feasibility constraints since excessive idealism could result e.g. in the unnecessarily prolonging of wars.\(^{103}\) Furthermore, in order to be effective in limiting war, just war theory’s norms must be able to be generally accepted. Therefore, these norms must be “morally plausible to large numbers of men and women; it must correspond to our sense of what is right”.\(^{104}\) Clearly, Walzer sets a morally desirable standard which explains, supports and appeals to our ‘commonsense morality’.

The foundation of his just war theory (and hence on which we could agree) are principles of political independence, communal liberty and human life.\(^{105}\) Given these values, Walzer emphasizes the right to collective self-determination and he sees sovereignty of states as an expression of these values.\(^{106}\) Nevertheless, his theory is grounded ultimately in the human rights of individuals: it is “in its philosophical form a doctrine of human rights”.\(^{107}\) This means that state sovereignty is conditional; derivative of protection of the population’s individual rights.\(^{108}\) As will become clear later in this section, various theorists have pointed out that there is a tension between Walzer’s state centered theory and emphasis on sovereignty on the one hand, and this

\(^{102}\) Walzer 2000, p. 122.

\(^{103}\) Walzer 2000, p. 116, 122-123.

\(^{104}\) Walzer 2000, p. 133.

\(^{105}\) Walzer 2000, p. 110

\(^{106}\) Walzer 2000, p. 108.

\(^{107}\) Walzer 2000, p. xxii.

\(^{108}\) Walzer 2000, p. xxi, xxii. Classic just war theory was grounded in natural law and natural rights. Throughout history, the norms of just war theory rested on various foundations. Today, most theorists ground just war theory in a doctrine of rights, as Walzer does. As we will see however, whereas Walzer emphasizes collective rights of peoples, many recent theorists emphasize individual rights and reject any inherent value of states and state sovereignty.
foundation in individual human rights on the other hand.\footnote{E.g. David Luban 1980, ‘The Romance of the Nation State’, in: Philosophy and Public Affairs, 1980, 9/4; David Luban, ‘Just War and Human Rights’, in: Philosophy and Public Affairs 1980, 9/2; David Rodin, War and Self-Defense, Oxford: Clarendon Press 2003; Cecile Fabre, Cosmopolitan War, Oxford: Oxford University Press 2012.} Despite that foundation, it appears as if his concern is more with national security than with human security.\footnote{Williams & Caldwell 2006, p. 314.} Additionally, Walzer’s just war theory is restrictive; the paradigmatic just war is self-defense against aggression, and humanitarian interventions are allowed only in very exceptional circumstances, i.e. in response to acts “that shock the moral conscience of mankind”\footnote{This exception is based on his commitment to human rights, p. 108.}

Walzer states that: “Implicit in the theory of just war is a theory of just peace”.\footnote{Walzer, ‘Terrorism and Just War’, in: Philosophy 2006, 34/1, p. 4.} When we make this theory of just peace explicit, it appears that he endorses a largely negative conception of peace. However, the peace that Walzer considers to be the goal of just war theory is not a purely negative peace as the mere absence of fighting. The goal of war is not “just any peace”.\footnote{Michael Walzer, ‘The Aftermath of War. Reflections on Jus Post Bellum’, in: Eric Patterson (ed.), Ethics beyond War’s End, Washington D.C.: Georgetown University Press 2012, p. 37.} Conquest and unconditional surrender are in principle unjustified after war.\footnote{The exception is an extremely evil regimes such as the Nazi regime. Walzer 2000, p. 112-113.} There is a relation between peace and justice, but this must be understood in a minimal way. The goal of just war theory remains a largely negative peace, understood as “peace-with-rights, a condition of liberty and security”.\footnote{Walzer 2000, p. 51.}

What is the minimum level of justice in peace for Walzer? Brian Orend further develops Walzer’s theory on post war justice, and explains that this is essentially determined by the just cause for war: after the rights violation that was the cause for war is stopped, and those rights are vindicated, post war obligations end despite the added value.\footnote{Brian Orend, Michael Walzer on War and Justice, Cardiff: University of Wales Press 2000, p. 136-137. Walzer 2000, 120. Walzer later states that indeed “ad bellum anticipated post bellum”. Walzer 2012, p. 35. For a similar position on peace as a minimum normative goal grounded in the collective right to self-determination and individual human rights see: Williams & Caldwell 2006. Gary Bass also points to this connection between jus ad bellum and jus post bellum, Bass 2004, p. 386.} In principle, political reconstruction after war is therefore prohibited.\footnote{The exception is an extremely evil regimes such as the Nazi regime. Walzer 2000, p. 175} This means that the object of war is
therefore not a return to the *status quo ante bellum*, since that situation led to war in the first place, but a ‘better state of peace’: “more secure, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations.”\textsuperscript{118} Since the paradigmatic just cause is a self-defense against external aggression, post war behavior is restricted to “resistance, restoration, reasonable prevention”.\textsuperscript{119} After that, the sovereignty of the defeated state should be restored as soon as possible. This means that here, the goal of just war theory is a minimal largely negative peace, which is stable and in which war is prevented, and in which the most fundamental rights to life, liberty and security are secured.

A recent defense of such peace as normative principle comes from Israeli politician Yossi Beilin. Based on the horrific consequences of war in terms of human suffering, he argues that the first priority is to end war. And given feasibility constraints in the world today, aiming for a (largely) negative peace is more realistic, and has a better chance of success than aiming for a high ideal that can be accepted by all those involved as a just peace.\textsuperscript{120} Beilin points to the danger inherent in setting a high standard. To push for more than just any peace is dangerous, he argues, as this can be a reason to resist a peace that is perceived as unjust.\textsuperscript{121} By aiming high – for a (largely) positive peace – it is likely that the war continues as this sort of peace cannot be achieved, and that consequently more injustice is done to precisely those innocent people.\textsuperscript{122} In this way, the desire for perfect ideal justice stands in the way of achieving peace. Walzer indeed mentions several examples in which aiming for a largely positive peace kept the war alive and consequently resulted in a dramatically worse situation

\begin{itemize}
\item \textsuperscript{112, 113.} Walzer 2000, p. 121-122.
\item \textsuperscript{118} Walzer 2000, p. 121.
\item \textsuperscript{119} A similar argument was made by Jan Gruiters, director of Pax, who stated on his blog on the situation in Syria in 2012 that because of the lack of realistic options to end the violence, we should aim for a ‘dirty peace’, because this would at least end the humanitarian catastrophe. Such ‘dirty peace’ would include a safe getaway for president Assad, securing Russia’s interests and forcing the opposition to accept compromises. See: \url{https://jangruiters.wordpress.com/2012/10/17/smerige-vrede/}.
\item \textsuperscript{121} As a matter of definition and terminology, it must be noted that Beilin considers only a mutual agreement between the former warring parties as an actual peace, and not an enforced peace such as the *Pax Romana*. This might still be desirable compared to a continuation of the war, but rather is a “different solution” which at least provides stability.
\end{itemize}
that would otherwise would have been the case.\textsuperscript{123} The general motivation behind a minimal goal as normative principle implicit in just war theory is that given the harsh political reality, such goal is most effective in limiting the negative effects of war, and such a goal proves to be difficult enough to achieve.

\textbf{7.5.2 Walzer’s and Coady’s Decent Peace}

Today, this concept of negative peace is no longer widely endorsed among just war theorists, and this has to do with a shift in just war theorizing. Steven Lee states that Walzer represents the ‘national defense paradigm’.\textsuperscript{124} This paradigm is reflected in just war theory as it developed since the two World Wars and which largely coincides with international law: there is a prohibition on aggression – the non-intervention principle – with the exception of a war of self-defense (or other-defense) against aggression. Hence, only a defensive war as response against an unjust offensive war can be justified. Inis Claude states that under this paradigm, the preservation of (negative) peace takes precedence over the promotion of justice.\textsuperscript{125} In the past decennia however, just war theory has become somewhat more permissive, and a humanitarian catastrophe has become an established just cause for war. In general, there is a firmer emphasis on individual human rights at the expense of the value of sovereignty and state rights. This shift is clear as well in political practice; e.g. UN peace building efforts, the development of the so called ‘responsibility to protect’ which includes the ‘responsibility to rebuild’, and emphasis on human rights in foreign policy.\textsuperscript{126}

This shift has affected Walzer himself also. As he states: “Ongoing disagreements, together with the rapid pace of political change, sometimes require revisions of a theory.” For Walzer, this means that he has become willing to allow humanitarian intervention, long-term military occupation and

\textsuperscript{123} Walzer mentions the examples of the Korean War, in which the post war situation would presumably have been better would South Korea and the US have restored the old boundary after having repelled North Korean aggression, and the situation in Israel which might have been better would Israel have given up the Gaza Strip and the West bank in 1967. Walzer 2012, p. 37.

\textsuperscript{124} Lee 2012, p. 292.


that he recognizes the need for including *jus post bellum* in just war theory.\textsuperscript{127} Since as we have seen, the just cause is considered to limit what can be done in the subsequent peace, a more permissive humanitarian just cause influences the goal of peace. Vindicating violated rights means that the peace after a humanitarian intervention involves securing these rights for the affected population, which probably requires regime change and reconstruction abroad. As a result, after a humanitarian intervention (or a defense against inherently aggressive and murderous regimes), a new regime must be created in order to protect the right to life, liberty and prevent future aggression.\textsuperscript{128} That does not mean that Walzer now endorses a positive peace as the goal of just war theory, but rather that his goal resembles our concept of a decent peace. The connection between peace and justice is strong but minimalist, according to Walzer, “so as to sustain the recognition that peace itself is a value at which we can justly aim and sometimes live with, even if it is unjust”.\textsuperscript{129} More concretely, this means that the peace after war involves the reconstruction of a sovereign state which is a safe and decent society, determined by a minimal conception of human rights.\textsuperscript{130}

Despite Walzer’s broadening of the humanitarian exception to the non-intervention principle, his just war theory remains restrictive. This is similar for Anthony Coady.\textsuperscript{131} Central to Coady’s just war theory is the collective right to self-determination. As sovereignty is an expression of this right, it is not absolute. It is connected to the right to self-government, which does not necessarily need to have the form of a democracy.\textsuperscript{132} Based on his appreciation of national self-determination together with a recognition of the evil of war, just war theory’s main goal is to limit war. Therefore, war is justified only in certain hard-to-satisfy conditions.\textsuperscript{133} According to Coady: “the evils of war are so great that restricting it to cases where the justification for resort to lethal violence is obvious and overwhelming is likely to have much better consequences than

\textsuperscript{128} Walzer 2012, p. 39.  
\textsuperscript{129} Walzer 2012, p. 37.  
\textsuperscript{130} Walzer 2012, p. 43-45.  
\textsuperscript{131} And his take on just war theory might be even more restrictive. On aggression see Coady 2008, p. 69-72 and on humanitarian intervention p. 73-77.  
\textsuperscript{132} Coady 2008, p. 77-79.  
\textsuperscript{133} Coady 2008, p. 16. “There is a presumption against the moral validity of resort to war given what we know of the history of warfare, of the vast devastation it causes (nowadays even more so) and the dubious motives that have so often fueled it.” Coady 2008, p. 73.
allowing a wider range of justifications that can easily be open to misinterpretation and abuse.\textsuperscript{134} A self-defense against aggression can be justified, as can humanitarian interventions in exceptional circumstances. In the latter case, sovereignty is disconnected from the people’s right to self-determination, and it is justified to aid a political community in a defense against their own state’s aggression.\textsuperscript{135}

As one would expect, this perspective on just war theory means that Coady also endorses something that resembles our decent peace as the goal of just war theory, although he himself refers to a ‘just peace’ and Augustine’s \textit{tranquillitas ordinis}.\textsuperscript{136} He seeks a middle position, which is exactly what our concept of decent peace is: more robust than a purely negative peace, but it does not equate peace with justice. Such positive ideal of peace is too morally loaded, and Coady argues that we must aim for a more practically relevant peace,\textsuperscript{137} which reflects that balance between feasibility and desirability.\textsuperscript{138} Coady agrees with Walzer that there is a strong connection between the just cause and what can be aimed at after war. In other words, the legitimate war aims limit and determine the subsequent peace, and there is a presumption against political reconstruction of the defeated state.\textsuperscript{139} In general, Coady argues, it would be best to leave the political regime in tact – despite the inherent risks. Nevertheless, the central aim is to ensure that the population can again realize “an independent political life for themselves after the war”, and Coady seems to acknowledge that sometimes

\textsuperscript{134} Coady 2008, p. 74-75. The importance of feasibility constraints in Coady’s theory is obvious. Aside from the practical problems related to realizing humanitarian objectives, he wars for idealism in just war theory, which leads e.g. to a misunderstanding of cultural and political realities of the invaded state.

\textsuperscript{135} Coady 2008, p.87. This way, Coady seems to sidestep grounding humanitarian intervention in the protection of individual human rights.

\textsuperscript{136} Note here that I separate those two concepts in my analysis: to me, Coady endorses a more negative concept of peace as opposed to the more positive peace that Augustine’s \textit{tranquillitas ordinis} is often considered to be, in the sense of a comprehensive just and lasting peace. Nevertheless, Coady does presents this concept as a middle position, and it is similar to the concept of decent peace in my systematization.

\textsuperscript{137} Coady 2008, p. 267. This is reflected in Coady’s understanding of just war theory in general as incorporating, e.g. through the conditions of last resort, proportionality and change of success, realist concerns. Just war theorists can agree with their moral theory should be realistic, concerned with consequences and real world circumstances, and focused on international stability. Coady 2008, p. 56.

\textsuperscript{138} While realism is essential in the settlement of a war, that does not mean that any end should be accepted. Negotiations are constrained by ideas of desirable outcomes. Coady 2008, p. 275.

\textsuperscript{139} Coady 2008, p. 275, 277.
this might require regime change.\textsuperscript{140} In negotiating the peace terms between former belligerents, they must seek a compromise, but not a potentially unjust compromise such as defended by Margalit. Rather, at least some of the interests of the former belligerents are honored in such compromise, and it reflects compassion and attentiveness for the interests of others.\textsuperscript{141} The peace that Coady has in mind is stable for the medium term; the disposition to violence and hostility is quieted, but need not be completely eliminated. It is sufficient that a resumption of war is no longer imminent.

Hence, Coady too remains modest with regard to the normative goal of peace. He warns that moralism can be not only imprudent but also morally questionable. As he argues: “Consciousness of one’s being justified in war combined with zeal for a particular political outlook or ideology can lead to illicit or imprudent imposition of reconstruction policies that not only work against peace but deny people a legitimate autonomy.”\textsuperscript{142} Imposing democracy or a certain religion after war would amount to ideological imperialism. Coady criticizes theorists that endorse a positive just peace for being naïve (discussed hereafter). Given the difficulties encountered today, it would be better, according to Coady, to be “less utopian, less lofty, and less consumed by our own righteousness, in prescriptions and principles for reconstructing conquered nations”.\textsuperscript{143}

\textbf{7.5.3 Orend’s Comprehensive Decent Peace}

Turning back to the developments in just war theory, Steven Lee argues that just war theory moves from the ‘national defense paradigm’ to a new ‘human rights paradigm’.\textsuperscript{144} Under this new paradigm, there is more concern for human security than for national security. Essentially, there is more emphasis on individual human rights at the expense of collective rights as national self-


\textsuperscript{141} Coady 2008, p. 268. This means that after war, it is unrealistic to want to “negotiate only with the morally pure”, argues Coady. In negotiating a compromise, one must be realistic and aimed at achieving a desirable outcome, which might require negotiating with partners which are not morally or politically respective, and which do not operate with a highly moral version of good faith. Coady 2008, p. 273-274.

\textsuperscript{142} Coady 2011, p. 53. For a similar warning see: Evans 2014, p. 41-42.

\textsuperscript{143} Coady 2011, p. 54-55.

\textsuperscript{144} Lee 2012, p. 292-295.
determination and the value of state sovereignty that is the expression of that. As it appears, the promotion of justice takes precedence over the preservation of a negative peace, which means that there is a stronger connection between peace and justice than in Walzer’s and Coady’s just war theory. The theorists that made this shift are often, but not always, more aspirational in their approach to normative theory.

Brian Orend is influenced by Michael Walzer, but is overall more idealistic, more permissive regarding the just causes for war, and places more emphasis on individual human rights.145 As a result, the concept of peace he holds to be central moves more towards the positive side of the continuum. Peace is not only defined by an absence of collective violence, and the most basic human rights, but also by a certain political structure and a full(er) range of human rights. The balance between feasibility and desirability is evident when Orend argues that: “I view just war theory as a set of rules designed to protect human rights as best they can be, amid the rough-and-tumble circumstances of war”.146 Nevertheless, he is far more idealistic – even naïve according to Coady147 – than Walzer. Orend claims that there are cosmopolitan duties owed to foreign populations to realize minimal justice.148 As a result, the creation of a minimally just state is an important part of the peace after war. A state is minimally just when it makes every reasonable effort to: (i) avoid violating the rights of other minimally just communities; (ii) gain recognition as being legitimate in the eyes of the international community and its own people; and (iii) realize the human rights of all its individual members”.149 The human rights that are most

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145 Chapter 6 showed that Orend’s position on jus post bellum clearly changed throughout the years that he works on this subject, in line with the general shift in just war theory here described. Today, Orend defends the ‘rehabilitation model’ after war, which aims to realize a far more comprehensive and positive peace than in his earlier years. See e.g. Brian Orend, ‘Justice after War’, in: Ethics & International Affairs 2002, 16/1; Brian Orend, ‘Justice after War’, in: Eric Patterson (ed.), Ethics beyond War’s End, Washington D.C.: Georgetown University Press 2012. This also means that some theorists targeting Orend’s position are no (longer) correct in doing so (on these grounds). See e.g. Evans 2014, p. 34, still labeling Orend’s position on jus post bellum as ‘restricted’ (minimalist).

146 Orend 2013, p. 5.

147 Coady 2011, p. 54-55.

148 Minimal justice is the threshold level for cosmopolitanism according to Orend, which means that above this threshold, states are permitted to give greater weight to the interests of the national population.

essential are the rights to security, subsistence, liberty, equality, and recognition.\textsuperscript{150} Realism makes Orend acknowledge that we cannot require perfection when it comes to the realization of human rights; but serious efforts and sincere intentions are required.\textsuperscript{151}

Obviously, Orend places more emphasis on individual rights. Sovereignty is conditional and can be easily overridden: whenever a state does not make a genuine effort to realize the human rights of its citizens, sovereignty is forfeited. After war, there is a presumption in favor of forcible regime change by the just victor in the defeated aggressor. While this might be difficult and costly, this is what a just war theory that factors in cosmopolitan duties should aim at.\textsuperscript{152} Orend clearly endorses a more comprehensive and positive peace as compared to Walzer and Coady, that we could call a comprehensive decent peace.

7.5.4 Evans's, Allman & Winright’s and Fabre’s Largely Positive Peace

Mark Evans also emphasizes a ‘just and durable peace’ as the goal of just war theory. Evans’ concept of peace seems to have even more positive characteristics than the peace that Orend endorses. Indeed economic reconstruction is part of building a just peace (the distribution of material resources), but also the reconstruction of the physical infrastructure and reestablishment of socio-cultural institutions, practices and relationships.\textsuperscript{153} The latter means that Evans presses on forgiveness and reconciliation as an essential part of the peace after war.\textsuperscript{154} There is an obligation to: “take full and proactive part in the ethical and socio-cultural processes of forgiveness and reconciliation that are central to the construction of a just and stable peace”.\textsuperscript{155} As Evans indeed points out, while this largely positive concept of peace as normative goal of just war theory is part of non-ideal theory, it is clearly

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\textsuperscript{150} Orend 2013, p. 35-36, 189.

\textsuperscript{151} Orend 2013, p. 38.

\textsuperscript{152} Orend 2013, p. 216.


\textsuperscript{154} While not strictly necessary for reconciliation, forgiveness regards the emotional inner life of individuals and requires a certain feeling of ‘being at peace’ with what might have happened before or during the war. This means that in this respect, Evans moves to a fully positive peace that connects the outer and inner dimensions of peace.

\textsuperscript{155} Evans 2012, p. 208-210.
oriented towards achieving an ideal concept of a just peace.\textsuperscript{156} Nevertheless, just war “theory itself does not shoulder an entire morality of peace building”.\textsuperscript{157}

Moving even further towards the positive side of the continuum is the peace endorsed by Mark Allman & Tobias Winright. They defend an aspirational Christian just war theory based on ‘love for one’s neighbor’, which includes respect for the enemy’s dignity.\textsuperscript{158} Hence, they reject a (largely) negative concept of peace as merely the cessation of violence and imposition of abstract principles. They declare to aim higher: as they state, there is a strong connection between peace and justice: “peace is an enterprise of justice”.\textsuperscript{159} And justice is understood as inclusive and substantive, negating self-interest, and envisaging an equitable peace in which reconstruction delivers systematic transformation and not merely regime change.\textsuperscript{160} The goal of just war theory is a just peace, explained as Augustine’s \textit{tranquillitas ordinis}, which is restorative and reconciling in nature for both the victim and the aggressor nation.\textsuperscript{161} Restoration after war is more comprehensive than merely realizing a minimally just state as Orend proposes.\textsuperscript{162} A just peace requires a certain political system which protects and guarantees human rights \textit{and} pursues the common good. Consequently, they state that their Christian background leads them to endorse a just and lasting peace inclusive of robust human rights and “social, political, economic, religious, and cultural conditions that allow citizens to flourish, to pursue lives that are meaningful and worthy of creatures made in the image and likeness of God”.\textsuperscript{163}

A just peace is also reconciling in nature, which means that Allman & Winright require something more than relative stability and a satisfactory \textit{status quo}. They emphasize reconciliation after war; and relations of respect, trust and friendship are part of the just peace they endorse. “The reconciliation phase seeks to turn enemies into friends and to bring emotional healing to the victims.

\textsuperscript{156}Evans 2014, p. 35.
\textsuperscript{157}Evans 2014, p. 36.
\textsuperscript{159}Allman & Winright 2010, p. 6.
\textsuperscript{160}Allman and Winright here quote Adrian Pabst, whom they say to agree with on his vision on justice after war. Allman & Winright 2010, p. 75.
\textsuperscript{161}Allman & Winright 2010, p. 8-9.
\textsuperscript{162}Allman & Winright 2010, p. 152-160.
\textsuperscript{163}Allman & Winright 2010, p. 159.
of war.”\textsuperscript{164} This results in long term stability. Although Allman & Winright state that the establishment of a just and lasting peace cannot be a cause for war, the just cause does not limit the subsequent peace as we have seen earlier. Their concept of peace encompasses many more positive characteristics than the vindication of the violated rights.

And lastly, we should consider a cosmopolitan just war theorist. Taking serious the foundation of just war theory in individual human rights means, for various contemporary theorists under the name of ‘revisionism’, that just war theory should be seriously revised.\textsuperscript{165} Revisionist just war theory is cosmopolitan and individual-centered, instead of state-centered. On that basis, they propose different norms of \textit{jus ad bellum} and \textit{jus in bello}, which often means that the \textit{jus ad bellum} becomes more permissive.\textsuperscript{166} Furthermore, as Seth Lazar and Laura Valentini interestingly pointed out recently, revisionists are aspirational, which is the third factor that indicates that revisionists would likely endorse a largely positive peace as the goal of just war theory.\textsuperscript{167}


\textsuperscript{165} E.g. Jeff McMahan, \textit{Killing in War}, Oxford: Oxford University Press 2009; Rodin 2003; Fabre 2012 etc. See further e.g. the Stanford entry on War by Seth Lazar: http://plato.stanford.edu/entries/war/.

\textsuperscript{166} Whereas it can also mean that the \textit{jus ad bellum} becomes more restrictive, e.g. by rejecting a self-defense against a so-called ‘bloodless invasion’ as David Rodin does. Rodin 2003.

\textsuperscript{167} Lazar and Valentini pointed out that the disagreement on the discrimination principle is a proxy battle for a deeper disagreement between traditionalists and revisionists about the nature and purpose of political philosophy. One of these deeper disagreements is precisely that balance between feasibility and desirability. As they demonstrate, traditional theorists defend the discrimination principle on concessive grounds. There are feasibility constraints that render it highly unlikely that a norm prohibiting the killing just combatants would be followed: it is very difficult for combatants to determine whether they fight a just war and whether their enemies are liable to be killed; as a feature of human nature, it is psychologically impossible for combatants to adhere to strict moral norms in the extreme circumstances of war in terms of dire peril, deaths, psychological trauma that they face; and combatants will nonetheless convince themselves that they are fighting a just war, which is often stimulated by propaganda and selective information of their political leaders. Revisionists acknowledge these constraints, but argue that the fact that it is unlikely that combatants comply with revised \textit{jus in bello} norms does not render the norms invalid. Furthermore, they are much more optimistic with regard to the possibilities: it might be difficult for combatants to make this distinction, but it is certainly possible if they make enough effort. Seth Lazar & Laura Valentini, ‘Proxy Battles in Just War Theory. \textit{Jus In bello,} the Site of Justice, and Feasibility Constraints’, in: David Sobel,
As revisionists have mainly considered the *jus ad bellum* and *jus in bello*, Cecile Fabre is one of the most eloquent revisionists, and also the first to give a systematic account of the character of the peace and *jus post bellum* after war.\(^{168}\) Her account is founded on cosmopolitanism in which individuals are the primary units for moral analysis and concern.\(^{169}\) Fabre distinguishes between basic human rights (following Henry Shue) which protect goods and freedoms needed for individuals to lead a humane life (worthy of a human being), and non-basic human rights which protect goods and freedoms needed to lead a flourishing life.\(^{170}\) Placing the threshold higher than Orend, Fabre holds that cosmopolitan justice requires that individuals are capable of leading not only a minimally decent life (or minimal justice for Orend), but a flourishing life.\(^{171}\) As a result, peace for Fabre is: “a state of affairs where all individuals actually enjoy their human rights to the freedoms and resources they need to lead a flourishing life”.\(^{172}\) The capability to flourish means that individuals are autonomous – able to pursue their own conception of the good – and includes bodily integrity, basic health, emotional and intellectual flourishing and control over material resources and political environment.\(^{173}\) An example of a non-flourishing life is having to take on repetitive, uncreative work, or being unable to enjoy the “cultural fabric of their society”.\(^{174}\) As it appears, this means that in Fabre’s just peace, outer and inner peace are connected.

Compared to Walzer and Coady, who emphasize sovereignty and hold that collective rights as self-determination of a political community have intrinsic

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\(^{168}\) Fabre 2016. In this chapter I cannot do justice to Fabre’s complex and well-constructed argument.

\(^{169}\) Fabre 2016, p. 2.

\(^{170}\) Fabre 2016, p. 3. Fabre adjusted her position in *Cosmopolitan War*: instead of seeing a just world as one in which individuals enjoy opportunities for a minimally decent life, she now states that this is not demanding enough; there is a duty to ensure that all individuals can lead a flourishing life. Fabre 2012 and Cecile Fabre, ‘Rights, Justice, and War. A Reply’, in: *Law and Philosophy* 2014/33, p. 402.

\(^{171}\) “One all have the resources required for a flourishing life, (...) the well-off have as a matter of right the personal prerogative to confer greater weight to their own goals and life-projects at the expense of the less well-off.” Fabre 2016, p. 4.

\(^{172}\) Fabre 2016, p. 12.

\(^{173}\) Fabre 2012, p. 19.

\(^{174}\) Fabre 2014, p. 404.
value, Fabre’s states that these are completely reducible to the individual rights of the members of such political community.\textsuperscript{175} Hence, state sovereignty is only instrumentally valuable, e.g. for the discharge of cosmopolitan duties and for the promotion of human rights. Despite Fabre’s emphasis on individual human rights and wellbeing, her just war theory is far more permissive than ‘Walzerian’ just war theory.\textsuperscript{176} It opens the door for additional just causes, as she allows e.g. for the possibility of ‘subsistence wars’: wars in defense of subsistence rights in cases of severe deprivation of the global poor against the global affluent.\textsuperscript{177} Finally, Fabre also argues that there must be long term stability and reconciliation between former enemies; it is not enough that former belligerents “no longer have a justified grievance against each other”.\textsuperscript{178} As expected, Fabre endorses a largely positive peace as the goal of just war theory.

\textbf{7.6 Decent Peace}

Now let us turn to the central question: How should a just war theorist concerned with \textit{jus post bellum} understand peace? There is obviously agreement on the fact that the peace that is aimed for is not a restoration of the situation \textit{quo ante bellum}, but a better state of peace. Developments in just war theory result in a further shift towards a more positive understanding of peace. However, it is not quite clear how far this shift should go. How much better must the peace be? Must a just and lasting peace be understood as a decent peace or as a largely positive peace? Given the factors that determine how just war theorists think about peace, this is not a question answered easily. It namely involves passing judgment on deeper disagreements as to the appropriate level of idealization in just war theory, the scope of just war theory, and the right balance between collective and individual rights. Settling these disagreements in a satisfying way is not a task that is pursued here. Even so, this section

\textsuperscript{175} For a critique on this argument see: Anna Stilz, ‘Authority, Self-Determination, and Community in Cosmopolitan War’, in: \textit{Law and Philosophy} 2014, 33/3.

\textsuperscript{176} Statman forcefully objects to Fabre’s conception of just war theory, arguing that it is too demanding in some respects (not allowing self-defense to protect national sovereignty), and too permissive in other respects, notably the wide range of just causes for war and the justification for targeting non-combatants in war. Daniel Statman, ‘Fabre’s Crusade for Justice. Why We Should not Join’, in: \textit{Law and Philosophy} 2014, 33/3.

\textsuperscript{177} Fabre 2012.

\textsuperscript{178} Fabre 2016, p. 12.
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attempts to answer this question. Before that, it is noted that the differences
between the two remaining positions on what constitutes a just and durable
peace are smaller than they appear, since they revolve around the meaning of
‘justice’ in just war theory, and since a corrective strategy is often adopted.
Nevertheless, these differences cannot be completely dismissed, and a decent
peace is defended as the proper normative goal of just war theory, based on the
action guiding character of just war theory, its limited nature, and the risk for
moral imperialism.

7.6.1 Justice in Just War Theory

The difference between theorists that endorse a decent peace and a positive
peace – which they all call a just and lasting peace – revolves around the
question as to what one understands to be ‘just’ in just war theory. As we have
seen, some just war theorists balance ideal principles of perfect justice and
prudential considerations in order to generate the best practical effects. There is a relatively small gap between ‘ought’ and ‘can’. What is considered to
be ‘just’ is a combination of different concerns such as these ideal principles,
peace as absence of war, individual wellbeing and feasibility and prudence. This
approach reflects what Evans calls an understanding of ‘justice as a rectificatory
concept’, applicable to problems that arise in our flawed world. Aspirational
just war theorists set the standard higher and press for ideal principles
(distinguished from strict moral idealism as utopianism, since the non-ideal
occurrence of war is acknowledged). These ideal principles reflect what Evans
calls ‘justice as a pristine concept’, and they are also called ‘first best
principles for war’, the ‘deep morality of war’, or in the case of peace, a ‘just
peace simpliciter’. This concept of peace begins by ‘ought’ and as a
consequence, the gap between ‘ought’ and ‘can’ is much larger. This means that
our moral ideals are less compromised and that a positive peace as normative
goal sets a more critical standard to assess current practice.

179 Compare Larry May’s concept of meionexia. Larry May, After War Ends. A Philosophical
181 These remarks are part of a very interesting exploration of the meaning of justice in
just war theory. See further: Evans 2014, p. 28-32.
182 Fabre 2016, p. 12.
Could the main difference between those positions on peace be merely a matter of terminology about what is called ‘just’?\textsuperscript{183} One might think so, as it appears that while aspirational just war theorists set a higher standard, they ultimately correct these demanding moral norms. Although they appear aspirational, they are so primarily in theory, but not (necessarily) in practice. Feasibility constraints slip in through the backdoor as a corrective strategy. This correction can either be a part of the moral framework, e.g. as corrective just war criteria, or externally as an additional test; a correction independent of the demands of just war theory. Fabre follows both strategies. As we have seen, she defends a permissive just war theory. She however admits that the \textit{ad bellum} criteria of proportionality and necessity are likely to stand in the way of a subsistence war being overall just: a war of the global poor against the global affluent would generally do poor people more harm than good. In effect, the just war theory she defends is permissive in theory, but might not justify more wars than the established self- or other-defensive wars and humanitarian interventions in practice.

But feasibility constraints also work as a correction independent of what is deemed ‘just’ in the aftermath of war.\textsuperscript{184} Fabre distinguishes between a ‘just peace \textit{simpliciter}’ and a ‘justified peace all things considered’. It is not always possible to realize a just peace in reality due to epistemic uncertainty, scarcity of resources and psychological constraints. Therefore, this ideal can justifiably be traded off in practice. “A justified all things considered peace is a compromise between ensuring that individuals’ human rights are secure and acknowledging that realizing a just and peaceful world is simply not possible.”\textsuperscript{185} This concept of a justified as opposed to a just peace brings us back to our concept of a decent peace. Namely, a justified peace is a peace in which individuals cannot lead a

\textsuperscript{183} Laura Valentini considers what she calls a ‘conciliatory’ attitude regarding similar differences in the positions of Jean Cohen and John Rawls. Valentini 2012, p. 657-658.

\textsuperscript{184} Another notable example of this strategy is Jeff McMahan. McMahan challenges the discrimination principle, and argues that unjust combatants cannot justifiably kill just combatants since they lack moral guilt. While he acknowledges feasibility constraints, such as the inability of combatants to properly assess the justness of their cause due to the complexity and epistemic uncertainty, he rejects that these should influence the morally valid norms (‘the deep morality of war’). Nevertheless, given the problematic consequences of institutionalizing these moral rules, the legal framework must uphold the traditional discrimination principle. Jeff McMahan, ‘The Morality of War and the Law of War’, in: David Rodin & Henry Shue (eds.), \textit{Just and Unjust Warriors. The Moral and Legal Status of Soldiers}, Oxford: Oxford University Press 2008, p. 32.

\textsuperscript{185} Fabre 2016, p. 13.
flourishing life, but in which nevertheless their basic rights are secured and they can lead a minimally just life. A post war situation that falls below this threshold would amount to injustice. Regarding restitution after war for example, Fabre holds that reparations for wrongdoings of war is a component of a just peace, but resources and epistemic constraints mean that they must be replaced by non-reparative reconstruction efforts (economic redistribution) in a justified peace. Furthermore, in this realistic justified peace, the addressees of these reconstruction efforts are not only the former belligerents but also outsiders.\footnote{Fabre 2016, p. 145-171.} Hence for Fabre, there are different gradations of justice: a peace can be unjust ((largely) negative peace), justified (decent peace), or just \textit{tout court} (largely positive peace).\footnote{Fabre 2016, p. 19-20.}

The last strategy is also followed by the other theorists that endorse a largely positive concept of peace. Feasibility constraints constitute for Evans an additional test separate from this theory of the justice of the aftermath of war. If a just peace cannot be achieved in practice, then we must be prepared to settle for a “suboptimal acceptable peace”.\footnote{Mark Evans, ‘Moral Responsibilities and the Conflicting Demands of Jus Post Bellum’, in: \textit{Ethics \\& International Affairs} 2009, 23/2, p. 160.} Evans is very clear that this ‘compromise’ is not a part of justice in the aftermath of war; it is rather a subsidiary principle that, in the case of the practical impossibility to secure justice, determines what actions are then justified (but not just) all things considered.\footnote{Evans 2014, p. 39.} Even Allman \\& Winright, the most idealist of the bunch, admit that in rare cases, we might have to settle for a tolerably just, or ‘suboptimal acceptable peace’. But aside from this very small concession to feasibility constraints, they argue that “any stepping back from this rigorous interpretation of the criteria (a just and lasting peace) makes for a less honest just war theory”.\footnote{Allman \\& Winright 2010, p. 74.} As such, they primarily warn for entering this “slippery slope” of allowing political realism into just war theory.\footnote{Allman \\& Winright 2010, p. 73, 95-96.}

This shows that just war theorists disagree less than initially appeared. Whereas some consider a decent peace to be a just peace, and others consider a decent peace an acceptable justified peace, they largely agree on its substance – basic human rights are secured – and that this is likely to be the goal of just war theory in practice. The main difference however is not merely one of

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terminology. While a largely positive peace might (often) be unachievable in practice, the importance of setting this normative goal for just war theory cannot be dismissed that easily. Walzer will not aim for a largely positive peace because he considers that undesirable, while Fabre will not aim for a less than largely positive peace when that is not necessary. In other words, theorists as Fabre hold onto this concept of peace as the regulative ideal of just war theory, guiding the aftermath of war in a certain direction. The question is whether that is desirable.

7.6.2 Defense of Decent Peace

As opposed to Evans, Allman & Winright and Fabre, this chapter suggests we should not seek a just positive peace after war, while being prepared – all things considered – to settle for justified decent peace. Rather, a decent peace after war is a just peace. Three arguments are presented for this claim.

First, a decent peace is the appropriate normative goal given the specific character of just war theory. As became clear, just war theory recognizes that war is a great evil in terms of overall death, suffering and destruction, but it also recognizes that war is a part of real world politics. It is premised upon this recognition of the evil of war, and just war theory’s main and most important task is to limit the horrors that are inherent to it. It is an action guiding theory, applicable to the flawed non-ideal world that we live in ‘here and now’. As we have seen, a balance between feasibility and desirability is therefore essential. In order to be effective, just war theory needs to offer norms which are both achievable in and after real world wars, as well as desirable – explained often, but not necessarily in terms of human rights.

This means that circumstances and psychological motivations must be incorporated in just war theory insofar as they constrain the feasibility of limiting war and achieving peace in the real world. It must make concessions to constraints regarding e.g. politics, institutions and culture (e.g. that imposing democracy has proved far more difficult in the absence of certain social structures) as well as to psychological constraints, and prescribe norms that are neither overly demanding to the extent that they intolerably diverge from what national interests require, nor are at odds with our commonsense morality.¹⁹² One can of course disagree on the proper balance between feasibility and desirability. Nevertheless, Joseph Carens’ comments in this respect might be

¹⁹² Likewise Valentini 2012, p. 659.
helpful, “the assumptions (a realistic or idealistic approach) we adopt should depend in part on the purposes of our inquiry.” Given the theory’s role as action guiding normative theory, feasibility constraints are not only a part of just war theory, but are part and parcel of it. Hence, the balance between feasibility and desirability in the concept of decent peace seems the most appropriate.

Second, we do not need a positive peace as regulative ideal – based on a ‘pristine’ conception of an ideal just world – to guide just war theory and shape jus post bellum, since that would exceed the limited nature of just war theory. The shift in just war theory means that a just peace is not only backward looking, but also forward looking. Nevertheless, its limited nature suggests that we should not look forward too far. Just war theory is not a vector for the realization of human rights broadly perceived, but instead is there to protect the most fundamental values in the messy and complex reality of war and its aftermath. It is a problem centered theory, designed to regulate the specific occurrence of war. As a result, its branches offer norms and imposes obligations that are far more narrow and limited than any general ideal or aspirational normative theory. Setting such a high standard overpromises what victors after war could and should achieve. As Steven Lee points out, the idea that war can serve morally lofty goals increases the danger that it will be used without the sort of restraints that are central to just war theory. A positive peace will not be achieved in the foreseeable future, and this makes jus post bellum an ongoing process with no clear end in sight, guided by some ideal of a just world in the distant future. Given the specific domain that just war theory applies to, this greatly overstretches the theory’s boundaries. Jus post bellum could easily become a ‘never ending story’ instead of being applicable to the temporary transition in the aftermath of war.

And third, an additional problem that was noted already by Coady and Rawls, is the questionable universality of the comprehensive ideology that could be entailed in a positive peace. There is nowadays a fairly large agreement on the interdependence and universality of human rights. However, the

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194 Evans 2014, p. 31.
195 See the World Conference on Human Rights, Vienna Declaration and Program of Action, A/CONF.157/23 1993 (Vienna Declaration); UN General Assembly, World Summit Outcome, A/RES/60/1 2005 (World Summit Outcome Document); and see further e.g. Christian Tomuschat, Human Rights, Oxford: Oxford University Press 2014, p. 47-72. Although the Vienna World Conference on Human rights and the World Summit
implementation of the full range of rights after war, especially if there is an emphasis on ‘liberal rights’, increases the risk for the well-known critique of moral imperialism, ethnocentrism and imposition of ‘Western’ values. This risk is particularly high when victors after war are considered to be obligated, as part of jus post bellum, to realize these human rights so that people in the war effected area can lead a ‘flourishing life’. If steps towards a positive peace are taken, this takes place outside the specific domain of just war theory; it cannot and should not be part of justum bellum. Seeking a just peace after war is a transitional process that ends whenever a sufficiently just peace, i.e. a decent peace is achieved. After the aftermath of war, just war theory seizes to be applicable and is substituted by a general theory of global justice.

7.7 Conclusion

The answer to Evans’ question “is it, indeed, justice to which we turn at war’s end?” would be yes. Or no, depending on what is understood to be just. ‘Justice’ in just war theory might be misleading if one thinks of justice in terms of ideal, ‘pristine’ or perfectly just principles. From the outset, this is not what justice in just war theory can be. War is the lesser of two evils, and we should not be deluded into thinking that this lesser evil is actually something good. Walzer eloquently states: in the exceptional domain of war, “justice is always under a cloud”. There is a relation between just war theory and a general theory of justice (such as global justice), but just war theory’s domain is limited and protects only the most important values. This relation does not therefore mean that the general theory and its regulative ideal should be incorporated.

Outcome stress the universality of human rights, they also acknowledge the ‘regional particularities’. Human rights “must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”, and “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind”.

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197 Evans 2014, p. 27.

198 Walzer 2004, p. x.
We should not misappropriate the goal of a theory of global justice and try to realize it as part of just war theory. Just war theory is designed to prevent the worst excesses, not to realize or take steps towards an ideal just world, which is what a (largely) positive peace would amount to.

More specifically, this chapter has argued that endorsing a largely positive peace as normative goal for just war theory is a bad idea for various reasons: it is ineffective since it sets a moral standard so high that it will not be achieved in practice; undesirable since it allows ongoing (even never ending) peace building with no clear end in sight, which goes well beyond the limited nature of just war theory; and potentially immoral, since it nearly conflates peace with a ‘pristine’ concept of justice, explained in terms of human rights broadly perceived, accompanied by a certain political structure and economic system, of which the universality might be contested. In the messy reality of war and war’s aftermath, it is wise to be modest. Therefore, this chapter warns against a too radical shift in just war theorizing.

What should be realized at war’s end is a ‘just and lasting peace’ understood as a decent peace which is stable for a substantial period of time, in which basic human rights are secured, and which includes forward looking provisions to relieve the post war deprivation as e.g. food and shelter in the immediate aftermath of war. And while it might be difficult to precisely determine when a decent peace is reached, this goal makes just war theory most effective in limiting the awfulness of war. It provides a standard critical enough to assess the current practice and can be realized in the aftermath of war. What does this conclusion mean for the third branch of just war theory regulating the transition to peace? As a decent peace shapes the scope and content of *jus post bellum*, it does not come as a surprise that this chapter suggests a similar moderate understanding of *jus post bellum*, that specifies how a just and lasting peace can be achieved after war. *Jus post bellum* would be a valuable part of the *justum bellum* system – conceptually sound, consistent qua character and an effective body of norms – when it is understood as moderate *jus post bellum*, concerned with individual wellbeing but remaining modest in what can and should be realized after war. This chapter hopes to have shown the necessity of further exploring such moderate *jus post bellum*. 
8. Decent Peace and Medium Jus Post Bellum

8.1 Introduction

The disastrous aftermath of the Iraq war shows the difficulties of post war peace building. The coalition partners rushed into a war without properly considering what to do once the war was ‘over’. There was, in other words, no adequate exit plan. An important lesson drawn by the Iraq Inquiry report is that it is better to have realistic and limited objectives than idealistic and overly optimistic objectives.¹ Instead of setting the bar too high, the report suggests that caution is advisable. Situations such as this have contributed to the realization that, when it comes to war and subsequent peace building, we should better be more modest, deliberate and careful, e.g. by considering the risks and consequences, setting realistic goals, making a feasible plan, reserving funds, and acknowledging that actions can create responsibilities. This is reflected in the UN ‘Brahimi Report’. It recommends that in order to be effective, UN peacekeeping missions must be properly resourced and equipped, and operate under clear and operationally achievable, i.e. realistic mandates.²

Strangely enough, just war theory seems to develop into an opposite direction. Not restrained by the cautionary approach resounding in the political reality of today, there is a shift towards an ever more encompassing jus post bellum. The shift towards maximalism means that more and more general values and individual human rights are incorporated, to the point that it appears as if a complete theory of global justice is brought into just war theory. Moreover, the underpinnings of that theoretical development are questionable. There remains substantial vagueness with regard to the concept of jus post bellum, that is not addressed to the extent that it should be. Fundamental

questions have to do with the relevant duty bearers, the appropriate scope and content of post war norms, and the central goal that *jus post bellum* aims to realize.

This book addressed that vagueness and critically assessed the concept of *jus post bellum*. Three questions were raised by the Iraq war: What do we want to do after war? What can we do? And what should we do? While we delved into the last question, this book showed that we cannot in fact separate these three questions. Moreover, the first two questions are essential when trying to answer the third: what we should do after war is determined by the right balance between what we ideally would want to achieve, and what we can achieve in practice. That balance between desirability and feasibility results in the defense of a modest ‘decent peace’ as the normative goal of just war theory, and a corresponding medium *jus post bellum* with an emphasis on responsible duty bearers. Hence, this book pleads for modesty in post war justice and warns for a too radical shift.

This last chapter takes stock of the arguments made throughout – i.e. the key findings – and reassesses the main goal of this research in order to contribute to the development of a more consistent, coherent and effective *jus post bellum*. Finally, it returns to the three general challenges for just war theory and points out areas of future research.

**8.2 Key Findings**

The first aim of this book was to flesh out the concept of *jus post bellum*, and reduce vagueness and lack of clarity. In order to fully understand the concept of *jus post bellum*, the research topic was contextualized in chapters 2 and 3, both in terms of its alternatives and its historical perspective. The application to the Gaza war gave an idea of some problematic aspects of just war theory: the complex reality on the ground to which it is applicable, and the epistemic problems that make its norms, hence also *jus post bellum*, vulnerable for abuse. Furthermore, it was shown that *jus post bellum* is rooted in classic just war theory, and Vitoria’s and Grotius’ principle of moderation inspired the here developed contemporary understanding of *jus post bellum*. Regarding the critical assessment and development of *jus post bellum*, the key findings are drawn from chapters 4 to 7.

Could *jus post bellum* improve just war theory? An integration – thus essentially a reintegration – of *jus post bellum* can indeed make just war theory
better equipped to cope with the changed character of war(fare) and the blurry boundaries between war and peace. Additionally, integrating *jus post bellum* benefits the general goal of just war theory: limiting war and realizing a just and lasting peace. Chapter 5 affirmed that it is not only desirable to integrate *jus post bellum*, but contrary to *jus ante bellum*, also possible to do so. Namely, *jus post bellum* is connected to just war theory’s other branches; offers norms that are independent but similar qua character; which applies to war related activities; can be grounded in the limited moral framework of just war theory; and (as general just war theory) addresses primarily (former) belligerents. However, these arguments are mainly valid for a limited conception of *jus post bellum*. That indicates that limited *jus post bellum* is more consistent with just war theory as a whole than a comprehensive maximalist *jus post bellum*.

Although integrating *jus post bellum* can indeed improve just war theory, uncertainty on the responsible duty bearers still seriously jeopardizes this third branch. Who is responsible for *jus post bellum*? Seven conditions were proposed as foundation for post war duties: moral responsibility; outcome responsibility; causality; benefit; capability; community; and role responsibility. A system for assigning post war duties in concrete situations was developed. It was argued that such system should combine these seven – backward and forward looking – conditions. A tentative answer was given as to how we balance these conditions in concrete situations.

The first step – as a precondition – in assigning post war duties is an assessment of the condition of capability. In order to halt post war deprivation and to help create a just and lasting peace, potential duty bearers need to be capable of making an effort to achieve this result. The second step entails an assessment of the conditions of moral, outcome and role responsibility. Thus, former belligerents are most likely responsible for *jus post bellum*. As third step, the conditions of causality, benefit and community further help in the distribution of post war duties. Based on this system, a nuanced version of the ‘belligerents rebuild thesis’ was defended. If former belligerents are not capable of bearing that duty, other actors are responsible instead. In that case, the responsibility does not shift to an indeterminate ‘international community’, but this system aims at assigning post war duties to specific actors. Admittedly, it remains difficult to assign duties based on these conditions in practice, but this system does offer a guideline with regard to responsibility for *jus post bellum*.

Next, the content and scope of *jus post bellum* was analyzed and the contemporary positions were mapped. The debate on *jus post bellum* is often
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categorized as an opposition between minimalism and maximalism, as regards: a short versus long timeframe; negative versus positive obligations; a limited versus a large array of norms; and the just cause as end versus achieving more than just that. It was demonstrated that this distinction is not appropriate to frame the contemporary positions on *jus post bellum*. Nevertheless, there are gradual variations qua content and scope of *jus post bellum*. A larger perspective is needed to pinpoint these variations, which shows that the content and scope of post war norms depend on two factors: the particular situation to which just war theory applies, and the general view on just war theory and international relations that is adopted. More concretely, the type of war and the nature of the involved state, coupled with a particular view on international relations – the role of the use of force, the concept of sovereignty, the rise of a cosmopolitan morality and the emphasis on individual human rights – explain the shift towards a more comprehensive maximalist understanding of *jus post bellum*.

To fully understand this shift, we need to take an even larger perspective and assess the concept of peace that is central to just war theory. The maximalist shift in *jus post bellum* is part of a larger shift within just war theorizing towards a more positive concept of peace. Contemporary just war theorists understand a ‘just and lasting peace’ in two ways: as a ‘decent peace’ or as a ‘largely positive peace’, in connection with justice either as a ‘rectificatory’ or as a ‘pristine’ concept. Is that shift towards a positive ‘pristine’ peace and a comprehensive maximalist *jus post bellum* a good idea? This book warned for a too radical shift, and ultimately pleaded for understanding a ‘just and lasting peace’ as a decent peace that is ‘just enough’, accompanied by a medium *jus post bellum* that specifies how such peace must be achieved. Three arguments were presented for that claim. First, a decent peace is the appropriate goal given the specific character of just war theory as an action guiding theory. In order to be effective in limiting war, just war theory needs to offer norms that are both achievable in the real world, as well as desirable in terms of human rights or individual wellbeing. Feasibility constraints are part and parcel of just war theory, and a decent peace best accommodates these constraints while setting a desirable moral standard. A largely positive peace on the other hand, is more ambitious and therefore expectedly less effective.

Second, maximalist *jus post bellum* aimed at a largely positive peace would exceed the limited nature of just war theory. Just war theory wants to protect the most important values in the messy reality of war. As such, just war theory inhabits an exceptional moral domain, more narrow and limited than our
‘normal morality’, and hence is distinct from general theories of e.g. global justice. Setting a largely positive peace as regulative ideal for the distant future would overstretch the boundaries of just war theory, and increases the risk that the theory is used for lofty goals disregarding the restraints that are central to it. As a problem centered theory, just war theory should not look too far beyond the war that it regulates. The third and last argument is the danger of imposing the values that make up a largely positive peace. Obligations to realize a broad array of human rights after war run the risk of moral imperialism, ethnocentrism and the imposition of Western values. Despite the unmistakable globalization and proliferation of individual human rights, respect for other peoples and cultures demands tolerance and modesty in just war theory.

8.3 A more Consistent, Coherent and Effective Jus Post Bellum

As is clear, jus post bellum can improve just war theory and make it better equipped to face contemporary challenges. But what type of jus post bellum should be integrated? A minimalist jus post bellum, aimed at restoring the status quo ante bellum, is not able to make the required improvement. And although maximalist jus post bellum appears to be better tailored for the political reality of today, the findings show the disadvantages of integrating such conception of jus post bellum. They rather suggests that we should aim to find a moderate middle way – inspired by Grotius’ principle of moderation – that one could call medium jus post bellum, which aims at realizing a just and lasting peace understood as a decent peace. This is similar to the ‘limited maximalist’ position as described in chapter 6. Although spelling out the specifics of this path to a decent just and lasting peace remains to be done, this appears to be a more consistent, coherent and effective jus post bellum.

First, a medium conception of jus post bellum improves the theory. It offers more than a return to the status quo ante bellum, but remains more consistent with just war theory as a whole than maximalist conceptions. Medium jus post bellum offers norms that are related to and compatible with the other just war norms. As opposed to maximalist jus post bellum, medium jus post bellum does not exceed the limited nature of just war theory as a problem centered theory; is tolerant with regard to cultural differences and other, less fundamental values; and does not overstretch the theory’s boundaries. Therefore, integrating medium jus post bellum brings together the different aspects of just war theory,
makes it better equipped to face the post war challenges faced today, and is conceptually consistent with the character of just war theory.

Second, medium *jus post bellum*, in which it is relatively clear who bears responsibility for what, is internally coherent as a body of norms. In short, it aims to create a decent and safe society after war, and is concerned with individual wellbeing but also with collective self-determination of peoples. Medium *jus post bellum* is determined by a selection of the most important human rights, notably to life, liberty and security. After the horrors of war, safety and security for the population are of the utmost importance. This means that the peace must be relatively stable, and that the grievances of former belligerents are quieted (although not necessarily disappeared).

If there is a power vacuum, or the regime in place is not able to secure these most important human rights, imposed political reconstruction may be part of *jus post bellum*. Political reconstruction is limited and does not require the creation of a liberal democracy. In practice, this would usually mean that the just cause for war determines the scope of *jus post bellum*; the political regime after a self-defense against aggression might remain intact when the aggression is repelled and prevented for the foreseeable future, while a humanitarian intervention almost inevitably entails political reconstruction of the regime responsible for the humanitarian catastrophe. Nevertheless, *jus post bellum* should not look forward too far, and must try to restore sovereignty as soon as is reasonably possible, namely whenever it can facilitate people’s right to self-determination. If the right to life is jeopardized by a lack of means of subsistence due to the war, providing these basic necessities of life is part of *jus post bellum*. Former belligerents are responsible for realizing *jus post bellum*, although other actors can be assigned post war duties when former belligerents are incapable. The system for assigning post war duties improves the coherence of medium *jus post bellum*.

Third, medium *jus post bellum* is most effective in limiting the horrible effects of war. This has been an important theme throughout this book. Just war theory is an action guiding theory that aims to limit war, halt and remedy the damage, destruction and deprivation inherent to it, and build a just and stable peace. Just war theory will only be able to achieve these aims if it finds an appropriate balance between feasibility and desirability. Medium *jus post bellum* sets a high enough moral standard that is concerned with individual and collective wellbeing, but not so high that will not be achieved in practice (and is
therefore demotivating). Medium *jus post bellum* spells out the path towards a lasting peace which ‘just enough’, instead of perfectly just.

### 8.4 Challenges and Further Research

Is Walzer right in speaking of the ‘triumph’ of just war theory? If he is, just war theory nonetheless copes with significant challenges. We have seen three of those challenges: the vagueness and epistemic problems (chapter 2 and 5); the changing character of war (chapter 2 and 4); and the revisionist critique (chapter 7). *Jus post bellum* can be a partial answer to the changing character of war and the revisionist emphasis on the importance of individual human rights. Nevertheless, further research remains necessary.

The first challenge to just war theory are the epistemic problems and the risk of abuse and manipulation. Just war theory offers norms that are to be applied to the variety of real world wars. One side of the coin is that these norms must be sufficiently general to be able to be widely applicable. However, the other side of the coin is that these norms are to a certain extent ‘vague’ and open for interpretation. The same norms can thus yield different conclusions regarding particular wars, as chapter 2 makes clear with regard to the Gaza war in 2008/2009 and chapter 5 with regard to the Iraq war that started in 2003. It might be difficult to determine who is the ‘just’ belligerent and who is the aggressor. Often, both sides claim to be justified *ad bellum*, and they might both genuinely believe to be so. It is well possible that insufficient information is available to make a definitive judgment. Also, it is possible that both sides have some justness on their side, as Anthony Coady argues: “there will usually be a constellation of grievances and perceived wrongs on both sides that go to make up the *casus belli*”.\(^3\) This compelling idea of comparative justice means that there are rights and wrongs on the side of all belligerents.

Not only does the general nature of the norms of the *justum bellum* lead to difficulties regarding application, it also means that they are prone to abuse and manipulation. As some critics argue, just war theory is used by political leaders as propaganda, giving their unjust wars an aura of legitimacy. In connection with the Iraq war, Andrew Fiala argues that “politicians use just war concepts to

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justify wars that are often chosen for other, less noble reasons." It provides political leaders with the tools to sell their military adventures as ‘just wars’.

The problems with application and abuse are a serious challenge for just war theory. However, this does not in itself invalidate the theory or diminish its value. Although just war theory is not always able to provide clear cut answers in every situation, it nonetheless structures the debate by providing an adequate moral framework. Just war theory can function as a critical theory, differentiating just and unjust wars. With regard to the Iraq war, the American government might have used just war language to justify that war, but it became clear that the Iraq war was in fact an unjust war.

The second challenge is the contemporary character of war and warfare. The face of war has changed significantly throughout history, depending on factors such as political constellations and technical developments. The implications of two important aspects are not addressed in this book: the growing number of civil wars and the asymmetric character of these wars due to the prominence of non-state actors. A case in point is how to apply the criterion of legitimate authority to non-state actors. Chapter 2 provides another example: how to apply the principle of discrimination when it is particularly difficult to make that distinction – e.g. when a national army fights irregular militias, who refrain from wearing uniforms and attack from within densely populated areas. These ‘new’ characteristics of war give rise to the question: How to modify just war theory to these contemporary armed conflicts?

Ideally, just war theory provides guidance for the great variety of international, civil and internationalized civil wars that exist today. The challenge for just war theory is to adapt itself as a flexible theory and seek ways in which its norms can be modified where necessary, in order to fit the political reality. This way, it remains capable of providing the needed guidance. This counts also for jus post bellum; when this concept is more fully developed, a next step is to give careful thought to the application of this branch to the aftermath

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6 Many other developments in contemporary war(fare), such as the use of (unmanned) drones, could be mentioned here.
of civil wars. This will not have radical implications for the here developed understanding of *jus post bellum*. Rather, *jus post bellum* could be adapted to these new characteristics, e.g. the system for the distribution of post war duties could be refined so that it accommodates non-state actors.

Finally, there has long been a remarkable consensus on traditional just war theory as formulated by Walzer in 1977. This position is now challenged, and an alternative revisionist understanding has been developed by authors such as Jeff McMahan, David Rodin and Cecile Fabre. This is the third serious challenge to just war theory. This research has taken the ‘Walzerian’ position as point of departure, including its basic premises, such as exceptionalism (because of its specific characteristics, war is a separate moral domain), its foundation in a combination of collective values and individual human rights, the state centric perspective and focus on international wars. These premises are challenged by revisionists: they reject the fact that war is a separate moral domain, but instead argue that it is covered by the same morality that is valid in everyday life. They regularly use artificial examples as the ‘fat man’ to defend their moral claims. Revisionist just war theory is not statist (or collectivist) but fiercely individualist. That all means that revisionists reach different conclusions when it comes to the norms of *jus ad bellum* and *jus in bello*.

With regard to *jus ad bellum*, revisionists question the permissibility of self-defense (e.g. in response to a ‘bloodless invasion’ that does not harm the individual human rights of the population) but they are more permissive when humanitarian issues are at stake. With regard to the *jus in bello*, combatant equality is rejected and a revision of the discrimination principle is proposed. Traditional just war theory holds that just and unjust combatants have an equal moral standing. Revisionists however argue that just and unjust combatants cannot be morally equal. While just combatants are allowed to kill unjust combatants, the reverse is not the case. It is argued that “combatants fighting for wrongful aims cannot do anything right, besides lay down their weapons”.8

The challenge is to assess how revisionism would work out for *jus post bellum*. Initially, it appears that there is a tension between this perspective and the more realistic perspective on *jus post bellum* here developed. Fabre (and other revisionists) propose more idealistic norms. At a practical level, however, a post hoc feasibility test can correct these ‘pristine’ norms. Given the specific character of just war theory, this might be a shortcoming in revisionist theory. The feasibility constraints are so fundamental that they must be integrated into

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8 Stanford entry on War.
just war theory on a theoretical level, so it is claimed here. In other words, feasibility must be part of the ‘justice test’. Nevertheless, the revisionist emphasis on individual human rights unquestionably influenced both this research and just war theorizing more generally. Furthermore, revisionists point to logical inconsistencies in the ‘Walzerian’ position. Given that one seeks to resist their radical conclusions, this shows the necessity of finding more solid foundations to strengthen this position.

8.5 Relevance

A modern just war theory must take the issue of post war justice into account. In sum, the findings provide the needed theoretical clarity on this relatively new and arguably important topic, and contribute to the development of _jus post bellum_. But over and above, the greatest hope of this research is that integrating this branch in just war theory indeed limits the negative effects of war, and supports the reestablishment of peace after real world wars. A medium _jus post bellum_, aimed at the transition to a decent peace, with an emphasis on the responsible duty bearers has the best chance to do that. This understanding of _jus post bellum_ might be modest, but still could improve many post war situations such as in Iraq.
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Summary

Justice after War

This book begins with the disastrous aftermath of the Iraq war, which demonstrates both the complexity and importance of post war peace building. Situations such as this raise three crucial questions: What do we want to do after war? What can we do? And what should we do? The first is a matter of hopes and ideals, the second a matter of strategy, and the third a matter of post war justice. Post war justice has come to the forefront of contemporary debates in the last decade, because the example of Iraq illustrates a broader development; characterized by the changing character of war, the increasing importance of the post war phase for military operations, and the complexities of contemporary peace building.

Just war theory is a thriving part of legal and political philosophy, and is the leading normative theory on issues of war and peace. Traditional just war theory consists of two sets of norms: *jus ad bellum* and *jus in bello*. Satisfaction of the first justifies a certain war as a whole, and satisfaction of the second justifies the different acts that compose a war. Traditional just war theory gives little thought to the aftermath of war. Given the outlined development, the lack of guidance is now seen as problematic. Some theorists argue that the most difficult problem posed by contemporary warfare is achieving a stable, secure ending to it. Due to the urgent need for a coherent and effective body of norms governing the situation after war, just war theorists note that the theory is incomplete. This has led to a newcomer in just war theory: *jus post bellum*. This third branch is supposed to offer similar norms for the complex aftermath of war; its satisfaction justifies the peace after war. That is the subject of this research: post war justice in just war theory, or *jus post bellum*.

*Jus post bellum* is welcomed today as part of the solution to post war challenges. The first proposal for *jus post bellum* dates from 1994 and since around 2004, there has been a steady trickle of publications on this new branch. In general, *jus post bellum* determines permissible action after war, and consists of norms that can roughly be divided into different categories: creating safety and security in the war affected area, achieving some form of reconstruction (political and general), compensation and reparations for the damage of war, pursuing criminal justice for crimes that have been committed both before and in the war, and enabling reconciliation between former enemies. However,
despite that important theorizing, there remains a problem in *jus post bellum* and the reflection thereon. As this third branch of just war theory is relatively new, it is not fully constructed or crystallized and there remains substantial vagueness. Furthermore, it is well-established that the goal of just war theory is a just peace, but that has yet to be clearly defined. As *jus post bellum* regulates the transition to peace, it is crucial to have a better grip on the concept of a ‘just peace’, in addition to the concept of a ‘just war’. Ergo, although *jus post bellum* is embraced by the majority of just war theorists, it is not yet quite mature as a full-fledged body of norms.

The central problem that this research addresses is *jus post bellum*’s vagueness and lack of clarity. This leads to the following central question: How to clarify and develop the concept of *jus post bellum*? This general question results in more specific sub questions: How are just war theory’s norms applied to specific wars? What was the status of (what is now called) *jus post bellum* throughout the history of just war theory? Would *jus post bellum* conceptually fit into the contemporary theory? Who are the relevant duty bearers? What is the content and scope of *jus post bellum*? What are the strengths and weaknesses of the main positions? And what is the ultimate goal of just war theory and *jus post bellum*? These questions are answered in the subsequent chapters of this book.

The book builds mainly on existing literature concerning just war theory and *jus post bellum*. The debate on *jus post bellum* is mapped and analyzed, key concepts, arguments and positions are systemized, and aspects of general just war theory, legal philosophy, and political philosophy are applied to questions of post war justice as a way to address unresolved issues. The aim of this research is twofold. The first aim is to flesh out the concept of *jus post bellum*. That way, this book reduces vagueness and aims to contribute to a good understanding of *jus post bellum*. The second aim is a more critical assessment of *jus post bellum*. In order to really improve the theory, *jus post bellum* should be consistent with just war theory as a whole, form a coherent body of norms, should be well tailored for the political reality of today and effective in limiting the negative effects of war. This is the normative part of this research. This book ultimately pleads for modesty in post war justice, and defends a medium *jus post bellum*, emphasizing the importance of allocating post war duties to responsible duty bearers.
**Summary**

*Inter Arma Silent Leges? About the Law's Problematic Relationship to War*

The second chapter discusses just war theory in general, applies its norms to a particular war, and raises two challenges: the epistemic problems and the complex reality on the ground. While the moral concepts of just war theory dominate the way many people think about war and peace, there are two rival perspectives on the ethics of war and peace. Pacifism takes the moral prohibition on killing – especially in conflicts between political communities – so seriously, that it rejects war. War can never be morally justified, and one must always seek nonviolent measures to address injustice. Realists reject the idea that moral principles are altogether applicable to international affairs. The international arena is characterized by struggle and power; and war is simply a part of this political reality. This chapter rejects these alternatives in favor of just war theory. It is argued that moral principles *are* applicable to the issue of war, and they can help in forming rational and well considered judgments. Just war theory offers the most important building blocks for discussions about particular wars.

What are these building blocks? The three branches of just war theory provide different sets of norms and principles which can help to regulate war. The *jus ad bellum* entails the criteria of just cause, legitimate authority, right intention, last resort, reasonable chance for success, and proportionality. Three criteria fall under *jus in bello*: necessity, proportionality, and discrimination. The *jus post bellum* offers criteria that prevent the occurrence of ‘victor’s justice’. These criteria of *jus ad bellum, jus in bello* and *jus post bellum* create an image of a just war that is initiated by one of the parties with just cause, waged by both parties in a limited fashion, and which ends with a just and lasting peace.

These norms are subsequently applied to the Gaza War in 2008/2009. The debate on the justice of that war is considered, and this reveals two problematic aspects of just war theory’s norms: the complex reality on the ground, and the epistemic problems that make its norms, hence also *jus post bellum*, vulnerable for abuse. The complexities of the reality of today make the application of these abstract norms quite difficult. The Gaza war is not a clear-cut case of aggression and self-defense, which raises questions as to how the just war criteria should be applied. Furthermore, since they are very general, their application depends to a certain extent on a certain interpretation of the norms itself, a reading of the facts and on political preferences. In other words, while norms such as self-
defense, proportionality, and non-combatant immunity are widely used in the public debate, this particular war shows that their application is often contested, and that they are susceptible to manipulation.

**Just War Theory in Historical Perspective and the Roots of *Jus Post Bellum***

While *jus post bellum* appears to be a modern invention, this third branch is not entirely new. The third chapter consists of a historical contextualization of just war theory, with an eye to *jus post bellum*. It outlines four major periods: classic just war theory, the transition to the law of nations, the heyday of positivism, and the present revival of just war theory.

1. Already in early history, just war theorists reflected on the morality of war. A comprehensive account of the idea of a just war, based on universal natural law, was developed by the Cicero (106-43 BC). Cicero identifies a central idea of just war theory, namely that the normal state of affairs is peace, and that war forms the exception that can only be justified as an instrument to protect or reestablish that peace. Saint Augustine (354-430) also emphasizes that peace is the ultimate end of war; which makes war a goal oriented activity. Thomas Aquinas (1224-1274) confirms that teleological character of war. Even those who seek war desire peace; they want to replace a ‘defective peace’, in which they are at peace on terms contrary to their desires, by a ‘more perfect peace’. But while this laid the foundation for *jus post bellum*, these post bellum norms were still quite general. This changed with the theory of Francisco de Vitoria (1480-1546), who provides a comprehensive and clear account of all three branches of just war theory. Moderation after the war is needed, as well as humility and proportionality.

2. A clear shift in theorizing about war and peace took place after the brutal religious wars in Europe. The Peace of Westphalia gave rise to modern nation-states. These sovereign states needed to regulate their external affairs, which led to the codification of international rules: the so-called law of nations. Hugo Grotius (1583-1645) marks the difference between traditional natural law and the law of nations (*jus gentium*), the latter being international law based on the will of independent nations. In this new ‘dualist’ system, these two systems are distinct. Although this law of nations imposes few restraints on victors after war, the victor should however be
Summary

guided by the moral principles of moderation and clemency. Grotius claimed that it is essential to keep in mind the prospect of peace in the midst of a war, and therefore to let considerations of humanity govern both the hostilities and the period after the war.

3. The following period was the heyday of positivism. This period set the stage for modern international law, with an enormous growth of codified legal rules. Questions of war and peace were considered from a purely legal framework, and moral just war theory became marginalized. War was an accepted instrument of states in the pursuit of their national policy goals. Consequently, war was seen as a ‘normal’ condition in international relations. There was no more reference to moral post bellum principles; the era of ‘victor’s justice’ had well and truly arrived.

4. The outbreak of the First World War marks the beginning of the present period. War became a matter of legal and moral consideration again. Certain key principles of traditional just war theory reappeared, such as just cause, and space was opened for (the revival of) jus post bellum. In this period, the League of Nations and subsequent United Nations were established. War was gradually rejected as a normal instrument in the hands of states. Today, war is perceived as a matter of global concern, and peace is again the normal ‘default’ state of affairs. Both legal norms and norms derived from just war theory are invoked in discussions on war and peace. For the jus post bellum, this means that the way states act after war is no longer a matter of discretion of the states involved. While the UN system is far from perfect, the organization plays an increasingly important role in post war peace building. Its focus on a durable peace after a war led to the 1995 ‘Agenda for Peace’ and the 2005 ‘Responsibility to Protect’ doctrine. A Peace Building Commission was established to help states in the transition from war to a durable peace. These developments show the contemporary emphasis on postwar justice. Moreover, now that norms of jus ad bellum and jus in bello are increasingly codified, it seems time to do the same for jus post bellum.

The Blurry Boundaries between War and Peace. Do we Need to Extend Just War Theory?

The fourth chapter addresses another challenge for contemporary just war theory (in addition to the challenges raised in the second chapter). While just
war theory is often said to be the leading position on the morality of war, it is in fact struggling to keep up with the changing international reality. It is premised upon a certain conception of war – as armed conflict between two states – and on a clear demarcation line between the situation of war and the situation of peace. This however, seems to no longer fit the political reality. Many agree that war itself and the way in which it is waged are different today as compared to earlier in history (the debate on the ‘new and old wars’). An important trend is that the number of wars between the armies of two states has declined since the Second World War. Also, it is often unclear whether a violent conflict qualifies as war, making it more difficult to separate the paradigm of war from that of peace. More often than not, we find ourselves in a grey area. This political reality, the changed character of war(fare), and the often blurry boundaries between war and peace raises questions of relevance and applicability.

An extension of just war theory seems to be a sensible way to ‘modernize’ just war theory, making it better equipped to face this challenge. A branch called *jus ante bellum*, preventive peacemaking, is sometimes suggested to precede *jus ad bellum*. Its norms would apply in peacetime, in the absence of a particular war or threat of war. The content of what is proposed for this branch varies: *jus ante bellum* is proposed in order to prepare for war in general (e.g. instructing the military on *jus in bello*), or it is proposed in order to prevent war from occurring at all. This latter conception of *jus ante bellum* is also referred to as *jus in abolitione belli* or ‘just peacemaking’. *Jus post bellum*, justice after the war, is the welcomed branch that could provide post war guidance. It is used to refer to either a body of legal norms or moral norms, or both, aimed at regulating the transition from war back to a ‘normal’ state of peace. As such, it provides a framework guiding political and military action, and it forms a standard which can be used to evaluate and judge specific post war situations.

This chapter explores a *prima facie* case for a four partite just war theory. Nevertheless, it is argued that it is not a good idea to integrate *jus ante bellum* into just war theory. It does not conceptually fit in as it consists of general guidelines instead of moral norms, the regulated activities and the addressees deviate from the established branches, and the foundation must be located entirely outside just war theory. Moreover, the goal of a just and durable peace would not, as perhaps expected, benefit from an integration of *jus ante bellum* because its guidelines are too indeterminate, idealistic and demanding compared to traditional just war theory. Aside from these conceptual difficulties and the infeasibility, adopting *jus ante bellum* would run the general
risk of inflating just war theory as a whole.

On the contrary, *jus post bellum can* be integrated. Namely, *jus post bellum* is conceptually connected to just war theory’s other branches, it offers norms that are independent but similar qua character and content, these norms apply to war related activities, they can be grounded in the limited moral framework of just war theory, and (as general just war theory) they address primarily (former) belligerents. However, these arguments are mainly valid for a limited conception of *jus post bellum*: minimalist *jus post bellum* is more consistent with the entirety of just war theory than a comprehensive maximalist *jus post bellum*. Integrating only a limited account of *jus post bellum* into the theory would be a good idea. This way, just war theory is more ‘complete’ in offering the required moral guidance in the contemporary political reality while at the same time conceptually leaving just war theory intact, and minimizing the risk of inflating and devaluating the theory.

**On the Duty to Reconstruct after War. Who is Responsible for *Jus Post Bellum*?**

After war, how should we distribute post war duties? It is far from clear who is responsible for realizing *jus post bellum*. This uncertainty about specific duty bearers might lead to a situation in which no one will properly acquit these duties, and the critique could be raised that *jus post bellum* is in fact merely empty rhetoric. For the theory to be action guiding and effective, it is crucial to distribute post war duties. In the contemporary debate on *jus post bellum*, responsibility is assigned to different actors, based on different moral or prudential arguments. Two main positions can be distinguished. The first position holds that *post bellum* duties should be assigned to the states that took part in the war: the former belligerents. Michael Walzer is an important representative of the ‘belligerents rebuild thesis’. This position is based on the idea that *post bellum* duties are implied in the cause for war, and on the idea that the just victor is responsible based on the Pottery Barn Rule: ‘you break it, you own it.’ Others, among them James Pattison, reject the ‘belligerents rebuild thesis’, because assigning *post bellum* duties to belligerents leads to unfair and imprudent outcomes. These theorists defend the second position, the ‘universal rebuild thesis’, which holds that the international community as a whole is responsible for rebuilding after war. But if this is so, then there need to be certain conditions that can distribute specific duties (e.g. to reconstruct) to
specific actors. This means that we need a comprehensive theory on responsibility for *jus post bellum*.

The fifth chapter explores the issue of responsibility, and answers two questions: 1. Which conditions can serve as the foundation for post war duties?; and 2. How to balance these conditions in concrete situations? David Miller’s theory on responsibility is used to address these questions, since the question on how to assign post war duties is essentially a question about collective remedial responsibly: Which states are responsible for remedying postwar damage and destruction? Six conditions for assigning remedial responsibility are discussed and applied to various post war situations: moral responsibility (guilt), outcome responsibility (contribution to a certain outcome), causality, benefit (past or future benefits), capability, and community. A seventh condition further helps to gain insight into the foundation for remedial responsibility after war: H.L.A. Hart’s concept of role responsibility.

The second question involves setting up a system for assigning the duty to reconstruct to specific actors in concrete situations. It is argued that instead of picking one of these conditions as the foundation for post war duties, we need a system that combines these seven backward and forward looking conditions. Such comprehensive system should do justice to the morally relevant considerations, while at the same time remaining focused on the aim of halting post war deprivation. The first step in allocating post war duties is determined by the condition of capability, which functions as precondition for assigning remedial responsibility. In order to halt post war deprivation and help create a just and lasting peace it is prerequisite that an actor is capable to achieve (part of) this goal. The second step is determined by the conditions of moral, outcome, and role responsibility. War involves intentional and collectively inflicted destruction, and is a great evil. Since there is a strong presumption that actors bear the burdens of their own actions, moral and outcome responsibility must remain important considerations when assigning the duty to reconstruct. Also, states can be responsible for post war reconstruction because of their specific role (e.g. as humanitarian intervener) and the promise of achieving certain results, which creates legitimate expectations. As third step, the conditions of causality, benefit and community further help in the distribution of post war duties.

This system thus presumes that belligerents are responsible for reconstruction after war. Nevertheless, it is assumed that it is morally unacceptable for people to be left in a deprived situation after war. Therefore,
the aim of halting post war deprivation and of building peace compels us to widen the scope of responsibility beyond the belligerents in certain situations. The ‘belligerents rebuilt thesis’ must therefore be understood in a more nuanced way than it initially appeared: belligerents are not solely responsible. If they cannot bear the duty to reconstruct themselves, other actors are remedially responsible instead. In that case, the duty to remedy post war deprivation does not shift to an indeterminate ‘international community’. Rather, the various conditions can be used to assign the duty to reconstruct to other specific actors. And while this might not make indisputably clear who is responsible after war, this system does help to distribute post war duties, which is essential for an effective *jus post bellum*.

**Jus Post Bellum. A Case of Minimalism versus Maximalism?**

The debate on *jus post bellum* is often characterized as a debate between two opposing camps: the so-called ‘minimalists’ versus the ‘maximalists’. How are these two positions characterized and what is the difference between them? The minimalistic or restricted position on *just post bellum* supposedly aims to restrict post war behavior and, therefore, consists mainly of negative moral imperatives. For example, there is a presumption against reconstruction of the defeated state. Victors are permitted to secure the cause that justified the war, but nothing more than that. This stems from the wish to prevent excesses by victors acting out of self-interest. This restricted understanding of post war norms means that they are relevant during a fairly short time-span: they apply to the end of war and its immediate aftermath.

The maximalist or extended position on *jus post bellum* is more ambitious. *Jus post bellum* is said to consist mainly of positive obligations, determining what actors are allowed or even obliged to do after war. Instead of fear for victors taking advantage of the defeated party, thus doing too much, maximalists fear that victors will leave having done too little. Maximalist *jus post bellum* therefore goes beyond addressing the injustice that was the cause for the war. The norm of political reconstruction is more broadly interpreted and additional norms are: forgiveness and reconciliation, reconstruction of infrastructure, economic development, and compensation for environmental damage. As a consequence of these broad and varied commitments, more time will be needed for the acquittal of these obligations. Therefore, maximalist *jus post bellum* continues to be applicable for a longer period after the end of the war.
However, sixth chapter makes clear that we cannot make this distinction so easily; it is simply not this 'black and white'. More often than not, contributions to the debate can hardly be labeled as either minimalist or maximalist. While the prevailing characterization of these two positions (negative versus positive obligations, limited versus extensive norms, a short versus long timeframe, limited versus unlimited by the just cause) might have counted for a position called 'minimalism proper', this position is today abandoned. Therefore, this characterization has lost its usefulness. In essence, all contemporary accounts of *jus post bellum* are maximalist to a certain extent. Maximalism is the new standard of normative thinking about *jus post bellum*.

There are nevertheless gradual differences between the main positions. What then determines the content and scope of *jus post bellum*? A larger perspective is needed to pinpoint these variations. This shows that the content and scope of post war norms depend on two factors. First, the particular situation to which just war theory applies, notably the type of war and the nature of the involved state. Second, the general view on just war theory and international relations that is adopted, including ideas on the role of the use of force, the value of sovereignty, the rise of a cosmopolitan morality and the emphasis on individual human rights. Together, these factors explain the shift towards a more comprehensive maximalist understanding of *jus post bellum*.

**Just Peace after War**

The axiomatic goal of just war theory is a ‘just and lasting peace’. Strangely enough, it is far from clear what that is exactly. This is a problem: the concept of peace is central to just war theory, and *jus post bellum* in particular, but it often remains implicit and vague. The shift towards a more comprehensive, maximalist *jus post bellum* makes this problem even more pressing. Hence, the central question in the seventh chapter is: How should a just war theorist understand peace, insofar that peace is the goal of just war theory, taking into account the theory’s middle position between political realism and moral idealism?

This first part of this chapter aims to construct a conceptual toolkit. The general nature of peace is analyzed, and three different facets are discussed: the temporal element of peace (temporary versus eternal), the spatial element of peace (inner versus outer), and the character of peace (negative versus positive). This is used to sketch a continuum of five concepts of political peace, ranging
from a purely negative peace, to a fully positive peace and in between a largely negative peace, a decent peace, and a largely positive peace. Which concept of peace can be the goal of just war theory? David Estlund’s theory on the role of feasibility constraints in normative political philosophy helps to shed light on this question. This explains: 1. Just war theory’s position in between strict political realism and moral idealism; 2. Why the outer two concepts cannot be the goal of just war theory; and 3. How to compare and assess the remaining three concepts of peace as potential goal of just war theory.

In the second part of this chapter, the proposed tool kit is used to map the debate and make explicit the sometimes implicit positions on peace. It appears that although most just war theorists agree that a ‘just and lasting peace’ is the goal of just war theory, they in fact fundamentally disagree on what constitutes such a just peace. Also, there is a shift in just war theorizing towards a more positive concept of peace. Contemporary just war theorists understand a ‘just and lasting peace’ in two ways: as a ‘decent peace’ or as a ‘largely positive peace’. Michael Walzer is a representative of a decent peace. The connection between peace and justice is strong, but minimalist, he argues. More concretely, this means that the peace after war involves the reconstruction of a sovereign state which is a safe and decent society, determined by a minimal conception of human rights, and an emphasis on collective self-determination. Other just war theorists move further towards the positive side of the continuum. Cecile Fabre is cosmopolitan, individual-centered, and overall more idealistic. Fabre holds that a just peace after war entails that individuals are capable of leading not only a minimally decent life but a flourishing life, and that requires e.g. bodily integrity, basic health, emotional and intellectual flourishing and control over material resources and political environment.

Upon a closer look however, it seems that these aspirational theorists are so primarily in theory, but not in practice. They correct that goal of a largely positive peace, but this is an ex post feasibility test. For example, Fabre distinguishes between a ‘just peace simpliciter’ and a ‘justified peace all things considered’. Because it is not always possible to effectuate a just peace in reality, that ideal can justifiably be traded off. This concept of a justified as opposed to a just peace brings us back to our concept of a decent peace. As a result, the goal of a largely positive peace, or just peace simpliciter, functions as regulative ideal.

How should a just war theorist, concerned with jus post bellum, understand peace? The shift towards a more positive understanding of peace should not go too far, even if it functions primarily as regulative ideal. This chapter argues that
we should not seek a largely positive peace after war while being prepared – all things considered – to settle for justified decent peace. Rather, it might be that a decent peace after war is a just peace. Three arguments are presented for this claim.

The first is related to the specific character of just war theory. Just war theory wants to limit the awfulness of war. It is an action guiding theory, applicable to the flawed non-ideal world that we live in. In order to be effective, just war theory needs to offer norms which are both achievable in the real world, as well as desirable – explained often in terms of human rights. This means that just war theory must make concessions to circumstances (politics, institutions and culture, e.g. imposing democracy might be difficult in the absence of certain social structures) and psychological motivations, insofar as they constrain the feasibility (practical possibility) of limiting war and achieving peace in the real world.

Second, we do not need a largely positive peace as regulative ideal since it would exceed the limited nature of just war theory. Just war theory is not a vector for the realization of human rights broadly perceived, but instead is there for protecting the most fundamental values in the messy and complex reality of war and its aftermath. It is a problem-centered theory, designed to regulate the specific occurrence of war. The idea that war can serve morally lofty goals increases the danger that it will be used without the sort of restraints that are central to it. Setting a largely positive peace as regulative ideal – based on an overambitious human rights approach – will make *jus post bellum* an ongoing process with no clear end in sight, guided by some ideal of a just world in the distant future. Given the specific domain to which just war theory applies, this greatly overstretches the theory’s boundaries.

Third and related, there is the danger of moral imperialism, ethnocentrism and imposition of ‘Western values’. The implementation of the full range of rights after war, especially when emphasizing ‘liberal rights’, increases the risk for the well-known critique of Western imperialism. This risk is particularly high when victors after war are obligated, as part of *jus post bellum*, to realize these human rights so that people in the war affected area can lead a ‘flourishing life’. If steps towards a positive peace are taken, that should take place outside the domain of just war theory.

Hence, endorsing a largely positive peace as normative goal for just war theory is a bad idea for various reasons: 1. It is ineffective since it sets a moral standard so high that it will not be achieved in practice; 2. Undesirable since it
allows ongoing peace building with no clear end in sight, which goes well beyond the limited nature of just war theory; and 3. Potentially immoral, since it nearly conflates peace with a ‘pristine’ concept of justice, explained in terms of human rights (broadly perceived), potentially accompanied by a certain political structure and economic system, of which the universality is contested. In the messy reality of war and war’s aftermath, it is wise to be modest.

What should be realized at war’s end is a ‘just and lasting peace’ understood as a decent peace, which is stable for a substantial period of time and in which basic human rights are secured. This might require forward looking provisions as part of jus post bellum – e.g. food and shelter – to relieve post war deprivation in the immediate aftermath of war. And while it can be difficult to precisely determine when a decent peace is reached, or what it entails exactly, this goal makes just war theory most effective in limiting the awfulness of war.

Decent Peace and Medium Jus Post Bellum

The examples of wars with disastrous aftermaths have led to a more cautionary approach in the political reality of today. International reports stress the importance of e.g. considering the risks of military interventions, setting realistic goals and a feasible exit strategy. Oddly enough, just war theory seems to develop in an opposite direction: there is a shift towards an ever more encompassing jus post bellum. This book critically assessed the concept of jus post bellum. Three questions were raised by the Iraq war: What do we want to do after war? What can we do? And what should we do? While this book delved into the last question, it shows that these three questions cannot, in fact, be separated. Moreover, the first two questions are essential when trying to answer the third: what we should do after war is determined by the right balance between what we ideally would want to achieve, and what we can achieve in practice. That balance between desirability and feasibility results in the defense of a ‘decent peace’ as the normative goal of just war theory. Hence, this book pleads for modesty in post war justice and warns for a too radical theoretical shift.

The path to a decent peace is a medium jus post bellum, with an emphasis on responsible duty bearers. This moderate middle way – inspired by Vitoria’s and Grotius’ principle of moderation – appears to be the most consistent, coherent and effective understanding of jus post bellum. First, as opposed to minimalism it improves the theory, and as opposed to maximalism, it remains more
consistent with the character of the entirety of just war theory: it does not exceed its limited character, is tolerant with regard to cultural differences and other values, does not conflate the theory with a theory of global justice, and offers similar norms qua character, content and addressees. Second, medium *jus post bellum*, in which it is relatively clear who bears responsibility for what, is internally coherent as a body of norms. It aims to create a decent and safe society after war in which basic human rights are secured, and is concerned with both individual wellbeing as the collective self-determination of peoples. Limited political reconstruction may be part of *jus post bellum* in case of a power vacuum. Moreover, if the right to life is jeopardized by a lack of means of subsistence, providing these basic necessities is also part of *jus post bellum*. Former belligerents are responsible for realizing *jus post bellum*, although other actors can be assigned post war duties when former belligerents are incapable. Third, medium *jus post bellum* is most effective in limiting the horrible effects of war. It sets a high enough moral standard, while making sure it is not so high that will not be achieved in practice. Medium *jus post bellum* spells out the path towards a lasting peace which is ‘just enough’, instead of perfectly just.

The book concludes that a modern just war theory *must* take the issue of post war justice into account. The findings provide the needed theoretical clarity on this relatively new and arguably important topic, and contribute to the development of *jus post bellum*. Finally, over and above, the greatest hope of this research is that integrating this branch in just war theory will indeed limit the negative effects of war, and support the reestablishment of peace after real world wars. A medium *jus post bellum*, aimed at the transition to a decent peace, with an emphasis on the responsible duty bearers has the best chance to do that. This understanding of *jus post bellum* might be modest, but has the potential to improve many post war situations.
Nederlandse samenvatting

Rechtvaardigheid na de Oorlog

Dit boek begint met een korte beschrijving van de rampzalige nasleep van de oorlog in Irak, wat de complexiteit en tegelijkertijd het belang laat zien van naoorlogse vredesopbouw. Dergelijke situaties, waarvan we er helaas meer zien vandaag de dag, roepen drie belangrijke vragen op: Wat willen we bereiken na de oorlog? Wat kunnen we doen? En wat moeten we doen? De eerste vraag gaat over hoop en idealen, de tweede over strategie en de derde over naoorlogse rechtvaardigheid. Naoorlogse rechtvaardigheid staat tegenwoordig hoog op de agenda. Dat komt omdat voorbeelden zoals Irak een bredere ontwikkeling laten zien: het karakter van oorlog is veranderd en de nasleep van oorlog is belangrijker geworden. Tegelijkertijd is hedendaagse vredesopbouw zeer complex.

De theorie van de rechtvaardige oorlog is een toonaangevende theorie als het gaat om morele kwesties van oorlog en vrede. Traditioneel bestaat deze theorie uit twee onderdelen: het *jus ad bellum* en het *jus in bello*. Het eerste biedt normen die bepalen wanneer het rechtvaardig is een oorlog te beginnen, het tweede biedt normen die bepalen welke militaire acties in een oorlog rechtvaardig zijn. Er is binnen deze theorie relatief weinig aandacht voor de nasleep van oorlog, en gezien de geschetste ontwikkeling is dat nu problematisch. Daarom is er een nieuwkomer binnen de theorie van de rechtvaardige oorlog: het *jus post bellum*. Dit derde onderdeel biedt vergelijkbare normen die van toepassing zijn op de situatie na afloop van een oorlog. Dat is het onderwerp van dit boek: naoorlogse rechtvaardigheid in de theorie van de rechtvaardige oorlog, ofwel het *jus post bellum*.

Het *jus post bellum* wordt verwelkomd als oplossing voor de moeilijkheden die zich na afloop van een oorlog voordoen. Het eerste voorstel voor *jus post bellum* dateert van 1994 en sinds 2004 wordt er regelmatig over dit onderwerp gepubliceerd. In het algemeen bepaalt het *jus post bellum* wat het moreel juiste gedrag is na de oorlog. Wat is rechtvaardig wanneer de oorlog eenmaal is afgelopen? Het *jus post bellum* omvat normen op het gebied van orde en veiligheid, politieke wederopbouw, strafrechtelijke rechtvaardigheid, restituties, reparaties en compensaties, algemene reconstructie en verzoening tussen voormalige vijanden.

Maar ondanks deze belangrijke theorerisering blijft er een probleem bestaan in de reflectie op het *jus post bellum*. Omdat dit onderdeel van de theorie van de
rechtvaardige oorlog relatief nieuw is, is het niet volledig uitgekristalliseerd en blijven wezenlijke elementen onduidelijk. Bovendien is het algemene doel van de theorie van de rechtvaardige oorlog het bereiken van een rechtvaardige en duurzame vrede, terwijl het helemaal niet duidelijk is wat zo’n vrede precies inhoudt. Omdat het *jus post bellum* de transitie naar vrede reguleert, is het van cruciaal belang om beter grip te krijgen op het concept ‘rechtvaardige vrede’ in aanvulling op het concept ‘rechtvaardige oorlog’. Dit vormt het centrale probleem dat in dit boek aan de orde komt: de vaagheid en onduidelijkheid van het *jus post bellum*. Hoe kunnen we het concept *jus post bellum* verhelderen en verder ontwikkelen? Deze centrale vraag leidt tot verschillende subvragen: Hoe worden de normen van de theorie van de rechtvaardig oorlog toegepast op specifieke oorlogen? Wat zijn de uitdagingen waarmee de theorie kampert? Wat was de status van het *jus post bellum* in de geschiedenis van deze theorie? Past het *jus post bellum* conceptueel gezien binnen de hedendaagse theorie van de rechtvaardige oorlog? Wie zijn de verantwoordelijke actoren, ofwel de dragers van naoorlogse plichten? Wat is de inhoud en reikwijdte van het *jus post bellum*? Wat zijn de sterke en zwakke kanten van de verschillende posities? En wat is het uiteindelijke doel van de theorie van de rechtvaardige oorlog en het *jus post bellum*? Met andere woorden: hoe ziet een rechtvaardige vrede eruit?

Deze vragen worden beantwoord op basis van een literatuuronderzoek. Het debat ten aanzien van het *jus post bellum* wordt in kaart gebracht en geanalyseerd, belangrijke concepten, argumenten en posities worden gesystematiseerd, en aspecten uit de algemene theorie van de rechtvaardige oorlog, rechtsfilosofie en politieke filosofie worden toegepast op naoorlogse rechtvaardigheid om onduidelijkheden op te helderen. Het doel van dit onderzoek is tweeledig: 1. Het concept van *jus post bellum* verder uitwerken teneinde bij te dragen aan een beter begrip ervan (analytisch); en 2. Het *jus post bellum* kritisch beoordelen (normatief). Met betrekking tot het laatstgenoemde doel is de veronderstelling dat, om de theorie van de rechtvaardige oorlog werkelijk te verbeteren, het *jus post bellum* consistent moet zijn met de theorie als geheel, een intern coherent geheel moet vormen, moet aansluiten bij de hedendaagse realiteit, en effectief moet zijn in het beperken van de negatieve effecten van oorlog. Deze kritische beoordeling leidt uiteindelijk tot een pleidooi voor een bescheiden opvatting van naoorlogse rechtvaardigheid.
**Inter Arma Silent Leges? Over de Moeizame Verhouding van het Recht tot de Oorlog**

Het tweede hoofdstuk behandelt de theorie van de rechtvaardige oorlog in het algemeen, inclusief de twee belangrijke alternatieve posities. Ook wordt de theorie toegepast op een daadwerkelijke oorlog teneinde twee belangrijke uitdagingen te laten zien: de epistemologische problemen en de complexe realiteit van oorlog.

In het denken over oorlog en vrede is vandaag de dag de morele begrippenwereld van de theorie van de rechtvaardige oorlog dominant geworden. Er zijn echter twee alternatieven: het pacifisme en het realisme. Het pacifisme neemt het verbod op doden dermate serieus, zeker in de context van een strijd tussen politieke gemeenschappen, dat het oorlog op morele gronden afwijst. Oorlog kan nooit moreel gerechtvaardigd zijn en er moet altijd gezocht worden naar geweldloze middelen om onrecht aan de kaak te stellen. Het realisme stelt daarentegen dat morele onderscheidingen er helemaal niet toe doen in oorlog. Geweld wordt gereduceerd tot iets onvermijdelijks dat samenhangt met de aard van de mens, maar zich aan diens beslissingsmacht onttrekt. In oorlog tellen alleen machtsverhoudingen en eigenbelang, de *raison d’état*. Beide alternatieven worden in dit hoofdstuk verworpen omdat zij geen van beide morele onderscheidingen maken ten aanzien van oorlog; onderscheidingen die wel degelijk gemaakt *kunnen* en *moeten* worden. Morele principes zijn van toepassing op oorlog, en de theorie van de rechtvaardige oorlog biedt belangrijke bouwstenen voor de beoordeling van concrete oorlogen.

Hoe zien deze bouwstenen eruit? De drie onderdelen van de theorie van de rechtvaardige oorlog bieden verschillende (maar gerelateerde) sets van normen en principes die helpen om oorlog te reguleren. Het *jus ad bellum* specificeert wanneer een oorlog op een gerechtvaardigde manier kan worden begonnen. Er moet worden voldaan aan zes criteria: zwaarwegende reden, bevoegde autoriteit, juiste intentie, laatste redmiddel, redelijke kans op succes en proportionaliteit. Gezien het zware instrument van oorlog moet men een zeer zwaarwegende reden hebben om over te gaan tot militair geweld, bijvoorbeeld zelfverdediging tegen agressie. Vaak wordt dit criterium uitgelegd in termen van het herstellen van geschonden rechten. Alleen het hoogste, bevoegde gezag mag deze zware beslissing nemen. De intentie moet goed zijn; de oorlog is gericht op het herstel van onrecht en is geen excuus voor het verwezenlijken van een verborgen agenda. Bovendien mag alleen tot oorlog worden overgegaan als alle andere
mogelijkheden om het aangedane onrecht te herstellen zijn uitgeput. Oorlog is een *ultimum remedium*. Ook moet er een redelijke kans zijn dat de oorlog succesvol zal zijn. Zinloze oorlogen en massaal geweld zijn verboden. Tot slot moet een afweging worden gemaakt tussen de schade die met de oorlog wordt aangericht en het voordeel dat door deze vorm van ‘rechtsherstel’ wordt bereikt. De kosten van het voeren van de oorlog moeten, met andere woorden, in een proportionele verhouding staan tot de baten.


Het *jus post bellum* geeft vervolgens aan welke eindtoestand gerealiseerd moet worden. Dit onderdeel van de theorie biedt criteria die ervoor zorgen dat de overwinnaar geen misbruik maakt van zijn positie. Op die manier draagt het bij aan het beperken van de negatieve effecten van oorlog, door bijvoorbeeld voor te schrijven dat er geen economisch misbruik wordt gemaakt van de verliezer, dat er geen marionettenregering wordt geïnstalleerd en dat er geen onrechtvaardige vredeseisen worden opgelegd. Samengevat laten deze criteria van het *jus ad bellum, jus in bello* en *jus post bellum* een beeld zien van een rechtvaardige oorlog die begonnen is met een zwaarwegende reden, op een beperkte manier wordt gevoerd en met een rechtvaardige en duurzame vrede eindigt.

Deze normen worden vervolgens toegepast op de Gaza-oorlog in 2008-2009, en gebruikt om het debat ten aanzien van de rechtvaardigheid van deze oorlog te analyseren. Dat maakt duidelijk dat de normen van de theorie van de rechtvaardige oorlog een grote rol hebben gespeeld. Maar deze analyse laat ook het problematische karakter van de theorie zien: de concrete toepassing van de abstracte normen op de complexe realiteit van oorlog is uitermate moeilijk. Aangezien de Gaza-oorlog geen duidelijk geval van zelfverdediging tegen agressie is, rijst de vraag hoe we de criteria moeten toepassen. Omdat ze vrij
algemeen en plooibaar zijn, hangt de toepassing ervan bovendien van een bepaalde lezing van de feiten af, en van politieke voorkeur. Er rijzen allerlei epistemologische problemen, zoals: In hoeverre kennen we de feiten waarop we de normen toepassen?; En hoe interpreteren we de abstracte principes? Met andere woorden: terwijl begrippen zoals zelfverdediging, proportionaliteit en non-combattantenimmuniteit regelmatig worden gebruikt in het publieke debat, laat dit hoofdstuk zien hoe moeilijk de toepassing op de weerbarstige realiteit is, dat conclusies op basis van deze criteria alsnog kunnen worden betwist, en dat het risico bestaat dat ze gemanipuleerd of misbruikt worden.

De Theorie van de Rechtvaardige Oorlog in Historisch Perspectief en de Oorsprong van het Jus Post Bellum

Hoewel het jus post bellum een moderne uitvinding lijkt te zijn, is dit onderdeel in feite niet geheel nieuw. Het derde hoofdstuk biedt een kort historisch overzicht van de theorie van de rechtvaardige oorlog, met het oog op het jus post bellum. Vier belangrijke periodes worden achtereenvolgens geschetst: de klassieke theorie van de rechtvaardige oorlog, de overgang naar het volkenrecht, de hoogtijden van het positivisme en het huidige systeem van internationale organisaties.

1. Er wordt sinds jaar en dag nagedacht over de moraliteit van oorlog. De term ‘rechtvaardige oorlog’ werd al gebruikt door Aristoteles (384-322 v. Chr.). Een uitgebreidere uiteenzetting van deze theorie, gebaseerd op universele natuurwetten, werd ontwikkeld door de Romeinse bestuurder en filosoof Cicero (106-43 v. Chr.). Cicero identificeert een belangrijk uitgangspunt van de theorie van de rechtvaardige oorlog, namelijk dat de normale toestand in de wereld vrede is en dat oorlog een uitzondering is die alleen kan worden gerechtvaardigd als een instrument om deze vrede te beschermen of te herstellen. In de eerste eeuwen van onze christelijke jaartelling kreeg het pacifisme de overhand. Vroegchristelijke kerkvaders zoals Tertullianus predikten absolute geweldloosheid. Dat veranderde echter in de vierde eeuw na Christus. De Kerk kreeg politieke macht en de pacifistische afwijzing van oorlog vormde een struikelblok voor de nieuwe politieke aspiraties. Augustinus (354-430) – samen met Cicero een van de grondleggers van de theorie van de rechtvaardige oorlog – probeerde het christelijke pacifisme te verenigen met de politieke wens om oorlog in bepaalde gevallen goed te keuren. Zijn theorie bepaalt dan ook dat zowel defensieve oorlogen ter
bescherming van de christelijke gemeenschap, als offensieve oorlogen ter bestraffing van kwaad, in bepaalde omstandigheden rechtvaardig kunnen zijn. Augustinus benadrukt bovendien dat vrede het ultieme doel is van de oorlog. Thomas van Aquino (1224-1274) bevestigt dit teleologische karakter van oorlog. Hij voert aan dat ook het beginnen van oorlog gebeurt vanuit een verlangen naar vrede; men wil een ‘gebrekkige vrede’ vervangen door een ‘volmaaktere vrede’. Maar hoewel deze opvattingen de basis leggen voor het *jus post bellum*, is dat nog steeds vrij algemeen. Dat veranderde met de het werk van Francisco de Vitoria (1480-1546), die een complete uiteenzetting geeft van alle drie de onderdelen van de theorie. Voor Vitoria is een rechtvaardige oorlog een reactie op onrecht. Ten aanzien van het *jus post bellum* schrijft hij voor dat de overwinnaar de verliezer niet mag ruïneren. Wat de overwinnaar wel mag doen na de oorlog wordt beperkt door het herstellen van de geschonden rechten. Van het grootste belang na de oorlog zijn de principes matiging, nederigheid en proportionaliteit. De winnaar kan deze principes toepassen door zichzelf te zien als een rechter die een onpartijdig oordeel velt.

2. Een duidelijke verschuiving in de theorievorming over oorlog en vrede vond plaats na de religieuze oorlogen in Europa. De Vrede van Westfalen vormde het begin van een nieuwe internationale gemeenschap van soevereine natie- staten. Deze soevereine staten wilden hun onderlinge relaties reguleren, en dat leidde tot de codificatie van internationale regels: het volkenrecht. Hugo de Groot (1583-1645) scheef in deze periode zijn klassieke werk: *Over het recht van oorlog en vrede*. Hij maakte een duidelijk onderscheid tussen het morele natuurrecht en het juridische volkenrecht (*ius gentium*). En hoewel het volkenrecht de strijdende partijen maar weinig beperkingen oplegt, hecht Hugo de Groot toch veel belang aan de morele principes als een manier om de negatieve effecten van oorlog te beperken. Evenals de klassieke theoretici was hij ervan overtuigd dat de normale toestand in de wereld vrede is, en oorlog de uitzondering die slechts is toegestaan als bepaalde rechten zijn geschonden. Ten aanzien van het *jus ad bellum* focust hij op het natuurrecht, en hij onderscheidt verschillende zwaarwegende redenen voor oorlog: de verdediging tegen (de dreiging van) agressie, het terugnemen van wat de staat toebehoort en de bestraffing van onrecht. Voor wat betreft het *jus post bellum* schrijft Hugo de Groot voor dat de overwinnaar zich moet laten leiden door de morele principes van matiging en clementie. Het is essentieel, zo stelt hij, de toekomstige vrede tijdens de oorlog in het oog te houden. Humanitaire
overwegingen moeten de boventoon voeren zowel tijdens de vijandelijkheden als na afloop van de oorlog.

3. De volgende periode wordt gekenmerkt door de hoogtijden van het positivisme, waarin de basis gelegd voor het moderne internationale recht. Het aantal gecodificeerde rechtsregels groeide aanzienlijk. Dit betekende echter dat kwesties van oorlog en vrede uitsluitend werden bezien vanuit een zuiver juridisch kader. De morele principes van de theorie van de rechtvaardige oorlog verdwenen naar de marge. Oorlog was een geaccepteerd instrument van staten die hun eigenbelang en machtspositie wilden veiligstellen of vergroten. Bijgevolg werd niet vrede maar oorlog gezien als de normale toestand in de wereld. De morele principes van de theorie van de rechtvaardige oorlog raakten volledig uit beeld. In dit tijdperk bepaalde de overwinnaar de regels na afloop van de oorlog.


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De Vage Grenzen tussen Oorlog en Vrede. Moet de Theorie van de Rechtvaardige Oorlog Worden Uitgebreid?

Het vierde hoofdstuk begint met een andere uitdaging voor de hedendaagse theorie van de rechtvaardige oorlog (in aanvulling op de twee uitdagingen die in het tweede hoofdstuk werden besproken). Hoewel de theorie toonaangevend is op het gebied van oorlog en vrede, lijkt zij achter te lopen op de veranderende internationale realiteit. De theorie van de rechtvaardige oorlog is gebaseerd op een bepaalde opvatting van oorlog, namelijk als een gewapend conflict tussen twee staten, en op een duidelijk onderscheid tussen oorlog en vrede. Dit beeld van oorlog is echter niet meer representatief voor de huidige politieke realiteit.

Verschillende onderzoekers zijn het erover eens dat zowel het karakter van oorlog als de manier waarop oorlog wordt gevoerd heel anders is dan vroeger (het gaat hier om het debat ten aanzien van de ‘nieuwe en oude oorlogen’). Een belangrijke verandering is dat conventionele oorlogen – die van start gaan met een oorlogsverklaring, tussen twee professionele legers worden uitgevochten en met een vredesverdrag eindigen – tot het verleden lijken te behoren. Ook is het vaak onduidelijk of een bepaalde situatie überhaupt wel een oorlog genoemd kan worden. Denk hierbij aan vredesoperaties, militaire bezettingen, burgeroorlogen, de ‘oorlog tegen het terrorisme’ en luchtaanvallen door onbemande drones buiten oorlogsgebied. Het kan lastig zijn om het paradigma van oorlog en het paradigma van vrede strikt te scheiden. Vaak bevinden we ons in een grijs gebied. Deze politieke realiteit, het veranderende karakter van oorlog(voering) en de vage grenzen tussen oorlog en vrede roepen vragen op naar de praktische relevantie en toepasbaarheid van de theorie van de rechtvaardige oorlog. Is de theorie nog van deze tijd?

Een uitbreiding met twee ‘nieuwe’ onderdelen lijkt een zinvolle manier om de theorie van de rechtvaardige oorlog te ‘moderniseren’, waardoor deze beter aansluit bij de huidige realiteit. Dat kan ten eerste door de introductie van het *jus ante bellum*, dat voorafgaat aan het *jus ad bellum*. Het gaat hier om normen die gelden in vredestijd, wanneer er geen specifieke oorlog of oorlogsdreiging is. De inhoud van wat onder deze noemer wordt voorgesteld varieert: het *jus ante bellum* is bedoeld als algemene voorbereiding op oorlog (bijvoorbeeld soldaten trainen in het *jus in bello*) of het is bedoeld om oorlog juist helemaal te voor- komen. Deze laatste opvatting van het *jus ante bellum* wordt ook wel aangeduid als *jus in abolitione belli* of *just peacemaking*. De theorie van de rechtvaardige oorlog kan ten tweede worden uitgebreid door het *jus post bellum*, dat als laatste
onderdeel van de theorie volgt op het *jus ad bellum*. Onder deze noemer wordt verwezen naar een geheel van juridische of morele normen, of beide, ter regulerings van de overgang van oorlog terug naar vrede. Als zodanig biedt het *jus post bellum* regels die richting geven aan politieke en militaire beslissingen en acties na afloop van de oorlog. Bovendien vormt het een standaard die kan worden gebruikt om de nasleep van oorlogen te evalueren en beoordelen.

Dit hoofdstuk verkent verschillende *prima facie* argumenten voor een vierdelige theorie van de rechtvaardige oorlog. Desalniettemin wordt betoogd dat het geen goed idee is om het *jus ante bellum* te integreren in de theorie van de rechtvaardige oorlog: het gaat om algemene richtlijnen in plaats van morele normen, het gaat niet om aan de oorlog gerelateerde activiteiten, is gericht op andere actoren en de fundering ervan moet geheel buiten de theorie van de rechtvaardige oorlog worden gezocht. Bovendien zal het doel van een rechtvaardige en duurzame vrede niet gemakkelijker worden bereikt door het *jus ante bellum* te integreren. De richtlijnen zijn daarvoor hoogstwaarschijnlijk te vaag, te idealistisch en te veeleisend. En afgezien van deze conceptuele moeilijkheden en praktische belemmeringen brengt het integreren van het *jus ante bellum* een serieus risico met zich mee: door te veel onder de theorie van de rechtvaardige oorlog te scharen vermindert de theorie als geheel in waarde en raakt zij overbelast. We moeten ervoor waken de theorie op deze manier op te blazen.

Het *jus post bellum* kan daarentegen wel worden geïntegreerd. Het is conceptueel verbonden met de andere onderdelen van de theorie: het biedt normen die onafhankelijk zijn maar vergelijkbaar qua aard en inhoud, de normen zijn van toepassing op aan de oorlog gerelateerde activiteiten, kunnen worden gefundeerd in het beperkte morele kader van de theorie van de rechtvaardige oorlog en, zoals de andere onderdelen van de theorie, richt het *jus post bellum* zich in de eerste plaats op (voormalige) strijdende partijen. Deze argumenten gelden echter met name voor een beperkte opvatting van het *jus post bellum*; alleen zo’n opvatting is consistente met de theorie als geheel. Dat is een goede reden om slechts een beperkt *jus post bellum* in de theorie op te nemen. Op die manier is de theorie van de rechtvaardige oorlog ‘completer’ en beter toegerust om de hedendaagse oorlogen te reguleren, terwijl zij tegelijkertijd conceptueel gezien in tact blijft en er een minimaal risico bestaat dat de theorie als geheel in waarde vermindert.
Naoorlogse Verplichtingen. Wie is Verantwoordelijk voor het *Jus Post Bellum*?

Hoe moeten we de taken verdelen na de oorlog? In de discussie over het *jus post bellum* is het verre van duidelijk wie verantwoordelijk is voor het realiseren ervan. Die onzekerheid is problematisch, omdat het ertoe kan leiden dat niemand die taken oppakt. Dat zou betekenen dat het *jus post bellum* niets meer is dan een lege huls. Wil de theorie effectief zijn in het beperken van de negatieve effecten van oorlog, dan is het cruciaal om naoorlogse taken aan specifieke actoren toe te wijzen.

Als we naar het huidige debat kijken, zien we dat theoretici verplichtingen aan verschillende actoren toewijzen, op basis van verschillende morele of prudentiële argumenten. Daarbij kunnen twee posities worden onderscheiden. De eerste positie stelt dat naoorlogse verplichtingen moeten worden toegewezen aan de voormalige strijdwijne partijen. Michael Walzer is een belangrijke vertegenwoordiger van deze ‘belligerents rebuild thesis’. Deze positie is gebaseerd op de overtuiging dat naoorlogse verplichtingen voortvloeien uit de zwaarwegende reden voor de oorlog, en het idee dat de overwinnaar verantwoordelijk is gebaseerd op de *Pottery Barn Rule*: als je iets kapot maakt, moet je het betalen. Andere theoretici, onder wie James Pattison, verwerpen deze *belligerents rebuild thesis*. Het toewijzen van naoorlogse verplichtingen aan strijdende partijen leidt tot oneerlijke uitkomsten, zo stellen zij (bijvoorbeeld wanneer de staat die intervenieert om een humanitaire catastrofe te stoppen wordt verplicht dat gebied daarna weer op te bouwen). Deze theoretici verdedigen daarom de tweede positie, de *universal rebuild thesis*, die inhoudt dat de internationale gemeenschap als geheel verantwoordelijk is voor het *jus post bellum*. Maar als dat inderdaad zo is, zullen we ook moeten bepalen hoe specifieke taken (bijvoorbeeld reconstructie) aan specifieke actoren worden toegewezen. Daarom is een uitgebreide theorie ten aanzien van verantwoordelijkheid voor het *jus post bellum* nodig.

Het vijfde hoofdstuk onderzoekt deze kwestie van verantwoordelijkheid en geeft antwoord op twee vragen. Welke voorwaarden kunnen als basis dienen voor naoorlogse verplichtingen? En hoe wegen we deze voorwaarden in concrete situaties? David Millers theorie over verantwoordelijkheid wordt gebruikt om deze vragen te beantwoorden, omdat de vraag naar het toewijzen van naoorlogse verplichtingen in wezen een vraag is naar collectieve herstellende verantwoordelijkheid: welke staten zijn verplicht de schade als gevolg van de
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oorlog te herstellen? Ter beantwoording van de eerste vraag worden zes voorwaarden besproken en toegepast op verschillende naoorlogse situaties: morele verantwoordelijkheid (de schuldvraag), resultaatverantwoordelijkheid (verantwoordelijkheid op basis van een bijdrage aan een bepaalde uitkomst), causaliteit, voordeel (reeds ontvangen of toekomstige voordelen), capaciteit en de gemeenschap. Een zevende voorwaarde helpt nog verder inzicht te krijgen in de basis voor herstellende verantwoordelijkheid na de oorlog: het concept van H.L.A. Harts rolverantwoordelijkheid (verantwoordelijkheid op basis van een bepaalde rol of gedane beloftes).

De beantwoording van de tweede vraag vereist een beoordeling en systematisering van deze voorwaarden. Het doel is om een bijdrage te leveren aan het ontwikkelen van een systeem voor het toewijzen van naoorlogse verplichtingen aan specifieke actoren in concrete situaties. Dit hoofdstuk laat zien dat in plaats van een van deze voorwaarden te kiezen als de basis voor naoorlogse verplichtingen, een systeem vereist is dat deze zeven voorwaarden combineert. Een dergelijk uitgebreid systeem doet recht aan relevante morele overwegingen, terwijl het tegelijkertijd is gericht op het herstellen van schade en het aanpakken van naoorlogse ontberingen.

De eerste stap bij de toewijzing van naoorlogse verplichtingen wordt bepaald door de capaciteit van actoren; een noodzakelijke voorwaarde voor het toewijzen van herstellende verantwoordelijkheid. Met het oog op een rechtvaardige en duurzame vrede moet een actor in ieder geval in staat zijn om (een deel) van dit doel te bereiken. De tweede stap wordt bepaald door de voorwaarden morele verantwoordelijkheid, resultaatverantwoordelijkheid en rolverantwoordelijkheid. Oorlog is een vorm van directe en collectief toegebrachte schade en van geweld, en daarmee een groot kwaad. Op basis van de sterke morele intuïtie dat actoren de lasten moeten dragen van hun eigen daden, moeten morele- en resultaatverantwoordelijkheid belangrijke overwegingen zijn bij het toewijzen van de plicht tot wederopbouw. Staten kunnen ook verantwoordelijk zijn als gevolg van de uitoefening van een specifieke rol (bijvoorbeeld als ‘humanitaire redder’). Als er in het kader daarvan beloften worden gedaan ten aanzien van bepaalde resultaten, dan kunnen die leiden tot legitieme verwachtingen. Als derde stap helpen de voorwaarden causaliteit, voordeel en gemeenschap verder bij het toewijzen en verdelen van naoorlogse verplichtingen.

Zowel de beoordeling van deze voorwaarden als basis voor naoorlogse verantwoordelijkheid als de afweging tussen die voorwaarden in concrete
situaties veronderstelt aldus dat de strijdlende partijen in beginsel verantwoordelijk zijn voor de wederopbouw na de oorlog. Zij zullen echter niet altijd in staat zijn om aan deze verplichting te voldoen. Omdat het moreel onaanvaardbaar is om mensen aan hun lot over te laten in erbarmelijke naoorlogse omstandigheden, kan het noodzakelijk zijn dat we de verantwoordelijkheid breder trekken dan de strijdlende partijen. Dit leidt tot een nuancesering van de *belligerents rebuild thesis*: strijdlende partijen zijn niet alleén verantwoordelijk. Als ze niet aan hun verplichtingen kunnen voldoen, zijn andere actoren secundair verantwoordelijk. Mocht dat het geval zijn, dan verschuift de verantwoordelijkheid niet naar een onbepaalde 'internationale gemeenschap', maar kan dit systeem helpen bij het toewijzen van naoorlogse verplichtingen aan andere specifieke actoren.

Er zijn ook redenen voor scepsis ten aanzien van de effectiviteit van het *jus post bellum*. De ontwikkeling van het internationale recht is een geleidelijk proces en een nieuwe Geneefse Conventie die het *jus post bellum* regelt ligt vooralsnog niet in de lijn der verwachting. Bovendien ontbreekt een institutioneel kader voor de toewijzing van herstellende verantwoordelijkheid. Ondanks het feit dat het *jus post bellum* door velen wordt verwelkomd als onderdeel van de theorie van de rechtvaardige oorlog, is de realiteit dat het internationaal recht en mondiale instituties achterblijven op de morele theorie. Als gevolg daarvan blijft het *jus post bellum* enigszins vrijblijvend, waardoor de verantwoordelijke actoren hun naoorlogse verantwoordelijkheid kunnen negeren. Toch kan het *jus post bellum* een nuttige rol vervullen. Juist in de afwezigheid van een juridisch en institutioneel kader schuilt het belang van een goed doordacht systeem voor het toewijzen en verdelen van naoorlogse verplichtingen. Hoewel het moeilijk kan zijn onomstotelijk vast te stellen wie verantwoordelijk voor het *jus post bellum* draagt, kan dit systeem bijdragen aan een goed onderbouwd oordeel.

**Jus Post Bellum. Minimalisme versus Maximalisme?**

Het debat over het *jus post bellum* wordt vaak gekenschetst als een debat tussen twee tegengestelde posities: minimalisme versus maximalisme. Hoe worden deze twee posities normaliter gekarakteriseerd? De minimalistische of beperkte opvatting van *jus post bellum* is vooral bedoeld om gedrag na de oorlog te beperken. Daarom bestaat het met name uit negatieve morele verplichtingen; partijen moeten na de oorlog vooral veel dingen *niet* doen. Zo is gedwongen politieke reconstructie na de oorlog in beginsel niet toegestaan. Overwinnaars
mogen de geschonden rechten herstellen (dat is de zwaarwegende reden voor de oorlog) maar niet meer dan dat. Deze benadering komt voort uit de wens om victor’s justice – wat ertoe kan leiden dat opportunistische overwinnaars excessen begaan – te voorkomen. Deze beperkte opvatting van jus post bellum betekent ook dat de normen in een kort tijdsbestek van toepassing zijn: ze reguleren de directe nasleep van de oorlog en kijken niet ver vooruit.

De maximalistische of uitgebreide opvatting van jus post bellum is veel ambitieuzer. Dit jus post bellum bestaat voornamelijk uit positieve verplichtingen, die bepalen wat actoren mogen of zelfs moeten doen na de oorlog. In plaats van bezorgd te zijn dat overwinnaars na de oorlog te veel doen, en daarmee profite- ren van de verliezer, vrezen maximalisten juist dat overwinnaars te weinig doen. Deze uitgebreide opvatting van jus post bellum gaat dus veel verder dan het her- stellen van de geschonden rechten die de oorzaak waren van de oorlog. De norm van politieke wederopbouw wordt veel ruimer geïnterpreteerd en er worden allerlei extra normen voorgesteld. Daarbij gaat het bijvoorbeeld om vergeving en verzoening, wederopbouw van de infrastructuur, economische ontwikkeling en compensatie voor milieuschade. Als gevolg van deze ruime en gevarieerde ver- plichtingen is er veel meer tijd nodig om het jus post bellum te realiseren, waardoor het voor een langere tijd van toepassing is.

Dit zesde hoofdstuk laat echter zien dat we dit onderscheid niet gemakkelijk kunnen maken; het is gewoonweg niet zo zwart-wit. Vaak passen bepaalde voor- stellen voor jus post bellum niet naadloos binnen een van deze posities. De karakterisering van deze tweedeling (negatieve versus positieve verplichtingen, beperkte versus ruime en gevarieerde normen, korte versus lange termijn, beperkt versus onbeperkt door de zwaarwegende reden voor de oorlog) zou kunnen opgaan voor ‘echt’ minimalisme en ‘echt’ maximalisme, maar die eerste positie wordt tegenwoordig niet meer verdedigd. Het verschil tussen de verschillende posities is daardoor minder groot dan op basis van de tweedeling zou kunnen worden verwacht. In wezen zijn alle huidige opvattingen van jus post bellum in zekere zin maximalistisch. Maximalisme is daarmee de dominante manier van denken over het jus post bellum.

Toch zijn er wel degelijk graduele verschillen tussen de verschillende opvat- tingen. Maar wat bepaalt dan de inhoud en reikwijdte van het jus post bellum? Om deze vraag te kunnen beantwoorden moeten we een stap terug doen; er is een groter perspectief nodig om deze variaties te duiden. Het blijkt dat de inhoud en reikwijdte van naoorlogse normen met name afhangen van twee factoren. Ten eerste, de situatie waarop de theorie van de rechtvaardige oorlog van
toepassing is. Daarbij gaat het om het type oorlog – is er bijvoorbeeld sprake van zelfverdediging of een humanitaire interventie? – en de aard van de betrokken staat. Drie aspecten zijn daarbij van belang: het oorspronkelijke karakter van de staat (was deze agressief?), de toestand na de oorlog (is er sprake van interne chaos of falen van de staat?) en vooral het beoogde karakter van de staat (hoe moet de staat eruit gaan zien?). Ten tweede, de achterliggende visie op de theorie van de rechtvaardige oorlog en internationale betrekkingen in het algemeen. Daarbij gaat het om ideeën over de rol van het gebruik van geweld, de waarde van soevereiniteit, de opkomst van een kosmopolitische moraal en de nadruk op de individuele rechten van de mens. Deze factoren verklaren de verschuiving naar een maximalistisch *jus post bellum*.

### Rechtvaardige Vrede na de Oorlog

Het doel van de theorie van de rechtvaardige oorlog is een rechtvaardige en duurzame vrede. Nu lijkt dit wellicht vanzelfsprekend, maar het is onduidelijk wat een rechtvaardige vrede precies is. Theoretici besteden hieraan relatief weinig aandacht. De kans bestaat dat zij het met elkaar oneens zijn als ze dieper ingaan op de specifieke kenmerken van vrede. Dat wijst op een fundamenteel probleem: vrede staat centraal in de theorie van de rechtvaardige oorlog, maar wordt als concept niet grondig geanalyseerd en blijft daarom impliciet en vaag. Dit probleem wordt pregnanter wanneer we ons realiseren dat de theorie van de rechtvaardige oorlog zich ontwikkelt in de richting van een maximalistisch *jus post bellum*, en dus ook richting een breder en meeromvattend begrip van vrede – een positieve vrede. Het is de vraag of het inderdaad een goed idee is om een dergelijke positieve vrede als normatief doel te omarmen. De centrale vraag die in dit zevende hoofdstuk aan de orde komt is dan ook: Hoe moeten we vrede zien, als het doel van de theorie van de rechtvaardige oorlog, rekening houdend met de middenpositie van de theorie tussen politiek realisme en moreel idealisme?

Het eerste deel van dit hoofdstuk probeert het benodigde conceptuele kader te ontwikkelen. Daartoe wordt het algemene concept van vrede verkend. Hierbij komen drie verschillende facetten aan bod: het temporele element van de vrede (tijdelijk versus eeuwig), het ruimtelijk element van de vrede (innerlijk versus intermenselijk), en het karakter van de vrede (negatief versus positief). Op basis hiervan wordt een continuüm van vijf concepten van de politieke vrede geschatst, variërend van een louter negatieve vrede tot een volledig positieve vrede en daartussenin een overwegend negatieve vrede, een fatsoenlijke vrede, en een
overwegend positieve vrede. Welk concept van vrede zou kunnen functioneren als het doel van de theorie van de rechtvaardige oorlog? David Estlund werpt licht op deze vraag met zijn opvatting over de rol van praktische beperkingen in normatieve politieke filosofie. Dat verklaart: 1. De positie van de theorie van de rechtvaardige oorlog tussen strikt politiek realisme en moreel idealisme; 2. Waarom de twee buitenste concepten op het continuüm niet het doel van theorie van de rechtvaardige oorlog kunnen zijn; en 3. Hoe we de resterende drie concepten van vrede moeten vergelijken en evalueren als het potentiële doel van de theorie.

In het tweede deel van dit hoofdstuk wordt het voorgestelde conceptuele kader gebruikt om de discussie in kaart te brengen en de impliciete posities ten aanzien van vrede expliciet te maken. Hoewel de meeste theoretici het erover eens zijn dat een ‘rechtvaardige en duurzame vrede’ het doel is van de theorie van de rechtvaardige oorlog, blijkt dat ze het in feite fundamenteel oneens zijn over wat een dergelijke vrede inhoudt. Ook is er een verschuiving naar een positievere opvatting van vrede zichtbaar. Vandaag de dag kunnen de belangrijkste posities worden gekarakteriseerd als een ‘fatsoenlijke vrede’ en een ‘overwegend positieve vrede’. Michael Walzer onderschrijft een fatsoenlijke vrede. Dat is geen vrede die louter wordt gekarakteriseerd door de afwezigheid van geweld. De relatie tussen vrede en rechtvaardigheid is sterk maar minimalistisch, aldus Walzer. Deze vrede is niettemin stabiel en het jus post bellum is gericht op de wederopbouw van een soevereine staat. Het doel is bovendien een veilige en fatsoenlijke samenleving, die wordt bepaald door een minimale opvatting van de mensenrechten, waarin in ieder geval de rechten op leven, vrijheid en veiligheid gerealiseerd zijn.

Dan zijn er theoretici die verder opschuiven naar de positieve kant van het continuüm. Cecile Fabres theorie over vrede is gebaseerd op het kosmopolitisme (waarbij individuen de primaire objecten van morele analyse zijn) en is individualistisch en idealistisch. Fabre maakt onderscheid tussen fundamentele mensenrechten die nodig zijn om een menswaardig leven te kunnen leiden en niet-fundamentele mensenrechten, noodzakelijk voor het leiden van een bloeiend leven. Wat betreft het normatieve doel van vrede legt zij de lat hoog: kosmopolitische rechtvaardigheid betekent dat individuen niet alleen een minimaal fatsoenlijk leven kunnen leiden, maar dat zij een bloeiend leven kunnen leiden. Dit verwijst naar de autonomie om een bepaalde opvatting van het goede te kunnen nastreven, naar mogelijkheden tot zelfontplooiing, emotioneel en intellectueel welzijn en naar het gewaarborgd weten van lichamelijke integriteit,
basisgezondheidszorg, en invloed op materiële goederen en politiek. Als voorbeelden van een niet-bloeiend leven noemt Fabre het moeten doen van eentonig werk en het niet kunnen deelnemen aan het culturele leven van de samenleving.

Bij nader inzien blijkt echter dat het verschil tussen deze twee opvattingen minder groot is dan het lijkt. De realistische theoretici als Walzer combineren ideale principes met pragmatische overwegingen om het beste effect te genereren. Dit past bij een opvatting van rechtvaardigheid als corrigerend concept; er is weinig verschil tussen wat ‘hoort’ en wat ‘kan’. De idealistische theoretici zoals Fabre benadrukken juist deze ideale principes van rechtvaardigheid. Rechtvaardigheid wordt hier gezien als een zuiver concept; er is een groot verschil tussen wat ‘hoort’ en wat ‘kan’.

Deze verschillende visies ten aanzien van de betekenis van rechtvaardigheid in de theorie van de rechtvaardige oorlog verhelderen het verschil tussen de opvattingen over vrede. Bij Walzer maken pragmatische overwegingen als het ware deel uit van de rechtvaardigheidstest. Maar ook voor Fabre zijn deze overwegingen van belang. Zij maakt een onderscheid tussen een ‘rechtvaardige vrede simpliciter’ en een ‘alles in ogenschouw nemende gerechtvaardigde vrede’ (justified peace all things considered). Het is in de praktijk niet altijd mogelijk een rechtvaardige vrede te realiseren, zo erkent Fabre. In het geval van praktische onhaalbaarheid moeten we water bij de wijn doen en de lat lager leggen. Praktische overwegingen werken hier als een ex post rechtvaardigheidstest. Dit brengt ons terug naar de fatsoenlijke vrede. Niettemin blijft bij theoretici als Fabre het concept van een overwegend positieve vrede overeind als regulatief ideaal van de theorie van de rechtvaardige oorlog, dat richting geeft aan het jus post bellum. Het is de vraag of dat wenselijk is.

Nu de vraag: Welk begrip van vrede zou moeten functioneren als doel van de theorie van de rechtvaardige oorlog? In dit hoofdstuk wordt verdedigd dat we na de oorlog geen ideale positieve vrede als normatief doel moeten stellen, terwijl we – alles in ogenschouw nemend – bereid moeten zijn een gerechtvaardigde fatsoenlijke vrede te accepteren. Een fatsoenlijke vrede na de oorlog is namelijk een rechtvaardige vrede. Drie argumenten worden daarvoor aangedragen.

Een fatsoenlijke vrede is allereerst het juiste normatieve doel, gezien het specifieke karakter van de theorie van de rechtvaardige oorlog. Het is in essentie een action guiding theory: een theorie die praktische richtlijnen biedt die van toepassing zijn op de hedendaagse onvolmaakte wereld. De lat te hoog leggen werkt demotiverend en daarmee wordt de theorie minder effectief in het beperken van de negatieve gevolgen van oorlog. Om doeltreffend te zijn moet de
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theorie van de rechtvaardige oorlog normen bieden die zowel haalbaar als wenselijk zijn. Dat komt het beste tot zijn recht in een fatsoenlijke vrede.

In de tweede plaats hebben we geen positieve vrede als regulatief ideaal – op basis van een ‘zuivere’ conceptie van een ideale wereld – nodig om richting te geven aan de theorie van de rechtvaardige oorlog en het *jus post bellum* in het bijzonder. Het is een probleemgerichte theorie, ontworpen voor het specifieke probleem van oorlog. Het is geen instrument voor de realisatie van mensenrechten in het algemeen en geen manier om een ideale rechtvaardige wereld te creëren. Integendeel, de theorie van de rechtvaardige oorlog dient ter bescherming van de meest fundamentele waarden en het voorkomen van de grootste excessen in de chaos van oorlog en de nasleep daarvan. Zoals Steven Lee opmerkt, brengt de overtuiging dat oorlog gebruikt kan worden voor verheven idealen het gevaar met zich mee dat de theorie gebruikt wordt zonder het soort beperkingen die juist centraal staan. De theorie van de rechtvaardige oorlog moet aldus niet worden gelijkgesteld aan een theorie van mondiale rechtvaardigheid.

Een derde, gerelateerd argument is de twijfelachtige universaliteit van de brede, veelomvattende ideologie die deel uitmaakt van een positieve vrede. Er is tegenwoordig een vrij grote overeenstemming over de onderlinge afhankelijkheid en de universaliteit van de mensenrechten. We moeten echter voorzichtig zijn: het realiseren van een breed scala aan mensenrechten na de oorlog, vooral met nadruk op liberale rechten, verhoogt het risico op de bekende kritiek van moreel imperialisme en het opleggen van de westerse waarden. Dat risico is bijzonder groot wanneer overwinnaars na de oorlog, als onderdeel van het *jus post bellum*, verplicht worden deze mensenrechten te realiseren opdat de mensen in het voormalige oorlogsgebied een bloeiend leven kunnen leiden. Als er stappen in de richting van een positieve vrede worden genomen, vinden deze plaats buiten het domein van de theorie van de rechtvaardige oorlog. Ná de nasleep van de oorlog is de theorie van de rechtvaardige oorlog niet langer van toepassing en moet de theorie plaats maken voor een algemene (ruimere) theorie van mondiale rechtvaardigheid.

Dit hoofdstuk concludeert aldus dat het omarmen van een positieve vrede als normatief doel van de theorie van de rechtvaardige oorlog geen goed idee is. Het is inefficiënt omdat een onbereikbaar hoge standaard demotiverend werkt. Dit maakt de theorie van de rechtvaardige oorlog minder effectief in het beperken van de schade, ontberingen en het menselijk lijden als gevolg van oorlog. De theorie is pragmatisch van aard en het doel moet daarbij aansluiten en praktisch
haalbaar zijn. Bovendien past een positieve vrede niet bij een theorie die van toepassing is op het specifieke probleem van oorlog, maar veeleer bij een algemene theorie van mondiale rechtvaardigheid. Een positieve vrede integreren in de theorie van de rechtvaardige oorlog staat voortdurende – of zelfs oneindige – vredesopbouw toe zonder duidelijk eind in zicht. Dat overschrijdt het beperkte karakter van de theorie ruimschoots. Het zou tot slot zelfs immoreel kunnen zijn, aangezien het vrede gelijkstelt aan een ‘zuiver’ ideaal van rechtvaardigheid, begrepen in termen van mensenrechten breed opgevat, vergezeld van een bepaalde ideologie, politieke structuur en economisch systeem waarvan de universaliteit kan worden betwist. In de chaotische en complexe realiteit van oorlog en de nasleep daarvan is het verstandig bescheiden te zijn. Daarom is een waarschuwing tegen een te vergaande verschuiving in de theorie van de rechtvaardige oorlog op zijn plaats.

Fatsoenlijke Vrede en Gematigd Jus Post Bellum

De voorbeelden van oorlogen met een rampzalige nasleep hebben in de internationale politiek geleid tot een kritischere houding. Er wordt bijvoorbeeld in belangrijke rapporten aangegeven dat er meer rekening moet worden gehouden met consequenties en risico’s van oorlogen en interventies, dat er realistische doelen gesteld moeten worden, dat er voldoende budget moet zijn en dat een haalbare exit-strategie van het grootste belang is. Het wekt daarom verbazing dat de theorie van de rechtvaardige oorlog zich lijkt te ontwikkelen in de tegenstelling: er is een steeds verder gaande verschuiving zichtbaar naar een uitgebreidere opvatting van het *jus post bellum*.

Dit boek biedt een kritische beschouwing van het *jus post bellum*. In de introductie werden drie vragen genoemd: Wat *wilden* we doen na de oorlog? Wat *kunnen* we doen? En wat *moeten* we doen? Terwijl de laatste vraag het aanknopingspunt was voor dit onderzoek, laat het boek zien dat deze drie vragen eigenlijk verbonden zijn. De eerste twee vragen zijn namelijk essentieel om de derde vraag te kunnen beantwoorden: wat *moeten* we doen na de oorlog wordt bepaald door de juiste balans tussen wat we idealiter zouden *wollen* bereiken, en wat we *kunnen* bereiken in de praktijk. Dat evenwicht tussen wenselijkheid en haalbaarheid, tussen idealisme en realisme, resulteert in de verdediging van een bescheiden opvatting van naoorlogse rechtvaardigheid en een ‘fatsoenlijke vrede’ als normatief doel van de theorie van de rechtvaardige oorlog. Een
fatsoenlijke vrede is stabiel voor een substantiële periode en waarborgt fundamentele mensenrechten.

Deze fatsoenlijke vrede kan bereikt worden door een gematigde opvatting van *jus post bellum*, met een sterke nadruk op de verantwoordelijke actoren. Deze middenweg – geïnspireerd door het principe van matiging van Vitoria en Grotius – lijkt de meest consistente, coherente en effectieve opvatting van *jus post bellum* te zijn. Ten eerste, in tegenstelling tot minimalisme verbetert een gematigd *jus post bellum* de theorie en in tegenstelling tot maximalisme sluit het er goed bij aan (consistentie): het past bij het beperkte karakter, is tolerant ten aanzien van culturele verschillen en minder fundamentele waarden, stelt de theorie niet gelijk aan een theorie van mondiale rechtvaardigheid en biedt normen die vergelijkbaar zijn met de bestaande normen qua karakter, inhoud en actoren waaraan verplichtingen worden toegewezen.

Ten tweede is een gematigd *jus post bellum*, waarbij het in grote lijnen duidelijk is wie waarvoor verantwoordelijkheid draagt, intern coherent als een geheel van normen. Het doel is een fatsoenlijke en veilige samenleving waarin fundamentele mensenrechten zijn gewaarborgd. Zowel individueel welzijn als collectieve zelfbeschikking is belangrijk. In geval van een machtsvacuüm is politieke wederopbouw, in beperkte mate, deel van het *jus post bellum*. Bovendien is het verstrekken van basisvoorzieningen, bijvoorbeeld voedsel en onderdak, onderdeel van het *jus post bellum* als het recht op leven in gevaar is door een gebrek aan middelen van bestaan als gevolg van de oorlog. Dit moet de naoorlogse ontberingen verlichten. Voormalige strijdende partijen zijn in beginsel verantwoordelijk voor het realiseren van het *jus post bellum*, hoewel deze verplichtingen aan andere actoren kunnen worden toegewezen als zij daartoe niet in staat zijn. Ten derde is een gematigd *jus post bellum* het meest effectief in het beperken van de verschrikkelijke gevolgen van de oorlog. Het legt de lat hoog genoeg zonder *te* ambitieus te zijn. Een gematigd *jus post bellum* laat zien hoe een fatsoenlijke vrede kan worden bereikt – een vrede die rechtvaardig genoeg is in plaats van perfect rechtvaardig.

Het boek eindigt met de stelling dat de hedendaagse theorie van de rechtvaardige oorlog rekening *moet* houden met naoorlogse rechtvaardigheid. De bevindingen scheppen theoretische duidelijkheid over dit relatief nieuwe onderdeel van de theorie, en dragen bij aan de verdere ontwikkeling van het *jus post bellum*. Bovenal is de belangrijkste wens van dit onderzoek dat de integratie van het *jus post bellum* een bijdrage levert aan het beperken van de negatieve effecten van oorlog, en dat het ondersteuning biedt bij het creëren van vrede na
concrete oorlogen. Een gematigd *jus post bellum*, gericht op de transitie naar een fatsoenlijke vrede, met nadruk op de toewijzing van verplichtingen aan specifieke actoren, heeft de beste kans om dat te doen. Deze opvatting van *jus post bellum* mag dan misschien bescheiden zijn, maar kan juist daarom situaties zoals Irak verbeteren.
About the Author

Lonneke Peperkamp (1980) studied law and philosophy at the Radboud University Nijmegen. During her studies, she did an internship at the UNHCR, was a voluntary legal consultant for Vluchtenlingenwerk, and worked at the Court ’s Hertogenbosch as a law clerk. Her master thesis was titled *How to eradicate poverty? An exploration of legal, political and moral obligations towards the global poor*. In 2007, she earned Master degrees in Criminal Law and Philosophy of Law. After graduation, Lonneke worked as a research assistant at the Radboud Medical Centre (Department of International Health) on a research project regarding the right to health, globalisation and health equity. After receiving an NWO research grant in 2008, she worked as a PhD candidate and lecturer at the Radboud University Nijmegen (Department Philosophy of Law). She combines this with volunteer work as youth educator for UNICEF. Currently, Lonneke is a researcher and lecturer at the Radboud University Nijmegen.
What should be done after war? This book deals with the timely and important topic of post war justice, or *jus post bellum*. Just war theory is a thriving part of legal and political philosophy, and the leading normative theory on issues of war and peace. Traditional just war theory consists of two branches: *jus ad bellum* and *jus in bello*. Aside from regulating the initiation of war and the conduct in war, there is now a growing interest in regulating the aftermath of war. As a result, *jus post bellum* is the welcomed third branch of just war theory. The aim of this book is twofold. First, to analyze the concept of *jus post bellum* and contribute to an adequate understanding of this new branch. Second, to critically assess and further develop *jus post bellum*.

This book delves into the historical roots of *jus post bellum*, the question of responsibility, the distinction between minimalist and maximalist positions, and the nature of peace as the overall goal of just war theory. Ultimately, the book pleads for modesty in post war justice. What should be aimed for after war is a decent peace; a peace that is 'just enough' instead of perfectly just. A medium conception of *jus post bellum* that emphasizes responsible duty bearers is the best way to achieve that. *Medium jus post bellum* wants to create a decent and safe society after war, is concerned with fundamental human rights, and includes limited political reconstruction and provisions such as food and shelter. As opposed to minimalist and maximalist understandings of *jus post bellum*, it is argued that *medium jus post bellum* improves just war theory, does not exceed its limited character, is internally coherent, and above all, is most effective in limiting the horrible effects of war.