

Jus Post Bellum

Mapping the Normative Foundations

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I

FOUNDATION, CONCEPT, AND FUNCTION

1

Jus Post Bellum, Grotius, and Meionexia

Larry May*

In very recent times, the *jus post bellum* has begun to get attention.¹ Yet this branch of the Just War tradition was certainly countenanced and discussed in very early times as well. Today it is recognized that there are at least six *post bellum* principles: retribution, reconciliation, rebuilding, restitution, reparations, and proportionality, what we might call 5R&P. This part of the Just War tradition is not nearly as well settled as the other two parts. Indeed, there is not even consensus on what the conditions are, or even whether they are conditions of the same sort as those of the *jus ad bellum* and *jus in bello*.

In this chapter I will highlight several themes that are of theoretical and practical interest. First, I give a brief account of the six principles of *jus post bellum*, indicating how each was already addressed by such important sixteenth and seventeenth-century theorists as Hugo Grotius, Francisco Vitoria, and Francisco Suarez. Second, I provide a defense of seeing *meionexia* as a principle of justice well-suited for *jus post bellum* deliberations. Third, I attempt to answer the question: Is *jus post bellum* binding law? by going back to Grotius and Hobbes, especially to their discussion of the relation between the laws of nature and the laws of nations. And then in the fourth section, I conclude with a few thoughts about how *jus post bellum* and transitional justice relate to each other.

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¹ See Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012); Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012); Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press, forthcoming in 2014). Also see Carsten Stahn and Jann Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008); and Eric Patterson (ed.), *Ethics Beyond War's End* (Georgetown University Press 2012).

I. Historical Roots of *Jus Post Bellum* Principles

After war is over, one of the most important and most difficult conditions to satisfy is that of retribution—bringing those to account who committed wrongs either by initiating an unjust war or by waging war unjustly. This is especially problematic because holding criminal trials and then punishing often-popular state leaders, for instance, sometimes makes another condition of *jus post bellum*, reconciliation, very difficult to satisfy. But it is hard to comprehend what *jus post bellum* justice would involve if it did not have some accounting for the wrongdoers during the war or armed conflict that has now ended. In the sixteenth century, Francisco Vitoria argued that wrongs committed during war should be punished “proportionate to fault,”² linking retribution with *jus post bellum* proportionality. And Vitoria argued that the guide to whether to seek retribution is whether it “be for the public good.”³ We will return to this idea several times in this chapter.

Closure is hard to achieve if there is not a public reckoning for those who used the war as an occasion to commit wrongs, or who chose to conduct war in a wrongful way. This is because at the end of war there needs to be a just peace. The major theorists of the Just War tradition rarely talked about criminal trials, but certainly were focused on punishment of some kind for the wrongdoers after war ends. Grotius talked about some kind of tribunal in this respect, as when he says that “in some cases war is lawfully waged [...] in order that they [the criminals] may be brought to trial.”⁴ But there would be another 300 years before the first war crimes tribunal would sit at Nuremberg.⁵

The second condition of the *jus post bellum* is reconciliation. After war or armed conflict is over, a key consideration of *post bellum* justice is that the parties come to a lasting peace where mutual respect for rights is the hallmark. Vitoria was concerned with the effects of punishing those who have done wrong during war, and argues that punishment must be mitigated by “moderation and Christian humility” so as best to achieve a secure and just peace.⁶ I will return to this idea of humility in Section 4. Reconciliation was recognized by Grotius when he discussed the conditions for which clemency rather than punishment should be meted out,⁷ or where he claimed that there are certain duties that must be performed even toward one’s enemies.⁸ Today, reconciliation is again taking center stage in *jus post bellum* debates with the idea of a return to the rule of law as a major normative category related to reconciliation.⁹

² Francisco Vitoria, *De Indus et de Ivre Belli Reflectiones* (Reflections on Indians and on the Laws of War, first published 1557, John Pawley Bate tr., The Carnegie Institution 1917) s. 56, 185.

³ Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 47, 182.

⁴ Hugo Grotius, *De Jure Belli ac Pacis* (On the Law of War and Peace, first published 1625, Francis W. Kelsey tr., Clarendon Press 1925) bk I, ch. 3, s. 13, 69.

⁵ See my discussion of the “Nuremberg Precedent” in Larry May, *Aggression and Crimes Against Peace* (Cambridge University Press 2008) ch. 7.

⁶ Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 60, 187.

⁷ Grotius, *De Jure Belli Ac Pacis* bk III, ch. 11, (n. 4) s. III, 725.

⁸ Grotius, *De Jure Belli ac Pacis* bk III, ch. 9, (n. 4) s. I, 722.

⁹ See Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge University Press 2010).

The third condition of *jus post bellum* is rebuilding. Rebuilding is the condition that calls upon all those who participated in devastation during war to rebuild as a means to achieve a just peace. Grotius said that “all the soldiers that have participated in some common act, as the burning of a city, are responsible for the total damage.”¹⁰ One of the most difficult issues in the *post bellum* debates over the centuries is whether both the just and unjust sides of a war have obligations to rebuild. Vitoria addressed this issue straightforwardly when he said that “injured states can obtain satisfaction” even if they are those who have done wrong because “fault is to be laid at the door of their princes” not with those people who acted in good faith in following the dictates of these princes.¹¹ While some in the Just War tradition called for the wrongful vanquished state to be severely treated, Vitoria and others were concerned that rebuilding was necessary for a just and lasting peace. This was also true of how the Allies responded to winning the Second World War, namely by funding the rebuilding of Axis cities in Germany and Japan, a topic to which we will return.

The fourth condition of *jus post bellum* is restitution. Vitoria addressed this condition when he urged that we distinguish between land and “immovables” in determining what the victor can legitimately demand.¹² Vitoria believed that restitution was due only in certain situations because he generally thought that the victors get to keep “movables” insofar as they are necessary for paying compensation for what the war has cost. In this regard Vitoria said that “he who fights a just cause is not bound to give back his booty.”¹³ Grotius also argued strongly for this view in his book *De Jure Praedae*.¹⁴

When it comes to land that has been seized, though, most theorists believed that these lands should be returned as a matter of restitution after war ends, as long as it is not necessary “as a deterrent.”¹⁵ This position on restitution is sometimes also held today, although it is becoming more common to think that restitution of land is normally owed at war’s end not as deterrent but as required restoration. There are exceptions, such as Israel’s refusal to give back the West Bank and Golan Heights after its so called Six Day War with Egypt and Syria. Israel claimed that these lands were needed to be able to deter future aggression. Here Israel seemingly followed Vitoria’s understanding of restitution in linking restitution to deterrence.

The fifth condition of the *jus post bellum* is reparations. Suarez said that “in order that reparation of the losses suffered should be made to the injured party” war may be declared.¹⁶ But reparations are more typically discussed as due after a war is over. Indeed, Grotius said that “there are certain duties which must be performed toward those from whom you have received an injury.”¹⁷ This remark is mainly addressed at

¹⁰ Grotius, *De Jure Belli ac Pacis* bk III, ch. 10, (n. 4) s. IV, 719.

¹¹ Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 60, 187.

¹² Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 50, 184.

¹³ Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 51, 184.

¹⁴ See Hugo Grotius, *De Jure Praedae* (On the Law of Prize and Booty, first published 1605, Gwladys L. Williams tr., Clarendon Press 1950).

¹⁵ Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 52, 184.

¹⁶ Francisco Suarez, “On War” (*Disputation XIII, De Triplici Virtute Theologica: Charitate*, first published c. 1610), in *Selections from Three Works* (Gladys L. Williams, Ammi Brown, and John Waldron, tr., Clarendon Press 1944) Disputation XIII, s. IV 4, 817.

¹⁷ Grotius, *De Jure Belli ac Pacis* bk III, ch. 11, (n. 4) s. I, 722.

prohibiting cruelty¹⁸ but it can easily also be seen as a way to view reparations, where even the just victor may have duties of reparation to the unjust vanquished. Reparations are often crucial for reestablishing trust among the parties after war's end as well as a simple matter of restitution.

The sixth *jus post bellum* condition is proportionality. One way to understand *post bellum* proportionality is as applying to each of the other five conditions. Whatever is required by the application of other normative principles of *jus post bellum* must not impose more harm on the population of a party to a war than the harm that is alleviated by the application of the other post-war principles. In this sense, *jus post bellum* principles are not necessary conditions so much as they are desiderata, to use Lon Fuller's term.

For Fuller, the components of the rule of law are desiderata.¹⁹ Desiderata differ from necessary or sufficient conditions in that they need not be satisfied, at least not to their fullest extent, for a war to be justly ended. But each of the desiderata must at least be partially satisfied nonetheless. So, the proportionality principle calls for a determination of how much each of the other *jus post bellum* principles should be applied in light of the context.

Jus post bellum proportionality is perhaps closer to a meta-principle than the other two Just War proportionality principles, *ad bellum* and *in bello* proportionality. But this proportionality principle is still about weighing and context as was true for the other proportionality principles. Yet, *post bellum* proportionality focuses on the other *post bellum* conditions, unlike the way the *ad bellum* and *in bello* proportionality conditions are understood. One of the reasons for this is that at war's end military operations have ceased, and so the actions that proportionality will concern are some of the very components of the larger *jus post bellum*, such as reparations and retribution. We are asked to consider whether the operation of these other *post bellum* principles might not do more harm than good. A just peace is one where demands are not disproportionate.

Think again about restitution and reparations. These principles are often seen as a key to post-war justice and important dimensions in achieving reconciliation. But if the losing side of a war is already devastated and cannot easily repay the winning side what it would normally be thought to owe, then there is reason to think that demanding that full reparations be made is in some sense disproportionate. The question is in what sense is it disproportionate to demand reparations payments from those who are already devastated by the effects of a long war. And one answer is that demanding full reparations might pose a greater burden on the losing side than it will benefit the winning side in terms of long-term peace. Indeed, for this and related reasons Grotius proposed that *meionexia*, demanding less, could be seen as a principle of *post bellum* justice. For demanding less than what is one's due can be crucial for avoiding disproportionate settlements at the end of a war or armed conflict. *Jus post bellum* proportionality is the condition, or desiderata, which is aimed at aiding in the avoidance of overly severe terms of a peace settlement.

¹⁸ For more on my Grotian account of cruelty and laws of war, see Larry May, *War Crimes and Just War* (Cambridge University Press 2007) chs 2 and 3.

¹⁹ See Lon Fuller, *The Morality of Law* (Yale University Press 1964).

II. *Meionexia* and *Post Bellum* Justice

In the early modern period, Grotius is the great defender of the principle of *meionexia* as the conceptual underpinning of *jus post bellum*. Grotius distinguishes an external and an internal “interpretation of the term ‘to be permissible.’”²⁰ External obligations are those imposed by explicit law; whereas internal obligations are “moral” obligations.²¹ It seems to me that the internal obligations that Grotius here addressed, which he also calls considerations of honor or humanity, are similar to what Hobbes, just a few years later, would call judgments “*in fora interna*” or judgments according to conscience.²² *Meionexia* is appropriately seen here by Grotius as part of the internal obligations of conscience. I return to this issue in Section 4.

And Grotius made this fairly explicit when he then addressed restitution and reparations. Even if one side fights a just war, it may not be entitled to the spoils of war, argued Grotius. Restitution as a matter of internal justice or obligation is something that may be owed even on the part of the just and victorious nation. And the reason for this is that justice can sometimes be a matter of not demanding what one has otherwise a (external) right to demand. Indeed, Grotius is one of the first to recognize that things that are permissible are of two kinds—a narrow permissibility in terms of what strict external right demands, and a wider notion that takes into account humanitarian considerations of the sort that *jus post bellum* involves. For Grotius, justice is not based in weakness but is grounded in what he had earlier described as “the common good.”²³ I return to this issue in the penultimate section of this chapter.

In Grotius’s view, justice is seen as a matter of moderation, where there are limits to what can be done “even in a lawful war.”²⁴ Grotius built on the Ancient Greek conceptions that saw justice as a form of moderation where justice was best understood in terms of moderation in the specific situation that one faced. And in this respect justice should not be seen as a strict notion that does not take account of the suffering that may result from demands that were permissible in one sense but not permissible in terms of values like compassion. Indeed, the idea that justice should encompass compassion is a central idea in what I regard to be the very best understanding of justice in a *jus post bellum* context.

Justice is normally understood as retributive, compensatory, or distributive. In retributive justice, the person who has done wrong is treated according to what is his or her due, in most cases this means some kind of penal sanction. In compensatory justice, one must pay back what one has wrongfully taken or damaged, again as what is due. In distributive justice, where things can be divided, equality is the rule, or there must be salient reasons for unequal division. But there is a fourth form of justice that is appropriate for situations where the good cannot be secured by adhering strictly to what is due, perhaps because securing what is due will set the stage for greater wrong

²⁰ Grotius, *De Jure Belli ac Pacis* bk III, ch. 10, (n. 4) s. III, 717.

²¹ Grotius, *De Jure Belli ac Pacis* bk III, ch. 10, (n. 4) s. V, 720.

²² See Thomas Hobbes, *Leviathan* (first published 1651) ch. 15.

²³ Grotius, *De Jure Belli ac Pacis* bk I, ch. 1, (n. 4) s. VIII, 36.

²⁴ Grotius, *De Jure Belli ac Pacis* bk III, ch. 11, (n. 4) s. I, 722.

or harm in the long-run. In my view, the form of justice appropriate for *jus post bellum* is *meionexia*, which incorporates aspects of the other three forms of justice, but is distinctly different from each of them.

In Aristotle's account, justice is a mean between the extremes of excess (demanding too much) and deficiency (demanding too little). Aristotle identifies the excess as *pleionexia*, but does not name the deficiency. I believe that the deficiency should have been named *meionexia*, as philosophers in the Ancient period who followed Aristotle recognized. But some of these philosophers, such as the Cynics, thought that *meionexia* was actually the best characterization of justice itself. I maintain that demanding too little is the wrong way to think of *meionexia*. Rather it is best seen as simply demanding less than one is due, or perhaps not demanding all that is one's due. So understood, *meionexia* can be seen as a form of justice. *Meionexia* calls for people to accept, or demand, less than what they are due if this is necessary for some greater good as well as for achieving justice understood in its wider sense.

Meionexia does not simply call for compromise or settling for less.²⁵ Instead, *meionexia* requires that in some cases people not demand what they are due as a way to gain a more secure and lasting peace. Compromise is problematic when it involves one or both parties having to sacrifice what is morally valuable to their integrity. On the assumption that all people strive for a just and lasting peace, there is no loss of integrity involved even when the parties decide to give up what is morally important to them. In the sense that all parties will equally get what they strongly desire, a just and lasting peace, there is a sense in which *meionexia* as a *jus post bellum* principle is closely related to justice understood in distributive terms.²⁶

In post-apartheid South Africa, criminal trials and accompanying punishments were not pursued even though the victims had the right to demand them as a matter of strict retributive justice. But in not following strict justice, the Truth and Reconciliation Commission did not let the perpetrators of apartheid off the hook since there were still some penalties, as was also true in Rwanda with the *gacaca* proceedings.²⁷ The idea was to establish a return to the rule of law and mutual respect within a war-torn society by indicating that the victors would not demand all that they had a right to. Here justice as *meionexia* was consistent with the deontological underpinnings of retributive justice.

In addition, when the Allies decided to help rebuild the Axis countries after the Second World War, this was not a compensatory payment but rather an investment in reestablishing peaceful partners and fellow democratic states. By not demanding what the victors had a right to demand, victors show a respect for those individuals who are part of the vanquished side but who are often not complicit in the aggression of their political and military leaders. Showing respect for these vanquished people, but not necessarily for their leaders, can be crucial for a return to the rule of law. In such a situation, the people are motivated to demand of their leaders a change in how the people's rights are viewed by these leaders.

²⁵ See Robert Goodin, *On Settling* (Princeton University Press 2013).

²⁶ See Martin Benjamin, *Splitting the Difference* (University of Kansas Press 1990); also see Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton University Press 2010); and Amy Gutman and Dennis Thompson, *The Spirit of Compromise* (Princeton University Press 2012).

²⁷ See Larry May, *Genocide: A Normative Account* (Cambridge University Press 2010).

On my construal of the *jus post bellum*, providing compensation to deserving vanquished victims is hard to do unless those who are *not* responsible for the victims' harms are asked to contribute to the payment of the compensation. After war ends the vanquished government often cannot provide such compensation. In this sense reparations and restitution are accomplished as is sometimes true in auto accident cases in the US and elsewhere, as a kind of no fault plan. Those who are most able to pay are asked to pay compensation, even though they have no strict duty to do so.²⁸ The justice of *jus post bellum* is secured not through giving to people what is their due in the short run, but in securing what is good for societies that seek to return to a lasting peace. Again, we can see this in operation historically in the way the US and its allies paid for the rebuilding of Germany and Japan after the Second World War.

Another way to see that *meionexia* is not necessarily at odds with traditional understandings of justice is to see that justice has often been associated with equity. Equity (*epikeia*), as a part of justice as fairness, has been one of the hallmarks of justice since the time of the Greeks but even more so in the contemporary period especially in the writings of John Rawls and other liberal theorists. Even if one is due something it may be that demanding it is not fair in some cases, and hence that it would be unjust to demand all that one is due. This may be unfair in the sense that it may fail to see that the person who is properly your debtor simply has gotten into this position not by his or her fault. Or the person who is in your debt may simply not have the means to pay you on demand without undermining his ability to support his family. The aspect of justice that encompasses fairness seems to be affronted if a person demands all that is one's due in such situations.²⁹

Equity is not the only dimension of fairness, since fairness also involves a concern for equality of treatment. And yet equality of treatment can be seen as better advanced sometimes when one does not, as opposed to when one does, demand all that is one's due. A situation where people start off with unequal shares of wealth will be exacerbated if a strict notion of justice (where each can demand all and only what one is due) is applied—thereby allowing the rich to get even richer at the expense of the poor getting poorer. Equal treatment is often one of the prerequisites for equal respect. Yet providing strictly equal treatment often exacerbates actual inequality. When there is major inequality in a society (of wealth or status) the way people think of their worth is also adversely affected. Indeed, such a situation could breed a society where people did not even have respect for one another as fellow human persons. And such disparity in respect normally intensifies conflict rather than providing a basis for the establishment of a lasting peace.

As I mentioned earlier, another component of justice is moderation, at least on the Aristotelian account. And an associated character-based virtue connected to moderation is humility, at least in the late-Medieval reworking of Aristotle. Vitoria spoke of the importance of "Christian humility" in the Just War tradition. While not a proper Greek virtue, the virtue of humility is closely linked with the kind of justice that is exemplified

²⁸ See Yaël Ronen, "Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted during Armed Conflict" (2009) 42 *Vanderbilt Journal of Transnational Law* 181–225 (who defends a standard of strict liability for compensating victims of armed conflicts).

²⁹ For more on equity, see Larry May, *Global Justice and Due Process* (Cambridge University Press 2011).

by *meionexia*. One does not demand all that is one's due out of a concern for the virtue of humility.

And humility also seems to be the appropriate attitude to have, given the epistemic problems associated with knowing what a person is due. It is the arrogant person who thinks he or she knows exactly what is his or her due, and demands it all. This is often arrogant because it does not recognize the epistemic difficulties of knowing the exact measure of what is one's due. Rather the person of virtue will recognize that humility is often called for when one is not certain of what is one's due, and that state of at least partial ignorance obtains so frequently that one should display humility rather than demand all that seemingly is one's due. Epistemic-based humility is a sign that one has the attitudes of a just person.

One might wonder whether *meionexia* might be better understood if it is not thought to be a form of justice. Perhaps we should associate *meionexia* with charity rather than justice. In this view, the concept of justice is best left to the strict considerations of public right. What one should do in terms of one's conscience seems to be a different matter than what one does as a matter of the kind of public justice associated with legality. Indeed, when *meionexia* is said to be the cornerstone of *jus post bellum*, it then becomes clear that we are not really talking of legal justice but of those considerations of private conscience that are best distinguished from public justice. To add a large component of what is normally seen as charity into a conception of justice seems merely to muddy the waters in understanding the nature of justice.

My response to this important criticism is to suggest that humility, if not charity, has played a role in the way justice is understood since the Middle Ages. In part, this is what seeing justice as a form of Aristotelian moderation is all about. For justice to be characterized as moderation, the demands of justice must not be seen as going beyond what is reasonable to demand of people, given the disparate situations people find themselves in. And seeing justice as connected to humility is also a way to make sure that justice is not associated with *pleionexia*, where one demands more than is one's due, either. Sometimes it seems as though the demands of justice are those that are the loudest—and in this way justice secures its place as the value of courtroom proceedings where prosecutor and defense counsel make conflicting and strident demands. But, in my view, justice is not best seen as adversarial in all settings. Yes, the victims need to be able to demand what is rightly theirs, but their demands must sometimes be seen as moderated by the circumstances.

So we have seen in this section that one who epitomizes moderation has a reason not to demand all that one is due at the moment since this may turn out not to be the best given long-term considerations. This brings us back to the ideas of *jus post bellum*. In order to secure the long-term goal of a just and lasting peace, it may be necessary for the current just and victorious party not to demand all that is his or her due in the short-term. And while it is true that the victorious party will thus lose what he or she has a strict right to gain in the short-term, there is often much more to gain by not demanding all that is one's due, and even in aiding those who may not deserve to be aided, so as to further long-term peace prospects. This is one of the central roles for *meionexia* in *jus post bellum* deliberations, as Grotius recognized.

III. A Brief Note on the Question: Is *Jus Post Bellum* Binding Law?

If *meionexia* is not a matter of strict justice, but of humility and moderation, are people bound to follow this form of justice. Grotius distinguished between the law of nations and the law of nature,³⁰ as did other seventeenth-century philosophers such as Hobbes.³¹ As I said earlier, Hobbes drew a distinction between what is binding in conscience, *in foro interno*, and what is binding in society, *in foro externo*. For Hobbes, natural law binds *in foro interno*, whereas civil law binds *in foro externo*. If one violates the laws of nature one commits a sin, not a crime. Only when the laws of nature have been given force and sanction by a sovereign does a violation result in a crime and a call for punishment.

Similarly, Grotius separates the bindingness of morality, of what he calls the laws of nature, from the bindingness of the law of nations. To say that something is only binding in one's conscience, at least in the seventeenth century when Grotius wrote, was not to imply that the bindingness was weak or inconsequential. What the law of nature dictates is "forbidden" according to Grotius.³² The law of nature is grounded in "the common sense of mankind,"³³ where all or almost all nations would affirm them. And Grotius adds that the law of nature is "written in their hearts, their conscience."³⁴ In this sense, *jus post bellum* as grounded in *meionexia* can be binding even if it is not a matter of strict justice. Indeed, not all of justice is binding in the same way, since not all of what is just is written into anything like black letter law.

The phrases used by Grotius and Hobbes are very similar to the words used in the Martens Clause to The Hague Convention, (II):

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.³⁵

Here we have a regime of international law that is not strictly speaking *lex lata* but is also more than mere *lex ferenda*. It is my view that Grotius saw the laws of nature, including the principle of *meionexia*, as having this character—they are binding but not in quite the same way as black letter law because they are not promulgated and proven in the same way.

³⁰ See Larry May and Emily McGill (eds), *Grotius and Law* (Ashgate Publishing Co forthcoming in 2014) esp. the essays in the final section.

³¹ See Larry May, *Limiting Leviathan: Hobbes on Law and International Affairs* (Oxford University Press 2013) esp. ch. 8.

³² Grotius, *De Jure Belli Ac Pacis* bk I, ch. 1, (n. 4) s. X, 39.

³³ Grotius, *De Jure Belli Ac Pacis* bk I, ch. 1, (n. 4) s. XII, 42.

³⁴ Grotius, *De Jure Belli Ac Pacis* bk I, ch. 1, (n. 4) s. XVI, 47.

³⁵ Preamble, Hague Convention (II) Respecting the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 Sept. 1900) 32 Stat. 1803. There has been a healthy debate about how large a role the Martens Clause has played and should play in the domain of proportionality. See Michael Newton and Larry May, *Proportionality in International Law* (Oxford University Press forthcoming in 2014).

Notice that the best way to translate Grotius's book, *De Jure Belli Ac Pacis*, is "On the Law of War and Peace." For our purposes it is of course worth comment that Grotius believed there were laws not only of war but also of peace, *jus post bellum*. Of course, the Latin term "*jus*" is ambiguous in English and can be translated not only as "law" but also as "rights," where perhaps "rules" is even better in this context. For Grotius there were binding rules of peace just as there were binding rules of war. Insofar as Martens would have extended the laws of war to also include the immediate aftermath of war, his "laws of humanity and requirements of public conscience" would also concern *jus post bellum*.

Today the laws of war are fairly well settled, which is not true of the laws of peace. In this sense *jus post bellum* is perhaps best seen as *lex ferenda*. Notice the switch in the Latin terms from "*jus*" to "*lex*." Given that "*lex*" is most commonly translated as "law" and not ever as "rights" or "right" perhaps the contemporary *jus ad bellum* and *jus in bello* should be renamed as *lex ad bellum* or *lex in bello*. My point is only that the question of whether *jus post bellum* is merely *lex ferenda* and not *lex lata* is a more complex question than one might first imagine, especially from a Grotian perspective. Yet, etymology aside, it is true that there is not as much treaty law or clear-cut custom, that pertains to the *jus post bellum*, as compared to the realms of *jus ad bellum* and *jus in bello*.

IV. Transitional Justice and *Jus Post Bellum*

Transitional justice concerns the moral and legal considerations that pertain to situations where a new, normally more democratic, regime is being formed after mass atrocity or oppressive conditions have been stopped. *Jus post bellum* concerns the moral and legal considerations that pertain to situations where a war or armed conflict has come to an end. In both cases justice considerations pertain to situations where a just peace is being established or reestablished. Transitional justice and *jus post bellum* share in common many concepts. In both transitional justice and *jus post bellum*, reconciliation is crucial but so also are retribution and reparations. In the literatures that are emerging on transitional justice and *jus post bellum*, the victims of war and atrocity are front and center. But of course the victims are not the only ones that need to be satisfied for the securing of a just peace. The bystanders as well as the those who fought on the unjust side of a war will also have to be satisfied to a certain extent if the peace is to hold.

The issues that I have been addressing are ones that have been addressed for thousands of years, and yet these issues are also some of the most current and most timely. The idea of holding truth commissions is very recent indeed. Yet, the idea of granting amnesty, rather than taking revenge or seeking retribution, after war's end is at least as old as written history, with important amnesties occurring in Classical Greece and earlier. Indeed, in reading Homer and Hesiod one comes away with the belief that in Ancient Greece wars ended in only one of two ways, in amnesties or in mass slaughter of the losers by the victors. Luckily today there are intermediate positions at the end of war or mass atrocity.³⁶

³⁶ On the issue of amnesty, see Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge University Press 2005) ch. 13; and Larry May, *Genocide: A Normative Account* (Cambridge University Press 2010) ch. 13.

Transitional justice differs from *jus post bellum* in that the focus of transitional justice is on the processes that lead to a democratic or at least a less repressive regime whereas *jus post bellum* is focused on the achieving of peace. So the goals are different in that peace of course can be achieved outside of democratic political processes. And democratic governments do not necessarily support the maintenance of peace. Indeed, the democratic government in the US seems to be constantly trying to find new places in the world to start wars.

Yet, there is significant overlap between transitional justice and *jus post bellum* since the kind of peace sought in *jus post bellum* is a just peace, and that almost always means a peace that is less oppressive than what had existed before. And democratic governments are probably more likely to support peace than non-democratic governments (although there remains a debate about whether there is a relation between democracy and peace). Perhaps most importantly, the wars that are fought today are much more likely to be civil wars than interstate wars, and the atrocities from which transition is sought are much more likely to be accompanied by civil war than not.

Transitional justice is closely linked today with the Responsibility to Protect (R2P), and R2P shares much in common with the 5R&P of *jus post bellum*. The emphasis in the third prong of R2P is on rebuilding, especially of the rule of law, and this is also true of the rebuilding condition of *jus post bellum*. But there is a difference, perhaps a major one, in R2P's other prongs that involve recourse to military intervention to bring about a stop to atrocities or to force a regime change toward a more democratic order. Insofar as transitional justice is associated with this prong of R2P, there is a significant difference with *jus post bellum*, which seeks a just end to military operations. Nonetheless, transitional justice and *jus post bellum* look toward a long-term just peace.

As I said at the beginning of these remarks, we have two examples that can tell us quite a lot about how best to understand *jus post bellum* and transitional justice: Japan and Germany at the end of the Second World War. And we have significant recent examples of attempts to establish criminal trials and also to deal with victim reparations—namely, the International Criminal Court, which is in the background of most of the contemporary debates about both *jus post bellum* and transitional justice. In addition, there are the ongoing attempts to find a way to end the US and NATO's long war in Afghanistan—unfortunately this war, like the one in Iraq, was begun without exit strategies—but surely this is what *jus post bellum* principles would have called for. Peace and justice do not come easily, and there will continue to be many examples where serious discussion of justice after war or atrocity may aid policy-makers and citizens in understanding how a just peace can be secure.