

ABSTRACT

Title of Dissertation: AFTER THE FIRE THE EMBERS STILL BURN:
A THEORY OF *JUS POST BELLUM*

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Ending wars right and justly has been an ethical imperative since they have first been fought. Given that the postwar periods of numerous wars fought in the recent past have been seriously bungled, the need for postwar ethics has become perspicuously clear. This need is also striking. It is striking because theories of *jus post bellum* have recently begun to take shape, yet they remain seriously deficient. *Jus post bellum* theorizing often remains narrowly focused on interstate warfare and is not reflective of the existing complexity and modalities of 21st century conflict. In addition, current theories typically focus on punishment, recriminations, and backward-looking models of justice that do not necessarily prioritize relief and aid to war-torn soldiers, societies, and civilians. By theorizing the concept of *jus post bellum* as a forward-looking cosmopolitan model of justice, where the central task is on building a just and lasting peace through stabilization, aid, and development, this dissertation aims to fill this gap. In so doing, the dissertation seeks to broaden the scope of *jus post bellum* by connecting it, and the just war tradition more generally, with the emerging contemporary literature of cosmopolitan global justice.

AFTER THE FIRE THE EMBERS STILL BURN: A THEORY OF *JUS POST BELLUM*

By

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Dissertation submitted to the Faculty of the Graduate School
of the University of Maryland, College Park in partial
fulfillment of the requirements for the degree of
Doctor of Philosophy
2013

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Introduction

Theorizing *Jus Post Bellum*

Introduction

Stories of war and its aftermath remind us that after the fires of war rage, the embers burn on. The salience of this feature of war makes the current state of normative theorizing about conflict all the more puzzling. Scholars of the just war tradition have significantly contributed to the development of normative principles concerning the ethics of beginning war (*jus ad bellum*) and the ethics of fighting war (*jus in bello*) but until very recently have remained comparatively quiet on the principles and practices of how war ends (*jus post bellum*). When scholars have theorized *jus post bellum* it has largely been inadequate. By providing an account of *jus post bellum*, and taking the just war tradition as my place of origin, this project aims to correct this shortcoming in the literature. At the same time, this dissertation seeks to broaden the scope of *jus post bellum* by connecting it, and the just war tradition more generally, with the emerging contemporary literature of cosmopolitan global justice.

When cosmopolitan scholars of global justice do discuss just war, they typically do so within the context of humanitarian intervention and sovereignty. With a focus on the universal, equal worth of all individuals, this is a logical starting point for cosmopolitans. Since the world as we know it can be a brutal place where grave, unjust violence is done to people, the cosmopolitan must answer what the moral responsibilities are when such abuses occur and to whom responsibilities of help and aid fall. But in doing so, cosmopolitans have situated their answers within the structure of the orthodox just war tradition — *jus ad bellum*

and *jus in bello* — and ignored *jus post bellum*. This is curious because cosmopolitan theory seems best placed to tackle the hard issues that *jus post bellum* scholars are just now grappling with. Principal among these issues is the distribution of postconflict responsibilities. In the wake of violent conflict individuals who were not liable to the harms of war often suffer serious deprivation and suffering; this suffering must be addressed. When the guns fall silent the need for the distribution of postconflict resources and goods raises pressing questions, not only for just war theory but also for cosmopolitan theorists.

What we find, then, are significant shortcomings in both the traditional just war literature and the emerging cosmopolitan scholarship on just war. Just war theory has offered important insights into the justice of when and how wars can be waged but very little about how they end. The global justice literature has provided significant contributions to the topic of distributive justice but has remained comparatively quiet about how this scholarship can contribute to *jus post bellum*. These two strands of thinking about justice — just war and cosmopolitan global justice — have largely been theorized separately. In this dissertation I argue that *jus post bellum* can be more effectively theorized if these two strands come together in a way that takes the end of war seriously.

This chapter proceeds as follows. Section I outline's the project's methodology, followed by a conceptual discussion of *jus post bellum*. Section II examines how when compared to *jus ad bellum* and *jus in bello*, classic formulations of the just war leave *jus post bellum* largely unexplored. Section III argues that in drawing from these classic formulations of just war contemporary accounts of *jus post bellum* are lacking and should be abandoned in favor of a reorientation of the theory. Section IV discusses how this reorientation should draw from cosmopolitanism as a way to more fully address the topic of global distributive

justice within *post bellum* contexts. Section V concludes with a summary of the remaining dissertation chapters.

1.1 The Approach Towards Theorizing *Jus Post Bellum*

This is a work in political philosophy; namely, the ethics of postconflict justice. In addressing this topic this work also draws from diverse areas of scholarship such as international law, international relations, and moral philosophy. This reflects not only a methodological choice, using aspects of these literatures to inform a normative theory of *jus post bellum*, but also my belief that these areas of study are deeply interconnected. A thorough and productive discussion about war and violence must recognize that this inevitably involves the relations of global actors, law, and key areas of political and moral philosophy. While this work draws from these areas, the primary “families” of scholarship within which it is situated are the just war tradition and cosmopolitanism (about which I will have more to say in a moment).

With respect to the ethics of war and conflict, international law has played an integral role. Some may view the traditional just war principles of *jus ad bellum* and *jus in bello* as primarily principles of international law, emphasizing the laws of war over its ethics. It is true that many of the principles that come out of the just war tradition have been instantiated in codified bodies of law, the Geneva Conventions of 1948 are one such example. It is important to note that natural law theorists, from whom much of the early modern just war tradition originated, viewed the ethical and legal principles of war as closely aligned, if not altogether synonymous. Under this view of natural law, the principles and laws of war are derivative of ethics; the two areas are almost indistinguishably intertwined.

On my view, although international law may sometimes align with just war principles, I take such principles to be primarily ethical in nature. I believe that morality can

and does inform law. The development of bodies of law, and the subsequent philosophical explication and analyses of such bodies, do produce important insights into morality and the law itself. Investigation of and discussion on the connection between law and morality are vitally important and can be illuminative when thinking about ethics and war, and this includes *jus post bellum*. But the laws of war are artifacts, often the product of the possible — arising through diplomatic horse-trading, power politics, customs, and norms — and they are often not a reflection of morality. As Michael Walzer has noted, “[t]he language with which we argue about war and justice is similar to the language of international law...legal treatises do not, however, provide a fully plausible or coherent account of our moral arguments.”¹ Although I do draw on international legal theory and principles, I view the content of *jus post bellum* covered in this work as primarily normative, not legal.²

Ethical principles should be constrained by what is politically possible, but that possibility must be broadly construed. In this work I have tried to strike a proper balance between the firm belief that we must broaden our moral view with aspirations towards a better world, while simultaneously recognizing the fact that politics and warfare are unfairly skewed towards the powerful, whom often ignore the imperatives of morality. But philosophical inquiry should not shrink from the task of expanding the realm of moral possibility. It is in this way that this work could be described as what David Rodin has called “aspirational moral argument,” which he defines as:

an argument which considers not simply what is most desirable given current constraints, but rather posits wholly alternative, and perhaps revolutionary, configurations of social, political, and legal realities...The purpose of such visions is

¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (NY, NY: Basic Books, 2006). pp. xx.

² The University of Leiden has produced a fruitful discussion on this topic through The *Jus Post Bellum* Project. See Leiden University, "The *Jus Post Bellum* Project," <http://juspostbellum.com/>. Also see C Stahn and JK Kleffner, *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (The Hague, The Netherlands: Asser Press, 2008).

to help identify long-term moral objectives rather than immediate directives. Indeed, the most significant part of moral advancement often consists not so much in identifying right and wrongs acts, or good and bad states of affairs, but in helping to realize the conditions whereby humans are enabled to behave morally and well.³

In this sense, normative theory must be tempered by empirical reality, but not wholly constrained by it.⁴

It is in this way that I view this work as part of a larger project that is both philosophical and political. This is the global project of advancing human dignity, well-being, development, peace, and justice. With respect to the explication and development of human rights (and natural law), Soltan argues that such developments should be viewed as part “of a program of struggle against a world dominated by the system of sovereign territorial states.”⁵ Contributors to this “program,” of which I count myself to be a part, are members of an ongoing, fluid, and dynamic process that attempts to sharpen and tackle philosophical issues as a way to advance the causes of justice and peace. In this way, a theory of *jus post bellum*, and theories of war and peace more generally, constitute an essential plank in this project. By helping guide our conduct in both normative and practical ways during times of violent conflict, we can aspire towards aiding in the mitigation of unnecessary harm and suffering and advancing the cause of human dignity.

In taking the approach of aspirational moral argument, I employ the tools of philosophy. This means that I engage in conceptual examination, make distinctions, and undergo the exploration of existing intuitions and principles and the development of novel normative principles. All along I attempt to work back and forth between these moral

³ David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002). pp. xiii.

⁴ Although space does not permit me to fully discuss the constraints that the politics of the powerful place upon theories of justice that hope to articulate the best of what is both philosophically and practically possible, I appreciate James Glass pushing me on this topic.

⁵ Karol Soltan, "Natural Law, Universal Human Rights and Science," *The Good Society* 12, no. 3 (2003). pp. 20.

principles and everyday intuitions through the process of reflective equilibrium. Throughout this process I have chosen to draw from examples of individual and collective forms of responsibility. In choosing such examples, I hope to ratchet up our intuitions as a way to explicate and make perspicuously clear the moral terrain of *jus post bellum*.

In many instances, I draw from cases and examples of individual responsibility. Some thinkers argue that with respect to moral responsibility, it is the individual who is ultimately responsible and the best suited to carry out the demands of global justice.⁶ While I believe that moral responsibility often resides with individuals, with respect to the moral requirements of *jus post bellum*, on my view, such responsibilities are best carried out through institutional schemes and mechanisms—that is, largely through collectives. So while I do employ some examples and thought experiments that center on individual responsibility, I largely do so for heuristic reasons.

One final methodological point; with respect to the use of terminology, in keeping with the tradition of just war scholarship, throughout this work I typically use the Latin variant of *jus post bellum*, but on some occasions, when style demands, I use the terms postconflict justice and postwar justice. For the purposes here, these terms should be considered as synonymous. I also employ the distinction between “political community” and “state.” By “political community,” I mean a collection of individuals who occupy a shared territory and share the bond of similar if not fully shared political ideals, norms, and values. Following Fabre, by “state” I mean “(a) the set of institutions and the individuals who occupy roles within those institutions, (b) which together govern over a given territory and people, (c) which decide whom to admit to that territory; (d) whose rules and decisions are *de*

⁶ Peter Singer, *One World: The Ethics of Globalization* (New Haven: Yale University Press, 2002).

facto binding over both that territory and people, and (e) which coercively enforce those rules and decisions.”⁷ The reason for this distinction should be obvious, it is not only states that fight wars or are threatened and harmed by them, and it has long been recognized that political communities now have the power to wage and fight wars.

Finally, many of these chapters cover interrelated but diverse literatures, and some of these chapters are quite long. With this in mind, I would like to register a call and request for patience. The length is necessary for my argument to fully unfold, but despite the length, I am able to address only so many relevant avenues of discussion. Therefore, my approach is to tackle only those elements that are most salient to *jus post bellum*.

What is Jus Post Bellum?

When considering *jus post bellum*, two important issues immediately arise. The first concerns how we define the “post” in *jus post bellum*. One can call to mind the ushering in of the ostensible “postwar” period of the Iraq War. This was marked by then President Bush’s triumphant 2003 speech aboard the USS Abraham Lincoln. Donning an aviator’s suit and with a banner reading “Mission Accomplished” as his backdrop, Bush declared an end to “major combat operations.”⁸ Shortly after, violence in Iraq flared and Bush’s declaration of the beginning of a postwar period seemed doubtful at best. More recently, on August 31, 2010, President Obama announced the end of combat in Iraq. At the time, troops were no longer performing counterinsurgency operations. Instead, they were “advisors” for counterterrorism actions. In this case, it was and remains unclear that the U.S. operations,

⁷ Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012). pp. 16.

⁸ CNN, "Bush Makes Historic Speech Aboard Warship (Speech transcript)," <http://www.cnn.com/2003/US/05/01/bush.transcript/index.html> Retrieved from the World Wide Web on May 11, 2009.

and the fifty thousand troops that remained to carry them out, really were in a postwar phase.

These events underscore the vexed nature surrounding how we define the “post” in *jus post bellum*. When does the postwar period actually begin? One prominent just war theorist, Brian Orend, refers to the concept of *jus post bellum* but then claims that he actually prefers the term “termination phase” to refer to the *post bellum* period and its activities.⁹ According to Orend, this phase includes the achievement of military and political objectives, the drawing down of troops, reduction and cessation of violence, and when appropriate, the signing of peace treaties.¹⁰ But this would seem to confuse *jus post bellum* with *jus ex bello* or *jus ad terminationem belli* (also called *bellum terminatio*), which entail the conditions under which wars should be brought to an end, i.e., terminated.¹¹

War termination is different from *jus post bellum*, which, as David Rodin defines it, “concerns the moral principles after a transition from war to peace has been achieved.”¹² The distinction between the postwar and war termination phases is important as it can provide useful theoretical clarity about the variant aspects of war and its temporally related activities. There may, of course, still be some combat related operations and termination-type activities during the *post bellum* phase, but to conflate war termination with *post bellum* is a

⁹ Brian Orend, "Jus Post Bellum: A Just War Theory Perspective," in Carsten Stahn and Jann Kleffner (eds.) "Jus Post Bellum: Towards a Law of Transition from Conflict to Peace," (The Hague, The Netherlands: Asser Press, 2008). pp. 34.

¹⁰ Ibid.

¹¹ *Jus ex bello* is defined as the conditions under which war should be brought to an end. See D. Mollendorf, "Jus ex Bello*," *Journal of Political Philosophy* 16, no. 2 (2008). For a discussion of *jus ad terminationem belli*, which addresses conditions for war termination see David Rodin, "Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression" " in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (2007).

¹² See Larry May, *After War Ends: A Philosophical Perspective* (Cambridge: Cambridge University Press, 2012). pp. 4.

mistake that ignores the important distinction between these two concepts. A theory of *jus post bellum* should focus on normative principles that relate to building the peace after war ends. This is different than the period, practices, and principles of termination.

Other theorists temporally conceptualize *jus post bellum* to include “the period following major combat operations up to and after the cessation of hostilities,” arguing, “[t]his means that *jus post bellum* considerations are likely to overlap *jus in bello* ones.”¹³ This is an improvement over conflating *jus post bellum* with *ex bello* and *bellum terminatio*, and it is true that *jus post bellum* will overlap with traditional just war categories such as *jus in bello*. Despite the improvement, this definition remains potentially problematic. This is because it continues to run into Bush’s problem — that is, it seems that even when major combat operations end (or at least they are declared to have ended) there can still remain a relatively hot war. In such cases, it is not clear that the “post” in *jus post bellum* has begun. Perhaps we need something between the end of major combat and the silencing of the guns after the cessation of hostilities.

Larry May prefers a more dexterous, “relative” approach.¹⁴ May argues that given the increasing absence of formal ceasefires and peace treaties, we should view a war’s ending “as relative to where things had been in an earlier period of hostile relations.”¹⁵ This has the benefit of remaining flexible; different types of conflicts will look differently when they “end,” or at least begin to end. For May, the real key for when a conflict moves into the postconflict phase is when hostilities decrease (although they may spike, decrease, and again increase at given intervals), the parties take peacemaking seriously, and they begin to move

¹³ Doug McCready, "Ending the War Right: 'Jus Post Bellum' and the Just War Tradition," *Journal of Military Ethics* 8, no. 1 (2009). pp. 67.

¹⁴ May, *After War Ends: A Philosophical Perspective*. pp. 3.

¹⁵ *Ibid.*

toward peace. As May puts it, “ war ‘ends’ when both parties are ready to explore what would constitute a just and lasting peace.”¹⁶ While in such situations there may be a good distance to go until there is a truly final and meaningful ending, May’s conceptualization seems at least partly right. Although, we may register concern that May’s use of “both” signals an application to only conflicts of a binary nature. Keeping this in mind, we can define loosely the “post” in *jus post bellum* as the period in which major combat operations have halted and warring parties and other relevant actors begin to move towards exploring and engaging in the building of a just and lasting peace. As just war scholar Brian Orend notes, the post in *jus post bellum* is much like sunrise. We may not all agree when dawn arrives, but we eventually come to recognize that a new day has emerged and that a new phase has been entered.¹⁷

The Content of Jus Post Bellum

The second issue that arises in an initial consideration of *jus post bellum* relates to the theory’s content. It may seem obvious, but *jus post bellum* is an account of justice after war, so we need to know what comprises and constitutes this justice. In my view, just war theory should be both prescriptively action-guiding and a theoretical tool which we can use in post hoc normative evaluation. In this latter sense, *jus post bellum* should help guide our reflections and evaluations of the justice of a given postwar period even after the war has come and gone. Such evaluation is more than just historical analysis. The casuistic approach of employing case studies of wars and their constituent parts to help clarify normative thinking has been a mainstay of the just war tradition for centuries. While historical usage does not

¹⁶ Ibid.

¹⁷ Orend, "Jus Post Bellum: A Just War Theory Perspective," in Carsten Stahn and Jann Kleffner (eds.) "Jus Post Bellum: Towards a Law of Transition from Conflict to Peace." pp. 34.

immediately confer methodological legitimacy, casuistry has led to significant normative development surrounding war, including the explication and refinement of its principles. These clarifications and refinements have, in turn, helped with the prescriptive action-guiding tasks incumbent upon an ethical theory of war. If this is an accurate description of two ways that just war theory can be normatively employed, then, not unlike other principles and categories of just war, we need to have a relatively firm view of the substantive content of *jus post bellum*.

In my view, the cornerstone of *jus post bellum* is the concept of rebuilding. Following the International Commission on Intervention and State Sovereignty (ICISS), we can define rebuilding as “full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”¹⁸ Rebuilding is, then, constituted by the following: ensuring and providing security to the population; processes, practices, and institutions of justice and reconciliation, including a functioning judicial system; and economic development.¹⁹

Admittedly, rebuilding takes us a good distance from the practice and procedures that classic just war theory traditionally governs. I will not attempt to defend the demands and obligations of rebuilding here, I take up that task in Chapter Two, but what I will say is that the concept of rebuilding is based upon two central notions. The first is the idea that war is embarked upon to build a more just and lasting peace. One hopes that in creating a durable peace the potential for future conflict is reduced. Under this somewhat idealized notion of war and its ends, rebuilding has pragmatic, instrumental weight. Rebuilding can

¹⁸ International Commission on Intervention and State Sovereignty, "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty," (Idrc, 2001). pp. xi.

¹⁹ Ibid. pp. 7-8.

help reduce the likelihood of a political community reverting back into a dangerous and violent entity, thereby reducing the need for future armed conflict.

There is also moral weight to rebuilding. This stems from the equal inherent worth of all individuals. To be sure, many individuals that are killed and maimed in war are liable to killing and maiming, but many, many more are not. This also includes individuals who have suffered harms lesser than, say, maiming and killing, but are significant nonetheless, such as destruction of property and infrastructure. Such individuals are simply caught in the crossfire, so to speak, and they deserve to live a life worth living with the requisite institutions, infrastructure, and capabilities to do so. Rebuilding can help make this happen.

Rebuilding may appear onerous and demanding, but when properly distributed as a collective responsibility these demands can be significantly reduced. As a matter of perspective, according to the Congressional Research Service, as of March 2011 the cost to the U.S. for waging one month's worth of war in Afghanistan was \$6.7 billion U.S. dollars (including money earmarked for then current reconstruction efforts).²⁰ By comparison, at the international Tokyo Conference on Afghanistan in July 2012, world donor states pledged \$16 billion in development aid through 2016. That is roughly \$2 billion per year, total. This amount will surely fall short of what is needed, and we can all but guarantee that the notoriously craven and corrupt Karzai regime and the governments that follow will siphon much of it off. But it is a fact that these rebuilding efforts are comparatively cheaper than military operations, both in blood and in treasure, and that their burden can be reduced

²⁰ Amy Belasco, *Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* (Congressional Research Service, 2009).

when distributed among various agents.²¹ It is important to keep in mind that without a proper ending, the seeds of conflict simply become yet again sown and the blood of the innocent often fuels the reaping.

1.2 The Classic Formulation of *Jus Post Bellum*

In a departure from classic and early contemporary just war theorizing, the concept of *jus post bellum* has recently undergone serious development as its own category within just war scholarship. This is not to say that classic formulations failed to consider the justice after war ends; they often did, but they did so in a way that did not advance development of *jus post bellum* as its own independent category within the theory of just war. One potential reason for this lack of independent development is that the concept of *jus post bellum* is presupposed by the *jus ad bellum* principles of right intention and just cause.

With respect to just cause, the belief was that the justness of the cause bears directly upon the justness of the postwar outcome — a war with a just cause is fought for a just ending—a just peace.²² This idea has roots that go back to the ancients, and although Cicero can be credited with an early version of the conception of a just peace, it was Augustine who offered a detailed articulation of the idea.²³ For Augustine, the cause of war explicitly aims towards the securing of a just peace at the time of the war's conclusion.²⁴ Augustine's central idea of the just peace was that the *post bellum* is presupposed by the *ad bellum*. As a result of

²¹ It is true that it might require combat operations to get to the point at which rebuilding can actually occur. But this is in keeping with my broader point that once the space has been made and rebuilding can proceed, it is a moral imperative to do so.

²² For a discussion of this view of the just peace see James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton, N.J.: Princeton University Press, 1975). pp. 26.

²³ “Wars, then, ought to be undertaken for this purpose, that we may live in peace, without injustice.” Marcus Tullius Cicero, *On the Commonwealth and On the Laws* (Cambridge: Cambridge University Press, 1999). On Duties, Book. I, Section 35.

²⁴ See Augustine, *The City of God Against the Pagans* (Cambridge: Cambridge University Press, 1998). Book 19, Chapter 12, pp. 934.

this presupposition, the view was that the development of *jus post bellum* as an independent category of just war theory need not occur. The content of *jus post bellum* is satisfactorily addressed by the content of *jus ad bellum*.

For Augustine, and many who followed, this view of just war was in keeping with the belief that the principles of the theory were deeply interconnected. This aspect of just war thinking makes it easy to see how the principle of right intention fits squarely with the notion of just peace.²⁵ Since the ultimate aim of war was a just ending, it followed that those leading and fighting wars must intend this aim. For Augustine, the intent of the both the leaders and the warriors was critically important. This meant that war must be undertaken with a heavy heart because “peace is not sought in order to the kindling of war, but rather war is waged in order that peace may be obtained. Therefore, even in waging war, cherish the spirit of peacemaker, that, by conquering those whom you attack, you may lead them back to the advantages of peace.”²⁶ Under this interpretation of right intention, not only must one aim towards a just ending in war, and comport oneself with the principles of fighting well and justly, but one must also intend and aim for a just peace. War could be just, but it must always be undertaken in a spirit of solemnity with the intent of a “peacemaker.” This inclusion of the just peace as an *ad bellum* intention of resorting to war and the *in bello* intention that one must hold while fighting, connects the *ad bellum* and *in bello* with the *post bellum*.

²⁵ For an excellent discussion of the historical role of right intention and just cause aiming towards a just peace, see Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*. chp. 1. *passim*.

²⁶ As quoted in Johnson. *Ibid.* pp. 41. Johnson does an excellent job of tracing the lineage of this idea through the major just war theorists of the ancient, medieval, and early modern periods.

These views of just cause and right intention have two important implications. The first is that *jus post bellum* has the potential to place constraints on the way that wars are begun and fought. The just peace reflects back upon and constrains both when a war can be fought and how the fighting is prosecuted.²⁷ Second, and for the purposes here the more important of the two, while the classic Augustinian just war formulation advanced some elements of *jus post bellum*, it also hampered the development of *jus post bellum* as an independent just war category. This was because *jus post bellum* thinking was partly parasitic on *jus ad bellum*, as it was believed that the criteria that one finds within the traditional just war principles provided sufficient normative *post bellum* content. The result was, therefore, that *jus post bellum* was not subject to the same level of development as the other categories of just war.

1.3 Contemporary *Jus Post Bellum*

In anticipation of the theory of *jus post bellum* that I will be defending throughout this work, it is useful to situate it within the context of past and current theories of *jus post bellum*. We can identify two general strands of *jus post bellum* theorizing, minimalism and maximalism, that share some decisively critical shortcomings but remain divergent enough to merit separate discussion. This will need further elaboration in coming chapters, but some preliminary remarks are in order.

²⁷ I discuss this point in greater detail in Chapter Six. For example, the principle of proportionality constrains conduct during war; such constraint has historically included both a prohibition on total war and a constraint on the pursuit of permissible ends. When coupled with the *jus ad bellum* constraint on the ends that can be permissibly pursued, how the content of *jus post bellum* is theorized can help inform what is permissible during war. For example, if the classic formulation of *jus post bellum* requires the pursuit of a just peace, then warring parties' conduct can be constrained in a way that ensures that such ends can effectively be met. *Ex hypothesi*, conduct in pursuit of a just cause that seriously jeopardizes postwar objectives, duties, and restraints can be rendered disproportionate. Postwar outcome and goals can factor into *in bello* proportionality calculations.

Minimalist Approaches to Jus Post Bellum

One influential strand of theorizing *jus post bellum* in contemporary scholarship has been the “minimalist” variant.²⁸ The minimalist believes that war is waged to vindicate the rights of the just, and the postwar duties and constraints of the given parties flow from this rights vindication. Under this view, individuals have rights. Among these rights is the right to self-defense. The rights of states are partly derivative of these individual rights and arise when individuals come together to form a political community as a way to preserve their rights and advance their individual and collective interests. As aggregate collections of individuals, states too possess rights. Among these are the rights of sovereignty and territorial integrity, and the right to self-defense when these preceding rights are violated.

In the just war tradition, this view of rights vindication has come to be the paradigmatic example of a just cause against aggression. The central idea behind this view is that the aggressor has violated the rights and sovereignty of a nation — a peoples — thereby dislocating and disturbing the *status quo ante*, the peace.²⁹ The just cause in response to aggression is largely a return of these rights, and under more narrow circumstances a limited improvement of the previous state of affairs.³⁰ Under this formulation, a just peace is

²⁸ I borrow this term from Bellamy, in Alex J. Bellamy, "The Responsibilities of Victory: "Jus Post Bellum" and the Just War," *Review of International Studies* 34, no. 4 (2008). Bellamy divides the moral requirements found in much *jus post bellum* scholarship into two categories: minimalist and maximalist. According to Bellamy, the minimalist “holds that moral principles derived largely from *jus ad bellum* and *jus in bello* concerns should constrain what victors are entitled to do after war and a maximalist position which holds that victors acquire additional responsibilities that are grounded more in liberalism and international law than in Just War thinking.” Ibid. pp. 601. Evans calls this the “restricted” and “extended” views of *jus post bellum*, in Mark Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum," *Ethics & International Affairs* 23, no. 2 (2009). pp. 149.

²⁹ Walzer gives what may quite possibly be the reigning articulation of this view. See Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 51-73.

³⁰ For example, in a rejection of a return to the *status quo ante* Aquinas argued “Hence all wars are waged that men may find a more perfect peace than that which they had

achieved when the restricted just cause has been fulfilled: the aggression has been rolled back and the aggressor has received appropriate sanction. Nothing more is required of the warring parties.

This minimalist view of just cause and *jus post bellum* has been deeply influential in contemporary just war scholarship. For example, in the now classic account of contemporary just war theory, Walzer draws on minimalism in his conception of just cause and *jus post bellum*. Walzer argues for a conception of *jus post bellum* in which the content shaping it is parasitic on *jus ad bellum* and connected to his communitarian views of the state. It is this view of the rights of individuals and political communities to which Walzer refers when he writes that:

[t]he theory of ends in war is shaped by the same rights that justify the fighting in the first place—most importantly, by the right of nations, even of enemy nations, to continued national existence and, except in extreme circumstances, to the political prerogatives of nationality. The theory...is, I think, harmonious with other features of *jus ad bellum*.³¹

The rights of individuals and the value of political community serve as the justificatory bedrock for the rationale of collective self-defense, and from which the content of *jus post bellum* stems. For the minimalist, the postwar goals, permissions, and obligations are driven and defined by the just cause — the vindication of rights. It is the restoration of these rights that shape “the theory of ends in war.”³²

As we can see, within the scope of the standard just war categories, traditional just war principles can generate *jus post bellum* content.³³ Although we may be reluctant to call

heretofore.” Thomas Aquinas, *Summa Theologiae*, vol. 42 (Cambridge: Cambridge University Press, 2006). Question 29: On Peace, Art. II, Reply Obj. 2.

³¹ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 123.

³² *Ibid.*

³³ For a discussion of this view of traditional just war theory and *jus post bellum* see Michael Walzer, “The Aftermath of War: Reflections on Jus Post Bellum,” in Patterson, E. (ed.)

these satisfactory articulations of postwar justice, both the classic and contemporary formulations of just war theory do contain elements of *jus post bellum*. It is also clear that numerous thinkers (rightly) believed that extant just war categories and principles presuppose these elements. But this presupposition relegated *jus post bellum* to the confines of traditional just war theory, slowing its development as an independent category of normative consideration. This is problematic because, as we shall see in a moment, using *jus ad bellum* and *jus in bello* as the sole basis for *jus post bellum* confines normative postwar thinking to a narrow spectrum of cases and agents. Although there is much to be learned from extant just war categories, relying on them solely provides an insufficient basis upon which to build a theory of *jus post bellum*.

Recognizing that *jus post bellum* brings to bear considerations and content different from, and partly independent of, the categories of *jus ad bellum* and *jus in bello*, recent just war scholars have begun theorizing *jus post bellum* as its own independent category.³⁴ The problem here is that much of this theorizing has been formulated through the minimalist model, emphasizing rights vindication and the associated duties, obligations, permissions, and constraints relevant to such vindication. For example, according to one of the leading *jus post bellum* scholars, Brian Orend, the core of *jus post bellum* should focus upon the permissions of just victors to defeat and roll back aggression, punish wrongdoers through war crimes trials

"Ethics Beyond War's End," (Washington, DC: Georgetown University Press, 2012). It should also be noted that in the past few years it seems that Walzer has moved away from this earlier position. For example, he writes that "[d]emocratic political theory, which plays a relatively small part in our arguments about *jus ad bellum* and *in bello*, provides the central principles of" *jus post bellum*. Michael Walzer, "Just and Unjust Occupations," *Dissent* (2004). pp. 61.

³⁴ Gary J. Bass, "Jus Post Bellum," *Philosophy and Public Affairs* 32, no. 4 (2004); Brian Orend, "Justice after War," *Ethics and International Affairs* 16, no. 1 (2002); Brian Orend, *The Morality of War* (Peterborough, Ontario: Broadview Press, 2006); Brian Orend, *War and International Justice: A Kantian Perspective* (Waterloo, Ontario: Wilfrid Laurier University Press, 2000).

and reparations, and the requirement, subject to a host of contingencies, of demobilization and rehabilitation of the vanquished. As Evans notes, Orend's theory "focus[es] on the rights of just combatants, whereas their responsibilities are apparently limited in the sense that they are largely negative in character (specifying what just combatants are not allowed to do)."³⁵ Although there are some minimally positive obligations in Orend's articulation of *jus post bellum*, it is largely an account that stems from the vindication and restoration of rights, the rights of the just victor.³⁶

The implications of this approach are twofold. First, because wars are fought for a set of narrow reasons, there is a firm belief that the end of war requires very little on the part of the victorious. But because just cause informs *jus post bellum*, and this is my second point, this view also requires a broad range of things that the victors cannot do. They cannot, for example, exact revenge or pillage the vanquished. In addition to being barred by justice, this would take their *post bellum* conduct beyond the *ad bellum* rights vindication. The minimalist seeks to limit both the duties and the permissions of the just victors. We likely agree that limiting *post bellum* conduct is a sensible way to prevent harmful and unjust excesses by the victors, but we may also have intuitions and beliefs that the ending of wars requires more, and these come into tension with minimalism. Still, one need not have to agree that there are more stringent obligations required of victors in order to reject *jus post bellum* minimalism.

This is because minimalism suffers from its own internal problems. I will name two: both the content and scope of minimalism is insufficient. Minimalism just simply does not say enough about the end of wars, the different types of wars, and the various agents involved. Now the minimalist may contend that we can squeeze a good deal of *jus post bellum*

³⁵ Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum." pp. 150.

³⁶ Orend, "Justice after War." pp. 147. Also see Orend, *The Morality of War*. pp. 180-181.

content out of *jus ad bellum*, that the vindication of rights and the right intention towards one's enemy offers a sufficient account of postwar rights, duties, and conduct. I believe that this is false. By purposefully restricting the content of *jus post bellum* through deriving it from *jus ad bellum*, *jus post bellum* effectively focuses on the just parties. And through using just cause as the basis for *jus post bellum*, such theories are rendered inapplicable to numerous types of wars other than just ones and their various outcomes (like, say, where neither side has a just cause). If we want a theory of *jus post bellum* that's content is narrowly applicable to "[a] just state seeking to successfully terminate its just war," then this would be fine.³⁷ But just war theory should provide wider normative guidance. Wars that end in a stalemate are left unaddressed, as are situations in which the just party loses. To the extent that theories of *jus post bellum* integrate it so closely with *jus ad bellum*, which minimalists must, they inordinately focus on the just and exclude types of wars in which *jus post bellum* remains an important topic.

Maximalist Approaches to Jus Post Bellum

As a result of these shortcomings, minimalism presents a particularly problematic and weak variant of *jus post bellum*. The shortcomings of *jus post bellum* minimalism have not gone unnoticed, and in recent years, both the scope and content of just war theory has been somewhat widened. These "maximalist" theories suggest the possibility that *jus post bellum* requires more than what minimalism prescribes,³⁸ holding open the possibility, and in some

³⁷ Orend, *War and International Justice: A Kantian Perspective*. pp. 232.

³⁸ See Mark Evans, "Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of Just Occupation," *Millennium: Journal of International Studies* 36, no. 3 (2008); Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum."; A. Gheciu and J. Welsh, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction," *Ethics & International Affairs* 23, no. 2 (2009). May, *After War Ends: A Philosophical Perspective*. McCready, "Ending the War Right: 'Jus Post Bellum' and the Just War Tradition."

cases requiring, that there are broader postconflict requirements falling not only to the unjust, but also to the just.³⁹ For these theories of *jus post bellum*, the important point is this: while still focused primarily on fleshing out the *post bellum* roles of the warring parties, *jus post bellum* is no longer tied exclusively to the vindication of rights. A theory of *jus post bellum* can draw from a broader view of postconflict permissions and responsibilities; this may include such rights but need not be limited to them.

In some cases, the rationale for the broadening of postwar obligations and responsibilities stems from the belief that the minimalist view fails to grasp the nuances of postconflict scenarios. For example, Evans points to cases of just occupation in his critique of the minimalist position. He argues:

A just occupation can draw the just occupiers into the fate of the occupied state far more profoundly than the restricted conceptions may fully acknowledge... just occupiers will still find themselves drawn into other, even longer-term political, social and economic affairs of the occupied country with respect to which they surely need further moral direction.⁴⁰

On empirical grounds, Evans points to what he treats like inevitability — like it or not, just occupations draw in just parties in a way that entails a whole host of extended activities. This view of mission creep is predicated on the position that extended responsibilities of the victor are entailed in at least one kind of postconflict situation — just occupations — for which minimalism provides no normative guidance.

³⁹ Although I do not always use the term “maximalist,” this dissertation aims to advance and defend a specific view of *jus post bellum* that could be called “extended” or “maximalist.” For the sake of parsimony and simplicity, I will not return to these terms when referring to the version of *jus post bellum* that I develop.

⁴⁰ Evans, “Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of Just Occupation.” pp. 540.

Others rest broader postconflict obligations on the basis of compensatory liability, “you broke it you buy it,” or what is perhaps better known as Colin Powell’s “pottery barn” theory of postconflict responsibility.⁴¹ Here the view is that responsibilities flow directly from a party’s causal contribution and role in the affairs of their now vanquished foe.⁴² While such views of liability may begin with the formulation of just cause as rights vindication, they need not integrate *jus post bellum* content so closely with it. They can, in effect, look towards other forms of normative guidance upon which to find the content of *jus post bellum*. In this case, it is liability and the belief that under certain conditions compensatory arrangements (typically on behalf of the just) are required.

There are also those who predicate *jus post bellum* obligations on the notion of shared wrongdoing.⁴³ Here the idea is that even when justified, killing in war is always a tragic act. This tragedian view applies to the killing perpetrated by both the just and unjust parties. This includes not only those who were liable to killing and maiming, but also those for whom which liability is absent. Central to this notion is the idea of atonement. Under this view, the logic of *jus post bellum* obligation flows from the belief that since any kind of killing in war is a tragedy, all must atone, including the just, and one way to do so is by reconstructing the war-torn.⁴⁴ As a result, the moral justification for postconflict reconstruction borne by the just is

⁴¹ Bob Woodward, *Plan of Attack* (NY, NY: Simon & Schuster, 2004). pp. 150.

⁴² Walzer, "Just and Unjust Occupations."

⁴³ Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum."

⁴⁴ This view of atonement is borrowed from Kant: “[a]t the end of a war, when peace is concluded, it would not be inappropriate for a people to appoint a day of atonement after the festival of thanksgiving. Heaven would be invoked in the name of the state to forgive the human race for the great sin of which it continues to be guilty.” Immanuel Kant, Hans Siegbert Reiss (ed.) "Perpetual Peace " in *Kant: Political Writings* (Cambridge: Cambridge University Press, 1991). pp. 105.

anchored in the shared engagement in tragedy and the need to atone for such “deep personal *post bellum* liability on the part of just combatants.”⁴⁵

Shortcomings in Maximalist and Minimalist Conceptions

While we may be inclined to view these extended theories of *jus post bellum* as an improvement over more minimalistic conceptions (because they are), both minimalists and maximalists’ theories share three crucial shortcomings that pervade much of the current *jus post bellum* theorizing. These theories: 1) have the effect of limiting the scope of *jus post bellum* in a way that unnecessarily focuses it on the past; 2) largely limit the responsible agents in the *post bellum* period to only the warring parties; 3) unnecessarily restrict the content of *jus post bellum*. In anticipation of the core arguments in this dissertation, I will briefly touch upon these three central problems, and in doing so, offer a sketch of the arguments that I advance and defend in subsequent chapters.

Current theories of *jus post bellum* continue to be deficient because they persist in relying upon *jus ad bellum* and *jus in bello* for much of their content. In turn, these principles serve as the direct referents for determinations of *jus post bellum* content. How is this so? These theories take the justice of given parties’ causes and conduct as the defining criterion upon which to make determinations of *jus post bellum* responsibilities, permissions, and constraints. When such theories of *jus post bellum* focus upon looking backward towards the justice and injustice of acts and agents, they crucially depend upon *jus ad bellum* and *jus in bello* principles as referents for making determinations of justice upon which they base their *jus post bellum* principles. But narrowly focusing on determinations of postconflict responsibilities by tying them to the justice of the cause and conduct is, I argue, misplaced.

⁴⁵ Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum." pp. 155.

First of all, there are practical concerns. To begin with, it is not always clear which party is just and has acted justly. This may be because the facts are obscure or, perhaps, justice has shifted, as in cases where a state that began with a just cause goes on to fight for an unjust cause. Since these theories of *jus post bellum* are predicated upon sorting out the various injustices of the given parties, when there are problems of determining the justice of a cause and the justice of acts of war, they hit a dead end. This is especially true when theories of *jus post bellum* limit their scope of applicability only to instances in which the victor is in possession of a just cause, as at least one prominent *jus post bellum* scholar does.⁴⁶ As we know, victory does not always go to the just. Of course, it is altogether plausible that neither side is just, in which case these theories of *jus post bellum* simply have nothing to say.⁴⁷

Even when practical considerations can be overcome and such determinations can be made, deeper theoretical problems persist. When justice after war is judged by and

⁴⁶ In much of his work Orend seeks to limit *jus post bellum* in two respects. First, by restricting responsible parties to the war's participants. Second, by applying *jus post bellum* only in cases of a just and legal war. As Orend states: "[i]t is only when the victorious regime has fought a just and lawful war, as defined by international law and just war theory, that we can speak meaningfully of the rights and duties, of both victor and vanquished, at the conclusion of armed conflict... *jus ad bellum* sets the tone and context for the other two categories... failure to meet *jus ad bellum* results in automatic failure to meet *jus in bello* and *jus post bellum*. *Once you're an aggressor in war, everything is lost to you, morally.*" Orend, *The Morality of War*. pp. 162. emphasis original.

⁴⁷ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*; Orend, *The Morality of War*; Bass, "Jus Post Bellum." Evans exemplifies the issue of constraining agency to apply only to the just: "[a]lthough my focus in this paper is on the moral situation of the just (post)combatants, I do not believe that *jus post bellum* should be silent on that of the unjust opponents. And, although it would not strictly speaking be part of just war theory, considerations of what should be done in the various possible aftermaths of unjust wars can and should be theorized as well." Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum." pp. 163-164, n. 4. This is the approach that Orend takes when he states that his theory aims to develop *jus post bellum* principles for "[a] just state seeking to successfully terminate its just war." Orend, *War and International Justice: A Kantian Perspective*. pp. 232. In addition to applying his theory to only just parties, Orend fails to consider that warring parties are increasingly comprised of both state and non-state actors, a feature of contemporary warfare in which his theory of *jus post bellum* is rendered silent.

focused upon backward-looking justice, it ignores the proper role of *jus post bellum*: to aid the suffering of those affected by war, largely by looking forward. Now some may argue that the focus of *jus post bellum* should be on looking toward *jus ad bellum* and *jus in bello* for determinative *jus post bellum* content, and that past behavior functions as the preferred guide to identifying the agents to whom such content applies. As this line of argument goes, these theories should focus the goal of *jus post bellum* on identifying the parties liable for harms, wrongs, and injustices and sanction or credit them accordingly.⁴⁸ This is the now dominant position in theories of *jus post bellum*.

Admittedly, there is an intuitive plausibility to this approach. Agents often should be held accountable for the outcome of their actions, and sometimes remedies should be tied to such determinations of responsibility, especially when agents act unjustly, they ought to be held to account. This may include such things as punishment for wrongful acts or holding the unjust responsible for restitution and compensation. Despite these intuitions, by so firmly entrenching *jus post bellum* in the architecture of the traditional just war categories, it becomes unproductively backward-looking. There are, of course, good reasons to look backwards after war. Crimes are committed, morality breached, and justice should be done. But it is another matter, and one that I argue against, if looking backward should be the

⁴⁸ Bellamy discusses the “broad consensus” among *jus post bellum* scholars that, in the event of the collapse of the unjust’s governing institutions, the responsibility of governing falls to the just. This consensus seems to stipulate the limitation of postwar governing to only the former warring parties. Bellamy, “The Responsibilities of Victory: “Jus Post Bellum” and the Just War.” pp. 615. Bass also limits the parties to warring agents and predicates responsibilities of *jus ad bellum* and *jus in bello* upon their conduct. See Bass, “Jus Post Bellum.” Williams and Caldwell develop *jus post bellum* principles that are backward-looking and restricted to only the warring parties. R.E. Jr. Williams and D. Caldwell, “Jus Post Bellum: Just War Theory and the Principles of Just Peace,” *International Studies Perspectives* 7, no. 4 (2006). pp. 318.

central task and focus of *jus post bellum*.⁴⁹ In fact, or at least so I argue, *jus ad bellum* and *jus in bello* principles are not the same principles, or at the very least not the only ones, that we want guiding *jus post bellum*.

There are two reasons for this. The first is because the practice of *jus post bellum*, and hence its orientation, is different from starting and fighting a war. Whereas *jus ad bellum* and *jus in bello* principles narrowly focus on who can wage war and how it can be waged, which remain integrally important action-guiding principles, the focus of *jus post bellum* should be on the practice of building and sustaining a just peace, a normative state of affairs that is best achieved largely through the practice of rebuilding. *Jus post bellum* should seek to find how best to aid the victims of war, and in a good deal of cases focusing only on the responsibilities of just or unjust warring parties simply will not do the trick.⁵⁰

This is my second point. As backward-looking theories, these theories of *jus post bellum* unnecessarily narrow the agents potentially responsible for aiding the victims of war. By being only narrowly applicable to the just or unjust warring parties, these theories of *jus post bellum* foreclose the possibility of being forward-looking theories of justice. Where backward-looking theories seek to base their prescriptions on attempts at identifying past wrongdoers, forward-looking theories begin with the recognition of an intolerable situation in need of remedy (here a postwar environment) and look toward the agents who are best placed to contribute to such remedy. In rare circumstances this may coincide with the just or

⁴⁹ I concede, that with respect to war, this is a controversial position and one that I will defend at length throughout the dissertation.

⁵⁰ For example, sometimes warring parties are simply not in a position to fulfill *jus post bellum* obligations, perhaps deep enmity exists between the parties, both communities are desperately poor, and so forth. I discuss these reasons in further detail, but my point is that there are very good reasons why we should not limit *jus post bellum* to only the warring parties, nor should we make all *post bellum* determinations contingent upon the justice that a given party possessed.

unjust party, but when this is not the case, when those best placed to help remedy the situation do not elide with the warring parties, such a theory of *jus post bellum* need not take such a restrictive view of responsible agents. This is not to say that unjust parties get a free pass, that they can begin unjust wars and fight them unjustly. They can and should not. But *jus post bellum* should be focused upon building peace, and in doing so we will often need to separate responsibilities for postwar rebuilding from the agents who have actually fought the war. To be sure, looking backward can play a role, but it should not be the central task and guiding light of a theory of *jus post bellum*.

By so deeply entrenching *jus post bellum* in the framework of *jus ad bellum* and *jus in bello*, the focus of current theories remains on the principles and practices of fighting wars, not building peace. Given the current state of *jus post bellum* scholarship, we need to rethink and reorient the theory towards a forward-looking model of postwar rebuilding.

1.4 A Cosmopolitanism Account of *Jus Post Bellum*

For guidance on the practice of rebuilding, and the substantive moral content that forms its basis, we must draw not only on traditional just war principles but also on broader moral theory. Cosmopolitanism is particularly well placed to inform a theory of *jus post bellum*. Although there are many variants of cosmopolitanism, I will not attempt to survey them all here and now. Throughout this work, I will be drawing from and developing an intermediate form of moral cosmopolitanism.⁵¹ Moral cosmopolitanism is predicated upon the key idea that individuals are the ultimate unit of moral worth, which applies universally at the global level, and without reference to borders, nations, families, and so forth. The modifier “intermediate” in cosmopolitanism signals affirmation of the three central tents of

⁵¹ Which I hereafter often refer to simply as “cosmopolitanism.”

moral cosmopolitanism, while permitting constrained partiality for one's associates and the potential duties that such associations entail.

How, then, does this variant of cosmopolitanism inform *jus post bellum*? To start, we can return to the moral commitments of cosmopolitanism that are built upon the conception of the individual. It is this conception of the person that serves as the grounds for *jus post bellum* motivation and content, and thus underlies why *jus post bellum* is of cosmopolitan concern. For cosmopolitans, individuals are the ultimate unit of moral worth. Not states, not nations, but individuals. Given this conception of the person, it is morally problematic that there are those who live in states of severe deprivation, and this includes postwar settings.⁵²

Cosmopolitanism sets the grounds for agents to be morally motivated to rebuild and act in the interest of those suffering from the ravages of war. Predicated upon individualism, universality, and generality, this foundation of *jus post bellum* provides the basis for the substantive account of *jus post bellum* that takes the concept of rebuilding as its core. Unlike alternative theories of *jus post bellum*, where the content and moral commitments are unduly restricted to relying upon *jus ad bellum* and *jus in bello*, by acting as a source for compelling moral reasons, a cosmopolitan account offers the possibility of a comparative widening of *jus post bellum* content.

Not only do the grounds of cosmopolitanism widen the content of *jus post bellum*, they also broaden the field of agents whom are potentially responsible for postwar rebuilding. In my view, cosmopolitanism takes the deprivation and suffering of individuals, which pervade the postwar period, to be an animating cause for concern that calls out for a

⁵² One may believe that the unjust do not deserve equal concern, their unjust actions made them liable to harm and brought war upon them after all. But it is a fact that a good deal of those affected by war, including citizens of an unjust regime, are not liable to these harms. In fact, they may have very well opposed their community's unjust actions, perhaps at even great cost and risk to themselves and their loved ones.

forward-looking remedy. It is this remedial justice that takes the bare *post bellum* suffering, harm, and deprivation as its starting point and asks, “what can be done to remedy this, and whom should be responsible for doing so?” Instead of singling out the just and unjust and then pegging allocation of *post bellum* responsibilities to such determinations, cosmopolitanism has the potential to widen the scope of potentially responsible agents. To put it simply, the fact that people exist in postconflict environments is a matter of serious moral concern that requires action. When appropriate and possible, such action should fall to the warring parties, and when not appropriate a theory of *jus post bellum* must include the possibility that third parties can be made responsible.

Filling the Gap: Cosmopolitans and Just War

As a moral theory of justice, cosmopolitanism is well placed to tackle the issues presented by a theory of *jus post bellum*, but it has yet to do so. Despite the obvious overlap, the scholarships on global distributive justice and just war originate out of quite different historical traditions, resulting in markedly different development. The former grew out of the western liberal tradition, where the focus had been largely upon reconciling the state as a coercive institution with the liberty and autonomy of individuals. Early liberal thinkers addressed the topic of war, but nowhere near in the level of systematic detail that those in the just war tradition have. In the case of the just war tradition, ethics and war largely stemmed from Judeo-Christian scholars who sought to reconcile earthly existence and the torments of organized violence with spiritual aspirations and care.⁵³ Given their very

⁵³ Justice and war was not a topic that was limited to Christian thinkers. For example, see Kelsay and Johnson’s work on just war and Islam. John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York: Greenwood Press, 1991).

different provenances, the literature on global justice has until recently remained rather separate from that of the just war.

To the best of my knowledge, there has not yet been a full cosmopolitan account of just war.⁵⁴ In addition, cosmopolitans have largely ignored the category of *jus post bellum*. The typical approach for cosmopolitan scholars has been to focus on the development of a general cosmopolitan theory of justice, and then to apply the theory to what the given scholar views as the pressing issues and problems that cosmopolitanism is particularly well placed to address. When cosmopolitans do discuss the issue of just war, it is largely within the context of sovereignty and humanitarian intervention.⁵⁵ One significant area of focus has been upon shifting the grounds of standard just war principles from the communitarian viewpoint of the protection of political communities to the cosmopolitan protection of individuals and their human rights.⁵⁶ This is an important shift, but one that still leaves the topic of *jus post bellum* largely unaddressed.

⁵⁴ Cecile Fabre's recent work is a limited exception. As comprehensive as it is, it wholly excludes *jus post bellum* (although, on Fabre's own account, a manuscript on cosmopolitan *jus post bellum* is in preparation). See Fabre, *Cosmopolitan War*.

⁵⁵ See Richard Vernon, *Cosmopolitan Regard: Political Membership and Global Justice* (NY, NY: Cambridge University Press, 2010). Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, Colorado: Westview Press, 2002); Charles Jones, *Global justice: Defending Cosmopolitanism* (Oxford, England: Oxford University Press, 1999). For example, in his important work on cosmopolitanism, Caney devotes two chapters to just war but omits *jus post bellum*. Instead, he focuses on a cosmopolitan reanalysis of standard *jus ad bellum* and *jus in bello* principles and devotes a chapter to humanitarian intervention. To his credit, Caney does discuss the "interdependencies between topics in global political theory," and includes a passing mention of the interconnection between things like famine and their contribution towards political violence. But Caney does not discuss the interconnection between distributive justice and *jus post bellum*. Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005). pp. 225, n. 57. Brock discusses humanitarian intervention and, within the context of the International Commission on Intervention and State Sovereignty's report, mentions (in a single sentence) postwar rebuilding. Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009). pp. 183.

⁵⁶ Caney, *Justice Beyond Borders: A Global Political Theory*; David Luban, "Just War and Human Rights," *Philosophy & Public Affairs* 9, no. 2 (1980).

While it is true that there are cosmopolitan accounts of aspects of just war theory, cosmopolitans have had almost nothing to say about *jus post bellum*. This is especially odd given the critical, yet unexamined, nexus between *jus post bellum* and cosmopolitan accounts of global distributive justice (the area of cosmopolitanism scholarship where the work has been most prolific). It is an obvious fact that postconflict rebuilding requires resources. Sometimes these resources come from warring parties, but often they come from third parties who were not participants to the fighting, and this requires a distributional balancing.⁵⁷ As David Hume so insightfully noted, absent conditions of moderate scarcity and in a world of plenty the “jealous virtue of justice would never once have been dreamed of.”⁵⁸ But that is not the world we live in, and Hume’s observation points to the fact that scarcity inevitably makes for hard distributional choices, a problem for which responsibilities of rebuilding are regrettably not immune.

With respect to such choices, the omission of global distributive justice vis-à-vis *jus post bellum* is compounded and brought into stark relief when we consider that just war theory and global justice share a key area of concern. This concern arises out of the tension between our cosmopolitan recognition of individual equality and the simultaneous existence of our associative obligations, that is, the common, everyday practice of providing unequal, partial treatment to our associates.⁵⁹ This tension is particularly true, and thus especially vexing, of postwar rebuilding, which requires vast commitment and expenditure of blood

⁵⁷ A case in point is Afghanistan. Since 2006 there have been numerous conferences to arrange for financial and security aid. These include the London, Kabul, Lisbon, Istanbul, Bonn, Chicago, and Tokyo Conferences. These conferences are often dominated by haggling over the size, scope, and origins of the aid.

⁵⁸ David Hume, Selby-Bigge, L. A., (ed.) "Enquiries Concerning the Human Understanding and Concerning the Principles of Morals," (Oxford, England: Clarendon Press, 1902). Section III. Of Justice.

⁵⁹ I take associative obligations to mean obligations that are non-contractual and arise and exist through one’s associations.

and treasure, more delicately defined as resources, goods, and services. This tension arises because such services will likely compete and conflict with the allocation of resources to communities' close associates. If in keeping with our everyday morality we accept associative obligations, how we balance them with non-associates in postwar need is a matter of concern for both scholars of global justice and *jus post bellum*.

Cosmopolitan and liberal thinkers have offered illuminating scholarship on the tension between associative duties and the core liberal cosmopolitan tenets of equality and universality.⁶⁰ But in the context of war, the tension has only been discussed parenthetically and the category of *jus post bellum* has been omitted. This dissertation aims to fill this gap.

1.5 Chapter Overview

This dissertation proceeds in two parts. In Part I I explore the content and grounds for a theory of *jus post bellum*. Drawing from cosmopolitan and Capabilities Approach literatures, I explore the intersection of global distributive justice and the demands and responsibilities of postconflict rebuilding. In Part II I explore how the content and grounds of *jus post bellum* can inform and are informed by the traditional just war categories of *jus ad bellum* and *jus in bello*; specifically the principles of just cause and proportionality.

In Chapter Two I begin by asking what a theory of *jus post bellum* should look like. What, as a matter of justice, should individuals living in postconflict environments come to expect from agents in a position to provide relief? I argue that the responsibilities to aiding

⁶⁰ Scheffler discusses this issue in Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001). On this point also see Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004). Onora O'Neill, *Bounds of Justice* (Cambridge, England: Cambridge University Press, 2000); David Miller, *National Responsibility and Global Justice* (Oxford; New York: Oxford University Press, 2007); Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (Chicago, IL: University of Chicago Press, 1985).

the war-torn, as instantiated in the emerging norm of the “Responsibility to Rebuild,” provide a promising start to answering this question. Despite this promise, I conclude that current responsibility to rebuild scholarship does not offer an adequate theoretical justification for the responsibilities entailed in postconflict rebuilding. The second section of the chapter aims to fill this theoretical gap by drawing on Sen and Nussbaum’s work on the Capabilities Approach.

In Chapter Three I go on to argue that the cosmopolitan elements of the Capabilities Approach provide compelling justificatory reasons for rebuilding war-torn societies, but that they also produce a theoretical tension. This tension stems from the conflict between the seeming impartial demands that result from cosmopolitanism’s elements of universality, individualism, and equality and the partiality that everyday morality requires. This now familiar and oft-debated tension resides in the fact that such partial treatment seems predicated upon considering individuals unequally, thus cutting against the core liberal tenet of the equal moral worth of all individuals. While the scholarship on this topic has been productive, it has ignored the fact that cosmopolitanism and associative duties potentially conflict in matters of postwar rebuilding.

I return to the idea of linking capabilities with specific aspects of postconflict rebuilding in Chapter Four. I argue that even if we can navigate the tension between the demands of cosmopolitan postwar rebuilding and associative obligations, this does little to mitigate questions surrounding to whom these duties fall. The central aim of this chapter is to address questions surrounding who has responsibilities to rebuild and upon what basis we can allocate these responsibilities.

In Chapter Five I develop an account of just cause that employs Augustine’s view of the just peace. In doing so, I explore the relationship between just cause and *jus post bellum*.

The product of this exploration is a substantive account of what I call the teleological principle of just cause — the idea that a just cause aims toward a just ending in war. The adherence to a principle requiring a just peace produces obvious obligations (mainly those associated with rebuilding), some of which may require prolonging a war in pursuit of their discharge. The dissertation proceeds carefully here and examines the tension between pursuing such obligations of rebuilding and the need to potentially kill in their pursuit.

In Chapter Six I develop a revisionist account of the principle of proportionality that accounts for *jus post bellum*. I examine how the demands and obligations of *jus post bellum* both constrain the principle and are constrained by it. I conclude by arguing that the traditional *in bello* proportionality principle is incompatible with *jus post bellum* since it permits unjust actors to pursue unjust ends. As a result of this incompatibility, I advance *ad bellum* and *in bello* proportionality requirements that take *jus post bellum* more seriously.

Chapter Seven concludes.

Chapter Two

Capabilities, Rights, and the Moral Justification for *Jus Post Bellum* Rebuilding

Introduction⁶¹

A year after the 2006 Israel-Lebanon war, I conducted human rights interviews with victims of the cluster bombs deployed by Israel in Lebanon.⁶² Most of my time was spent in the south, in the Lebanese coastal city of Tyre and the small villages surrounding it. Despite the rapid pace of rebuilding that had occurred in a year's time, the physical destruction that remained was considerable. Bridges stood seemingly intact until one's eye traced the contour and curve of the bridge. What at first appeared to the eye like the beautiful sweep of well-planned architecture was finally met by the image of twisted steel and broken chunks of hanging concrete. The outskirts of villages seemed peaceful enough. I had the pleasant experience of visiting a citrus grove, closing my eyes and letting the sun warm my face, breathing deeply and inhaling the fresh scent of ripening oranges. Moments later, shattering the quiet, a demining team detonated an unexploded cluster bomb that remained from the previous year's battle. Apparently, the orchard was filled with them, a grim reminder that this was a place of both death and beauty.

⁶¹ A version of this narrative appeared in Jesse Kirkpatrick, "Exploding Lebanon." Campaign for Innocent Victims in Conflict's Field Blog. <http://civicfieldreports.wordpress.com/2008/09/11/guest-blogger-exploding-lebanon/>. Retrieved from the World Wide Web, October 1, 2011.

⁶² Israel saw its share of destruction as well, some of which, albeit comparatively less than Lebanon, was the result of Hezbollah's grotesque use of cluster munitions. See: Human Rights Watch, "Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict," <http://www.hrw.org/en/news/2006/10/18/lebanonisrael-hezbollah-hit-israel-cluster-munitions-during-conflict>.

What struck me during my interviews with these victims was the sharp contrast between these beautiful settings of orchards, thriving villages, a family's backyard, and the elements of war and destruction that pervaded these spaces. This was a stark contrast, elements located in space and time that seemingly have no business together. There were farmers laughing and smiling while they worked a field that had yet to be demined. Children played in a small quadrant of a yard that had been cleared of bombs but were fastidiously careful not to misstep as the area around the home has yet to be deemed safe. When one dug deeper it was clear that beneath this façade was tension, unhappiness, and a great concern for safety, well-being, and making ends meet. As one can imagine, it is hard to farm with the prospect of being blown up hanging in the air. In the same way, a game of catch is much less fun when the rules include ensuring that the ball doesn't stray into a kill zone.

Stories like these are not unfamiliar to those who have experienced war and its destruction. Even those of us who are fortunate enough to lack direct experience with war are bombarded with such scenes; images and accounts of war and its grim aftermath pervade headlines and news footage. It is readily clear enough that war can leave much sorrow and misery in its wake. The stories of victims of conflict may often cause us to reflect upon questions and issues concerning *jus post bellum* (justice after war). We may feel sorrow or discomfort when we are greeted with the image of the smiling eyes of a child juxtaposed by postwar destruction. In many postconflict settings, scenes like these recur and persist; reconstruction and the pace of peace are slow. While politicians and institutions haggle over development dollars and allocations of postconflict responsibility, morally innocent individuals live in squalor, trapped in lives hobbled by *post bellum* miseries.

It is the purpose of this chapter to address how we may grapple with the harms that have beset postconflict societies and what ethical principles can help guide conduct in the

aftermath of war. This chapter offers an explication and defense of a theory of *jus post bellum* predicated upon the simple idea that in postwar situations, the primary goal should be on looking forward and working towards aiding those in need. This theory is best instantiated in a conceptualization of postconflict rebuilding that draws from three key areas of scholarship: 1) the emerging norm of the Responsibility to Rebuild; 2) the Capabilities Approach; and 3) human rights theory. In establishing the basis for these aspects of a theory of *jus post bellum*, this chapter proceeds in two main sections. In the first section, I survey three approaches to theorizing postconflict justice, arguing that the emerging norm of the Responsibility to Rebuild offers a promising articulation of key areas of a theory of *jus post bellum*. Despite this promise, the current Responsibility to Rebuild scholarship fails to offer an adequate theoretical justification for the demands and responsibilities entailed in rebuilding.⁶³ The second section of the chapter aims to fill this theoretical gap by advancing a version of the Capabilities Approach that demonstrates the linkage between capabilities and postconflict rebuilding. In this section, I go on to argue that when viewed in tandem with human rights, the Capabilities Approach provides compelling reasons and an ethical justification for rebuilding war torn societies.

⁶³ Many authors refer to the term “reconstruct.” David A. Blumenthal and Timothy L. H. McCormack, *The legacy of Nuremberg : civilising influence or institutionalised vengeance?*, International humanitarian law series (Leiden ; Boston: Martinus Nijhoff Publishers, 2008); C.C. Crane and W.A. Terrill, *Reconstructing Iraq: Insights, Challenges, and Missions for Military Forces in a Post-Conflict Scenario* (Strategic Studies Institute US Army War College, 2003); Ghenciu and Welsh, “The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction.” Following the parlance of the Responsibility to Protect, I prefer the more comprehensive term “rebuild.” As I understand and use the term, the responsibility to rebuild includes not only reconstruction and recovery assistance, but also reconciliation, security provisions for the population, development of a functioning judicial system, the planning and implementation of policies that facilitate the return of refugees, and economic (re)development. Recently, this concept has gained normative and legal currency as it is now defined as a component of the larger concept of the Responsibility to Protect. See International Commission on Intervention and State Sovereignty, “The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty.”

2.1 Three Conceptions of *Jus Post Bellum*

The Minimalist Model of Rights Vindication

In contemporary legal and moral scholarship, the conceptualization of postconflict justice is diverse. As I noted in the introductory chapter, although recent scholarship suggests that the view may be shifting, once common among theorists in the just war tradition is the view of war as rights vindication.⁶⁴ Perhaps the strongest proponent of this view among contemporary just war scholars is Michael Walzer. According to Walzer, “[t]he rights of the member states must be vindicated.” He goes on to conclude that “[t]he defense of rights is a reason for fighting. I want to now stress again, and finally, that is the only reason.”⁶⁵ As *jus post bellum* scholar, Brian Orend, puts it, war is waged for “a more secure possession of our rights.”⁶⁶ Adherents of this view argue that a just war is undertaken to restore the rights of the just political community that have been violated by the unjust, and that this provides guidance as to the breadth and depth of postconflict involvement of the victors in the affairs of the vanquished.⁶⁷

Following Bellamy, let us call this position the minimalist view. As I noted in the introduction, for minimalists, postconflict justice is typically defined as limited to punishment, reparations, and in some cases disarmament and security assurances. The primary focus is on establishing a restoration of the rights of the victors within such prescribed limitations. For those holding the minimalist position, one of the primary

⁶⁴ Brian Orend, "Jus Post Bellum," *Journal of Social Philosophy* 31, no. 1 (2000); Orend, "Justice after War."; Orend, *War and International Justice: A Kantian Perspective*; Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*.

⁶⁵ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 59, 72.

⁶⁶ Orend, "Justice after War." pp. 45.

⁶⁷ For a survey of thinkers who subscribe to this view see Bellamy's discussion of what he calls the "minimalist" position of *jus post bellum*. Bellamy, "The Responsibilities of Victory: 'Jus Post Bellum' and the Just War."

concerns is limiting the rights and ability of the victors to exploit or inappropriately involve themselves in the affairs and lives of the vanquished. But proponents of the minimalist model of *jus post bellum* also recognize that vindication of these rights and the restoration of peace typically requires radical change. Restoration of the *status quo ante bellum* is not the goal of war, including the postconflict period, because the *status quo* likely contains the reasons and conditions for which war was waged in the first place. To a certain extent, then, rights vindication and a reasonable attempt at securing of future peace, necessarily entails involvement of the victors in the affairs and lives of the vanquished.

As may be obvious, there is an internal tension in the minimalist's position. The demands of attempting to secure even a minimal just outcome will often require more involvement and resources than the minimalist's position permits. This leads to the further problem that, despite the acknowledgement of some measure of necessary postconflict involvement in the affairs of the vanquished, this approach ignores the broader range of obligations that can arise when agents violently involve themselves, even when they are forced to be involved, in the affairs of others. Such involvement often includes obligations to building or rebuilding institutions and political, social, and economic arrangements that profoundly shape and affect peoples' lives.

In addition to this internal inconsistency in the minimalist's position, I believe that rights vindication and minimal obligations towards the postconflict vanquished is problematic in its failure to recognize broader motivators for more demanding postconflict responsibilities on behalf of the victors. We need to be open to the fact that there may be postconflict responsibilities that are predicated upon and rooted in a more demanding account of justice. I believe that this is the case, and I develop an account of the Capabilities Approach below, and a larger cosmopolitan account of justice in the following chapter, that

aims to defend this view. But one need not subscribe to such an account of justice to see how *jus post bellum* minimalism problematic. The minimalist position lacks in its failure to recognize that a wider range of actors can potentially be required to aid in rebuilding efforts. The minimalists operate from the assumption of an unsubstantiated *prima facie* obligation for the warring parties to work towards achieving a minimal just ending to a war. While it may at times make good sense for this to be the case, it is unclear that such efforts should be required of *only* the warring parties, let alone in such a minimal way. We can see this point in the case of humanitarian intervention where an obligation to rescue and rebuild falls to all members of the global community, even if it is only one agent who takes on the initial burden of intervention.

A further problem with this view of *jus post bellum* is that it fails to address the changing (or likely changed) face of war. Under the rights vindication model, war is viewed as interstate conflict, the roles of victor and vanquished are relatively clear, and the victors largely determine the terms of peace. Wars fitting this description continue to occur but at an increasingly diminishing rate. A large number of conflicts now occur internally, and peace is determined by outside parties, such as the United Nations and United Nations Peacekeepers.

As Bellamy notes:

Across the board, the overall number of wars has declined, by one count from over fifty in 1992 to below thirty ten years later. Furthermore, the proportion of these wars that were ‘internal’ increased from sixty-one percent in 1988 to eighty-three percent in 1999. Indeed, the number of wars since 1975 that fit the mould assumed by the minimalist perspective on *jus post bellum* has barely ever reached beyond ten percent of the total. The point, then, is that minimalism has little to say about the great majority of wars.⁶⁸

Bellamy’s discussion raises an important question: if the minimalist view now applies to only

⁶⁸ Ibid. pp. 611.

a small number of conflicts, and I would add focuses inordinately on the just, given its limited scope and applicability, is this really an attractive theory of *jus post bellum*? We need to look elsewhere.

Elements of International law

Customary and codified international law is a second area that provides an articulation of elements of *jus post bellum*. It is beyond a doubt that the codification of the laws of war has provided an important constraint on when war can be waged and the type of conduct that is permissible while war is fought. But the law of armed conflict also reflects the compromise and horse-trading that is inevitable in international politics. Consequently, relying wholly upon international law to establish a theory of *jus post bellum* has significant shortcomings. The primary disadvantage is that international law is relatively narrow in scope, and as a result, it fails to cover a wide range of postconflict cases and aspects of ethical theory that we would hope for in a theory of postconflict justice.⁶⁹

Take the example of arguably the most developed area of the current body of international law applicable to *jus post bellum*, the law governing occupations. As some of the first attempts at codifying elements of *jus post bellum*, the 1899 and the 1907 Hague Conventions were largely limited to addressing the permissions, obligations, and limitations of occupiers. The fact that these limitations on occupying powers were repeatedly violated during the period of World War II led to calls for better-developed occupation law. The Geneva Conventions of 1949 and the 1977 Additional Protocols were intended as improvements on the previous legal protections for noncombatants, especially occupied noncombatants. One pressing issue is that it is unclear that occupation law permits or

⁶⁹ Brian Orend discusses how, with the exception of war crimes trials, the “sum total of international law regulating war-termination” is limited to Articles 32-41 of the Hague Convention (IV). Orend, *War and International Justice: A Kantian Perspective*. pp. 218-223.

addresses the broader types of obligations and management of postconflict society that are entailed in the concept of rebuilding.⁷⁰ It is, of course, a matter of debate as to what activities should constitute rebuilding. Nevertheless, it remains problematic if we do find that morality may demand the discharge of certain postconflict activities precluded (or unaddressed) by international occupation law.

Finally, while this body of law applies to occupation, an aspect of postconflict justice, the problem is that it addresses only a narrow spectrum of postconflict responsibility. While narrowness and specificity are generally assets in matters of law, current postconflict issues are much more diverse than those addressed by international law. To take one example, there can be postconflict outcomes in which an occupation does not necessarily arise. In cases such as these the scope and demands of postconflict obligations are unclear and receive insufficient guidance from standing international law. This results in a significant gap between normative issues and legal prescriptions currently available. The fact is that as they currently exist, the laws of war are insufficiently comprehensive when it comes to postconflict settings.

A second example of postconflict obligations addressed partly by international law falls under the concept of transitional justice. Transitional justice can be defined as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”⁷¹ Bassiouni provides some detail to the types of accountability mechanisms that can exist within the practice of transitional justice.

⁷⁰ Bellamy, "The Responsibilities of Victory: "Jus Post Bellum" and the Just War." Also see Gheciu and Welsh, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction."

⁷¹ R.G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16(2003).

- (1) International prosecutions. This includes prosecutions before a permanent international criminal court.
- (2) International and national criminal investigatory commissions
- (3) Acknowledgment of responsibility through national mechanisms such as investigative and truth commissions and reconciliation hearings and findings, both national and international
- (4) National prosecution
- (5) National lustration mechanisms
- (6) National civil remedies
- (7) International mechanisms for the compensation of victims⁷²

Not all of the measures of transitional justice that Bassiouni describes fall under international law, but measures 1-3 and number 7 certainly do. The accountability mechanisms of transitional justice can play an important role in facilitating peace and justice in the wake of human rights and humanitarian violations in postwar situations. When such crimes and ethical breaches occur it is important to hold perpetrators responsible and facilitate reconciliation. But like international occupation law, the model of transitional justice remains a limited legal and moral framework with respect to postconflict justice; it offers only an element of a theory of *jus post bellum* and is insufficiently comprehensive.

These issues stem partly from the salient fact that the area of international law related to armed conflict and war has been developed to be narrow in scope and inevitably does not cover a wide range of postconflict cases. This has led at least one scholar to call for a new Geneva Convention for justice after war.⁷³ Consequently, until such developments occur, international law continues to leave unresolved many ethical issues involving postconflict justice that we are faced with today. On these matters we must turn to both a broader conception of *jus post bellum*.

⁷² M.C. Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability," *Law and Contemporary Problems* 59, no. 4 (1996). pp. 19-22.

⁷³ Brian Orend, "Justice After War: Toward a New Geneva Convention," in Eric Patterson (ed.) "Ethics Beyond War's End," (Washington, DC: Georgetown University Press, 2012).

Responsibility to Protect

In the past few years, the development of the concept of the Responsibility to Protect (RtoP) has offered a comprehensive and demanding articulation of postconflict obligations. First introduced in 2001 by the International Commission on Intervention and State Sovereignty (ICISS), adopted unanimously at the 2005 United Nations World Summit, and subsequently supported twice by the United Nations Security Council, the principle of RtoP has taken shape as an important, albeit disputed, norm of protection and responsibility.⁷⁴

The core principles of RtoP are based upon a reconceptualization of sovereignty. Under RtoP, sovereignty is no longer viewed simply as a monopoly on the use of force and control over territory and citizenry, but instead as a form of responsibility “in both internal functions and external duties.”⁷⁵ These internal functions require the protection and respect for the human rights of a given state’s population, and the external duties refer to a similar respect for the populations of other states. This normative redefinition of sovereignty, and the type of protection to which it is referring, is largely predicated on the idea that agents deserve protection from gross violations of their human rights. Under RtoP, this responsibility for the protection of individuals rests first and foremost with the respective state in which a population resides. When a state fails to effectively protect its population, it becomes the responsibility of the international community to step in and offer protection. In the language of RtoP, the state’s sovereignty can be “pierced.”

⁷⁴ For an excellent history of the development of RtoP in intellectual and diplomatic arenas see Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity, 2009). Gareth J. Evans, *Cooperating for peace : the global agenda for the 1990's and beyond* (St. Leonards, NSW, Australia: Allen & Unwin, 1993).

⁷⁵ International Commission on Intervention and State Sovereignty, "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty." para. 2.14.

As envisioned in the principle of RtoP, this aiding in protection of the citizens of states that are delinquent or unable to fulfill their own protection responsibilities takes the form of three pillars: prevention, reaction (including violent intervention), and rebuilding. In the case of RtoP's pillar of reaction, there are two important features. First, the rights in question are construed purposefully narrowly, and are of the kinds that are violated when war crimes, genocide, ethnic cleansing, and crimes against humanity are perpetrated. Other more expansive but still basic rights are generally excluded. In addition to a narrow scope of rights, protection is only triggered when their violation is widespread. These features effectively mean that the type and number of violations of human rights are two threshold conditions that must be met before intervention can be triggered. The logic here is to purposefully limit the scope and applicability of RtoP to grievous crimes that violate human rights in a widespread fashion. The aim is that these constraints establish a reasonable barrier against unwarranted and illegitimate abrogation of sovereignty.

In cases of purposeful violation or gross negligence, under certain conditions, including when reasonable alternatives have been exhausted, members of the international community may militarily intervene as part of the pillar of "reaction." As one can imagine, who exactly constitutes the international community with respect to fulfilling these broad ranging duties is a matter of disagreement, similarly, as are which agents who may legitimately intervene and what the proper legal framework is for legitimizing intervention. Some interpreters of the 2005 United Nations World Summit Outcome Document maintain that this responsibility rests solely with members of the international community, interpreted as comprised of UN member states acting under United Nations Security Council authorization. In keeping with this interpretation, such proponents of embedding legitimacy in multilateral institutions argue that RtoP excludes unilateral intervention. Others maintain

the sovereign, legal right for unilateralism, claiming that this is in both the spirit and letter of the Outcome Document.⁷⁶

Although there is no clear consensus on what responsibilities the concept of RtoP should include, it is important to note that unlike humanitarian intervention's focus on military means of intervention, RtoP is conceptualized largely as a range or spectrum of options. With a focus on protection, RtoP has the advantage of functioning as a series of increasingly aggressive tactics across a spectrum of policy options, culminating in intervention and, ultimately, requiring rebuilding.⁷⁷ As the ICISS states:

The responsibility to protect implies the responsibility to not just prevent and react, but to follow through and rebuild. This means that if military intervention is taken — because of a breakdown or abdication of a state's own capacity and authority in discharging its "responsibility to protect"—there should be a genuine commitment to helping to rebuild a durable peace, and promoting good governance and sustainable development.⁷⁸

While this is a considerable normative development among the community of states in thinking about responsibilities after wars end, this is a view found in the just war tradition since the time of Augustine: a necessary component of a just war is a just ending.⁷⁹ But this claim does little to answer a pressing correlative question: if a just war must end justly what, then, does this just ending look like? Or, in the parlance of RtoP, what does the responsibility to rebuild entail? The answer is that rebuilding can be conceptualized as a

⁷⁶ United Nations General Assembly, "2005 World Summit Outcome," *New York: UN (United Nations Document)* (2005). para. 139.

⁷⁷ There is significant disagreement on what is, perhaps, a more important point: if the responsibility to rebuild should be a postwar duty at all. Tellingly, this requirement found in the ICISS Report was dropped from the UN Outcome Document.

⁷⁸ International Commission on Intervention and State Sovereignty, "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty." 5.1; pp. 39.

⁷⁹ Augustine, *The City of God Against the Pagans*. See bk. 19, chp. 12, pp. 934.

broad set of postconflict obligations that include three key areas necessary for a political community to function: security, justice, and economic life.

Let us turn to a more substantive articulation of what is required of rebuilding in these areas.

(a) Security

-Basic protection for lives and property irrespective of one's race, ethnicity, age or gender.

-Disarmament, Demobilization, and Reintegration of former fighters.

-To the extent possible, rebuilding and reintegration of local armed forces, both military and police.

-A well-planned and executed exit strategy of intervening force(s) that does not leave a security vacuum.

(b) Justice

-When absent, ensure the development of a functioning judicial system.⁸⁰

-Ensure a standard model penal code.

-Equal and fair rights for returnees. Unequal treatment for returning refugees (often minorities) can result in inequalities in basic services, creation and enforcement of property and other laws, and employment opportunities.⁸¹

-Return Sustainability—The ICISS defines return sustainability as “creating the right social and economic conditions for returnees. It also includes access to health, education and basic

⁸⁰ As the ICISS notes: “[t]he point is simply that if an intervening force has a mandate to guard against further human rights violations, but there is no functioning system to bring violators to justice, then not only is the force’s mandate to that extent unachievable, but its whole operation is likely to have diminished credibility both locally and internationally.” International Commission on Intervention and State Sovereignty, “The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty.” pp. 41.

⁸¹ For example, the return of Serb’s to Croatia in the aftermath of the Yugoslav wars of the 1990’s exemplifies issues that returnees often face, such as discriminatory property laws. Joanna Harvey, “Return Dynamics in Bosnia and Croatia: A Comparative Analysis,” *International Migration* 44, no. 3 (2006).

services, and is linked to reform in other areas—eradicating corruption, promoting good governance, and long-term economic regeneration of the country.”⁸²

(c) Economic Life

- Promote economic growth, sustainable development, and market re-creation.
- If appropriate, end sanctions and punitive economic measures as soon as practicable.
- Quick and comprehensive return of economic governance to the local population.
- When appropriate, offer fair compensation to those harmed. This may take the form of reparations, the establishment of relief and reconstruction funds (as was the case with the U.S. and Iraq), and ex-gratia forms, such as solatia, condolence, and battle damage payments.

What we find within the concept of the responsibility to rebuild is a range of concrete postconflict responsibilities that offer substantive criteria for elements of a theory of *jus post bellum*. But even if we do agree with the starting premise that war entails an obligation to rebuild, such broad obligations nevertheless raise pressing conceptual issues.⁸³ Perhaps most important is that within the scholarship, the responsibility to rebuild lacks a rigorous normative justification.

It is claimed that within the international community there is a “consensus” that intervening in the affairs of a state through coercive force entails a responsibility to rebuild.⁸⁴ As skeptical as we may be about such an empirical claim, the UN World Summit Outcome Document omitted rebuilding as a component of RtoP after all, the claim largely refers to consensus at the political and diplomatic level, thus setting aside the philosophical difficulties that exist when such responsibility is posited. Some may see a practical value to this approach, and there is some merit to this view. Avoiding philosophical questions and

⁸² International Commission on International Intervention and State Sovereignty, “The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty.” pp. 42.

⁸³ It is my aim to defend this premise in the following sections.

⁸⁴ Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*. pp. 193.

difficulties allows the international community to more quickly move towards developing the institutional mechanisms that make such rebuilding possible and, in some cases, engage in actual postconflict rebuilding. With an eye on easing the suffering of individuals living in postconflict environments, this is a laudable aim in its own right. But this desire for speedy implementation ignores the fact that good theory makes good practice. In fact, a number of the questions that institutions and practitioners face surrounding rebuilding are theoretical in nature, underscoring the intersection between the challenges that face both practitioners and theorists alike. A primary question we may ask, then, is on what *ethical* grounds is the responsibility to rebuild based? I now turn my attention to the normative foundation for rebuilding.

2.2 Why Rebuild? An Ethical Justification

Using the Capabilities Approach as my framework, my interest is twofold. First, by viewing the content of basic human rights as informed by and informing capabilities, I aim to show that those agents who fall below a minimum baseline of basic minimum rights are owed assistance as a matter of justice. Second, I aim to demonstrate that the constituent parts included in the concept of rebuilding (security, recovery, reconstruction, reconciliation, and economic (re)development) are linked to and can be justified through an appeal to basic human rights and capabilities. This linkage arises because, as I will argue, rebuilding creates the background conditions needed to lead a minimally decent life—a life of dignity—a core goal of developing capabilities. If rebuilding is so linked with capabilities, this provides us with one potential ethical justification for rebuilding.

Setting the Parameters: Rights and Upward Bounds

Human rights are not agent-relative; they are universal, pre-legal and exist independent of membership to a state, nation, ethnic group, religion, class, or sex. Following

Shue, I take a basic human right to provide: “[t]he rational basis for a justified demand. If a person has a particular right, the demand that the enjoyment of the substance of the right be socially guaranteed is justified by good reasons, and the guarantees ought, therefore, to be provided.”⁸⁵ Basic rights are, then, rights that are necessary to live a minimally decent life. Obviously, much more could be said about what human rights mean and from where they come, but following Walzer, “[i]t is enough to say that they are somehow entailed in by our sense of what it means to be a human being. If they are not natural, then we have invented them, but natural or invented, they are a palpable feature of our moral world.”⁸⁶ Human rights are features of human experience and life that are not merely instrumental; they are intrinsically fundamental to leading a life that is fully human.

We can envision rights in three ways. First, rights constitute a baseline, a set of conditions in which when an agent falls below there are morally urgent reasons to act on her behalf. Second, rights can also act as side constraints on the behavior of other agents, giving us some guidance about what one agent can and cannot do to another. Finally, rights act as a target or a goal. They let us know where it is that an agent should be. In these three senses, rights are evaluative, constraining, action-guiding, and aspirational.

The process of developing a foundation for rights begins with marking off some parameters as to what constitutes a right. The first of these is to establish an upward bound. The upward limits of what we want a theory of rights to cover must be by recognizing the obvious facts concerning human need and limitation. These lines stake out what constitutes the appropriate domain of human need as it relates to rights, derivative of features that are

⁸⁵ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton, N.J.: Princeton University Press, 1996). pp. 13.

⁸⁶ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 54.

common across human experience, sometimes a result of biology, and typically empirically identified.

With respect to limitations, theories of human rights often attempt to reasonably constrain the content of rights lest they become so expansive that they are practically impossible to fulfill. These constraints also help ensure that such rights are not so broadly construed that they lack the urgency typically associated with rights claims. Practicality and urgency constraints, respectively, offer a way to allay such concerns surrounding the potential for ballooning expansion of enumerated rights.⁸⁷ Central to this thinking is the requirement that for something to count as a right one should be able to do something about it, and it should be important enough to warrant someone doing something. James Griffin offers such a basis in his argument that practicalities and personhood are essential elements to thinking about human rights. As Griffin puts it, for something to count as the content of a right it must be a “socially manageable claim on others.”⁸⁸

Similarly, Sen posits what he calls *social influencability* and *importance* as partial constitutive requirements for a right, constraints that are roughly analogous to urgency and practicality. Using the language of freedom, which he views as an inherently integral component to live a life of dignity, Sen states, “[f]or a freedom to count as a part of the evaluative system of human rights, it clearly must be important enough to justify requiring that others should be ready to pay substantial attention to decide what they can reasonably

⁸⁷ A similar set of constraints have been put forth by Sen in his idea of “special importance” and “social influencability” and in Griffin’s conception of personhood and practicality. Amartya Sen, “Elements of a Theory of Human Rights,” *Philosophy & Public Affairs* 32, no. 4 (2004). pp. 329; James Griffin, “Discrepancies Between the Best Philosophical Account of Human Rights and the International Law of Human Rights” (paper presented at the Proceedings of the Aristotelian Society 2001); James Griffin, “First Steps in an Account of Human Rights,” *European Journal of Philosophy* 9, no. 3 (2001).

⁸⁸ James Griffin, *On Human Rights* (Oxford, England: Oxford University Press, 2008). pp. 38.

do to advance it. It also has to satisfy a condition of plausibility that others could make a material difference through taking such an interest.”⁸⁹ Since perspectives on the needs required to live a life of dignity can have significant variation in relative value, some have champagne tastes and others are content with small mercies, we must have a way to differentiate which needs or features of life arise to meeting the threshold for consideration as a right.

Practicality and urgency constraints offer not only a basis for determining what rights give rise to interpersonal and interactive importance, but these concepts also help us identify the upward limits of rights. For example, I may reasonably find my neighbor often throwing loud parties late into the night to be very disruptive to my sense of peace. This act may be a violation of the law, but not a violation of my basic human rights. It lacks the kind of urgency we would expect from serious rights claims. In another case, John may have been born without a right leg. John has a deep desire to have a leg just like his left one—made from his own flesh and bone. Given current limitations in the field of medicine, John’s case is at present irremediable. Now John may make the case that his need to have his health restored is urgent, and it certainly is. John could have a claim for proper care or prosthesis, but not to such measures that are beyond human provision. Given the practicality constraint, John’s situation is not a situation about his rights. Since rights claims can trigger a duty of justice, we do not have rights to things that are beyond human capacity to produce, provide, or influence.

Urgency and practicality are effective constraints, but they do not necessarily bar undue infringement on an agent’s own rights. For example, there are certain features or experiences that may be intrinsically important to one’s life, like love and affection, but that

⁸⁹ Sen, "Elements of a Theory of Human Rights."pp. 329.

one agent cannot be forced to dispense or give to another. Love and affection are certainly urgent, or perhaps more appropriately put they are important functions of a life, and fostering the capacity to love and give love is an important aspect of personal health and fulfillment. I may have a need for love, but if my wife no longer loves me she cannot be compelled, even if practical, as a matter of my need, to provide me with love. Needs, even practical urgent needs, do not always entail a right in which one can make a claim upon another. If X has a need for Y, it does not follow that X *always* has a right to Y, even if it is practical for Y to provide it. As we can see, practicality and urgency are, then, necessary but not sufficient conditions for the presence of a right. In addition, one may have a general need, but this need does not allow for the infringement of another agent's rights.

Of course, much more could be said about constraints on the upward bounds of rights. My basic point is that any useful theory of rights needs to place constraints on what counts as a right, and practicality, urgency, and sensible non-violation of others' rights are some reasonable parameters that help mark off this territory.

Setting The Baseline Threshold: An Explication of the Method

As I use the term, a baseline threshold is a measure that establishes the level at which when people fall below, morally urgent reasons for action are triggered. For our purposes this "action" means the necessary elements of postconflict rebuilding. In anticipation of the argument that I will be developing for the remainder of the chapter, it is important to note that this baseline threshold is constituted by the requirements necessary to live a life of dignity. Now this says nothing about what actually constitutes the substantive requirement necessary to live a life of dignity. I turn to this matter in the following section where I explore how the Central Capabilities can do so. But before I fill out the substantive content of what constitutes a life of dignity, we must determine how it is that the bar of justice, the

baseline threshold that agents should not be permitted to sink below, can be determined. To this end, my goal in this section is to explicate the formal approach for how we can fill out the content for what constitutes this baseline threshold, and by extension provide justificatory force with respect to cases of postconflict rebuilding. This is the topic to which I will now turn.

Some scholars have approached the problem of determining the necessary conditions for a life of dignity through the lens of basic needs.⁹⁰ While more recent scholarship has provided a broader account of what these needs may be, earlier basic needs approaches focused on access and possession of commodities. This inordinate focus on commodity possession as a measure of well-being resulted in what Sen aptly termed, “commodity fetishism.”⁹¹ To the extent that basic needs approaches are guilty of such a charge, the approach opens itself up to significant problems.⁹² First, there are considerable variations among individuals’ and societies’ abilities to convert commodities and income into their life goals. Take the now well-known example of a cripple and an able bodied individual.⁹³ It is obvious that a disabled individual needs more resources (commodities and

⁹⁰ Paul Streeten, *Basic Needs: Some Unsettled Questions*, Working Paper (East Lansing, MI: Office of Women in International Development, Michigan State University, 1984); Paul Streeten, *First Things First: Meeting Basic Human Needs in the Developing Countries* (Oxford: Published for the World Bank by Oxford University Press, 1981).

⁹¹ Amartya Sen and G. Hawthorn, (ed.), *The Standard of Living* (Cambridge: Cambridge University Press, 1989). pp. 25.

⁹² More recent basic needs scholarship, and even some earlier literature that Sen suggests is possibly guilty of a commodities focus, moves quite a bit away from actual or likely commodity possession as measure of well-being to include, for example, feelings of self worth and dignity. See *ibid.* pp. 24, n. 9. For example, leading basic needs scholar, Paul Streeten includes self determination, self reliance, national and cultural identity, and a sense of purpose in life and work. Streeten also emphasizes that “the basic needs approach encompasses nonmaterial needs.” Streeten, *First Things First: Meeting Basic Human Needs in the Developing Countries*. pp. 34.

⁹³ Amartya Sen, "Equality of What?," in *Tanner Lectures on Human Values*, ed. Sterling M. McMurrin (Cambridge: Cambridge University Press, 1980).

income) to live than an able bodied individual. A focus on providing an equal amount of commodities or opulence to individuals is misplaced insofar as agents' commodity needs vary. In addition, necessary commodities have significant interpersonal differences that depend upon geographic, economic, and cultural factors. A focus on commodities overlooks differences that often give rise to variations in how individuals need and use particular commodities.⁹⁴ For example, requirements for appearing in public with self-esteem while attending events like a parade or a dinner party) vary depending upon a variety of personal and social factors. Focusing on commodities as the determinative metric in a basic needs approach does not provide enough relevant information to adequately assess the well-being of different individuals, nor does it take seriously the different resource needs among individuals.

In addition to commodity fetishism, there are justificatory issues with the basic needs approach. As Sen notes, "the strategic relevance of basic needs is not a controversial matter," but their foundation is.⁹⁵ The criticism here is that earlier versions of the basic needs approach quickly glossed over foundational questions related to the justification of such needs and moved too hastily towards implementation. In the process, this approach provides neither an adequate theoretical foundation for its basis nor does it tell us just why these needs are important. For example, are basic needs important because they improve overall utility? Does their justification and importance hold more than instrumental value? The basic needs scholarship is not always clear on these questions.

In recognizing the intrinsic value of some needs (like self worth and identity), recent basic needs scholars have begun to focus more on needs as a way of "provide[ing] all human

⁹⁴ On this point, as it relates to primary goods, see Adina Schwartz, "Moral Neutrality and Primary Goods," *Ethics* 83, no. 4 (1973).

⁹⁵ Sen and Hawthorn, (ed.), *The Standard of Living*, pp. 25.

beings with the *opportunity* for a full life,” as opposed to securing opulence and commodities.⁹⁶ This has the advantage of rejecting needs based upon false or maladaptive preferences, instead attempting to determine what needs are actually necessary to lead a full life and then emphasizing choice and opportunity to exercise these needs. To the extent that the basic needs approach moves away from and avoids the trappings of “commodity fetishism,” emphasizing the importance of the presence for the opportunity for a full life and the needs it requires, it moves more closely towards the preferable Capabilities Approach.⁹⁷

Originally pioneered by Amartya Sen as an approach towards international development issues in the field of economics, the Capabilities Approach attempts to identify intrinsically important elements of life that one must be able to avail oneself of in order to lead a life of dignity. The Capabilities Approach emphasizes what an individual can potentially do or be in life; these bundles of capacity to do or be are the capabilities.⁹⁸ As Sen puts it “[t]he approach is based on a view of living as a combination of various ‘doings and beings,’ with quality of life to be assessed in terms of the capability to achieve valuable

⁹⁶ Streeten, *First Things First: Meeting Basic Human Needs in the Developing Countries*. pp. 21. emphasis original.

⁹⁷ There are, of course, approaches in addition to basic needs that one could address (for example, consequentialism, Rawls’s all purpose means, or welfare approaches). I choose the basic needs approach for two reasons. First, although there are important differences, it is often conflated with the Capabilities Approach. Second, it seems to me to be one of the most credible contending approaches but lacks the advantage of providing a justification for a broader account of needs or capabilities that we may prefer as a basis for postconflict rebuilding. Of course, one could offer a very broad account of what constitutes “basic” needs and we can quibble about how far one can stretch the term. Nevertheless, as they are typically formulated, basic needs are substantively different from capabilities.

⁹⁸ The literature on these advantages is large. See D.A. Crocker, "Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic," *Political Theory* 20, no. 4 (1992); D.A. Crocker, "Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic Part 2," *Women, Culture and Development: A Study of Human Capabilities* (1995).

functionings.”⁹⁹ Instead of examining opulence or preference satisfaction, the Capabilities Approach asks what a given agent’s opportunity is to achieve valuable combinations of human functionings, with functioning defined as the exercising of a range of choices within a capability. In this sense, an agent can have a capability, and whether she exercises this capability through functioning is a matter of personal choice. The Capabilities Approach has the advantage of focusing on an agent’s opportunities and freedom to do or be in a way that allows for the ends of one’s life to be determinately decided by the given agent.

The distinction between capabilities and functioning underscores the strong thread of personal autonomy that runs through the approach.¹⁰⁰ It is not necessarily important what one chooses, but that one has the freedom to choose. Focusing on developing freedoms and capabilities as opposed to, say, happiness, is based upon the idea that while certain basic capabilities should be available to all, not all agents may choose to exercise them. In a now well-known example, Sen makes this clear by calling to his readers’ minds an ascetic who has chosen to forgo food. While this individual is surely entitled to the basic capability of nourishment, he also retains the freedom to choose or not to choose to eat. This freedom component of the Capabilities Approach is beneficial because it maintains a set of basic minimums that are necessary to live a life, while remaining agnostic on how one chooses to exercise such freedoms. The approach, in effect, explicates what is needed for a good life while leaving open to the individual decisions regarding their own final ends. This has the benefit of allowing choice to exercise one’s own plans and to shape what such a life should look like.

⁹⁹ Martha Craven Nussbaum and Amartya Sen, eds., *Capability and Well Being in The Quality of Life* (Oxford: Clarendon Press; Oxford University Press, 1993). pp. 31.

¹⁰⁰ On this point see David A Crocker, *Ethics of Global Development*, Cambridge: Cambridge University Press (2000).

While also respecting personal choice and autonomy, the Capabilities Approach also has the methodological advantage of providing a more objective way towards identifying intrinsic features for a decent life. In his excellent discussion of the Capabilities Approach, Crocker notes the role that such intrinsic value and human need play, “[w]hen we conceive of human achievement and the freedom to achieve, we have identified the level of *intrinsic value* (for humans). That which is intrinsically valuable for human beings and provides the basis for further inquiry are certain sorts of human functionings, ways of being and doing, and the capabilities to so function.”¹⁰¹ As Crocker suggests, the Capabilities Approach emphasizes achievement and the freedom to achieve as elements of intrinsic value as instantiated in capabilities and functioning.

We are reminded here that while we may strive to be as pluralistic as possible with respect to how individuals order their given ends, an ethical theory that will be of use must take some stand on value. Sen reminds us that “[a]ny moral theory would have to begin with some primitive diagnosis of value.”¹⁰² Certain judgments of value are made and normative conclusions are drawn with respect to basic capabilities and needs. They are value laden, most obviously in their conception of what makes a human human, but also in what makes a human life decent or good, and while the choice to exercise capabilities is preserved and respected, a life devoid of any functioning would certainly be an impoverished one.

It is this very “primitive diagnosis of value” that enables the Capabilities Approach to be used not only as a form of quality of life assessment—as a way to examine the lives of individuals and see how they comparatively fare vis-à-vis relative standards of living—but

¹⁰¹ Crocker, "Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic." pp. 590. emphasis added.

¹⁰² Amartya Sen, *Resources, Values, and Development* (Cambridge, MA: Harvard University Press, 1984). pp. 310.

also as a way towards “theorizing about basic social justice.”¹⁰³ Comparative quality-of-life assessments can tell us how individuals may be in need and what their relative standing is to others. Such diagnostic assessments can provide indications of where individuals, governments, and institutions fall short in their commitments to human beings, and from the standpoint of social justice, capabilities can help us form what these commitments may be. The role that capabilities can play in social justice arises not only from the fact that capabilities help inform us as to what qualities of life are intrinsically important, but also because they can provide animating reason to act when fellow human beings are deprived of these capabilities.

Of course, one may have concerns about an account of justice that ascribes particular features or qualities of life as intrinsically necessary to live, and then derives its force from this very ascription. One understandable reason for this concern is that our descriptions of intrinsic human need or capacities, in this case what is necessary to lead a minimally decent life, may be incorrect, and if this is so then the corresponding rights to these basic capabilities are likely inaccurate. There are some relatively uncontroversial needs that, quite simply as a function of a biological organism, an individual would surely perish without. Nutrition and proper protection from the elements are two such examples. Now one may agree that these needs are necessary, yet still deny that they give rise to rights. Not every need corresponds to a right.¹⁰⁴ This criticism is sharpest and most forceful when applied to the larger set of more controversial capabilities that are not necessarily rooted in human biology. But this methodological skepticism is deeper than quibbling with the particular assignable rights that the Capabilities Approach could reasonably be expected to

¹⁰³ Martha Craven Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Belknap Press of Harvard University Press, 2011). pp. 18.

¹⁰⁴ I take up this point more fully below.

generate. It also questions the very adequacy of this method as a foundational approach towards untangling what such rights may be. As Miller notes, this criticism proceeds along the lines that the method “moves from a descriptive premise to a normative conclusion, so it cannot be deductive.”¹⁰⁵ In defending this approach, Miller also notes, “it can nonetheless be a valid moral argument: ‘People suffer extreme pain when tortured; therefore they have a right not to be tortured’ is a valid moral argument, even though it is logically possible to assert the premise and deny the conclusion.”¹⁰⁶ In this respect Miller is correct, but a more forceful criticism of this process is based upon the view that internally validating normative conclusions by definition lack the characteristic of externality that should form the foundation of ethical reasoning.¹⁰⁷

The concern here is that appeals to an internal perspective do not allow for sufficient validation from outside or from an impartial source. One potential way to rescue the Capabilities Approach from this criticism is to note that there is space for external validation. The Capabilities Approach’s identification of an intrinsic value for humans, the process of internalist evaluative inquiry, is a process where we reflect on what the important features of a human life are, while recognizing and keeping in mind that these can be externally validated in that they come to us as “humanly experienced context for human lives, evolving in history, yet relatively constant, presenting certain possibilities and foreclosing others.”¹⁰⁸

¹⁰⁵ Miller, *National Responsibility and Global Justice*. pp. 178.

¹⁰⁶ Ibid.

¹⁰⁷ Williams makes such an argument in Bernard Williams, *Ethics and the limits of philosophy* (Cambridge, MA: Harvard University Press, 1985). Nussbaum provides a persuasive reply from which I am here drawing in Martha Craven Nussbaum, "Aristotle on Human Nature and the Foundations of Ethics," in Altham, J. E. J. and Harrison, Rossin (eds.) "World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams," (Cambridge; New York: Cambridge University Press, 1995). pp. 121.

¹⁰⁸ Nussbaum, "Aristotle on Human Nature and the Foundations of Ethics," in Altham, J. E. J. and Harrison, Rossin (eds.) "World, Mind, and Ethics: Essays on the Ethical Philosophy

The features of importance that we tentatively identify are contingent truths, and this contingency points to a degree of variation in human experience arising from culture, class, location in space and time, and so forth. Despite this external contingency there are *internal* fixed points, features of our humanness that are true independent of the vagaries of our external natural world. These are features that are “a more or less permanent part of the internal perspective of human beings in many times and places.”¹⁰⁹ In this sense, the process is internally validating because it is deeply rooted in human experience. Despite this internality, this process can still provide the groundwork for further ethical debate, even debate that draws from external justifications, in a way that need not preclude external points of view or outside validation.

A final concern with the Capabilities Approach is that normative conclusions using human nature as their bases not only slip too easily from fact to value, but also that such facts are often construed or articulated in a purposefully biased manner. This critique rests not so much on getting an account of human need right, as it does on the concern that definitions of human nature can be purposefully exclusionary on nefarious grounds. How we define the “permanent part of the internal perspective of human beings” may be in a way that purposefully excludes or discriminates against those who do not hold, or are not considered capable of holding, this perspective.¹¹⁰ This concern is not without merit, history is replete with examples of appeals to human nature that defined whole groups of peoples as something less than human, lacking human requisites or capacities deemed necessary to

of Bernard Williams." pp. 121; For a discussion of this method see Crocker, "Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic." pp. 588-90.

¹⁰⁹ Nussbaum, "Aristotle on Human Nature and the Foundations of Ethics," in Altham, J. E. J. and Harrison, Rossin (eds.) "World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams." pp. 120.

¹¹⁰ Ibid. pp. 121.

enjoy equal rights and treatment.¹¹¹ Nevertheless, this repugnant treatment is not the result of methodology. While the basis of this exclusion can begin with a question like, “what are the requirements (i.e., capabilities) necessary for an individual to enjoy political or civil rights,” it is not inherently malicious. After all, there may very well be good grounds upon which to restrict rights such as in cases of severe mental disability or the lack of requisite maturity resulting from age (like children). What is important to keep in mind is that the proper answers to such questions are going to be informed not exclusively by an appeal to human nature or biology but by ethical argument. Appeals to human need and nature should be tempered with ethical reflection, and in these cases theory and policy will be decided because we have engaged in critical ethical reflection that scrutinizes the empirical evidence while concomitantly appealing to moral norms and principles. While this process can give way to repugnant conclusions, this need not be the case.

What we hope to arrive at, as tentative conclusions to the conditions necessary to live a life of dignity are, then, culturally sensitive and variable, but not completely culturally bound. The foundation in which we are to root a theory of postconflict justice must have a model of justification that can be widely adoptable and acceptable; it should provide the basis for justification across religious, cultural, and moral variations in which many individuals of differing backgrounds and beliefs could accept such a justificatory model. The goal is to generate a schema of basic human rights and capabilities that are sufficiently plausible, and can be justified as widely as possible, on grounds that people of different backgrounds and beliefs could find legitimate. In short, the justification should be as sensitive to variations in religious, cultural, and political belief as possible, thus expanding the

¹¹¹ Here Aristotle’s classification of natural slaves comes to mind. Aristotle and CDC Reeve (trans.), *Politics*, Indianapolis, IN: Hackett (1998). Book I.

purchase it has among agents of differing backgrounds. This is no easy task, but I believe the Capabilities Approach is sufficiently sensitive to these variations, while also recognizing the universal aspects of the necessity for basic capabilities.

2.3 A Baseline Threshold: Central Capabilities and Basic Human Rights

Where thinkers such as Sen have preferred to leave the identification of core capabilities open, fluid, and subject to the method of public reasoning, thus resisting their specific enumeration, others such as Nussbaum have attempted to identify a list of “central capabilities” that are viewed as necessary to live a life of dignity. The impetus behind this development is that once identified the Central Capabilities can be employed to “generate political principles” and a “threshold level of capabilities.”¹¹² Over the years this list has been revised and modified, and it should be thought of as a dynamic enterprise, not as an attempt at a static rendering. Although Nussbaum is not alone in developing a list of Central Capabilities or needs, her account remains one of the most influential.¹¹³ This influence stems largely from the power of the connection that is drawn between these identified capabilities, human flourishing, and their intrinsic value in a life of dignity. As Soran Reader notes, Nussbaum’s approach is “normative rather than just providing a framework,” for the

¹¹² Martha Craven Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000). pp. 12-13. In some of Sen’s earlier work he did speak of basic capabilities. See Sen, “Equality of What?.”; Amartya Sen, *Inequality Reexamined* (New York: Russell Sage Foundation; Harvard University Press, 1992); Sen and Hawthorn, (ed.), *The Standard of Living*.

¹¹³ The basic needs literature is abundant. For other approaches see David Braybrooke, *Meeting Needs* (Princeton, N.J.: Princeton University Press, 1987); Brock, *Global Justice: A Cosmopolitan Account*; Miller, *National Responsibility and Global Justice*. In David Miller’s work, “National Responsibility,” he draws from a theory of basic needs as a justification for human rights, and while Miller does discuss needs in some detail, he does not explicitly provide an enumerated list.

purposes of evaluative comparisons.¹¹⁴ As we can see, this approach can be taken as not only a method for making baseline comparisons between individuals' various states of well-being, as Sen partly does, but also as a way to envision the theoretical tools for social justice. In this vein Nussbaum has generated a list of ten Central Capabilities, and upon examination we can see how these correspond closely with elements of postwar rebuilding found in RtoP (in brackets are the elements of postwar rebuilding that correspond to a constituent capability).¹¹⁵

1. *Life*. The opportunity to live a normal life span, not suffer from premature death, nor have a life diminished to the point of not worth living. [Security]
2. *Bodily health*. [Security and Economic and Institutional Development]
3. *Bodily integrity*. Freedom from undue and unwarranted bodily harm. Freedom of movement. [Security]
4. *Senses, imagination, and thought*. Use of the senses to imagine, reason, and think, supported by education. Being able to use the mind to freely express (artistically, spirituality, etc.) one's thoughts. [Institutional Reconstruction: political, economic, and justice systems that, at the very least, permit free expression]

¹¹⁴ In an excellent article, Reader details some differences between Sen and Nussbaum, noting that Nussbaum's approach differs in the following ways: "1) being normative rather than just providing a framework; 2) distinguishing types of capabilities, specifying a list of basic capabilities and giving content to them; 3) rejecting relativism; 4) grounding CA in the work of Aristotle and Marx; 5) not attaching significance to the distinction between well-being and agency capabilities; 6) rejecting the capability-utilitarianism Sen seems to endorse, instead treating basic capability requirements as grounding rights." Soran Reader, "Does a Basic Needs Approach Need Capabilities?," *Journal of Political Philosophy* 14, no. 3 (2006). pp. 337. n. 3.

¹¹⁵ Over the years Nussbaum has provided numerous iterations of her list of Central Capabilities. I draw from what is at present her most recent account, as found in Nussbaum, *Creating Capabilities: The Human Development Approach*. pp. 33-34. Much of the explicative language for each of the capabilities is taken directly from Nussbaum.

5. *Emotions*. “to love to grieve, to experience longing, gratitude, and justified anger...[s]upporting this capability means supporting forms of human association that can shown to be crucial to their development.”¹¹⁶ [Security]
6. *Practical Reason*. The ability to form one’s life plans and conception of the good, to revise the plans and the good. Nussbaum underscores the importance that freedom of conscience would play here. [Development of education systems and political and social institutions that permit freedom of conscience]
7. *Affiliation*. Freedom of speech and assembly. Social interaction. Having the social bases of self-respect including nondiscrimination and equal treatment under the law. [Security, Economic Development, and, in some cases, Reconciliation]
8. *Other species*. Having the ability to live with other species and the natural world. [Security, including environmental security and stewardship, Systems of Justice]
9. *Play*. A reasonable expectation to recreate. [Economic Development: to the extent possible foster economic conditions that are non-exploitative and allow leisure time]
10. *Control over one’s environment*. This includes political and material control. Political: to participate in political processes and have a reasonable measure of democratic self determination. Material: Equal property rights, employment, and safety from unreasonable search and seizure. [Development and Security]

When paired, the list of Central Capabilities corresponds with the specific features of postconflict rebuilding. At its core, this correspondence is deceptively simple. A postconflict society that lacks the key features of security, justice, and an opportunity for fair economic

¹¹⁶ Ibid.

life, will likely lack the corresponding Central Capabilities, providing us with not only a metric for assessing human welfare in postconflict settings, but also a target and motivating reasons for action on the behalf of those living in postconflict societies.

Now that we have the general contours of capabilities and *jus post bellum*, we can explore three important features of the interplay between postconflict rebuilding and the Capabilities Approach. The first is a kind of derivative or reductionist account of postconflict rebuilding. If we believe that a given set of capabilities are important, and elements of postconflict rebuilding help fulfill those capabilities, then by extension, fulfilling a feature of rebuilding helps foster achievement of a life of dignity. In this sense the importance of postconflict rebuilding is a derivative, instrumental good. Rebuilding helps contribute to the creation of the institutions and social structures necessary to live a decent life.

On this justificatory line, one may be tempted to view the value of postconflict rebuilding as derivative of the goods that it makes possible and its importance as reducible to the instrumental goods that it yields. This reductionist account of postconflict justice only tells part of the story. Postconflict rebuilding is also important because some of its elements are not merely instrumental in achieving capabilities, but also are synonymous with particular capabilities. Take the Central Capability of bodily integrity. Providing postwar security, a postconflict rebuilding responsibility, is, in effect, providing for the capability of bodily integrity. Security of one's physical body from undue and unwarranted harm or molestation is an intrinsic good that is synonymous with the Central Capability of bodily integrity. In this case, the postconflict responsibility is so closely aligned with the correlative capability that it is nearly indistinguishable. Unlike solely in the reductionist account, it seems that

postconflict responsibilities can sometimes have more than mere instrumental value; they can be intrinsically important when they are synonymous with a given Central Capability.

Of course, postconflict security is also an instrumental good that helps secure additional capabilities. Take the case of postconflict famine. Although the underlying causal factors for famine are complex, war often exacerbates the conditions of famine, making countries that are at risk of famine or famine-prone especially vulnerable.¹¹⁷ In the case of famine and war, two of the proverbial four horsemen do ride together. As Kiros and Hogan note in their study of war and famine:

[War] typically destroys food production and distribution, dislocates mass populations, and forces the relocation of refugees. War also undermines social services, in particular health services, as meagre government resources are taken away from social services to finance military build-ups. Deliberate diversion of food supplies by various armed factions as well as the disruption of transport and marketing and economic hardship often cause severe food shortages.¹¹⁸

The authors' (unsurprising) policy recommendations include "reducing armed conflict, [and] addressing food security in a timely manner," both of which play a vital role in postconflict situations.¹¹⁹ Since we know that famines are often the result of not a shortage of resources, but a denial of access to them, the example of famine and postconflict security helps bring out both the intrinsic worth of some elements of postconflict justice and the instrumental goods that they can provide.¹²⁰ In the example of famine, because security permits and

¹¹⁷ Amartya Sen, "Wars and Famines: On Divisions and Incentives," in *Economics of Arms Reduction and the Peace Process: Contributions from Peace Economics and Peace Science*, ed. W. Isard, C.H. Anderton (NY, NY: North Holland, 1992). pp. 219–33.

¹¹⁸ G.E. Kiros and D.P. Hogan, "War, Famine and Excess Child Mortality in Africa: The Role of Parental Education," *International Journal of Epidemiology* 30, no. 3 (2001). pp. 456.

¹¹⁹ Ibid. Take, for example, the study published by faculty from the U.S. Army War College in which the role of postconflict famine reduction and prevention is underscored. Crane and Terrill, *Reconstructing Iraq: Insights, Challenges, and Missions for Military Forces in a Post-Conflict Scenario*. pp. 53.

¹²⁰ Again see Sen, "Wars and Famines: On Divisions and Incentives." pp. 219–33.

facilitates access to food, the intrinsic good of postconflict security also instrumentally helps secure the capability of bodily health (with nutrition being an essential component of health). This example is evidence of how a component of postconflict rebuilding can simultaneously be of both intrinsic and instrumental value.

It is important to keep in mind that while postwar planning may necessitate prioritizing certain responsibilities over others (like ensuring security prior to economic redevelopment) there remains a deep interconnection between all of the Central Capabilities and their intrinsic worth, just as there is a deep interconnection between all elements of rebuilding. Of course, conditions will at times necessitate providing more of one capability than another, but these situations should not be viewed as a rank ordering of preference, but more as a tragedy in and of themselves. Perhaps I may have to forgo an operation that I seriously need in order to provide food for my son. The choice between my bodily health and my son's nutrition are in conflict and either choice I make is unfortunate. When faced with two tragic situations it is near impossible to adequately reconcile a decision; both choices are bad. Gareth Evans makes a similar point in his discussion of pursuing the imperatives of postconflict peacebuilding simultaneously. Although Evans does prioritize security, his point is that the elements of postconflict reconstruction must all be pursued, and prioritization should not be construed as a reduction in the worth of other imperatives.¹²¹

The above example brings to mind that even though particular responsibilities of rebuilding may lay the groundwork for the achievement of capabilities, the fulfillment of postconflict responsibilities does not necessarily equate with the realization of a capability.

¹²¹ Gareth J. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution Press, 2008). pp. 149.

While this may be an obvious point, it is important for two reasons. First, it underscores how far a postconflict political community may have to go to achieve some measures of justice. Rebuilding does not ensure a just society, but can only help to foster the necessary conditions for social justice.

The preceding point also helps with a conceptual clarification. The reason that fulfilling a postconflict responsibility does not necessarily entail realizing a capability is because the conceptualization of the capability may be thicker and thus more demanding than the demands of a given postconflict responsibility. While certain postconflict responsibilities may comprise an important component of a capability, they may not represent the capability in its totality. The implications for this conceptual clarification are important because it can lead to revisions in our thinking surrounding postconflict justice. Perhaps we begin with an initial formulation of a thinner notion of postconflict security, one that entails, for example, only a minimal amount of the freedom of movement in a postconflict environment. Upon reflectively considering the Central Capability of bodily integrity (which includes the freedom of movement), we may consider that a life without true, reasonably unrestricted freedom of movement is an impoverished life. Based upon this reflection we may further decide that a conceptualization of the postconflict rebuilding responsibility of security should include a thicker, more robust definition of freedom of movement. In this way capabilities can provide useful informational inputs, and these inputs may further impact our views concerning the normative conceptualization of postconflict responsibilities.

Like other forms of moral theory that employ the method of reflective equilibrium, the Capabilities Approach can prove to be a useful reflective tool in a way that will cause us to try to close or shorten the gap between the ethical demands of capabilities and

postconflict responsibilities. This back and forth between postconflict principles, capabilities, and the postwar conditions and environment help us explicate and refine the theorization of postwar conduct and morality.

Of course, there may be times where we would not wish to define the postconflict responsibility in a way that is synonymous with a Central Capability. Sometimes postconflict responsibility will purposefully fall short of realizing certain capabilities. The Central Capability of play and the correlative postconflict responsibility of development is likely one such case. While the ability to play and avail oneself of leisure is certainly an essential component of life, the responsibility to redevelop may fall short of requiring all that the capability of play entails.¹²² Despite best attempts, postconflict conditions and constraints will often prevent the realization or achievement of capabilities. It is very well possible, and often likely, that even though postconflict responsibilities have been reasonably discharged and fulfilled, they do not fulfill the realization of the Central Capabilities. In such cases, the Capabilities Approach can aid us in setting rebuilding targets and goals that can help form the basis of policy and planning.¹²³

In summary, by examining the three features that mark the interplay between postconflict rebuilding and capabilities, we can see how the Central Capabilities and the

¹²² Similar to the Universal Declaration of Human Rights' right to "periodic holidays with pay," the capability of play may be critiqued as unrealistic, even frivolous. United Nations General Assembly, "Universal Declaration of Human Rights," *Resolution Adopted by the General Assembly* (1948). Art. 24. We can think of play or leisure as a component of the more persuasive concept of non-domination, the ability to be free from near-constant toiling without one's own time and ability to exercise one's own life goals. Thanks to Art Lederman for this point.

¹²³ As Crocker notes, "the long-term goal of good and just development—whether national or global—must be to secure an adequate level of agency and morally basic capabilities for everyone in the world—regardless of nationality, ethnicity, religion, age, gender, or sexual preference." Crocker, *Ethics of Global Development*. pp. 390. Also see Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2009). chp. 17.

demands of postconflict rebuilding are closely related. In the first sense, the justificatory force of postconflict rebuilding is reductive and derivative of the instrumental good it provides in helping realize the conditions necessary to achieve the Central Capabilities. Second, there are cases in which postconflict responsibilities are synonymous with specific Central Capabilities. In these cases, achieving the given postconflict responsibility also means achieving the capability and making it available to members of the political community in which the responsibility has been carried out. When viewed in this light, postconflict responsibilities are not merely instrumentally good, but also intrinsically good. In contrast to when capabilities and rebuilding responsibilities align synonymously, there are times when a postconflict rebuilding responsibility can be viewed as only a more narrow constituent part of a broader capability. Cases like these help us recall that postconflict responsibilities do not, and (likely) will not, entail a full realization of the corresponding Central Capability. Even a theory of *jus post bellum* that requires activities as demanding as rebuilding will fall short of achieving the high mark that the Capabilities Approach sets.

Capabilities, Rights, and Setting the Baseline Threshold

Now that we can see the connection between the Central Capabilities and the importance of rebuilding activities, let us turn our attention to how capabilities can be practically used as an evaluative baseline below which individuals should not be permitted to sink.

The use of a threshold or baseline is not uncommon; it is widely employed for a variety of normative and policy-oriented measures and is already implicit in the concept of

rebuilding.¹²⁴ When viewed through the lens of the utter tragedy of war and its devastating effects, this baseline becomes all the more important. War often creates circumstances and conditions so terribly dire that as a matter of justice we need clear articulations of not only the target of where we want a postconflict society to be, but also how far people can sink in the interim.

In terms of global justice, perhaps the most familiar type of threshold is found in theories of human rights.¹²⁵ As Henry Shue so eloquently puts it in his seminal work, "Basic Rights":

One of the chief purposes of morality...and basic rights above all, is indeed to provide some minimal protection against utter helplessness to those too weak to protect themselves. Basic rights are a shield for the defenseless against some of the more devastating and common of life's threats...They are social guarantees against actual and threatened deprivations of at least some basic needs...*Basic rights are the morality of the depths. They specify the line beneath which no one is to be allowed to sink.*¹²⁶

Like Shue, many use the language of rights as a way to describe the baseline for the "morality of the depths,"¹²⁷ and since its inception, the Capabilities Approach has been linked to

¹²⁴ This can be seen in a formal articulation of the reasoning behind RtoP rebuilding: Agents Z are entitled to X. War can reduce Agents Z to below the baseline of X. Therefore, Agent Q should rebuild Agents Z until X is achieved.

¹²⁵ Sen and Nussbaum have, respectively, employed a baseline in their work, using capabilities as a way to develop theories of human rights. Martha Craven Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66(1997); Sen, "Elements of a Theory of Human Rights." Nussbaum has also employed the concept of capabilities as a baseline somewhat independent of human rights as a way to spur social justice. See Nussbaum, *Creating Capabilities: The Human Development Approach*.

¹²⁶ Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. pp. 18.

¹²⁷ Like Shue, David Luban uses the language of human rights to stipulate how their violation constitutes a threshold that can justify humanitarian intervention. Luban, "Just War and Human Rights." David Miller employs a theory of basic rights derived from human need to establish a baseline threshold for global duties of humanitarianism and justice. Miller, *National Responsibility and Global Justice*.

theories of human rights.¹²⁸ It is true that we can view capabilities in much the same way as we can view basic rights, that is, as a baseline under which no one should sink. With their focus on equality and shared universalism, rights and capabilities are similar. This fits with the concept of capabilities and rights as being of intrinsic moral worth. In their absence, a human would not be able to lead a decent life. Violation of these rights, and failing to make available basic capabilities, justifies an urgent moral claim. Rights express a kind of moral urgency that offers protection from potential violation, and when violated, signal that immediate redress is needed. As Shue puts it, “[b]asic rights, then, are everyone’s minimum reasonable demands upon the rest of humanity.”¹²⁹

While these foregoing features point to similarities between rights and capabilities, Shue’s point underscores a subtle but important difference between the two. Basic rights seem to act as claims *to* the Central Capabilities. When someone says that they have a right to nourishment or a right to bodily integrity, they are making a claim that they have a right to this capability irrespective of if such a capability is in fact currently available. Having a right even when it is denied or absent, to use the words of Donnelly, presents a “possession paradox.”¹³⁰ This paradox indicates that a capability is different from a right in an important way. The paradox highlights the fact that one is in possession of a right simply by virtue of being a human in a way that one is not in possession of a capability. This is because the capabilities are certain objective features of a human life (like the capability for play,

¹²⁸ See Amartya Sen, "Rights as Goals," in *Morality and Objectivity: A tribute to J.L. Mackie, Ted Honderich* (ed) (London; Boston: Routledge 1985).; Amartya Sen, "Rights and Agency," *Philosophy & Public Affairs* 11, no. 1 (1982).; Martha Craven Nussbaum, "Aristotelian Social Democracy," in *Liberalism and the Good*, ed. R. Bruce Douglass, Gerald M. Mara, and Henry S. Richardson (New York: Routledge, 1990). pp. 239, supra note 12.

¹²⁹ Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. pp. 19.

¹³⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989). pp. 11.

association, bodily integrity, and so forth). One empirically possesses a capability or one does not, there is no paradox of possession. We can see this in Nussbaum's specification of basic capabilities, which she defines as "the innate faculties of the person that make later development and training possible."¹³¹ If such capabilities are innate, it is simply a fact that by virtue of biology, some individuals will not possess them.

In contrast, when we think of rights, the possession paradox refers to both moral and empirical states. The actual empirical status of the ability to exercise or have a right fulfilled depends upon contingent features of one's social and natural environment, but this contingency does little to change the moral possession of a right. What this paradox captures is the distinction between the ability to potentially exercise a right and an agent's possession of the right. With rights, one possesses them even in the absence of the potential ability to exercise them, but with capabilities, if one cannot exercise the capability, they do not possess it. With rights, the concepts of possession and exercising are distinct, and with capabilities they are not. This distinction points to the likelihood that some elements of human rights can be viewed as independent of capabilities, if not altogether antecedent to them.¹³²

The implications of the distinction between the potential to exercise a right and possession of a right are worth briefly discussing. To start, rights may play a greater role in justifying capabilities than those who advocate for relying solely on basic capabilities let on. By exploring and appealing to rights, we may give greater currency to the reasons for caring about capabilities. When we drill down, it may be the reason (at least partly) that we ought to care about a capability is justified by an appeal to a corresponding right. By extension, we

¹³¹ Nussbaum, "Capabilities and Human Rights." pp. 24.

¹³² On this point see Martha Craven Nussbaum and Jonathan Glover, *Women, Culture, and Development: A Study of Human Capabilities* (Oxford; New York: Clarendon Press; Oxford University Press, 1995). pp. 98; Nussbaum, "Capabilities and Human Rights." pp. 293.

may find that appeals to rights should constitute a greater role in justifying postconflict rebuilding, and this means that we should not be so quick to dispense with the concept, language, and rhetoric of rights when theorizing *jus post bellum*.

One area where capabilities and rights share a similarity is in their diagnostic capacity. Both can help tell us how agents fare in a given set of circumstances, such as in instances when rights are violated or left unfulfilled or if agents lack the freedom to exercise given capabilities. The ability to perform such diagnoses points to the similarity that rights and capabilities share in offering ways in which they can provide objective descriptions of conditions of social justice. In this way, rights and capabilities are aligned, but there also remains an important diagnostic difference between rights and capabilities. This lies in the fact that providing all individuals with a right, say, an economic right like a decent wage, does little to tell us how well certain individuals may comparatively fare. When compared to rights, given particular conditions that we may want to assess, capabilities can often provide us with more precise and determinate measures of well-being. For example, we can imagine that X group (in a political community) has the human right to a decent (minimum) wage, and that this right is fulfilled. But focusing upon rights fulfillment tells us little more than just that—this right has been fulfilled. What it fails to provide is a detailed account of what individuals, or groups of individuals, can do with this wage. Capabilities show us how even though all have a right to X, and said right is respected and fulfilled, unacceptable inequalities can endure. This point is particularly salient in postconflict environments where, given social and political conditions, there may be groups who have been subject to unjust and unfavorable conditions that result in situations that leave them comparatively much

worse off than the rest of the population.¹³³ In terms of postwar rebuilding, where there are numerous cases of particular neighborhoods suffering comparatively more damage, certain groups being brutalized under the former regime, or resources being so disproportionately allocated, measures of rights fulfillment tells us comparatively less about how individuals fare and when they may need a larger share of resources or aid.

A final point is that one might very well concede or readily agree that basic capabilities are necessary to live a decent life, but nevertheless deny that individuals have a right *to* these capabilities. This is a familiar argument that largely falls on the distinction between positive and negative rights. The most common and forceful objection against positive rights and duties is found in the Nozickian libertarian view of rights.¹³⁴ Let us call this the traditional view.¹³⁵ Exploring the merits of the traditional view is important because, as I have detailed, capabilities and rights share several salient features, one of which is the fact that both can be viewed as requiring not only negative but also positive duties.

The traditional view maintains that the only rights that are rights are “negative” in nature, relating to prohibitions on conduct or side-constraints. Under this view, simply

¹³³ Nussbaum echoes this point in her discussion of the role that capabilities can play in policy planning and resource allocation: “[a]nalyzing economic and material rights in terms of capabilities would thus enable us to understand, as we might not otherwise, a rationale we might have for spending unequal amounts of money on the disadvantaged, or creating special programs to assist their transition to full capability.” Nussbaum, “Capabilities and Human Rights.” pp. 295.

¹³⁴ Robert Nozick, *Anarchy, State, and Utopia* (NY, NY: Basic Books, 1977).

¹³⁵ There are other objections to the so-called “positive” rights that do not rest solely on philosophical grounds but that arise from concerns stemming from the possibility of achieving an overlapping consensus on rights. The argument here is that a more minimal account of rights is what are likely to achieve such a consensus. Such critics suggest that the demands and philosophical grounds for positive rights might be too contentious and we should, therefore, focus on advancing arguments and political projects that focus primarily on negative liberty. For a sample of this “pragmatic” approach see Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, N.J.: Princeton University Press, 2001). Thanks to C. Fred Alford for pressing me on this point.

refraining from given types of conduct fulfills negative rights; negative duties require nothing beyond omission. In contrast, positive rights are seen as requiring positive duties or actions. The importance, in part, attached to refraining as opposed to providing is the idea that if all rights have a correlative duty, then the rights of all claimants correspond to identifiable duty-bearers.¹³⁶ Since negative rights require only omission and refrain from action, all individuals can be reasonably required to accept such duties because they need do nothing more than just doing nothing. In contrast, positive rights require more than just omission, they require action. John's right to food means that when he cannot secure this right himself, it requires action on the part of others to provide him with food. Unlike negative rights, where the duty-bearers are clearly identifiable, with positive rights the identification of duty-bearers is rather difficult. Those holding the traditional view argue that the duty-bearing requirements of positive rights not only entail too much on the part of potential duty-bearers, but also that the allocation of such duties is unwieldy and hobbled with practical difficulties. It is on the grounds of liberty, feasibility, and overdemandingness that proponents of the traditional view typically reject positive rights.

The problem here is that such views that are predicated upon the strength of the positive-negative distinction fail to recognize that rights that are commonly viewed as negative often require significant positive action. For example, take the right to be free from torture. This is commonly viewed as a negative security right. The belief here is that fulfillment of the right to bodily integrity requires no action or duties beyond refraining from

¹³⁶ For the full suite of objections to including positive subsistence rights as human rights see Maurice Cranston, *What are Human Rights?* (NY, NY: Basic Books, 1962). These objections include the claims that positive subsistence rights are not truly connected to fundamental interests, they are burdensome and demanding on governments and individuals, and they are not feasibly fulfilled, especially in states lacking in development.

torturing. But as numerous scholars have noted, in order for the negative right to not be tortured to be fulfilled, and a good deal of additional negative rights, requires a whole range of positive activities.¹³⁷ Guaranteeing this right includes such positive actions as establishing law and order, training and education programs for security personnel, and the necessary oversight needed to ensure their compliance. Furthermore, there are many positive actions required to prevent and disrupt torture from occurring. As Donnelly points out, such positive and negative distinctions are somewhat historically and situationally contingent; the right to torture is “largely negative in Stockholm but somewhat more positive in the South Bronx,” and the positive right to food some times requires no more than government restraint.¹³⁸ In many cases, what are traditionally considered positive rights often require much more than just restraint and forbearance in a way that defies a discrete classification as strictly positive or negative.¹³⁹

This fact is brought out in the feature of the Capabilities Approach that takes *all* capabilities as intrinsically necessary to lead a full life. The intrinsic importance of capabilities points to the recognition of a connection between the classically characterized positive and negative obligations. Not unlike our example of torture, one cannot argue in favor of negative rights like association, speech, and security without affirming the importance of a suite of positive rights. It takes positive actions to fulfill some negative duties. Although the

¹³⁷ Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. chp. 2; Jones, *Global justice: Defending Cosmopolitanism*. pp. 60; Caney, *Justice Beyond Borders: A Global Political Theory*. 119-121.

¹³⁸ Donnelly, *Universal Human Rights in Theory and Practice*. pp. 33.

¹³⁹ Jeremy Waldron makes this point nicely in his discussion of “successive waves of duty.” This is the idea that a right creates successive waves of duty that, depending upon the circumstances, requires action, omission, commission and sometimes a complexity that is too complicated to categorize under either heading of positive or negative. Jeremy Waldron, “Two Sides of the Coin,” in *Liberal rights: Collected Papers, 1981-1991* (Cambridge: Cambridge University Press, 1993). pp. 25.

Capabilities Approach has tended not to focus on the positive-negative distinction the way that rights-based approaches have, the intrinsic importance of all capabilities irrespective of their perceived correlation to action or omission demonstrates that in the Capabilities Approach the positive-negative dichotomy becomes considerably weakened.

Now some may argue that the urgency and importance of basic capabilities or rights is not in doubt, but where the issue lies is in the demandingness of the correlative required duties. Fully addressing this concern would require a discussion of the agents and entities to which these duties fall. This is an argument that I take up more fully in Chapter Four where I address how we allocate responsibility for postconflict rebuilding. But for the moment, I want to briefly touch on three points concerning the third plank of the traditional view's critique of positive duties—overdemandingness.

The criticism of overdemandingness is concerned with the possibility that by blurring the distinction between positive and negative rights and their correlative duties, we are left with a glut of duties that fall on the individual in a way that is too demanding. The concern is that if the starving or war-torn in distant lands have a right to being rebuilt, the moral obligation by various duty-bearers to help in such an effort makes it difficult to live a life according to one's own plan. One reply to this objection is that it is based upon an inaccurate view of the demands found in the duties required by positive rights. As I noted previously, positive rights do not always require positive action. The example of famine nicely demonstrates this point. Sometimes famine can be avoided, and the commonly considered positive right of nutrition can be met, by simply refraining from action. In cases such as these, rights or capabilities that are commonly believed to require additional positive duties, in fact, do not.

One could nevertheless agree with the weakening of the distinction between positive and negative rights and still remain concerned that the demand on individuals remains too great. After all, the potential demands of postconflict rebuilding could very well demand a very good deal from agents who are responsible for rebuilding. But the demands to which this criticism refers are inordinately self-regarding and partial. The hardships, trauma, and devastation found in postconflict situations are very demanding, indeed, for those who suffer from them.¹⁴⁰ If such needs are going to be ignored or discounted, then we must have very good reasons to do so, especially when there are political communities with vast amounts of comparative wealth that appear lavish by even reasonable standards. This is not to say that such reasons do not exist, but the burdens and demands of those in need seriously challenge the blanket rejection of duties of aid on the grounds of being overdemanding.

Furthermore, it is likely that the burdens on individuals can be made less onerous the more they are diffused. One way that this can be achieved is by looking towards institutions (like international organizations) and collectives (like states) as entities upon which demands can be placed. In this way, sharing the burdens of rebuilding can substantially reduce the costs to individual agents. Similarly, the responsibility to rebuild need not necessarily fall to one single agent. Numerous agents (like states) can be tasked with rebuilding efforts, thereby again decreasing the demands that would otherwise be placed upon a single collective agent. I will not say anything here about how these duties are assigned, as I take up the issue at

¹⁴⁰ For insightful discussions on the demands that are placed on those in need see Caney, *Justice Beyond Borders: A Global Political Theory*. pp. 117 and pp. 119-121; Jones, *Global justice: Defending Cosmopolitanism*. pp. 34-5.

length in Chapter Four. I simply want to underscore the point that postconflict rebuilding need not be as onerously demanding as some critics contend.

As we can see, there are productive tensions between capabilities and rights, as well as mutually reinforcing similarities. Despite these similarities (or maybe because of them), some scholars have argued that the use of capabilities may be comparatively more effective than rights. Nussbaum argues that, at least in some aspects, the approach of capabilities is preferable to that of rights.¹⁴¹ Similarly, Bernard Williams posits that basic capabilities are a preferable foundation for the normative and rhetorical justification of rights.¹⁴²

I am not very happy myself with taking rights as the starting point. The notion of a basic human right seems to me obscure enough, and I would rather come at it from the perspective of basic human capabilities. I would prefer capabilities to do the work, and if we are going to have a language or rhetoric of rights, to have it delivered from them, rather than the other way around.¹⁴³

Gillian Brock argues in her conception of global justice that a theory of human need (which she aligns almost indistinguishably with capabilities) should be preferred over human rights when justifying the moral obligations found in cosmopolitan theories of global justice.¹⁴⁴

Despite the merits of the Capabilities Approach, we should also keep in mind that theories of human rights still retain a forceful importance, and this importance should give us pause when considering dispensing of them altogether. As we have seen through examining some of the distinctions and similarities between rights and capabilities, there remain both theoretical reasons and practical advantages to retaining rights in a theory of *ius post bellum*. Rights provide us with the language that describes the entitlements that humans

¹⁴¹ Nussbaum, "Capabilities and Human Rights." see n. 66.

¹⁴² Bernard Williams, "The Standard of Living: Interests and Capabilities" in *The Standard of Living*, ed. Amartya Sen and Geoffrey Hawthorn (Cambridge: Cambridge University Press, 1987). *passim*. esp. pp. 94, 100.

¹⁴³ Ibid. pp. 100.

¹⁴⁴ Brock, *Global Justice: A Cosmopolitan Account*. pp. 71-2.

are owed and the urgency of these needs in forceful language that now has global currency. There is a rhetorical elegance, with undeniable moral force, that occurs when one invokes the language of rights that is currently absent in the language of capabilities. Saying, “my right to be free from torture has been violated,” has, quite frankly, a broader appeal and understanding (and a better ring to it) than saying, “my basic capability to bodily integrity is not being met because of torture.” Words matter, and this is one practical advantage that rights retains over capabilities.

My goal in this section has not been to resolve the issues between capabilities and rights here and now, if they even can be, but to point to some significant ways that capabilities and rights are aligned, conceptually differ, the normative work they can do in tandem, and why one should not be subsumed into the other. Both rights and capabilities help justify postconflict rebuilding and help establish the baseline threshold upon which we can make assessments and set social justice targets for cases of postconflict rebuilding.

2.4 Conclusion

This chapter has reviewed how three areas of normative theory tackle *jus post bellum*. In the model of *jus post bellum* as the vindication of rights, we found that the changing face of war coupled with minimal postconflict obligations gave us empirical and normative grounds upon which to question the validity of this view. In addition, we found that international occupation law and transitional justice do offer guidance on postconflict conduct, but that this guidance remains too narrow in scope, leaving unaddressed not only a range of further legal questions, but also normative issues pertaining to *jus post bellum*. Finding that these first two families of theories of postconflict justice were insufficient, we turned to the emerging normative principle of the Responsibility to Protect, and specifically the principle of the responsibility to rebuild. Beginning with the premise that RtoP’s concept of rebuilding offers

a promising articulation of a forward-looking theory of *jus post bellum*, I was quick to note that the principle is in need of further normative justification before we can conclude that it deserves a position in *jus post bellum*.

In taking up the task of establishing a justification for postconflict rebuilding, I turned to a theory of capabilities and rights. In exploring the comparative strengths and weaknesses of rights and capabilities, I explicated a baseline threshold that could function as a metric for assessments of conditions in postconflict settings. This baseline threshold is predicated on a linkage between the Central Capabilities and the demands of the responsibility to rebuild. I argued that when viewed in this fashion, the Capabilities Approach offers powerful and persuasive justificatory reasons for rebuilding that stem from the role that the Basic Capabilities play in all human lives. When individuals residing in a society emerging from the scourges of war cannot exercise their basic capabilities, this provides animating reasons to rebuild.

Chapter Three

Cosmopolitanism, Associative Duties, and *Jus Post Bellum*

Introduction¹⁴⁵

Abdullah sat down with a sigh. He seemed not quite comfortable in his new living room in Amman, Jordan. Although not lavish by any means, the room was well appointed. The sofa and loveseat were new and the room was decorated in good taste. When I excused myself to use the bathroom, Abdullah's five-year-old son drew me into an adjacent room to join him in playing with his new action figures. I realized that the rest of the apartment was unfurnished and practically empty. Perhaps Abdullah's lack of ease stemmed from the fact that Abdullah was a refugee and his home was in Baghdad. At least it used to be. In the wake of the U.S. invasion of Iraq, desperate to help provide for his family, Abdullah took up work as a contractor for a Western firm. As a result, insurgents harassed his family. He was labeled a "collaborator" and a "sympathizer." In events that were still not altogether clear to him, or maybe that he did not want to share with me, his eldest son was kidnapped and murdered. He and his wife feared for the safety of the remaining family members and, after great expense, were fortunate enough to relocate to neighboring Jordan. Any war-planner will tell you that once the dogs of war are unleashed, it is unclear where they will roam. Abdullah's tragedy is testimony to this grim fact.

While Abdullah's pain and sorrow is clear to us, the moral duties required in postconflict rebuilding are less so. One reason for this lack of prescriptive clarity is because we may be pulled in two different ethical directions—between our duties to strangers (and humanity) and our duties to those close to us. These moral quandaries happen all the time.

¹⁴⁵ This story is taken from a personal discussion. Abdullah is a pseudonym.

They are a staple of our everyday lives. We may ignore a fundraising appeal from UNICEF, instead using the resources to pay for our kid's soccer lessons. We may ignore a beggar on the street on our way to a lavish meal. Or we may support the building of expensive infrastructure programs, new rail lines, roads, and bridges that, while not essential, make our lives easier, all while people starve half a world away. When determining the allocation and fulfillment of postconflict responsibilities, a similar ethical tension arises. On one hand we have postconflict political communities in serious need and on the other we have the demands of our "own" political community. With respect to *jus post bellum*, this becomes even more vexing when we consider the role that third parties, who were not participants to a given conflict, should play in rebuilding. They too have duties to humanity, but also the prerogative of their citizenry. Reconciling these competing needs is no easy task.

One of the reasons that these moral demands are so difficult is because they point to a broader theoretical tension that resides at the heart of liberal theory. This is the tension between recognizing all individuals as free and equal, while simultaneously showing partial treatment to those in one's own (non-global) political community. How can we recognize the equality of all while conferring special and often exclusionary benefits on only some? It is not surprising that as a theory deeply rooted in liberalism, we find a similar problem within cosmopolitan global justice. This problem originates from the belief that the duties of global justice stemming from moral cosmopolitanism cut against the partiality required toward one's own political community.¹⁴⁶ These two strains of thought internal to liberalism—the cosmopolitan strain and the associative duties strain—are in tension.

¹⁴⁶ By moral cosmopolitanism I mean the ethical approach that takes individuals as the ultimate unit of moral worth, in a way that applies globally and without reference to one's associations (such as family, race, nationality, and so forth). I discuss moral cosmopolitanism, and cosmopolitanism more generally, much more fully below.

The partiality-impartiality conflict internal to liberal theory is most pronounced in the tension that resides between associative duties and general duties. General duties are duties that exist because of shared humanity. These are duties that inhere because of the equal worth of all individuals and that are owed to people simply because they are people. They are, at their heart, cosmopolitan duties. In contrast, special duties are a certain class of duties that exist between particular people because of a relationship or engagement in interaction.¹⁴⁷ I take associative duties to be a form of special duties; these are duties that are non-contractual, arise and exist through one's associations, and are shared among members. Such associations can exist through numerous kinds of valuable relationships. While there is disagreement concerning the provenance of such duties, and the kinds of relationships that produce them, common examples include those existing between marital partners, family members, friends, neighbors, co-nationals, and compatriots.¹⁴⁸

What is the relationship with these concerns to a theory of *jus post bellum*? As the saying goes, war is built on blood and treasure; the fact of the matter is that both are often expended in postconflict environments. Postconflict rebuilding is always costly, often dangerous, and typically requires commitments from parties that were not originally party to the fighting of the war itself. Since scarcity inevitably makes for hard distributional choices, a problem for which duties of rebuilding are regrettably not immune, then we must ask how, with respect to rebuilding, do our general cosmopolitan duties interact with our associative duties.

¹⁴⁷ For a discussion of special duties see H.L.A. Hart, "Are There any Natural Rights?," *The Philosophical Review* (1955). pp. 183.

¹⁴⁸ See Jeff McMahan, "The Limits of National Partiality," in McKim, Robert & McMahan, Jeff (eds.), "The Morality of Nationalism," (New York: Oxford University Press, 1997). In fact, much of the essays in the preceding collection point to such a disagreement.

This chapter proceeds in five sections. In the first section I argue that there is a strong theoretical basis for cosmopolitanism in the capabilities approach. I go on to argue that insofar as capabilities are linked with postconflict duties (a claim I made in the previous chapter), these duties are susceptible to the now familiar critique that the impartiality required by cosmopolitanism is unrealistic and tone deaf to the value and demands of the partiality required by associative duties. General postconflict duties are in tension with our special duties. In the next section, I survey some cosmopolitan positions that address this tension and argue that a variant of “moderate cosmopolitanism” is the most tenable. I go on, in the third section, to examine three positions that attempt to resolve this tension. The first position attempts to justify associative duties by their instrumental worth. The second two approaches, both of which are prioritarian, that is, sharing the claim that because one kind of duty can always be rank-ordered higher than the other (i.e., prioritized), argue that the tension between associative duties and cosmopolitan duties is merely illusory. The first position argues that associative duties always receive priority, while the second prioritizes cosmopolitan duties. I advance a position skeptical of prioritarianism, arguing that if a case exists where these duties do conflict, and neither type of duty has general priority *in all cases*, then the thesis upon which prioritarian positions rest is false. There will indeed be trade-offs between these two types of duties, as opposed to harmonious compossibility. In the fourth section, I argue that we must turn to a casuistic approach when assessing conflicts between general and special duties as they relate to *jus post bellum*. The fifth section concludes.

3.1 Capabilities and Cosmopolitanism

The Terrain of Cosmopolitan Theory

The idea of cosmopolitan is literally ancient.¹⁴⁹ When Diogenes identified himself as a “citizen of the world” or when Plutarch extolled that “we should regard all human beings as our fellow citizens and neighbors,” they were articulating the sentiments of cosmopolitanism.¹⁵⁰ These calls for recognizing the equality of others begin with the recognition of two central elements inherent to our well-being. The first is the value that we attach to intimate relationships; the joy and meaning that springs forth from our involvement in relationships with family members, friends, neighbors, and co-citizens. The second element begins with the importance of recognizing our existence in a world that is broader than what may be immediately apparent. To be sure, with the development of global communications, increasing ease of travel, and the widening of many individuals’ spheres of experience, this feature of our existence is becoming increasingly clear. Nevertheless, in the fog of our everyday lives, this fact remains easy to lose sight of. The early proponents of a cosmopolitan outlook understood that despite the obvious differences of race, ethnicity, nationality, and so forth, we are situated in a world marked by a shared humanity, a humanity that is largely constituted and underpinned by the equal moral worth of us all. Viewing humans as both local citizens and as citizens of the world stems from an intuitively attractive moral view that affirms the equal worth of all individuals, while also recognizing that our local affiliations and attachments are deeply personal and meaningful.

¹⁴⁹ For a brief historical overview of cosmopolitan thinkers see Caney, *Justice Beyond Borders: A Global Political Theory*. pp. 4-5.

¹⁵⁰ As cited in Martha Craven Nussbaum, "Patriotism and Cosmopolitanism," in Martha Nussbaum and Joshua Cohen (eds.) "For Love of Country: Debating the Limits of Patriotism," (Boston, MA: Beacon Press, 1996). pp. 7.

Underpinning this egalitarian strain of cosmopolitanism is a conception of the person that cosmopolitans have reaffirmed iterations of since antiquity. As Pogge so nicely summarizes:

Three elements are shared by all cosmopolitan positions. First, *individualism*: the ultimate unit of concern are *human beings*, or *persons*—rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations, or states. The latter may be units of concern only indirectly, in virtue of their individual members or citizens. Second, *universality*: the status of ultimate unit of concern attaches to *every* living human being *equally*—not merely to some sub-set, such as men, aristocrats, Aryans, whites, or Muslims. Third, *generality*: this special status has global force. Persons are ultimate units of concern for *everyone*—not only for their compatriots, fellow religionists, or such like.¹⁵¹

These three core tenets, universality, individualism, and generality, have come to form the backbone of contemporary accounts of cosmopolitanism, and we can see the cosmopolitan strain in the Capabilities Approach that I articulated in Chapter Two. This stems from the basic fact that individuals, no matter where they reside, ought to have the fair opportunity to lead a decent life, wherein they possess the requisite capabilities to do so. As we know, there are certain conditions that make such a prospect extremely difficult, states under the rule of despots, political communities mired in poverty, and typically postconflict environments.

Identifying the relationship between cosmopolitanism and capabilities, albeit without the explicit connection to postconflict justice, is not without precedent. For example, in her 1994 essay “Patriotism and Cosmopolitanism,” Nussbaum defended the view that we are first and foremost citizens of the world, specifying that in the spirit of recognizing the equal moral worth of all, our commitments and duties are to humankind.¹⁵² Perhaps Nussbaum’s most explicit articulation of the cosmopolitanism of the Capabilities Approach is found in

¹⁵¹ Thomas Pogge, “Cosmopolitanism and Sovereignty,” in Chris Brown (ed.), “Political Restructuring in Europe: Ethical Perspectives,” (London, England: Routledge, 1994). pp. 90.

¹⁵² Nussbaum, “Patriotism and Cosmopolitanism,” in Martha Nussbaum and Joshua Cohen (eds.) “For Love of Country: Debating the Limits of Patriotism.”

her argument for the link between capabilities and global justice: “[j]ust as it seems intolerable that a person’s basic opportunities in life should be circumscribed by that person’s race or gender or class, so too does it seem unsupportable that basic opportunities should be grossly affected by the luck of being born in one nation rather than another.”¹⁵³ She goes on, “if basic justice requires that a person’s entitlements not be curtailed by arbitrary features, then justice is ubiquitously violated in the current world order, and the bare existence of inequality (pushing many people below the capability threshold) is reason enough to do something about it.”¹⁵⁴ It would seem, then, that under the principle of equal worth, if one individual is entitled to the Basic Capabilities as a matter of justice, then all individuals are, and this is surely a cosmopolitan ideal.

There is moral appeal to affirming this cosmopolitanism that comes from the liberal roots of the Capabilities Approach. But there are numerous variants of cosmopolitanism, some more tenable than others, and we need a more fine-grained conceptualization of cosmopolitan theory before we can begin to see how it can inform and be informed by the concept of *jus post bellum*. This is particularly the case when we consider the twin allegiances articulated by Diogenes; the pull between what we owe our “own,” what we owe the “other,” and how we navigate these competing claims and duties.

Moral and Institutional Cosmopolitanism

Just as there are many theories of justice, there are many theories of cosmopolitanism, and it would be helpful to draw some distinctions between them.¹⁵⁵ We

¹⁵³ Nussbaum, *Creating Capabilities: The Human Development Approach*. pp. 115.

¹⁵⁴ Ibid.

¹⁵⁵ Charles Beitz, "Cosmopolitanism and Global Justice," *Current debates in Global Justice* (2005).; Charles Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1979).; Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs* 1, no. 3 (1972); Nussbaum, "Patriotism and Cosmopolitanism," in Martha Nussbaum

can begin by distinguishing between moral and institutional cosmopolitanism.¹⁵⁶ Moral cosmopolitanism is embodied in the three tenets of universality, individuality, and generality, and makes a claim concerning the moral status and composition of individuals. Institutional cosmopolitanism is concerned with the development and role of global institution and “is committed to a concrete political ideal of a global order under which all persons have equivalent legal rights and duties, that is, are fellow citizens of a universal republic.”¹⁵⁷ This distinction is important because it reflects the fact that one can be a moral cosmopolitan while also rejecting the need and desirability for a world government; as Kant so clearly argued, the prospect of which is unpalatable at best, and likely downright dangerous.¹⁵⁸ It is highly probable that a global republic would be insensitive to difference instantiated in the ordering of individual lives, the lives of collections of peoples, and differing and competing pluralistic conceptions of the good.¹⁵⁹

Not unlike Kant, many liberals want to defend certain forms of partiality and duties to associates; as a result, cosmopolitanism has been open to the charge that it is at best tone deaf to the value of such affiliations, and, at worst, it seeks to eviscerate partial

and Joshua Cohen (eds.) "For Love of Country: Debating the Limits of Patriotism."; Caney, *Justice Beyond Borders: A Global Political Theory*.; Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*.

¹⁵⁶ On this distinction see Charles Beitz, "Cosmopolitan Liberalism and the States System," in Chris Brown (ed.), "Political Restructuring in Europe: Ethical Perspectives," (London, England: Routledge, 1994). Pogge makes a similar distinction but uses the terms “legal” and “moral.” Pogge, "Cosmopolitanism and Sovereignty," in Chris Brown (ed.), "Political Restructuring in Europe: Ethical Perspectives." pp. 49.

¹⁵⁷ Pogge, "Cosmopolitanism and Sovereignty," in Chris Brown (ed.), "Political Restructuring in Europe: Ethical Perspectives." pp. 49.

¹⁵⁸ In his opposition to a global government, Kant forcefully states: “[f]or the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy.” Kant, "Perpetual Peace ". pp. 113. Or, as he later puts it, such “universal despotism...saps all man’s energies and ends in the graveyard of freedom.” Ibid. pp. 114.

¹⁵⁹ Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004).

considerations. The logic behind these presumptions is the belief that if all individuals must be treated equally, irrespective of group membership, then surely the cosmopolitan desires a morality devoid of partiality. So the argument goes, on pain of contradiction, the cosmopolitan would have to eschew partial treatment of associates, and the fear here is that this could mean an end to political communities as we know and value them.

Some extreme forms of cosmopolitanism do seek the elimination of partial moral considerations, but this need not be taken as a defective feature of cosmopolitanism as a whole. Moral cosmopolitanism is not necessarily incompatible with the existence of associations like nations or states *per se*; critiques of institutional cosmopolitanism do not necessarily apply to moral cosmopolitanism. Let us turn to some variations in moral cosmopolitanism that address the tension resulting from associative duties.

Moderate Cosmopolitanism

Explicating and attempting to resolve the tension between the demands of global justice and associative duties has been a central project of contemporary liberal and cosmopolitan thinkers.¹⁶⁰ As Scheffler notes, “[b]oth particularist and globalist ideas have become increasingly influential in contemporary politics, and one of the most important tasks for contemporary liberal theory is to address the twin challenges posed by particularist and globalist thinking.”¹⁶¹ Tan puts the point more sharply with respect to cosmopolitanism, “the principal challenge for cosmopolitans at this stage of the debate is to show how the aspiration for justice without borders can be reconciled with what seems to be a basic moral

¹⁶⁰ Moellendorf, *Cosmopolitan Justice*; Pogge, "Cosmopolitanism and Sovereignty," in Chris Brown (ed.), "Political Restructuring in Europe: Ethical Perspectives."; Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*; Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism*.; Charles Beitz, "International Liberalism and Distributive Justice: A Survey of Recent Thought," *World Politics* 51, no. 2 (1999).

¹⁶¹ Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*. pp. 67.

fact that people may, and are indeed obliged to, give special concern to their compatriots.”¹⁶²

If we are to accept the basic premises of cosmopolitanism, then this tension must be addressed.

One variant, cosmopolitanism about justice, attempts to address this tension by staking out the boundaries of permissible practices of partiality. Following Scheffler, we can define cosmopolitanism about justice as an approach “oppose[ing] any view which holds, as a matter of principle, that the norms of justice apply *primarily* within bounded groups comprising some subset of the global population.”¹⁶³ He goes on to specify that cosmopolitanism about justice rejects nationalist and communitarian claims that “principles of justice can properly be applied *only* within reasonably cohesive social groups,” and liberal theories, “which set out principles of justice that are to be applied in the *first* instance to a single society.”¹⁶⁴ Cosmopolitanism about justice draws from the universal aspects of moral cosmopolitanism, holding that boundaries and membership affiliations do not tell against the scope of justice at the most basic level.¹⁶⁵ This is not to say that special duties cannot and do not arise from one’s membership and relationships, but only that borders and boundaries do not necessarily prescribe bounded justice at the exclusion of broader duties of justice.

Cosmopolitanism about justice is not monolithic, and how the respective demands of special relationships and global justice are adjudicated depends upon the type of cosmopolitanism about justice under discussion. Theorists commonly distinguish three

¹⁶² Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism*. pp. 136.

¹⁶³ Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*. pp. 112. emphasis added.

¹⁶⁴ Ibid. emphasis added. As we can see, cosmopolitanism about justice can reject prioritarian and exclusionary ordering of the duties of justice (hence, the italicized terms “*primarily*,” “*only*,” and “*first*”), while still retaining the possibility of duties to those with to whom we stand in special relation.

¹⁶⁵ For a survey of this concept see Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism*. pp. 10-11.

variants: weak, strong, and intermediate.¹⁶⁶ All variants acknowledge the equal moral worth of individuals but differ in what this equality requires.

Weak cosmopolitanism affirms the equal moral worth of individuals, but says little beyond this requirement. Weak cosmopolitanism is limited in that it need not require anything beyond *recognition and consideration* of the equality of all individuals. Owing to these minimal requirements, this view can be associated with strong forms of moral partiality. But the moral requirements with this kind of cosmopolitanism are without teeth; little more than a vapid recognition of the worth of individuals outside of one's immediate relationships is needed to fulfill its demands. General cosmopolitan duties are taken to be subsidiary when compared to those duties arising from special relationships. Conversely, strong cosmopolitanism is "the view that all humans ought to treat all others equally and, in particular, have no more, or less, reason to help an one needy person than any other."¹⁶⁷ The problem with strong cosmopolitanism is that it cuts against our common, everyday morality, our understanding of and interaction with our day-to-day world. It takes an unrealistic view of how humans do and should conduct their lives. Weak cosmopolitanism requires equal moral concern, whereas, strong cosmopolitanism requires equal treatment.¹⁶⁸

Recognizing that weak cosmopolitanism is "undistinctive" and "anodyne" and that strong cosmopolitanism "implausibly curtails associative duties," a third type of cosmopolitanism has been theorized.¹⁶⁹ Intermediate cosmopolitanism affirms the three

¹⁶⁶ For a discussion of these distinctions see David Miller, "Cosmopolitanism: A Critique," *Critical Review of International Social and Political Philosophy* 5, no. 3 (2002); Thomas Pogge, "Cosmopolitanism: A Defence," *Critical Review of International Social and Political Philosophy* 5, no. 3 (2002); Thomas Brooks, "Cosmopolitanism and Distributing Responsibilities," *Critical Review of International Social and Political Philosophy* 5, no. 3 (2002).

¹⁶⁷ Pogge, "Cosmopolitanism: A Defence." pp. 86.

¹⁶⁸ Miller, "Cosmopolitanism: A Critique." pp. 43-44.

¹⁶⁹ Pogge, "Cosmopolitanism: A Defence." pp. 86.

central tenets of moral cosmopolitanism while permitting *constrained* partiality and the possible duties that such partiality entails. These may include associative duties arising from relationships or memberships such as family, friends, and compatriots, while simultaneously acknowledging that there are duties and demands to individuals with whom one does not have a special relationship. Intermediate cosmopolitanism can be open to the possibility that general duties may, at times, supersede associative duties or that associative duties may trump general duties—a moral cosmopolitan need not necessarily commit to the view that either is presumptively decisive.¹⁷⁰

My focus in this chapter, and to which my theory of capabilities attaches, is moral cosmopolitanism in general, and intermediate cosmopolitanism (hereafter often referred to as simply “cosmopolitanism”) in particular. How then does intermediate cosmopolitanism attempt to reconcile the tension between the demands of universalism and partiality? In the following section I discuss two attempts: the first is the reductive justification of associative duties. This approach justifies associative duties insofar as they further cosmopolitan aims, thus reducing their value to their instrumental efficacy. The second approach, the prioritarian argument, is agnostic on the justification of associative duties. Instead, this approach tries to develop the elements of a general decision procedure for which certain types of duties take priority over others.

3.2 Justifying Associative Duties

The Reductive Strategy of Justification

Some intermediate cosmopolitan positions attempt to reconcile associative duties and general duties by highlighting the instrumental value of associative duties. For example,

¹⁷⁰ This claim will be clearer in a moment when I discuss two kinds of intermediate cosmopolitanism that take opposite positions on which type of duties are presumptively decisive.

in his book “One World,” Peter Singer begins with a presumption against partiality, but mounts a defense of it on instrumental consequentialist grounds. Singer starts with a passage from Henry Sidgwick, in which Sidgwick advocates different forms and strengths of partial treatment:

We should all agree that each of us is bound to show kindness to his parents and spouse and children, and to other kinsmen in a less degree: and to those who have rendered services to him, and any others whom he may have admitted to his intimacy and called friends: and to neighbors and to fellow-countrymen more than others: and perhaps we may say to those of our own race more than to black or yellow men, and generally to human beings in proportion to their affinity to ourselves.¹⁷¹

Using Sidgwick’s list of associations as a starting point, Singer evaluates the various forms of partiality or “preference for one’s own,” as he puts it.¹⁷² By examining these groups, Singer reduces the amount of partiality that he believes is permissible, while justifying certain types of partiality in light of the fact that living from a completely impartial perspective would likely result in bad effects.

It is not so important for us to determine which types of relationships survive Singer’s scrutiny, not many as it turns out. Instead, our interest is in how Singer justifies the value of special relationships, and he does so by appealing to the instrumentally good effects that partiality can produce. Take, for example, Singer’s examination of “those who rendered services” (neighbors, grandparents, parents, kin).¹⁷³ Partial treatment is permissible because of gratitude and reciprocity; two features of these relationships that help foster smooth and effective social byproducts. Singer is not alone in this approach. Similarly, Robert Goodin seeks to justify and legitimate exercises of national and patriotic partiality on the grounds

¹⁷¹ Henry Sidgwick, *The Methods of Ethics*, 7th ed. (London, England: Macmillan, 1907). pp. 246. As cited in Singer, *One World: The Ethics of Globalization*. pp. 153.

¹⁷² Singer, *One World: The Ethics of Globalization*. pp. 154.

¹⁷³ Sidgwick, *The Methods of Ethics*. pp. 246. As cited in Singer, *One World: The Ethics of Globalization*. pp. 153.

that it is an efficient and sensible way to fulfill universal duties. As Goodin puts it, “[s]pecial responsibilities are, on my account, assigned merely as an administrative device for discharging our general duties more efficiently.”¹⁷⁴ In the same vein, Nussbaum writes that partiality is permissible because it is “a sensible way to do good.”¹⁷⁵

These approaches share the thesis that cosmopolitan principles are the dominant, unifying principles upon which other ethical principles are derived and justified, including associative duties. The force and value of associative duties is reducible to, or derivative of, the value of cosmopolitanism.¹⁷⁶ Under this view, partiality is called for because it is an effective way to “do good” or because it is an administratively feasible and efficient way to help fulfill cosmopolitan duties.

Even if we grant this reductive account, if we agree that Singer and Goodin are right that these relationships are instrumentally valuable (which I believe they are), reducing relationships to the instrumental goods they produce seems to miss the larger point about their value. This is because the value of special relationships seems to be intrinsic. The intrinsic value of special relationships, and the duties that go with them, results from the fact that certain associative duties are crucially important to the nature of the given relationship, and are intrinsically constitutive to its nature. Absent these duties, the relationship fails to hold and even ceases to be recognizable as the relationship itself.¹⁷⁷ One common example

¹⁷⁴ R.E. Goodin, "What is so Special about our Fellow Countrymen?," *Ethics* 98, no. 4 (1988). pp. 685.

¹⁷⁵ Nussbaum, "Patriotism and Cosmopolitanism," in Martha Nussbaum and Joshua Cohen (eds.) "For Love of Country: Debating the Limits of Patriotism." pp. 136.

¹⁷⁶ There are other justifications for partiality, particularly concerning partiality towards one's compatriots. Such justifications include: mutually beneficial arrangements, institutional duty, and the natural duty of justice to establish institutions. I will not explore these here.

¹⁷⁷ For the constitutive feature of partiality and special relationships see McMahan, "The Limits of National Partiality," in McKim, Robert & McMahan, Jeff (eds.), "The Morality of

of such a relationship is that of mutual love, say, the loving marriage between husband and wife. This relationship requires partiality. Without it, the relationship would cease to exist as we know it. Although mutually loving marriages can be instrumentally justifiable, they do not derive their worth exclusively from these instrumental reasons. They are intrinsic to leading a good life, and constitutive of our well-being.

This view of special relationships and their correlative duties is separate and distinct from the instrumental value that they hold. They are non-reducible and, thus, the justification for such relationships can be made without the methodological move of reducing them to, or deriving their force from, the broader ethic of cosmopolitanism. Given this important shortcoming, we should be inclined to reject the forms of intermediate cosmopolitanism that seek to justify the worth of associative duties by reducing their value to merely their instrumentality. Some scholars remain dubious that this is intermediate cosmopolitanism at all, and have taken to calling this approach “extreme” cosmopolitanism.¹⁷⁸ As an alternative, moderate cosmopolitanism should acknowledge the value of cosmopolitan moral principles, while also recognizing that justifications for partiality can be independent of such principles and are not reducible to them.

What we can see emerge is a moderate type of cosmopolitanism that recognizes duties stemming from our common humanity, while still allowing partiality. But does this recognition of the intrinsic value of associative duties simply exacerbate the problem with which we began? By affirming the twin values of special relationships and equal, universal, individual moral worth do we not come full circle and return to the tension between

Nationalism." Also see Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*. pp. 59, pp. 92-3.

¹⁷⁸ Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*. pp. 115-119; Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism*. pp. 11-12.

partiality and universalism? Identifying the intrinsic value of relationships and duties may help us answer why certain duties are important, but it provides little help with the issues concerning which duties receive priority when conflicts between them occur.

3.3 Conflicting Prioritarian Approaches

Some thinkers suggest that there is not an incompatibility between general duties and special duties. We can call this the prioritarian view of duties. The prioritarian seeks to provide a general rank ordering of duties that can be systematically applied when special and general duties seemingly conflict. Let us begin with associative prioritarianism. The associative prioritarian argues that associative duties require “one to give the interests of one’s associates priority of various kinds over the interests of other people.”¹⁷⁹ For the associative prioritarian, there is no conflict between general duties and associative duties. When a seeming conflict occurs, associative duties always win.

The most significant critique of the associative prioritarian position originates from the grounds of fairness. Prioritization of even the reasonable needs and interests of one’s associates has given rise to what Scheffler has called the distributive objection, which he defines as “an objection on behalf of those individuals who are not participants in the groups and relationships that are thought to give rise to associative duties.”¹⁸⁰ Scheffler continues, “[t]he distributive objection sees such duties...as supplying them [group members] with benefits that may be unreasonable.”¹⁸¹ In a world marked by extreme deprivation, poverty, and war-torn misery, those objecting to associative duties on distributive grounds argue that the partiality required by associative duties confers

¹⁷⁹ Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*. pp. 53. I take up the issue of prioritization below.

¹⁸⁰ Ibid. pp. 56.

¹⁸¹ Ibid.

unwarranted and unfair advantage to in-group members. As Scheffler notes, this objection has some of its greatest force at the political level. “[T]he idea that associative duties provide a mandate for those who are already rich in resources to turn their attention inward, and largely ignore the suffering and deprivation of the rest of the world,” has come under significant criticism.¹⁸² We can feel the force of this argument. There seems to be something deeply troubling about prioritizing the needs, wants, and desires of one group of already very well off individuals at the expense of those in greatest need. At the same time, it seems that our special relationships and the duties that they give rise to are a central component of our lives and our well-being. They are a staple of our everyday morality.

One cosmopolitan attempt at addressing the conflict between general and associative duties, and by extension the distributive objection, is through what we can call the “additional duties defense.”¹⁸³ Unlike the associative prioritarian argument, the additional duties defense begins with a baseline that is determined by general cosmopolitan duties. Associative duties are retained, but they are construed as additional to our general duties. From a distributional perspective, once the basic duties of justice have been met, individuals have the prerogative to allocate whatever is left over to their associates. When the two types of duties (associative and general) conflict, general cosmopolitan duties win. As Pogge argues, associative duties can cause us to owe more to our associates but cannot require, nor even permit us, to give less to others who we would owe something to in the absence of an associative relationship.¹⁸⁴ Similarly, Sen argues that we begin with our general duties and

¹⁸² Ibid. pp. 58.

¹⁸³ Jonathan Seglow, "Associative Duties and Global Justice," *Journal of Moral Philosophy* 7, no. 1 (2010).

¹⁸⁴ As Pogge puts it, “special relationships can *increase* what we owe to our associates, but they cannot *decrease* what we owe to everyone else.” Pogge, "Cosmopolitanism: A Defence." pp. 90–1. Emphasis original. Similarly, Diane Jeske concludes that “I must continue to give

then find the grounds to give “additional weight to the interests of those who are linked to us in some significant way...through the identification of a supplementary allegiance.”¹⁸⁵

Tan argues for a similar evaluation of duties beginning with the background of the basic structure of justice arrived at impartially, which then forms a constitutive and decisive measure against which other duties can be assessed. In Tan’s view, the associative prioritarians have it backwards, “[j]ustice aims to assess our existing practices, not the other way around,” he argues.¹⁸⁶ Instead of grounding justice in the current normative practice of partial treatment for members of our own in-group, we ought to begin with our conception of justice and then evaluate our common practices (in this case partiality towards our associates) against this background theory of justice. According to such advocates of the additional duties defense, the general duties of justice should inform everyday practices. When these practices do not elide with our established moral principles, arrived at through reflection, then we ought to adjust such practices in order to comport them with the principles of justice. The belief here is that our considered judgments will lead us to the additional duties defense, which tells us that it is general cosmopolitan duties that receive priority.

Henry’s needs [i.e., my general duties] the same weight in deliberations as I would have given to those needs if I did not have special duties to Emma.” Diane Jeske, "Associative Obligations, Voluntarism, and Equality," *Pacific Philosophical Quarterly* 77, no. 4 (1996). pp. 300.

¹⁸⁵ Amartya Sen, "Humanity and Citizenship," in Martha Nussbaum and Joshua Cohen (eds.) "For Love of Country: Debating the Limits of Patriotism," (Boston, MA: Beacon Press, 1996). pp. 114.

¹⁸⁶ In arguing in favor of using the demands of global justice as a way to assess the permissibility of partiality, Tan states: “for the fundamental issue is whether a global distributive scheme that is informed and limited by patriotic partiality is a just one in the first place,” and he goes on to say, “the fact of people’s particular citizenship, and its effects on the global distribution of wealth and resources, is a fact that should be evaluated against our theory of justice.” Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism*. pp. 156.

3.4 The Case for Casuistry: No Clear Resolution Between Duties¹⁸⁷

Both the associative prioritarian argument and the additional duties defense are prioritarian arguments. As a result, both are predicated upon the same general premise: we can come to a presumptively decisive, generalizable prioritarian ordering of cosmopolitan and associative duties. But this seems incorrect. It is not always clear that general cosmopolitan duties should win out against special duties or that associative duties should always be rank-ordered higher than general duties. It seems that there is real potential for conflict between these types of duties and that we need an alternative way to adjudicate these tensions. This challenges the central plank of both the additional duties defense and the associative prioritarian argument: that a generalizable clear rank ordering of duties can be established, i.e., prioritized.

A feature of the very world in which we live is that we are constantly pulled in different directions by competing, and sometimes incompatible, moral choices. When confronted by such choices, it seems unlikely that we can resolve these complex decisions by simply appealing to a general decision-procedure. But in cases where A and B seemingly conflict, the prioritarian argues that there is a clear answer, that there is no deep tension, and that the conflict is only illusory. I am skeptical of the prioritarian arguments for two reasons: 1) it seems possible that associative duties and general cosmopolitan duties do, in fact, conflict; 2) it is unclear that we can have a clear ordering of priorities for all general cases where general cosmopolitan duties and associative duties do conflict.¹⁸⁸

¹⁸⁷ This approach has been proposed by Lazar in Seth Lazar, "Debate: Do Associative Duties Really Not Matter?," *Journal of Political Philosophy* 17, no. 1 (2009).

¹⁸⁸ There are prioritarian positions that argue that there is in fact a conflict between these duties but that the conflict can be resolved through an application of prioritarianism. Addressing these specific arguments is outside the scope of this chapter. But I will say that

Since the prioritarian argument purports to give us the theoretical tools that upon applying can resolve such conflicts between duties in a presumptively decisive way, to seriously challenge the prioritarian position one need only point to a case where a real, genuine conflict exists. In the following section I present two cases where, I argue, conflict between associative duties and general duties arise. It is not my objective to resolve the tensions or to provide decisive answers to the questions they pose. The goal of this section is more limited; my attempt is to simply demonstrate that *contra* the prioritarian arguments, there is a real tension between associative duties and duties of global justice. In presenting the existence of a tension, I aim to show that the central premise of prioritarianism is flawed.

Conflicting Cases and Conflicting Duties

Take this example. Let us imagine a postconflict situation in which a state's population is struck by famine. There is a father, his adult son, and a stranger who is the same age and size as the son and whom they just met a short while ago. Let us further imagine that the adult child and the stranger's nutritional needs are identical. They are all walking and the father happens upon a food ration, not because of diligence or hard work but because of mere luck. The father has eaten, so he has no need for the ration. The ration is divisible in only two ways. The first way is an equal 50-50 split. The second way results in a slightly unequal ration, say, a 70-30 split. Food is scarce and the father knows that both individuals may not find food for quite some time. The 70-30 split would really help whoever receives the greater portion.

The father clearly has two duties. There is the cosmopolitan duty requiring equal consideration (or even possibly treatment) to the stranger, and there is the associative duty to

my criticism of the crux of the prioritarian thesis applies to these arguments as well. See Lazar for a discussion of these arguments. Ibid.

care for one's own son. Now the associative prioritarian could say that it is the father's duty to provide the extra bit of ration to his son; that there is no conflict between a general cosmopolitan duty to the stranger and the associative duty that one owes one's offspring. In fact, many advocates of associative duties argue that agents are *required* to give priority to their associates, and in this case, the father would be required to give the extra benefit to his kin.¹⁸⁹

But it seems to me that there is a conflict that is more than a mere ersatz one occurring between these two types of duties, and it occurs in a way that prioritarianism does not adequately capture. It seems that the presumptive decisiveness of the prioritarian view of associative duties comes into conflict with the basic moral premises that the additional duties defense brings into relief; the help and aid of those who are not are associates, on the basis of their equal worth. Even if we soften the cosmopolitan line and take the view that what is required is equal justification to each party, as opposed to equal treatment, it is unclear how cosmopolitan or associative duties would guide us to a presumptively decisive practical outcome. This is because, I believe, there is a real conflict that occurs between the demands of equality found in liberal theory and the enduring partiality manifest in the love and care that a father must provide to his son.¹⁹⁰ We can further imagine how this ordering problem can become compounded when we move from the level of interpersonal relationships to the complex global world of postconflict justice.

¹⁸⁹ One may challenge this example by pointing to the fact that by walking with the stranger the father and son have formed an association with him. We could further stipulate that the stranger just happens to be walking a few paces behind them, they have not spoken, acknowledged each other's presence, and so forth. Basically, they have, at least tacitly, not formed a group. If they did form a group, then this simply points to potential conflicts even within associative relationships.

¹⁹⁰ Of course, in this case, someone will be disadvantaged by the inherently unequal distribution. My larger point is that associative prioritarians require that dad chooses son.

Take a second example. We have a general duty to provide some sort of aid to the worst off to increase the marginal existence of the less fortunate. But this aiding will reduce the stock of resources that can be provided to our associates. Let us imagine that, as I have argued, there is a positive duty to help provide postconflict relief to those existing below the capabilities baseline. This relief is borne not only by participants of the conflict, but also by capable third parties. The justification for third-party responsibilities rests on general cosmopolitan duties of global justice.

We can imagine a scenario in which a state has established a fair system of taxation in which part of the funds are allocated to providing postconflict reconstruction for a third party. Let us imagine a woman, Judy. Judy has a young daughter. In providing care for her daughter, Judy must expend much of her resources and time; the care required for Judy's daughter is very costly. Judy works one night a week as a housekeeper to help defray her expenses. She feels badly, but she hides her housekeeping wages by being paid off the books. Her sole reason for doing so is so that she can avoid the high taxes that are levied to draw resources for the newly instituted postconflict rebuilding redistributive scheme. Judy's small tax dodging, in turn, reduces the stock of the postconflict rebuilding funds and slows the achievement of raising those individuals in the postconflict environment to the capabilities baseline (i.e., an adequate level of development). But it also allows Judy to provide adequate care for her daughter and sometimes even extras, things that she and her daughter need but could be considered above the minimum care required. Sometimes these are special picture books or a trip to the museum, things that Judy believes will help her daughter flourish. Despite her hardships, Judy's daughter exists comfortably. By world standards she is even doing quite well.

Now Judy has both associative duties and general duties of justice; she has duties to care for her daughter and duties to provide material support for the postconflict funds.¹⁹¹ Saying that her associative duties require her to provide more to her daughter does not seem to solve this genuine moral dilemma. Judy exists comfortably, she is safe, and has enough discretionary resources to afford things like books and the museum. But the additional duties defense which tells us that “special relationships can *increase* what we owe to our associates, but they cannot *decrease* what we owe to everyone else,” also does not seem decisive.¹⁹² For the additional duties proponent, we have a general duty and our relationships cannot provide moral justification for reducing the stock of goods that these general duties require, even marginally. Judy could not even hide a single penny if it decreased what she owed to others. Neither of these prioritarian positions seems satisfying. Surely, Judy should be able to provide a comfortable existence for her daughter. But those living in deprivation also deserve some remedy. It seems that there is really a conflict with this case.¹⁹³ A real dilemma exists, and the prioritarian argument that claims that these types of duties simply do not conflict seems untenable.

¹⁹¹ The case can be made that, like Godwin’s example of the choice between saving his father or Archbishop Fenelon from a fire, these examples unfairly trade on the use of kin and that family is different from other types of relationships (like compatriots). I concede that these relationships are different, and that when faced with the choice between, say, saving one individual based upon *only* nationality, there would be good reason to prefer neither one to the other. But the prioritarian argument makes no distinction between the *types* of relationships in question, if it did, it would fail to be a presumptively decisive, generalizable decision procedure. Instead, the prioritarian position claims a decisive ordering for *all* cases. William Godwin, *An Enquiry Concerning Political Justice* (Printed for GG and J. Robinson, 1798). II-2.

¹⁹² Pogge, "Cosmopolitanism: A Defence." pp. 90–1. emphasis original.

¹⁹³ Some may object to Judy’s tax dodging as itself unjust. We could modify the example to stipulate that the new “tax” is actually elective; citizens are opted-in to the system but are permitted to opt-out at any time of their choosing.

3.5 Conclusion

These brief cases help illustrate several shortcomings in the prioritarian approach.¹⁹⁴ First, the approach likely fails in its generality. Depending upon the given prioritarian position, there are one of two possibilities: 1) there are cases in which associative duties gain priority over general duties; 2) there are cases in which general duties have priority over associative duties. Returning to the brief examples that I provided, if it is true that there are cases in which the duties could potentially cut either way, then each prioritarian claim is false. As a general approach, both associative prioritarianism and the additional duties defense seem to be incorrect. The first plank of the prioritarian position, generalizability, fails.

The failure of the first plank of the prioritarian argument connects to the second problem. Under the prioritarian argument, possibilities 1 and 2 require the impossibility of a third possibility: 3) that in some cases there is no clear and easy resolution between the duties; a real moral conundrum exists. This is because in claiming that the conflict between general and associative duties is illusory, that no such conflict exists, each prioritarian position logically claims compossibility of general and special duties.¹⁹⁵ This is the second plank of the prioritarian argument. But if duties do conflict, and neither type of duties seem to have general priority *in all cases*, the compossibility thesis upon which prioritarian positions rest is false. There will indeed be trade-offs between these two types of duties, as opposed to harmonious coexistence.

Finally, as a practical approach, prioritarianism does not capture the nuances of most peoples' moral lives. As in the cases provided, our moral lives, both individual and collective, are motivated by various reason-giving sources. We are informed by our close relationships

¹⁹⁴ The fact that cases such as these are not decisive underscores the weakness of the prioritarian argument.

¹⁹⁵ That is, possible at the same time, concurrently coexisting.

that at times tug at our hearts and appeal to reason and emotion in different ways. We can also reflect upon the suffering of people we have never met and be motivated to action by their situations. But the prioritarian approaches to adjudicating these issues are unhelpful. In their pursuit of parsimony and their claim for achieving presumptive decisiveness over a range of nearly infinite cases, they lose focus on the fact that our moral world is fraught with various reasons for action and inaction. Our personal and social lives are filled with a web of competing, complimentary, and interlocking, relationships that impact our allegiances and duties.

I propose taking a casuistic approach towards adjudicating conflicts between general and special duties, especially those that arise in postconflict cases. There is no clear basis to say that associative duties (and this is not to say that war does not create associations) take priority over general duties to rebuild or *vice versa*. We need to know a number of informational variables to come to any kind of even moderately decisive conclusion. This includes the needs of the associates, the needs of those living in postconflict environments, the role that given parties may play in the rebuilding efforts, and so forth. None of these particulars are captured in the one-size-fits-all approaches towards duties of justice. Moellendorf puts it quite elegantly when he posits that we should “take neither the duties of global or domestic justice in general as primary. According to this account, there is no standing preference for either the global or domestic claims...adjudication is on the basis of background considerations of justice implicated by the particular dispute.”¹⁹⁶ He goes on to conclude, “[s]ince we may not say that in general the claims of one group override the claims of the other, it is impossible to give an account of the duties owed to members of one of the two groups, in cases of conflicting claims, without considering the claims of members of the

¹⁹⁶ Moellendorf, *Cosmopolitan Justice*. pp. 42.

other.”¹⁹⁷ I take his point to be that when competing claims arise, we must look at the specific cases in order to arrive at a proper adjudication of the dispute.¹⁹⁸ We need to know the nature of the duties and the stories behind them.

Some may despair that such casuistry provides ethical cover for the well off to continue to ignore the plight of the poor. That by not always prioritizing the needs of those reduced to existence below the capabilities baseline in postconflict settings, wealthy communities, states, and institutions will simply slip the hook and continue to unfairly prioritize their associates. As Jonathan Seglow suggests:

Which duty gives us the strongest reason to do something depends upon the situation we face. If associative duties always took priority over non-associative duties they would be a strange sort of duty because duties are justified by values and one normally compelling value can be over-ridden by considerations of greater moral importance in certain circumstances... associative duties behave much like other kinds of duties. They are more than simply permissions; they give us reasons to do things, they serve important values and they are not absolute.¹⁹⁹

As Seglow concludes, we should not view each kind of duty as ironclad and impervious to justifications for being superseded by a more important duty. We must remember that the world is fraught with inequality, and that when the rights and needs of the wartorn are compared to those of the wealthy and fortunate, it will be quite likely, if not nearly certain, that the former are prioritized.

We should be clear that such conflicts are certain to exist in situations of postconflict rebuilding. As I write this in July of 2012, there is a large donor conference to decide the financial fate of postconflict Afghanistan. Mainly men leading extremely rich countries will

¹⁹⁷ Ibid. pp. 43.

¹⁹⁸ There is, of course, the possibility that when presented with cases of competing duties and obligations, we may hit a moral blind-alley, a position in which there is no clear-cut moral decision because our intuitions and principles break down.

¹⁹⁹ Seglow, "Associative Duties and Global Justice." pp. 72-73.

make important decisions that will decisively affect Afghanistan's postconflict future. It is likely that the amount settled upon will be paltry in comparison to what these countries spend on their own domestic luxuries. At their heart, the choices that these situations will force are moral ones that require normative guidance. Rebuilding requires a large commitment of resources, services, goods, time, and human capital. When fulfilled by third parties, if even only partly, these general duties will inevitably conflict with associative duties. It would be absurd to make decisive general claims concerning the competing duties of justice without considering the specific details of the situation. We may be able to identify some general patterns and rules of thumb, but we need to look at cases. If not, we may likely make the wrong calls for or against expending blood and treasure.

Chapter Four

Allocating Jus Post Bellum Rebuilding Responsibility

Introduction

The children's book *Why War is Never a Good Idea* articulates the bad effects of war.²⁰⁰ The book concludes with a poignant example of the consequences of postconflict destruction. A war-torn village's well is poisoned with the horrors of war; the author, Alice Walker, presciently warns that although these particular villagers choose not to drink the waters of war, in many places some of the nicest people do. Walker's message is important: war is a gruesome, terrible business and it can easily sweep up some of the nicest, peace-loving people, combatants and noncombatants alike. Sadly, the postconflict poisons of war taint the well, affecting both those who fight and those who chose not to drink. Walker's imagery of the tainted well points toward the concepts of obligation and responsibility; even when carried out in its most cautious and scrupulous form, war inevitably alters the lives of those it touches in a "poisonous" way. This quality of war, a process that is marked by its deleterious nature, causes us to wonder: when the wells are poisoned and the innocent suffer, who has an obligation to clean up such a mess, and upon what basis could we allocate responsibility to do so?

War is filled with maiming, killing, and destruction. Some of these harms are intentional and affect those liable to maiming or killing. But, tragically, war often maims and kills numerous individuals not liable to such harms. This fact of war can be seen in the casualties arising from large, interstate wars such as WWII and smaller engagements such as the United States' drone program. Since World War II, it has been civilians that have

²⁰⁰ Alice Walker and Stefano Vitale, *Why War is Never a Good Idea* (NY, NY: Harper Collins, 2007).

comprised the largest number of war dead, reaching a high of 90% of fatalities in the 1990s.²⁰¹ Some of these civilians may have been liable to killing, since liability does not always correlate with civilian status, and while it is difficult to pinpoint moral status with such statistical methods, it is nevertheless clear that a large portion of those harmed in war have very little to do with the actual war effort, are morally innocent, and are not liable to the harm that befalls them. They are often the victims of happenstance, gross misconduct, or tragic error. In some cases these harms are widespread and affect large numbers of people. The destruction of infrastructure, as was the case of the U.S.'s destruction of Iraq's electrical system in 1991, is one such example. Other times the harms are individual or of a smaller scale, like the destruction of noncombatant homes. Such harms are no less tragic.

With the destruction of war in mind, let us take the bundles of duties found in the responsibility to rebuild as morally sound.²⁰² If this is so, it is then necessary to identify to whom these responsibilities and obligations fall and the relevant criteria employed to make such determinations. We can identify this as a problem of what David Miller calls "remedial responsibility."²⁰³ Being remedially responsible "means to have a special obligation to put the bad situation right, in other words to be picked out, either individually or along with others,

²⁰¹ By some estimates, civilian casualties have increased at a staggering rate, comprising 15% of fatalities in World War I and jumping to 90% by the 1990's. See C. Ahlström and K.Å. Nordquist, *Casualties of Conflict: Report for the World Campaign for the Protection of Victims of War* (Uppsala, Sweden: Department of Peace and Conflict Research, Uppsala, 1991). Of course, there is controversy over such large estimates. For a methodological critique of such casualty counts see Adam Roberts, "Lives and Statistics: Are 90% of War Victims Civilians?," *Survival* 52, no. 3 (2010). Nevertheless, it is generally agreed that civilian casualty rates have increased significantly.

²⁰² Again, these include the duty to provide security, the development of institutions such as the judiciary, economic, and political systems—in short, "full assistance with recovery, reconstruction and reconciliation." Report of the International Commission on Intervention and State Sovereignty, "The Responsibility to Protect," (2001). pp. XI.

²⁰³ I should note that I am using remedial responsibility in a way that is different from Miller. Miller does not closely align remedial responsibility with agency.

as having a responsibility towards the deprived or suffering party that is not shared equally among all agents.”²⁰⁴ Determinations of remedial responsibility give rise to two sets of related questions. First, how does remedial responsibility arise? What actions or criteria give rise to determinations of remedial responsibility in postconflict settings? Second, who are the agents to which remedial responsibility can be assigned?

With respect to the latter question, one obvious candidate possibility is that the responsibility always falls to the warring parties. Fault-based or causal models are one way to allocate responsibility, and there is intuitive plausibility to this argument; it seems attractive to predicate responsibility upon an agent’s causal role in the outcome. But as we shall see, this approach alone is problematic. Another method is to develop institutional arrangements that clearly order matters of responsibility. This is no small task. Such institutions can help define who is responsible and to what extent, and it should be obvious enough that picking out the relevant actors who should aid in postconflict peacebuilding is crucial to achieving even modest steps towards postconflict justice. Gareth Evans, co-chair of the International Commission on Intervention and State Sovereignty (the committee that helped bring RtoP to the forefront of debate), argues that such a lesson, “as obvious as [it] may seem, appear[s] not yet fully absorbed—and certainly not fully acted upon—by all of the relevant international players.”²⁰⁵ If Evans is correct, this may be one reason we see very little institutionalization of postconflict rebuilding mechanisms. But before we can establish such institutions, we need to have a better sense of the basis upon which such remedial postconflict responsibility rests. In the end we must, as Evans suggests, “[f]irst, sort out who should do what and when—immediately, over a medium transition period, and in the longer

²⁰⁴ David Miller, "Distributing Responsibilities," *Journal of Political Philosophy* 9, no. 4 (2001). pp. 454.

²⁰⁵ Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*. pp. 149.

term—and then allocate the roles and coordinate them effectively, both in relevant capitals and on the ground,” but not before we determine how it is that we are to “sort out who should do what and when.”²⁰⁶ We need to know the bases of such decisions before we can begin to “allocate the roles and coordinate them effectively.”²⁰⁷

I propose that this is a practical problem in need of an applied normative solution. The prospect of such philosophical analysis may make those more inclined to policy-oriented scholarship grow impatient. Some may prefer to dispense of normative analysis altogether, instead favoring expeditiously moving towards institutional proposals and policy analyses with minimal ethical inquiry. This is a mistake. First, it ignores the normative implications of the very absence of robust and globally functioning rebuilding institutions and schema. While, as Evans intimates, we know the cast of characters and the end goals of rebuilding, still absent are the processes by which such actors are “sorted out,” and once sorted, the reasons for which they have been allocated a given responsibility. The normative justification for these choices is crucial. Providing justification for one’s choices, especially when they are as weighty as those under discussion here, is at the core of public reasoning. If we are sorting out actors to rebuild, then they are owed the reasons for which we may choose to allocate remedial responsibility, and we better be sure that the reasons we have for doing so are ethically sound. There are also practical reasons for this normative approach. Giving normative considerations short shrift runs the risk of ignoring the philosophical underpinnings that can form the basis of the design of institutions tasked with allocating postwar rebuilding responsibilities. A firm grasp of these normative justifications is imperative, not only when advocating for the creation of institutions but particularly when

²⁰⁶ Ibid.

²⁰⁷ Ibid. pp. 149.

they are in their infancy, as they are most susceptible to challenge during these periods. The goal of this chapter is to provide ways in which we can determine the allocation of postconflict remedial responsibility here and now, in the absence of institutional arrangements vested with the authority to do so.

This chapter proceeds as follows. It begins by sketching two models for determining postconflict remedial responsibility. The first model is backwards looking and is predicated upon an agent's duty to correct for harms caused by war, specifically to those not liable to such harms, for which they can be identified as having a participatory role. The second is an identification of guiding criteria or factors that are relevant in determining rebuilding responsibility in the absence of agents' direct involvement with the war. These may be cases in which an agent bears special duties (like a shared history or colonial experience) or has another relevant connection that bears upon the discharge of the general cosmopolitan duties entailed in rebuilding. In contrast to the first model, this second model is forward-looking and seeks to identify how the required remedy, aid, and relief owed to those suffering the scourges of war can be allocated. As may be obvious, these two types of allocation often track along two categories of agents, participant agents and nonparticipant third party agents, whose remedial responsibility arises by appealing to different duties of justice. In the first instance, the duties generated stem from types of responsibility linked to agents' conduct. In the latter, responsibility is derived from broader cosmopolitan duties of justice. In the following section I explore these types of agency and justice more fully. I begin by discussing how three kinds of responsibility (moral, legal, and outcome) can give rise to remedial responsibility for participant agents. It is a staple of common moral belief that absent an overriding justification for excusal, when an agent is responsible for harms caused, she is also responsible for remedying the harm. I go on to discuss why there may be

times when participant agents' moral, legal, and outcome responsibility should be delinked from remedial responsibility. That is, why sometimes participants responsible for the harms caused during war should not or will not be responsible for fulfilling the duties of rebuilding in the postwar period. This, in turn, creates space for the possibility that third party non-participant agents can be remedially responsible for postconflict rebuilding. This possibility provides the impetus for developing guiding criteria for when such agents may be required to do so, a task that I take up in section 4.6. I conclude the chapter by arguing that these models of responsibility offer substantive guidance with respect to allocating the discharge of duties vis-à-vis the demands required by *jus post bellum* rebuilding.

4.1 Clarification of Method

Before proceeding, a few methodological clarifications are in order. In what follows I sometimes employ the use of cases to draw conclusions concerning how individual agents can be found remedially responsible. I do not do so out of a commitment to the belief that individual agents should always be found remedially responsible for postwar rebuilding, in most cases they should not.²⁰⁸ I primarily employ individual-level cases as a heuristic device that helps in our general thinking about allocating responsibility. From such determinations at the individual-level, we can then scale up the responsibility to the level of collectives.

Second, notwithstanding certain exceptions, we can employ a distinction between the responsibilities of individuals and the collective communities of which they form a part.

Although space does not permit me to defend the concept here, I am employing a view of

²⁰⁸ There are a small number of exceptions to this claim. For example, in some cases, like those of belligerent kleptocratic leaders, it could be appropriate to hold individual leaders remedially responsible, requiring them to fund rebuilding efforts from their own ill-gotten wealth.

collective remedial responsibility that rests upon what Larry May calls distributed responsibilities.²⁰⁹ In May's view:

[i]f the group is organized so that it can engage in joint action we speak of the group as acting and having responsibilities. These collective responsibilities can be understood as distributed insofar as the responsibility of the group is completely reducible to the responsibilities of the members of the group, the individual human persons who compose the group.²¹⁰

The concept of distributed responsibility is in keeping with the concept of ethical individualism inherent in moral cosmopolitanism, which treats individuals as the locus of moral concern and the ultimate units of analysis, rights, and duties. When I refer to remedial responsible "agents" or "parties," it is important to keep in mind that it is not typically ordinary combatants (in the case of participants of a war) or noncombatants (whose political communities are nonparticipants) who are to directly provide such remedy, but the state or institutions upon whose behalf they act or to which they are a member. Here the individuals are the agents, and the collective is the principal. It is in this sense that collectives, mainly states, are the "repository of the moral obligations of individuals," and act on their behalf.²¹¹

Having remedial responsibility fall primarily to collectives not only lessens the burdens placed on individuals, but also allows the greatest marshaling of resources. In the current global system this will primarily be states, collections of states, such as NATO, and in some cases international organizations like the United Nations. It is simply the case that as our world exists today, it is these actors who have the greatest power and capacity to rebuild.

²⁰⁹ For a discussion of collective responsibility see Larry May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (South Bend, IN: University of Notre Dame Press 1987); Larry May, *Sharing Responsibility* (Chicago, IL: University of Chicago Press, 1993); Larry May, *The Socially Responsive Self: Social Theory and Professional Ethics* (Chicago, IL: University of Chicago Press, 1996).

²¹⁰ May, *After War Ends: A Philosophical Perspective*. pp. 147.

²¹¹ *Ibid.* pp. 149.

It is also important to take note of the distinction between rebuilding the lives of individuals directly and the broader rebuilding of political communities. Although much of the requirements found in the duties to rebuild that I have articulated occur at the level of the state, there may be times, as I discuss below, when rebuilding efforts entail appropriate remedy for specific individuals. An example of this may be in certain cases of direct harm to innocent noncombatants and their private possessions. This is in keeping with the demands of rebuilding that I detailed in Chapter Two that, when appropriate, require fair compensation or remedy to those harmed.

It is of course possible that even if one finds persuasive the logic of compensating victims directly, one may still argue that this is qualitatively different than rebuilding the political community by way of infrastructure and institutions. As the argument goes, there is a difference between direct compensation and rebuilding because compensation is made directly to individuals, while rebuilding benefits the broader political community, some of whom do not deserve aid because of their unjust conduct or because they are simply very well off. In the same way that I compensate my friend for the destruction of their bike, it does not mean that I have to compensate all members of the community for all destroyed bicycles. It is true that unlike in private holdings, where there is individual or small group ownership, in the case of public holdings there are typically no direct individuals to compensate. But if we view the state as an aggregate collection or institutional representative of individuals, then it is easier to recognize that when the institutions, infrastructure, and public goods that enable citizens to live their lives undergoes destruction, it surely affects the members of the political community, many of whom are innocent.

4.2 Participant Agents and Nonparticipant Third Party Agents

When discussing postconflict remedial responsibility it is important to begin by identifying the categories of agents to whom responsibility can be allocated. The first category that we can identify applies to the participants of a war. Not unsurprisingly, we can call this participant agency. Although space does not permit me to fully explore the concept of participation, a general account will suffice.²¹² Taking a collectivist, non-metaphysical view of participation, a participant agent is one whose conduct is sufficiently contributory to the hostilities that in the absence of its support the conflict could not proceed. A non-exhaustive list of examples includes such activities as providing financial, logistical, legal, and material support. Participants to a war first and foremost include the warring parties. We may be tempted to stop and categorize participants as only those directly involved in the fighting. I take a somewhat more expansive view. Participants can also include parties not *directly* involved in the hostilities but who provide various aforementioned means of support. One example of this is participation in a proxy war; the situation raging in Syria as I write this (2013) has the makings. Turkey, Qatar, Jordan, and Saudi Arabia are arming the opposition rebel forces, the rather disparate group called the Free Syria Army, who is also receiving communications, intelligence, and logistical support from a number of Western states. China, Russia, and Iran are providing similar assistance to the Assad regime. It seems that such agents could quite plausibly fit the definition of participants. Similarly, if John intends

²¹² I realize that how we determine participation can be influenced by our view of agency. For example, one may argue that engaging in the global community, say through economic participation in global capitalism or participation in multilateral institutions, is sufficiently participatory to make one a participant (even if only very remotely and indirectly) in a war. I am in theory open to this possibility, but my point is to distinguish between those who we can identify in an everyday, common sense way as participants and those who are not. I am not so much concerned with where we exactly draw the line but with establishing some general parameters to do so.

on robbing a bank and I provide him the guns to do so, while not a *direct* participant to the crime, I nevertheless participate. To be a participant in a war the agent need not be the party engaged in fighting or those combatants pulling the trigger.

In contrast to participant agents, nonparticipant third party agents are agents who are not party to the hostilities and who do not provide support, such as material or financial, to the participants of a war. These agents might have some small measure of involvement, but this involvement is sufficiently indirect or weak that it does not rise to the level of participation. An example of such involvement might be a state opening up their borders to refugees, or permitting NGO's like the Red Cross to ferry humanitarian supplies across their border into a neighboring state's conflict zone. We would be inclined to say that such an agent is minimally involved in aspects of the war, but is not a participant. Similarly, we can imagine that John is robbing a bank. I happen to be at the teller's window cashing a check. To reach the teller more quickly John pistol-whips me and I crumple to the ground. We can say that I have been forcefully involved in the robbery, but would not say that I am a participant. Nonparticipant third party agents may have some involvement in a conflict, but it would not be inaccurate to say that they do not participate.

With the distinction between these two kinds of agents in mind, we can see that criteria for determining and allocating remedial responsibility (see Table 1) can often track along these lines of agency.²¹³ In some cases these fall to participant agents and in others to third party nonparticipant agents.

²¹³ The remainder of what follows in this chapter largely explores the various criteria (outlined in Table 1) that can help guide allocating remedial responsibility to rebuild.

Table 1: Typology of Agents and Criteria for Allocating Responsibility

Participant Agents	Third Party Nonparticipant Agents
Outcome	Proximity
Moral	Power/Capacity
Legal	Community and Associative Obligation
Just Cause	Benefitting
	Institutional Obligation


 Some Crossover

Of course, the ways that remedial responsibility can be allocated can at times apply across these types of agency; inevitably there will be some instances of crossover. For example, a third party nonparticipant agent may be allocated remedial responsibility on the basis for which direct participant agents are usually found responsible. An example may be where State A retains third party nonparticipant status by expressly choosing to refrain from participation in a war of other defense (say, humanitarian intervention), even though they could do so with little cost and adverse effect to their own interests. Here we may say that State A's nonparticipation confers a degree of responsibility for the resultant events, thus creating the grounds for remedial responsibility. This is based upon the harms brought about by the outcome of their act of nonparticipation (what I call outcome responsibility).

Application of the criteria for allocating remedial responsibility can transcend the categorical distinctions between participant and nonparticipant third party agents. In this sense, the schema's distinctions with respect to agency that I provide are somewhat of a simplification. But this simplification helps us to obtain more fine-grained thinking in our conceptualization of allocating remedial responsibilities for postconflict rebuilding. How participant agents can be found remedially responsible is the topic to which I shall now turn.

4.3 Participant Agents and Legal, Outcome, and Moral Responsibility

Legal Responsibility

With respect to remedial responsibility, the central idea behind participant agency lurks the simple thought that agents are responsible for the outcomes that occur because of their participation. One way that remedial responsibility commonly arises is through determinations of legal responsibility. Through the application of laws, legal institutions can assign responsibilities to agents, and when they breach or fail to fulfill their responsibilities, hold them accountable. As present conditions now stand, there is very little by way of such legal mechanisms and certainly not in the form empowered and equipped to comprehensively address the various aspects of postconflict rebuilding satisfactorily.²¹⁴ In the rare instances when domestic or international law does exist for such postwar remedy, determinations of legal responsibility can sometimes result in the allocation of remedial responsibility. There have been some recent and encouraging developments on this front. For example, the regional government of Balochistan Province, Pakistan, passed an ordinance in 2013 requiring the government to financially assist victims of acts of terrorism. Another example includes the September 11th Victim Compensation Fund, which was established to compensate those who suffered physical harm or death resulting from the September 11, 2001 terrorist attacks on the United States. The United States Congress has also established funds to compensate civilians harmed in the Iraq and Afghanistan wars, respectively. While all of these are welcome developments in linking legal responsibility to

²¹⁴ Even when legal mechanisms do exist, they are incomplete, often narrowly focused, and do not represent full remedy in the form of rebuilding. Take, for example, The United Nations Compensation Commission (UNCC). The UNCC was created in 1991 by the United Nations Security Council with the mandate of compelling Iraq to pay compensation to Kuwait for the former's invasion of the latter. Iraq initially accepted liability, and the provisions stipulated by the UNCC, and then spent the better part of a decade shirking its duties under the agreement, which involved only compensation.

postwar (or terror) remedy, their *ad hoc* and piecemeal nature signal the significant shortcomings in the area of law and postconflict remedy. There is still yet to exist, both domestically and internationally, any comprehensive laws that govern remedy for postconflict harm, nor for the more comprehensive task of postconflict rebuilding. Given the glaring absence of such legal mechanisms, we are left to look for additional ways in which participants and nonparticipants alike can be allocated postconflict remedial responsibility to rebuild.

Outcome Responsibility

One such way the connection between participant agents and remedial responsibility can be established is through what Honoré calls “outcome responsibility.”²¹⁵ As defined by Honoré, “outcome responsibility means being responsible for the good and harm we bring about by what we do.”²¹⁶ The nature of being responsible for the outcome of our actions requires that in determining outcome responsibility we seek to answer if a given agent can be credited for good outcomes and “discredited for bad ones.”²¹⁷ Accepting the concept of outcome responsibility means living in a way that we acknowledge the fact that when our actions are responsible for bringing an individual or group of individuals harm, in some circumstances and under certain conditions, we have a remedial obligation to them. As Welsh puts it, “[t]he moral intuition underpinning this imperative is therefore about compensating for unintended consequences and ensuring the well-being of those affected by

²¹⁵ Tony Honoré, "Responsibility and Luck," in "Responsibility and Fault," (Oxford: Hart, 1999). pp. 14.

²¹⁶ Ibid.

²¹⁷ Ibid.

one's actions.²¹⁸ With respect to *jus post bellum*, for one to be outcome responsible requires an established link with participation in the given act(s) in question.²¹⁹

Contrary to what some authors suggest, it is important to note that outcome responsibility is not synonymous with causal responsibility.²²⁰ Making causal claims is not only notoriously difficult, especially with respect to the ambiguities inherent in situations involving war, but also misplaced as the form of responsibility that we want to establish.²²¹ A tragic scene from the war documentary *Restrepo* illustrates this point. In the film, American soldiers call in an airstrike on a suspected Taliban redoubt (a house). In the aftermath of the strike, U.S. soldiers enter the area only to discover the bodies of innocent women and children who have been killed by the strike. Among the rubble are also what we can assume to be Taliban weapons (rifles and rocket launchers); it appears that the dwelling at some point housed Taliban fighters. What is beyond dispute is that morally innocent noncombatant civilians who were not liable to killing were killed.²²² Who is *causally* responsible for these harms? Was it the soldiers who ordered the airstrike? The pilots firing the missiles? Intelligence officers who failed to warn of civilian presence? Or do the Taliban

²¹⁸ Gheciu and Welsh, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction." pp. 124.

²¹⁹ This link may somewhat counterintuitively include the decision to do nothing when faced with the choice to participate. If I happen to stand by as a child drowns in a pool, *ceteris paribus* I can be found outcome responsible.

²²⁰ For example, A. Gheciu and J. Welsh conflate causal responsibility with outcome responsibility. Gheciu and Welsh, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction." pp. 124.

²²¹ For difficulties in ascribing causal responsibility as a determinative way to allocate forward-looking responsibilities, see H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968). pp. 211; Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*; Miller, "Distributing Responsibilities."; Miller, *National Responsibility and Global Justice*; Henry Shue, "Exporting Hazards," *Ethics* 91, no. 4 (1981). Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton, N.J.: Princeton University Press, 1980).

²²² I am here speaking of the children whom are distinctly and incontrovertibly innocent.

fighters bear causal responsibility for apparently using a civilian structure as a base of operations and putting innocents in harm's way?

Answers to questions like these will differ depending upon what conditions and criteria we use to assess causality. While this same fact applies to outcome responsibility, there is a crucial difference between the two. Causality aims to answer why something happened, "what made the difference between O's occurring and its not occurring," and as such, "human agency has no special status when causal responsibility is being allocated."²²³ It makes no difference if we identify an intelligence officer or a computer malfunction as the causal factors behind the fatalities. Causal responsibility is agnostic on agency, whereas in contrast, outcome responsibility is agent-specific. This distinction between causal responsibility and outcome responsibility is important because it points to the fact that with outcome responsibility, we are concerned with ascription of responsibility that is inherently tied to agency, a feature that is crucial when considering allocating responsibility for harms brought about by war. In such cases, we are looking backward to determine which agent is outcome responsible so we can look forward towards aiding the recipients or victims of the harm.

The distinction between causal and outcome responsibility can be further elucidated by the fact that when we consider outcome responsibility, we are considering not only agency, but also if a given agent can be "credited with the good outcomes of actions and discredited for the bad ones."²²⁴ In contrast to outcome responsibility, this crediting and debiting need not be the case with causal responsibility. As a way to illustrate this distinction, David Miller uses the helpful example of the case of a genuine accident in which the agent is

²²³ Miller, *National Responsibility and Global Justice*. pp. 87.

²²⁴ Honoré, "Responsibility and Luck," in "Responsibility and Fault." pp. 14.

excused from outcome responsibility but is found causally responsible.²²⁵ In Miller's example, someone drops and breaks a figurine as a result of being startled by a loud gunshot. In such a case we may say that the individual is causally responsible for the breakage, but not outcome responsible. This is because we would not wish to put the breakage of the figurine as a debit to them. Similarly, we could hypothetically say that the U.S. forces in *Restrepo* who ordered the strike were causally responsible, but for various reasons (say, the fog of war) we would not wish to debit them with the deaths, and would, therefore, not say that they are outcome responsible.²²⁶

These foregoing distinctions demonstrate the normative force of outcome responsibility. With its link to agency and personal responsibility, outcome responsibility is important because it forms a constituent component of our lives. As Honoré argues, "[w]e could not dispense with outcome responsibility without ceasing to be persons."²²⁷ It seems, then, that the concept of outcome responsibility is an essential aspect of our personal identity. It permits us to exist in the social world in a way that we can exercise choice and enjoy the benefits and fruits of our decisions, while concomitantly realizing the costs that also arise as a result of such existence. Such allocation of outcome responsibility in the aftermath of war permits us to keep this continuity, to realize our place in the world among other beings with interests, values, and lives to lead. It allows us to celebrate the outcome of our actions, and when things go wrong, to own up to the harms that have been caused and to make right on them. Being found outcome responsible is one way that agents can be allocated remedial responsibility for *jus post bellum* rebuilding.

²²⁵ Miller, *National Responsibility and Global Justice*. pp. 88-89.

²²⁶ This is not to say that in reality the U.S. forces were not outcome responsible, they very well could have been.

²²⁷ Honoré, "Responsibility and Luck," in "Responsibility and Fault." pp. 15.

Moral Responsibility

In addition to outcome and legal responsibility, moral responsibility can also lead to determinations of remedial responsibility for participant agents. By moral responsibility I mean an action or state of affairs for which an agent can be morally praised or blamed.²²⁸ A familiar feature of moral life is the linkage of moral responsibility with remedial responsibility. It is a staple of common morality that *ceteris paribus* if an agent is morally responsible for harm, then she should make good on it and offer corrective measures. Of course, how we arrive at such conclusions of moral liability is no easy matter and will vary depending upon the various criteria used to make such an assessment. Nevertheless, finding an agent remedially responsible because of moral fault is a cornerstone of everyday morality. To take on or be debited with remedial responsibility because of moral liability signals that the agent is required to help return or restore the victim when possible, and when not, like in the case of loss of life or irreplaceable property, to find other ways to make things right. Correcting for moral fault demonstrates not only the obligation of helping the victim get out of the mess that they have been put into, but also the obligation of trying to shift the ledger from debit to credit—to both restore and repair.²²⁹

The moral importance of holding outcome responsible agents accountable for harms caused may tempt us to equate outcome responsibility with moral, and sometimes legal, responsibility. Although one can be, one need not be morally responsible to be outcome

²²⁸ For this merit-based view of moral responsibility, see Joel Feinberg, "Problematic Responsibility in Law and Morals," *The Philosophical Review* 71, no. 3 (1962).

²²⁹ See Larry May's discussion of reparation and restitution in May, *After War Ends: A Philosophical Perspective*. esp. chp. 10.

responsible and *vice versa*.²³⁰ While they may sometimes converge, it is important to set these types of responsibility apart. In fact, in postconflict settings we may often wish to hold agents outcome responsible but not morally responsible. For example, again in the film *Restrepo*, there is a scene in which some tribal elders call for a meeting with U.S. military leaders. Excited because the elders rarely reach out to the Americans, the U.S. forces interpret the invitation as a breakthrough. Upon entering the meeting, the Americans learn that the purpose is for the elders to request compensation for a cow that died after of being caught up in some barbed wire that the troops had placed at their outpost's perimeter. For the moment, let us imagine that the Americans did their due diligence to ensure that the wire was put up with the care necessary to ensure minimization of potential harm to people, animals, and the environment. In such a case we could say that while the American's are not morally responsible for the death of the cow, they are outcome responsible. Such circumstances may permit the further conclusion that on the basis of outcome responsibility, the troops should be found remedially responsible and take the appropriate measures to remedy the harm caused. Conditions may merit moral excuse, be sufficiently ambiguous to make moral attribution impossible or normatively unwarranted, while still allowing for outcome responsibility.

We should not think that separating moral responsibility from outcome responsibility renders outcome responsibility devoid of moral force. This is evident in the fact that being outcome responsible for an event and debited accordingly can create moral

²³⁰ As Miller reminds us, an agent can be morally responsible even when not outcome responsible. Plotting to kill an individual even though one's plans are unexpectedly disrupted is one such example. Miller, *National Responsibility and Global Justice*. chp. 4.

imperatives.²³¹ This point becomes particularly important with respect to postwar remedial rebuilding responsibilities that can accrue among warring parties. Imagine that a house, vacated by its rightful owners, is believed by Just Agent to be inhabited and used by Unjust Combatants who are liable to killing. Just Agent comes upon the house, a firefight ensues, and Just Agent destroys the house. Upon inspection, Just Agent realizes that Unjust Combatants were really Friendly Allies; this was a case of “friendly fire.” Although Just Agent’s conduct in destroying the house was morally permissible, we could still find Just Agent outcome responsible for the destruction of the dwelling. Given the circumstances, we could further argue that Just Agent’s outcome responsibility creates a normative imperative to make good on the necessary measures needed to correct for the harm. In this case it may be compensation of some sort to the rightful owner. Whereas agents may not be morally responsible for the chain of events in which they are outcome responsible, they can be morally responsible for the necessary remedial measures related to the outcome of their actions, especially when such actions may require corrective or restorative measures to make right for harms caused.²³²

Emerging State Practice and Outcome, Moral, and Legal Responsibility

Some current state practices signal an emerging recognition of the need to take remedial responsibility for harms caused during war for which a given agent is outcome responsible, but not necessarily morally or legally responsible. One such example is the

²³¹ I discuss below some circumstances under which outcome responsibility should not give rise to remedial responsibility.

²³² I discuss below the potential criticism that this approach potentially ignores the role that moral fault ought to play in determinations of remedial responsibility. Put another way, why is it that a just agent fighting justly should compensate for morally and legally permissible conduct? Should it not be the unjust belligerents who are assigned outcome responsibility, and by extension remedial responsibility, on the basis of moral blame for the precipitating events?

nascent but emerging international norm of “making amends.” Defined as the practice of warring parties providing recognition and help to civilians harmed during combat, the practice of amends can take various forms. The following are some recent examples:

[T]he North Atlantic Treaty Organization (NATO) has adopted a compensation policy for Afghan war victims; the U.S. Congress has created the first-ever livelihood assistance programs for civilians harmed in Iraq, Afghanistan, and Pakistan as result of U.S. combat operations; and the Pakistani government offers civilians harmed in the Federally Administered Tribal Areas (FATA) payment for deaths and injuries.²³³

Of course, such compensatory arrangements can occur during a conflict, potentially making one wonder if such activity can be properly referred to as *jus post bellum* conduct. But wartime compensation aids in postwar rebuilding, as when it helps in healing and reconciliation.

Amends activities can also function as part of postwar rebuilding, like when compensation is sorted out and made in the postconflict phase. The important point is that amends programs recognize loss and establish the link between the moral imperatives of remedial responsibility that can arise from outcome responsibility, even in the absence of moral and legal fault.

This broader point is explicitly instantiated in the arguments advocating in favor of expansion and institutionalization of amends programs. For example, the Making Amends Campaign (MAC) argues that “[e]ach warring party should make amends to civilians for

²³³ Making Amends Campaign, "Making Amends Campaign Brief," <http://www.makingamendscampaign.org/making-amends-campaign-brief/>. The U.S. Department of Defense also has some good examples of such compensatory arrangements and programs. See United States Department of the Army and United States Marine Corps, "The US Army/Marine Corps Counterinsurgency Field Manual: US Army Field Manual No. 3-24: Marine Corps Warfighting Publication No. 3-33.5," (Chicago, IL: University of Chicago Press, 2007). Appendix D-6 has a representative sampling of compensation schemes and funds that have been established. In addition to funding authority instantiated by the DOD Appropriations Act, U.S. Congress has established specific funds for the Iraq war. These include: CERP, Iraq Relief and Reconstruction Fund, Iraq Freedom Fund, and the Commanders Humanitarian Relief and Reconstruction Program funds. For an analysis of these programs see S.L. Pickup et al., "The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan Military Operations," (DTIC Document, 2007).

harm it causes them within the lawful parameters of its combat operations, *despite having no legal obligation to do so*,²³⁴ and that, “the provision of amends by a warring party is also not in itself evidence of legal liability for a violation.”²³⁵ Similarly, in a policy paper on postconflict compensation programs, the U.S. General Accounting Office (GAO) states, “[t]hese payments are expressions of sympathy or remorse based on local culture and customs, but not an admission of legal liability or fault.”²³⁶ The motivations of the MAC and the GAO’s reasons for distinguishing between legal fault and compensatory responsibility are likely very different. The former seeks to underscore the gap in international law, where parties engaged in legal wartime destruction are not *legally* required to make amends, as a way to advocate for the codification of the requirement to make amends for wartime harms. The latter likely seeks to insulate the U.S. from such legal liability. But the point of agreement here is that a moral imperative can arise in such cases, thus, requiring one to engage in remedial practices to make right even for morally and legally permissible harms caused.

Compensation programs such as those highlighted by the MAC are important; they signal an emerging willingness to recognize the link between outcome responsibility for harms caused to innocent individuals during war, and the moral imperative to make good on correcting or compensating for such harms. As Honoré indicates, there may be times that, because of bad luck, stupidity, acting on erroneous information, or physical error, we still hold individuals as outcome responsible and morally require them to set right the harms caused even in the absence of moral or legal fault.²³⁷ Although this is a sentiment that tracks

²³⁴ Making Amends Campaign, "Guiding Principles," <http://www.makingamendscampaign.org/guiding-principles/>

²³⁵ Ibid.

²³⁶ Pickup et al., "The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan Military Operations." pp. 2.

²³⁷ Honoré, "Responsibility and Luck," in "Responsibility and Fault." pp. 14.

with common, ordinary moral intuition and practices, it is one that has often been largely ignored in the arena of war. All too often innocent civilians bear the costs of war, even just wars, and are left suffering from the harms of postwar destruction.²³⁸ When we examine the institutionalization of compensation efforts, we can see the link between outcome responsibility, compensatory liability, moral responsibility, and participant agency.

Let us take stock. I have so far identified some types of responsibility that may guide us in determining remedial responsibility for participant agents; these include outcome responsibility, moral responsibility, and legal responsibility. These types of responsibilities can track closely with each other—agents can be legally and morally responsible because they are outcome responsible—or they can be quite distinct, like when an agent may be outcome responsible but not morally or legally responsible. Furthermore, we can think of two kinds of moral imperatives resulting from participant agency. First, there are the forms of compensatory arrangements that can be made directly to those harmed. These take such forms as solatia payments, condolence payments, apologies, and payments for battle damage. These forms of remedy are connected to the responsibility to rebuild in the sense that they constitute the kinds of efforts and requirements of rebuilding that are necessary for individuals to go on living their lives, on smaller, case-by-case bases. Second, there are the requisite large-scale endeavors inherent to rebuilding war-torn societies, these include funds and capacity building measures necessary for rebuilding elements of a society such as infrastructure and the development of political and social institutions.

²³⁸ For example, the UN General Assembly recently adopted principles on providing reparations to victims but they only address unlawful conduct. See United Nations General Assembly, "Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," in *United Nations General Assembly Resolution, U.N. Doc. A/RES/60/147* (2006).

4.4 Assessing Participant Agency as the Basis for Remedial Responsibility

In the preceding sections I discussed ways that participant agents can be found remedially responsible. I also explored the strong moral reasons for holding such agents who are responsible (in various senses of the word) remedially responsible for postconflict rebuilding. This approach towards remedial responsibility is not uncommon for theorists of *jus post bellum* who often tie postwar rights, responsibilities, and permissions to only participant agents, i.e., the warring parties, who are morally, legally, or outcome responsible.²³⁹ But should an agent that has been “credited with the good outcomes of actions and discredited for the bad ones,” always be made the party of remedy?²⁴⁰ Should a participant’s legal or moral responsibility result in remedial responsibility in matters of war and peace?

While types of postwar rebuilding efforts tied to allocations and determinations of participant agency can function as effective mechanisms for ensuring the partial righting of wrongs caused by war, taken alone, this model of postwar justice is flawed. In the following section, I explore why focusing the responsibility for *jus post bellum* rebuilding activity only on the participants of a war is a mistake.

The Fog of War and Indeterminacy

One potential objection against focusing on participant agency as the basis for *jus post bellum* rebuilding is that, at least at some levels, attributions of responsibility for harms caused by participants during war are notoriously difficult to make. This is especially true of smaller-

²³⁹ Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum."; Orend, "Jus Post Bellum: A Just War Theory Perspective," in Carsten Stahn and Jann Kleffner (eds.) "Jus Post Bellum: Towards a Law of Transition from Conflict to Peace."; Orend, *War and International Justice: A Kantian Perspective*; Walzer, "Just and Unjust Occupations."

²⁴⁰ Honoré, "Responsibility and Luck," in "Responsibility and Fault." pp. 14.

scale engagements like individual actions, single firefights, and battles, activities that form the backbone of many arrangements that rely upon participant agency as the basis for allocating responsibilities for remedies. The multiplicity of actors can make it logistically difficult to determine who did what in battle in a way that may preclude accurately ascribing outcome (and moral and legal) responsibility to participant agents. This ascription is particularly so in cases where there are not only numerous parties fighting, but also shifting alliances, faulty reporting, outright denial, lack of will or capacity, and purposeful obfuscation of participation in the hostilities. Participants of wars are typically reluctant and unwilling to acknowledge not only responsibility for harms caused, but also participation in a war altogether.²⁴¹ In such cases, identification, assignment, and allocation of postconflict obligations can be difficult to make.

While determining outcome responsibility can be difficult during and after war, especially when a party is reluctant or unwilling to take responsibility, recent practice demonstrates that it is not impossible.²⁴² As I have noted above, the U.S. has recently institutionalized a number of programs that have compensated victims of war. Although not without problems, these programs have functioned in ways that attempt to overcome the practical problem of indeterminacy.²⁴³ Such methods include more detailed accounting of

²⁴¹ The United States' drone program is one example of a participant denying battle activity. The U.S. kills individuals in Pakistan and Yemen and then refuses to acknowledge not only participation in the drone strikes, but the existence of the drone program altogether.

²⁴² For example, the United Nations Mission in Afghanistan instituted a tracking mechanism for civilian deaths in the conflict, and the African Union Mission in Somalia has been working with NGO's to establish such a mechanism. While such tracking mechanisms may not always establish participant responsibility, they are a significant step forward in the pursuit of holding participants responsible for their actions in war. Nevertheless, these are the exceptions, not the rule.

²⁴³ I do not mean to convey that U.S. compensation programs for harms caused during war are unproblematic. On the contrary, procedural issues, including those concerning the fairness of compensation decisions, plague the programs. For an excellent discussion of

participants' actions in battle, reporting mechanisms for filed claims which can alert parties to harms for which they may have been unaware, funding and oversight procedures, and compensation schema intended to address particular types of harms caused (e.g., battle damage, death, and so forth). Of course, such examples require willingness on the part of warring participants to engage in and be subject to accountability processes and mechanisms; such willingness is often rare. With the increase of technology, interest groups pressuring regimes to be more accountable for their actions and transparent in their participation, and courageous journalists, local activists, and human rights organizations on the ground, the possibility of such identification has improved. Despite some positive developments on this front, there nevertheless remain significant practical, logistical, and empirical issues with establishing the various forms of responsibility for participants.

Justice Cause and Remedial Responsibility

Of course, practical, logistical, and empirical issues are most prominent when fine-grained assessments are made at the smaller-scale level of determining responsibility based upon individual battles, actions, and harms perpetrated by combatants.²⁴⁴ One way to overcome these hurdles is by taking a broader, macro-level approach. Under this approach we can dispense with attempting to establish remedial responsibility on the basis of conduct

these problems see the research of Jonathan Tracy. Tracy is a former Judge Advocate in the U.S. Army who was responsible for adjudicating claims of civilians harmed by U.S. and coalition military activities. Jonathan Tracy, "Compensating Civilian Casualties: "I am Sorry for your Loss, and I Wish You Well in a Free Iraq," (Prepared for the Carr Center for Human Rights Policy and Campaign for Innocent Victims in Conflict 2008).; Jonathan Tracy, "Responsibility to Pay: Compensating Civilian Casualties of War," *Human Rights Brief* 15(2007).

²⁴⁴ The story of Army Ranger Pat Tillman, whose being killed in action by "friendly fire" was reportedly covered up by the Pentagon, is one example of the difficulty in establishing the facts of smaller-scale events. The fact that such determinations are difficult even in advanced democracies with access to public information should give us pause. See Jon Krakauer, *Where Men Win Glory: The Odyssey of Pat Tillman* (NY, NY: Anchor, 2010).

in most *individual* events, and instead look to larger events and actors as the basis. This approach, thereby, focuses on the bigger picture at the overall level of the participants; namely, political communities. One important consequence of zooming out, and losing focus on attributions of responsibility predicated upon information gathered at the level of smaller-scale actions, is that the macro-approach needs an alternative basis upon which to allocate remedial responsibility. If we are not considering individual or joint conduct at the level of, say, battle engagement, then what criteria can we use to determine the larger actions of political communities? The most common way to achieve this alternative, at least in the just war tradition, is by aligning remedial responsibility with the justice of an agent's cause. This approach does not preclude the possibility of allocating remedial responsibility for smaller-scale actions, when such determinations can be made. But when determining how to balance the factors in allocating the credits and debits with respect to participant agents and their remedial responsibilities for the broader demands of rebuilding, it is the justice of the *casus belli* that is taken into consideration. For example, under this approach, in a war between two states, one just and one unjust, the unjust state is allocated remedial rebuilding responsibility on the basis that they lacked a just cause. By using the justice of the cause as the determinative factor in allocating responsibility, the aforementioned problems present in more fine-grained, smaller-case analysis can be avoided.

The potential advantages of this approach towards remedial responsibility are twofold. First, it is likely that epistemic judgments and determinations concerning the justice of an agent's cause prove easier than those involving more numerous smaller-scale events in a war. Logic dictates that it would be easier to determine that Iraq aggressed against Kuwait in the early 1990's, than it would be to determine the exact conduct of a given Iraqi infantry company. This has, in fact, proved to be the case with the aforementioned United Nations

Compensation Commission, where the impetus behind the compensation was based upon the injustice of Iraq's cause and not the minutiae of individual battles. The Commission did not, for example, examine individual engagements to assess whether in some cases Iraqi combatants behaved permissibly and, therefore, conclude that in such particular cases Iraq should not be held liable for the harms produced. Instead, individual compensation decisions were based upon Kuwaitis proving that death or destruction occurred during combat, and if so proven, Iraq was found responsible on the basis that it lacked a just cause. Drilling down on the details of who did what and when would have made the Commission's work impossible, endlessly bogging them down in fine-grained analyses.

The second potential advantage is that this approach insulates the model of remedial responsibility from the charge that it ignores the moral component of justice in war. Recall, the approach of allocating remedial responsibility on the basis of outcome responsibility can be agnostic on the justice of the parties fighting. It simply looks to which participant agent should be debited and allocates remedial responsibility accordingly. For example, even though the U.S. is a just agent in Afghanistan (and this point is debatable), their compensation program is designed to determine compensation decisions upon the basis of outcome responsibility. If U.S. troops destroy an Afghan civilian's house in a firefight with the Taliban, then they are liable to make amends irrespective of the unjust nature of the Taliban's fight. While outcome responsibility can, it need not consider moral fault in determining if an agent should be debited, and thus found responsible for the outcome of an act. Assigning remedial responsibility to a participant agent in ways that are agnostic on the question of justice can give rise to calls of unfairness.

Moral Fault and Unjust Participants

This latter point is important when we begin to think about the role that moral fault plays in determining which parties should take responsibility for harms caused after war, and to what extent. It seems intuitive that moral culpability should play a role in determining if an agent should be found responsible and subsequently allocated remedial responsibility on such a finding. This is particularly so when we wish to determine how agents are credited or debited with the outcome of an event. One such way is to heavily weight the ledger in favor of just agents in a way that debits unjust parties even for outcomes that occur because of the conduct of the just. Returning to the previous example, perhaps the Taliban try to unjustly kill U.S. combatants. The U.S. combatants justifiably shoot at the Taliban in self-defense, taking great care to have a nice shot. Despite the great care they took, the U.S. combatants damage some nearby dwellings. One may ask why it should be that the just combatants are responsible to remedy the harm to the dwellings and not the Taliban? The Taliban forced their hand, and without their doing so the U.S. combatants would never have fired a shot and the resultant harm to the dwellings would never have ensued. Are not unjust parties at least somewhat outcome responsible for the legitimate harms brought upon them, the risks that they pose to others, and the resultant destruction that can result from just parties defending themselves or others?²⁴⁵ If they had not made themselves liable to killing then the just party would have no reason to respond in self or other-defense. After all, the unjust force has no business fighting; almost every life they take and every bit of destruction they

²⁴⁵ The responsibility of the unjust is, of course, not limitless. The just party is subject to the constraints of proportionality and necessity. For example, remedying disproportionate harms brought about unnecessarily may not be the responsibility of the unjust agent. If it is the case that the unjust can be determined outcome responsible on such a basis, then it would seem that they should only be responsible for legitimate harms perpetrated by just agents.

cause is unjustified, including the harms caused to the just soldiers.²⁴⁶ Given this sentiment, it would seem that when an unjust party is able to bear the costs of their behavior, and this includes reasonable responses to such behavior by intervening parties, then they should.²⁴⁷

One simple reason why it is normatively desirable that an unjust participant agent should be made remedially responsible for harms brought about by their actions is for the sake of fairness. When an agent acts unjustly, illegitimately, and in a way that brings about harm, it is only fair that they should be made to bear the costs. They are morally obliged to make things right. The role of punishment and deterrence is another reason to hold the unjust responsible; this line of thinking certainly has a long history in the just war tradition. Otherwise, allowing agents to resort to unjust war, unleashing the horrors entailed, and then still being free from rebuilding obligations, could lead to more unjust wars. Morally culpable agents not being made to bear the costs of their immorality can be said to be immoral. Under such logic, we may wish to debit the unjust for most, if not all, of the death and destruction brought to the institutions of the political communities in question and, thus, be made remedially responsible for rebuilding.

Just Participants and Remedial Responsibility

The logic of deriving remedial obligation from a notion of compensatory liability for unjust actions seems strongest in cases of the unjust. What about in cases where a party has

²⁴⁶ I say “almost” because there are times, like in the case of resistance from the perpetration of war crimes or human rights abuses, when an unjust fighting force with an overall unjust cause can have a just war aim. I take this point up more fully in the next chapter. For an excellent discussion of this point, and the principle of just cause more generally, see Jeff McMahan, “Just Cause for War,” *Ethics & International Affairs* 19, no. 3 (2005).

²⁴⁷ We have seen such a set of circumstances in Libya. As Libya’s ambassador to the U.S. wrote, “Libya doesn’t need aid in the traditional sense, as our oil reserves can largely pay for reconstruction and development.” Of course, as Ambassador Ali Suleiman Aujali goes on to note, Libya is in need of technical assistance in sectors such as security, healthcare and education. Ambassador Ali Suleiman Aujali, “Helping Libya Take its Next Steps,” *Washington Post*, July 7, 2012. pp. A17.

justice on their side? Is there a basis for cases where just agents should be allocated remedial responsibility? At first blush it may seem counterintuitive that a just party, with a just cause, and mostly fighting justly be made responsible for harms brought about by war, but we must remember that war is punctuated by shared wrongdoing. Even in wars of self-defense, just parties kill and harm those not liable to killing and harming. In acts of war that are supposed to be “surgical” and precise, mistakes are made and need to be made good on; war is a messy affair and those taking due care often harm the innocent. Even if we take the view that the unjust warring parties should be found responsible for such mistakes made in the course of the permissible use of force, the history of war is replete with unfortunate examples of forces fighting with a just cause purposefully committing atrocities. The Allied firebombing of Dresden is one such example. Just forces commit unjust acts, and while a just cause may help excuse one from moral culpability for unintentional harms for which one is outcome responsible, it does not provide excusal for the remedial moral obligation which enjoins one who has caused intentional harm. It nevertheless remains unclear that such instances, while reprehensible, should form the primary basis of remedial responsibility if, on balance, much of the war was conducted justly. This may especially be the case if the resultant destruction flowed from just and permissible conduct on the part of just participants.

If the aim of a just war is a more perfect peace that is enduring, stable, and features rebuilding and reconciliation, we can see another potential reason why remedial responsibility for postconflict rebuilding can fall to the just. Part of achieving a just cause is ensuring a just end state, and such an ending should consider rebuilding. But one need not take a demanding teleological view of just cause to envision the importance of a just warring

party having rebuilding responsibility.²⁴⁸ From a pragmatic perspective, as states and their militaries are beginning to recognize, reconciliation and reduced enmity and anger helps foster a more durable peace. Compensatory gestures for harms caused are actions that can help facilitate such a lasting peace and, when done correctly, more comprehensive, larger-scale rebuilding efforts signal a willingness to usher in a period of peace on behalf of the just. Such activities can help create and maintain the condition of a more just and lasting peace.

Finally, the rationale for rebuilding on the part of the just goes beyond mere prudential considerations and the justice of a cause. Many individuals caught up in war are innocent and, while the destruction of their property or person may be morally or legally permissible, they undeservedly suffered a serious deprivation. To the greatest extent possible this deprivation should be made right. This sentiment tracks with our common understanding of taking responsibility for our participation and role in the world, sometimes even when we are merely swept up in a state of affairs against our will. We can imagine a situation of harms related to justified self-defense. Marge and Bill are picnicking on the side of a deep lake. Bill is asleep. Joe happens upon the scene and tries to rape Marge. Marge is strong and fights back, getting the upper hand on Joe. Sill asleep, Joe knocks Bill into the water; Bill cannot swim. Joe takes this opportunity to successfully flee the scene, leaving Marge on shore with a drowning Bill.²⁴⁹ Fortunately, Marge is an excellent swimmer. Even though Marge was justly resisting Joe's sexual assault, I think most of us can agree that Marge is responsible to jump in and save Bill, even to apply life saving measures if necessary. Joe is a scoundrel who obviously conducts himself with little regard for other human beings,

²⁴⁸ I develop this account more fully in Chapter Five.

²⁴⁹ Of course, if Joe suddenly had a change of heart, then he should rescue Bill. He is outcome responsible for Bill's predicament and should be remedially responsible for its correction.

but the Bills of the world deserve help, even when parties responsible for the harms shirk their duties to provide it. This latter sentiment points to the possibility that a just participant may be allocated remedial responsibility simply on the basis of the fact that the unjust participants are unwilling or unable to rebuild.²⁵⁰

In light of shared wrongdoing, the importance of reconciliation, and aiding those in need, even just agents *can* be allocated remedial responsibility for rebuilding, but it remains to be seen if they *should* be. These foregoing reasons do little in telling us why remedial responsibility should by default extend to the just participant agent(s), as some scholars contend it should.²⁵¹ If this were the case, then all an unjust agent would need to do to be rebuilt by the just agent(s) would be to initiate an unjust war and then shirk their rebuilding obligations. That makes no sense.

Problems with Just Cause as the Basis for Remedial Responsibility

Although we may find some of the arguments in favor of linking outcome responsibility and remedial responsibility to justice of a cause initially persuasive, this approach remains problematic. One reason is that it may be unclear which party actually has a just cause.²⁵² Just as there are difficulties in establishing smaller-scale actions that are

²⁵⁰ Marge's duty comes with the proviso that she should only be required to rescue insofar as it does not unreasonably put her at risk. I discuss such provisos as they relate to rebuilding below.

²⁵¹ It is puzzling that some scholars contend that it is the just agents whom are by default responsible for rebuilding efforts. Brian Orend contends, "[a] war-winner, striving to achieve the goal of creating in the defeated aggressor a minimally just society, ought to do all of the following..." Orend, "Justice After War: Toward a New Geneva Convention," in Eric Patterson (ed.) "Ethics Beyond War's End." pp. 188. What about non-winners? Even if they are working towards the goal of creating a minimally just society, why is it only the just winners' responsibility?

²⁵² The recent war between Russia and South Ossetia is one example of the difficulty in establishing an act of aggression by a party. In this case, each party claimed that the other was the aggressor. See Heidi Tagliavini, "Independent International Fact-Finding Mission on the Conflict in Georgia," (European Union: Brussels, available at

clouded by the fog of war, it is also true of events occurring on a larger scale, like those used in establishing *casus belli*. This problem is compounded by the possibility of large numbers of participants in a given war. There can be directly involved state parties, third party states providing support, regional security alliances like the North Atlantic Treaty Organization or the African Union, forces operating under the auspices of international organizations like the United Nations, and irregular, non-state actors. As the participants increase, the ability to accurately determine who has acted justly and with justice on their side decreases.

Perhaps most importantly, even if we determine that a side has an unjust cause, not all members of the collective agent, like a state, are unjust. If we are tying remedial responsibility to the justice of an aggregate agent, it is unclear if holding all of a population remedially responsible is fair. This point especially troubles moral individualists who view the individual as the ultimate unit of moral worth.²⁵³ If the goal of making the justice of a political community's cause as the basis for remedial responsibility is to ensure that those in ethical breach are fairly held responsible, then such an approach could have the counterintuitive effect of conferring responsibility to agents whose only unjust involvement in the war happens to be membership in a political community with an unjust cause. This can be the case even in democratic regimes where popular support for a given war is divided. Some citizens may have elected officials on the basis of their advocacy for a given war, but a large portion of the population may oppose the war and some may even do so actively. The problem becomes particularly pronounced when we consider nondemocratic regimes, where the citizenry have little choice and control over matters of military policy and is, at least on some occasions, kept purposefully uninformed.

<http://www.ceiiig.ch/Report.html>, 2009). Retrieved from the World Wide Web on December 11, 2012.

²⁵³ Rodin, *War and Self-Defense*. pp. 164.

A related objection applies to the overall approach (what I called the macro-approach above) of determining moral liability or fault by appealing to the justice of the overall cause, and not the justice of individual actions. This line of criticism maintains that by zooming out and losing focus on individual acts, using justice of the cause as the basis for fault fails to account for the actual justice of the actions of individuals.²⁵⁴ The concern here is that the ethics of war are reducible to the actions of individuals and, therefore, it should be these actions that are the basis of moral concern. By taking justice of the cause as the basis for ascriptions of ethical conduct, the macro-approach loses the ability to provide such fine-grained analysis. Space does not permit me to fully pursue this line of criticism here, but its force should at least give us pause when considering using just cause as the sole basis for determinations of remedial responsibility.

It is also possible that pegging remedial responsibility to the unjustness of a participant agent may encourage more destruction on the behalf of the just. If a group of partygoers are responsible for cleaning up the aftermath of the party, then they are likely to be more careful about the mess they make than they would be in cases where someone else is tasked with the cleaning. Similarly, if the unjust side is deemed remedially responsible for acts for which they are not directly outcome responsible, it is possible that a just force may be more willing to engage in destructive and harmful actions in which they would be otherwise unwilling if they were responsible for the harms they caused.

²⁵⁴ For an ethical individualist approach to killing in war see Jeff McMahan, *Killing in War* (Oxford, England: Oxford University Press, 2009). For a critique that McMahan's theory of liability demands fine-grained analyses that are nearly impossible to make in wartime see Seth Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy & Public Affairs* 38, no. 2 (2010).

Excusal for Participant Agents

Even if the foregoing issues can be overcome, just because an agent is morally, legally, or outcome responsible does not mean that they should be *ipso facto* remedially responsible for rebuilding. There are considerations and factors applicable to participant agents that may lead us to conclude that they should not be assigned remedial responsibility. First of all, even when uncontroversially outcome responsible, agents may be unwilling to shoulder the costs of making good on the harms for which they are responsible. This applies to both just and unjust agents. It is a sad fact that even in the face of obvious and compelling reasons for obligations, agents who are responsible for bringing about harms can often be the least willing to help those whom they have harmed. I am reminded here of when my brother witnessed a stabbing in downtown Washington, DC. The assailant, who was at the very least outcome responsible, fled the scene, leaving the victim lying in the street bleeding from his wounds. My brother, an uninvolved passerby, was left remedially responsible for providing aid and assistance. This required my brother to tend to the man's wounds—using his wadded up tee shirt to staunch the bleeding—and helping him call his husband to notify him of the situation. The analogue here is that in wars, participant agents may not always be willing to conduct the necessary rebuilding activities. Like the stabbing assailant, they may just walk away.

In addition to immovable unwillingness, participant agents may lack the resources and capacity necessary to rebuild. Not everyone can swim like Marge, and few political communities have the oil wealth of Libya to fund their own rebuilding efforts. We must recall that rebuilding includes not only financial resources, but also technocratic and intellectual capabilities; capabilities that participant agents may lack or be ill equipped to provide. Lack of capacity can create conditions that make allocations of remedial

responsibility unfeasible and unfair to participant agents. Furthermore, when a political community has been vanquished or badly damaged, requiring them to rebuild may exacerbate the damage. Such an example of this is the case of Germany after the Second World War. Rebuilding their own state, let alone compensating or rebuilding for the harms they caused to others, was so costly that it would have been crippling. The perils and pitfalls of making unjust participants responsible are evidenced by the situation Germany underwent in the aftermath of the First World War, where the Germans were made responsible in a way that bred resentment and hostility for the costs that they were forced to bear. These postwar burdens helped sow the seeds for the conditions that contributed to World War II.²⁵⁵ Ethics aside, the prudential wisdom of both participant and nonparticipant third party responsibility for rebuilding has long been recognized.

But in cases like those involving unjust vanquished or impoverished states, it can also be the case that assuming all or most of the rebuilding responsibilities places an unfair burden on the just participants. They may have expended great resources in both blood and treasure, and may not be in a position to help rebuild. This is especially true if the intervention is humanitarian in nature. Here the participant may be the primary intervening agent, but not remedially responsible for the rebuilding efforts. In such cases there was a duty to aid that fell to all political communities, and for whatever reason it happened that the participant agent(s) are the ones that performed the action on their behalf. Now that such an obligation has been fulfilled, it should not be the responsibility of the intervening participant(s) to finish the job.

²⁵⁵ When an unjust vanquished state is assigned remedial responsibility for rebuilding out of a desire to punish or deter, it is important to recall that there are surely significant numbers of the state's citizenry who were opposed to the unjust war and possibly to the unjust regime altogether.

In addition to unwillingness and lack of capacity, participant agents may not be best placed to discharge remedial duties in postconflict situations because of enduring enmity and distrust between the parties. Populations who have suffered the scourge of war may quite reasonably want those they fought uninvolved in their affairs. They may view the other side with distrust, perceive their motives as impure and imperialistic, and exhibit outright hostility to their presence and involvement in rebuilding. This can be particularly true when ethnic, religious, and historical tensions played a role in the cause for the war in the first place and especially true if they continue to endure in the postconflict phase. If one of the central goals of rebuilding is healing and reconciliation, the involvement of participant agents with the potential to exacerbate tensions can work at cross-purposes to these goals.

4.5 Assessing Remedial Responsibility for Third Party Nonparticipant Agents

These are just some of the reasons for which participant agents may not be best placed to remedy the harms of war. My aim is not to catalogue all the conditions that can give rise to the excusal of remedial responsibilities by participant agents. Instead, I wish to underscore that there are a variety of weights and considerations that factor into how we assign remedial responsibility. When it is not feasible or wise to allocate remedial responsibility to participant agents, to whom, then, should it be allocated?

The Importance of Remedy

In everyday affairs it is not uncommon for nonparticipant third parties to be allocated remedial responsibility. The basis of these commitments and responsibilities varies. A police officer can happen upon a citizen in need and exercise her oath and institutional role, a good Samaritan can come upon a burning building with a woman and her dog trapped inside and fulfill his humanitarian obligation, or a skier can encounter a stranded hiker suffering from hypothermia and give him her jacket, thus fulfilling her duty to rescue.

In each of these cases it might make sense to locate the various participants, identify the type(s) of responsibility they bear, and see if such responsibility constitutes a linkage to the requirement of their remedying the situation. This is in keeping with the compelling sentiment that agents be made responsible for the outcome of their actions, their moral faults, or their legal obligations. In certain instances these determinations may make very good sense as a way to allocate remedial responsibility, but in others it may be impossible, counterproductive, or just plain undesirable. This is because, as we have seen, backward-looking justice is more complicated and may do less good than we may think. This complexity further illuminates an underlying tension between our desire to hold participant agents responsible for their conduct and the fact that there are times when this desire conflicts with the forward-looking task of providing remedy and relief to those in need.

Perhaps I am hiking with friends and we encounter a father who has been struck unconscious, and his baby, Chester, has been pushed out onto thin ice. Our priority should be getting Chester to safety, even if this requires forgoing the opportunity to chase down the villain who pushed him out there. It does little good for us to make our primary goal trying to track down the participants in this situation to make things right. We should be focused upon providing remedy, in this case the rescue of Chester. This example points to the fact that in providing justice, it is sometimes appropriate to decouple participant agency from remedial responsibility. In some cases it will be a simple fact that even though the need for remedy does not fall to the participants to provide, it still persists. The problem is that in such cases we need to know the basis upon which to allocate the attendant responsibilities bound up in providing it. This allocation hinges upon identifying the relevant criteria that help us determine which agents should be identified for the remedy. I turn to such criteria below, but for the moment, the point that I want to make is that we can identify situations in

which various remedial responsibilities are required of third party agents who are removed from the events leading to the need for aid. This reminds us that in matters of severe harm like war, even when agents are not participants, they can be held remedially responsible for rebuilding.²⁵⁶

This conclusion reminds us that if our goal is to rebuild the war-torn, then it may simply be that backward-looking models of justice may not be the most helpful. As Robert Goodin notes, “[t]hese familiar difficulties merely reinforce the point that backward-looking notions of causal responsibility are related only imperfectly at best to the forward-looking problem of allocating task responsibility.”²⁵⁷ In reflecting on Goodin’s point we would do well to be reminded of the words of Le Ke Son who is, as the New York Times reports, “a doctor and the most senior Vietnamese official responsible for the government’s programs related to Agent Orange and other chemicals used during the war.”²⁵⁸ Le Ke Son argues, “the debates [surrounding backward-looking justice and remedial responsibility] should take a back seat to aid.”²⁵⁹ He goes on to articulate the point that is well-recognized by philosophers, “[w]e spend a lot of time arguing about the reason why people are disabled...[o]ne way or another they are victims and suffered from the legacy of the war. We should do something for them.”²⁶⁰ Le Ke Son is correct. Theories of *jus post bellum* that seek to locate and attribute causal responsibility, and by extension moral or legal responsibility, by always looking backwards in the hope of establishing a direct link leading from the

²⁵⁶ On this point see Virginia Held, "Can a Random Collection of Individuals be Morally Responsible?," *The Journal of Philosophy* 67, no. 14 (1970).

²⁵⁷ Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*. pp. 126. The task to which Goodin refers is aiding the vulnerable.

²⁵⁸ Thomas Fuller, "4 Decades on, U.S. Starts Cleanup of Agent Orange in Vietnam," *New York Times*, August 10, 2012. A4.

²⁵⁹ Ibid.

²⁶⁰ Ibid. As Henry Shue similarly reminds us, “[y]ou are here and in a position to help this victim. Is there a stronger claim upon you now?” Shue, "Exporting Hazards." pp. 135-36.

responsible participants to remedial responsibility, run the risk of sacrificing the meaningful remedy and relief that looking forward can bring. If the central task of rendering postconflict justice is rebuilding, then we often want to look forward and not backward.

This is not to say that those who have committed criminal and unethical acts should not face justice. They most certainly should, and there are instances when bringing tyrants, torturers, and killers to justice is very forward-looking. Take, for example, the case of the Central Intelligence Agency (CIA) and their torture program. In rejecting Senator Patrick Leahy's call for a truth commission, the Obama administration has chosen to "look forward."²⁶¹ As Obama put it, "I'm a strong believer that it's important to look forward and not backward, and to remind ourselves that we do have very real security threats out there."²⁶² As the New York Times' editorial staff notes, a problem arises with this approach, "[i]n practice, the administration has chosen to look back selectively, eschewing prosecutions and civil relief for victims," while prosecuting a CIA officer who allegedly leaked the names of fellow agents.²⁶³ It should be obvious that when possible, as is the case with the CIA's torture program, we should look backwards. A forward-looking ethics of remedy should not be mistaken for an ethical promotion of impunity.

This draws out two important points. First, it may be necessary to look backward in order to provide forward-looking remedies for harms. It seems obvious enough that establishing who is responsible for what actions can help, and may actually be sometimes

²⁶¹ Daya Gamage, "Obama rejects probe on Bush-era torture: "Need to look forward not backwards"," *Asian Tribune*, July 22, 2011. <http://www.asiantribune.com/news/2011/07/21/obama-rejects-probe-bush-era-torture-%E2%80%9Cneed-look-forward-not-backwards%E2%80%9D>. Retrieved from the World Wide Web, July 25, 2012.

²⁶² Ibid.

²⁶³ New York Times Editorial Staff, "No Penalty for Torture," *New York Times*, September 5, 2012. A26.

necessary, in allocating remedial responsibility. Establishing types of responsibility by looking backward shows where backward-looking ethics may merge with remedial responsibility. But we can imagine, and this is my second point, where even when we have established responsibility based upon looking backward, that the responsible agents avoid remedial responsibility. This is especially likely when institutions, laws, and other formal mechanisms for assigning remedial responsibility are corrupt, anemic, or virtually nonexistent.²⁶⁴ In such cases, backward-looking justice diverges from forward-looking remedies. Conceptually and practically, determining on whose shoulders the duties of rebuilding peace falls can be a matter separate from the task of looking backward as a way to render justice. Goodin puts the point nicely:

[C]ausal responsibility and task responsibility really are quite distinct notions. They merge in their practical implications only in those (possibly rare) circumstances wherein those who were, in the past, in a position to cause harm will, in the future, remain in a position to provide help. Where that is not true, as it is usually not, responsibility would seem to lie elsewhere. Forward-looking notions...are what justifies the ascription of responsibilities for present and future action.²⁶⁵

In the case of assigning remedial responsibility, the goal is to identify agent(s) that should set about helping rebuild, which, depending upon the context, can include backward-looking elements. Of course, if we are making forward-looking ascriptions of remedial responsibility

²⁶⁴ It seems to me that states and individuals are morally bound to create such institutions and mechanisms, but space does not permit me to discuss just what these may be. The basis for such a sentiment is derived from what Rawls called the "natural duty of justice." This is the duty to support just institutions and when they are absent create such institutions. John Rawls, *A Theory of Justice*, Revised ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999). pp. 99. For a useful discussion of this see Allen E. Buchanan, "The Internal Legitimacy of Humanitarian Intervention," in "Human Rights, Legitimacy, and The Use of Force," (Oxford: Oxford University Press, 2010). Larry May offers a very brief discussion of one such institutional arrangement modeled on no-fault insurance. See May, *After War Ends: A Philosophical Perspective*. pp. 194-5.

²⁶⁵ Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*. pp. 127.

for postconflict obligations, one of the central issues concerns the relevant criteria we use to do so.

4.6 The Basis for Remedial Responsibility: The Connection Theory

The Connection Theory

I have argued that the reasons in favor of holding participant agents remedially responsible because of their outcome, legal, or moral responsibility appeals to the notion of making right for incurred wrongs and harms. So far, I have been claiming that in the absence of participant agents who are best placed to undertake the remedial responsibility to rebuild, third party agents should do so. The allocation of remedial responsibility to third party agents can be justified on the general cosmopolitan duty to aid those in need.²⁶⁶ We may think of a child who falls into the pool amidst a crowd of poolgoers. We can agree that someone should help the child, but the question remains as to how we decide to whom this responsibility falls. Similarly, the suffering, harm, and devastation brought about by war are in need of remedy, but we need a clear way to help guide allocations of remedial responsibility.²⁶⁷

Despite the pressing need, there remains a dearth in scholarship addressing the basis upon which remedial responsibility can be allocated for cases of postconflict rebuilding.²⁶⁸

²⁶⁶ This is not to suggest that considerations of cosmopolitan obligations do not factor into moral reasons for agents who are morally, legally, or outcome responsible. Such considerations are often interconnected, drawing on various reasons and criteria for their determinations.

²⁶⁷ For a discussion of allocating responsibility in the absence of institutional and procedural mechanisms see Held, "Can a Random Collection of Individuals be Morally Responsible?."

²⁶⁸ The work of Gheciu and Welsh provides a mapping of the various rationales advanced in the rhetorical arguments made by powerful state actors engaged in postconflict rebuilding. While the authors identify some insightful rationales, analyzing the ostensible reasons for which rich and powerful states engage in postconflict reconstruction does little to shed light on how the demands and responsibilities of postconflict rebuilding can be allocated. As the authors readily concede, such analyses are simply outside the scope of their work. See

Some of the best work on the topic of allocating remedial responsibility comes from David Miller. While Miller does not address postconflict remedial responsibility specifically, his research does tackle the allocation of remedial responsibility for matters of humanitarian duties.²⁶⁹ In fleshing out remedial responsibility, Miller offers what he calls a connection theory, or the idea “that A should be considered remedially responsible for P’s condition when he is linked to P in one or more of” a given set of specified ways.²⁷⁰ The given sets of specified ways, i.e., the connective elements linking agents in need to agents of remedy, are the criteria used to help identify remedial responsibility. In developing his theory, Miller advances numerous ways that remedial responsibility can be identified, such as moral responsibility, outcome responsibility, causal responsibility, benefit, capacity, and community.²⁷¹ Let us now turn to how some of these criteria can be applied to postconflict rebuilding

I have already discussed ways that participant agents may be remedially responsible. But before turning to third party agents, let us review the ways that such agents can be commonly allocated remedial responsibility, remaining mindful of the possibility that third party agents may also be found responsible in these various ways.²⁷²

Gheciu and Welsh, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction."

²⁶⁹ On the distinction between duties of justice and duties of humanity see Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33, no. 2 (2005).

²⁷⁰ Miller, *National Responsibility and Global Justice*. pp. 99. For an earlier version of the theory, see Miller, "Distributing Responsibilities."

²⁷¹ Miller, *National Responsibility and Global Justice*. pp. 100-104.

²⁷² I am here partly drawing on Miller’s work. Ibid. pp. 100-104.

Participant Agents

1. Moral Responsibility

An agent can be remedially responsible when they are morally responsible for their actions. As I noted, the persuasiveness and logic of the connection between moral responsibility and remedial responsibility is very strong. Not only does it provide for relief and potentially corrective measures that aid the agent who has been harmed or deprived, it also helps set the moral scales aright. By holding a morally responsible agent remedially responsible we are helping restore the moral *status quo ante*, which *ceteris paribus* is desirable. When considering moral responsibility, it is important to note that the remedy that it stems from is separate from punishment. It may or may not be appropriate to punish the morally responsible agent, but this is a question independent from allocating remedial responsibility; the task at hand is focused on aiding those in need, not punishing the perpetrator. This is not to say that these two concepts are mutually exclusive, part of punishment or deterrence can involve remedy, but it need not. Finally, in order to hold an agent morally responsible, the conditions must be such that we can attribute blame or fault to them in a way that mitigating circumstances or excusing factors do not provide sufficient grounds to exculpate the individual from such blame.

2. Legal Responsibility

As I have discussed, there are significant gaps in international law that make holding agents legally responsible for postconflict rebuilding unsatisfactorily difficult. To date, no formal institutional mechanisms exist that properly allocate remedial responsibility for comprehensive postconflict rebuilding; not even for agents for which harms can be directly tied. Nevertheless, one can most certainly be allocated remedial responsibility on the basis of legal responsibility. In cases where there is rule of law and the existence of institutional legal

mechanisms, this is one of the most familiar ways in which to ensure that remedial responsibility is assigned and carried out. From tort law, criminal law, and truth and reconciliation commissions to the International Criminal Court's jurisdiction for war crimes, crimes against humanity, and genocide, legal responsibility is evidence of an effective way to allocate remedial responsibility.²⁷³ If A is found legally responsible for B's condition, then A can be held remedially responsible.

3. Outcome Responsibility

An agent can be outcome responsible if there are good reasons to credit or debit the agent with the given outcome. In so doing, we may also allocate remedial responsibility to the outcome responsible agent to ensure that the consequences of the outcome are made right. As I have noted, outcome responsibility plays an important role in constituting our everyday lives. We generally expect to be held responsible for the good and bad consequences of our actions. If I study all night for a big exam and do well on it, then I am given the credit. Conversely, if I decide to blow the exam off and instead go out for a night of drinking which results in my failing the exam, I expect to be debited with the outcome. It seems that there is, as Honoré has argued, independent moral weight to holding individuals outcome responsible—without it we would likely be much different and possibly worse creatures than what we are with it. When our outcomes result in certain kinds of significant harms, then there is good reason to be held remedially responsible.

4. Achievement of Just Cause

I argue in Chapter Five that the principle of just cause should be reformulated and considered a teleological principle. The reason for this teleology is because a primary aim of

²⁷³ On this point see Kirkpatrick, Jesse. A Modest Proposal: A Global Court for Human Rights. *Journal of Human Rights*. forthcoming.

just causes for war is to create a more just, stable, and durable peace. In order to achieve such a lasting peace, rebuilding must occur. As a result, an internal feature of the principle of just cause is the responsibility to rebuild. Given this definitional revision, a just cause already contains some commitment, at least in theory, to the remedial responsibility to rebuild. The “in theory” caveat exists because, as I have argued for much of this chapter, there are compelling reasons why the participant agent (i.e., a fighting force with a just cause) is not best placed or the most appropriate agent to carry out rebuilding and, therefore, should not be allocated the remedial responsibility to do so. Nevertheless, if an agent has a just cause, then they should expect to contribute to the rebuilding. This contribution could include such acts as direct involvement in the rebuilding efforts or marshaling support for third parties to do so.

Third Party Agents

In the absence of participant agents, what are the ways that we can identify remedial responsibility for third party nonparticipants?

1. Proximity

Proximity can play a role in assigning remedial responsibility, especially when combined with capacity, the next criterion I discuss. There are times when being physically close is reason enough to provide aid. As Goodin notes, “[d]uties and responsibilities are not necessarily (or even characteristically) things that you deserve. More often than not, they are things that just happen to you.”²⁷⁴ There is not some metaphysical reason why an agent might be called upon to be, in Judith Jarvis Thomson’s words, a “minimally decent Samaritan.”²⁷⁵ An agent’s simple existence in the world is sometimes enough to trigger duties of justice like helping

²⁷⁴ Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*. pp. 133.

²⁷⁵ Judith Jarvis Thomson, "A Defense of Abortion," in "Rights, Restitution, and Risk: Essays in Moral Theory," (Cambridge, MA: Harvard University Press, 1986). pp. 133.

those in dire need. This is, of course, under the condition that the cost is not prohibitively high to oneself. In the case of war, this may be a neighboring state assisting with the sheltering and eventual repatriation of refugees (the moral and legal principle of non-refoulement is one such example of how proximity can create moral duties of aid). The criterion of proximity becomes more forceful if we draw from Miller's distinction between immediate and final remedial responsibility.²⁷⁶ There is no reason to think that simply because an agent has been allocated immediate or initial remedial responsibility, that they will assume all of the responsibilities to rebuild or be made to bear the burden for the full extent of the necessary duration. My brother passing by the stabbing victim made him initially remedially responsible, but not responsible for the full, extended remedy of the victim. In any case, it seems that not unlike the responsibility of rescuing a child swept up in the river simply because one happens to be passing by, the allocation of responsibility for at least some elements of postconflict rebuilding can be influenced by proximity.

2. Capacity

If the central concept behind remedial responsibility for rebuilding is finding a way to provide aid to those suffering in postconflict environments, then it is fairly obvious that capacity will play a crucial role in identifying responsible agents. One way to identify who is responsible for rescue or aid is through determining who has the strongest capacity to do so. Of course, different agents will have differences in capacity varying in strength and kind relative to other agents. These differences, along with the obvious balance of the relative costs among actors, can help us assign responsibility. For example, we can imagine State A has the greatest capacity. But it could also be the case that this state has a long history of oppressing those in need. Here capacity and effectiveness do not necessarily come together.

²⁷⁶Miller, "Distributing Responsibilities." pp. 488.

Perhaps the same state has a large financial capacity to aid, but that for whatever reason the costs of aiding would also be significantly high, perhaps even much higher than another state with less capacity but also with less cost. My point here is that when considering capacity we must be careful about balancing a variety of factors, including the capability and effectiveness of the agent(s) against the costs that rebuilding would potentially require.

3. Community and Associative Obligation

As I explored in Chapter Three, community, broadly construed, can give rise to associative obligations and bonds. While these associative obligations may be seen to compete with remedial rebuilding responsibilities (at least with respect to more distant others or those not commonly considered to create associative ties), they can also create bonds and ties that may play a role in allocating remedial rebuilding responsibility. With respect to postconflict responsibilities, associative obligations can exist between numerous groups, some of which include ties between co-nationals, families, tribes, religions, cultures, and so forth. Just as these ties can be intrastate affiliations, they can also exist across borders. Perhaps this may be the result of contemporary or historic partitions, break-ups of nations with the formations of new states, or migration patterns arising because of war or economic conditions. For various reasons people and borders may move, but the ties that bind remain.

Causal reasons aside, the point is that groups of peoples, nations, and states forge deep ties that can give reason to call upon the other in times of need. Such associative relationships can exist antecedent and independent of the need for postconflict rebuilding, but because a key intrinsic component of such special relationships is that they create special obligations on the part of those within them (i.e., members), community and associative relationships can function as a relevant criterion in allocations of remedial rebuilding responsibility.

4. Benefitting²⁷⁷

Being the beneficiary of an action, turn of events, or historical circumstances can give rise to remedial responsibility.²⁷⁸ This is common practice in criminal cases involving theft of goods or merchandise, where the unknowing recipient of stolen goods can be ordered to return them. In more remote circumstances arising from historical injustice, although it remains contentious, we may find that beneficiaries are remedially responsible for compensating or correcting for the unjust benefits they have received. In the more general case of war, there are circumstances where one population would not have benefitted if the war had not come about. In general, we may be inclined to think that such benefits or gains should not be returned. We can imagine that State A goes to war and as a result their oil production is severely curtailed. State B is relatively removed from the war, but increases their own petroleum production and considerably increases their profits. They may do so for a variety of motivations, for economic reasons, for geopolitical reasons (say, to avert an oil crisis), and so forth. In cases where there is not a clear unjust action we may not find benefitting as a particularly persuasive criterion. When it is clear that the beneficiary party has received gains from unjust actions, then the allocation of remedial responsibility is more persuasive. As Butt concludes, “benefitting from the plight of those in desperate need, however involuntarily, constitutes an additional morally relevant form of connection.”²⁷⁹ Alone or in combination with other criteria, benefitting from war can prove important enough of a connection to merit remedial obligation on behalf of the beneficiary.

²⁷⁷ For an excellent discussion of how benefitting can result in remedial responsibility see David Butt, "On Benefitting from Injustice," *Canadian Journal of Philosophy* 37, no. 1 (2007).

²⁷⁸ For a discussion of how one may be sanctioned as a result of being a beneficiary of goods or benefits, even involuntarily or nonconsensually, that arose through historic injustice see Judith Jarvis Thomson, "Preferential Hiring," in "Rights, Restitution, and Risk: Essays in Moral Theory," (Cambridge, MA: Harvard University Press, 1986).

²⁷⁹ Butt, "On Benefitting from Injustice." pp. 130.

5. Institutional Role

I have so far been largely discussing *ad hoc* ways that third party agents can be found remedially responsible. As I stated at the outset, this is largely because there is a conspicuous absence of formal mechanisms to allocate remedial rebuilding responsibility at the international level. The fact of this absence does not mean that there are *no* institutional bodies or roles that can play a relevant part in rebuilding. To the extent that they do exist, such bodies may be allocated specific remedial obligations. In recent years there have been some significant steps in favor of institutionalizing postconflict responsibilities. Although space does not permit me to fully discuss them here, the establishment of the United Nations Peacebuilding Commission (PBC) is one such instance.²⁸⁰ Established in 2005, the PBC's main purpose is threefold:

- a. Bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery;
- b. Focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundation for sustainable development;
- c. Provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, to develop best practices, to help to ensure predictable financing for early recovery activities, and to extend the period of attention given by the international community to post-conflict recovery.²⁸¹

Given the relative nascence of the Commission, its role as only an intergovernmental advisory body (which means that it lacks compulsory powers), and still untested capacity for

²⁸⁰ For a discussion of the development, organization, and institutional structure and composition of the PBC see Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (NY, NY: Routledge, 2011); Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*; Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*.

²⁸¹ United Nations General Assembly, "2005 World Summit Outcome." para. 98.

dealing with larger postconflict cases, we currently have to accept that the Commission and other more *ad hoc* institutional arrangements and roles are just but one criterion of many that will help guide allocations of remedial responsibility for postconflict rebuilding.²⁸² Until more robust institutions have been developed, a connection theory remains one of the most efficacious ways to allocate postconflict remedial responsibility. With that said, even with the institutional development and entrenchment of bodies like the Commission, it may very well be that having an institutional role is one factor out of many connections that is relevant in determining remedial responsibility.

4.8 Allocating Responsibility

In matters of rebuilding, context and specifics are important, morality can be messy, and there will be compelling and competing reasons why agents should and should not be allocated remedial responsibility. Given this complexity, how can we allocate remedial responsibility? One method applies the types of responsibility in rank-order or lexically. In such a case we could, for example, say that first and foremost those morally responsible should be made remedially responsible. Failing proper or feasible determinations of moral responsibility, we then move to outcome responsibility, and so forth. Such an ordering is untenable for at least two reasons. First, it fails to account for the degrees to which one may

²⁸² Here I have in mind the various kinds of postconflict conferences that generate noncompulsory donor commitments. The case of Afghanistan is an excellent example of this kind of engagement and quasi-institutionalization of rebuilding. Such *ad hoc* meetings generating state-level commitments include: the London Conference of January 2010; Afghan Cooperation Program as most recently endorsed by the North Atlantic Council on March 1, 2010; Kabul Conference of July 2010; Lisbon Conference of November 2010; The Istanbul Process on Regional Security and Cooperation which was launched in November 2011; the Bonn Conference in December 2011; Chicago (security) of June 2012; and Tokyo (financial) of July 2012.

be responsible. For example, an agent can hold weak moral responsibility (their actions are only somewhat morally blameworthy), and another agent can hold no moral responsibility but a greater degree of outcome responsibility. Who is remedially responsible? In matters of degree, a simple rank ordering does nothing to help us decide which principle of responsibility to apply. In addition, this approach fails to take seriously the goal of remedial responsibility—aiding those who have suffered the ravages of war. The morally blameworthy agent may lack the capacity to help the victim. In such instances rank-ordering types of responsibility does little to help us determine who should be remedially responsible. We must look elsewhere.

This returns us to Miller’s connection theory. Miller specifies how the connection theory operates:

The nature of the link varies greatly: in some cases, as we shall see, it provides a substantive moral reason for holding A remedially responsible, whereas in others it simply picks A out as salient for non-moral reasons... The point to bear in mind is that the weight of justification is borne by the pressing need to relieve P; and the necessity of identifying a particular agent as having the obligation to provide the relief.²⁸³

The connection theory is an improvement over other models because it assesses a plurality of factors, having the advantage of potentially weighing the strengths of various connections not only against each other, but also against other ethical obligations and practical constraints and considerations. Instead of arriving at a general conclusion that agent Z should do Y across all cases, it is more effective and realistic to conclude that Z should do Y given $X^1, X^2, X^3 \dots X^n$. Numerous agents will surely have relevant connections to the party in need, and there should be no expectation that only a single agent would be allocated

²⁸³ Miller, *National Responsibility and Global Justice*. pp. 99-100.

remedial responsibility. This has the advantage of ensuring that not one single party bears the whole burden of postconflict rebuilding.

4.9 Conclusion

In this chapter I began with the central normative premise that has run through this work: after war, war-torn communities should be rebuilt. This premise is followed by the logical corollary that there is a responsibility to rebuild. The responsibility for which, following David Miller, I called remedial responsibility. But this premise and conclusion do nothing to answer the two central questions that follow: Who is responsible? How do we allocate postconflict remedial responsibility? Further driving this problem is the rather obvious observation that the current global order lacks institutions capable of assigning responsibility for postconflict rebuilding. Driven by these two questions, and in light of this absence, this chapter set out to develop an account of the relevant connections that can help determine and allocate postconflict remedial responsibility.

I began by distinguishing between different types of responsibility that partly track along lines of agency. In doing so, I identified two types of agents that are particularly salient to the task of allocating postconflict responsibility: participant agents and third party nonparticipant agents. This distinction between these types of agents is important because it points to a seeming tension inherent in a forward-looking theory of *jus post bellum*—we want to aid victims of war in the most effective and expeditious way possible, but we also want to hold participants responsible for their unjustifiable harmful conduct. While not necessarily mutually exclusive aims, they often do conflict. This tension is captured in the intuitive plausibility in the backward-looking nature of most theories of *jus post bellum*. Such theories ascribe postconflict responsibilities, construed primarily as punishment and compensation, by examining relevant factors associated with the temporal periods and actions related to the

times before or during a war. This approach is attractive because it is largely in keeping with our common intuitions and beliefs that, absent sufficient excusing circumstances, participant agents are and should be held remedially responsible for their own voluntary actions. If I promise to walk your dog, fail to do so, and as a result she soils the carpet, I am remedially responsible for fixing the carpet. We can determine my remedial responsibility by looking back at my acts and omissions.

But, as I argued, unlike the domestic sphere where we (at least hopefully) have relatively fair and reasonable institutions and procedures for determining such responsibility, and conditions are generally such that we can make such determinations with a reasonable degree of accuracy, war occurs in conditions that lack such advantages. But this is not the only problem with looking backwards. In addition to the significant practical hurdles endemic in looking backwards as a way to assign remedial postconflict responsibility to participants, there are considerable normative disadvantages to doing so. There are certainly good reasons for holding some participant agents remedially responsible, but there are also very good reasons for delinking remedial responsibility from the backward looking models of *jus post bellum*, especially if one of the central goals of *jus post bellum* is rebuilding and, more generally, building a just and lasting peace. It seems, then, that we need to look to a broader set of reasons and criteria for determining remedial responsibility. Rather than remaining insistent that it is the responsibility of the participants alone to remedy the terrible state of affairs that war often wreaks, we need to look ahead.

Chapter 5

Just Cause and *Jus Post Bellum*

Introduction

The principle of just cause has a kind of priority—justice of the cause is one of the primary ethical conditions that must be satisfied prior to any use of force. This applies at the individual level of interpersonal self-defense and at the level of political communities. This feature of the principle of just cause has generally become an accepted precondition that must be met before a political community can ethically resort to war. This is, in part, evidenced by the fact that parties to a conflict often appeal to the justice of their cause. Former President George W. Bush often invoked the justice of the cause (to find weapons of mass destruction and later to liberate Iraqis) for the invasion of Iraq. Earlier, his father, former President George H.W. Bush, dubbed his administration’s invasion of Panama, “Operation Just Cause.” The concept of just cause has even captured the popular imagination. There is a video game entitled “Just Cause,” it even has a sequel with the ever-original title, “Operation Just Cause 2.” On a more serious note, a rebel fighting against Qaddafi’s forces in Libya recently commented, “We have God on our side and a just cause, but Qaddafi has better weapons.” These appeals resonate with the idea that the first determination of the justness of a war is found within its cause.

As I view it, a just cause is a constrained aim in the pursuit of justice and peace. Thought of in this way, cause gives us a conception of what type of ends political communities must, in part, aim towards when engaging in war. Throughout this chapter I explore, advance, and defend a teleological principle of just cause. The teleological principle of just cause can be defined as requiring that just causes aim towards conclusions of war that

include many but not all of the demands found in the theory of *jus post bellum* that I have so far advanced.²⁸⁴ Put slightly pithier, a teleological just cause aims at *jus post bellum* as the ultimate goal of a given war.

This feature of a teleological just cause has been identified early on in the history of the just war tradition in what has come to be known as the just peace (defined as the idea that a just war is fought for a just ending). There is, then, historical precedent for viewing *jus post bellum*, or at least elements of it, as internal to the concept of just cause. This also underscores the interconnection between the categories of *jus ad bellum*, *jus in bello*, and *jus post bellum*. We can see this connection if we reflect upon the fact that included among the ends for which a cause aims are elements of *jus post bellum*. This means that *jus post bellum* must be considered not only before a war is started, but also while it is fought; the means used to pursue war must not make a just peace impossible. In this sense, *jus post bellum* can play a significantly more important feature in traditional just war theory's principles than has been previously recognized in the contemporary just war scholarship.

My goal in this chapter is to explore the relationship between just cause and *jus post bellum*. This chapter proceeds as follows. In section one I provide a brief explication of defensive rights as the basis for recourse to war. I then turn to the architecture of a theory of just war, exploring where we ought to situate *jus post bellum* within an overall theory and how this location may affect *ad bellum* and *in bello*. In section three I argue that a teleological principle of just cause is a profitable way to take seriously the importance of postwar justice within the traditional framework of the just war tradition. I then review the rich history of

²⁸⁴ I here refer to some of the demands of *jus post bellum* as opposed to all of postconflict rebuilding because, as I will argue, I believe that the demands of *jus post bellum* entailed in just cause may be reduced or less stringent than those found in the whole of the concept of rebuilding.

linking just cause to *jus post bellum* in the just peace view of just cause, while also noting some ambiguities and shortcomings in these approaches. In the next section I provide a substantive account of the teleological principle of just cause, arguing that this requires that just agents must attempt to secure a just peace, while also noting that this account presents us with a dilemma. The dilemma involves the fact that if we view the justification of killing and maiming in war as predicated upon the idea that such activity can only befall those who are made liable by involvement in sufficiently grave wrongs, then we need to wonder if pursuit of postwar rebuilding efforts can meet the justificatory demands of such a theory of liability. This question arises because on first blush it seems that many rebuilding activities lack the importance for which we would want to permit killing. I attempt to resolve this issue by appealing to recent advances in the conceptualization of just cause and liability. I conclude the chapter with a defense of the teleological view, tentatively arguing that just cause is and should be connected to *jus post bellum*.

5.1 Justifying Just Cause: Defensive Rights

One obvious reason for the place of prominence for the principle of just cause is because a just cause establishes and constrains the reasons for which it is that political communities can resort to war, while also substantiating the permissible ends for which war can be used as a means. The substantive content of these two features, the reason for war and the ends for which it is pursued, continue to be a matter of debate. One cause upon which there is considerable agreement is national self-defense. The inclusion of national self-defense as a just cause is widely accepted not only in the philosophical literature of the just war tradition, but also in the international community of states, evidenced by its inclusion in the United Nations Charter. Also widely accepted, but somewhat more controversial, is third party defense, as in the case of humanitarian intervention or RtoP. National self-defense and

defense of others are, with some small exceptions, two causes upon which there is general agreement that they constitute just causes that can justify resort to war. What remains an area of comparatively wider debate is the reasons *why* such cases are just causes. What, exactly, is it that constitutes and underpins the philosophical justification of the concept? While space does not permit me to wade too deeply into this debate, a discussion of just cause needs to at least briefly address the matter.

There are two strategies commonly deployed in providing a justification for why agents can resort to war.²⁸⁵ The first is the analogical strategy. The analogical strategy views the rights of states as similar to those of individuals. Just as individuals have the right to self-defense against lethal threats, so too do states have the right to self-defense against attacks on their right to sovereignty.²⁸⁶ The claim here is that the rights of states, at least the right to self-defense, are analogous to those of individuals—states are entities in possession of rights. Ethical individualists argue that the problem with the analogical strategy is that it fails to account for the fact that it is individuals, not some institutional entity, that kill, destroy, and maim during war.

Troubled by this issue, others employ the reductive strategy. Proponents of the reductive strategy contend that the reasons for which a political community can resort to war

²⁸⁵ For a detailed discussion of these two strategies see Rodin, *War and Self-Defense*. *passim*.

²⁸⁶ For attempts at conferring rights to states in a way that make states *qua* states rights bearers similar to individuals see Emer de Vattel, *Le droit des gens; ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (Washington, D.C.: Carnegie institution of Washington, 1916); Christian Wolff, *Jus gentium methodo scientifica pertractatum* (Oxford, England: The Clarendon Press, 1934). Also see Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 58. Here Walzer takes an intermediate position, where he defends the rights of both individuals and political communities, defending the rights of the latter on both reductive and communitarian grounds. For a critique of this view see Rodin, *War and Self-Defense*.

are reducible to the rights of individuals.²⁸⁷ This strategy views the state as a collective agent wherein its moral standing is reducible to the moral standing of its individual members. A state's members have the right to personal self-defense, and in cases of war, combatants simply exercise self and other defense. In this way, the state is ontologically infirm and lacks the status of an individual rights-bearer.

As may be obvious, the account of moral cosmopolitanism that I developed is in significant tension with the analogical view. If individuals are the locus of moral consideration and worth, and states are viewed as collectives constituted by their individual members, then it is impossible for states to have rights *qua* states. In contrast, under the view of moral cosmopolitanism that I developed, the rights of states are reducible to and constituted by those of their individual members. The cosmopolitan approach that I favor is in keeping with the core tenets of the reductive view; the rights of individuals underpin the reasons for which states can resort to the use of force.

This focus on ethical individualism may make some adherents of the more communitarian view of the value and defense of political communities uneasy, but the reductive strategy's appeal is not limited to its compatibility with the ethical individualism of moral cosmopolitanism. As Cécile Fabre has noted, the reductive strategy of national self-defense also has a collectivist variant. This variant rests upon the collective rights of political self-determination and territorial integrity as among those for which individuals can resort to the use of force to defend. These rights stem from individuals' rights to form political communities for a scheme of fair mutual cooperation and to help shape their own conception of the good. But as we all know, third parties (combatants) acting on behalf of those whose rights are threatened (noncombatants) largely fight wars. Here the Hohfeldian

²⁸⁷ See McMahan, *Killing in War*.

concept of one's power to transfer their right to self-defense to third parties, in this case to combatants, is crucial.²⁸⁸ According to Fabre, this power "confers on the state the right to wage war in defence of the fundamental rights of its citizens."²⁸⁹ This power of transfer has the important implication of retaining the ethical individualism inherent in moral cosmopolitanism, while retaining a place for the defense of political communities based upon recognition of their value. Since much of the fighting and killing done in war is done not in literal self-defense, such as by combatants in battle, but is carried out to defend the rights of third parties (like one's noncombatant compatriots), the collectivist variant of the reductive strategy plays a critical role in justifying some instances of national defense.

Much more could be said about the justifications used in the rights to wage war and to kill during war. My limited goal is to provide a sketch, albeit a very brief one, of how national and other defense can be justified through an appeal to rights that are reducible to the individual.

5.2 Where the Action Is: The Site of *Jus Post Bellum*

In his article, "Where the Action Is: On the Site of Distributive Justice," G. A. Cohen explores where justice applies. Cohen asks if justice should apply at private levels like the family, or merely at the political level, like the basic structure of society.²⁹⁰ But there is another way that the site of justice can be explored, and this is where and how aspects of justice are located within a theory. Construed in this sense, I am interested in the site of *jus post bellum*, specifically, where the concept of *jus post bellum* should be properly located within the overall structure of a theory of the just war. By exploring where the action is for *jus post*

²⁸⁸ For an illuminating discussion on a cosmopolitan theory of national and other defense see Fabre, *Cosmopolitan War*. esp. chp. 2.

²⁸⁹ Ibid. pp. 55.

²⁹⁰ Gerald A Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy & Public Affairs* 26, no. 1 (1997).

bellum, we also can obtain a clearer view of the second component of just cause (recall the first was the reasons for which it is that political communities can resort to war), the ends for which war can be pursued.

Throughout this work, I have firmly argued that *jus post bellum* ought to be considered on par with *ad bellum* and *in bello*. It would seem, then, that I have already tipped my hand with respect to the site of *jus post bellum*, the just war tradition should entrench *jus post bellum* in just war theory, but I have yet to fully discuss how *jus post bellum* affects and is affected by extant just war principles, and how this affects the ends for which war can be pursued. In the following chapter I discuss the role *jus post bellum* plays in the principle of proportionality, but the question remains as to where the action is when we consider *jus post bellum* and the principle of just cause. How the concept of just cause has and should be treated in a theory of just war more generally, and in *jus post bellum* in particular, merits discussion.

To begin with, one can reduce to almost nil *jus post bellum*, and ethics more generally, from considerations of war. Perhaps prescriptive realists take the most well trodden path to this approach.²⁹¹ The example *par excellence* of prescriptive realism is found in Thucydides' "History of the Peloponnesian War" and exemplified in the arguments found in the work's Melian Dialogue. An exchange between Athens, a military superpower, and the small nation of Melos, the dialogue displays Athens' desire to conquer Melos as a lesson to their rival Sparta. Athens presents the Melian citizenry with the opportunity for two choices: they can

²⁹¹ Prescriptive realism can be contrasted with descriptive realism. I take descriptive realism to mean an empirical thesis concerning the interaction of political communities (states) in the international system, and that this interaction is governed by power, not morality. Alternatively, prescriptive realism is the normative thesis that relations between political communities ought not to be governed by morality. For one of the standard articulations of prescriptive realism see Edward Hallett Carr, *The twenty years' crisis, 1919-1939: an introduction to the study of international relations*, Harper torchbooks. Academy library (New York: Harper & Row, 1964). pp. 153.

submit to the will of Athens or resist and feel the full force of Athens' military might. In the end, Melos resists and pays dearly, many Melians are slaughtered, and the remaining survivors are enslaved and sold off.

Within the dialogue, we find a conception of war that is based on the belief that it is an activity governed not by moral constraints, but permissions that emanate from raw power. Take, for example, the infamous line given to the Melians by Athens: "the strong do what they have the power to do and the weak accept what they have to accept."²⁹² Under the reasoning put forth by Athens, the normative ethos is one that rejects pleas of rights and protections for the weak and vulnerable during times of war. According to Athens, such sentiments of justice and equity are unpersuasive and immaterial; what is important is power. This view of power has serious implications, it allows for the absolute vanquishing of the victor's opponents with little regard for justice before, during, and after war. The dialogue offers us not only a view on how war is waged and fought, but it also gives us a ruthless conception of *jus post bellum*.

The reasons for the rejection of the prescriptive realist position are well known, and I will not rehearse them here.²⁹³ My larger point concerns the site of *jus post bellum*, for which the realists take a clear, unequivocal stance. Returning to Thucydides, for the Athenians, justice after war is of minimal concern, at least for the victors. This is evidenced by both words, "when these matters are discussed by practical people, the standard of justice depends upon the equality of power to compel," and later, deeds.²⁹⁴ We may be quick to

²⁹² Thucydides, *The Peloponnesian War* (Baltimore: Penguin Books, 1954). pp. 360.

²⁹³ The rejection of realism has been a key theme in justifying the place of ethics in contemporary just war theory. See Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. chp. 1, "Against Realism," pp. 3-20.

²⁹⁴ Thucydides, *History of the Peloponnesian War*. pp. 360. Justice was, of course, of great concern to the Melians who were later slaughtered. Those spared were sold into slavery.

conclude that the Athenians believe that there is no justice in war, but I think this conclusion would be a mistake. This is because Athens does espouse a “standard of justice” but it is one that is relative to the possession of power and inextricably linked to and dependent upon the power to compel. Absent such an equality of power, the standards of justice are tilted in favor of the strong. The strong make the rules and the weak obey. Viewed in this way, based upon their relative position of superior power, Athens can claim that they do possess a just cause because they are powerful and, thereby, determine the content and demands of justice.

We may be uncomfortable with Athens’ position of moral relativism. If justice is simply determined by relative positions of power, then prison gangs can rape justly and hegemony can invade whomever they wish. But in addition to preferring an objective account of justice, we can find the prescriptive realists’ position untenable for its conception of *jus post bellum*. For the prescriptive realist, *jus post bellum* is situated outside the scope of a theory of war and what happens in the wake of conflict is of little ethical concern. In claiming a position of just cause, even on relative merits, the Athenians show their adherence to a relative account of justice, and such a relative account does not include *jus post bellum*, neither independently nor in any way linked to just cause. In short, for the Athenian brand of prescriptive realism, how wars end has little impact on if they were just. Of course, the problem is that locating considerations of postwar justice outside the scope of moral reasoning, as evidenced by the fate of the Melians, can result in devastating consequences.²⁹⁵

²⁹⁵ It may be more appropriate to draw the distinction between *post bellum* theories and *jus post bellum* theories. The former are concerned with the general concept of postwar situations, which does not necessarily include theories of justice, whereas, by definition, the latter must contain the inclusion of justice. It seems to me that despite their hardened view, the Athenians are articulating a conception of *jus post bellum* since they are advancing arguments about the place of justice within postwar contexts. Much of the dialogue centers on this very topic.

An alternative to the foregoing view is locating *jus post bellum* within the existing structure of extant just war principles, and this can be achieved in various ways. For example, in this chapter I have been arguing that *jus post bellum* is already present in the principle of just cause (for a cause to be just it must aim towards achieving postwar justice), and in this way just cause is connected to *jus post bellum*. Another proposal for how this can be achieved is through linking a publicly declared precommitment to *jus post bellum* to the existing principle of right intention.²⁹⁶ The idea is that a just fighting force ought to have the intention of achieving a just outcome to the war. Approaches like these demonstrate how the site of *jus post bellum* has important theoretical implications. As Johnson notes, a compelling reason for looking towards the principles of just cause and right intention is because “the way a war is fought and the purpose at which it aims, including the peace that is sought for the end of the conflict, are not unrelated, whether in practical or in moral terms.”²⁹⁷ Locating features of *jus post bellum* within the principle of just cause has the dual effect of further constraining the permissible resort to war and, once war is undertaken, to ensure that the means and ends are compatible with a just ending. War is constrained because a commitment to ensuring and helping to ensure a just ending is required, and without such a commitment the resort to war is impermissible. Once war is embarked upon, the means used must also be such that they do not make achieving a just peace impossible. Finally, the ends for which war is undertaken must obviously include those that are in

²⁹⁶ See Annalisa Koeman, "A Realistic and Effective Constraint on the Resort to Force? Pre-Commitment to 'Jus in Bello' and 'Jus Post Bellum' As Part of the Criterion of Right Intention," *Journal of Military Ethics* 6, no. 3 (2007). Koeman's idea for this linkage comes from Brian Orend, *Michael Walzer on War and Justice* (Montreal: McGill-Queen's University Press, 2000).

²⁹⁷ James Turner Johnson, *Morality & Contemporary Warfare* (New Haven, CT: Yale University Press, 1999). pp. 208.

keeping with *jus post bellum*, ensuring that the other goals of a war do not make *jus post bellum* unachievable.

This all needs further specification and support, a venture that will constitute much of the remainder of this chapter and the one that follows. But these points imply that the reason for getting the site of *jus post bellum* correct is that conceptions of it can have a significant impact not only on conduct after war, but also on conduct throughout the duration of a given conflict. Where the action is can help determine where the scope and content of postwar justice ends up.

5.3 The Teleological Principle of Just Cause: A Provisional Definition²⁹⁸

Before proceeding further, let me define the teleological principle of just cause.

The teleological principle of just cause:

A just cause is the pursuit of war under the condition that "those attacked are liable to be warred upon," and, according to the internality criterion,²⁹⁹ includes ceteris paribus the aim of just peace.³⁰⁰

The ultimate aims or ends of a war are to achieve a just and peaceful resolution or end-state—the just peace.

One obvious concern with the teleological principle of just cause is that the requirement for a just peace, as instantiated in the internality criterion, may place undue burdens or demands on the party waging a war for a just cause. But the demands of rebuilding and the agents to whom the demands fall, as stipulated in the internality criterion,

²⁹⁸ I would like to distinguish the account that I call the teleological view of just cause proper, with the concept of teleology more generally. The claim that the former makes, and what makes it a teleological conception, is the view that all causes in a war should tend towards the given ends of a just peace.

²⁹⁹ The internality criterion is the requirement that just cause must contain a requirement for the pursuit of a just peace. It is in this sense that the principle of just cause is teleological with respect to *jus post bellum*.

³⁰⁰ McMahan, "Just Cause for War." pp. 11.

are subject to certain conditions and provisos. First and foremost are the fairness and feasibility constraints concerning the responsibilities of just parties that I outlined in Chapter Four. As I indicated, there will be some cases where it is impossible, undesirable, and unfair to require rebuilding activities on the part of the just parties. In such instances, we may wish to allocate rebuilding responsibilities to third parties whom were not participants in the hostilities. While the internality criterion puts forth such a requirement, it would be foolish to suggest that it is unyielding in the face of valid and reasonable excusing factors. Under such conditions of excuse, the teleological principle of just cause still requires that the just agent(s) support and work towards a just peace to the extent practicable. This support may include such activities as direct and indirect financial, material, and political contributions in support of rebuilding or support of a third party that has taken up the task. What it does not require is a suicide pact, ironclad, with unyielding obligations that fly in the face of common sense. Nevertheless, a party with a just cause must be willing to engage in attempting to achieve a just peace and know this prior to resorting to the use of force.

Accounts of Just Cause, Just Peace, and Jus Post Bellum

Since early in the history of the just war tradition, *jus post bellum* has been treated as an area of moral concern that is closely connected to the principle of just cause. Perhaps the most common form of linking just cause with a conception of just ends is the “just peace” approach. Although Cicero articulated something on the order when he stated, “[w]ars, then, ought to be undertaken for this purpose, that we may live in peace, without injustice,” it was Augustine who offered a more robust articulation of the conception of a just peace.³⁰¹ According to Augustine, the causes and ends of war should always aim towards the securing of justice at the time of the war’s conclusion:

³⁰¹ Cicero, *On the Commonwealth and On the Laws*. On Duties. bk. I, section 35.

Indeed, even when men choose to wage war, they desire nothing but victory. By means of war, therefore, they desire to achieve peace with glory...Wars themselves, then, are conducted with the intention of peace, even when they are conducted by those who are concerned to exercise their martial prowess in command and battle. Hence it is clear that peace is the desired end of war...even those who wish to disrupt an existing state of peace do so not because they hate peace, but because they desire the present peace to be exchanged for one of their own choosing.³⁰²

In Augustine's view, wars are conducted for the achievement of a just peace, or at least the intention of achieving it. Since peace is the "ultimate purpose of war," under this account the just peace is a constituent part of just cause—all causes for war aim for a just peace.³⁰³

Following Augustine, but offering a marked improvement to his concept of just peace, Aquinas argued, "[h]ence all wars are waged that men may find a more perfect peace than that which they had heretofore."³⁰⁴ Aquinas's account proves important because it stipulates the rejection of the *status quo ante bellum*. For Aquinas, the cause of war was not just securing the peace of the *status quo ante bellum* but to achieve a more perfect peace. This is in keeping with the idea that a just war typically aims to change the *status quo*, making a return to the *status quo ante bellum* a ridiculous proposition.

Conceptions of the just peace also extend to the classic international jurists.

Following Augustine, Suarez articulated a tripartite division of war, distinguishing three temporal periods. According to Suarez, "with respect to every war," we must identify, "its inception; its prosecution, before victory is gained; and the period after victory."³⁰⁵ Like

³⁰² Augustine, *The City of God Against the Pagans*. bk. 19, chp. 12, pp. 934. emphasis mine. Here I am following Bellamy's interpretation of Augustine's view of just peace and its theoretical implications. Bellamy, "The Responsibilities of Victory: "Jus Post Bellum" and the Just War."

³⁰³ Ibid.

³⁰⁴ Aquinas, *Summa Theologiae*, 42. Question 29: On Peace, Art. II, Reply Obj. 2.

³⁰⁵ Francisco Suárez, *Selections from Three Works of Francisco Suárez, S.J. De legibus, ac Deo legislatore, 1612. Defensio fidei catholicae, et apostolicae adversus anglicanae sectae errores, 1613. De triplici virtute theologica, fide, spe, et charitate, 1621* (Oxford, England: The Clarendon Press, 1944). Here Suarez discusses the rights and duties of proper war termination such as the

many before him, Suarez goes on to propound that the “chief end of war is to establish such a future peace,” construed as applying to “the period after victory.”³⁰⁶ Similarly, in Book I of “The Law of War and Peace,” Grotius states, “[w]ar itself will finally conduct us to peace as its ultimate goal.”³⁰⁷ In the sense that the ends for which wars ought to be resorted to included postwar peace, the classical just war theorists long ago recognized the importance of *jus post bellum* as it related to the cause of and conduct during war.

Identification of the connection between just cause and *jus post bellum* is not limited to classical just war thinking. For example, contemporary political theorist Gary Bass briefly touches on the interconnection: “a number of conclusions about the demands of *jus post bellum* follow from extant just war theory. *Jus post bellum* is connected with *jus ad bellum*, for instance, in that the declared ends that justify a war—whether stopping genocide or preventing aggression—impose obligations on belligerent powers to try, even after the conclusion of the war, to bring about the desired outcome.”³⁰⁸ There is, then, historical and

distribution and return of property, restitution and reimbursement, punishment, and settlement terms that provide a reasonable assurance of future peace. Disputation VIII, 5. pp. 839. Following those before him, Vitoria addresses similar *post bellum* questions, such as the discharge of confiscated property, punishment and killing of the guilty and innocent, and territorial seizure, acquisition and return. Francisco de Vitoria, *Francisci de Vitoria De Indis et De ivre Belli Relectiones* (Washington, D.C.: Carnegie Institution of Washington, 1917). esp., *The Second Reflection On the Indians, Or on the Law of War Made by the Spaniards on the Barbarians*. pp. 163-187.

³⁰⁶ Vitoria, *Francisci de Vitoria De Indis et De ivre Belli Relectiones*. Section VIII, Section 5. pp. 839. In this case, Suarez was discussing the extent of permissible punitive acts and just reparations. Vattel departs from this conception and maintains that the “object of war” is the vindication of rights, defense, and future security. Vattel, *Le droit des gens; ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*. esp. bk. III and IV. bk. IV, in particular, extensively examines “The Restoration of Peace.” chps. I-IV specifically address war termination and peace treaties. pp. 343-361.

³⁰⁷ Hugo Grotius, *Hugonis Grotii De jure belli ac pacis libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur* (Washington, D.C.: Carnegie Institution of Washington, 1913). pp. 33.

³⁰⁸ Bass, Gary J. “Jus Post Bellum.” *Philosophy and Public Affairs* 32, no. 4 (2004): 384-412. pp. 386.

contemporary precedent for explicitly conceiving of the principle of just cause as containing *jus post bellum*.

In keeping with this precedent, the historian of the just war tradition, James Turner Johnson, concludes that there is a “consensus” among contemporary historians approaching the tradition “from the standpoint of theological ethics” that the classical form of just war theory included “the further requisite that the end of such war always be peace.”³⁰⁹ As Johnson notes, many of the theorists who formed the classical period of just war scholarship, and I would add those that followed them in the modern and contemporary periods, maintained the connection between *ad bellum*, *in bello*, and *post bellum*. This is evidenced by the fact that thinkers such as Augustine, Aquinas, and Grotius treated *jus post bellum* as an area of moral concern firmly rooted within the larger structure of the just war tradition. As proponents of the just peace, they staked out the theoretical commitment that not only were questions of justice after war important, they were sufficiently important to merit a direct link with just cause. *Jus post bellum* was not a further addition to the multi-part criteria of just cause, but it was a criterion that functioned as a core measure of a cause’s normative strength. If a cause’s aim or goal was not the attainment of a just peace, then the cause was *prima facie* unjust. To answer the question, “where is the action with respect to *jus post bellum*,” we can reply that, at least partly, “it is within the principle of just cause.”

5.3 Reaching Outside the Theory: A Substantive Account of *Jus Post Bellum*

The View of Just Peace: The Problem of Underspecification

While the inclusion of the concept of just peace within just cause is a profitable conceptual improvement over contending accounts of the principle, many theorists’

³⁰⁹ Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*. pp. 26.

articulations of the just peace were and are largely underspecified and generally formulated. This underspecification can be motivated for a variety of reasons. For example, a purposefully underspecified account of *jus post bellum* may arise from real or perceived political constraints. Those responsible for statecraft and war policy may be less inclined to make robust and specific moral commitments to postconflict justice (or non-moral commitments for that matter) for the very real fear that they may not live up to their goals. The political price for failure is often high.

Some underspecification may also result from theoretical commitments. One such commitment is the view that a minimal level of substantive content provides a sufficient account of what a just peace entails. The motivation here involves a philosophical commitment to *jus post bellum* minimalism.³¹⁰ For the minimalist, the content of *jus post bellum* is constituted and adequately addressed by the traditional just causes. Here the demands of *jus post bellum* involve only those that are entailed in the traditional just causes, like, say, vindicating rights after aggression. Once the victor's rights have been vindicated, *jus post bellum* has been achieved. Simply achieving this limited just cause fulfills *jus post bellum*. With such achievement construed in a minimal fashion, and completely specified in the extant principle of just cause, there is no need to further specify the substantive content of the just peace.

A third reason for purposeful underspecification is the belief that the content of a just peace is already sufficiently informed by a substantive account of the good. If just peace were, after all, sufficiently informed by an independent, comprehensive account of the good, why would it need further explication or inclusion of additional content? A theory of the good informs the normative content of just peace, the ends for which all wars are waged,

³¹⁰ See the Introduction for a discussion of minimalism.

and the ethical standards contained within the good become the referential criteria or content by which we can attempt to determine postwar justice. And since we know what the good is, by appealing to it we also know the content of the just peace; it is, by and large, a fulfillment of the good.

The central problem with these approaches is that while the formal account of the principle of just cause makes sense, proponents often neglect to provide a substantive account of the content. The issue of underspecifying *jus post bellum* has not gone unnoticed among scholars of just war theory. Williams and Caldwell argue, “the fundamental problem with this position [the just peace] is that just war theorists rarely discuss the ‘end of peace’ and what such an objective implies.”³¹¹ As the authors go on to rightly state, “[w]e can concede that there is an important link between why and how a war is fought and how it concludes, but this no more eliminates the need for principles to insure a just peace than the existence of *jus ad bellum* principles eliminates the need for principles to insure that war is fought justly.”³¹² And why should it? The development of independent postconflict principles should, and can, work in concert with the traditional *ad bellum* and *in bello* principles; there is no reason why in closely linking *jus post bellum* with traditional just war principles one must rely wholly upon them. By situating *jus post bellum* within extant just war principles, we need not necessarily end up with an impoverished theory of postconflict justice. On the contrary, a theory of *jus post bellum* that makes space for the development of independent normative postconflict content and informs and is informed by extant just war principles is an enriched theory.

A Substantive Account of Jus Post Bellum and the Implications for Killing in War

³¹¹ Williams and Caldwell, "Jus Post Bellum: Just War Theory and the Principles of Just Peace." pp. 312.

³¹² Ibid.

To avoid the problem of an underspecified articulation of the just peace, we obviously need some account of its substantive normative content. In providing such an account, we also need to ask, as Mark Evans does, “to what extent can JPB’s concept of a ‘just peace’ draw upon the same theory of justice used in the concept of a just cause?”³¹³ This question becomes particularly pressing if, as I suggest, the teleological principle of just cause’s internality criterion requires that *jus post bellum* factors into considerations and evaluations of just cause.

Evans’ question points to two issues. The first is methodological. Can a theory of *jus post bellum* appeal to the content found in just cause? It would seem that for most cases the answer would be “very little.” This is because just cause is based upon a purposefully narrow, laser-like set of reasons instantiated by a theory of defensive rights. While in just war theory both just cause and *jus post bellum* do draw from an account of rights, the justification for postconflict rebuilding is underpinned by rights that are different than those typically found in the traditional just causes for war. What are these rights? The substantive conception of the just peace should draw from the full suite of postconflict rebuilding obligations and related activities that I detailed in Chapter Two. Subject to certain provisos related to their fulfillment and allocation, these include providing stability, order, and the creation or rehabilitation of a functioning system of justice, as well as economic (re)development.

The implications of using rebuilding to fill out the substantive content of the just peace means that, for most cases, we must reach outside of the just war tradition’s principle of just cause to generate *jus post bellum* content. This is the approach that I have been thus far

³¹³ Evans, "Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of Just Occupation." pp. 543.

advancing in my theory of *jus post bellum* rebuilding, and it is predicated upon employing a cosmopolitan account of capabilities and rights to underpin the responsibility to rebuild. It is true that sometimes the justification for rebuilding will converge with the causes for a war, like in cases of providing security, but in a great many instances, like economic well-being or play, these rights will be very different.

Take the following example. The cause for war is to defend the rights of Agents X from aggression by Agents Y. In so doing, we must recognize the forfeiture of some of the rights of Agents Y. This forfeiture will likely result in the killing or maiming of those who are liable to attack, and, unfortunately, also those who are not liable. After the war is done and the cause of defeating aggression is secured, we return to respecting the rights of all of Agents Y who are no longer liable to killing since they no longer threaten aggression. Now Agents X set about their rebuilding efforts. But there will also be the exception of those who oppose the postwar scheme and make themselves liable by unjustly attacking Agents X. But the reasons for this killing come from two different causes. In the first case, it was the just cause of national self-defense. Now this cause has been achieved, the aggressor (Agents Y) repelled and defeated. But in the postconflict phase, it is the *jus post bellum* just cause that is being pursued. The reason for which violence may be done is not to defend one's nation from aggression (although at the interpersonal level, in some instances it may be to defend oneself from attack), but to advance the cause(s) of *jus post bellum*. The point here is that each of these causes rests upon a different set of rights for their justification.

This brings us to the second implication of Evans' question. This implication stems from the fact that in many postconflict settings some fighting will still occur, and this will require killing and destruction. If it is the case that we have to reach outside of the just war tradition to generate *jus post bellum* content, then this conclusion sets up a potential conflict

that exists in the likelihood that many of the demands of *jus post bellum* rebuilding do not seem to be of the type for which killing can occur. Whereas, principle of just cause is typically underpinned by a theory of rights that are justified by the logic of self and other defense, the rights found in rebuilding are based upon a cosmopolitan account of capabilities and rights, many of which do not directly correlate with self or other defense. If these are two different kinds of rights, which I believe they are, the question is, then, can the rights that rebuilding is supposed to protect and fulfill give reason for killing in war?

Independent and Contributing Causes

In light of these distinctions, how are we to view the cause of achieving the just peace through the pursuit of postconflict rebuilding when hostile unjust parties oppose it? One way is to interpret the requirements of the internality criterion as minimalistic. Under such an interpretation, the criterion could merely require that a just party do its best to advance a just peace by taking due care to ensure that its conduct during the war minimizes the jeopardizing of such an achievement. But this “due care” conception of the criterion does not seem correct. Under such logic, in Afghanistan, for which the stated cause was to halt the Taliban’s harboring of terrorists, the U.S. would only be required to neutralize the terrorist threat, ensuring in the process that they took due care to not devastate the country too badly so that a just peace could be formed by someone at some future point, upon which time no more would be required. Securing the rights of women and girls and freeing people from the grip of such extremists would not only not be required it would not be permitted.

If more is required by the just, then an alternative way to justify the pursuit of the just peace is viewing the necessary elements, here defined as those contained within

rebuilding, as “conditional” just causes.³¹⁴ In their article, “The Just War and the Gulf War,” McMahan and McKim distinguish between “contributing” and “sufficient” just aims, which McMahan now calls “independent” and “conditional” just causes.³¹⁵ Independent just causes are causes that alone are sufficient to justify a war. These causes are singularly important enough to make the cause for war just and permissibly pursued. The cause of resisting aggression is one such example of an independent just cause. Conditional just causes are causes that alone are not sufficient to justify war, but can contribute to a war’s justification and can be pursued in tandem with or subsequent to the pursuit of an independent cause.

With the distinction between independent and conditional just causes in mind, let us again take the case of Afghanistan. We begin with the independent just cause of halting the Taliban’s harboring of terrorists. This cause also requires *ceteris paribus* the pursuit of a just peace, which entails the contextually appropriate activities found in postconflict rebuilding. But the just peace is herein a conditional cause; on its own we would not say that Afghanistan could be warred against so that it can be rebuilt, and this will likely be the case for most wars.

Under one interpretation of the teleological principle, one could argue that if rebuilding activities are, in fact, conditional causes, then all we need are a good number of them (4, 6, maybe 10) that can add up to an independent just cause for war. I do not believe that this is so. One reason is because the evaluation of just cause is, unlike proportionality or

³¹⁴ I should note that, to the best of my knowledge, the requirements of rebuilding have not been previously characterized as “conditional” causes. In the literature there are three candidates (deterrence, disarmament, and lesser humanitarian wrongs) for conditional causes. See Thomas Hurka, “Liability and Just Cause,” *Ethics & International Affairs* 21, no. 2 (2007); McMahan, “Just Cause for War.”

³¹⁵ See Jeff McMahan and Robert McKim for the distinction between sufficient and contributing “just aims,” in Jeff McMahan and Robert McKim, “The Just War and the Gulf War,” *Canadian Journal of Philosophy* 23, no. 4 (1993). pp. 502-506. Also see McMahan, “Just Cause for War.”

consequentialist calculi, not an evaluation of the amount of good that results from a war, but the type of good pursued.³¹⁶ War cannot, for example, be pursued for the good that all of the rebuilding would do, no matter how great. Although this rebuilding may be viewed as a type of good, it is the wrong type of good to constitute an independent just cause. If a cause was made just by the amount of good that could likely be achieved through the pursuit of war, then we could justify interventions and wars as a way to increase peoples' capabilities.³¹⁷ One need only to reflect upon the justifications of colonialism for a stark example of this logic pursued.³¹⁸ One counterintuitive way to think of just cause as restricted by the type of cause and not the amount of good it produces is that it is even possible that a war with a just cause would produce very little good. This may make the war overall less just, not because the justice of the cause is somehow reduced but because the war may be disproportionate. While conditional causes are causes of the right type to pursue, they are not the right kind of causes to be pursued independently; even when several are combined together they do not make a sufficient cause for war.

Although conditional causes do not have an additive feature, one should not assume that there are no aggregative or cumulative considerations in determinations of the types of cause. This is easily seen in the example of a state's military unjustly killing members of its population. There is a distinction between, say, the military undertaking a single extrajudicial killing of a morally innocent citizen and killing seventy five thousand innocent citizens.

While I cannot fix a certain number to what separates a conditional cause from an

³¹⁶ On just cause as a type of aim see McMahan, "Just Cause for War." pp. 4.

³¹⁷ I am reminded here of a conversation that I had with a self-purported Communist colleague who defended China's invasion of Tibet on the grounds that it produced a great deal of good for the Tibetans.

³¹⁸ On this matter see John Stuart Mill, *A Few Words on Non-Intervention* In *Essays on Politics and Culture*, edited by Gertrude Himmelfarb, 368-84. Gloucester, Peter Smith, 1973.

independent one, the scale of abuse plays an important part in determining the kind of cause in a way that is independent from the addition of multiple lesser causes and also separate from calculations of proportionality. It is possible, then, that a conditional cause can become significantly weighty or important that it turns into a sufficient cause for war. This is often the case with human rights abuses that were not initially sufficient to justify war, but become grave and numerous enough that they cross the threshold from a conditional to an independent cause. In this sense, scale matters and can sometimes push just conditional causes towards becoming independent ones.

All of this returns us to our original question: if conditional just causes cannot be pursued independently, why is it that they can be pursued once a war with an independent just cause has been undertaken? With respect to the teleological principle of just cause, how or why can the aims of rebuilding be legitimately pursued if they are not regarded as independently sufficient? Thomas Hurka has suggested a plausible explanation for why some conditional causes may be pursued permissibly. According to Hurka, this is because of what he calls the “partly global form” of liability:

[v]ersions of just war theory that allow conditional causes...permit war only when an enemy has made itself liable by being responsible for a serious wrong, and deny that some goods, such as economic and artistic ones, can ever be relevant to justifying war. But they allow certain other goods, such as disarmament and deterrence, to become morally relevant benefits given another, independent just cause, and to do so even if there is no specific liability to the use of force in pursuit of them: the more global liability associated with the independent just cause suffices to make them legitimate goals.³¹⁹

³¹⁹ Hurka, "Liability and Just Cause." pp. 202-203. I should note that Hurka includes deterrence and disarmament as conditional causes and is reluctant to decisively include most humanitarian aims.

On this view of just cause and liability, some just conditional causes can be pursued. This is not because of an individual liability that is tied to an independent cause but because of a broader partly global type that “suffices to make them legitimate goals.”³²⁰ Hence the liability to killing that attaches to the unjust is justified not by appeal to conditional just causes, although these can count as “morally relevant benefits,” but to the independent just cause.³²¹

Let us take a simplified example. The police perform a drug bust and break into Criminal’s house. Upon entry, the police are able to seize all of the drugs and secure the scene. But the police have the belief that there is a puppy that would benefit from being removed from the house. The puppy’s life is not very good; it does not receive much exercise and is rarely taken for walks. To get the puppy, the police need to break down the door to the room of Criminal’s daughter. It seems to me that without Criminal making himself liable to the original search, he would not have been liable to having his daughter’s door broken down. That is, the removal of the puppy by force would not have constituted an independent cause. But since the police have pursued the initial independent cause of the drug bust, they are permitted to pursue the conditional cause of removing the puppy. The liability for which the puppy’s removal is attached is the “global form.”

Now it is possible that there are some activities of rebuilding that will constitute independent causes. Providing security and protection from widespread, systematic, and grave rights abuses is one such example. But there will undoubtedly be other activities, likely the great majority of rebuilding, which should be characterized as conditional just causes. Hurka’s approach is attractive because it retains the role that liability to killing plays in the pursuit of a just cause, but is not so implausibly restrictive that it fails to permit the relief of

³²⁰ Ibid.

³²¹ Ibid. pp. 202

the suffering of a majority of a population who has the right to be rebuilt. This point can be drawn out in the case of Afghanistan. If it were the case that the Taliban had agreed to give up Osama bin Laden and the other terrorists responsible for the crimes of 9-11, the independent cause of the U.S. would be achieved. Let us further imagine that the U.S. wanted to fulfill the additional causes of halting the implementation of draconian Sharia law and also rebuilding the infrastructure damaged during the war—two causes that, I believe, most would agree were not independent just causes but were mere conditional causes. Let us further imagine, and this is the case in reality, that the Taliban opposes these two aims. I think most would agree that if the U.S. had failed to pursue these aims, leaving a Taliban to do their will and an Afghanistan ravaged from war, they would be perpetrating an injustice.

If we return to Hurka's partly global form of liability, we can see how individuals not liable to killing in war in the pursuit of a mere conditional cause alone may become liable when a conditional cause is pursued in the presence of an independent cause. Why is it, then, that certain conditional causes can be pursued? Hurka argues that the explanation for the legitimate pursuit of two conditional causes, deterrence and disarmament, can likely be found by drawing upon a parallel with criminal punishment.³²² In such a case it is impermissible to punish someone prior to commission of a crime even when there is very good reasonable suspicion that she will commit it. But once an individual has committed a crime, it is permissible to take further action to promote prevention and deterrence. As Hurka notes, "[t]his view of punishment still requires liability, since only a criminal who has made himself liable by criminal action may be punished. But the liability is only the more global one of having acted criminally rather than any specific liability for incapacitation by

³²² Ibid. pp. 204-205.

imprisonment.”³²³ While this parallel may help explain why the conditional causes of prevention and deterrence can be pursued when combined with an independent cause, as Hurka himself admits, the analogy is less persuasive when applied to the objectives of postconflict rebuilding.³²⁴

Although I agree with Hurka, and I think that an argument can be made for a breakdown in the analogy between deterrence and rebuilding, I do think that the analogy between prevention and rebuilding remains coherent. Measures are permissible when they help in preventing and ensuring that an imprisoned criminal cannot engage in the future act of forming gangs who extort, make the streets unsafe, and who shoot out the street lights to make drug sales, murders, and muggings easier. Locking up someone for merely considering such acts (but not taking the steps to put a plan into motion) would be impermissible. But once someone is incarcerated, further preventative steps can be taken. Similarly, harming unjust opponents who were already liable to killing for wrongs associated with an independent just cause can also prevent their stymying of rebuilding efforts, which can, in turn, help prevent future conflict. The liability here is Hurka’s more global one of having acted unjustly “rather than any specific liability for” the foregoing wrongs.³²⁵ Such unjust opponents often want to keep people impoverished, women ignorant and uneducated, and the level of development low because it permits them control. But we know that having unjust thugs in control of a territory is not good for the just agents who just fought them and is even worse for those living under their tyranny. This latter point underscores that in addition to preventing future crimes and attacks from such individuals, it also helps in

³²³ Ibid. pp. 204.

³²⁴ Ibid. pp. 208. Here Hurka is discussing the specific aim of combatting lesser humanitarian wrongs like the Taliban’s oppression of women.

³²⁵ Ibid.

removing the root conditions of future conflict. Poverty and injustice can be fertile ground for future conflict, and rebuilding can help prevent such seeds from being sown.

This leaves nothing said about the obligations to the beneficiary population, nor their expectations. I have discussed such obligation at length throughout the dissertation, but I have said less about the expectations that a population may have after war, especially after an intervention that is humanitarian in nature. A population's reasonable postwar expectations are important because when they are not met they can turn what may be a potential ally into an enemy. Leaving a community utterly devastated and suffering the ravages of war is bad enough, but it is potentially worse (from a pragmatic point of view) if the community's expectations for rebuilding are not met and such failure is attributed to the just party who has just walked away. If I am shipwrecked and starving and you approach me with a potential rescue but only leave me with a crust of bread, this will certainly breed resentment, animosity, and, insofar as I have the capacity, the potential for future conflict. In this sense, rebuilding again can attach to the notion of prevention.

As I have argued, it also seems that as a matter of justice there is an obligation to rebuild, either on the part of participants of a war or nonparticipant third parties. Here the analogy with prevention does not capture the right to be rebuilt, or more accurately, the rights to be rebuilt and the capabilities that rebuilding can help make possible. On their own, these rights and capabilities do not seem to justify killing and maiming, but there is something intuitively attractive about fulfilling these rights if left with the choice of walking away from a postconflict society. And herein is the conundrum: if these rights do not typically permit killing and maiming for their fulfillment, why is it that in a postwar setting they can? I believe that the partly global form of liability begins to help answer this question.

5.4 The Teleological Principle of Just Cause: A Restatement

In light of this analysis, the teleological principle of just cause is in need of a restatement. I propose the following principle:

A just cause is the pursuit of war under the condition that “those attacked are liable to be warred upon.”

The ends of this pursuit include independent just cause(s) that are separate from jus post bellum and, subject to the internality criterion, ceteris paribus both independent and conditional jus post bellum just cause(s).

As we can see, this formulation is predicated upon the view that the purpose or aim of a war is twofold:

- 1) Achievement of the independent just cause(s).
- 2) Achievement of the *jus post bellum* just cause(s).

5.5 Conclusion

In this chapter I began with a formal account of a teleological principle of just cause. I have argued that this view of just cause has historical origins rooted in the just war tradition, but that they have remained largely underspecified. To overcome this problem, I offered a substantive account of the principle. Drawing from distinctions recently made in the concept of just cause, I went on to explore the relationship between just cause, liability, and *jus post bellum*.

Admittedly, this is a rough first cut at examining how rebuilding activities may constitute conditional causes. These reasons only begin to scratch the surface of intuitions that we have about rebuilding. We may likely find that when it comes to pulling the trigger, the reasons associated with *jus post bellum* for which killing can occur may be much less than those activities demanded by a theory of rebuilding. The implications of this possibility remain uncertain, but one potential outcome is that the conceptualization of the just peace will require much less rebuilding on the part of the just when such activities require killing

the unjust. In this way, it may be possible that just cause, and by my definition the just peace, come somewhat apart from the suite of activities required in rebuilding. If the goals of just peace are not contributing causes, and harm to even the unjust cannot be perpetrated to achieve them, then much of the demands of postwar rebuilding can only be fulfilled when the guns have truly fallen silent. I admit that there is something seemingly paradoxical in the idea of killing to rebuild. This is especially so where elements of the population who are not associated with the independent just cause take up arms to violently oppose rebuilding efforts. And this may get to a point where it is not out of enmity for rebuilding *per se*, but a result of having grown tired of having their affairs intervened in by outside forces. It would seem, then, that there is a fine line between just rebuilding activities and unjust intervention. But the fact remains that if a just force walks away from a war with their independent just cause met but with a suffering vanquished population, there is something deeply intuitively wrong.

Chapter Six

Proportionality and *Jus Post Bellum*

Introduction

Wars can begin justly and they can end well, but many of our conclusions and judgments about war turn on issues of conduct — that is, how they are fought. Even wars with the best causes can be fought badly. On its own merits, we ought to care about such *in bello* conduct. The result of a badly fought war is more harm, more suffering, more destruction, and more killing and maiming; but there is another reason, largely unexplored in the just war tradition, for why we ought to care about *jus in bello*. Wars fought badly also help shape and determine the contours of the peace that follows. In some cases, wars are fought so indiscriminately and so disproportionately, that such behavior makes postconflict peace nearly impossible to obtain. Given this importance, how is it that a theory of *jus post bellum* can aid us in our search for answers regarding what can be done while a war rages on? And how can the *in bello* ethics of fighting help form our theory of *jus post bellum*?

It is widely agreed upon that in order for a war to be begun and fought justly it must be proportionate. Despite this agreement, and the long history that the principle of proportionality has in the normative theorizing about war, the concept remains ambiguous and elusive. This ambiguity is, in part, driven by multiple conceptions and theorizations of the principle. While the content of the principle and what it requires remain matters of dispute, there are, nevertheless, some areas of general agreement. It is generally agreed upon that proportionality is a constraint on harm, and in order for this harm to be justified it must be instrumental in pursuit of the given end. The harm is, in turn, weighed against the value of the given end. If the good in question outweighs the harm, the act is proportionate; this

applies to both the harm that can be caused by going to war and harm incurred from acts that occur during war. This points to the fact that within the just war tradition, proportionality has historically been treated as a two-part principle. The first part assesses proportionality in the run up to war, commonly known as *jus ad bellum* proportionality. *Ad bellum* proportionality calculations assess the goods and harms that can occur if a war were to be undertaken. The second type, *jus in bello* proportionality, considers the harms resulting from acts occurring during war.³²⁶ Although this division between *ad bellum* and *in bello* proportionality is a common staple of contemporary just war theory, there remains debate on what counts as the ends, what counts as the goods, and what forms the basis of such a calculation.³²⁷

This commonly held construction of *ad bellum* and *in bello* proportionality raises two important issues. First, the goods that are commonly counted as an expected result of a war, and that form the basis of the relational criteria for *jus ad bellum* proportionality, are problematic. This problem results from the inclusion of goods within the proportionality calculation that are ambiguous and far too expansive, a point that will expand upon in the following section. The second issue is that the common approach for assessing *in bello* proportionality ignores both the justice of combatants' cause(s) and the justice of their aims. Put plainly, *in bello* proportionality calculations typically do not take into account the justice of the ends being pursued by a fighting force. Under this view, both just and unjust

³²⁶ Although, strictly speaking, this need not necessarily take the *goods* of an act within war as a measure of proportionality. In fact, the articulation of proportionality found within statutory international humanitarian law is agnostic on the "good" of an act. Instead, it takes the military advantage of an act as the principle referential criterion. For example, see the "1977 Additional Protocol I to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts ". Art.51, (5)(b).

³²⁷ There is somewhat more settled agreement on the aspect of harms; they are typically those that affect innocent civilians. These could be unintended killing, maiming, and destruction of property, infrastructure, environmental damage, and so on.

combatants can be *in bello* proportionate without regard to the justness of the ends they pursue. Following the revisionist variant of just war theory, I think this is wrong, and I mean to argue that this orthodox conception of proportionality results in a morally untenable position for proponents of *jus post bellum*.

Like in Chapter Five, my aim is to continue explication and analysis of traditional just war principles. The central focus of this chapter is on unpacking how proportionality is related to the concept of *jus post bellum*. I will discuss two features of proportionality. The first feature addresses the relational criteria that constitute a proportionality calculation. In addressing this issue, we can then examine the second feature of proportionality by asking, in turn, how the appropriate goods and harms that form the basis of proportionality help inform and are informed by our views on *jus post bellum*. I conclude the chapter by providing a reconceptualization of the principle of proportionality that is informed by *jus post bellum*, while recognizing that this reconceptualization cuts against the orthodox view of the principle of proportionality as it is most commonly found in the just war tradition. I will present my argument through employing the “historical approach,” focusing on the history and historical usage of the concept of proportionality.³²⁸

6.1 *Ad Bellum* Proportionality: Weighing Goods and Harms

Within the just war tradition it is almost universally agreed upon that in order for the undertaking of a war to be just, it must be proportionate. This *ad bellum* criterion of proportionality says that the destructiveness, evils, or harms caused by a given war should not exceed the goods that the war brings about. As is obvious, this condition places constraints upon the goods and harms that can be assessed during the evaluation of a war.

³²⁸ For a discussion of the historical approach to just war theory see Cian O'Driscoll, "Divisions within the Ranks? The Just War Tradition and the Use and Abuse of History," *Ethics & International Affairs* 27, no. 01 (2013).

While there is agreement to the imposition of such a set of restrictions within a proportionality principle, what constitutes or comprises these restrictions is a point of dispute. In fact, within the literature, theorists offer a wide range of what they believe should constitute the goods and harms weighed in a proportionality calculation. While such variance can be problematic in itself, the lack of consensus on the specific goods and harms is a subordinate problem. The primary issue rests with the *types* of goods and harms that are to be weighed when assessing the proportionality of pursuing a just war.

Within much of the just war literature, the goods calculated in the proportionality principle are often open ended, imprecise, and not restricted. Take, for example, the oft-cited Pastoral Letter issued by the U.S. Catholic Bishops. Concerning proportionality, the letter states, “the damage inflicted and the costs incurred by war must be proportionate to the good expected by taking up arms.”³²⁹ The good to which the bishops refer is unclear. Not only does this view of the expected good to be assessed lack any real specificity, but also it is problematically unrestricted. Are we to count such good of “taking up arms” as, say, world economic growth or an appreciable increase in space technology and exploration? This is certainly a good for the world, but is this the *type* of good that should count in taking up arms? Certainly not. By not restricting the resultant goods in question, this articulation of the proportionality principle can be interpreted to count any and all expected goods that are the result of the war, even those that are only remotely related to the results of the conflict. This seems an insufficient basis upon which to judge the proportionality of the resort to war.

Others use variations of consequentialist calculi as a measure for *jus ad bellum* proportionality. In using the German invasion of Belgium as an illustrative case, Coppieters

³²⁹ *The Pastoral Letter issued by U.S. Catholic Bishops*. As published in Jean Bethke Elshtain, ed. *Just War* (NY, NY: New York University Press, 1991). pp. 101.

and Fotion specifically advocate for counting all benefits and harms in *ad bellum* proportionality: “Proportionality is a measure of overall benefits and harms. Neither principle measures benefits and harms from the point of view of one side only. Rather, they both take everyone’s interests into account—including the potential enemy.”³³⁰ In this case we might find the spirit of this language admirable—to consider not only the cost to one’s own “side” but also those that the enemy may potentially bear—but even a generous reading cannot avoid the fact that in the letter of the principle we run into a problem. The fundamental issue is that overall benefits are too expansive to form the basis for the referential criteria in which proportionality is weighed. Imagine, for example, that we have a population that has a just cause for war. They are also a population that derives great psychological joy from war; engaging in this war would bring them very great happiness. Are we to count this benefit in our overall calculation? Clearly, there are certain types of goods that should be discounted or, in this case, excluded altogether. These include those benefits that arise from the desire to harm and subjugate others simply for the pleasure that is derived from such suffering.

Furthermore, to what extent are we to take into account harms to which unjust combatants are possibly subject? Should these harms be counted equally or should some harms to certain people be discounted? If all battle deaths were equal, then a ratio of comparatively larger amount of deaths of unjust soldiers to just soldiers (say, 501 unjust soldiers die and 300 just soldiers die) would make the resort to war *de facto* disproportionate. If this were the case, an innocent person who kills three attackers in self-defense acts

³³⁰ Bruno Coppieters and Nick Fotion, eds., *Moral Constraints on War: Principles and Cases* (Lanham, MD, Boulder, CO, New York and Oxford: Lexington Books, 2008). pp. 128. The additional principle in “neither” principle that Coppieters and Fotion refer to is the just cause interpretation of the likelihood of success. It has little bearing on the aspect of the proportionality definition I wish to discuss.

disproportionately. Even if each attacker tried to kill the innocent victim subsequent to the killing of her predecessor, the innocent victim would have to stop after killing the first. Any killing that takes more lives than those being saved, even if in just self-defense, would be disproportionate under this view. This is deeply counterintuitive, and it seems that harms to unjust combatants should be discounted, at least somewhat.

This is not to say that the death and harms of the unjust do not count at all. It may be the case that a vastly larger number of unjust enemy combatant deaths do factor into proportionality considerations. We may, in fact, conclude that a war that would entail killing ten thousand unjust soldiers to save one just soldier is not proportionate, but it nevertheless seems that the deaths of unjust soldiers should not be calculated equally.³³¹ It then seems that the harms that even the unjust are subject to should count in an *ad bellum* proportionality calculation, and that there is some sort of upward threshold that we reach when considering the deaths of the unjust. I cannot pursue such intricacies here, but what is unclear, at least from Coppeters and Fotion, is what this should be.

While the harms and benefits affecting one's potential enemy should be calculated, even if they are discounted, what about interests? Do Coppeters and Fotion really mean *everyone's* interests? Certainly some interests need to be discounted from friend and foe alike. It seems odd to include the interests of rabid fascists who desire nothing more than domination of others. Or what about terrorists bent upon sowing unjust death and destruction? A reasonable interpretation of the authors' argument may be to take everyone's interests into account and reject those interests that are unreasonable. Consideration of

³³¹ Miller makes the argument that the harm of unjust combatants' deaths should be heavily weighted against the good they produce, at least in an *in bello* proportionality consideration. See Richard W. Miller, "The Ethics of America's Afghan War," *Ethics & International Affairs* 25, no. 02 (2011). pp. 103–131.

everyone's interests need not mean that we take all interests seriously. Under this interpretation, the authors' view seems more plausible. Nevertheless, this articulation of the principle remains problematic. If we are to take everyone's interests into account, what is the point of reference for adjudicating competing interests in such an interest-based principle of proportionality? An unjust enemy clearly has an interest in not being killed and defeated, as does the just fighting force. Without a way to make stable judgments concerning interpersonal interest comparisons, it is unclear how such a principle would function. Like in certain versions of consequentialism, there may be a way to adjudicate such comparisons, say, discounting repugnant preferences. Unfortunately, the authors do not say what these adjudication measures may be. In any event, interests do not appear to be an appropriate consideration on which to base proportionality.

Proportionality and Justice

Such expansive conceptualizations of the goods that count in *ad bellum* proportionality calculations result in significant problems for these versions of the principle. This results in principles that are ambiguous and unnecessarily open-ended, diminishing their theoretical appeal and effectiveness in application. What, then, are the proper referential criteria? In its most persuasive formulation, or at least so I will argue, the proportionality of a war is tied to the harms caused by the war and their relative balance when weighed against the goods brought about through the pursuit of the war's just cause(s)—what I call the justice-based principle of proportionality.³³²

Orend offers a partially similar formulation of *ad bellum* proportionality when he ties the benefits of a just war to the justice of the cause: “[o]nly if the projected benefits, in terms

³³²McMahan and Hurka, respectively, take a similar approach to proportionality. Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33, no. 1 (2005); McMahan, *Killing in War*.

of securing the just cause, are at least equal to, and preferably greater than, such costs as casualties may the war action proceed.”³³³ I take Orend to mean here that it is the ends that are contained in the just cause(s) that form the basis of referential criteria to which a proportionality consideration must appeal. Yet, it is not clear that this more restricted view is to what Orend is referring. Orend goes on to stipulate that his proportionality principle “mandates that a state considering a just war must weigh the expected *universal* (not just selfish national) benefits of doing so against the expected *universal* costs.”³³⁴ Under Orend’s formulation of the principle, these universal benefits and harms are at least partially bounded by being tied to justice (of the cause), but while the considerations of harm and benefit are tied to the just cause, they are, nevertheless, still universal in scope. Are we really to weigh the *universal* benefits and harms? The benefits of all individuals on earth? Unjust soldiers? Hateful despots? Or what about the joy of those residing in an opulent seaside retirement community who hold huge stock portfolios in weapons manufacturers and who can expand their champagne tastes as a result of their increase in share value because of the war? The list could go on and on. The merit of Orend’s position is that it recognizes that it is plainly incorrect to weigh potential, foreseen, or expected goods in the resort to war that are not tied to the justice of the cause. Unfortunately, and this is to say nothing of the fact that Orend limits the application of this principle to only states, we find an untenable account of the goods and harms that are to be weighed, and again encounter an issue similar to that found in the Pastoral Letter and Fotion and Coppeters’ formulation: an unrestricted, open-ended, and in this case, universal account of benefits and harms

³³³ Orend, *The Morality of War*. pp. 59.

³³⁴ *Ibid.* emphasis original.

As opposed to overall benefits of a war or the consideration of utilitarian interests, the goods that count in *ad bellum* proportionality should be those that are directly related to the just cause for war. The good that results from, say, a population's satisfaction from killing or increased economic activity are not the types of goods that should count against the harms that war may bring about. They are not the kinds of goods for which individuals can be killed or maimed, a constitutive activity of war. Obviously, more could be said here, and I will provide a fuller account of the justice-based principle of proportionality in Section 3, but before providing this account, let us turn from the current explication of *jus ad bellum* proportionality to *jus in bello* proportionality.

6.2 The *Ad bellum* and *In Bello* Division of Proportionality

While the problem of ambiguity and open-endedness in the calculable criteria of *ad bellum* proportionality principle are notable, a second issue found in orthodox conceptions of *in bello* proportionality is cause for deeper concern. This problem arises from the omission of the requirement for the presence of justice in the ends being pursued in calculations of *in bello* proportionality. This is partly because in its traditional formulation, proportionality is generally considered two distinct principles: one principle pertains to considerations of the proportionality of going to war (*ad bellum*) and another principle is related to the proportionality of acts in war (*in bello*), each with their own goods and ends to be assessed. This division is in itself unproblematic, and I think that it is correct. We need to, after all, assess the proportionality of a war before it starts and while it is in progress, but while *ad bellum* proportionality requires the presence of justice, *in bello* proportionality does not. As we shall see, this results in an ethical incoherence that presents significant issues for *jus post bellum*.

There is a long history of treating proportionality considerations for acts occurring during war as separate from the justice of their goal. Although we find a degree of pluralism among views, two identifiable lines of thought emerge in this approach towards proportionality. The early international jurists considerably developed the first line of thought; notable among them was Vitoria for his views which helped further the “independence thesis,” the view that ethical considerations concerning *jus ad bellum* are separate from those involving *jus in bello*, including considerations of proportionality.³³⁵ The second development has a lineage in late modern and contemporary political and ethical thought, where Sidgwick and Walzer, respectively, did much to advance the independence thesis. While the arguments of these thinkers are related, they possess sufficiently distinct features in their treatment of proportionality to merit independent discussion.

Epistemic Uncertainty and Simultaneous Ostensible Justice

Vitoria’s view of *jus in bello* hinges upon a key central premise: if we cannot make definitive, objectively true determinations of the justice of a fighting side’s cause, then we are largely confined to divorcing considerations of justice from states’ and soldiers’ permission to engage in war. Under this view, we can try to prescribe when kings and statesmen can go to war and for what reasons war may be appropriate, but when fighting actually occurs there is no stable way to determine the justice of the respective sides. Accordingly, this necessitates that we must treat each side as if they are both simultaneously just and structure our just war principles accordingly.

Vitoria’s writing on war did much to develop the view that assessments of *in bello* proportionality should not contain the justice of a party’s goal as a relational criterion against which to weigh harms. The reasoning behind this is clear if we turn to Vitoria’s work, “On

³³⁵ McMahan discusses the problems that this view presents. McMahan, "Just Cause for War."; McMahan, *Killing in War*.

the Law of War,” where he argued that because of our inherent epistemic limitations, we lack the ability to act as objective arbiters of justice in our assessments of just cause—a limitation that, according to Vitoria, applies to leaders and soldiers alike.³³⁶ Vitoria recognized the obvious problem of subjective reasoning being open to fallacious judgment, a prince may well believe he has justice in his cause but simply be mistaken. In such cases, according to Vitoria, those parties holding such false epistemic belief suffer from what he called “invincible ignorance.”³³⁷ In such circumstances of genuine invincible ignorance, Vitoria, in my view correctly, calls for excusal of culpability for waging and fighting a war with an objectively unjust cause. But in an odd twist, simply being sufficiently ignorant, invincibly so, not only results in complete exculpation but also makes one in possession of a just cause. Vitoria argues that a war fought under conditions of invincible ignorance “is just in the sense of being excused from sin by reason of good faith,”³³⁸ and that, “there is no inconsistency, indeed, in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side there is invincible ignorance.”³³⁹ According to Vitoria, the possession of invincible ignorance not only holds sufficient grounds for a complete excusal of the culpability of embarking on and fighting in an unjust war, it also permitted one to justly do so, a view that Johnson has coined “simultaneous ostensible justice.”³⁴⁰

I think that Vitoria’s writing is ambiguous enough in what seems like the possibility of objective justice arising from false epistemic belief that this may cause us to wonder how

³³⁶ Unlike his discussion in “*De Indis*,” where this permission was confined to leaders, in “On the Law of War” Vitoria extends the permission to fight to rank-and-file combatants.

³³⁷ Vitoria, *Francisci de Vitoria De Indis et De iure Belli Relectiones*. pp. 178.

³³⁸ Ibid. pp. 177.

³³⁹ Ibid. pp. 155.

³⁴⁰ Johnson coined this term in Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*. pp. 175.

ostensive “simultaneous ostensible justice” is for Vitoria. It seems to me that this ambiguity can leave one to reasonably interpret Vitoria as theorizing the earthly possibility (because in his view, God knows all objective fact) that two sides can be objectively simultaneously just, and this is an odd view indeed. Take an example. Johan lives in a neighborhood where there have been numerous violent home intrusions. Fearing for his own safety and the safety of his wife and son, Johan has purchased a pistol. One night Johan is home, the power is out, and he thinks he hears an intruder. He arms himself and sets out down his stairs to investigate. In the doorway, he sees the figure of a man who has somehow entered his home. Fearing for his life, Johan calls out to the perceived intruder to halt or he will shoot. The man approaches and Johan fires. Moments later, the power returns to the house and in the light Johan discovers he has killed his son who, away at college, returned to surprise his family. We may say that Johan’s actions are excused, even subjectively justified, but we would hesitate to call his actions just. While ignorance may reduce culpability, even to the extent of full excusal, we need not conclude, as Vitoria had, that subjective epistemic belief results in a just cause.

This view of invincible ignorance, where subjective belief is equated with objective justice, did not lead Vitoria to advocate for a reduction in violence, a halt to war or a conversion to pacifism, as one might expect if the justice of a cause for killing and maiming cannot be determined. Instead, the possibility that any given side could possess invincible ignorance led Vitoria to conclude not that we should strengthen the threshold needed to resort to war but that we should instead attempt to ensure scrupulous adherence to limitations in conduct particular to acts during war. As Johnson notes, “the implication drawn from this [view] was to strengthen the limitation on violence placed by the *jus in bello*.”

³⁴¹ According to Vitoria’s logic, given the possibility of a fallacious conclusion about the justice of one’s own cause, both sides should be equally bound by a set of *in bello* rules. This is in the interest of all warring parties, after all, it could be that the side for which one fights may turn out to be the unjust one. The possibility of such a conclusion should, therefore, lead participants in war to duly exercise particular restraint while fighting. We may want to fight and kill, but given that we may be wrong about the justice of our side’s cause, we should fight with as much restraint as possible.

While I think Vitoria’s view on epistemic belief and justice is flawed, his ends were noble: to constrain soldiers from engaging in wanton, needless destruction, to limit the impact of war on civilians, and to help ensure that fighting is done with restraint. But Vitoria’s view had two unfortunate implications. While attempting to increase restrictions on *in bello* conduct, the reasoning behind Vitoria’s argument led to a more permissive principle of just cause.³⁴² Johnson notes the effect that Vitoria’s view has had on the just war tradition.

Allowing the possibility of a war just on both sides reduces the importance of the *jus ad bellum* and increases the emphasis on the *jus in bello*. This dual effect has in fact characterized the treatment of war in international law over the past three centuries, in which the *limits* to be set on war have been the subject of far more discussion than the *prohibition* of war for unjust causes.³⁴³

The problem with Vitoria’s view, and the shift in focus to *in bello* more generally, is deeper than Johnson indicates. In addition to degrading the importance of the principle of just cause, Vitoria also helped undermine what should be the greatest *in bello* restraint—the

³⁴¹ Kelsay and Johnson, *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*. pp. 18.

³⁴² I say “attempting” because this formulation of *in bello* proportionality allows for the actions of unjust actors to be considered proportionate. A feature, I will argue, that in actuality results in a *more* permissive proportionality principle.

³⁴³ Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*. pp. 190.

limitations that the absence of a just cause should place upon those fighting. By presuming the presence of at least ostensive justice on both sides, Vitoria's theory, in effect, gives equal permission for states to proportionately resort to war, and for the justice of combatants' causes and aims to be divorced from *in bello* proportionality. By deemphasizing justice in favor of rule following, and helping align just war theory towards an emphasis on the bilateral equality of combatants' war permissions, Vitoria helped pave the way in giving equal footing to combatants to pursue their causes and aims irrespective of if such pursuits are for just ends.³⁴⁴

This reduction in the importance of *ad bellum*, and the increased focus on *in bello*, became a hallmark of just war thinking during the modern period. As Geoffrey Best puts it, "while the *jus ad bellum* withered on the bough, the *jus in bello* flourished like the Green Bay Tree."³⁴⁵ The international jurists who helped shape the content of the international laws and customs of war, the lineage of which in some cases exists until the present, were responsible for much of this *in bello* emphasis.

Sidgwick and The Independence Thesis

Like Vitoria, Sidgwick advocated for divorcing *in bello* principles from considerations of justice. With respect to proportionality, Sidgwick came to this conclusion because he believed that an *in bello* proportionality principle could not be based upon the justice of combatants' ends.

In formulating the rules which civilized opinion should attempt to impose on combatants, we must abstract from all consideration of the justice of the war; we must treat both combatants on the

³⁴⁴ In fairness to Vitoria, this permission was restricted to those who truly believed they possessed a just cause or just aim, those who fought in "good faith." But, as Johnson noted, the implications were that this view has "in fact characterized the treatment of war in international law over the past three centuries." Ibid. pp. 190.

³⁴⁵ Geoffrey Best, *Law and War Since 1945* (Oxford, England: Oxford: Clarendon Press, 1994). pp. 20.

assumption that each believes himself to be in the right, and that his object in fighting is to obtain due redress for wrong.³⁴⁶

Unlike Vitoria's conception of simultaneous ostensible, the basis for Sidgwick's *in bello* proportionality principle rests upon the limits of utility comparisons. As Walzer notes in his discussion of Sidgwick's position:

There is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured. Our moral judgments (if Sidgwick is right) wait upon purely military considerations and will rarely be sustained in the face of an analysis of battlefield conditions...Sidgwick apparently thought this conclusion inescapable, once we agree to make no judgment as to the relative utility of different outcomes.³⁴⁷

In light of these perceived limitations, Sidgwick seemed to believe that the real importance lay in constructing an instrumentally efficacious principle of proportionality. Given the high frequency with which disputes about the justice of a cause occur, and the likely irresolvability of these disputes, Sidgwick argued that we need a body of moral and legal norms that limits violent conduct *during* war. For even in the absence of consensus about matters of justice of cause wars do indeed occur. In fact, this may be the very basis for the outbreak of a war.

Sidgwick's belief that we must "abstract" from the justice of the cause and look elsewhere for criteria in which to judge the proportionality of combat was motivated by the desire to achieve agreement with respect to the kinds of limits placed upon destruction that can be wrought during war. Sidgwick grounded this *in bello* proportionality constraint in the idea that disproportionate conduct was: "(1) any mischief which does not tend materially to this end, nor (2) any mischief of which the conduciveness to the end is light in comparison

³⁴⁶ Henry Sidgwick, *The Elements of Politics*, 3rd ed. (London, England: Macmillan, 1908). pp. 267.

³⁴⁷ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 129.

with the amount of the mischief.”³⁴⁸ Under Sidgwick’s view, given the difficulties surrounding subjective claims of justice, the relational criteria for *in bello* proportionality should focus upon actions related to victory and mischief, not justice.

The problem with Sidgwick’s articulation of *in bello* proportionality is the primacy that it gives to victory.³⁴⁹ In war, victory is one of the most important goals, if not the most important, and because Sidgwick’s principle provides for the harms (mischief) to be weighed against the ultimate end (victory) of the war, the principle is at risk of allowing just about any amount of harm for its achievement. The difficulty here is that insofar as the conduct is deemed necessary and conducive towards achieving the end, this account of proportionality permits the perpetration of widespread and grave harms in the pursuit of winning. Sidgwick’s principle is too permissive, running the risk that interests, values, and protections of innocent individuals become subordinate to the goal of victory. As long as acts are conducive to winning, they are proportionate. As Walzer notes, the problem here is that Sidgwick “sets the interests of individuals and of mankind at a lesser value than the victory that is being sought.”³⁵⁰ In addition to permissiveness, and this is my broader point, Sidgwick’s abstraction from the justice of the cause permits the pursuit of unjust aims by unjust combatants to be deemed potentially proportionate. Combatants with unjust cause and unjust aims working towards victory can sow an incredible amount of mischief. As we shall see, this approach to *in bello* proportionality has broad implications for *jus post bellum*.

³⁴⁸Sidgwick, *The Elements of Politics*. pp. 268.

³⁴⁹ Sidgwick acknowledged that the second proposed criterion of his proportionality principle was “inevitably so vague that as to leave room for great differences of opinion.” Ibid. pp. 267.

³⁵⁰ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 129.

Despite these issues, the independence thesis remains not only the mainstay of moral formulations of proportionality, but it also dominates the law of armed conflict. Stating that the laws of war apply “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,” the preamble paragraph of the Geneva Conventions Additional Protocol I articulates the separation of *ad bellum* and *in bello* in proportionality³⁵¹ Article 51 of Protocol I goes on to define an *in bello* disproportionate act as “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.”³⁵² The goods, in this case the ends of direct military advantage, apply without prejudice to both just and unjust combatants. Justice of the cause and the final aims of those fighting are again abstracted from; an unjust party, fighting for an unjust cause, and without any aim for a just ending or a just peace can fight proportionately insofar as the acts are not “excessive in relation to the concrete and direct military advantage anticipated.”³⁵³ As the preamble and Article 51 make explicitly clear, there is no distinction made between combatants who possess a just cause or a just aim and those who do not.

Acts of aggression are outlawed in international law, and embarking on an unjust war of aggression cannot meet the *ad bellum* requirement of proportionality, but once a state engages in war, the *in bello* acts in question can be proportionate insofar as they adhere to

³⁵¹ "1977 Additional Protocol I to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts ". Preamble.

³⁵² Ibid. Art. 51, (5)(b).

³⁵³ Ibid.

prohibitions stipulated by international humanitarian law.³⁵⁴ The reasons for such a division between *ad bellum* and *in bello* proportionality in international law are complex and I cannot explore them here, but whatever reservations we may have concerning the ethical coherence of this division, there is some persuasive practical logic of relying upon the independence thesis in its application to international law.

One argument in favor of the independence thesis is that there is a division between international law and morality. This argument does not reject the possibility of objective moral claims concerning the justice of a cause, nor does it deny the ethical breaches often committed by unjust combatants, but it maintains that even in the face of such objective determinations, the appropriate focus of law should be on constraining the present behavior of warring parties. While there may be moral reasons to care about the justice of a given side's cause, from the position of legal enforcement, a division in proportionality is pragmatically efficacious. When institutions and mechanisms established for the adjudication of conflict resolution and the maintenance and protection of peace and security (such as the United Nations Security Council), break down or are circumvented, then, so the argument goes, it makes good sense to attempt to constrain conduct during war. Even in the face of moral prohibitions unjust wars will be fought, and it is the task of international law to ensure that those fighting will scrupulously adhere to the legal constraints set forth. What is desirable is reconciled with what is possible.

³⁵⁴ I should note that in keeping with the historical trend, the primary focus of international law has been placed on *in bello* conduct. For example, the Rome Statute of the International Criminal Court (ICC) outlaws genocide, crimes against humanity, war crimes, and aggression. All of these are *in bello* crimes, with the exception of aggression. For years, aggression had formally been included in the ICC statute. It was not until 2010, eight years after the treaty came into force, that this formal inclusion gave way to substantive content after state parties finally agreed on a definition.

I readily admit arguments that favor the independence thesis on legal grounds can be persuasive. But there are certainly implicit moral issues at work when confronted with the equal legal permission for combatants to kill, maim, and destroy proportionately irrespective of their moral status; a status that is, in my view, informed by the justice of the ends for which they fight. These moral issues persist even in the face of pragmatic reasons for this legal division. Given the horse trading, compromise, and bullying of international politics, it is no surprise that this is the principle that exists in international law. Nevertheless, these flaws are apparent, serious, and very much contribute to the kinds of abhorrent political violence that are today still considered proportionate. Despite these issues, given the constraints of the world in which we live, this principle may have been, and may very well still be, the most agreeable legal articulation of proportionality. Unfortunately, what is possible in global politics may not always reflect what is morally just.³⁵⁵

6.3 Proportionality and *Jus Post Bellum*

Ad Bellum and In Bello Proportionality

As I detailed above, the goods that count in *ad bellum* proportionality should be those that are directly related to the just cause for war. I noted that this idea was in need of further exploration when I first made this claim in the earlier section on proportionality and justice. This idea is in keeping with the conceptualization of just cause that I detailed in Chapter Five, where a just cause refers to the types of aims or goals of a given war, and because this is a restrictive notion there are numerous aims that are excluded even if they would produce goods. These include such aims as spurring technological innovation, raising a country's GDP, or increasing the happiness of a population. While these are all goods, they are the

³⁵⁵ Thanks to Jim Glass for pushing me on taking more seriously the “politics of interest” and the likely opposition and intransigence of states to the demands of rebuilding.

wrong type of goods for which war can be pursued. Unlike counting some goods that may result from the war, say, decreasing unemployment or increasing psychological pleasure, under the justice-based principle, the inclusion of such goods is excluded. When the relational criteria for what counts in assessments of proportionality are restricted to those that result from a just cause, the consequence is that we find a narrowing of the types of goods that can count towards making resort to war proportionate; the result is a more restrictive *ad bellum* proportionality principle.

What about *in bello* proportionality? We can clarify our thinking with respect to *in bello* proportionality by applying a distinction between an overall just cause and the goal of an act of war, what we can call a “war aim.”³⁵⁶ War aims occur once a war has begun, that is, they occur during a war. War aims are, thus, subject to the constraint of *in bello* proportionality, for which the harm of the aim must be weighed against the good produced by the end. This structure parallels the common conceptualization of *in bello* proportionality. An important feature of a war aim, and one that sets it apart from *ad bellum* proportionality, is that it can be just or unjust, proportionate or disproportionate, in a way that does not have to correlate with the justice of a combatant’s overall cause. Now this may at first seem like a re-articulation of the orthodox conception of *in bello*, where the permissibility of the aims of combatants are abstracted from the justice of their ends. But as we will see in a moment the logic behind it is not.

There is an important point to be made here, and it derives from the view that the application of justice for assessments of proportionality applies to both *jus ad bellum* and *jus in bello* proportionality calculations. As we have seen, in orthodox just war theory, the commonly held view is that *ad bellum* and *in bello* principles of proportionality have different

³⁵⁶ McMahan, *Killing in War*. pp. 19.

referential components. This is displayed in the principles of Vitoria and Sidgwick and in international law. Recall that under the international law variant of the principle, the proportionality of an *in bello* act is determined not by the justice of the aim but by the act's relation to direct military advantage. This results from the belief that *jus ad bellum* and *jus in bello* are, in Walzer's words, "logically independent."³⁵⁷ Walzer's reasons for endorsing this independence are complicated, and I cannot fully explore them here, but he tells us:

In our judgments of the fighting, we abstract from all considerations of the justice of the cause. We do this because the moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience.³⁵⁸

Like Sidgwick and Vitoria, Walzer believes that assessments of the proportionality of an *in bello* act of war are independent from the justice of a cause and the justice of a war aim. Much of this view hinges upon what is implicit in the previous passage but what Walzer elsewhere explicitly calls "the moral equality of soldiers," the view that soldiers are morally equal and share equal permissions, rights, and restraints on the battlefield.³⁵⁹ As is obvious, views that adhere to the independence thesis are agnostic on whether or not the agent(s) in question possess a just cause or have a just aim.

This independence thesis has recently suffered from significant, persuasive criticism, primarily originating from the analytical variant of just war theory.³⁶⁰ The central critique of those who reject the thesis comes from the idea that justice matters in both *ad bellum* and *in bello* principles. The result of this view is that because unjust combatants lack a just cause,

³⁵⁷ Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 21.

³⁵⁸ *Ibid.* pp. 127.

³⁵⁹ *Ibid.* pp. 34.

³⁶⁰ For the strongest critique of the thesis see McMahan, "Just Cause for War."; McMahan, *Killing in War*. For some potentially problematic implications of this view of liability and proportionality see Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay."

they typically cannot satisfy the *in bello* proportionality requirement.³⁶¹ The idea here is that the ends for which an act of war's harms ought to be assessed against are those attached to a just cause or a just war aim; since unjust combatants lack justice, they cannot act proportionately while fighting. This is an important and interesting thesis that has generated significant debate, but my concern is with its implications on *jus post bellum*, an area that remains unexplored.

One final point is in order before turning to *jus post bellum* and this involves returning to the distinction between a cause and a war aim. A moment ago, I claimed that a war aim could be just or unjust, proportionate or disproportionate, in a way that does not have to correlate with the justice of a combatant's overall cause. I also claimed that under almost all circumstances because unjust combatants lack a just cause they cannot satisfy the *in bello* proportionality requirement. This leaves open the possibility that combatants with an unjust cause can, in limited circumstances, act proportionately. How can these two related claims be so? The two preceding claims rest upon the notion that justice matters in *in bello* principles; in order for an aim of war to be permissible, it must be for just ends. Given this simple premise, we can see how it is possible that a group of combatants with an overall just cause may have a war aim that is unjust; whereas, combatants with an unjust cause may have a just war aim. This means that combatants with an unjust cause but a just war aim can act *in bello* proportionately in its pursuit. For example, combatants with an unjust cause could justly aim to defend noncombatants from grave humanitarian breaches perpetrated by combatants acting with a just cause, but with the obvious unjust war aim of perpetrating humanitarian

³⁶¹ As I discuss below, there are some circumstances in which unjust agents may act proportionately. On this point see McMahan, "Just Cause for War," pp. 6. For a lengthy discussion of the view that unjust combatants cannot satisfy *in bello* proportionality see Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114, no. 4 (2004). esp. pp. 708-718.

violations. Even with these distinctions in place, it is true that in most cases the aim of a given side's combatants will correlate with the justice of the cause, making it very difficult for unjust combatants to satisfy the *in bello* proportionality requirement. This is because both the *ad bellum* and *in bello* principles of proportionality share the requirement that in order for the goal that is being pursued to be proportionate, it must be just. This is at significant variance with standard orthodox articulations of *in bello* proportionality.

Jus Post Bellum Proportionality

We can see how restricting the referential content of proportionality assessments to include those found only in just causes and just aims can be construed as taking more seriously the *jus post bellum* idea of a just ending of war. This is because such a formulation of proportionality rules that many of the acts of unjust combatants will be disproportionate. Since unjust combatants are fighting for unjust ends, their victory will almost always result in an unjust ending. In this sense, the justice-based proportionality principle already contains a minimal regard for the just ending of a war. Even absent an articulation of a just peace, it is obviously preferable to have a just party victorious over an unjust party. By excluding acts of war that do not aim towards justice, this revisionist proportionality principle already elevates the standing of *jus post bellum*, but not all ends of war are created equal. A just peace is often preferable to just a peace. We can find a notion similar to this in the idea that the aim of war is not a restoration of the *status quo ante bellum* but an improvement upon it. Partly quoting Liddell Hart, Walzer, who is perhaps the most forceful advocate of the independence thesis, states: “[t]he object in war is a better state of peace.” And *better*, within the confines of the argument for justice, means more secure than the *status quo ante bellum*, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic

determinations.”³⁶² If this is true, it seems odd, then, that such a concern for a better state of peace, for *jus post bellum*, would permit conduct by unjust parties to be ruled as proportionate when it is at complete variance to goals such as the ones Walzer proposes.

For Walzer, the reason why such conduct by the unjust can be *in bello* proportionate rests upon the independence thesis. But in the very few pages of “Just and Unjust Wars” that Walzer does devote to war’s ends, he discusses the role that *in bello* proportionality can play in establishing a just peace in a way that is at deep variance with his steadfast defense of the independence thesis in the remainder of the work, “[i]n a just war, its goals properly limited, there is indeed nothing like winning...And that means that there are sometimes moral reasons for prolonging a war.”³⁶³ Walzer goes on to say that in such considerations, “here the doctrine of proportionality is surely relevant.”³⁶⁴ But if in cases in which just parties are to fix their *in bello* conduct of prolonging (i.e., fighting) upon the justice of the ends, it is unclear how *in bello* principles (including proportionality) apply “equally and indifferently on aggressors and their adversaries,” or how, “the rules of encounter take no cognizance whatever of the relative guilt of governments and armies.”³⁶⁵ If the ends of war are a better state of peace, and *in bello* proportionality applies equally to both just and unjust combatants, how is it that an unjust side can apply proportionality to assess the “moral reasons for prolonging a war,” when their ends are an unjust peace?³⁶⁶ If we are to balance

³⁶² Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. pp. 121-122. It is interesting that Walzer chooses a quote in which Hart tells us that the object “in” war is a better peace, not the object of war. If it were Walzer’s view that the object in war was a better peace, then this would seem to contradict his view that the object in war, at least for the unjust, is simply to win and not to necessarily achieve a just peace. I am not inclined to make too much of this and just to chalk it up as a minor prepositional infelicity.

³⁶³ Ibid. pp. 122.

³⁶⁴ Ibid. pp. 123.

³⁶⁵ Ibid. pp. 123-124.

³⁶⁶ Ibid. pp. 122.

the prolongation of war and its resultant harms against the justice of the ending, how, then, do unjust belligerents apply such an *in bello* proportionality calculation?

One possibility is to interpret Walzer's discussion as a prudential argument: the *in bello* harms of continuing a war must be weighed against potential goods that the termination of a war will bring about. For example, perhaps in ending a war more quickly, the unjust belligerents will suffer fewer casualties and reach more favorable terms of settlement than they would if they continued their fight. In this construction, it is perfectly possible for an unjust belligerent to apply such a calculation. But Walzer expressly states that this consideration factors into the "moral reasons for prolonging a war," and unjust belligerents rarely have moral reasons for such prolongation.³⁶⁷ Even if they did, Walzer tells us that unjust belligerents do not need moral reasons for engaging in a conflict nor for prolonging the fight. They fight without reference to the justice of their aims, but here Walzer is referring to a just war in which the moral reasons for continued fighting are for the aim for a better peace. It is unclear how this can be equally applied to unjust belligerents.

This is not the only way that *jus post bellum* is present in the classical account of proportionality. For example, Walzer argues that there is a utility of acting with restraint and fighting proportionately so as to ensure a quiet peace, "if we are (at least formally) indifferent as to which side wins...it is important, then, to make sure that victory is in some sense and for some period of time a settlement among the belligerents."³⁶⁸ The harm of some acts that could jeopardize a peaceful ending to the war must be weighed against the good they will produce. Actions that sow the seeds of enmity and hatred, making peace more difficult to achieve, must be considered. This should be regarded as a credit to the orthodox view of

³⁶⁷ Ibid.

³⁶⁸ Ibid. pp. 132.

proportionality, but it points to a deeply unattractive implication of the Walzerian *in bello* principle. If the harms of an action must be at least somewhat weighed against the damage they might do to achieving the goods found in peace, then it is unclear how unjust agents who are fighting for unjust ends are to make such calculations. Unjust agents' conduct is, of course, variable. Some of their actions will make peace more difficult than others, and I take this to be Walzer's broader point, but if such actions can be considered proportionate to the ends of peace, then the peace he has in mind must be of a merely of a negative character, because it leaves open the possibility that the unjust are victorious. While in some circumstances a negative peace may be preferable to war, there are certainly others in which we would find such a notion insufficient.

Being sensitive to how one's conduct and actions during a war can impact the postwar peace demonstrates how postwar justice can inform and constrain *in bello* conduct. The connection between *post bellum* and *ad bellum* proportionality deepens if we consider the implications of the teleological view of just cause that I outlined earlier. This is because the teleological principle requires that *ceteris paribus* a just party aim towards a just peace. Given this requirement, considerations and factors pertinent to *jus post bellum* play a role in the calculation of *ad bellum* proportionality goods and harms. A war that cannot or does not treat the potential demands of a just peace seriously would have this count against the proportionality of the war. This is not to say that the war would be necessarily disproportionate, there may be goods that outweigh this harm, but the postconflict harm must be counted. Under this view, the principle of proportionality functions in an inverse relationship to *jus post bellum*: the proportionality principle becomes narrower and less permissive as *jus post bellum* become wider and more demanding.

Now one may argue that such a requirement would unfairly constrain political communities that lack the capacity to engage in postwar rebuilding activities. Adherents to such a view may be inclined to believe that in cases such as justly responding to aggression, a warring party should not be counted as disproportionate if it lacks the capacity to rebuild. But we can imagine similar situations where a party may lack capacity to carry out a proportionate war independent of *jus post bellum*. Imagine that State A lacks precision weapons. As a result, they lack the capacity to respond to aggression in a way that minimizes killing and destruction. By responding to this aggression they are expected, because of their lack of capacity, to kill many, many people and to sow widespread destruction. We can imagine that all things equal this could be a disproportionate use of force (it would also violate the principle of discrimination, but that is a separate matter). We would not say that because State A lacks precise weapons that we need not count the expected harm in the *ad bellum* proportionality calculation. Similarly, we would be reluctant to say that postwar harm resulting from State A's lack of capacity to, say, provide postwar order and security (as was the case of the U.S. in Iraq) should not count in an assessment of *ad bellum* proportionality. Lacking the capability to act proportionately does not make one's act proportionate.

Of course, not only will the demands of *jus post bellum* constrain *ad bellum* and *in bello* proportionality, but proportionality will also constrain the goals of *jus post bellum*. The cost of achieving a just peace will need to be assessed against the potential harm that it can bring about. As May puts it, "the end of a just and lasting peace is not of infinite value, and so we need to know how valuable it is if we are to weigh its value against the disvalue to be produced by the particular means being proposed to accomplish this end."³⁶⁹ These ends, as I have suggested throughout this work, include those entailed in postconflict rebuilding. So,

³⁶⁹ May, *After War Ends: A Philosophical Perspective*. pp. 221.

as May suggests, we will need to determine the value of pursuing these ends in light of the expected disvalue their pursuit may produce. Here we can return to our considerations of pursuing conditional just causes, like in the case of some rebuilding efforts in Afghanistan. We may, upon reflection, consider that the disvalue of their pursuit outweighs the value of their achievement. Considerations of this type will be crucial in deciding if we can, as I put it in Chapter Five, kill to rebuild.³⁷⁰

6.4 Conclusion

Proportionality is a complex concept, and recent scholarship has helped illuminate and resolve some of its complexities. Yet, there remains very little scholarship on *jus post bellum* proportionality. In this chapter, I have proposed that the objective possession of justice ought to be the backbone of both *jus ad bellum* and *jus in bello* proportionality principles. Not only would this strengthen the principle in these areas but it would also take *jus post bellum* more seriously. If we are not to be indifferent about the justice at war's end, then we cannot be indifferent about the justice of the aims of those fighting. I have only explored a few of the intricacies of *jus post bellum* proportionality and its relationship to *ad bellum* and *in bello*; it is obvious that much more work can be done on the topic. I think what is clear from this discussion is that the importance of the end of wars and the justice that we hope for in their ending demonstrates that *jus post bellum* deserves a disproportionately bigger role in just war scholarship than it receives.

³⁷⁰ Richard Miller suggests that such rebuilding, at least as it pertains to Afghanistan, might be considered disproportionate in light of the harm it causes. Miller controversially includes the harm caused to the Taliban. Miller, "The Ethics of America's Afghan War."

Conclusion

I am too much of an optimist to believe, as some do, that war is an ineliminable part of our nature, but I remain enough of a realist to recognize that it will be with us for the foreseeable future. I also believe that wars are sometimes necessary and that they can be fought justly. There is, of course, a rich tradition of this ethical view—the just war—of which I count this work to be a part. The focus of this tradition has largely been on the conditions under which wars could be started and how they should be fought. This makes sense. If we can discover and then advocate for ethical principles and laws that constrain the recourse to war, we have done well. Of course, sometimes war must be pursued. When this is the case, the kind of conduct and acts that are permissible should also be narrowed. Limiting these two areas (the resort to war and conduct during it) can save those who inhabit the world a significant amount of misery.

But there is another aspect of war, and one that has been seriously neglected; this is war's end—the time when the guns fall silent and peace is being built. Along the way, most of those working in the just war tradition somehow forgot that if wars can indeed be just, then they ought to be fought for a just ending. This dissertation has set out to articulate and defend an account of *jus post bellum*. More specifically, I aimed to explore the content of *jus post bellum* and its ethical justification. In this pursuit, I began with an examination of the emerging ethical and legal norm of the Responsibility to Protect (RtoP). I did so because RtoP entails the responsibility for members of the international community to not only prevent and react to human rights abuses sometimes through the use of military force, but also to rebuild communities in the aftermath of its use.

With its focus on security and the reconstruction of institutions, I argued that the language and conceptualization of rebuilding as instantiated in RtoP offers a promising articulation of *jus post bellum* that is forward-looking and oriented towards remedying the harm and suffering that so often besets those living in postwar environments. I was also quick to note that despite the intuitive appeal of the Responsibility to Rebuild, the concept's theoretical justification has not been convincingly articulated. In Chapter Two, I aimed to fill this gap by seeking to ground the normative justification for rebuilding in a rights-based cosmopolitan account of the Capabilities Approach. With its focus on the equal moral worth of the individual, and its move beyond myopic, parochial concerns, cosmopolitanism provides us with the framework for such a justification.

Underpinning this framework is the Capabilities Approach, cosmopolitan in itself. The Capabilities Approach offers powerful and persuasive justificatory reasons for rebuilding that stem from the role that capabilities play in all human lives. I noted that since rebuilding activities play an instrumental role in helping secure and achieve capabilities, *jus post bellum* rebuilding is critically important. When individuals residing in a society emerging from the scourges of war do not possess basic capabilities, this provides animating reasons to rebuild. In this way, the Capabilities Approach provides us with an aspiration—a target for social justice—and a metric for establishing a baseline threshold, below which no one should be allowed to sink.

The ethical justification for *jus post bellum* rebuilding rests, then, on the importance of achieving an adequate level of development and functioning that permits one to lead a life of dignity. It is in this way, as I have argued, that this dissertation is a contribution to an ongoing political and theoretical project of advancing human rights and well-being. This means that the justification for postconflict rebuilding does not preclude the possibility that

this may be but one approach towards its justification. It is quite possible that others may seek to include reasons for rebuilding that are, for example, based on a dignitarian approach or an appeal to the ethics of care. These perspectives and approaches towards advancing development, well-being, and human dignity are perfectly compatible with cosmopolitanism and the Capabilities Approach. I suspect that we will find that there is a plurality of reasons for which postconflict rebuilding ought to occur and that I have simply articulated one of them.

As I noted in Chapter Three, cosmopolitanism is subject to a challenge long recognized in the global justice literature. The problem, at least as these critics contend, stems from the conflict between our general cosmopolitan duties to aid others and the special duties we owe to our associates. Such critics allege that cosmopolitan theory, and its attendant positions on equality and the redistribution of resources and goods, ignores everyday, common-sense morality; they charge that cosmopolitanism is inflexible and tone deaf to the demands of partiality that are required in the relationships that play an integral role in our lives. While this quandary has long been recognized in the global justice literature, it is not commonly associated with *jus post bellum*. This is a mistake. *Jus post bellum* rebuilding requires significant costs, resources, and investment of human capital, some of which will certainly impede, hamper, or reduce the stock of benefits and goods that we may otherwise give to our associates. If *jus post bellum* demands rebuilding, then the activities required to meet these demands will almost certainly conflict with the duties we owe to our family, friends, and co-citizens.

Cosmopolitans have in various ways attempted to mitigate or defeat the foregoing objection by arguing that these disputes are merely ersatz ones. Under this view, there is no conflict between our general and special duties because cosmopolitanism requires that we

prioritize the fulfillment of our general duties to humanity before we are able to give special treatment to our associates. As we saw, there are serious problems with this “prioritarian” position; as a result, I argued (*contra* prioritarianism) that there is actually no presumptively decisive way to adjudicate conflicts between the duties we owe to our associates and the duties we owe to our non-associates living in postconflict environments. As an alternative, I proposed taking a casuistic approach to the various cases with which we will be presented when faced with the demands of *jus post bellum*. I concluded that by engaging in a process of reflective equilibrium, we could test specific, variegated cases against our considered judgments, thus providing us with a clearer idea as to whom we owe what. In some cases it will be morally permissible to show partial treatment to our associates. In other cases morality will require that we fulfill our duties to those in postwar environments.

While the casuistic approach may help guide us in adjudicating competing claims between our special and general duties, it nevertheless fails to inform us about the basis on which we can allocate various types of responsibility for rebuilding. The question of who should rebuild remains. In Chapter Four, I attempted to answer this question by articulating the relevant criteria and connections that can help determine and allocate what I called remedial responsibility. In identifying such criteria, I argued that responsibility for remedy could generally track along two types of agents: those who are participants of a war and those third parties who are not. This distinction is important because it points to a tension inherent in a forward-looking theory of *jus post bellum*—we want to aid victims of war in the most effective and expeditious way possible, but we also want to hold participants responsible for their unjustifiable harmful conduct. While not necessarily mutually exclusive aims, they often do conflict. This tension is captured in the intuitive plausibility in the backward-looking nature of most theories of *jus post bellum*. Such theories ascribe postconflict

responsibilities, construed primarily as punishment and compensation, by examining relevant factors associated with the temporal periods and actions related to the times before or during a war. Under this view, we can determine remedial responsibility by looking back at agents' acts and omissions. This approach is attractive because it is largely in keeping with our common intuitions and beliefs that, absent sufficient excusing circumstances, agents are and should be held responsible for their own voluntary actions.

But, as I argued, in addition to the significant practical hurdles that exist in looking backwards as a way to assign postconflict remedial responsibility to participants, there are considerable normative disadvantages to doing so; this is particularly so if one of the central goals of *jus post bellum* is building a just and durable peace. Rather than remaining insistent that it is the responsibility of the participants alone to remedy the terrible conditions found in postconflict environments, we need to look ahead. In keeping with this notion, I advanced a forward-looking articulation of responsibility for postconflict rebuilding that sought, at least partly, to disaggregate past actions from future remedy.

In Part Two of the dissertation, I focused on how the content and demands of *jus post bellum* affect and are affected by the traditional just war principles of just cause and proportionality. In Chapter Five I explored the relationship between the principle of just cause and *jus post bellum*. Here I drew from scholarship dating back to antiquity in examining the idea that the aim of war is to secure a more just and lasting peace. In this sense, we saw how in this idea of the “just peace,” the concept of *jus post bellum* is, at least formally, already present in the principle of just cause—in all causes for war the aim is to secure a more just peace. Of course, this formal articulation of the just peace says nothing of its substantive content, and often just war scholars seemed content with this underspecification.

I went on to argue that a substantive account of the just peace ought to be informed by the concept of rebuilding, while recognizing that this may also present us with a dilemma which arises from the tension between the fact that morality may require rebuilding activities, but sometimes these activities are opposed by some of the direct beneficiaries. Some opponents may view the presence of rebuilders as illegitimate (such as in instances of occupation), while others may be opposed to the very goals of the activities (like, for example, the Taliban's opposition to the building of a liberal model of public education). In such instances, it may be the case that opponents use violence or the threat of violence to impede or halt rebuilding efforts, thus requiring rebuilders to use force if they want to successfully rebuild. In such cases, it remains an open question if such opponents should be liable to killing. Should those agents seeking to rebuild be permitted to kill and maim in their efforts to do so? In exploring this issue, I advance a conceptualization of liability that, under restrictive circumstances, permits the killing of such opponents. I concluded that sometimes agents could, in fact, kill to rebuild.

Turning to the principle of proportionality, Chapter Six continues the discussion of the traditional just war principles and *jus post bellum*. In this chapter, I developed a revisionist account of the principle of proportionality, proposing that the objective possession of justice ought to be the backbone of both *jus ad bellum* and *jus in bello* proportionality principles. If the goods counted in both *ad bellum* and *in bello* proportionality are those constituted by the just cause or just aim of a war, then calculations of the proportionality would necessarily be concerned with the end of a war. Actions and aims that were undertaken in pursuit of unjust goals would be necessarily defined as disproportionate and, thus, rendered impermissible. This would strengthen *jus post bellum* because the acts in question would have to tend towards just ends, and by extension this would aid in the just ending of wars.

The task of this work has been an attempt to partly remedy the absence of *jus post bellum* in theories of cosmopolitan global justice and the just war tradition. I have also attempted to provide a robust normative account of why we, as citizens of the world, ought to care about justice when a war ends. The reason is a simple one. It is based on our common humanity, equal worth, and the attendant rights and duties that stem from these features of our moral world. If the arguments in this dissertation are sound, then those living in postwar environments are owed the same standard of living as anyone else—the basic conditions that make a life worth living possible. We would do well to remember that after the fires of war rage, the embers burn on. In the wake of conflict, there is, then, an imperative to help rebuild communities that have suffered through such violence—to work as partners, as equals, in helping build a just and lasting peace. These are the basic demands of justice after war.

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