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War's Aftermath and the Ethics of War¹

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1. Introduction

Both natural law as articulated by, *inter alia*, Vitoria, Suarez and Grotius, and positivist international law as defended in the 18th century by Vattel and Wolff, place great emphasis on what belligerents may do to one another once the war is over. Kant himself, of course, writing a century after Grotius and at the same time as Vattel, puts the *jus post bellum* firmly on the table with his sketch of a *Perpetual Peace*.² And yet, until the 2003 invasion of Iraq by the US-lead coalition, and notwithstanding Walzer's brief remarks about *jus post bellum* in his seminal 1977 *Just and Unjust Wars*,³ war ethicists have devoted far more energy to discussing the moral grounds upon which resorting to war is just (*jus ad bellum*), and the ways in which war ought to be fought (*jus in bello*) than they have given to the normative issues which arise once the guns have fallen silent. Since 2003, however, there has been a steady trickle of works on *jus post bellum* – though by no means as many as one might have expected.

Although disagreements abound as to what constitutes a just post-war state of affairs, there is a relatively high degree of consensus on the following requirements: victorious belligerents should aim to restore the political sovereignty and territorial integrity of their defeated enemy; some form of compensation for war-time wrongdoings should be paid to victims; assistance should be given to the defeated enemy and its civilian population towards the reconstruction of their country; wrongdoers should be put on trial; and, crucially, a stable and durable peace should as far as possible be the overarching aim of erstwhile belligerents when dealing with one another.⁴

In this paper, I do not review the history of *jus post bellum*, good accounts of which can be found elsewhere.⁵ Nor do I attend to the various principles which, by consensus, make for a just post-war peace (see Ohlin's and Lu's contributions in this volume.). Rather, taking my cue from recent work in just war theory, much of which

² Francisco de Vitoria, "On the Law of War," in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance, *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 1991); Francisco Suarez, "De Bello," in *Selections from Three Works of Francisco Suarez, S.J.: De Triplici Virtute Theologica, Fide, Spe, Et Charitate (1621)*, ed. James Brown Scott (Oxford: Clarendon Press, 1944); Hugo Grotius, "The Rights of War and Peace," ed. Richard Tuck (Indianapolis, Ind.: Liberty Fund, 2005); Christian Wolff, "Jus Gentium Methodo Scientifica Pertractatum," (Oxford: Clarendon Press, 1934); Emmerich de Vattel, "Le Droit Des Gens, Ou, Principes De La Loi Naturelle Appliquées Á La Conduite Et Aux Affaires Des Nations Et Des Souverains," (Washington, DC: Carnegie Institute, 1916); Immanuel Kant, "Perpetual Peace: A Philosophical Sketch," in *Kant - Political Writings*, ed. Hans Reiss, 2 (Cambridge: Cambridge University Press, 1991).

³ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977).

⁴ Gary Bass, "Jus Post Bellum," *Philosophy & Public Affairs* 32 (2004); C.A.J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008); Mark Evans, "Moral Responsibilities and the Conflicting Demands of Jus Post Bellum," *Ethics & International Affairs* 23 (2009); "Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of 'Just Occupation'," *Millennium - Journal of International Studies* 36(2008); Larry May, *After War Ends - a Philosophical Perspective* (Cambridge: Cambridge University Press, 2012); Brian Orend, *The Morality of War* (Peterborough, On.: Broadview Press, 2006); "Justice after War," *Ethics & International Affairs* 16 (2002); "Jus Post Bellum," *Journal of Social Philosophy* 31 (2000) Robert E. Williams and Dan Caldwell, "Jus Post Bellum: Just War Theory and the Principles of Just Peace," *International Studies Perspectives* 7 (2006); David Rodin, "Two Emerging Issues of *Jus Post Bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression," in *Jus Post Bellum - Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann K. Kleffner (The Hague: T.M.C. Asser Press, 2008).

⁵ See, e.g., Alexis Keller, "Justice, Peace and History: A Reappraisal," in *What Is a Just Peace?*, ed. Pierre Allan and Alexis Keller (Oxford: Oxford University Press, 2008); Stephen C. Neff, "Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective," in *Jus Post Bellum - Towards a Law of Transition from Conflict to Peace* (The Hague: T.M.C. Asser Press, 2008).

consists in scrutinising the relationship between *jus ad bellum* and *jus in bello*, I focus on the relationship between *jus post bellum* and those two *jura*. In so doing, I aim to offer an account of the role and place of *jus post bellum* within just war theory and to highlight avenues of inquiry on the aftermath of war which have been largely ignored so far.

I proceed as follows. In section 2, I discuss recent arguments to the effect that *jus ad bellum* and *jus in bello* exhaust just war theory, and that *jus post bellum*, far from being a key member of the family (as it were), in fact does much better as an outsider. I claim, on the contrary, that there is ample space for *jus post bellum* within just war theory; in partial agreement with those arguments, however, I agree that a full account of the ethics of war's aftermath must also draw on other fields of normative inquiry. In section 3, I flesh out in greater details connections and disconnections between *jus post bellum* on the one hand, and the other two *jura* on the other hand.

Two preliminary remarks are in order. First, the categories of *jus ad bellum*, *jus in bello* and *jus post bellum* are meant to identify different phases of the war and are standardly thought to comprise normative principles which are specific to those phases. I do not think that those labels are more than a convenient expository device, but for the sake of exposition, I shall use them to denote norms governing, respectively, the resort to war, belligerents' conduct in war, and post-war states of affairs – bearing in mind that those norms might sometimes be the same. I shall also assume, for the sake of argument, that a war is just if and only if it meets the following conditions: it has a just cause, where one has a just cause if one's fundamental human rights are violated through the use of lethal force; it is a proportionate means to avert such violations; it is not fought and won through the deliberate and indiscriminate targeting of innocent non-combatants; it stands a reasonable chance of succeeding by military means which do not breach the requirements of proportionality and discrimination; it is the only way to pursue the just cause whilst minimising casualties; and neither its occurrence nor the way it is fought unnecessarily threaten, once it is over, the establishment of a durable and all-things-considered justified peace. Some of those requirements are recognisably *ad bellum* requirements, whilst others are standardly thought to belong to *jus in bello*.

Second, *jus post bellum* is sometimes thought to encompass two distinct phases. The first, norms for which have been dubbed *jus ex bello* by Darrel Moellendorf and *jus terminatio* by David Rodin, is the process by which belligerents stop fighting and sue for peace.⁶ Once the fighting has stopped, however, attention must be given to what constitutes a just post-war state of affairs: this in fact is what I take *jus post bellum* to mean. My aim is to offer an analytical and normative framework for thinking about this emerging field.

2. *Jus post bellum* and just war theory: in, or out?

At first sight, merely asking whether *jus post bellum* properly belongs to just war theory might seem odd, so broad is the consensus, amongst war ethicists, that a complete theory of the just war must, *qua* such theory, incorporate norms for regulating the aftermath of war. And yet, 'incorporatist' arguments are either remarkably cursory, deeply problematic, or both. Thus, Gary Bass argues that in so far as post-war considerations shape our ex post verdicts on the justness or lack thereof of the war, 'it is important to better theorize post-war justice – *jus post bellum*

⁶ Darrel Moellendorf, "Jus Ex Bello," *Journal of Political Philosophy* 16 (2008); Rodin, "Two Emerging Issues of *Jus Post Bellum*."

– for the sake of a more complete theory of the just war.⁷ In a similar vein, Larry May claims that ‘if the object of war is a just and lasting peace, then all of Just War considerations should be aimed at this goal, and the branch of the Just War tradition that specifically governs the end of war, *jus post bellum*, should be given more attention, if not pride of place, as opposed to being neglected as is often the case.’⁸ Brian Orend, one of the most prolific and earliest contemporary writers on *jus post bellum*, gives the following reasons in support of the incorporation of *jus post bellum* into just war theory: contemporary conflicts show us, if it were needed, that peace settlements are deeply controversial and it is urgent therefore to offer a normative account thereof. Moreover, constructing an account of the *jus post bellum* helps block the pacifist objection to just war theory that the latter fails to offer comprehensive principles for a better world. Finally, ‘failure to construct principles of *jus post bellum* is to allow unconstrained war termination’ and ‘probably prolongs fighting on the grounds’ – thus raising the ire of pacifists.⁹

Pace Bass and May, however, it does not follow from the plausible claim that the end of a just war is a just peace that theorising about the just peace is itself a part of just war theory. To illustrate, we might think, for example, that a world in which, following a war, millions of people are left without the necessities of life, or millions of people are left with fewer resources at their disposal than a lucky dozen thousands, is not a world where a just peace obtains. But (it might be argued) an inquiry into what are the correct principles of post-war distributive justice (for example, distributing resources according to basic needs v. distributing according to some egalitarian metric) is not a branch of just war theory: rather, it is a part of a wider theory of distributive justice. *Pace* Orend, moreover, it does not follow from the claim that we should think about the justness of post-war settlements that this inquiry is, again, part of just war theory. Nor does it follow from the claim that thinking about peace after war would pacify the pacifist. Furthermore, Orend’s last move rests on unsubstantiated assertions about the connection between moral enquiry and political practice: in particular it is not clear at all that there would have been less bloodshed had it not been for the just war tradition.

The foregoing comments raise the obvious question of what it means to be ‘part of just war theory’. In section 3, I shall develop the point that, in so far as principles for a just *post-war* world are significantly shaped by belligerents’ war-time relationship *qua* belligerents, it is entirely appropriate to think of *jus post bellum* as a member of the family. In the remainder of this section, I respond to some recent arguments to the effect that a theory of justice after war need not rely on a prior account of the just war – indeed, to put it more strongly, ought to be kept separate from such an account. Seth Lazar puts the point as follows.¹⁰ *Jus post bellum*, when incorporated into a theory of the just war by its advocates, is ‘relentlessly backward-looking’, since its constitutive principles – as defended by *post bellum* theorists in the extant literature – are read off belligerents’ breach of or compliance with *jus ad bellum* and *jus in bello*. But there are good reasons, Lazar tells us, for resisting this move. In particular, given that all sides in war are guilty of grievous wrongdoings, we simply cannot hope to achieve just rectification and compensation. Moreover, compensation and punishment are invitations to ‘revisit the wrongs of war’, and do little to alleviate the enormous suffering and minimise the deep resentments which war

⁷ Bass, "Jus Post Bellum.", 384.

⁸ May, *After War Ends.*, 13.

⁹ Orend, *The Morality of War*, 160-61.

¹⁰ Seth Lazar, "Scepticism About Jus Post Bellum," in *Morality, Jus Post Bellum, and International Law*, ed. Larry May and Andrew T. Forcehimes (Cambridge: Cambridge University Press, 2012), esp. 219ff.

occasions: the burdens of compensation programmes inevitably fall on the most vulnerable and victors' justice is a recipe for the resumption of violence.¹¹

What, then, should an account of justice after war look like? It should confer priority to building peace over compensation and punishment; and it should extend its reach beyond belligerents to include outsiders. As Alex Bellamy also puts it, focusing on belligerents, as most theorists of the *jus post bellum* do, is an antiquated way to think not just about war but also about peace, as peace settlements are increasingly overseen by international institutions and enforced by multinational peacekeeping forces which were not themselves parties in the conflict.¹² In a similar vein, James Pattison argues that the burdens of reconstruction after war should fall on whomever is best able to rebuild effectively, and not necessarily on belligerents.

As a critique of much of extant theories of the *jus post bellum*, Lazar's points strike me as overstated. For a start, as Larry May suggests in *After War Ends*, given that a great many individuals have been, or at some point will be, somehow connected to war wrongdoings through fault or unjust benefitting, it makes sense to impose on all of them, via whichever coercive institutions under whose jurisdiction they live, a duty to contribute to an international compensation fund out of which the reconstruction of war-torn communities could be rebuilt.¹³ This proposal takes into account the fact (which Lazar rightly stresses) that more or less all belligerents commit grievous wrongdoings, whilst at the same time preserves the deeply rooted intuition that being at fault, or wrongfully benefitting, does confer on agents obligations which they would not have otherwise.

More generally, Lazar's targets are not inattentive to the fact that punishing aggressors might jeopardise chances for peace and to the risks of victors' justice; nor do they overlook the fact that extracting compensations from the vanquished belligerent risks jeopardising the livelihood of the most vulnerable members of that community.¹⁴ There is also a particularly rich philosophical literature on punishment for war crimes which defends international criminal tribunals in terms which Lazar would not disavow. Whilst those authors do not always portray themselves as theorists of the *jus post bellum*, any account of contemporary works on the aftermath of war should take their views seriously.¹⁵

¹¹ Lazar also makes the conceptual point that a theory of the just war can be complete without tending to the aftermath of war, for such a theory, *qua* theory of *war*, only means to justify and constrain fighting in war. Likewise, a theory of legitimate use of force, *qua* such theory, may be complete without attending to what should or may happen once force has been used. (ibid., 218-19.) However, to stipulate that a theory of war is only about the justification and regulation of *fighting* is to settle the issue by definitional fiat – a move which should be resisted. As for the parallel with a theory of legitimate force, it will not convince Lazar's opponents, who may well reply, plausibly I think, that a complete theory of the legitimate use of *force* should attend to, e.g., punishment for unjustified use (in so far as punishment involves the use of force) and compensatory obligations arising from unjustified use (to the extent that compensatory obligations too are enforced).

¹² Alex Bellamy, "The Responsibilities of Victory: Jus Post Bellum and the Just War," *Review of International Studies* 34 (2008); (James Pattison, "Jus Post Bellum and the Responsibility to Rebuild," *British Journal of Political Science* FirstView(2013).

¹³ May, *After War Ends*, 194-95.

¹⁴ See, *pêle-mêle*, Bass, "Jus Post Bellum"; Evans, "Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of 'Just Occupation'"; Orend, "Justice after War"; "Jus Post Bellum"; Rodin, "Two Emerging Issues of *Jus Post Bellum*"; Michael Walzer, "The Aftermath of War," in *Ethics Beyond War's End*, ed. Eric Patterson (Cambridge: Cambridge University Press, 2012); Doug McCready, "Ending the War Right: Jus Post Bellum and the Just War Tradition," *Journal of Military Ethics* 8 (2009); May, *After War Ends*.

¹⁵ See, e.g., Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007); *Crimes against Humanity: A Normative Account*, Cambridge Studies in Philosophy and Law (Cambridge: Cambridge University Press, 2005); *Aggression and Crimes against Peace* (Cambridge: Cambridge

That said, I agree that a comprehensive theory of justice after war must draw on other strands of political and moral philosophy such as the philosophical foundations of the criminal law or theories of distributive justice. As Bellamy and Pattison suggest, this does imply that principles for post-war justice should not exclusively focus on belligerents. However – and this is crucial – so to conceive of such a theory does not yield the overly strong thesis that *jus post bellum* has no place within just war theory. For while it is true that articulating and defending an account of what constitutes a just post-war state of affairs requires attending to those other branches of philosophy, one cannot and should not occlude the fact that at least some of the parties in that state of affairs were locked into a lethally adversarial relationship. To put the point differently, and as in fact Lazar himself acknowledges, what is at issue here is not just peace *simpliciter*, but just peace after war – peace between Britain and Germany in the first few years following WWII rather than peace between those two countries here and now, in 2014. To be sure, there are difficulties in discerning when two erstwhile belligerents move from living in mutual post-war peace to mutual peace *simpliciter*. However, and to rehearse a familiar point, even if we cannot sharply identify when dusk is over and night begins, or when dawn gives way to daytime, we can certainly distinguish night-time from daytime. Likewise in this context. In the light of that fact, then, just war theory *qua* just war theory need not, indeed must not, confine itself to thinking about belligerents' decision to go to war and their conduct therein, and thereby overlook peace after war. If it becomes the richer for drawing on areas of moral and political philosophy with which it is not overly familiar, so much the better for it.

3. *Jus ad bellum, jus in bello and jus post bellum: mapping the relationship*

If, as I have just suggested, our concern is with peace between recent belligerents (by which I mean, here, both communities at war and their individual members), it pays to inquire into the extent to which belligerents' *post-bellum* rights and duties are partly determined, and in different ways, by the moral status of their resort to, and conduct in, war. In this section, I argue that they are. In so doing, I map out some of those normative connections between the three *jura*. To reiterate, and to be absolutely clear: the question of what constitutes a just post-war state of affairs is not settled merely by studying the implications of belligerents' resort to and conduct in war. I focus on this particular inquiry here because my concern in this paper is to look at *jus post bellum* in relation to *jus ad bellum* and *jus in bello*.¹⁶

As a starting point, let us turn to contemporary debates about the relationship between *jus ad bellum* and *jus in bello* and see whether, and if so how, different conceptions of that relationship can help us understand the ways in which belligerents' resort to and conduct in war have a bearing on their rights and duties after war. On the so-called orthodox account of the morality of war, the moral status of the war *ad bellum* has no bearing whatsoever on combatants' rights, duties and permissions once the war has started: combatants on either side of the *ad bellum* divide (for example, the divide between unjustified aggression and justified self-defence) have exactly the same rights and permissions, notably the permission to kill

University Press, 2008); David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law," in *The Philosophy of International Law*, ed. John Tasioulas and Samantha Besson (Oxford: Oxford University Press, 2010); R. A. Duff, "Authority and Responsibility in International Criminal Law," in *The Philosophy of International Law*, ed. John Tasioulas and Samantha Besson (Oxford: Oxford University Press, 2010).

¹⁶ I develop a comprehensive account of justice after war in Cécile Fabre, "Cosmopolitan Peace," (Oxford University Press, under contract forthcoming).

enemy combatants; they are also similarly legitimate targets for one another.¹⁷ As applied to the relationship between *jus post bellum* and the other two *jura*, the orthodox account so construed would hold that belligerents' rights, permissions and obligations vis-à-vis another once the war has stopped are entirely independent of the moral status of their war *at bellum* and/or *in bello*. On the so-called revisionist account of war, by contrast, acts of killing which are carried out pursuant to an *ad bellum* unjust war are wrongful, unlike acts of killing carried out pursuant to a just war.¹⁸ As applied to the relationship between *jus post bellum* and its counterparts, the revisionist account would hold that failing to meet the requirements of *jus ad bellum* and/or *jus in bello* entails a failure to meet the requirements of *jus post bellum*.

In order to assess those positions, we must draw a crucial and generally overlooked distinction between procedural and substantive justice. Generally put, substantive justice delineates agents' rights to goods and freedoms, whereas procedural justice identifies which agents is entitled to decide whether substantive justice should obtain. For example, suppose that all agents have a right to food. Suppose further that one such agent refuses the food to which he is entitled – for example, because he is a prisoner on hunger strike. The right to food is a matter of substantive justice; the claim that the prisoner has decisional authority on getting the food, or (on the contrary) that prison officials are entitled to force-feed him against his wishes, are claims of procedural justice. In the present context, substantive justice pertains to the content of a peace settlement, whereas procedural justice pertains to the conditions under which belligerent are deemed competent to negotiate and endorse that peace settlement. This is a deeply important issue, for a just post-war world is one which (most would agree) is characterised by a peace process issuing in a peace settlement involving all parties, as opposed the unilateral and coercive imposition by the victor on the vanquished of a given state of affairs. A theory of the *jus post bellum* must therefore account for both just substance and just process. Thus, when delineating the relationship between *jus post bellum* on the one hand, and *jus ad bellum* and *jus in bello* on the other hand, in the light of the orthodox and revisionist accounts of war, we must distinguish between the following views:

Independence with respect to substance: Considerations other than as derived from our moral assessment of resort to and conduct in war wholly determine the terms of the peace settlement.

Dependence with respect to substance: Whether the terms of a peace settlement are just or unjust to its parties entirely depends on the moral status of those parties' war *ad bellum* and/or *in bello*.

Independence with respect to process: Belligerents are competent to negotiate and endorse peace agreements irrespective of the moral status of their resort to war, or conduct in war, or both.

Dependence with respect to process: Whether a belligerent is competent to negotiate and endorse a peace settlement is entirely dependent on the moral status of those parties' war *ad bellum* and/or *in bello*.

¹⁷ Walzer, *Just and Unjust Wars*.

¹⁸ David Rodin, *War and Self-Defence* (Oxford: Oxford University Press, 2002); C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008); Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); Cecile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012).

I should say at the outset that not all of those views are in fact held by just war theorists. In that sense, the discussion that follows is in part speculative: its payoff is a more precise understanding of belligerents' post-war *prima facie* rights and duties, *qua* belligerents. Consider first the question of substantive justice. The view that whatever wrongdoings belligerents committed *in bello* have no bearing on their rights, duties and liabilities *post bellum* is obviously implausible, since it implies that perpetrators and victims of those wrongdoings are morally on a par – such that, for example, the former do not have moral obligations to compensate the latter, or are not liable to being put on trial for war crimes. It would be equally implausible, I think, to hold that *ad bellum* wrongful decisions, such as a decision to mount an unjust invasion, should have no bearing on the content of the peace settlement, for such a view implies that a just peace settlement cannot compel the aggressor to withdraw its troops, and that the leaders of an unjust aggressor cannot be prosecuted for the crime of aggression.

By contrast, some might be tempted by the view that the content of a peace settlement as pertains to ordinary soldiers on the unjust side should not be dictated by that side's unjust decision to resort to war *ad bellum* and by those soldiers' participation in that war *in bello*. In fact, it is on this particular point that the orthodox account of the relationship between *jus ad bellum* and *jus in bello* might be thought to provide ammunition in support of its application to *jus post bellum*. For consider. It is standardly said that combatants, particularly ordinary soldiers, act under duress when ordered by their leaders to go into battle, or that they do not have access to the information they would need in order to assess whether the cause for which they are fighting is just. On both counts, then – duress and epistemic handicap – it would be unfair to deprive soldiers who happen to fight on the unjust side of the permission to defend their lives; by that token, of course, in so far as it would be unfair to deprive those who fight on the just side of that exact same permission, all soldiers, whatever the moral status of their cause, are permitted to kill enemy soldiers. As applied to the relationship between *jus ad bellum*-*jus in bello* on the one hand and *jus post bellum* on the other hand, then, the orthodox account would hold that peace agreements which adversely affect unjust soldiers – particularly ordinary soldiers – are unfair precisely because the latter acted under duress, without access to proper information, or both. This, in fact, is a plausible way to read Larry May's long argument to the effect that ordinary soldiers are not morally liable to being put on trial for their participation in an unjust war.¹⁹

Admittedly, *to the extent* that ordinary soldiers from the defeated and unjust belligerent have acted under duress and in ignorance of the moral status of their war, it would be unfair to punish them and to demand from them payment of compensation. *If*, thus, soldiers on the unjust side are morally innocent of the wrongdoing of waging an unjust war, then there is nothing to distinguish them, morally speaking, from the victorious and just belligerent soldiers. However, the antecedent clause 'if' is crucial to the success of that argument. For if it turns out that ordinary soldiers do not act under duress and have appropriate access to the information which is needed in order to assess their war from a moral point of view, then those who fight on the unjust side are not morally on a par with those who fight on the just side: unlike the latter, they are (*prima facie*) liable to being killed. Moreover, as the revisionist account of the ethics of war notes, far greater numbers of civilians can be deemed causally and morally responsible for the war, whether just or unjust, than is usually thought to be the case. Those civilians who are responsible for an unjust war are (*prima facie*) liable at the very least to being harmed whereas

¹⁹ May, *Aggression and Crimes against Peace*.

those who are not responsible, or who somehow take part in a just war, are not. Accordingly, if soldiers and (some) civilians are responsible for an unjust war, then it is plausible to deem them morally liable to being punished and to paying some compensation to their enemy.²⁰ My point, note, is that those agents would not be wronged by the imposition of punitive and/or compensatory harm. This is entirely compatible with the view (urged by both *post bellum* theorists and Lazar) that when deciding whether to extract compensation or to punish we must take into account the extent to which we would in fact threaten prospects for a durable and all-things considered justified peace.

One should not infer from the foregoing considerations that proponents of the revisionist account of war are necessarily committed to the view that whether the terms of a peace settlement are just or unjust to its parties entirely depends on the moral status of those parties' war *ad bellum* and/or *in bello*. Orend seems to endorse that view (though he does not address separately the connection between *jus ad bellum* and *jus post bellum* on the one hand, and the connection between *jus in bello* and *jus post bellum* on the other hand.) As he puts it, 'failure to meet *jus ad bellum* results in the automatic failure to meet *jus in bello* and *jus post bellum*. Once you're an aggressor in war, everything is lost to you morally.'²¹

I do not think that this is right and working out why yields a nuanced account of the relationship between the three *jura*. In particular, it matters to an unjust belligerent's post-war moral rights, liabilities and duties how unjust its war was.²² Other things equal, violations of the just cause requirement are morally worse than violations of other *ad bellum* requirements, since a war so started has no justification in the first instance. Suppose, for example, that A invades B at time t_1 without just cause. B successfully repels the invasion by force at t_2 even though measures short of war which would have lead A to withdraw its troops were available. A decides to sue for peace at t_3 even though it still has troops on B's territory. For B to insist that A should vacate its territory is entirely appropriate, even though B should not have used force to recover it in the first instance. Contrastingly, if A who *ex hypothesi* lacks a just cause for war is victorious, it cannot rightfully insist on annexing B's territory as part of the peace settlement. Although both belligerents have acted unjustly *ad bellum*, the fact that A lacked a just cause for war when B did have one makes a difference to what they can rightfully demand of one another at the negotiating table.

The point applies not just to the relationship between *jus ad bellum* and *jus post bellum* but also to the relationship between *jus in bello* and *jus post bellum*. Suppose that A has a just cause for war against B, for which it cannot obtain redress other than by going to war. Suppose moreover that A could win its war without breaching the requirements of proportionality and necessity, but that its forces nevertheless indiscriminately and deliberately kill 50,000 innocent civilians_B, and unnecessarily cause \$20 bn worth of damage within B. B, for its part, goes to war against A for an unjust cause in the pursuit of which its forces kill 5,000 civilians_A and destroy \$2bn of infrastructure within A. Combatants_A and citizens_A are not liable to punishment and compensatory damages simply for killing members of B who gave them a just cause for war and for the proportionate, rightful destruction, of property owned by

²⁰ Interestingly, Walzer defends the imposition of punitive reparations on citizenries whose (democratic) community has waged an unjust war. See Walzer, *Just and Unjust Wars*, ch. 18.

²¹ Orend regards an act of aggression as morally wrong by definition – though he also endorses the view that armed humanitarian intervention is sometimes permissible. Since such intervention presumably takes the form of an *attack* on the target country, a morally neutral definition of aggression is more appropriate. See Orend, *The Morality of War*, 162.

members of B who are liable to incurring such a loss. By contrast, their counterparts in B are (*prima facie*) liable to incurring those burdens for killing without just cause. However, combatants_A and combatants_B who have committed those war crimes are all liable to punishment, and A's and B's citizenries are both liable to paying compensatory damages for the wrongful destruction of their enemy's infrastructure - although (and this is crucial) the relative magnitude of their respective wrongdoings issues in differential compensatory and punitive burdens. On that count, then, A and B, though both wrongdoers *in bello*, are not morally on a par *post bellum*.

To recapitulate, the post-war rights and duties of belligerents are partly determined both by those belligerents' decisions *ad bellum* and by their conduct *in bello*. To some extent, this is obvious. However, the foregoing discussion teaches us two lessons. First, generally, just war theorists should articulate more carefully than they tend to do what follows from the claim that a war is unjust because it has a just cause, or that it is unjust because it is not the option of last resort, or that it is unjust because it is fought indiscriminately.²³ Second, and relatedly, bringing verdicts on the justice, or lack thereof, of a war *ad bellum* and/or *in bello* to bear on *post bellum* normative assessments is at least as complex, if not more so, than bringing *ad bellum* verdicts to bear on *in bello* conclusions.

So much for post-war substantive justice. What about post-war procedural justice? Earlier I distinguished between two views which proponents of the orthodox and revisionist accounts of the morality of war might be tempted to endorse:

Independence with respect to process: Belligerents have the standing to negotiate and endorse a peace settlement irrespective of the moral status of their resort to war, or conduct in war, or both.

Dependence with respect to process: Whether a belligerent has the standing to negotiate and endorse a peace settlement is entirely dependent on the moral status of those parties' war *ad bellum* and/or *in bello*.

To say that a belligerent has the standing to reach a peace agreement is to say that it has the (Hohfeldian) power to change its jural bundles of claims, privileges, immunities and powers with respect to the content of the agreement's clauses, *and* that it is recognised as having that power by the other party. Suppose, for example, that A invaded B as a result of a longstanding dispute over some territory which had been in B's possession but which A claimed it in fact owned. Suppose further that B's leadership carpet-bombs some of A's cities, and that A's leadership, sensing both that they will not win the war and that they nevertheless are in a position to inflict considerable losses on B, sue for peace. It is in the interest of both A and B to end the war. A and B agree that A will withdraw its troops from the disputed territory and formally renounce its claim to it; they also agree that B will pay part of A's reconstruction costs. Setting aside the question of whether those terms are just, to say that A and B have the standing to reach a settlement with one another on those terms is to say that they both have the power to change one another' jural bundles over, respectively, the disputed territory (such that citizens_A no longer have claims over it, while citizens_B acquire such claims), and the resources needed for reconstructing A. In addition, the power to change jural bundles must be protected

²³ I develop that point in connection with the issue of war termination and continuation in my 'War Exit'. See Cécile Fabre, "War Exit," *Ethics* (forthcoming).

by rights as held by the relevant officials not to be interfered with when negotiating (for example, rights not to be kidnapped, assassinated, etc.²⁴) and, more foundationally, by claims against those subject to those agreements that the latter comply. Furthermore, this protected power is a fiduciary power which belligerent leaders have and exercise on behalf of their citizens. Finally - and this is crucial - neither has the standing to reach this particular settlement if the other party has a justification for refusing to grant it the power to negotiate and endorse it. By analogy, Andrew may well have the power to give his car to Bernard; but if Bernard refuses to accept Andrew's gift, for example on the grounds that Andrew is a morally repugnant individual, Andrew does not in the end have the standing to change his jural bundles over his car vis-à-vis Bernard. Thus, standing refers both to a belligerent's authority vis-à-vis its own members, and to its authority vis-à-vis its enemy.

Our task, then, is to provide an account of the conditions under which belligerents have the standing to reach a peace settlement. According to the independence view, whether belligerents have waged a just war is not a necessary condition for standing. On what I take to be the most plausible account of the power to govern in general, this seems right. For on that account, which I set out elsewhere, state officials have that power only if their directives better enable those who are subject to them to enjoy their pre-institutional moral rights and to fulfil their pre-institutional moral duties than they would have in the absence of any state or if they were included in any other feasible state.²⁵ It could very well be, thus, that an unjust belligerent (whether *ad bellum*, *in bello*, or both) would, through the peace settlement which it negotiates, provide its members as well as outsiders with better conditions overall for the protection of their moral rights and the fulfilment of their moral duties than they would have otherwise. To claim that a peace agreement is invalid just in virtue of the fact that one or more of its parties ended up at the negotiating table thanks to conducting an unjust war risks adversely affecting individuals - typically, those who are already the weakest - for whom the alternative, in the form of a long, destructive war, might be far worse.²⁶ If the moral status of the war does not affect belligerents' *de facto* ability to provide such protection for its citizens and outsiders, then it seems that they have the standing to reach negotiate and endorse the peace settlement. By implication, under those conditions, proponents of the revisionist account of the morality of war, who hold that the moral status of acts of war killing is dependent on the moral status of the cause which they serve, ought to resist the view that the moral status of a belligerent as a peace negotiator and endorser is dependent on the moral status of their war.

In some cases, however, the acts carried out by an unjust belligerent are such as to vitiate the latter's standing in either, or indeed both, of the two senses described above - vis-à-vis one's members and vis-à-vis one's enemy. Thus, the Allies famously refused to negotiate with the Nazi regime in the closing stages of WWII precisely because the war the latter conducted was morally so abhorrent that its officials simply could not be granted any moral authority to act on behalf of the German people and to enter in a contractual relationship with the Allies. Likewise, in the Spring of 1994, the Tutsi Rwandan Patriotic Front refused to negotiate peace terms with Rwanda's extremist Hutu-dominated government, whose officials had orchestrated the genocide of c. 800,000 moderate Hutus and Tutsis. The question,

²⁴ In fact, in the law of treaties, just procedural conditions also include prohibitions on fraud, deception and unjustified coercion. See the 1969 Vienna Convention on the Law of Treaties.

²⁵ Fabre, *Cosmopolitan War*, 46ff.

²⁶ For a similar point, see Daniel Schwartz, "The Justice of Peace Treaties," *The Journal of Political Philosophy* 20 (2012).

though, is why. One possibility is that committing certain acts is in itself disqualifying. It is hard not to have sympathy for that view: the thought that Hitler, had he not killed himself, might have sat with F.D Roosevelt and Winston Churchill and hammered out a peace agreement, as if on a footing of equality, is repellent. (Then again, so is the thought that Stalin, whose crimes both in war and peace plausibly equalled or at least came very close to Hitler's, *did* sit with Roosevelt and Churchill at the 1945 Yalta Conference.) That said, even with those kinds of leaders at the helm, there might not be any alternative, so that for all that they did, they nevertheless are the best institutional actors available to represent the interests of their citizens. This does not impugn the Allies' decision not to confer negotiating standing on the Nazis; but it should alert us to the dangers of depriving some actors of standing without considering what their absence from the negotiating table might mean for those whom they would represent and who, however grievous their leaders' wrongdoings and their possible complicity in it, have not forfeited their right to be treated humanely.

Another argument for the view that unjust belligerents lack the standing to reach a peace settlement is that their war-time deeds are such that they simply cannot be trusted to do better than any other feasible alternative at the bar of the rights and duties of those who are liable to the terms of the peace settlement. A peace settlement binds two categories of agents whose trust in its justice is crucial for the realisation of a durable peace: those on whose behalf the war was waged, and those against whom it was waged. Amongst the former, some may well have supported the war whilst others opposed it (notwithstanding their leaders' claim to act on their behalf and in their interest) but had little control over it. Those agents cannot reasonably be presumed to trust in a leadership which authorized the commission of crimes as grievous as the mass killings of innocent non-combatants or an unwarranted wholesale aggression against another community. In fact, they can justifiably assume that, on the balance of probabilities, those wrongdoers will negotiate and endorse peace terms which will either consist in or lead to their rights being violated, or render them less able to fulfil their obligations to one another than feasible alternatives would do. On this view, it is not the commission of the wrongdoings itself which deprives wrongdoers of standing; rather, the nature of the wrongdoings is such as to suggest that trust would not be given. If those points are correct, both *ad bellum* and *in bello* wrongdoings can deprive their perpetrators of standing so long as they are sufficiently grievous.

4. Conclusion

In this paper, I provided support, contra some recent critics, for the often-made point that just war theory, *qua* such theory, should attend to justice after war, though I agree with those critics that the content of principles for a just peace should be determined by broader considerations of (*inter alia*) distributive justice, and not just by the extent to which leaders, soldiers, and civilians acted in breach of or in compliance with *jus ad bellum* and *jus in bello*. At the same time, I argued that understanding the relationship between *just post bellum* and the other *jura* of war provides some insight into the tasks which an account of justice after war must set itself. Three points in particular are worth extracting from the foregoing discussion. First, the relationship of the *just post bellum* to its *ad bellum* and *in bello* counterparts is one of partial dependence – such that the moral status of a post-war state of affairs from belligerents' point of view sometimes, but not always, depends on the moral status, from that same point of view, of the war which lead to it. Second, and relatedly, that relationship is rather complex, whether one endorses the orthodox account of the latter or is sympathetic to the revisionist account. In particular, from

the point of view of belligerents' post-war rights and duties, it matters deeply which just war requirement(s) they breached. Finally, a theory of the *jus post bellum* must provide an account not just of the substantive justice of a peace settlement but also of its procedural justice. *Post-bellum* substantive justice has generated growing attention of late: procedural justice, hardly any. If this paper succeeds in convincing at least some of its readers of the importance of that question, it will have gone some way towards achieving its aims.