CHAPTER 1

Introduction: Normative principles of jus post bellum

In this book, I draw on the work of Hugo Grotius to provide a Grotian account of the normative principles of *jus post bellum*, governing practices after war ends. In this sense I will aim to fill a gap in the literature concerning the Just War. There is extensive discussion of the normative principles that should govern the initiation of war, *jus ad bellum*, and also of the conduct of war, *jus in bello*. But there has been very little work on *jus post bellum*. In taking Hugo Grotius's work, *De Jure Belli ac Pacis*, as my point of departure I will seek to ground the normative principles after war ends in the 400-year-old secular tradition of writing about the Just War. I will also attempt to connect this tradition with the emerging international law literature on transitional justice which is primarily concerned with how to move from a position of mass atrocity or war to a position of peace and reconciliation. In the end I will depart from the advocates of the Just War and argue that contingent pacifism is most in keeping with normative principles after war ends.

In this introductory chapter I will set out what I take to be the six normative principles of *jus post bellum*: rebuilding, retribution, reconciliation, restitution, and reparation, as well as proportionality. I will also address one of the thorniest of issues: what difference should there be between victors and vanquished in terms of post war responsibilities. And even more importantly, how much difference should it make if the victor had begun the war without just cause? In one sense, this is a seemingly easy question to answer – the party who has done wrong should pay for damages caused by its wrongful behavior. If the war was begun wrongly then everything that follows is the responsibility of this wrongdoing party. But in another sense, this is a deeply difficult issue since the point of *jus post bellum* is to establish a just and lasting peace, and yet this is very unlikely to happen unless both parties see themselves as responsible for the post war reconstruction.

I will first address several conceptual problems with the very idea of having principles for post war reconstruction. Second, I will discuss how justice, especially transitional justice, should be conceived in debates about the end of war. Third, I will address how to think about *jus post bellum* principles in light of the fact that all wars have peace as their aim. Because of this fact, the principles governing a just peace seem relevant to whether war should be initiated at all. Next, I will address the thorny set of issues revolving around whether the aggressors should be the only party responsible for reconstruction and how responsibilities should be apportioned among victors and vanquished. Then the remainder of the chapter will set out in brief compass the normative principles of *jus post bellum*. Each of these principles will be the subject of at least one, and often several, succeeding chapters. Finally, I will discuss the substance of the various chapters that will follow, as I attempt to describe and defend a set of six normative principles governing practices after war ends. I will also discuss how the normative principles concerning war's aftermath influence and are influenced by the normative principles governing the initiation and the conduct of war.

1.1 HOW SHOULD WE UNDERSTAND *JUS POST BELLUM*?

Before getting into a discussion of the specific principles that should govern the situation after war ends, we need to think about what is involved in *jus post bellum* normative considerations. And the first place to start is with the idea of what "post" war means. This is a more difficult issue than one might initially imagine. Think of the Second Gulf War which began in March of 2003. By May of 2003, US President George W. Bush declared victory in this war. At that time only a few hundred US soldiers had been killed. By August of 2010, when US President Barrack Obama declared an end of combat operations, nearly 3,000 more US troops had died since Bush declared victory. And even as late as the middle of 2011, tens of thousands of US troops were still in Iraq.

When did the Iraq War move into its "post" phase? Surely it wasn't when Bush declared victory since combat – with 3,000 US casualties – continued for seven more years. When Obama declared an end to combat operations, perhaps then the Iraq War ended. But what of all of the troops left behind – with casualties continuing even though these troops were mostly not directly involved in combat? Then remember that after the "end" of the Second World War, large groups of US troops remained in Germany and Japan – indeed, US troops remain there as of 2011. So, it

is hard to tell when war has ended just by looking at when major combat operations have ended, or when most troops have returned home.

The "post" in post war discussions may refer to when serious questions of peace building occur.[1] Typically this is after hostilities have ceased and when there has been some kind of truce or peace treaty. But there will be many wars where there is never a formal peace treaty and yet where surely there is an end of the war. And in other cases there will never be "peace building" at all, even as the war surely comes to an end. For this reason, and reasons given in the previous paragraph, I think that we should be flexible in how we regard the "post" in *jus post bellum*.

Helen Stacy has suggested that rather than try to give a definitive statement of what "post" means, instead we simply use the term "mopping up."[2] On this creative, and somewhat whimsical, way to resolve this thorny conceptual issue, *jus post bellum* refers to any principles that govern the mopping up efforts, namely the efforts at the end and after the end of war that lead into a position of peace. In this way, we don't have to decide precisely when war ends but only when the practices of mopping up begin. It is conceivable that mopping up efforts occur even while it is pretty clear that war is still waging, although often this will be a very dangerous thing to do. Later I will argue that certain decisions both about whether to go to war and how to wage war should indeed be influenced by considerations of *jus post bellum*. In this sense, the borders of these three Just War branches are permeable anyway so it should come as no surprise that "post" war is difficult to define exactly.

It seems that today, especially in asymmetrical wars, there is no ceasefire or anything that could be called the formal end of a war. It is for this reason that I think that we should understand the phrase "after war ends" as relative to where things had been in an earlier period of hostile relations. War "ends" in asymmetrical wars when hostilities have diminished sufficiently so that rebuilding can be practically discussed. Or to put the point in a slightly different way, war "ends" when both parties are ready to explore what would constitute a just and lasting peace. There might still be considerable distance to traverse in order to reach this goal but the parties are talking about the prospects for peace rather than the continuation of hostilities in the way they had been in the recent past. Here the category of "after war ends" is relative to where parties were before

[1] I thank Hilary Charlesworth for this suggestion.
[2] Helen Stacy's remarks were made at a workshop on "Ethics, *Jus Post Bellum*, and International Law," August 25, 2010, in Canberra, Australia.

compared to where they are now in terms of goals to be pursued. Justice considerations of *jus post bellum* then come into the fore when parties previously focusing on hostilities begin to focus instead on peace.

Another issue to think about is whether we can separate further the practices that lead to a war's end from the practices that are instrumental in reestablishing the peace. I follow David Rodin's helpful categorization of the way a war is brought to an end, called *jus ad terminationem belli*, or *bellum terminatio* for short, which concerns "victory, defeat, stalemate, or intervention by a third party." He distinguishes *bellum terminatio* from "*jus post bellum* proper, which concerns the moral principles after a transition from war to peace has been achieved."[3] I will say very little about *bellum terminatio*, even though past theorists of the Just War tradition were quite concerned about the terms of peace treaties, for instance. I will restrict myself to the justice-based considerations after war ends, *jus post bellum* proper, since this topic has been greatly underexamined, and yet is of the highest importance today.

Although the morality of peace treaties, for instance, is not of high priority today, the exception is whether to accept, as just, amnesty provisions of those treaties, especially when the amnesties are directed at the leaders of the aggressor or genocide-inducing State. I will say a bit about this issue of amnesties and have addressed it elsewhere.[4] What is today called transitional justice is thus misnamed if we accept Rodin's suggestion, since it concerns pretty much the same as *jus post bellum* proper.[5] A good book is yet to be written about how to regard *bellum terminatio*, but I will not attempt to write it here.

A further issue is whether the normative principles are conceived as moral or legal or some combination of these two. The *jus post bellum*, as well as the other branches of the Just War, were first discussed by the medieval theorists who were largely natural law theorists. According to natural law doctrine, there is not a clear line drawn between the moral and the legal. Both moral law and positive law participate in the natural law governing all that transpires on earth; and the natural law participates in God's eternal law. The positive law may be somewhat narrower in scope than the moral law, but there is a sense that law and morality

[3] David Rodin, "Two Emerging Issues of *Jus Post Bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression," in Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, The Hague: TMC Asser Press, 2008, p. 54.

[4] See Larry May, *Crimes against Humanity: A Normative Account*, NY: Cambridge University Press, 2005, ch. 13.

[5] The exception is Ruti Teitel, who is concerned with both the transition from war to peace and the justice of the peace, in her book, *Transitional Justice*, NY: Oxford University Press, 2000.

cannot diverge much from each other since they are based in the same natural law.

Contemporary adherents of natural law theory hold that morality informs and limits the positive law. And the laws of war thus end up being both moral and legal. My view is that *jus post bellum* principles are primarily moral principles that are meant to inform decisions about how international law is best to be established down the road. Here it is important to note that on this construal, *jus post bellum* principles are not legal principles themselves. *Jus post bellum* principles are normative in that they are moral norms and they tell us what should become law. But until there is some lawmaking act, such as an international convention (a multilateral treaty), what I will identify as *jus post bellum* principles are primarily moral norms that have strong force in our thinking about what norms should be enacted into international law.

Legal theorists have been somewhat confused about the other two branches of the Just War tradition, the *jus ad bellum* and *jus in bello*, because they both have moral force and they have already been instituted as law by multilateral treaties, such as the four Geneva Conventions of 1948. But these other two branches of the Just War tradition, like the *jus post bellum*, are in my view primarily moral norms. In setting out a group of *jus post bellum* principles I am making a plea for them to become instituted, but my arguments in favor of having them become legal norms should not be confused with thinking that they already have legal status, which they do not. One of the *jus post bellum* principles, the principle of proportionality, is really a meta-norm in that it is meant to function as a qualification on the other norms. And in this sense it is not as readily able to be instituted as a legal norm.[6] Yet, it is also true that such a principle of *jus post bellum* will strongly inform what international laws should be instituted.

Finally, it might be asked, who is the intended addressee of these *jus post bellum* principles? Here the answer is also not as easy as one might think. It would be easy to say that the addressee is any political leader who contemplates taking his or her country into war. But it is rare indeed when political leaders consider the Just War tradition in their war-making decisions, let alone in their decisions about how to act after war is over. Rather it is more likely that it is the average citizen of a State that is about to embark on war, or is already enmeshed in war, who would consider the morality and legality of how wars ought to end. And the average citizen is

[6] I am grateful to Jovana Davidovic for discussion of this point.

the one who will have to say no to wars that are fought in such a way that peace is unlikely to result from the war that a State's leaders are mounting. As has been true of the Just War tradition throughout its existence, *jus post bellum* is primarily addressed to those who are already predisposed to act morally and who care about peace.

Indeed, it seems to me that this is all that can be hoped for, namely to add to the conscientious and careful reflections of members of the citizenry of a State that is on the verge of, or already embarked on, a path to war. Like all writing about morality, it is not obvious who all is included in the intended target audience. But this much seems clear: in cases of *jus post bellum* reflection, the audience is largely humanity, with special attention to those members of humanity who can make a difference in decisions about how to act at war's end. This focus on humanity is in keeping with Hugo Grotius's views as well as the Preamble of the United Nations Charter, as we will see.

1.2 TRANSITIONAL JUSTICE AND *MEIONEXIA*

Transitional justice overlaps with the older idea of *jus post bellum*, which is also under-theorized, in that both concern how to regard just practices and institutions after war or mass atrocity has come to an end. Transitional justice often concerns the way to move from an authoritarian regime that did not respect the rights of the people to a democratic regime that does respect rights. *Jus post bellum* normally concerns how to move to a situation of stability after war. But both transitional justice and *jus post bellum* involve reconciliation with a violent past. The justice considerations here are often markedly different from those concerning traditionally understood distributive or compensatory justice. This is because the aim is to achieve a just and lasting peace in a society that has been ravaged by war and human rights atrocities such as genocide. And to accomplish this goal of justice certain compromises must be reached, including those concerning rights, even as the very rights compromised are normally thought to be the cornerstone of traditional ways to conceive justice.

In my view, *jus post bellum* as well as transitional justice calls for moderation because that is often what is needed for previously conflicting groups to achieve lasting peace. In considering post war justice I will start with Aristotle, who first set the modern terms of debate about justice and first gave the traditional account of justice in distribution and

compensation. Aristotle begins Book v of his *Ethics* by asking "what sort of a mean justice is, and what the extremes are between which justice lies."[7] Initially, Aristotle proposes that "the unjust man takes more than his share," whereas the just man takes or demands only what is his due.[8] But in the very next paragraph, Aristotle says:

> The unjust man does not always choose the larger share (*pleionektes*); of things that are bad in themselves he actually chooses the lesser share, but he is nonetheless regarded as trying to get too much, because "getting too much" refers to what is *good*, and the lesser evil is considered to be in some sense good.[9]

One is tempted to say that justice for Aristotle lies between the extremes of taking too much (*pleionexia*) and taking too little (*meionexia*), and context matters, except for the fact that Aristotle does not directly mention *meionexia*. But he clearly does hold that distributive justice involves taking only what is one's due, the epitome of justice.

In my view, Aristotelian moderation is also the key to transitional justice. Even though Aristotle does not consider *meionexia* as a virtue, he does set the stage for such a possibility. Aristotle's general idea is that we must distinguish two kinds of good: things good in themselves and things good for the individual. The aim of moral education is that eventually people will become habituated so that they see the things that are good in themselves as also good for them. But part of the task of pursuing things good in themselves is that one restrain oneself, perhaps demanding less than is one's due, and not pursue some things that may be in one's interest but are opposed to what is good in itself. This is one of the types of moderation that is crucial for living the virtuous life for Aristotle.

While Aristotle clearly does not recognize *meionexia* as a virtue, demanding less than is one's due is the kind of moderation that Aristotelian virtues epitomize. Moderation is best seen as restricting behavior away from excesses and deficiencies. Aristotle seems to see *meionexia* as a deficiency and *pleionexia* as an excess, although he never makes this explicit. Yet, Aristotle also says that what is a deficiency in one situation could be a virtue in another situation. I will argue that in certain situations, especially in transitions from war to peace, *meionexia* may indeed be something like a virtue, although surely not in all cases and situations.

[7] Aristotle, *Nicomachean Ethics*, 1129a4–5, trans. J. A. K. Thompson, Penguin Books, 2004, p. 112.
[8] *Ibid*., 1129b2, p. 113. [9] *Ibid*., 1129b7–10, p. 114.

One of the few references to *meionexia*, the disposition to accept less than one is due, comes from Xenophon. In his work, *The Education of Cyrus*, he says the following:

> Thus they were encamped by regiments, and in the mere fact of common quarters there was this advantage, Cyrus thought, for the coming struggle, that the men saw they were all treated alike, and therefore no one could pretend that he was slighted, and no one sink to the confession that he was a worse man than his neighbors (*meionexia*) when it came to facing the foe.[10]

Here *meionexia* is thought of as a vice for soldiers in that soldiers should not demand for themselves less than was their due.

Indeed, Xenophon believes that disabusing soldiers of their tendency to think that they were not as capable as their fellow soldiers was a key source of providing them with a conscience well-framed for battle:

> Moreover the life in common would help the men to know each other, and it is only by such knowledge, as a rule, that a common conscience is engendered; those who live apart, unknowing and unknown, seem far more apt for mischief.

To have a military conscience, soldiers needed not to think too little or too much of what was their duty.

In this respect, Xenophon partially followed Aristotle in thinking of *pleionexia*, demanding too much, and *meionexia*, demanding too little, as the vices framing the mean of justice. But in another respect Xenophon does not follow Aristotle who at least allowed for the possibility that something like *meionexia* could be a virtue in certain situations, since conscience favored moderations and called for a consideration of circumstances. But perhaps this is because Xenophon was addressing soldiers and Aristotle was addressing Athenian civilians, or perhaps because Xenophon was addressing wartime, not transitional, situations. It appears that the only ancient philosophers who saw *meionexia* as a virtue were the Cynics, who were also arguably the first cosmopolitans.[11]

As far as I am aware, Hugo Grotius is the first modern thinker to talk of something like transitional justice in terms of *meionexia*. In his early work, *De Jure Praedae* (1605), on why the Dutch fleet should not have to

[10] Xenophon, *Cyropaedia* (The Education of Cyrus), trans. Henry Graham Dakyns, rev. F. M. Stawell, London: Macmillan, 1914, Book 2, ch. 1, sec. 25.

[11] William Desmond, *Cynic*, Berkeley: University of California Press, 2008, p. 124, says that "Pseudo-Lucian uses an unusual antonym for *pleionexia* ('wanting too much') – *meionexia* ('wanting too little'): the Cynic prays that he may be able to persevere in his virtue of *meionexia*."

give back booty seized in just victories against the Spanish fleet, Grotius follows Xenophon in thinking of *meionexia* as a vice for victors:

> Justice consists in taking a middle course. It is wrong to inflict injury, but it is also wrong to endure injury … the truly good man will be free from *meionexia*, that is to say, from the disposition to accord himself less than his due.[12]

But Grotius here also regards *meionexia* as a vice for those who are victims in war – saying it is wrong to endure injury because one thinks one does not deserve to be spared. Interestingly, in his later writings, especially his monumental work *De Jure Belli ac Pacis* (1625), Grotius continues to regard *meionexia* as a vice at least concerning how *victims* should view what is their due. But the general idea of *victors* taking less than they deserve is seen as a virtue insofar as it is part of a general strategy so that peace might more easily be achieved.

I propose that we follow the later works of Grotius and see *meionexia*, at least in some situations, as something that victors are counseled to accept in order better to achieve humanitarian goals in the transition from war or mass atrocity to peace. But *meionexia* should be counseled against for victims in that they should still demand all that is their due, and the world community should come together to provide compensation for victims of war and mass atrocity. In this respect there is an asymmetry in the idea of *meionexia* that needs further support.

Historically, individual victims have often been forced not to get proper compensation at the end of war or mass atrocity, especially if the victims came from the "unjust" side of a war. On the other hand, victors have been treated as fully warranted in demanding often crushing penalties from vanquished nations, especially if the vanquished were considered to have engaged in an unjust war. My view is that an asymmetry can be seen as a plausible strategy, but not the one that has been traditionally accepted. Rather, in my view transitional justice demands that victims receive their due, even if victors may have to provide the majority of the compensation for victims to achieve their due, and even though victors will thus not get what is their due. This asymmetry is premised on the idea that those who are most vulnerable must get what is their due first, in situations of scarcity.

Vulnerability to death and serious physical harm should be the criterion that we use to decide who should not be asked to act from *meionexia*

[12] Hugo Grotius, *De Jure Praedae* (On the Law of Prize and Booty) (1605), trans. Gwladys L. Williams, Oxford: Clarendon Press, 1950, p. 3.

and demand less than their due. In wartime situations, the most vulnerable are often the victims of war, and often these are civilians on both sides of that war. Those who are not victims, as I will later argue, should be the ones who are counseled to act from *meionexia*. In discussion of the rules of war, other forms of asymmetry have been recognized, such as the longstanding view that civilians should be treated much better than soldiers during war. The rationale for this so-called principle of discrimination is similar to that for recognizing the claims of victims before the claims of nonvictims, especially victors – namely a concern for first protecting those who are most vulnerable.

Here we might remember that at the end of the First World War, Germany was heavily penalized so that the victorious Allies could get their due, at least in part at the cost of victims in Germany not getting compensated. And many believe that German resentment led to the Second World War. It is also noteworthy that at the end of the Second World War the victorious Allies paid most of the costs of reparation and restitution for the victims in Germany and Japan, in order to achieve, what has in fact transpired to be, a long-term just peace in those nations.

1.3 PEACE AS THE OBJECT OF WAR

Nearly everyone to have written on the subject of war would agree that the object of a just war is the achievement of a just and lasting peace. Suarez says that "one may deny that war is opposed to an honorable peace" but one cannot deny that war "is opposed to an unjust peace, for [war] is more truly a means of attaining peace that is real and secure."[13] And Grotius says it is a mistake to make a blanket argument against the "justice of wars, so long as there are men who do not suffer those that love peace to enjoy peace."[14] Wars of self-defense are just because they have a just peace as their object, as are wars fought for the defense of innocent others. Wars fought for territorial expansion or for conversion of the heathens are generally not considered just unless there is some connection between these wars and the object of a just and lasting peace. Israel for instance argued that its war, to expand into the Golan Heights and the West Bank in its Six Day War in 1967, was justified because securing these lands was claimed to be necessary for the long-term peace in the region.

[13] Francisco Suarez, *Disputation XIII, De Triplici Virtute Theologica: Charitate*, ("On War," in Selections from Three Works: Charity) (*c.*1610), trans. Gwladys L. Williams, Ammi Brown, and John Waldron, Oxford: Clarendon Press, 1944, p. 802.

[14] Hugo Grotius, *De Jure Belli ac Pacis* (On the Law of War and Peace) (1625), trans. Francis W. Kelsey, Oxford: Clarendon Press, 1925, p. 71.