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A Second Independence Thesis? The relationship between *jus ad bellum* and *jus post bellum*

Lonneke Peperkamp

1. Introduction

Can unjust war lead to a just peace? And does a just war that is wrapped up badly become an unjust war in retrospect? We are increasingly confronted with such questions in recent years. Let me give two examples. Assume, first, that the 2003 Iraq intervention was an unjust war; the threat posed by Saddam Hussein's weapons of mass destruction was not grave enough to justify a war of pre-emptive self-defence. We might doubt whether such war can nevertheless lead to a just a durable peace, e.g. when the American British coalition would succeed in liberating the population from Saddam Hussein, improving the local human rights situation, and perhaps even creating a 'new model of democracy' in the Middle East. Second, assume that the 2011 Libya intervention was justified as a necessary and proportionate use of force to prevent Muammar Gaddafi's army from committing a massacre among the Libyan population. It had however a disastrous aftermath; the intervention resulted in a major power vacuum, political instability, and ongoing chaos and violence. Does this compromise the intervention *an sich*? We might doubt whether a humanitarian intervention is justified when interveners do not in fact protect the population from political violence after an evil regime is toppled.

These examples demonstrate the need to think about the relationship between *jus ad bellum* and *jus post bellum*. The dynamics between them have many implications for the way we understand both the separate branches, and just war theory as a whole. Unlike the relationship between *jus ad bellum* and *jus in bello*, however, this issue is seriously underexplored in contemporary just war theory, which results in vagueness and questions as the above. Furthermore, the theorists that address the relationship between *jus ad bellum* and *jus post bellum* disagree on its nature and are rarely explicit about the sort of independence discussed. On the one hand, 'conventionalists' as Michael Walzer seem to hold that *jus post bellum* is independent, whereas so-called 'revisionists',¹ on the other

¹ To divide contemporary positions in just war theory in two 'camps' is undisputedly simplistic. Nevertheless, there is an evident split between two main approaches, and these approaches can be labeled as conventionalism and revisionism. The former refers to Walzerian just war theory, also called the 'traditional' or 'orthodox' position, because it has been the default position for decades, and generally taken as the starting point of inquiries within this field. Far from being a coherent position, revisionists generally set out to revise conventional just war theory. For analyses of these two approaches see e.g.: Seth Lazar, 'Just War Theory: Revisionists vs. Traditionalists' (2017) 20, *Annual Review of Political Science*; James Pattison, 'The Case for the Nonideal Morality of Just War: Beyond Revisionism versus Traditionalism in Just War Theory' (2016) 46 (2) *Political Theory*; Christian Braun, 'The historical Approach and the 'War of Ethics within the Ethics of War'' (2018, published online) *Journal of International Political Theory*. For critique on the appropriateness of the term 'revisionism' see e.g. Uwe Steinhoff, 'Rights, Liability, and the Moral Equality of Combatants', *Journal of Ethics*, 13, p. 339-366. A further discussion on the terminology used can be found here:

hand, seem to consider *jus post bellum* as being dependent on *jus ad bellum*. My goal in this chapter is to explore the relationship between these branches and shed light on this issue. Two central questions need to be answered: 1) Can we consider *jus post bellum* to be independent from *jus ad bellum*?; and 2) Can we consider *jus ad bellum* to be independent from *jus post bellum*?² I will concentrate on the extent to which *jus ad bellum* and *jus post bellum* are: 1. conceptually independent, i.e. constitute separate domains with different criteria answering different questions; 2. normatively independent, i.e. can be judged separately; and 3. practically independent, i.e. do not influence each other on the practical level.³

A significant part of the debate in just war theory has centred on the independence of *jus in bello*: independence thesis₁. This debate can learn us something about the independence of *jus post bellum*: independence thesis₂.⁴ According to international law and conventional just war theory there is a firm separation between *jus ad bellum* and *jus in bello*.⁵ Consequently, just and unjust combatants have equal rights and obligations in war. As is well known, much contemporary work in just war theory criticizes independence thesis₁. Revisionists claim that it is impossible for unjust combatants to comply with *jus in bello*: “combatants fighting for wrongful aims cannot do anything right, besides lay down their weapons.”⁶ It is plausible that the arguments *pro* and *contra* *jus in bello* independence are valid for *jus post bellum* independence as well. Walzer states: “*Post bellum* justice is independent of *ad bellum* and *in bello* justice – in the same way as these latter two are independent of each other. An unjust war can lead to a just outcome, and a just war can lead to an unjust outcome.”⁷ Consequently, a defence of the first independence thesis would lead to a defence of the second, and a rejection of the first would lead to a rejection of the second. Based on this presupposition, most conventional just war theorists would endorse independence thesis₂, and most revisionists would not. Although few revisionists have focused on *jus post bellum*, the main exception is Cécile Fabre, who indeed argues

<http://peasoup.typepad.com/peasoup/2015/05/ethics-discussions-at-pea-soup-cecile-fabres-war-exit-with-critical-precis-by-helen-frowe.html>.

² Parallel to the two questions that I started with, but reformulated and generalized.

³ There are various ways in which something can depend on something else. E.g. the dependency of x on y can relate to the existence; the character or content; the normative status of x; or the practical implications for x. In this chapter, I will focus on the conceptual, normative, and practical levels of independence. These levels are related, and it is not always easy to distinguish them. I will not go into the ontological independence between the two branches because that seems straightforward: although a non-permanent war is always followed by a post war phase, and both the post war phase itself and *jus post bellum* cannot exist without a preceding war, the two branches – as sets of norms – can exist independently of each other. There can be *ad bellum* norms without norms that regulate the *post bellum* phase, and there can also be *post bellum* norms while war and warfare is unregulated.

⁴ Carl Ceulemans focuses some much needed attention on the relationship between *jus in bello* and *jus post bellum* in this volume, an issue that I will not explore here.

⁵ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books 2015).

⁶ Lazar (n 1).

⁷ Michael Walzer, ‘The Aftermath of War. Reflections on Jus Post Bellum’, in Eric Patterson (ed.), *Ethics Beyond War’s End* (Georgetown University Press 2012) 44.

that the rights and duties of belligerents after war are partly determined “by the moral status of their resort to and conduct in war”.⁸

This chapter systematically analyses the relationship between the two branches. In doing so, I will test Walzer’s presupposition that the arguments for independence thesis₁ are valid for independence thesis₂. The analysis will show that the presupposition does not hold; most of the arguments do not work ‘in the same way’. This sheds a new light on the issue discussed in this chapter. It leads to the interesting observation that, quite to the contrary of what one might expect, conventionalists have reasons to reject independence thesis₂ and revisionists have reasons to endorse independence thesis₂. Furthermore, I will argue that, to fully understand the relationship between *jus ad bellum* and *jus post bellum*, we need to look beyond *jus post bellum* independence and recognize the other part of that relationship: *jus ad bellum* independence.

I proceed as follows. Focusing on *jus post bellum*, we need first an understanding of the contents of this third branch. The following section provides such overview. This shows that there are certain characteristics that make independence thesis₂ more complex than independence thesis₁. The third section defines independence thesis₁. The main arguments *pro* and *contra* are outlined in the fourth and fifth sections. Those sections (3-5) provide the building blocks for the analysis of independence thesis₂ in section six. In sections seven and eight, I analyse the two constitutive parts of the independence relationship: *jus post bellum* independence (independence thesis₂) and *jus ad bellum* independence. There is an important warning to be made at this stage: there are no straightforward answers to the two central questions. Given the complexity of *jus post bellum*, the various sorts of independence, and the different dynamics at play, simple either/ or answers are impossible. As with many things, the answers lie somewhere in the middle. *Jus ad bellum* and *jus post bellum* are independent in important ways, but significantly dependent in other ways. The precise extent to which they are (in)dependent hangs, among other things, on one’s conception of *jus post bellum*.

2. Jus post Bellum

Post war justice has come to the forefront of contemporary debates.⁹ While there was attention for this issue in classic just war theory, it remained off the radar for a long time, and then re-emerged a few decades ago in modern just war theory. The first proposal for *jus post bellum* dates from 1994 and publications on this new branch appear on a regular

⁸ Cécile Fabre, *Cosmopolitan Peace* (Oxford University Press 2016) 21.

⁹ This section is based on previous work: Lonneke Peperkamp (2014), ‘*Jus Post Bellum*: A Case of Minimalism versus Maximalism?’ (2014) 21 (3) *Ethical Perspectives* and Lonneke Peperkamp, ‘The Blurry Boundaries between War and Peace: Do We Need to Extend Just War Theory?’ (2016) 102 (3) *Archives for Philosophy of Law and Social Philosophy*.

basis since 2004.¹⁰ *Jus post bellum* is a moral framework regulating the situation after war.¹¹ In general, it aims to create a just and durable peace and prevent the occurrence of 'victor's justice'.¹² It does so by offering norms that determine permissible action after war. That provides guidance for political and military action, and it forms a standard which can be used to evaluate particular post war situations. *Jus post bellum* is based on an idea of universal human rights, both individual rights as the collective right of self-determination, and familiar moral principles such as the Pottery Barn Rule ('you break it, you own it'¹³) and liability to proportionate retribution for committed crimes. It contributes to limiting the awful 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 many agree on the importance of *jus post bellum* in just war theory,¹⁴ there is no agreement on the precise content of such a branch. Often, the debate on *jus post bellum* is presented as a debate between two opposing positions: minimalism and maximalism.¹⁵ Strict minimalism is the classic conception of post war justice, which can be traced back to e.g. the Roman statesman and philosopher Cicero. A just ending of a war consists in a restoration of the situation that existed before the war – the situation *quo*

¹⁰ See for example: Michael Schuck, 'When the Shooting Stops. Missing Elements in Just War Theory' (1994) 111 (30) *Christian Century*; Gary Bass, 'Jus Post Bellum' (2004) 32 (4) *Philosophy & Public Affairs*; Brian Orend, 'Jus Post Bellum. A Just War Theory Perspective' in Carsten Stahn & Jann Kleffner (eds), *Jus Post Bellum. Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008); Mark Evans, 'Balancing Peace, Justice and Sovereignty in Jus Post Bellum. The Case of "Just Occupation"' (2008) 36 (3) *Millennium – Journal of International Studies* 2008; Mark Allman & Tobias Winright, *After the Smoke Clears. The Just War Tradition and Post War Justice* (Orbis Books 2010); Eric Patterson (ed.), *Ethics beyond War's End* (Georgetown University Press 2012); Larry May, *After War Ends. A Philosophical Perspective* (Cambridge University Press 2012); Carsten Stahn, Jennifer Easterday & Jens Iverson (eds.), *Jus Post Bellum. Mapping the Normative Foundations* (Oxford University Press 2014); Fabre (n 9).

¹¹ My focus is this paper is not the decision to end the war, but on the aftermath of war. These are two different issues, answering two different questions: When and how should the war be terminated? What is just behavior in the aftermath of war (i.e. after war's end)? There are theorists that defend a fourth branch of just war theory, *jus ex bello* or *jus terminatio*, governing the issue of war termination: Darrel Moellendorf and David Rodin respectively. I think that there is not only a link between *jus ad bellum* and *jus ex bello*; but the latter is covered by the former: *jus ex bello*/ *jus terminatio* is largely a continued and slightly adapted application of *jus ad bellum* norms on the ongoing war, regarding the question: Is the war justified? That is not an argument that I can pursue here. See: Darrel Moellendorf, 'Jus Ex Bello' (2008) 16 (2) *Journal of Political Philosophy*; David Rodin, 'Ending War' (2011) 25 (5) *Ethics & International Affairs*; Darrel Moellendorf, 'Two Doctrines of Jus Ex bello' (2015) 125 *Ethics*.

¹² Thanks to an anonymous reviewer of this chapter, who rightly commented that *jus post bellum* was discussed earlier in history under the heading of 'just peace'. See e.g. Robert Holmes, *On War and Morality* (Princeton UP 1989) 292; Douglas Lackey, *The Ethics of War and Peace* (Prentice Hall 1989) 43–45, 51–52. There are even specific accounts of 'justice after war', e.g. of Immanuel Kant, but space precludes me from going into that here.

¹³ Orend (n 10) 49.

¹⁴ There is critique on including *jus post bellum* in the just war framework too. Alex Bellamy, e.g., argues: "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' (2008) 34 (4) *Review of International Studies*. Seth Lazar is also skeptical and argues that we do not need to integrate *jus post bellum* because the issues regulated are better perceived in the broader ethics of peace building. Seth Lazar, 'Scepticism About Jus Post Bellum' in Larry May and Andrew Forchimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012).

¹⁵ E.g. Bellamy (n 14), Mark Evans, "'Just Peace": An Elusive Ideal' in Eric Patterson (ed), *Ethics Beyond War's End* (Georgetown University Press 2012); Alexandra Gheciu & Jennifer Welsh, 'The imperative to rebuild: Assessing the Normative Case for Postconflict Reconstruction' (2009) 23 (2) *Ethics & International Affairs*.

ante bellum.¹⁶ Consideration for the vanquished civilians is required, and those who behaved humanely during warfare should be spared.¹⁷ This conception is characterized by a general negative obligation for the victor to withdraw without doing (further) harm. Contemporary minimalists, such as Michael Walzer, are similarly concerned with limiting what victors are allowed to do after war. However, while they endorse a somewhat restricted version of *jus post bellum*, the goal of just war theory is not a literal restoration of the status *quo ante bellum*, but a 'better state of peace', that could be called a 'decent peace'.¹⁸ Victors should aim for a situation that is more secure, less vulnerable to territorial expansion, and safer than it used to be for civilians.¹⁹ Such conception of *jus post bellum* still emphasizes negative duties, but imposes positive duties on the victor as well, e.g. in terms of political reconstruction and provision of basic necessities. Maximalists, such as Mark Evans and Cécile Fabre, are more ambitious. 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.²⁰ Accordingly, they propose mainly positive obligations. The goal of just war theory is the creation of a more ideal just peace, which 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".²¹ To achieve this goal, maximalist *jus post bellum* obligations are broader and more comprehensive than minimalist obligations.

But although the content and scope of *jus post bellum* differs, this third branch consists of norms that can roughly be divided into different categories: safety & 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 & security in the war affected area. This has two components: A) guaranteeing international peace and security, through the consolidation of peace and the prevention of future external aggression; and B) guaranteeing the security of the citizens of the defeated state itself, which means the prevention of future internal aggression. This requires e.g. disarmament, arms control and the reintegration of soldiers in the society.²² Additionally, safety and security requires the provision of immediate necessities for the local population in need, such as "law and order, food and shelter, schools and jobs".²³ This does not involve broad economic reconstruction, but resembles emergency relief for deprived people in the immediate aftermath of war.

¹⁶ Walzer (n 7) 36 and Michael Walzer, *Arguing about War* (Yale University Press 2004) 18.

¹⁷ Cicero, *On Duties (De Officiis)*, 44 BC, transl Walter Miller, Harvard University Press 1913) 37.

¹⁸ I argue this in Lonneke Peperkamp, 'A Just and Lasting Peace after War' in Carsten Stahn et. al. (eds.), *Jus Post Bellum and the Justice of Peace* (Oxford University Press (book under contract, chapter under review)).

¹⁹ Walzer (n 5) 121.

²⁰ Helen Frowe, *The Ethics of War and Peace: An Introduction* (2nd edn Routledge 2016) 240; Mark Evans, 'Moral Responsibilities and the Conflicting Demands of Jus Post Bellum' (2009) 23 (2) *Ethics & International Affairs* 150.

²¹ Fabre (n 9) 12.

²² Bass (n 10) 394.

²³ Walzer (n 7) 43-44.

Political justice entails norms regarding the (re)construction of 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 basic 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, the proper scope of political justice after a war is hotly debated. The central question is: when and to what extent is coercive political change justified? There are different values at stake here: on the one hand international security and the protection of individual human rights, and on the other hand sovereignty of states and self-determination of peoples. The exact turning point varies, and is dependent on the way these values are weighed. For minimalists such as Walzer, sovereignty and self-determination are so important that political reconstruction of the defeated state is only allowed after humanitarian interventions and in case of inherently aggressive and murderous regimes.²⁴ For Orend, tending more towards maximalism, the turning point appears in an earlier stadium, namely, when a state fails to be minimally just. Consequently, political reconstruction after war is obligated in a wider range of situations, and entails the construction of a minimally just regime.²⁵ In a similar vein, Larry May considers a political reconstruction central to post war justice. A crucial part of *jus post bellum* is the obligation to “re-establish a rule of law that will protect human rights and create a just and lasting peace”.²⁶

The category of criminal justice entails norms on how to deal with international crimes that have occurred at the start and/ or during the war. Criminal justice can serve a variety of more specific goals, such as retribution, deterrence of future crimes, closure for the victims, fostering reconciliation; and the expression and confirmation of shared values. There are different instruments to establish criminal responsibility: e.g. through national trials, the International Court of Justice, international criminal tribunals, hybrid tribunals, the International Criminal Court, or truth and reconciliation commissions.²⁷ Defining the precise obligations in this category difficult, again, because there are different values at stake here. On one hand, the value of retributive justice – punishing the guilty – and on the other hand the value of national and international peace and security. Debated is the conflict that can arise between retributive justice and peace. How to weigh those two values when they conflict: should the value of retributive justice be sacrificed when that is necessary 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.

²⁴ Walzer (n 7) 39, 43.

²⁵ More precisely: “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 (n 10) 43.

²⁶ Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) 14-19.

²⁷ For an excellent recent account of this *post bellum* category see: Jens Ohlin, ‘Justice after War’ in Helen Frowe and Seth Lazar (eds), *Oxford Handbook of the Ethics of War* (Oxford University Press 2018).

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.²⁸ Fabre argues that although victims have a right to seek punishment of perpetrators of crimes, achieving peace and preventing further rights violations may require foregoing punitive justice and granting amnesties to these perpetrators.²⁹ Other theorists firmly resist such compromise. Retributive justice is valued so highly that responsible individuals should always be held accountable in war crimes trials.³⁰

Restitution, reparation and compensation are matters of distributive and compensatory justice. It seeks to materially compensate the victims of aggression for inflicted damage. Post war instruments falling in this category are the handover of occupied territory, restitution of confiscated property, payment of compensations for destroyed property or psychological harm. The known principles of proportionality and discrimination help to determine the scope of reparations and the addressees. The extracted reparations should not be overly punitive and should discriminate between those who were responsible for the aggression and those who were not.³¹ Usually, the civilian population is deemed irresponsible, although Walzer holds that citizens of the aggressor bear collective responsibility for the damage done, and hence reparations can be extracted through a tax system.³²

While safety & security; political justice (to a certain extent), and criminal justice (balanced in a certain way) make up what can be called the 'core' of *jus post bellum*, the category of general reconstruction consists of norms that are broader and more comprehensive. Therefore, they are often said to be part of maximalist *jus post bellum*. This entails obligations regarding comprehensive economic reconstruction and development (beyond providing basic necessities for people in need in the immediate aftermath of war),³³ rebuilding infrastructure like road, rails and electrical grids,³⁴ cleaning up the environment. 'Maximalists' generally argue that instead of extracting compensation, the victor must invest in the defeated state in order to foster reconstruction.³⁵

²⁸ Walzer states: "sometimes security might require amnesties and public forgetfulness". Walzer (n 7) 45. See also Brian Orend, 'Justice after War' (2002) 16 (1) *Ethics & International Affairs*, 53.

²⁹ Fabre (n 9) 209-217.

³⁰ E.g. Louis Iasiello, 'Jus Post Bellum: The moral responsibilities of victors in war' (2004) LVII (3-4) *Naval War College Review*, 47-48 and Richard DiMeglio, 'The Evolution of the Just War Tradition: Defining Jus Post Bellum' (2005) 186 *Military Law Review*, 153-158.

³¹ E.g. Brian Orend, *The Morality of War* (2nd edn Broadview Press 2013) 166-167.

³² Walzer (n 7) 42.

³³ Evans (n 15) 208 and Allman & Winright (n 10) 160-163.

³⁴ Evans (n 15) 207-208; Allman & Winright (n 10) 161; and Orend (n 28) 52.

³⁵ Evans (n 15) 207-208; Brian Orend, 'Justice after War' in Eric Patterson (ed.), *Ethics beyond War's End* (Georgetown University Press 2012) 188.

The last category, forgiveness and reconciliation, also characterizes the maximalist position.³⁶ For Fabre, reconciliation is central to building peace after war; “reconciliation after war is to post-conflict studies what motherhood and apple pie are to American home life.”³⁷ Necessary for reconciliation between former enemies are forgiveness and especially trust, Fabre argues.³⁸ Evans also argues that repairing the relationships between former enemies is an extremely important aspect of post war justice.³⁹ Victors are obligated 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”.⁴⁰ 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”.⁴¹

What is particularly relevant for the exploration of independence thesis₂ is that the content of *jus post bellum* can consist of various permissions and obligations: guarantee safety & security; achieve a decent or high level of political justice; extract compensations; bring criminals to justice; invest broadly in the economy to raise the standard of living; foster reconciliation. For minimalists, safety & security, limited political reconstruction, and criminal justice are sufficient to achieve a minimally just peace, in addition to what Walzer calls ‘provision’ of basic necessities in war’s immediate aftermath.⁴² In such peace basic human rights are secured, and it is stable for a substantial period of time. Maximalists set the bar higher, and propose additional obligations aimed at achieving a more ideal just and durable peace, in which the vanquished people are able to flourish. To that extent and perhaps the most significance difference between the two conceptions of *jus post bellum*, the obligation to achieve a significantly higher degree of political justice. For Orend, political reconstruction is central to *jus post bellum*; the goal is the construction of a ‘minimally just regime’ in any defeated aggressor.⁴³ Other maximalists see even more extensive political reconstruction as part of *jus post bellum*.⁴⁴

³⁶ A recent paper of Catherine Lu distinguishes two distinct concepts of reconciliation: relational and structural reconciliation. Catherine Lu, ‘Reparations and Reconciliation’ in Helen Frowe and Seth Lazar (eds), *Oxford Handbook of the Ethics of War* (Oxford University Press 2018).

³⁷ Fabre (n 9) 247.

³⁸ In this context Fabre rightly distinguishes between international conflicts after which reconciliation can be understood in a limited way, and civil conflicts, which require a more comprehensive peace building process. Fabre (n 9) 246-280.

³⁹ A “potentially serious deficiency” according to Mark Evans. Evans (n 15) 210.

⁴⁰ Evans (n 15) 208.

⁴¹ Evans (n 15) 211. Some theorists defend an even more comprehensive understanding of reconciliation: Mark Allman and Tobias Winright 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 (n 10) 102.

⁴² Walzer (n 7) 43-44.

⁴³ Orend (n 35) 187.

⁴⁴ E.g. “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,

With this outline of *jus post bellum* in mind, we can see how certain characteristics of this branch make independence thesis₂ more complex than independence thesis₁. First, *jus post bellum*, as a body of norms, is far more comprehensive than *jus in bello*. While the latter concerns itself with one main question – Who/ what are legitimate targets in war? Or, who/ what can be killed/ destroyed? – *jus post bellum* concerns itself with a variety of questions, such as: Who should rebuild after war? What sort of rebuilding is required? Can a regime be changed permissibly? Who should be prosecuted and punished for international crimes? How? Who is owed compensation? The main *post bellum* question – How to build a just and durable peace? – is so broad that it consists of many different elements; it entails a large collection of specific permissions and obligations in various categories, and a similarly comprehensive range of areas of action. The remainder of this chapter will show that these various permissions and obligations are related to *jus ad bellum* in different ways. Second, as opposed to *jus in bello*, the branch of *jus post bellum* is not an integral part of the just war framework; it rather seems to have one foot in and one foot out.⁴⁵ It cannot be completely grounded in the limited moral framework of just war theory. *Post bellum* norms regarding e.g. reparations and criminal prosecutions are backward looking, but forward looking norms regarding safety & security and economic rebuilding are grounded in general theories of social justice, political theory, and/ or global distributive justice.⁴⁶ It seems, therefore, that while backward looking permissions and obligations are strongly connected to just war theory, forward looking permissions and obligations are not. And third, as outlined in this section, there is no agreement on the precise content and scope of *jus post bellum*. The minimalist account is focused on a limited set of mainly negative obligations, while the maximalist account is focused on a more comprehensive set of mainly positive and forward looking obligations.⁴⁷ These different conceptions of *jus post bellum* have a bearing on the relationship with *jus ad bellum*: minimalist *jus post bellum* is more tightly connected to just war theory than maximalist *jus post bellum*.

3. Independence Thesis₁

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.” Allman & Winright (n 10) 159.

⁴⁵ This point I make in Peperkamp (n 8). See similarly: Cécile Fabre, ‘War’s Aftermath and the Ethics of War’ in Helen Frowe and Seth Lazar (eds), *Oxford Handbook of the Ethics of War* (Oxford University Press 2018) 509.

⁴⁶ Walzer argues as much: “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 [of post war justice]. They include self-determination, popular legitimacy, civil rights, and the idea of a common good.” Walzer (n 16) 164. Fabre agrees with these broader foundations of *jus post bellum*: “I agree [with Seth Lazar] that a comprehensive theory of justice after war must draw on other strands of political and moral philosophy such as philosophical foundations of the criminal law or theories of distributive justice.” Fabre (n 45) 509.

⁴⁷ For important nuances see Peperkamp (n 8).

Let us move to the relationship between the branches of just war theory. Following Walzer, the presupposition is that the arguments *pro* and *contra* independence thesis₁ are valid for independence thesis₂ as well. At the very least, I assume that these arguments enhance our understanding and provide tools with which to assess independence thesis₂.⁴⁸ For that reason, this third section defines independence thesis₁. The following two sections map the arguments *pro* and *contra*, without delving into the specifics of the debate.

The separation between *jus ad bellum* and *jus in bello* is essential in international law and in conventional just war theory. There is a legal prohibition on the use of force, as well as a moral presumption against war. For that reason, it is often assumed that when war occurs, there is at least one aggressor, morally guilty of waging an aggressive war. Hence, *jus ad bellum* is asymmetrical. Nevertheless, the subsequent warfare is governed by legal and moral rules, and these rules are the same for just and unjust combatants alike. This argument is most famously made by Walzer: the first two branches of just war theory are independent. A just war can be fought unjustly, and an unjust war can be waged in accordance with the rules of *jus in bello*. According to independence thesis₁, the normative status of *jus in bello* is not determined by the compliance to or violation of *jus ad bellum*. Warfare, i.e. the acts that compose the war, can be in accordance with *jus in bello* even though the war itself is unjust. Although *jus ad bellum* is asymmetrical, based on moral fault, *jus in bello* is symmetrical and not related to the moral fault for the war. It is judged separately. On the conceptual level, the two branches are distinct bodies of norms; they consist of different permissions and obligations, which can be separated. Additionally, *jus ad bellum* does not determine the content and/ or character of *jus in bello*. *In bello* norms are the same for all actors, applying equally to both just and unjust combatants: the principle of the moral equality of soldiers.⁴⁹ The principle means more specifically that combatants are equally liable to be killed, and equally permitted to kill each other. All combatants have to adhere to the same rules of *jus in bello*, e.g. ensure that their attacks are necessary to achieve a military advantage, are proportionate to the military aims, and that non-combatants are not deliberately targeted. This is reflected in international humanitarian law: it determines that its norms apply to all those concerned, without reference to the nature, origin or causes of the armed conflict.

4. Arguments *pro* Independence Thesis₁

There are four general arguments for independence thesis₁, which might be relevant for independence₂ as well: exceptionalism, pragmatism, actors, and moral guilt. The first main argument is based on an important premise; a certain conception of the nature of just war

⁴⁸ See also Fabre (n 45) 509-510.

⁴⁹ Walzer (n 5) 34-50.

theory. Conventional just war theory assumes that war is an exceptional moral domain that is distinct – although not separated – from normal morality (*exceptionalism*).⁵⁰ There are several reasons for theorists to endorse such 'exceptionalism': the magnitude and scale of war as a violent conflict; the fundamental political interests at stake; the uncertainty and 'fog of war'; and the general non-compliance with fundamental moral norms such as the obligation to respect the right to life.⁵¹ In general, this means that conventional just war theorists deny that war can be judged using 'normal' morality, i.e. norms that regulate interpersonal relations. Walzer states that the war convention: "is necessarily imperfect, I think, quite aside from the frailties of humankind, because it is adapted to the practice of modern war. It sits the terms of a moral condition that comes into existence only when armies of victims meet."⁵²

In the exceptional state of affairs that war is, this zone of radical coercion (a state of emergency), some of our most important moral principles are on hold. According to conventional just war theory, even this exceptional state of war is governed by certain moral norms, protecting the most essential values, but not the full gamut of moral reasons.⁵³ In this context, the independence thesis means that the intentional killing of combatants can be justified in the exceptional time of war, despite the fact it is not normally allowed to kill one another unless for very good reasons. I.e. everyone has a right to life, and the intentional killing of other human beings is considered morally wrong when someone did nothing to forfeit that right. In war, just and unjust combatants are morally equal, unlike the victim and his robber on the street. The reality of killing is accepted, perceived as an inherent part of war, and just war theory tries to regulate the activity of war by proscribing that attacks must be necessary and proportional to the military goal aimed for, and that deliberate killing must be limited to other combatants.

This relates to the pragmatic argument for the independence thesis (*pragmatism*). Just war theory's main goal is to limit war and its awful consequences in terms of death, suffering, and destruction. *Jus ad bellum* aims to restrict the number of wars, and *jus in bello* restricts the amount and the sort of violence. According to the standard view, the war itself cannot be just from both sides; there is likely to be at least one just and one unjust actor.⁵⁴ If *jus in bello* would depend on the *jus ad bellum*, there would be a serious risk of noncompliance (of the unjust actor) with the laws of war because it would be clear from the outset that they are morally lost anyway. That would remove a major incentive for

⁵⁰ Henry Shue writes the following in his critique of Jeff McMahan: "I am not suggesting that there are two separate moralities, one inside war and one outside. Morality is all of a piece; the fundamental moral considerations are the fundamental moral considerations. But (...) there is less similarity than McMahan assumes between ordinary life and war." Henry Shue, 'Do We Need a Morality of War?' in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford University Press 2008) 88.

⁵¹ See e.g. Walzer (n 5) 335-345.

⁵² Walzer (n 5) 45.

⁵³ Seth Lazar, 'Endings and Aftermath in the Ethics of War' (2010) (CSSJ Working paper series 2010, on file with author) 22.

⁵⁴ I will nuance this standard view later in this chapter.

combatants to minimize the damage they do by following the rules of *jus in bello*, such as not intentionally targeting civilians.⁵⁵ A symmetric, independent *jus in bello* is most effective: it yields the best overall results when it comes to limiting warfare, or so could be argued.⁵⁶ The best way to ensure that the war does not escalate is by regarding the branches as independent.

The third argument for independence thesis₁ is based on the fact that these branches apply to different actors and regulate different activities (*agents*). *Jus ad bellum* is a political matter; the decision whether or not to wage war is usually made by the representatives of states or international organizations. In terms of *jus ad bellum*: the legitimate authority is the legal representative of the state, often political leaders or the government. This means that these political leaders or institutions of states (or other political groups) are responsible for the justness of the war. Arguably, they are obligated to factor in and commit themselves to the rules of conduct in war at the *ad bellum* decision.⁵⁷ But the way that the war is subsequently fought is up to the military leadership and individual combatants. *Jus in bello* is not so much a political matter; it is a military matter. Individual combatants wage the war.

The last and related argument is that of responsibility and moral fault, or rather, the lack thereof (*moral guilt*). Combatants - the actors that are addressed by *jus in bello* - did not decide to wage war, and cannot, therefore, personally be held responsible for their leaders' wrongful decision to wage war. Whether or not their war was just, they are not to be blamed for that. Combatants are all in the same boat, and might even recognize each other's humanity and lack of responsibility. Walzer famously dwells on the reflective understanding between enemy combatants: "Armed, he is an enemy; but he isn't my enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments. These human instruments (...) are "poor sods, just like me", trapped in a war they didn't make. I find in them my moral equals."⁵⁸ By fighting in their state's war, they did not lose their moral innocence. The branches not only apply to different actors, the actors addressed by *jus in bello* are simply not morally responsible for the war. This works similarly the other way around. When individual combatants commit war crimes, this does not generally affect the justness of the war itself. Unless, of course, war crimes are committed systematically, ordered by those political leaders, or adopted as strategy of war.

⁵⁵ Frowe (n 8) 104.

⁵⁶ This consequentialist argument can be turned around: it could be argued that a dependent *jus in bello* raises the *ad bellum* bar, effectively limiting war(fare). Knowing in advance that their combatants would be liable to attack without them equally being permitted to attack their enemy, could dissuade states to violate *jus ad bellum*.

⁵⁷ Orend (n 28) 48.

⁵⁸ Walzer (n 5) 36.

5. Critique on Independence Thesis₁

The independence thesis₁ has come under serious attack by revisionists such as Jeff McMahan. Far from being a coherent camp or position, revisionists set out to revise conventional just war theory in various ways, and what they seem to share is a critical attitude towards the conventional norms. Many of them specifically criticize the claim that *jus in bello* is independent from *jus ad bellum*. This critique is based on very different premises, i.e. a different conception of the nature of just war theory.

Most revisionists hold that there is nothing inherently special about war, which is why they reject the assumption that war is an exceptional moral domain. Instead, it is often assumed that the moral rules governing war should be reduced to the moral rules of everyday life (*reductivism*); i.e. war must be judged using our 'normal morality'. An unjust war is simply an aggregate of unjust attacks, and a just war is an aggregate of just acts of individual self- and other defence on a large scale.⁵⁹ Hence, reductivism reflects the idea that just war theory is determined by familiar moral principles as e.g. human rights, individual self-defence/ liability to defensive harm.⁶⁰ And since war is understood by using our normal morality, the argument runs as follows: if you are attacked on the street, you are allowed to defend yourself against that unjust attacker. When you harm him in defending yourself, he is not allowed defend himself and harm you as response to your justified defence. It would be very odd to consider you and the attacker moral equals in this respect; the attacker is not equally entitled to the same rights of self-defence, since only he posed an unjust threat and therewith forfeited his right not to be harmed or killed.

This means that *jus ad bellum* and *jus in bello* cannot be independent. In the words of Jeff McMahan: "The revisionist approach treats war as morally continuous with other forms of violent conflict and therefore rejects the idea that a different morality comes into effect in conditions of war. It asserts that the principles of *jus ad bellum* apply not only to governments but also to individual soldiers, who in general ought not to fight in wars that are unjust. [agents] It denies that *jus in bello* can be independent of *jus ad bellum* and concludes that in general it is not possible to fight in a way that is objectively permissible in an unjust war."⁶¹ Just as *jus ad bellum*, *jus in bello* is asymmetrical: unjust combatants are responsible for posing an unjust threat and therefore forfeit their right to life (*moral*

⁵⁹ E.g. David Rodin, *War and Self-Defense* (Clarendon Press 2003).

⁶⁰ This is precisely the critique that Walzer has on Jeff McMahan: "I don't deny its perceptiveness; I only want to deny its relevance to the circumstances of war. This is, after all, one of the reasons that we hate war: It is a coercively collectivizing enterprise; a tyrannical enterprise; it overrides individuality, and it makes the kind of attention that we would like to pay to each person's moral standing impossible; it is universally oppressive. Just war theory is adapted to the moral reality of war, which means that 'justice' in the theory lives, so to speak, under a cloud." Michael Walzer, 'Response to McMahan's Paper' (2006) 34 (1) *Philosophia* 43. See also Shue (n 50) 111 and Henry Shue, 'Laws of War' in Samantha Besson & John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010), 519-520.

⁶¹ Jeff McMahan, 'Rethinking the 'Just War,' Part 2' (2012, online) *New York Time Opinionator*. Available at: <https://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-2/>.

guilt). They are legitimate targets in war. Conversely, just combatants have done nothing to forfeit that right; they *are* innocent in the morally relevant sense. Hence, while just combatants are allowed to kill unjust combatants under the restrictions of *jus in bello*, the reverse is not the case. The normative status of *jus ad bellum* determines the normative status of *jus in bello*. While the two branches are conceptually different sets of norms, the content of *jus in bello* is determined by *jus ad bellum*. The norms differ among actors: just and unjust combatants are not morally equal. This means that the *jus in bello* norms, as we know them, only apply to just combatants.⁶² For them, there is only one obligation: stop fighting. If unjust combatants kill innocent just combatants that are only trying to defend themselves against unjust aggression, they are guilty of murder.

As we have seen, conventional just war theorists incorporate pragmatic considerations into just war theory. While McMahan is mainly concerned with the philosophical coherency of the theory, he does not turn a blind eye to the real world. He acknowledges that in reality, many combatants act under duress in war, and there are all sorts of epistemic problems which make it very difficult for combatants to know whether their war is just or not. For that reason, his radical conclusions regarding *jus in bello* would be hard to implement given the reality on the ground. "Revisionists therefore accept that it is necessary, at least at present, for the *law* of war to retain a code of *jus in bello* that is symmetrical between just and unjust combatants. They accept, in other words, that the law of war as it applies to combatants must at present diverge not only from morality but also from domestic criminal law, which assigns asymmetrical defensive rights to wrongful aggressors and their potential victims."⁶³ Therefore, although independence thesis₁ is wrong as a moral principle (it does not reflect the 'deep morality of war'), holding both just and unjust combatants to the same *jus in bello* is a smart thing to do in practice (*pragmatism*). McMahan adopts a 'two tiered approach': he separates the 'deep' moral norms from pragmatic legal norms. The independence of *jus in bello*, by which combatants are equally obligated to follow *jus in bello* norms, is a merely a useful convention.

6. Independence Thesis₂

With the substance of *jus post bellum* and the main arguments *pro* and *contra* independence thesis₁ in mind, let us now consider independence thesis₂. As to be expected and based on the connection between the two independence theses, Walzer defends independence thesis₂: the normative status of *jus post bellum* is not determined by the compliance to or violation of *jus ad bellum*. Post war peace building can be in accordance with *jus post bellum*, even though the war itself was unjust. *Jus post bellum* is symmetrical:

⁶² And as noted earlier, unjust combatants are simply obligated to stop fighting. Lazar (n 1).

⁶³ McMahan (n 61).

not related to the moral fault for the war. Conceptually, it can mean that *jus ad bellum* does not determine the content of *jus post bellum*. Just and unjust actors have the same permissions and obligations after war; former enemies are equally bound by the norms of *jus post bellum*.

Let us explore independence thesis₂ in more detail. Can we consider *jus post bellum* to be independent from *jus ad bellum*? According to the strict minimalist interpretation of *jus post bellum*, post war justice simply consists in a retreat without doing further harm. That interpretation would make answering the question easy: Such negative obligation falls on just and unjust belligerents equally. Strict minimalist *jus post bellum* is conceptually and normatively independent. But as we saw, according to contemporary interpretations, post war justice is more comprehensive; it entails more than a restoration of the status *quo ante bellum*. This does not, therefore, decisively answer the question.

In support of independence thesis₂, it can be noted in general that just war theory comprises three delineated branches. These branches consist of different sort of norms, governing different activities related to the practice of war. These often collide with the different phases in war – beginning, middle, and end – although not necessarily.⁶⁴ They help to answer three questions: When is it justified to start a war?; How should the war be fought?; What is a just aftermath of war? The distinction between the branches enables that these questions are answered independently, at different times, through the application of three different sets of norms. *Jus post bellum* is a conceptually distinct branch of norms, regulating specific activities relating to political reconstruction, criminal justice, reparations, etc.

Furthermore, it appears as if *jus post bellum* is also normatively independent; it should be judged separately. This claim is made by various theorists. Larry May endorses independence thesis₂. He defends symmetry of *jus post bellum*: both just and unjust former belligerents are bound by *jus post bellum*, and in principle, these norms apply equally to former belligerents.⁶⁵ At the end of war, “justice considerations are not necessarily to be determined by who was in the wrong, or at fault, in starting the war.”⁶⁶ Furthermore, Walzer notes: “It seems clear that you can fight a just war, and fight it justly, and still make a moral mess of the aftermath – by establishing a satellite regime, for example, or by seeking revenge against the citizens of the defeated (aggressor) state, or by failing, after a humanitarian intervention, to help the people you have rescued to rebuild

⁶⁴ See further Lazar (n 53) 13; 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 University Press 2014) 296, Peperkamp (n 8).

⁶⁵ Larry May further explains: “It may be true that the victorious party did not initiate, and would not have initiated, the war. And in this respect the principles of *jus ad bellum* are not symmetrical. But once the war starts, concerning tactics and concerning peace, the principles of Just War govern symmetrically.” May (n 26) 14, 17.

⁶⁶ May (n 26) 17, 18.

their lives.”⁶⁷ The justice of the peace that is created after war is to be judged independently from the judgments before and in the war. A just war is no guarantee for a just peace. But does this mean that an unjust aggressor can create a just peace after war? Not according to Brian Orend. He rejects independence thesis₂, and states that it is simply impossible for an aggressor to impose just peace terms. A violation of *jus ad bellum* ‘infects’, as a virus, both the conduct and the conclusion of war. When there is no justice at the start of war, there will be no justice at the end. It is, according to Orend, a matter of ‘garbage in, garbage out’.⁶⁸ “Truly, once you’re an aggressor in war, everything is lost to you, morally.”⁶⁹

However, three things must be properly considered here: the seriousness of *ad bellum* unjustness; the level of dependence; and the specific conception of *jus post bellum*. First, the aggressor-victim dichotomy more nuanced than Orend pretends it to be. Blatantly unjust aggressors, such as the Nazi regime or Saddam Hussein’s Iraq, who wage war to pursue an extremely unjust cause, are the exception nowadays. What also qualifies as an unjust cause is e.g. an intervention in an insufficiently severe humanitarian crisis, or a self-defence against a threat that is not yet imminent (a preventive attack instead of a pre-emptive attack). It is not hard to imagine such aggressor achieving post war justice, and it is not at all clear that such an ‘aggressor’ is morally lost from the outset. Additionally, wars can be unjust because there were still other options available to counter the problem, or when the intention was not in line with the just cause for war. Walzer rightly states that “a misguided military intervention or a preventive war fought before its time might nonetheless end with the displacement of a brutal regime and the construction of a decent one.”⁷⁰ Also, the possibility that all belligerents have some justness on their side should be acknowledged. Anthony Coady states: “there will usually be a constellation of grievances and perceived wrongs on both sides that go to make up the *casus belli*”.⁷¹ This compelling idea of comparative justice means that there are rights and wrongs on the side of all belligerents. *Ad bellum* unjustness is, in other words, a matter of gradation. Not all garbage that goes in is equally disgusting.

Second, it is indeed hard to see how an aggressor could achieve post war justice and create a just peace after winning an unjust war. E.g. a war of conquest is unlikely to lead to a just post war settlement, because it is an act of theft which ends up with territory being in the wrong hands.⁷² True, while even a successful genocidal aggressor has *post bellum* obligations, e.g. to compensate for inflicted damage, it cannot achieve a just

⁶⁷ Walzer (n 16) 163.

⁶⁸ Orend (n 31) 219.

⁶⁹ Orend (n 31) 188.

⁷⁰ Walzer (n 16) 163.

⁷¹ Anthony Coady, *Morality and Political Violence* (Cambridge University Press 2008) 90.

⁷² Walzer (n 16) 163.

peace.⁷³ Most aggressors are not, however, of the extremely aggressive Nazi like variety; 'extreme aggressors' are the exception. What remains, therefore, is an argument about the *likelihood* of an aggressor complying with *jus post bellum*, i.e. on the practical level, not a conceptual or normative claim.⁷⁴ Most aggressors *could* achieve some form of post war justice. An unjust war that entails an illegitimate annexation of territory, as arguably happened after the war between Russia and Ukraine, *could* lead to a minimally just peace in Crimea. When Russia would take over *de facto* control, but would re-establish safety and security, allow the Crimean population a certain degree of self-governance, and bring perpetrators of war crimes to justice, it would largely comply with *jus post bellum* norms. It might be unlikely, but the small likelihood of an unjust aggressor creating a just peace does not, in itself, invalidate independence thesis₂.

And third, the situations in which one considers *ad bellum* unjustness to be extreme enough to make achieving post war justice impossible very much depends on one's particular conception of *jus post bellum*. Which aggressors can comply with *jus post bellum*? Maximalists that aim for an ideal just peace in which people are able to flourish might not only find it impossible that the Nazis achieve such a goal; less extreme aggressors cannot achieve that either. It is not unlikely for them, but simply beyond imagination. Minimalists, however, would consider it unlikely that less extreme aggressors, as Russia, can achieve post war justice in e.g. Crimea, when post war justice is understood in a limited way. My point is that, with some very rare exceptions, it is not impossible for an aggressor to achieve post war justice, in the minimal sense, that is: when a minimalist conception of *jus post bellum* is adopted.⁷⁵ Orend's rejection of independence thesis₂ seems not entirely convincing.

Let us now further explore independence thesis₂ and recall the arguments for independence thesis₁. One of these arguments supports *jus post bellum* independence as well: the pragmatic concern of limiting the evils of war. As outlined in the second section, *jus post bellum* contributes to limiting the awful effects of war. Either by proscribing retreat without doing further harm in the strict minimalist interpretation, or by prohibiting e.g. installing a puppet regime, and proscribing e.g. the restitution of lost property in the more

⁷³ Outright aggressive wars, when successful, will most likely lead e.g. to the conquest and annexation of a neighbouring country's territory, and might end in full political domination or the installation of a puppet regime. That would be an ongoing violation of the right to self-determination, and it would be extremely difficult, if not impossible, for such a victor to achieve political justice in the vanquished state or area. According to Orend's account of political justice obligations, focused on creating a minimally just political regime, although it might result in a regime (their own?) that respects basic human rights, it is extremely unlikely that such a regime is legitimate in the eyes of the local population and the international community.

⁷⁴ First, there is certainly an increased risk in terms of compliance with *jus post bellum* norms when the victor is an unjust aggressor, and that is relevant. The *ad bellum* normative status undeniably influences what happens *post bellum*. The risk of non-compliance exists not only when an aggressor wins the war, but also when a just victor is a state that is not minimally just itself. When an illegitimate regime that violates the basic human rights of its own citizens wins a war, it is unlikely (but not impossible) that this actor would create a minimally just regime in the defeated state, even when it waged a just war. The moral character of the victor influences the risk of non-compliance, as does the moral character of the war.

⁷⁵ See also Carl Ceulemans, 'After the Dust Settles: Reflections on Postwar Justice' (2014) 42 *Millennium - Journal of International Studies*, 915.

maximalist interpretation. In general, it offers criteria that prevent the occurrence of 'victor's justice', and that seems equally, or perhaps even particularly important when the victor is an unjust aggressor. Endorsing independence thesis₂, judging *jus post bellum* separately, assumes that violations of *jus ad bellum* do not acquit belligerents from *post bellum* duties. Both just and unjust actors are held responsible for post war justice. This means that in case the unjust actor knows or suspects that *jus ad bellum* was violated, he is not 'morally lost'; the incentive to achieve post war justice remains. That must be welcomed in light of *jus post bellum*'s aim to limit the awful effects of war and to build peace in the war affected area. Holding just and unjust actors responsible stimulates compliance with *jus post bellum*, and increased compliance leads to a larger likelihood of achieving a just, or at least a decent peace. Hence, an independent *jus post bellum* is most effective.

Unlike the argument of pragmatism however, other arguments for independence thesis₁ do not work 'in the same way'. Let us recall the argument of exceptionalism: conventional just war theorists consider *jus ad bellum* and *jus in bello* independent because they are grounded in different moral domains. By assuming that an exceptional moral domain is entered after the start of war, they are able to separate the initiation of war and warfare into two separate activities, governed by different norms. This argument cannot be used to defend independence thesis₂. *Jus post bellum* comes into play *after* the war; it does not apply in the emergency situation of war but in peacetime. Both *jus ad bellum* and *jus post bellum* are governed by the 'full gamut' of moral reasons.⁷⁶ Is that an argument for *jus post bellum* dependence? Not necessarily. While conventionalists 'need' exceptionalism to show that a seemingly singular activity must be separated into two activities - the initiation and the practice of war - that is not necessary for *jus post bellum*. The aftermath of war (as opposed to *jus ex bello/ jus termination*) gives rise to new activities. There is no longer an ongoing activity of war, or, for that matter, an ongoing activity of attack, burglary, or rape, when such activity ends. Let us suppose that a bully attacks you with a knife on the street. Since he unjustly attacked you, he is responsible for remedying the problem he caused, and liable to proportionate retribution. Consequently, we could argue that this bully is morally obligated to e.g.: pull you away from the busy road where you fell down, provide first aid, call an ambulance, turn himself in with the police, and compensate for damage he has done to you. Not everything is lost to him; he could do 'the right thing' after the attack. In the same way, post war justice is quite distinct from the act of war and warfare itself, and it can also be judged separately.⁷⁷

⁷⁶ See also Lazar (n 53) 22.

⁷⁷ Nevertheless, as we have seen in the previous section, when he does comply with post attack obligations, it does not influence the unjustness of the initial attack, or make it less bad. He should not have attacked you in the first place. But the overall incident would be somewhat less blameworthy when the bully did the right thing after the attack.

The analysis so far still seems to support the independence of *jus post bellum*. However, the remainder of this section shows that independence thesis₂ cannot be correct after all, or at least it should be qualified. There are strong conceptual and normative links between the two branches. One such link is that the type of war that is waged is crucial for the content of *jus post bellum*.⁷⁸ Wars are waged to e.g. defend one's sovereignty, change an oppressive regime, to protect the population of another country against grave human rights violations, to mitigate a certain threat, or to stabilize so-called 'failed states' (aside from clear unjust causes for war, such as gaining control over foreign territory). Consider e.g. the defence of Finland against the Soviet Union in 1939. The war aim does not give rise to extensive obligations of political reconstruction in the Soviet Union; it is focused on protecting Finnish sovereignty. After an actual attack and successful self-defence, *jus post bellum* obligations are usually limited, focused on stopping the aggression and preventing it from happening again. The aggressive political regime might remain intact. However, *post bellum* obligations are more comprehensive after other wars, notably 'wars of choice'. For example, the pre-emptive 2003 Iraq war did arguably give rise to obligations of political reconstruction. Dismantling the Baathist regime of Saddam Hussein was part of the war strategy, which makes the coalition responsible for the power vacuum, something that needed to be considered *ad bellum*. *Jus post bellum* in the aftermath of a humanitarian intervention might be even more comprehensive. The intervener adopts a humanitarian role, and inherent in the cause is the duty to indeed halt the catastrophe and to remedy the deprivation. Humanitarian intervention almost inevitably entails political reconstruction of the regime in order to guarantee safety and security, i.e. halt the taking of human lives and to prevent it from happening in the near future.⁷⁹ These more comprehensive obligations might require short or longer term occupation of the victor. Carl Ceulemans states that specific *jus post bellum* norms are "somewhat *ad bellum* sensitive".⁸⁰ But this can be formulated in stronger terms. The content of *jus post bellum* is clearly shaped by the cause for war.⁸¹ In other words, the cause for war gives rise to specific *post bellum* obligations. This way, it influences and partly determines the content of *jus post bellum*.

Additionally, some *post bellum* norms are directly tied to *jus ad bellum*. As was noted in the second section, *jus post bellum* consists of a broad spectrum of permissions and obligations. *Jus post bellum* has one foot in, and one foot out of just war theory. On the one hand, backward looking obligations, as reparations and criminal prosecutions, flow from the war itself, and are grounded in principles related to moral responsibility and

⁷⁸ Thanks to an anonymous reviewer, who pushed me to be more explicit on this matter.

⁷⁹ For an excellent paper on Walzer's developing understanding of humanitarian intervention: Terry Nardin, 'From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention' (2013) 24 (1) *European Journal of International Law*.

⁸⁰ Ceulemans (n 75), 915.

⁸¹ See, too Lazar (n 53) 5.

outcome responsibility, such as the duty to compensate for inflicted harm ('Pottery Barn Rule'), to remedy caused problems, and to be liable to proportionate retribution for committed crimes. Forward looking obligations as extensive political reconstruction and economic development, on the other hand, are grounded in general theories of human rights, social justice, political theory, and/ or global distributive justice. The question of *jus post bellum* independence depends on the specific norms discussed. On the one hand, backward looking obligations flow from a violation of *jus ad bellum* (and *jus in bello*); they are related to the wrongdoing of war (and in war, for that matter). These norms are not symmetrical; they differ among actors and apply only to the actor that bears moral guilt. When an actor (state or individual) is morally responsible for waging an unjust war, that actor is liable to criminal prosecution and punishment for the crime of aggression. Additionally, when obligations of restitution and compensation are endorsed as part of *jus post bellum*, only the actors that are morally responsible for annexing territory, stealing property, or destroying cultural heritage are responsible for the restitution of illegitimately acquired territory or goods, or paying compensation for destruction. These obligations are based on the moral responsibility to make amends for unjust harms. Hence, while the argument of moral guilt for the war might be set aside by conventional just war theorist in times of war, based on the assumption that combatants are not responsible for their leader's wrongful decision to wage an unjust war, moral guilt is essential for the backward looking obligations after war. These norms depend on *jus ad bellum*.

On the other hand, there is symmetry, i.e. a certain *jus post bellum* independence, regarding forward looking norms. According to May, all belligerents are bound by the underlying responsibility to safeguard basic human rights.⁸² Both just and unjust actors are responsible for guaranteeing safety and security when that is necessary to achieve a decent peace after war. One could even argue that *jus post bellum* is symmetrical in a wider sense. Since these forward looking obligations rest on general theories of justice, an endorsement of a form of e.g. distributive justice and/or egalitarianism can widen the net of responsible actors to include international organizations and states that were not involved in the war. James Pattison argues that post war obligations are universal and should be taken up by the actors that are most capable of realizing a just peace after war.⁸³ In the individual example: when the bully runs away, and you lay bleeding on the street, other pedestrians walking in the vicinity are morally obligated to pull you away from the street and call an ambulance as well. Given that *jus post bellum* governs a situation that

⁸² May (n 26) 16-17.

⁸³ James Pattison, 'Jus Post Bellum and the Responsibility to Rebuild' (2015) 45 (3) *British Journal of Political Science*. See also: Bellamy (n 14) and Fabre (n 45).

is distinct from the war itself, a convincing case can be made for universal post war obligations, which would make *jus post bellum* globally symmetrical.⁸⁴

Clearly, there is a bundle of dynamics at play. Despite arguments in support of independence thesis₂, there are also arguments that undermine it. *Jus post bellum* is independent in some ways, but dependent in other ways. For that reason, independence thesis₂ cannot simply be endorsed or rejected. Although *jus post bellum* is a distinct set of norms, its content is influenced by *jus ad bellum* through the cause for war. The specific cause for war gives rise to certain *post bellum* norms in some wars, norms that might not arise in other wars. Furthermore, a distinction ought to be made between different *post bellum* norms: some norms are strongly connected with the wrongdoings of war, and others are not. Therefore, while the forward looking norms might be independent and thus symmetrical, the backward looking norms most definitely are not. On the normative level, although the branches can and should to be judged separately, and compliance with *jus post bellum* is usually not impossible after an unjust war, it is unlikely that an aggressor achieves some form of post war justice. What matters, here, is the specific conception of *just post bellum* that is adopted: does one aim for a decent peace, or a just peace in which people are able to flourish? Lastly, there is a pragmatic reason to hold all belligerents responsible for post war peace building, insofar that holding both *jus* and unjust actors responsible for peace building leads to a limitation of post war suffering. While this analysis does not give us an simple answer to our first question - Can we consider *jus post bellum* to be independent from *jus ad bellum*? - it does give an insight in the way in which *jus post bellum* is and is not independent. When we, however, want to understand the relationship between *jus ad bellum* and *jus post bellum* fully, we need to consider the second question too: Can we consider *jus ad bellum* to be independent from *jus post bellum*?⁸⁵

7. Is *Jus ad Bellum* Independent from *Jus post Bellum*?

As noted in the previous section, the three branches of just war theory are distinct bodies of norms on the conceptual level. *Jus ad bellum* offers norms that help answer the question: When is it justified to start a war? In addition to constituting a conceptually distinct branch of norms, *jus ad bellum* seems also normatively independent in an important way: it should

⁸⁴ Walzer argues that the burdens of reconstruction need to be wider distributed, for example in the situation of Iraq. Walzer (n 16) 167-168. He does not, however, fully endorse the idea of universal *jus post bellum* duties in the way that Pattison does. Neither do I think that this is not a convincing position. See: Peperkamp (n 8).

⁸⁵ Both sides of the relationship are recognized by Carl Ceulemans: "Saying that there is a dependency relation between two just-war components means that the moral content of one component will be influenced by whether or not the principles of the other component have been respected." Ceulemans (n 75) 914. Furthermore, Steven Lee discusses these two sides with regard to the relationship between *jus ad bellum* and *jus in bello*. See further on these two sides of independence thesis₁: Steven Lee, *War and Ethics. An Introduction* (Cambridge University Press 2012) 97-102.

indeed be judged separately. *Jus ad bellum* is supposed to be action guiding; it helps to assess, at a given point in time, given a particular situation, under certain circumstances, with the information then available, whether the decision to wage war is justified. That assessment does not include, for obvious reasons, the benefit of hindsight.⁸⁶ Changed circumstances or new information that was not known during *ad bellum* decision making, cannot be held against an actor, when reasonable efforts were made to get that information. A war that is wrapped up badly, such as the 2011 Libya intervention, does not make a war *ad bellum* unjust when it was just to begin with. The justness of the war, in other words, depends on what was known, and what could reasonably be known at that time. Similarly, the creation of a just peace in accordance with *jus post bellum* cannot retrospectively justify an unjust war. Ultimately, the judgements regarding these separate branches add up; they are taken together to indicate whether, and to what extent, the war *as a whole* was justified. The overall justice of the war is determined based on the level of compliance with the different sets of norms. And while a just peace does not make a war *ad bellum* just, a war that violated *jus ad bellum*, but was subsequently fought broadly in accordance with the rules, and wrapped up in accordance with *jus post bellum*, is overall less bad than a war that violated the norms of all three branches.

Nevertheless, in the following I will show that *jus ad bellum* cannot be considered fully independent either. There are various ways in which *jus post bellum* influences *jus ad bellum*. When passing judgement on the *ad bellum* justness of a war, blatant violations of *jus post bellum* can reveal information about the decision to wage war. E.g., it can indicate insincere intentions at the time of the *ad bellum* decision. Also, it can indicate that a certain cause for war is in fact an unjust cause, e.g. when seemingly aggressive military actions, such as Russia's intervention in Crimea, in fact ends in an annexation of territory and a severe deterioration of the local population's human rights situation.⁸⁷ Furthermore, violations of *jus post bellum* can reveal a lack of genuine consideration of the war's reasonable chance of success.⁸⁸ Behaviour in war's aftermath and the degree of *jus post bellum* compliance gives, in that way, information about the relevant considerations during the *jus ad bellum* decision, creating a complete picture. That helps to assess the justness of that decision, and that can be done without passing judgement with the benefit of hindsight.

More significantly even, *jus post bellum* is part of *ad bellum* decision making, that is, it plays a role in the decision whether or not to wage war. The flipside of *jus ad bellum*'s influence on *jus post bellum*, discussed in the previous section, is that, to a certain extent

⁸⁶ That does not mean that these judgments should not be passed. They should, and this can be seen as the continuous application of *jus ad bellum*, which helps determine the ongoing moral status of the war, and indicates when the war should be terminated.

⁸⁷ See e.g.: <https://www.bbc.com/news/world-europe-41386490>.

⁸⁸ That is, when one does, in fact, endorse this principle as part of the *ad bellum* assessment; there are various theorists who reject the last resort criterion.

and depending on the cause for war, the latter influences the former too. Larry May and Brian Orend take this a step further. They appear to assume that *jus ad bellum* is not only influenced by *jus post bellum*, but that it is contingent on it. *Jus post bellum* functions as an additional – that is, separate – restraint on war. Orend argues that the *jus ad bellum* requires a commitment to “appropriate war termination”. Without such commitment, the war is *ad bellum* unjust: “if it cannot so commit, it ought never to start the process”.⁸⁹ Similarly, May holds that “if there is a duty to rebuild on the part of the victor (which there is according to May), then war should normally not be initiated unless State A has the means and will to rebuild the vanquished State B’s infrastructure that will be damaged by State A’s military action.”⁹⁰ Even though there is a just cause for war, say self-defence against external aggression, and all the other criteria were met, the war would nevertheless be *ad bellum* unjust if the defender would anticipate that it could not create a just peace in the war’s aftermath, i.e. if it would be likely that the war would end in such devastation that the principles of rebuilding and reparations would be violated in the aftermath of war.⁹¹ *Jus post bellum* turns into an independent *ad bellum* criterion, which makes *jus ad bellum* contingent on *jus post bellum*; even limiting self-defence.

While *jus ad bellum* is certainly influenced by *jus post bellum*, and is in that way dependent on it, I doubt whether *jus ad bellum* is indeed contingent on *jus post bellum*. May and Orend might push it too far when they assume that *jus ad bellum* fully depends on *jus post bellum*, or that the norms of the latter should be completely integrated in the former.⁹² That conflates the three separate categories, and it makes just war theory overly restrictive. It rather appears that some *jus post bellum* norms partially determine *jus ad bellum* by informing and influencing its existing criteria. First, irrespective of the cause for war, not all the *post bellum* norms have to be integrated completely in the *ad bellum* decision. While e.g. guaranteeing safety and stability must usually be part of those considerations, pursuing criminal justice need not be an obstacle. That is, the fact that an actor foresees that it does not have the resources to successfully facilitate criminal justice after a humanitarian intervention, which predictably lets the genocidal aggressor off the hook, does not significantly influence *jus ad bellum*, or lessen the justification for an otherwise justified war.

Second, the type of war that is waged determines the extent to which *jus post bellum* influences *jus ad bellum*. Depending on the cause for war, particular *post bellum* elements are more or less relevant for the *ad bellum* decision. Self-defence against an actual armed attack does not necessarily entail duties of reconstruction in the war’s aftermath, and that does not need to be considered *ad bellum*. However, in many wars,

⁸⁹ Orend (n 31) 51.

⁹⁰ May (n 26) 16.

⁹¹ May (n 26) 163.

⁹² See further for a rebuttal of May’s assumption that *jus post bellum* functions as a separate *ad bellum* criterion: Lazar (n 53).

the anticipated situation after war is part of the decision to start it. As noted in the previous section, stopping a genocidal aggressor involves indeed a commitment to actually rescue local population, provide safety and security, and further obligations to politically reconstruct after the genocidal regime is toppled. A humanitarian intervener must consider from the outset its capacity to achieve that. The peace that *jus post bellum* is aimed at, is shaped by the cause for war, and so informs the *ad bellum* criteria.⁹³ The reasonable chance of success refers to an estimation of the likelihood of achieving the cause in war's aftermath, which requires including the resources required for that success, and integration in the overall strategy. Likewise, the proportionality criterion requires an estimation of costs and benefits of the means to achieve that goal, which requires looking ahead at the anticipated post war situation.

It is this sort of assumption that plagues the justness of the 2003 Iraq war (among many other things). In 2016, the Iraq Inquiry report found that UK planning and preparation for post war Iraq "were wholly inadequate".⁹⁴ There was no proper plan for post war administration, security and reconstruction.⁹⁵ 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".⁹⁶ But according to the Inquiry, sufficient information was available, e.g. on the likelihood of internal conflict and political disintegration in Iraq, the potential scale of the political, social, economic and security challenges, the burdens of protracted peace and nation building, and the scarcity of international partners willing to assist in post conflict peace building. This illustrates the relevant difference between retrospectively changing the moral status of *jus ad bellum* and assessing the status given the particular situation at that time. Hindsight was not required; the information was not new to the involved actors. These considerations needed to be, but were not, part of the *ad bellum* decision whether or not to wage war. Hence, the question is whether the information was known, or could have reasonably be known, at the time of the *ad bellum* decision making. The aftermath is an integral part of the military campaign, to be taken into consideration from the outset. Hence, the disastrous aftermath of the Iraq war not only demonstrated a violation of core *jus post bellum* norms, such as providing basic safety and security for the population, but also raised (additional) doubts with regard to *jus ad bellum*.

It seems, therefore, that *jus post bellum* is part of *jus ad bellum* by informing its criteria; to a more or lesser extent given the specific cause for war. Although the former is a distinct branch of norms and its normative status is not retrospectively changed by compliance or transgression of the latter, it is impossible to maintain that *jus ad bellum* is

⁹³ Lazar (n 53) 5.

⁹⁴ The Report of the Iraq Inquiry, Executive Summary, 122. Online: <http://www.iraqinquiry.org.uk/the-report/>. See further John Chilcot (et al), *The Report of the Iraq Inquiry*, HMSO, 12 vols. 2016.

⁹⁵ See also Philippe Sands, 'A Grand and Disastrous Deceit' (2016) 38 (15) *London Review of Books*, 9.

⁹⁶ Iraq Inquiry, Executive Summary, 83.

not conceptually influenced by *jus post bellum*, nor that the *ad bellum* judgment has nothing to do with the *post bellum* judgement. Hence, *jus ad bellum* is partially dependent on *jus post bellum*. It influences the decision whether or not to fight. We should be very wary though, about allowing *jus post bellum* considerations to make *jus ad bellum* impossible. When an actor anticipates that it can stop a genocidal aggressor, but cannot create a minimally just regime after a humanitarian intervention, the intervention might still be proportionate and relatively successful, and hence justified, when it at least significantly improves the local human rights situation. *Jus post bellum* norms do not fully determinate the *ad bellum* decision, which would make just war theory overly restrictive, but rather work as secondary limitation.

8. (In)dependence

Can we consider *jus post bellum* to be independent from *jus ad bellum*? And can we consider *jus ad bellum* to be independent from *jus post bellum*? An unjust war, such as the 2003 Iraq war, *can* end in a just peace. Aggressors are usually not 'morally lost'; former belligerents are bound by *jus post bellum* norms, although not equally. And a just war that is wrapped up badly, such as the 2011 Libya intervention, does not become an unjust war in retrospect. The analysis of the relationship between *jus ad bellum* and *jus post bellum* sheds some light on the two examples that I started with.

My goal was to contribute to a better understanding of the relationship between *jus ad bellum* and *jus post bellum*, and to bring to light some nuances that reflect the complexity of that relation. As I warned in the introduction, it seems impossible to answer the two central questions in a straightforward way. *Jus ad bellum* and *jus post bellum* are independent in certain ways, but not in others. The branches are independent in that they consist of different sorts of action guiding norms, governing different activities, often applicable at various points in time. They should be judged separately, and ultimately add up to make the war *overall* more or less justified. The Libya intervention was an *ad bellum* just war, but the disastrous aftermath makes it less overall just that it could have been when the responsibility to rebuild would have been taken more seriously. Furthermore, holding all belligerents responsible for *jus post bellum* is important because that is expected to be most effective in limiting the evils of war.

Nevertheless, I argued that both branches are also obviously linked, and some of those links are much stronger than between *jus ad bellum* and *jus in bello*. There are various ways in which the two branches influence each other: 1) *Jus post bellum* is part of *jus ad bellum* through the criteria of just cause, reasonable chance of success, and proportionality; 2) In this way, the cause for war determines the content of *jus post bellum*; 3) Relative *jus ad bellum* compliance of the victor increases the prospects for a decent or

just peace; 4) Moral guilt plays an important role in the backward looking *jus post bellum* norms, which are distinctly asymmetrical. My best and tentative answer to our two central questions is that *jus ad bellum* and *jus post bellum* partially depend on each other. The more precise answer, i.e. the extent to which both branches are linked, hangs on the cause for war, the specific permissions and obligations considered, and the way in which *jus post bellum* is conceived.

How does the specific conception of *jus post bellum* relate to one's answer to the two questions? Testing Walzer's presupposition showed that, because of the specific nature of *jus post bellum*, most of the arguments for independence thesis₁ are *not* valid for independence thesis₂. It would be wrong to assume, therefore, that conventional just war theorists would endorse independence thesis₂ in the same way as they endorse the first, and revisionists would defend the claim that *jus post bellum* is independent in the same way as *jus in bello*. In fact, the foregoing sheds a completely different light on that assumption. Generally speaking, minimalist *jus post bellum* is endorsed by conventionalists who aim at a decent peace after war. Such minimalism acknowledges some forward looking obligations, but is focused on backward looking obligations such as reparations and criminal prosecution. That indicates that minimalist *jus post bellum* is strongly connected to just war theory and hence relatively dependent on *jus ad bellum*. Maximalist *jus post bellum* is usually, but not always,⁹⁷ endorsed by revisionists, who aim at an ideal just peace after war. They use broader foundations to ground more extensive forward looking obligations. Fabre, for example, argues: "What, then, should an account of justice after war look like? It should confer priority to building peace over compensation and punishment, and it should extend its reach beyond belligerents to include outsiders."⁹⁸ There is a tendency to forgo backward looking permissions and obligations, and instead impose forward looking obligations that foster a just and lasting peace on belligerents *and* other actors. *Jus post bellum* is disentangled from just war theory, and consequently far less dependent on *jus ad bellum*.

Surprisingly therefore, the analysis leads to the observation that, quite to the contrary of what one might expect, it is coherent to defend one independence thesis and not the other. Conventionalists, insofar as they are minimalists focusing on backward looking obligations, should be inclined to reject independence thesis₂, despite their endorsement of independence thesis₁. Revisionists, insofar as they are maximalists focusing on forward looking obligations, should be inclined to endorse independence thesis₂, despite their rejection of independence thesis₁. I hope to have shown both these inclinations would be wrong; *jus ad bellum* and *jus post bellum* at least somewhat

⁹⁷ For example, Orend is a traditionalist just war theorist, who endorses a maximalist account of *jus post bellum*.

⁹⁸ Fabre (n 45) 508.

independent and somewhat dependent. But the extent to which one thinks they are linked is determined by one's specific conception of *jus post bellum*.