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Edited by Larry May and Andrew T. Forcehimes

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Introduction

Larry May and Andrew T. Forcehimes

There are well-recognized moral and legal problems that arise concerning the initiation as well as the conduct of war or armed conflict. Increasingly, moral and legal problems are being recognized also at the end of armed conflict or war. Just as there has been significant debate in law and philosophy about the *jus ad bellum* and the *jus in bello*, so there is now a debate also about *jus post bellum*. This collection of essays brings together leading legal, political, and moral theorists to discuss normative issues that arise when war concludes and when a society strives to regain peace. The questions concern retribution, reparations, and rebuilding, along with questions about how reconciliation might possibly be effected in war-torn societies.

The emerging field of *jus post bellum* scholarship is still in its formative years. Indeed, the very idea of *jus post bellum* is itself contested, in terms of its meaning and its usefulness. Just as theorists have wondered whether or not transitional justice really is a form of justice, rather than merely a call for compromise, so theorists are raising questions about the justice or conceptual salience of *jus post bellum*, as will be evidenced in the final two essays of this anthology. What is not contested is that there is a need for forthright discussions of conceptual and normative issues that arise in truth and reconciliation commissions as well as war crimes trials and reparations programs. We offer this new collection of essays, originally presented at an August 2010 workshop in Canberra, Australia, held under the auspices of the Centre for Applied Philosophy and Public Ethics, and generously supported by a grant from the Australian Research Council, as a significant advance in these debates.

Transitional justice concerns the normative considerations that apply to a society that is moving from a repressive, non-democratic society to one that is non-repressive and democratic. Most of the repressive societies that are in this state of transition are also emerging from a period of mass atrocity or from a civil war. *Jus post bellum* concerns societies that are trying to regain peace after

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a period of war or armed conflict. In this sense, there is considerable overlap between transitional justice and *jus post bellum*. One of the most important questions for both emerging fields of inquiry is when it might be justified not to prosecute political and military leaders who have clearly caused harm. And if there are to be such trials, which often make tensions worse in the society in question, how and where should they be conducted? And how should we regard claims for reparations, which often threaten to disrupt fragile peace building processes?

In the transition from war, mass atrocity, or repressive regimes, how should we regard the idea of democracy and human rights? Should regimes be toppled unless they are democratic, or is it sufficient that these regimes are less repressive than before, now thoroughly peaceful, and protective of human rights? Are there moral reasons for thinking that soldiers should be relieved of responsibility so as to advance the goal of peace building? And how should we regard the often conflicting goals of telling the truth about what occurred in the past and allowing individuals to have their day in court? How should we view the hard cases of economic actors as well as child soldiers? In our anthology, each of these important questions receives detailed analysis, and practical as well as theoretically informed answers are offered.

In the remainder of this introduction, we will summarize the main lines of argument of each of the essays of the anthology. We begin with a pair of essays on truth telling and reparations. We then proceed to several essays on retribution, concerning what form retribution should take and where prosecutions should take place. Then there are essays that discuss hard cases. The anthology concludes with two pieces, one by a philosopher and one by a lawyer, that offer significant challenges to the very idea of *jus post bellum* as a discrete field of inquiry.

The collection starts with an essay by Margaret Walker. Walker, setting the theme for many of the later essays, begins by canvassing the genesis of *just post bellum*, noting that it has developed out of two overlapping traditions – just war theory and transitional justice. Despite this overlap, she contends that there is a notable absence of discussion of public truth telling in the just war tradition, which is surprising given the prominence of truth commissions in transitional justice theorizing. This divergence over truth telling in the extant literature prompts her to explore in more detail the relevance and implications of truth telling not only domestically but internationally as a necessary feature of post-conflict justice. Her inquiry into public truth telling proceeds by examining the notion of a “right to the truth.”

Walker asks: In the wake of atrocities, are individuals entitled, as a matter of justice, to an investigation into the events that transpired? To answer this question, she turns to the recently published “Study on the Right to the Truth”

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by the United Nations Commission on Human Rights, arguing that there are three reasons in favor of a right to the truth: (i) it acts as a kind of reparation affirming and restoring the dignity of victims; (ii) it identifies those responsible, making it possible to hold them accountable; and (iii) it helps to prevent such atrocities from happening again by exposing how they arose. Once Walker establishes a right to the truth, she then turns to truth commissions as the most familiar (but not the only) way to make good on this right, in order to see if truth telling should be a norm that extends beyond the domestic context (where it has typically been confined).

Walker argues that insofar as the right to the truth is a matter of human rights, then conceptually, it seems equally applicable to the international domain, especially since human rights violations are often perpetrated or facilitated by foreign powers. Accordingly, since (minimally) truth commissions, properly executed, produce a credible account of events and expose those responsible for them, she contends that these commissions should be extended beyond the domestic sphere. Without such commissions (or the like) victims have their dignity doubly violated, once during the atrocity, and after by having the truth hidden. Yet extending truth commissions to the international sphere introduces various complexities, most notably, truth commissions are often viewed as a process of self-assessment driven by a particular national narrative, thus the application to interstate conflict seems difficult. Walker, citing empirical studies, argues that this difference does not exclude the possibility of effective international truth commissions.

The essay cautiously concludes with a proposal for how post-conflict truth telling might be realized in international contexts, arguing for an international multilateral institution, similar to the International Criminal Court, or various conflict- or topic-specific “truth tribunals” which would help ensure that the truth is recovered – protecting victims’ right to the truth and providing the benefits mentioned previously.

Examining reparations and restitution through the lens of transitional justice, Larry May contests the conventional view that justice requires that people should get what is their due. In opposing the standard view, May argues that, after mass atrocity, in restitution and reparations: (i) those wronged should sometimes demand less than their due, and (ii) compensation should not necessarily be paid by the wrongdoer but by the one who is in a position to do so. The hope is that (i) and (ii) will more effectively move war-torn states to a just and lasting peace – the aim of transitional justice – with priority given to those who are the most vulnerable.

May begins by tracing the origins of transitional justice back to the concept of *meionexia* – taking too little – and its opposite *pleionexia* – taking too much. The latter is taken by Aristotle to be a vice (the former Aristotle fails

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to mention). May turns to Hugo Grotius in order to develop how *meionexia* might play a role in post-war considerations. He argues that in some cases it is a virtue for the just victors of a battle to temper their compensatory claims, even if this means taking less than they are justified in demanding in order to facilitate the transition to peace.

With this conception of transitional justice in mind, May carefully reexamines restitution and reparations. He defines *restitution* as the process of restoring what has been stolen or lost to a rightful owner. On his account, the wrongdoer – the one who initially caused the loss of the item or the one who failed to return it – has a duty to make amends and rectify the wrong committed. *Reparations* are due when one damages an item or relationship yet, unlike restitution, the item remains in the original owner's possession. Again, wrongdoers have a duty to restore or compensate for the loss. Ideally, then, the two interconnected goals of restitution and reparations dovetail: that victims would be compensated for their loss, and this compensation would be provided by taking away the benefits received by wrongdoers. But situations are not always ideal. May's account thus acknowledges that the wrongdoer has a duty to give restitution and reparations for the harm committed, yet unlike the traditional account, he does not limit this duty solely to the wrongdoer; rather, he argues that the focus should be placed on rectifying the harms done so as to ensure that at least one of the goals of restitution and reparations is met. This means, May concludes, that in these non-ideal cases there are reasons for supporting compensation of victims even if resources have to come from those who strictly do not have duties to the victims.

Phil Clark begins our string of essays in this volume concerning punishment after war. He sets up this topic by noting that central to both of the key frameworks explored in this anthology – *jus post bellum* and transitional justice – is a focus on addressing past crimes through international law. However, he argues that the current top-down approach that emerged in the aftermath of World War II, what he calls the Nuremberg model, is becoming increasingly outdated in the face of decentralized conflicts where non-state perpetrators (like the economic actors that Kyriakakis will highlight) play major roles. This new type of conflict means that trials cannot be relegated only to those highest in the chain of command.

The failures of the Nuremberg model have been met by creative alternatives in the form of community-based justice mechanisms as, for example, utilized after the genocide in Rwanda and the Ugandan civil wars. Clark briefly describes the histories of both conflicts as a way to illustrate the crucial role that community-based approaches play in accomplishing transitional justice goals. Clark then, drawing on his extensive fieldwork, argues that the

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community-based courts in Rwanda called *gacaca* – modified customary practices that act as courts – challenge the Nuremberg model. Specifically, the effectiveness of local prosecutions of lower-level perpetrators of genocide would have overwhelmed international courts and tribunals, and this community-based approach, combined with its accessible procedures, improves fractured relationships and promotes community healing and forgiveness. The *gacaca*, and similar community-based alternatives, are not free from criticism. As a result, Clark addresses three standard lines of critique leveled at *gacaca*: first, *gacaca* fail to be truly indigenous; second, they lack due process; and third, they are controlled and even exploited to further the aims of a select group of elites. He concludes that each of these objections fail, and thus *gacaca* prove to be an effective way of dealing with the challenges that modern combat pose for the Nuremberg model.

It is worth noting here two points of contact with other essays in this volume. In a similar fashion as Walker, Clark argues that *gacaca* promotes healing in virtue of the truth telling that occurs as part of their procedures. Additionally, Clark's point that lower-level actors need to be held accountable in order to heal the social fabric is, as we shall see, echoed in Mark Drumbl's essay concerning child soldiers.

Continuing our section on courts and tribunals after war, Jovana Davidovic offers a deeply insightful look into the nearly three decades of oppression suffered by East Timor, and the subsequent and woefully inadequate attempt to implement transitional justice mechanisms, specifically in terms of prosecution of those responsible. She explains that due to a lack of convergence of various commissions on how to arrange the prosecutorial courts, a local ad hoc tribunal emerged, which proved to be a monumental failure. And subsequent attempts to remedy this failure have only complicated matters, leaving the transition to a just and lasting peace still far from realized.

Davidovic maintains that the failures of the transitional justice mechanisms in East Timor are instructive, since they bring into question an oft-touted feature of certain institutions, namely the ability to pursue multiple transitional justice goals simultaneously. For example, those in favor of the local ad hoc tribunal held that it would, primarily, prosecute those responsible for the mass atrocities and, secondarily, be a visible symbol of the local rule of law, but neither of these goals was in fact met.

Abstracting two general rules from this particular situation, Davidovic contends that (i) in most cases, secondary aims thwart the primary aims. That is, single-goaled mechanisms or institutions of transitional justice have a better chance at being successful. And (ii) if an institution is not capable of meeting its primary transitional justice goals, then arguing in favor of the institution

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by pointing to secondary objectives that it might fulfill fails to give sufficient reasons for supporting it. Davidovic closes by arguing, despite the previous failures, for international prosecution of the crimes committed, so long as the aim of the court is focused exclusively on reestablishing the rule of law for East Timor.

Noting an additional problem with current prosecutions after war, Joanna Kyriakakis argues that a key feature of *just post bellum* is holding those who are responsible for a conflict accountable; however, the guiding principles that undergird this idea on both just war and transitional justice approaches reflects liberal criminal law, which is often blind to or marginalizes the contributions of economic actors. She clarifies this point by providing, among other telling examples, an in-depth account of the role that economic actors played in heightening and prolonging the Liberian conflict.

This leads Kyriakakis to posit three reasons for thinking that, in some cases, a priority should be placed on accountability measures concentrated specifically on economic crimes. First, inasmuch as restitution and reparations are a goal of post-conflict resolution, as May's essay also indicates, and since economic actors often benefit from conflict, then holding economic actors accountable for the wrongdoing that they perpetrate is necessary. Second, given the role that richer nations frequently play in promoting conflicts among poorer nations for their benefit, overlooking economic actors calls into question the legitimacy (and commitment to equality) of international institutions that act in the name of justice. The third reason, which is the same as one of Walker's motivations for public truth telling, is that a failure to address the wrongs of economic actors invites a future repetition of the same unjust conflict. Thus, Kyriakakis concludes that if there is going to be justice in *jus post bellum*, economic actors cannot continue to be ignored but must be held accountable.

Mark Drumbl, working within the transitional justice framework, challenges current best practices (as seen in the Paris Principles) and human rights policies that child soldiers should be considered faultless passive victims – children are shielded from any culpability related to the crimes that they may have committed during war. Like Kyriakakis, Drumbl draws on the Liberian Truth and Reconciliation Commission, as well as the Sierra Leone and South African commissions, showing that viewing child soldiers as faultless passive victims hinders positive transformations after conflict by taking an overly simplistic perspective.

For instance, he points out the benefits of culturally specific disarmament, demobilization, and reintegration programs, namely, that those who participate have a far greater chance of successfully reentering their respective communities. But these benefits are not conferred on former child soldiers

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when the faultless passive victim imagery is in place, because central to nearly all endogenous rituals (like the community-based justice mechanisms that are the focus of Clark's essay) is the notion that one needs to be purified or decontaminated. Additionally, the faultless imagery glosses over the particularities unique to each child's actions during the war. And given that the atrocities the child actually committed during conflict matter to the members of the community, without such specific decontamination children have a more difficult time being forgiven and accepted back, closing a door to redemption and opening a door for other various injustices to occur.

To prevent these adverse effects, Drumbl argues that the process of truth telling, reparations, and other aspects of *jus post bellum* generally require a more nuanced and sophisticated view of child ex-combatants. Yet his position does not require the other extreme of prosecuting all child soldiers; rather, he modestly holds that each new situation should be considered in light of its complexities.

Tony Coady continues this volume's theme of examining community practices and accountability after war. He contends that since individual fighters are culpable for engaging in an unjust war, they should be treated differently upon a war's termination. This seems an intuitive point as it pertains to *jus in bello*. War criminals typically are strongly condemned, not lavishly praised. And yet, this same condemnation is not extended to those who fail to object to fighting in an unjust war. This asymmetry, Coady argues, is a mistake. And yet it is the dominant norm for many communities and nations to grant unqualified praise to its current or returning troops. For example, those that claim that the war in Iraq is an unjust war still "support the troops," and the parliament of Italy recently considered whether to honor and give pensions to all World War II fighters regardless of what side they fought on.

The first part of Coady's essay is negative, addressing the arguments in favor of the current practices of supporting the troops after war even if the war was unjust. Most notable, but not the only position that he argues against, is the claim that soldiers can act honorably or bravely even in an unjust war, and hence this bravery should be commended. Coady responds to this position by pointing out a claim propounded by those in favor of the unity of the virtues – context matters. And this is a point that must be denied by those who wish to give unqualified praise for troops.

Rebuffing support for current post-war troop treatment makes room for the positive part of Coady's argument, supporting the notion of individual accountability for fighting in a war through an examination and defense of conscientious objection. He argues that soldiers have a responsibility to examine (and reject) the justice of the war they are called upon to fight. And

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accordingly, in the same way that soldiers are to abstain from intentionally killing noncombatants, so too are they to abstain from fighting if the justification for war is wanting. The upshot of the argument, then, is that celebration and treatment of troops after the war needs to be in line with the *jus ad bello* and *jus in bello* considerations for that war. This means refraining from the celebration of those that have willfully participated in great wrongs, and may even mean honoring those who conscientiously objected.

As mentioned, one of Coady's examples is of those who deem the war in Iraq an unjust war and yet still praise the troops. This example nicely leads to the central question Robert B. Talisse attempts to answer in his contribution: Could democratization ever serve as a just cause for war, as it purportedly did for the invasion of Iraq? Talisse makes it manifestly clear that he has several reservations that democratization could justify the war in Iraq, but controversially he argues that the fact that a war is waged for the sake of democratization does not necessitate that the war is unjust. In other words, in his view, under certain conditions, the goal of establishing democracy could serve as a just cause for war. This view thus challenges the standard view that only defense against aggressive acts can constitute a just cause for war.

The first step in Talisse's argument is to canvass the burgeoning literature that challenges the restriction of just causes for war to aggressive acts against states. In arguing for an expanded conception of just cause he holds, like Clark and Kyriakakis, that the traditional view is outdated because hierarchically organized state actors are not always the primary actors in modern conflicts. Additionally, the standard view fails to take into account civil conflicts that are confined within a state (like those in Rwanda and Uganda described by Clark). Given that the standard view seems inadequate, Talisse argues that there must be a revision in what is classified as a just cause for war, and this opens the conceptual space necessary for providing an argument for democratization as a just cause.

Talisse's argument is elegantly simple. Drawing on empirical findings, he argues that democracies systematically improve the human rights conditions of those living under them; hence, if, as others have argued, humanitarian duties can serve as a just cause for war, and if democracies help satisfy those humanitarian duties, then democracy should serve as a just cause for war. Clearly, Talisse's argument is concerned with *jus ad bellum* considerations, yet he also argues that viewing democracy as a *prima facie* just cause should influence *jus post bellum* thinking. For if democratization could serve as a just cause, then, he argues, this should shape, for example, how secure the democracy is made after the war and who and how much should be supported. This argument thus rests (in a similar way to Coady's) on a tight connection between *jus ad*

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bellum and *jus in bellum* considerations with *jus post bellum* implications. This tight connection, as we will see in the next essay, is exploited by Seth Lazar who argues that it renders the *jus post bellum* irrelevant.

Seth Lazar's contribution to this volume investigates and rejects three prominent claims in the literature surrounding *jus post bellum*, as interpreted by just war theorists: first, the priority of compensation; second, opposing Davidovic and Kyriakakis, that war criminals and political leaders responsible for unjust conflict be punished; and third, that intervening states are responsible for reconstruction. Lazar argues that the implausibility of each of these three claims furthers a general notion of skepticism concerning corrective post-conflict justice.

Offering various objections to the priority of compensation, Lazar argues that if compensation is going to be consistently pursued and applied it will entail untenable burdens on all parties. He adds that even if the weight of compensation is not crushing, it often leaves the most vulnerable in a worse position. He thus expresses two worries that May takes up in his essay and their divergent responses are worth noting.

In arguing against the punishment of those responsible for mass atrocities, Lazar offers multiple objections. First he calls into question the idea that punishment acts as a disincentive for preventing future unjust actions. Second, he worries that there are various points at which the process of culpability-based attributions could go wrong, for example, identification of the guilty, identification of the degree of guilt, and the degree of punishment. If, at any point, a mistake is made, then those who punish act unjustly. He thus contends that the risk of acting unjustly is too high and unjust actions could in fact rekindle the very conflict that the punishment is trying to prevent.

Finally, Lazar argues that in the face of an institutional collapse after conflict both traditionally proposed solutions – that the unjust belligerent should bear the cost or that the just state should bear the cost – seem problematic. If an unjust belligerent must bear the cost as a whole, then the cost will be passed on to individuals who neither supported unjust actions nor acted unjustly. If, however, just states are required to help, then why should this not place a demand on all states? Here again Lazar's and May's essays seem to cross paths, but with quite different intuitions at play in their reaction to these problems.

Lazar concludes by asking: What principles are *jus post bellum* supposed to be regulating, and does our general moral outlook not already cover them? In answering this question, he argues that theories of *jus post bellum* are parasitic on the governing principles of *jus ad bellum* and *jus in bellum*, with *jus ad bellum* and *jus in bellum* providing both the foundation and the content for *jus post bellum*. As a result, just war theory is comprehensive even if *jus post*

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bellum is absent, which, he argues, gives us reasons to be skeptical of theories of *jus post bellum*, especially if they are supposed to be different from the rest of just war theory.

In our second essay that challenges the necessity of *jus post bellum* as a new area of study, Robert Cryer argues that *jus post bellum* should not be seen as a seamless byproduct of just war theory. He begins by noting various incompatibilities between the definitions of the purported founders of *jus post bellum*, like Augustine, Vitoria, Suárez, Grotius, and Gentili, and contemporary theorists. His point is that one should be wary of attempts to trace the lineage of these scholars as a foundation for modern law, and that *jus post bellum* today should not be viewed as a historically continuous descriptive term but as a new normative term. Cryer then asks: If viewed as a new normative concept, does *jus post bellum* provide a positive advance in our thinking and practices?

He answers this question in the negative, arguing that since humanitarian and international law already exists (even with its problems) it is better to accept the current working system than to attempt to develop a fundamentally different system. In support of this position Cryer argues for two interlinked points: (i) that a new area of *jus post bellum* would face numerous legal and definitional drawbacks, since many of the details of the system have yet to be worked out; and (ii) the ambiguities that would pervade this new system invite mistreatment and exploitation from more powerful nations. Thus, this new theoretical and practical enterprise called *jus post bellum* could thwart precisely those ends often touted by *jus post bellum* advocates.

This collection of essays has brought philosophers, lawyers, and political scientists together for a very productive and sometimes surprising dialogue on the underexplored topics of *jus post bellum* and transitional justice. And while the authors have not agreed on whether *jus post bellum* should be seen as a new field of inquiry or merely an extension of already existing fields of inquiry, they have agreed that the issues under investigation in our volume are vitally in need of the kind of good work we have presented here: namely, work that is theoretically sophisticated but also deeply practically informed. The discussion begins here, but surely it will not soon end. Indeed, there are plans already underway for a second volume on these important issues investigated in the interdisciplinary way so well epitomized by the authors in this collection of essays.