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# On the Duty to Reconstruct After War: Who is responsible for *jus post bellum*?

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War can easily be classified as the most destructive of all human activity. After the smoke clears, one side of the coin might be a picture of parades and smiling faces. However, the other side of the coin is likely to be a picture of damage, destruction and deprivation. How should we deal with those post war situations? This question has come to the forefront of academic and political debates the last decade.<sup>1</sup> Many argue that the problems encountered in and after today's armed conflicts, such as those in Iraq and Afghanistan, demonstrate the need for norms to govern the aftermath of war.<sup>2</sup> Therefore, *jus post bellum* is welcomed as a 'new' branch of just war theory, complementing the theory's two traditional branches—*jus ad bellum* and *jus in bello*.<sup>3</sup> *Jus post bellum* is meant to function as moral compass, offering the needed guidance in the aftermath of war. Its norms regulate the transition from war back to a 'normal' state of peace. As such, it aims to provide a framework guiding political and military action, and it forms a standard which can be used to evaluate and judge particular post war situations. A just and stable peace is the axiomatic goal of *jus post bellum*.<sup>4</sup>

While many agree on the importance of a third branch, the debate largely revolves around its exact content. What falls under the heading of *jus post*

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1. While Schuck was the first to explicitly address *jus post bellum* in 1994, attention grew particularly in the last ten years. See, e.g., Michael J Schuck, "When the Shooting Stops: Missing Elements in Just War Theory" (1994) 111:30 *Christian Century* 983; Louis V Iasiello, "Jus Post Bellum: The moral responsibilities of victors in war" (2004) 57:3-4 *Naval War College Review* 33; Richard DiMeglio, "The Evolution of the Just War Tradition: Defining Jus Post Bellum" (2005) 186 *Mil L Rev* 116; Brian Orend, "Jus Post Bellum: A Just War Theory Perspective" in Carsten Stahn & Jann Kleffner, eds, *Jus Post Bellum, Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser Press, 2008) at 31.
2. See, e.g., Iasiello, *supra* note 1 at 39; Alex Bellamy, "The responsibilities of victory: Jus Post Bellum and the Just War" (2008) 34:4 *Review of International Studies* 601 at 601; Orend, *supra* note 1 at 36.
3. Not everyone however welcomes *jus post bellum*. There are few authors who criticize this new branch of just war theory. Alex Bellamy, e.g., argues that we should be careful to insist that *jus post bellum* has become a third branch of just war theory, since its incorporation is by no means unproblematic. "As yet unresolved questions about its connection to the other just war criteria, their applicability in different types of war, their impact upon broader judgments about legitimacy, and relationship with the indeterminacy of the *jus ad bellum* criteria, suggest that it is premature to insist that *jus post bellum* has become a third component of the Just War tradition." Bellamy, *supra* note 2 at 622. Seth Lazar is also skeptical and argues that we do not need *jus post bellum* as part of just war theory, because the issues it regulates are better perceived in the broader ethics of peace building. *Jus post bellum* needs to look forward to the task of peace building and is therefore grounded in a broader ethics of peace building instead of flowing from just war theory. See Seth Lazar, "Endings and Aftermath in the Ethics of War" (2010) 13 *CSSJ Working Paper*, online: [http://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ016\\_Lazar\\_Endings&Aftermath\\_War.pdf](http://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ016_Lazar_Endings&Aftermath_War.pdf).
4. E.g., Mark Evans, "Moral Responsibilities and the Conflicting Demands of *Jus Post Bellum*" (2009) 23:2 *Ethics & International Affairs* 147 at 149.

*bellum*? Some *post bellum* norms are found in practically all proposals. This can be called the ‘core’ of *jus post bellum*. The first priority after war is halting the aggression and ensuring safety and security in the war-affected area. This means both guaranteeing international peace and security, through the prevention of future external aggression, and guaranteeing the security of the citizens of the defeated state itself, which means the prevention of future internal aggression. Reconstruction of the defeated state is also an undisputed part of *jus post bellum*. Political reconstruction entails for example (but not necessarily) institutional reform, legislative reform, reformation of the security sector, the realization of human rights, and replacement of (members of) the prior regime. General reconstruction entails broader tasks as economic development,<sup>5</sup> rebuilding infrastructure like road, rails and electrical grids,<sup>6</sup> and cleaning up the environment. Criminal justice is also widely acknowledged as part of the core of *jus post bellum*. It deals with international crimes that were committed before and/or during the war.<sup>7</sup>

The exact tasks and scope of norms proposed under the heading of *jus post bellum* varies and has changed in the course of its relatively short existence. In traditional just war theory, the conception of (what is now called) *jus post bellum* was limited. This ‘minimalist’ *jus post bellum* was premised upon the idea that just wars are conservative in character.<sup>8</sup> The restoration of the situation *quo ante bellum* is the just outcome of war.<sup>9</sup> As such, norms of such *jus post bellum* are primarily backward looking, focused on the former belligerents, particularly limiting what victors are allowed to do after war. Consequently, the tasks of minimalist *jus post bellum* are restricted to a restoration of the previous situation, the resistance and prevention of aggression, extracting reparations and pursuing criminal justice. This conception of *jus post bellum* has changed and today, there is a general tendency towards a ‘maximalist’ conception of *jus post bellum*.<sup>10</sup> This means that the body of *jus post bellum* has grown; more tasks are taken up under this heading. Reconstruction is considered to be an essential part of contemporary *jus post bellum*. It not only entails political reconstruction, but various tasks regarding general and economic reconstruction as well. As a result, the scope of *jus post bellum*, especially reconstruction, can be quite comprehensive, *post bellum* tasks require a fairly long timeframe, and involve a broad set of positive duties. Norms of maximalist *jus post bellum* are

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5. Mark Evans, “‘Just Peace’ An Elusive Ideal” in Eric Patterson, ed, *Ethics Beyond War’s End* (Washington, DC: Georgetown University Press, 2012) 197 at 208; Mark Allman & Tobias Winright, *After the Smoke Clears: The Just War Tradition and Post War Justice* (Maryknoll: Orbis Books, 2010) at 160-63.
  6. Evans, *supra* note 5 at 207-08; Allman & Winright, *supra* note 5 at 161; Brian Orend, “Justice after War” (2002) 16:1 *Ethics & International Affairs* 43 at 52.
  7. Other tasks of *jus post bellum* that are often mentioned are compensation, reparations and reconciliation.
  8. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed (New York: Basic Books, 2000) at 121.
  9. Michael Walzer, “The Aftermath of War. Reflections on Jus Post Bellum” in Eric Patterson, ed, *Ethics Beyond War’s End* (Washington, DC: Georgetown University Press, 2012) 35 at 36.
  10. See further: Lonke Peperkamp, “Jus Post Bellum: A Case of Minimalism versus Maximalism?” (2014) 21:3 *Ethical Perspectives* 255.

therefore no longer mainly backward, but also forward looking: not aimed at restoring the previous situation, but rather aimed at improving the situation of deprivation in the defeated state. As a result, it is not exclusively addressed to the former belligerents.

This short assessment leads to an important question which has not received sufficient attention in the *jus post bellum* literature: After war, how should we distribute post war duties and how can we assign them to the appropriate actors? In other words, who are the addressees of *jus post bellum*—the duty bearers? The development regarding *jus post bellum*'s content and scope brings to light a very serious problem: it is far from clear who is responsible for realizing *jus post bellum*. This uncertainty about specific duty bearers might lead to a situation in which no one will properly acquit these duties, and the critique could be raised that *jus post bellum* is in fact merely empty rhetoric.<sup>11</sup> If responsibility for the duty to reconstruct cannot be assigned, does this third branch of just war theory exist? For the theory to be action guiding and effective, it is crucial that it is possible to determine who is responsible after war. It appears that this question is not to be answered easily. While it is clear that the (would be) belligerents are the addressees of *jus ad bellum* and *jus in bello* norms, this seems different for the third branch of just war theory. The general shift towards maximalist *jus post bellum* means that this branch entails positive duties, is both backward and forward looking, and that post war reconstruction is of the essence for building a just and stable peace. In light of the interest of all states in a lasting peace, it might be inappropriate to address only former belligerents for *jus post bellum* based on the fact that they were engaged in this war. Rather, it seems that the contemporary maximalist view on *jus post bellum* entails that the international community as a whole is responsible for post war reconstruction. But in that case, how do we determine more precisely who the specific duty bearers are?

In the contemporary debate on *jus post bellum*, responsibility is assigned to different actors, based on different moral or prudential arguments. Two main positions can be distinguished. The first position holds that *post bellum* duties should be assigned to the states that took part in the war: the former belligerents. Michael Walzer is an important representative of what James Pattison calls the 'belligerents rebuild thesis';<sup>12</sup> Walzer holds that the just victor is primarily responsible for *jus post bellum*. Analogue to individuals who do good in the world and as result have more obligations than people who do nothing, states who do the right thing also acquire more responsibilities, so Walzer argues.<sup>13</sup> The *jus ad bellum* decision entails positive post war duties that need to be fulfilled. On top of that, unilateral action of the victors is most effective in this respect, particularly if regulated by an international organization.<sup>14</sup> Brian Orend agrees that *post*

11. See also: James Pattison, "Jus Post Bellum and the Responsibility to Rebuild" (2015) 45:3 British Journal of Political Science 635 at 636; Alexandra Gheciu & Jennifer Welsh, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction" (2009) 23:2 Ethics & International Affairs 121 at 137.

12. Pattison, *supra* note 11 at 636.

13. Walzer, *supra* note 9 at 40.

14. *Ibid* at 41.

*bellum* duties are implied in the cause for war and puts forward another important argument for this position: the just victor is responsible based on the ‘Pottery Barn Rule:’ ‘you break it, you own it.’<sup>15</sup> Walzer urges that we are sensitive to the needs and sentiments of the local population, which means that we have to involve the population of the defeated state to gain legitimacy.<sup>16</sup>

Among others, Pattison rejects the ‘belligerents rebuild thesis’, because assigning *post bellum* duties to belligerents leads to unfair and imprudent outcomes, e.g., that humanitarian interveners should rebuild; that belligerents are often not the most appropriate actors to fulfill these tasks; that belligerents can cease to exist; that it might be difficult to distribute duties between belligerents; and that they can refuse to fulfill them.<sup>17</sup> The concern that belligerents might not be the most appropriate actors to reconstruct the war torn state is voiced more often. This can be the result of a lack of political will or a lack of material capacity of belligerents.<sup>18</sup> Seth Lazar argues that in general, assigning *post bellum* duties (solely) to the just victor would place a too heavy burden on them.<sup>19</sup> Therefore, these theorists defend the second position, namely that the international community as a whole is responsible. One might call this the ‘universal rebuild thesis,’ since it is argued here that *post bellum* duties are universal.<sup>20</sup> This position would then reflect contemporary international practice, in which states are considered to hold a shared responsibility for human security. E.g., part of the ‘responsibility to protect’, now widely endorsed, is the ‘responsibly to rebuild’ after war.<sup>21</sup> It is argued that “peacemaking has become an international affair.”<sup>22</sup>

It is clear that there is disagreement in the current debate and that the two main positions resemble a more limited and a more extensive understanding of *jus post bellum*. Different and often competing arguments are used as foundation for post war responsibility, often without an elaborate explanation. For the first position, assigning responsibility seems to be fairly straightforward: post

15. Orend, *supra* note 1 at 49.

16. Walzer, *supra* note 9 at 43, 44.

17. Pattison, *supra* note 11 at 638-41.

18. The potential lack of political will and material capacity of just victors is also mentioned by Alex Bellamy. See Bellamy, *supra* note 2 at 623; George Clifford similarly argues: “Nations that win a war may not have the resources, political will, or acceptability required to build a just peace unilaterally.” George Clifford, “*Jus post bellum*: Foundational principles and a proposed model” (2012) 11:1 *Journal of Military Ethics* 42 at 44; Gheciu and Welsh further explain why belligerents might not be the most appropriate actors: they generally have high stakes; can be biased; and might not be in the best position to act. See Gheciu & Welsh, *supra* note 11 at 134, 136.

19. Particularly with regard to just interventions. Seth Lazar, “Scepticism about *Jus Post Bellum*” in Larry May & Andrew Forchimes, eds, *Morality, Jus Post Bellum, and International Law* (Cambridge: Cambridge University Press, 2012) 204 at 216-17.

20. Lazar argues that in case of a humanitarian intervention, the duty to reconstruct is universal, since the original intervention was a universal duty and everyone should help one in need. *Ibid* at 216.

21. World Summit Outcome Document 2005, online: <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>.

22. Carsten Stahn, “The Future of *Jus Post Bellum*” in Carsten Stahn & Jann Kleffner, eds, *Jus Post Bellum, Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser Press, 2008) 231 at 323-24. In the words of Clifford: “In a world increasingly tied by global interests and linkages, responsibilities for achieving progress toward peace are international and entail situationally determined elements and commitments.” Clifford, *supra* note 18 at 44.

war duties are implied in the just cause of war; whoever ‘breaks’ something for a just cause is responsible for repairing what has been broken. But this is not as simple as it appears. Whereas the just victor might indeed, so to say, have broken something which consequently needs repairing, it is the unjust belligerent who is the prime ‘breaker.’ How should we distribute responsibility between just and unjust belligerents?<sup>23</sup> And what if either or both of these belligerents are not willing or able to effectively reconstruct after war? The second position raises questions on the distribution of responsibility as well and even more profoundly. If the international community as a whole is indeed responsible, then there need to be certain conditions that can distribute specific duties (e.g., to reconstruct) to specific actors. This means that we need a comprehensive theory on responsibility for *jus post bellum*.

Alexandra Gheciu and Jennifer Welsh encountered this theoretical lacuna.<sup>24</sup> They mapped and analyzed the various ethical imperatives that are put forward in the public debate by international actors that set out to rebuild war torn states. It appears that these imperatives entail problematic dilemmas, and that the underlying principles have the potential to clash in particular situations. For example, regional states could have special obligations due to their proximity, but they might not be in the best position to act due to the nature of existing relationships. These authors do not resolve these dilemmas, since that “would require arguments that present a compelling case for privileging one guiding principle over others (...).”<sup>25</sup> James Pattison builds on this and attempts to theorize responsibility for *jus post bellum* in such a way that it is possible to privilege one specific guiding principle. He claims that *jus post bellum* is characterized by collective, international obligations, which should be assigned according to the ability to fulfill these obligations.<sup>26</sup> Because belligerents are often not the most capable actors, he even argues that there should be a “presumption against belligerents rebuilding.”<sup>27</sup> While these two analyses are important steps in closing the theoretic lacuna regarding post war responsibility, Gheciu and Welsh leave the way open for further development, and Pattison’s thought provoking argumentation leads to an unsatisfying conclusion, in which capacity and efficiency essentially determine who bears the duty to reconstruct.<sup>28</sup>

23. Larry May argues that the burdens of *jus post bellum* should be shared between belligerents. They have to work together to reestablish the rule of law and secure that just and lasting peace. The condition of proportionality is helpful in distributing responsibility between former belligerents. Larry May, *After War Ends: A Philosophical Perspective* (Cambridge: Cambridge University Press, 2012).

24. Gheciu & Welsh, *supra* note 11 at 121-23.

25. *Ibid* at 143.

26. Pattison, *supra* note 11 at 635.

27. *Ibid* at 658.

28. Pattison raises justified concerns against the ‘belligerents rebuild thesis’. However, his main argument against this thesis is its supposed relation to the ‘dependence approach’, according to which the justness of the war is dependent on *jus post bellum*. And as Pattison rightly rejects the latter approach, he rejects the ‘belligerents rebuild thesis’ as well. I am not convinced by this line of argument, particularly because of that supposed relation. Aside from Gary Bass, most theorists defending the ‘belligerents rebuild thesis’ do not rely on the ‘dependence approach’ but use other arguments. His argumentation therefore not invalidates the claim that former belligerents are the prime duty bearers after war.



Therefore, while the debate on the content and scope of *jus post bellum* is far from settled, I want to focus on the issue of responsibility, which deserves more attention than it has received so far. *Jus post bellum* can only be considered a fully fledged third branch of just war theory if it is clear who bears the responsibility for it, i.e., if it is clear who is addressed by the duties under *jus post bellum*. This means that at least two main questions need answering. First: Which conditions can serve as the foundation for post war duties? Second: How to weigh these conditions when they clash or when they point to different actors? This article directly addresses the foundation for responsibility after war with an eye to developing a system for assigning post war duties in concrete situations. Here I will focus mostly on the duty of post war reconstruction, as arguably the most comprehensive task after war and widely acknowledged as essential for contemporary *jus post bellum*.<sup>29</sup>

I take it that David Miller's theory on responsibility (section 2) is a proper venue to address the questions mentioned, since the question on how to assign the duty to reconstruct is essentially a question about collective remedial responsibility, the issue that is central in Miller's approach. I will subsequently analyze (section 3) the conditions that Miller distinguishes for assigning remedial responsibility and apply them to post war situations. This will bring out the strengths and weaknesses of these conditions as foundation for *jus post bellum* duties. I will also explore a condition that is not prominent in Miller's taxonomy, and which can be approached through Hart's concept of role responsibility (section 4). Obviously, it is most important to take stock of the value of the various conditions, and to try and determine how they should be applied in real life. The goal is to contribute to developing a system for assigning the duty to reconstruct to specific actors that can claim general agreement. This requires that a hierarchy is set up which enables us to balance these conditions in particular post war situations (section 5). Only with such a system in place is there a realistic prospect that *jus post bellum* functions as a useful tool in the creation of (somewhat resembling) a just and stable peace.

### Miller's Collective Remedial Responsibility

The duty to reconstruct after war is a matter of collective remedial responsibility: it is argued that a certain actor, e.g., the victorious state, is collectively responsible for remedying post war deprivation. But while just war theorists usually assume that states can bear duties, collective responsibility is not undisputed. The problem of collective responsibility not only arises with regard to postwar situations; this issue has been raised with regard to problems of global justice, and a promising solution in this regard is provided by David Miller.<sup>30</sup> In general, Miller defends

29. I am aware that there are major differences among theorist about what is part of reconstruction and what the appropriate scope of reconstruction must be. In this article however, I want to leave this matter aside and delve into the issue of responsibility instead.

30. David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007) at 81. Miller's study on national responsibility is well constructed and complex, and unfortunately I can only discuss parts of his argument in this article.

the idea of national responsibility in the sense that individuals have special duties towards fellow nationals, but that they have also duties of global justice beyond those resulting from violations of the rights of others. Put simply, Miller eloquently defends a position in the global justice debate similar to that of John Rawls, in which special duties to one's community are asserted but in which at the same time duties of justice towards the global community are defended. It is an alternative to both cosmopolitan egalitarianism such as defended by Simon Caney which denies the relevance of national borders,<sup>31</sup> and nationalism such as defended by Thomas Nagel, who distinguishes duties of justice for fellow citizens and much weaker global duties of charity or humanity.<sup>32</sup> Despite contemporary developments in our globalized world, Miller argues there remain significant differences between the national and international context. Therefore, national principles of social justice cannot extend to global relations: the nation state remains the privileged context for social justice.<sup>33</sup> But this does not mean that no strong duties exist beyond the boundaries of the nation state. These *are* duties of justice and not merely duties of charity or humanity, and they go beyond those resulting from the violation of the rights of others. These duties of global justice are generated by basic human rights. It means that for Miller, human deprivation and suffering is something that cannot be tolerated; it requires collective efforts and thus collective responsibility.

David Miller's theory on responsibility, developed in the context of the global justice debate, can help us theorize the issue of responsibility in other situations: i.e., after war. His concept of remedial responsibility as opposed to outcome responsibility, and the concept of collective responsibility as opposed to individual responsibility are particularly useful. Miller explains the first distinction by using an example in which a teacher returns to an overturned classroom.<sup>34</sup> The teacher might want to know who is responsible for producing the mess, but also who is responsible for clearing up that mess. The first question refers to the agent producing the outcome (outcome responsibility), the other question to the agent who has the duty to put the bad situation right (remedial responsibility). Both these concepts can be applied in individual contexts such as Miller's example of the classroom, but also in collective contexts: the second important distinction Miller makes is between individual and collective responsibility. In so far as the concepts of outcome and remedial responsibility are applicable to collectives, they can be used for our understanding of just war theory, which deals primarily with collective responsibilities.<sup>35</sup> There are good reasons to take

31. Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2005).

32. Thomas Nagel, "The Problem of Global Justice" (2005) 33:2 *Philosophy and Public Affairs* 113. For an extensive discussion of the difference between duties of justice and duties of charity see: Allen Buchanan, "Justice and Charity" (1987) 97:3 *Ethics* 558; Miller positions himself in the global justice debate as 'social liberalist', following the terminology of Charles Beitz. This position is contrasted with cosmopolitan liberalism on the one hand and *laissez-faire* liberalism on the other. Miller, *supra* note 30 at 20-21.

33. Miller, *supra* note 30 at 15-16.

34. *Ibid* at 83-84.

35. At least in the *ad bellum* phase just war theory deals with collective responsibilities, but even violations of the *in bello* rules might point at collective responsibilities, when, e.g., the army does not provide sufficient training for its soldiers in Geneva rules or, worse, actively encourages brutalities.



Miller's perspective when considering the issue of responsibility for *jus post bellum*. Below, I will briefly discuss these reasons and the two preliminary issues: Miller's conceptions of outcome and remedial responsibility and that of collective responsibility.

For Miller, the conceptual difference between outcome responsibility and remedial responsibility is essential. The first type, outcome responsibility, refers to the person that produced the outcome, e.g., who made the mess in the classroom. It is the responsibility that a person bears for his own decisions and actions.<sup>36</sup> This type of responsibility is backward looking and answers the question who is responsible for a certain problem. Outcome responsibility has a strong causal component but cannot be identified with causality: causal responsibility questions why something has happened, whereas outcome responsibility properly questions "whether a particular agent can be credited or debited with a particular outcome—a gain or a loss, either to the agent herself or to other parties".<sup>37</sup> Usually, when an individual is responsible for a certain outcome, we feel that the gains and losses that fall upon that actor should stay where they are, whereas gains and losses that fall upon others should be shifted, e.g., compensated. In general, there is a presumption that agents are permitted to enjoy the benefits of their actions, as well as bear the burdens of those actions.<sup>38</sup>

The second type is remedial responsibility, which refers to the person that has the duty to remedy a certain problem. It is thus forward looking and questions at whom fixing the problem can be attributed, i.e., who is in that sense responsible. The focus is on the problem that needs remedy. As such, remedial responsibility is the responsibility that a person may have to help those who are in need of our help, although the person who is supposed to help did not necessarily bring about the need. Solving the problem is often connected to outcome responsibility since outcome responsibility is in many circumstances the most obvious basis for remedial responsibility. This means that the person who was responsible for the outcome, is also remedially responsible. However, actors can be remedially responsible even when they are not outcome responsible for the deprivation, and then their responsibility is based on other conditions. Miller argues that when global problems occur, initially, "there is a moral requirement that falls on everybody else to provide the help or the resources that are needed."<sup>39</sup> But how do we distribute such a duty? It is important to single out some particular actor (or actors) who is obligated to put the bad situation right.<sup>40</sup> This is what it means to be remedially responsible: there is a special responsibility to remedy a problem that is not equally shared with all agents, and this agent is liable to sanction if the responsibility is not properly discharged.<sup>41</sup> Thus, this meaning of responsibility is

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36. Miller, *supra* note 30 at 81.

37. *Ibid* at 87.

38. *Ibid* at 87.

39. *Ibid* at 98.

40. David Miller, "Distributing Responsibilities" (2001) 9:4 *Journal of Political Philosophy* 453 at 469.

41. This sanction is not necessarily punishment but can entail blame as well. Miller, *supra* note 30 at 98-99.

concerned with remedying a problematic situation, and therefore it is important to single out the actor (or actors) that has a special responsibility to end this problematic situation, e.g., of deprivation. To do that, Miller proposes a taxonomy of six different conditions which are relevant when distributing remedial responsibility. As this type of responsibility is precisely what we need for *jus post bellum*, Miller's taxonomy might serve as a base for the development of a system for assigning the specific duty to reconstruct after war.

Next to the distinction between outcome and remedial responsibility, Miller distinguishes between individual and collective responsibility. Whereas individual responsibility might not pose too many problems, collective responsibility is more contested.<sup>42</sup> Miller defends the idea of collective responsibility; he holds that different collectives might be responsible, but he focuses on the nation state who he considers either collectively outcome and/or collectively remedially responsible.<sup>43</sup> This nationalist position would help us enormously with understanding just war theory in general, and *jus post bellum* in particular. Most just war theorists presume such a collective perspective when they consider states, nations, or armies as the addressees of just war theory, who consequently bear the related duties.<sup>44</sup> International organizations also play a role in just war thinking, particularly the United Nations. However, it must be noted that the United Nations do not act as a genuine collective body but rather via the medium of its member states. Adopting the perspective of collective responsibility as conceived by Miller is useful in developing an account of *jus post bellum* which might work in practice. The international arena consists indeed of sovereign (nation) states that decide upon matters such as war, peace building and development aid. As such, this perspective is 'reality based' and might improve the existing global realm by attributing responsibility to these collective actors. When we want to consider post war duties in a world without a world state,

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42. There is an extensive and extremely interesting debate on collective responsibility. However, in this article I want to shed light on responsibility for *jus post bellum*, rather than fully defend the issue of collective responsibility as such. This is not to deny that there are other positions that are eloquently defended, focusing on individuals and individual responsibility, also for the issue of war (e.g., Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012). For Miller's defense of national responsibility based on the 'like-minded group model' and the 'cooperative practice model' see Miller, *supra* note 30 at 111-34, for critique, e.g., Roland Pierik, "Collective responsibility and national responsibility" in Helder de Schutter & Ronald Tinnevelt, eds, *Nationalism and Global Justice. David Miller and his critics* (London: Routledge, 2011) 94, and for a defense against criticism David Miller, "Collective responsibility and global justice" (2012) 19:4 *Ethical Perspectives* 627 at 631-35. For the purpose of this article, I assume that there is something like collective responsibility, or that it is at least a useful fiction, and that as such, nations and states can be responsible actors.

43. According to Thom Brooks, we can widen Miller's focus and extend remedial responsibilities to other groups with a shared identity such as religious groups. Thom Brooks, "Remedial responsibilities beyond nations" (2014) 10:2 *Journal of Global Ethics* 156 at 156, 166.

44. One might think in this context of the recent revisionist turn in just war theory, initiated by theorists such as Jeff McMahan, which is based on an individualist account of the theory as opposed to the traditional statist account. This challenges mainly the traditional account of *jus in bello*, as it argues that combatants are not morally equal, but that their individual moral standing depends on the justness of 'their' war. Space precludes me from elaborating further on this topic. See, e.g., Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002); Helen Frowe, *The Ethics of War and Peace: An Introduction* (London: Routledge, 2011) at 29-49, 118-39.

and without the United Nations which can robustly impose responsibilities and enforce compliance, (nation) states remain the prime international actors. Given our present purpose, namely to develop an account of responsibility for *jus post bellum*, I assume that there is something like collective responsibility.

This is not to say, however, that no difficulties exist as it comes to assigning collective responsibility in concrete cases, which is readily acknowledged by Miller. Accepting collective responsibility in the abstract is one thing and distributing it in the concrete an entirely other thing. Miller foresees problems when attributing collective responsibility to individuals for the policy and actions of a specific nation state, because of their role in the decision making process. Therefore, collective responsibility can be attributed to individuals who represent that collectivity, to varying extents. In other words, collective responsibility is a matter of degree, depending on what Miller calls the ‘control dimension’ and the ‘constraint dimension’. The first dimension looks at the degree of control individuals have over the policy of their collective, i.e., the nation. Obviously, the claim that all citizens share in national responsibility is difficult to uphold when the state is as authoritarian in nature as North Korea, where the population has hardly any influence over state policy. Here responsibility resides only with the ruling elite. In democratic states and in authoritarian states which enjoy popular support, its members do share in the collective national responsibility. The more democratic the state is, the more it makes sense to identify acts by the state as genuine national acts, and to spread responsibility among the population.<sup>45</sup> The second dimension, the constraint dimension, takes into account the external environment of the nation. Is the nation able to execute the policy of their choice and to what extent is it constrained by its external environment, e.g., by a lack of natural resources or by being small and thus not very influential? With regards to problems of global justice, Miller follows Rawls in arguing that external and physical factors—constrains so to speak—do influence the economic wellbeing of the nation, but domestic factors—the economic and political system and the national cultural values—have by far the most significant impact. Therefore, the constraint factor never fully takes away collective (here national) responsibility although national responsibility is always a matter of degree. As such, national responsibility is the norm rather than the exception, and individuals share in this national responsibility by virtue of their membership of nations.<sup>46</sup>

A special difficulty with collective responsibility, which is particularly relevant for *jus post bellum*, arises with the distinction between states and nations. Miller seems to refer deliberately to the nation state as main collective actor, but that obscures the obvious problem that not all international actors are nation states. The terms state and country refer to legal and political entities that are sovereign, internationally recognized, and self governing over a certain territory

45. Margaret Moore, “Global justice, climate change and Miller’s theory of responsibility” in Schutter & Tinnevelt, *supra* note 42 at 133.

46. David Miller, “National Responsibility and Global Justice” (2008) 11:4 Critical Review of International Social and Political Philosophy 383 at 386-87.

(noting that the geographic location is emphasized with the term ‘country’).<sup>47</sup> A nation on the other hand refers to a large group of people that share a culture, language, religion and/or history. When a state encompasses such a unity, it is referred to as a nation state. But, as is well known, there is a plurality of cases in which state and nation do not coincide: there are stateless nations (e.g., the Kurdish nation) and multinational states (e.g., the former Yugoslavia, Canada, Iraq). Miller defines a nation state in a similar matter: “The people who belong to it are subject to a common set of coercively imposed laws; they are engaged in a co-operative practice regulated by a common set of economic and social institutions; and they share a common national identity.”<sup>48</sup> In short, its characteristics are sovereignty, economic co-operation and national identity. This enables Miller to focus on nation states as bearers of collective responsibility, but it seems more fair, especially for *jus post bellum* purposes, to keep in mind both entities.<sup>49</sup> The state as institution is usually the actor that formally decides on international matters. As such, it will be mainly (nation) states that are outcome responsible for war and post war deprivation.<sup>50</sup> States can also formally accept outcome responsibility for a particular situation.<sup>51</sup> However, nations can be held responsible in this respect as well; Miller agrees when stateless nations “carry out a form of ethnic cleansing precisely in order to constitute a territorial state of their own”.<sup>52</sup> One might also think of Islamic State, perhaps best viewed as stateless nation despite its self-chosen name, as being responsible. Considering remedial responsibility, it is relatively easy to assign remedial responsibility to states in terms of identification, and indeed states are the prime actors to discharge remedial responsibilities. However, this might well mean that we assign responsibility vicariously, according to Miller. Think of the responsibility of the German Nazi state as distinct from the responsibility of the German people.<sup>53</sup> Miller admits that this matter remains somewhat opaque: “it may not be clear which of the two relationships—citizenship or nationality—is doing the work when arguments about the importance of the nation state are being advanced.”<sup>54</sup>

47. The definition of statehood in international law is described as follows: “The *state* as a person of international law should possess the following qualifications: a permanent population; a defined territory; government; and capacity to enter into relations with the other states.” Article 1 Convention on the Rights and Duties of States 1933 (Montevideo Convention, entered into force 26 December 1933), online: <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.

48. Miller, *supra* note 46 at 390.

49. This has to do with Miller’s foundation for collective responsibility, which are both the ‘like-minded group model’ and the ‘cooperative practice model’. Together, they can serve as foundation for the responsibility of nations and nation states, however, the foundation of mere state responsibility would rely solely on the ‘cooperative practice model’ which Miller considers fragile. David Miller, “David Owen on global justice, national responsibility and transnational power: a reply” (2011) 37:4 *Review of International Studies* 2029 at 2030.

50. This might be somewhat different for the problem of global poverty. Miller argues that nations are often outcome responsible for global poverty, since “it is not states, but peoples, who deforest land or deplete fish stocks, for example.” Miller, *supra* note 42 at 643.

51. *Ibid* at 643.

52. Miller, *supra* note 49 at 2030.

53. Miller, *supra* note 42 at 644.

54. Miller, *supra* note 49 at 2029. Similarly, when Miller considers the difference between compatriots and citizens in the nation-state, he states that while “there is much to be said for making

Miller's analysis is highly relevant for the topic of post war justice, both because of his distinction between outcome and remedial responsibility and for his emphasis on collective (national) responsibility for global problems, arguing that even when actors were not involved in bringing about a problem, they might nonetheless be responsible for solving it. This is extremely helpful: it became clear that *jus post bellum* faces a serious problem, not only because formerly warring parties might not be the best placed to discharge post war duties, but also because of the uncertainty regarding the distribution of responsibility among other actors. To simply state that the just victor must rebuild while it clearly lacks the mental or the material capacity, or to state that the responsibility for *jus post bellum* falls indeterminately on 'the international community,' does not bring us further; "(...) an undistributed duty such as this to which everybody is subject is likely to be discharged by nobody."<sup>55</sup> Remediating the post war damage, the war's destruction and deprivation and the building up of a just and durable peace should be the main concern after war. Analogue to Miller's example of the teacher returning to an overturned classroom, that consequently needs to be cleared up, the war torn state needs to be 'cleared up' as well.<sup>56</sup> Since it is urgent to have a theory of responsibility for *jus post bellum*, it is adamant to apply Miller's theory to *jus post bellum*, and to come up with a system that provides the conditions for assigning *post bellum* remedial responsibility. In the next section, an effort is made to analyze Miller's taxonomy in the context of post war situations.

### The Foundation of Post War Duties

To address global problems in general, Miller holds, firstly, the concept of remedial responsibility to be central (because global problems need to be addressed in any case) and proposes, secondly, what he calls a connection theory of remedial responsibility: the nation that is connected in one or more ways to global problems, say deprivation, can be held responsible for remedying or improving that situation. Given that it is intolerable to leave deprivation and suffering to continue, it is the aim of the theory to come up with a proper way to assign responsibility to at least one actor. This leads Miller to propose six conditions which can constitute the foundation for remedial responsibility: moral responsibility, outcome responsibility, causal responsibility, benefit, capacity, and community. All these conditions are considered equally important and they need to be balanced against each other in concrete situations by using moral intuition, according to Miller: "We have to rely on our intuitions about the relative importance of different sources of connection."<sup>57</sup> In short: the various links that these conditions establish between an actor and a particular situation should be considered in

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nation-states the primary bearers of global responsibilities, even here the fit between the group that is collectively responsible and the institution to which responsibility is assigned will be imperfect". Miller, *supra* note 42 at 648.

55. Miller, *supra* note 30 at 98. See also: Miller, *supra* note 40 at 469.

56. Miller, *supra* note 30 at 83-84.

57. *Ibid* at 107.

distributing remedial responsibility. It will become clear that the arguments for assigning post war duties to certain duty bearers, put forward by just war theorists, largely correspond with these conditions. It is therefore useful to analyze these six conditions and so help our thinking about the distribution of duties after war. It will appear, or so I hold, that in this particular context some conditions do seem to weigh stronger than others, and that there are specific difficulties involved in using these conditions as a foundation for *post bellum* responsibilities. I will discuss three types of cases to explain how these conditions could work: self- or other-defense, humanitarian intervention, and ‘debated wars,’ wars of which the justness is contested.

The first condition Miller discusses is ‘moral responsibility.’ When applied to post war situations, this condition is an intuitively strong argument for assigning responsibility.<sup>58</sup> While it might be difficult in the case of global problems such as poverty to appoint a particular agent that is to blame, this seems to be easier in the case of war. In general, war is prohibited: modern just war theory holds that war is principally immoral, but can be justified in exceptional circumstances, and there is a legal prohibition on the use of force by states.<sup>59</sup> Therefore, something has clearly gone wrong if war does occur. This means that usually, there will be at least one unjustified aggressor bearing the moral guilt for the war and subsequent deprivation. As in individual situations of responsibility, it makes sense to hold remedially responsible the actor that was at fault for the war. This restores the moral balance between the ‘aggressor’ and the ‘victim’.<sup>60</sup> In a case of an unjustified attack and legitimate self- or other defense, such as the first Gulf War, the aggressor, Iraq, was morally responsible for the war and subsequent deprivation in Kuwait. As they were unjustified in their attempt to annex Kuwait, they are morally to blame for the damage. Based thereon, Iraq appears a likely candidate for being remedially responsible for deprivation in Kuwait.

How does this first condition work for the deprivation resulting from a humanitarian intervention? The situation which leads to a humanitarian intervention is characterized by internal instead of external aggression. Here, we stumble upon the difficulties that were foreseen by Miller when addressing collective responsibility. These type of cases involves a humanitarian catastrophe (or the imminent threat thereof) due to aggression usually performed by the state, i.e., governmental elites in power, against (parts of) the population, such as occurred in Cambodia or Libya. Clearly, the Khmer Rouge and the Ghaddafi clan were morally responsible for the severe harm inflicted on the population. In these cases however, it is difficult to hold the nation or the population collectively responsible for the deprivation and suffering. We could assess the extent to which the population had control over the national policy and its collective action (could the Cambodians have prevented the uprising of the Khmer Rouge in some way?), but in both situations, it would give rise to a minimal degree of collective

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58. *Ibid* at 100.

59. Article 2.4 United Nations Charter 1945 (entered into force 24 October 1945), online: <http://www.un.org/en/charter-united-nations/>.

60. Miller, *supra* note 30 at 100.



responsibility at best. Therefore, it is rather difficult to use the condition of moral responsibility to pin down remedial responsibility after humanitarian interventions: while the state was (presumably) morally responsible, the morally responsible elites will—after the intervention—no longer make up that state; and the population of, say, Cambodia bears no (or minimal) collective national responsibility for the deprivation.

The third type of case shows another difficulty with using moral responsibility as foundation for remedial responsibility: can we always determine who bears moral guilt? While it might on some occasions be clear who was to blame for the war—i.e., who violated *jus ad bellum*—that is often not the case. In many cases, the justness of wars is debated and it takes years to determine who was justified *ad bellum* and who was the aggressor, if ever. We need only to bear in mind the disagreement on the justness of the Iraq or Afghanistan war to illustrate this point. Clearly, Al Qaida was responsible for the terrorist attack on the USA, and there was a connection between Al Qaida and the Afghan Taliban regime. But was that enough to justify war? Obviously, it is not quite easy to determine who is morally responsible for the war and destruction in Afghanistan and thus to assign remedial responsibility using that condition. Nevertheless, also for debated wars, moral responsibility is presented as strong argument for assigning post war duties to belligerents.<sup>61</sup> As such, its intuitive appeal is why opponents of the 2003 Iraq war are of the opinion that the USA and its coalition partners, having unjustly invaded Iraq, are responsible for reconstructing that state.

The second backward looking condition is ‘outcome responsibility.’ Obviously the actor that is morally responsible for a particular outcome is also outcome responsible. However, other actors can also be outcome responsible even though they are not at the same time morally responsible.<sup>62</sup> This condition enables us to bring many other actors into the picture, which is especially useful with regard to *post bellum* situations. Namely, not only the unjust aggressor but both (or all) of the belligerents are outcome responsible for the damage to a certain extent. Considering the first Gulf War, Iraq was morally and outcome responsible for the post war deprivation in Kuwait, but the USA and its coalition partners were outcome responsible as well. While they were justified in defending Kuwait against Iraqi aggression, damage was caused while doing that. Therefore, Kuwait’s deprivation is partly a side effect of the USA’s otherwise justified intervention, making it outcome responsible to some degree. This way, responsibility can be assigned to the ‘other defender’ (here also the just victor) as many theorists do. The war was justified but still, it remains the lesser of two evils, i.e.: it is an evil for which the actor is responsible.<sup>63</sup> We could even assess whether Kuwait is partly outcome responsible itself as well. Kuwait’s actions prior to August 1990, such as not respecting the oil quota, were an important reason for Iraq to attack

61. Pattison rightly points out that: “non-belligerents may have also been culpable for the war, such as those that finance the war and provide military equipment.” Pattison, *supra* note 11 at 639.

62. Miller, *supra* note 30 at 89.

63. See also Evans, *supra* note 4 at 153.

Kuwait. Iraq made no secret of its plans for the military attack. Kuwait could have foreseen this outcome and by not adjusting its policy, it could be argued that although it is not morally responsible for the war, it is nevertheless (partly) outcome responsible since it contributed to that particular course of events. This way, the ‘just defender’ itself, which is also the ‘victim’ can be held responsible.

This condition of outcome responsibility works similarly for humanitarian interventions: while Vietnam was arguably justified in intervening in Cambodia to stop Khmer Rouges’ massacre, forcing them back to jungle rebellion, it attributed to the damage nonetheless. While the Cambodian state, by way of Khmer Rouges’ representatives, was both morally and outcome responsible for many deaths, damage, destruction and deprivation, Vietnam is outcome responsible as well because it intervened. As such, this condition can serve as a foundation for assigning remedial responsibility to the humanitarian intervener.

As we have seen, outcome responsibility (which is broader than moral responsibility) and remedial responsibility are often connected when the former is the basis for the latter. In the context of war, this condition can also be used as a foundation to hold belligerents responsible for reconstruction after war, based on their contribution to that particular outcome, whether their actions were justified or not. This is what it means to be responsible based on the adage ‘you break it, you own it’. Being in the Pottery Barn, the one who caused the damage and created the problem is responsible for putting it right, even if the person breaks something by accident.<sup>64</sup> Therefore, outcome responsibility is particularly useful for debated wars such as Iraq and Afghanistan, because it does not presuppose moral guilt for the war. Rather, the actor’s share in producing the outcome—the post war situation—is used to attribute responsibility.

This, of course, does not decide to what degree belligerents are responsible. It would appear that states who are morally responsible for the war are often largely responsible for the outcome as well, whereas other belligerents who are merely outcome responsible, are so to a lesser extent. We could question whether, since they were *ad bellum* justified, their share in causing the particular outcome is large enough to serve as foundation for assigning remedial responsibility. It seems odd to hold the ‘just defender’ responsible for the damage done in defending itself, since it was both justified in doing so, and it had no choice.<sup>65</sup> The ‘other defender’ and ‘humanitarian intervener’ were justified also, but made a deliberate choice to intervene, knowing that it would cause damage despite its expected positive effects. It was, so to say, a ‘war of choice’. Nevertheless, such war of choice is one that is aimed at helping others (so we assume), which is why

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64. A metaphor often accredited to Secretary of State Colin Powell, who supposedly warned President George Bush that he would ‘own’ all Iraq’s problems after the invasion. See, e.g., Bob Woodward, *Plan of Attack* (New York: Simon & Schuster, 2004). In reality, the retail chain of home furnishing stores Pottery Barn does not have such a rule. Additionally, it should be noted that contrary to Pattison’s reference to this motto, it seems not to refer to moral guilt for damage as basis for the obligation to put it right (Colin Powell did not think at that point that the US would be the unjust aggressor), but rather to outcome responsibility for certain damage. Pattison, *supra* note 11 at 637-39.

65. Assuming here that letting an aggressor annex the victim’s state is not a viable option.

some argue that, since they already helped others by intervening, to require them to reconstruct after war is overly demanding or even unfair.<sup>66</sup>

Next to these two backward looking conditions for assigning post war responsibility, causality is the third and final backward looking foundation. ‘Causality’ constitutes an important element of the previous two conditions, but it is introduced as an independent condition by Miller.<sup>67</sup> While outcome responsibility is in many respects broader than moral responsibility, pure causality is even broader.<sup>68</sup> As such, it is possible that causal responsibility brings more actors into the picture than solely those who are morally and/or outcome responsible. However, this condition can function independently as foundation for remedial responsibility only in exceptional circumstances. Miller describes the example of someone who acts under coercion: “B says he will kill P, unless A first punches her in the face.”<sup>69</sup> Also, one can think of rare occasions when the causal link between an action and a result is so unpredictable that it would be unreasonable to hold that actor outcome responsible.<sup>70</sup> Suppose that Iraq did not openly threaten to attack Kuwait, and suppose the attack was a totally unforeseen reaction to the aforementioned Kuwaiti policy. Kuwait was not morally or outcome responsible, but could be perceived as partly causally responsible for the damage done in the war. Also, it is possible to imagine a situation in which a just intervener prevents a genocide in state A, while this unexpectedly causes a civil war to erupt in state B. Nevertheless, while this might be possible in theory, causality does not constitute a serious independent condition for the duty to reconstruct.

Taken together, these three backward looking conditions for attributing post war duties are based on what Gheciu and Welsh call a ‘compensation rationale,’ i.e., the strong moral intuition that one has to compensate for the consequences of one’s actions and to ensure the well-being of those affected by them.<sup>71</sup> As backward looking conditions—and consequently focused on the former belligerents—difficulties are nonetheless encountered when using these conditions as foundation for post war responsibility. Here one has to mention, first, the problem of assigning national responsibility insofar as it is collectively owed by the state and the individual members of the population. Some states are so organized that it is unfair to hold the population collectively responsible. Second, serious epistemic problems exist with regard to the indeterminacy of moral guilt. While initially, it seemed relatively easy to determine the actor that is morally blameworthy, the reality shows many debated wars: war is often not a situation of the

66. Lazar, *supra* note 19 at 20. Mark Evans, “At War’s End. Time to Turn to Jus Post Bellum?” in Carsten Stahn, Jennifer Easterday & Jens Iverson, eds, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014) 26 at 36; Pattison, *supra* note 11 at 638.

67. Although Miller rightly acknowledges that it can be difficult to separate pure causal responsibility from relationships of outcome and/or moral responsibility. Miller, *supra* note 30 at 102.

68. This progressive scale is an oversimplification, think, e.g., of the type of moral responsibility that results from an omission to act, which I will elaborate upon in the next section. Miller, *supra* note 40 at 456.

69. Miller, *supra* note 30 at 101.

70. *Ibid* at 101.

71. Gheciu & Welsh, *supra* note 11 at 124.

‘good guys’ against the ‘bad guys.’ Both sides usually claim to be justified *ad bellum*. But who is?<sup>72</sup> It is well possible that insufficient information is available to make such judgment, both before, in and after the war—and it is possible that both (or all) actors have some justness on their side.<sup>73</sup> Therefore in practice, moral guilt is likely to be a matter of degree.<sup>74</sup>

An important third difficulty exists with regard to distributing post war duties solely on the basis of backward looking conditions. Gheciu and Welsh rightly argue that: “backward looking ideas of causal responsibility relate imperfectly to the forward looking task of addressing a problem, since the actor who caused another actor to be in danger is not always best placed to rectify the situation.”<sup>75</sup> In other words, it is not at all clear that former belligerents are adequate duty bearers in the sense that the problem of post war deprivation gets solved. Former belligerents can have high stakes in terms of their own interests and can also be seen as biased. Many Kosovars, to mention just one example “remain suspicious of the motives and likely effectiveness of EU peace building.”<sup>76</sup> Obviously, the way the population in a post war situation perceives the actor that is willing to reconstruct is important for the effectiveness thereof. This is why Walzer argues that the just victor should always seek the consent of the defeated. Furthermore, belligerents might not be best placed to remedy post war deprivation because they simply lack the capacity to do so. This means that, despite the powerful intuitive appeal of these backward looking conditions as foundation for post war duties, they are probably not sufficient to solve the problem of distributing responsibility for *jus post bellum*.

Therefore, it is important to present the other conditions for outcome responsibility. Miller’s fourth condition, ‘benefit’, combines backward and forward looking elements. Applied to the issue of war, it points to actors that benefited from the war. Belligerents might have benefited from the war, but there might also be actors who are not morally, outcome or causally responsible for the war or subsequent deprivation, but who have nonetheless benefited from that process—the so called ‘innocent beneficiaries’.<sup>77</sup> Benefit can thus serve as an additional as well as independent condition for assigning remedial responsibility as it points to belligerents or outsiders who are the beneficiaries of the action or policy that caused harm. In case of the Iraq war, the USA is considered by many morally and outcome responsible for the war, and on top of that, it benefited from the war in terms of securing their oil interests and in terms of acquiring profitable

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72. See further on the idea of comparative justice: Steven Lee, *Ethics and War: An Introduction* (Cambridge: Cambridge University Press, 2012) at 104-06.

73. See, e.g., CAJ Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008) at 90.

74. These two difficulties are equally valid for outcome and causal responsibility; the actors’ share in a certain outcome can be difficult to trace back or to determine: it is nearly impossible to accurately determine the exact degree of responsibility. See further, e.g., Pattison, *supra* note 11 at 638-41.

75. Gheciu & Welsh, *supra* note 11 at 134.

76. *Ibid* at 135.

77. Miller mentions, e.g., that it is possible that A played no causal role but nevertheless benefited from the process that led to P’s deprivation because “resources that would otherwise have gone to P have been allotted to A.” Miller, *supra* note 30 at 102-03.

oil contracts for US corporations. Considering non-belligerents, one could even argue that not merely those who *have* benefitted are responsible, but also those who *would* benefit from the remedy in the longer run. Some just war theorists argue that the results of a particular war can bring wider benefits than for those directly involved in terms of national and international security.<sup>78</sup> For example, a stable non-Taliban Afghanistan—not yet realized at this point—which is no breeding ground for international terrorism is in everybody’s interest. In this line, reconstructing states—preferably as democracies that respect basic rights—as a strategy in the fight against terrorism, brings wide benefits so that everyone might be considered as responsible for bringing about this result. The reconstruction of failed states is “something fundamental to the pursuit of regional and international security”.<sup>79</sup> Obviously, in case of a humanitarian catastrophe, the deprived nation is itself the main beneficiary of an intervention,<sup>80</sup> but the surrounding states also benefit from this reconstruction, e.g., from establishing a stable state and halting refugee flows. It could be argued that the international community as a whole benefits from reconstruction of a failed state after a humanitarian intervention; left in chaos, a collapsed or failing state destabilizes its environment and constitutes a potential breeding ground for international terrorism. What remains difficult here as well, is to determine the precise amount of benefit: which benefits weigh strong enough for attributing to those beneficiaries the duty to reconstruct?

Gheciu and Welsh describe such considerations under the heading of ‘benefit’ as the ‘defense of society rationale’, based on a broad understanding of national interests. They present Kosovo as the example to show that international actors taking up their responsibility can build institutions based on democratic values, respect for human rights and a market based economy and that therewith international security is advanced.<sup>81</sup> This condition seems to be a weaker foundation for assigning remedial responsibility than the backward looking conditions. Furthermore, Gheciu and Welsh point to two disadvantages when applying this condition in order to establish remedial responsibility to reconstruct. First, since it is difficult to calculate the benefits and their value for any state’s national interest and since this benefit might change over time, there is the danger of inconsistency. The foundation for the duty to reconstruct could cease to exist during the course of the reconstruction efforts. Second, if the duty to reconstruct is based on the actor’s national interests, it might lead to a lowering of standards.<sup>82</sup> For example, it is questionable whether making sure that Afghanistan is no breeding ground for international terrorism requires the same degree of reconstruction as ensuring that the Afghan people can lead a minimally decent life.

78. E.g., Michael Walzer, *Arguing about War* (New Haven: Yale University Press, 2004) 35 at 43, 44.

79. Gheciu & Welsh, *supra* note 11 at 129-31.

80. Which is why Helen Frowe argues that they should bear the burdens of reconstructing as well. “So, if an intervening state inflicts collateral harms in the course of a humanitarian war, we might think that the burden of making good those harms falls to those who are the beneficiaries of the intervention, and not the intervening state.” Frowe, *supra* note 44 at 213.

81. Gheciu & Welsh, *supra* note 11 at 130.

82. *Ibid* at 139-40.

The fifth condition for attributing remedial responsibility is fully forward looking: the ‘capability’ of a future duty bearer. Who would practically be capable of remedying the post war deprivation?<sup>83</sup> The underlying moral principle is well-known and says: who can help should help. A contemporary and often used example is Singer’s example of the child that is almost drowning in the pond. Whoever is present when this happens, is remedially responsible to save the child. Obviously, since the goal is reconstruction of the war-torn state in order to remedy the deprivation and achieve a just and lasting peace, capacity to actually perform that task is essential.<sup>84</sup> This is a consequentialist condition which focuses both on the desired result and the actor (or actors) that is most likely to achieve that aim. Whereas in an individual situation, it is possible that only one actor is capable to provide a remedy (e.g., when one person is close enough to prevent someone from falling from a steep cliff or when one person is able to save the child from drowning), which makes him alone remedially responsible, in post war situations there will be many ‘capable’ actors. Therefore, this condition requires an assessment of the capability of actors of reconstructing after war, given the particular circumstances. This probably entails balancing capability, effectiveness and costs and as such, it requires an analysis of, e.g., financial costs and resources, and knowledge of the local situation and experience in reconstruction missions.

Using capacity as a foundation for assigning remedial responsibility in post-war situations has strong intuitive plausibility. We do not tend to hold an actor remedially responsible when this is unrealistic or overly demanding in terms of capability. Suppose Tanzania would have intervened in Rwanda to stop Hutu extremists from further executing their plan. However, they would not have the financial and material means to effectively reconstruct Rwanda afterwards. It seems both imprudent to assign remedial responsibility to Tanzania, because it could not effectively remedy the deprivation, but it is also unreasonable since they already taken up the task of intervening and additional duties would bring too much costs for themselves.

This condition is presented by Miller as one among the six conditions for assigning remedial responsibility. Nonetheless, it seems that this condition is of a different order. We have already encountered several difficulties when applying the previous conditions as foundation for remedial responsibility and noted as an important problem precisely this requirement of capacity. A state might be linked in several ways with post war deprivation, e.g., it is both morally and outcome responsible, and may have benefited from the war. But despite these strong links, if it does not have any capacity to fulfill such duty, remedial responsibility cannot be assigned to that state. In those situations, moral and outcome responsibility do

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83. Miller, *supra* note 30 at 130.

84. According to Pattison, this foundation trumps the other foundations for assigning the duty to reconstruct. This consideration is more important than the other factors, because they relate to less morally urgent concerns. Namely, the goal is to properly rebuild the war torn state and protect the populations basic rights. Pattison, *supra* note 11 at 656. He therewith disagrees with Miller, who claims there is no hierarchy between the discussed variables.



not lead to the duty to make it right. In such cases, Miller argues that “since the whole purpose of identifying remedial responsibilities is to get help to P, picking the agent who is actually able to provide that help makes obvious sense.”<sup>85</sup> Thom Brooks too argues that “the ability to provide a remedy is central to the possibility of possessing a remedial responsibility.”<sup>86</sup> This means that the condition of capability works as a precondition for assigning remedial responsibility, rather than as one among the other conditions. Despite Miller’s insistence on there not being a hierarchy between the six conditions, he writes that: “we have no alternative but to consider each of the agents (...) able to provide a remedy and then to assess how strongly each is connected to the impoverished group.”<sup>87</sup>

The final condition for assigning *post bellum* duties is ‘community.’ Some states are located within the same region as the war torn state, or states may share the same religion or culture with the war torn state. Therefore, they are linked in such a way so that remedial responsibility can be assigned to these states. It seems convincing that relations based on shared communities give rise to special obligations. For example, it would seem right that other states in the region, but also Belgium, are more responsible than others to contribute to the building up of Rwanda after the Rwandan genocide. Sharing a geographical region or a history together generates shared responsibilities, in this case towards post-war Rwanda.<sup>88</sup> Gheciu and Welsh argue in a similar vein that the shared identity of European countries with the Balkans was used as foundation for Europe to have a special duty to reconstruct this area.<sup>89</sup>

### Role Responsibility

Miller’s taxonomy helps us gain insight into the foundation for remedial responsibility after war. However, the reasons just war theorists give for assigning the remedial duty to reconstruct to certain actors are not completely explained by the above analysis. An important issue is still absent: a special type of moral responsibility which can be approached through Hart’s concept of role responsibility. Hart explains role responsibility in the context of his comprehensive account of individual responsibility in the national legal system. His famous example of the drunken captain who lost his ship at sea with all aboard serves as an illustration of the fact that responsibility can refer to “a wide range of different, though connected, ideas.”<sup>90</sup> One of these types of responsibility is role responsibility: the responsibility that is based on the fulfillment of a specific role, in this case, that of a captain who is responsible for the safety of the passengers. By getting drunk and not making the required effort, he is violating his role responsibility and thus

85. Miller, *supra* note 30 at 103.

86. Thom Brooks, “Rethinking remedial responsibilities” (2011) 4:3 *Ethics & Global Politics* 195 at 200.

87. Miller, *supra* note 30 at 107.

88. Miller, *supra* note 40 at 462.

89. Gheciu & Welsh, *supra* note 11 at 126.

90. HLA Hart & John Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 2008) at 211.

responsible for the loss of the ship and passengers. In short, with a certain role come specific duties, e.g., for captains to ensure the safety of the passengers and to deliver the cargo, or for parents to bring up their children. Hart has a rather broad understanding of role responsibility, as it also involves duties that come with temporary tasks, assigned to someone by agreement or otherwise.<sup>91</sup>

Because of the importance of role responsibility for *jus post bellum*, as distinct from moral responsibility discussed above, it is necessary to present it as a separate seventh condition. The above shows that the most obvious reason for moral responsibility in post war situations is the moral guilt for the war itself—the moral responsibility related to unjustified aggression. However, an actor can also be morally responsible based on either an omission to act in accordance with a certain formal role, or based on an (usually more informal) *ad bellum* assumed role. As such, role responsibility is a subspecies of moral responsibility. Miller states that one can be morally responsible for failing to fulfill a pre-existing obligation.<sup>92</sup> And although Miller does not discuss this type of moral responsibility in detail, he mentions an example which resembles the type of responsibility that is meant here: a dad takes two kids to the park, where one breaks the other's arm by accident, while he reads a newspaper. Dad is not causally responsible but he is morally responsible because he failed in his duty to take care of the kids, something that he assumed when he offered to take them to the park.<sup>93</sup> He did not himself inflict the damage, but this specific role as supervisor comes with duties which he is bound to fulfill.

This concept of moral role responsibility must serve as an additional condition for assigning the duty to reconstruct in two ways. First, actors might have duties attached to a specific formal role and be role responsible when they fail to discharge the attached duties *ad bellum* or *in bello*. Consider again the Rwandan genocide: clearly, Hutu extremists were morally responsible for the deaths and damage in 1994. However, Belgium and other members of the UNAMIR mission were present at the time. Despite their initial limited mandate, they were formally assigned the duty to protect the Rwandan population. As is painfully known, they withdrew after the first Belgian soldiers were killed, and manifestly failed in their mission because of this omission to act when it was necessary to do so. They are role responsible for failing to prevent the genocide,<sup>94</sup> while they were not responsible in a causal way.<sup>95</sup> Similarly, European countries intervened in the Balkans and took on the role of protecting the population. Their failing to properly discharge that responsibility during the war creates a strong foundation for remedial responsibility.<sup>96</sup>

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91. *Ibid* at 212-13.

92. Miller, *supra* note 30 at 100.

93. Miller, *supra* note 40 at 456.

94. Of course the UN itself was in the end responsible for failing to provide the necessary political authorization, manpower and material for effective military action.

95. Although if we trace causality further back, we could argue that Belgium was causally responsible since they institutionalized the ethnic division between Hutu's and Tutsi's, which played a role in the animosity and subsequent aggression between the two groups.

96. Gheciu and Welsh argue that: "the European Union's current responsibility to rebuild in the Balkans stems from a dual source: perceived special duties vis-à-vis fellow Europeans, and

Second is the responsibility that lies entailed in *jus ad bellum*. Actors can be morally responsible not only because of their violation of *jus ad bellum*, or because of their omission to act in accordance with a certain role, but also based on a role that they self-adopted through a public *ad bellum* ‘promise.’ Suppose that a state justifies its *ad bellum* decision to go to war, and that it makes promises about the post war situation as part of its just cause and chance of success. In that case it (informally) adopts a certain role which entails specific duties. Examples would be the wars in Afghanistan and Iraq: they were originally waged as self-defensive wars but humanitarian considerations were invoked as well in the justification for those wars. Particularly during the Iraq war, the emphasis shifted more and more towards ending the human rights violations and promoting democracy as main causes for war.<sup>97</sup> By such a public statement, the state makes a promise with which it takes upon itself a distinct role that creates responsibility. It is then obligated to fulfill that role and the duties that are attached to it; in other words, it is responsible for achieving the promised goal. Actors can also try to avoid such moral role responsibility by refusing to make such a promise. When a coalition of states intervened in Libya in 2011, leaders were, contrary to the wars in Afghanistan and Iraq, anxious to stress the limited nature of the intervention. Barack Obama stated that the focus of the mission was to protect Libyan civilians, not regime change.<sup>98</sup> This strategy of emphasizing the limited *casus belli* is aimed at limiting Western responsibilities after the war.

In short: with specific commitments and the assuming of a certain role comes moral role responsibility. This last condition further explains our intuitions on how to distribute responsibly after war. It clarifies why we tend to hold the just victor remedially responsible after humanitarian interventions, or after debated pre-emptive wars that are aimed at regime change and protection of the population. That is not only because of moral and/or outcome responsibility. Also, these states are responsible for post war reconstruction because of the adopted role and the promise of achieving certain results, which creates legitimate expectations.

### A System for Assigning Post War Duties

The goal of this article was twofold: to shed light on the foundation for responsibility after war and to develop a system for assigning the duty to reconstruct to specific actors. In the above, various conditions were analyzed and an insight into the foundation for responsibility was given. As we have seen, most just war

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the additional responsibility incurred by recent negligence in fulfilling those duties.” Gheciu & Welsh, *supra* note 11 at 126.

97. George Bush declared “The goal in Iraq and Afghanistan is for there to be democratic and free countries who are allies in the war on terror. That’s the goal. (...) we will stay there to get the job done.” See George W Bush, *Public Papers of the Presidents of the United States*, Book 2, July 1 to September 30, 2004 at 1715.

98. See, e.g., <http://news.sky.com/story/844653/obama-libya-mission-is-not-regime-change>. A national security advisor further explained that “it’s the Libyan people who are going to make their determinations about the future.” See <http://thehill.com/homenews/campaign/151191-white-house-suggests-regime-change-is-goal-of-libya-mission>.

theorists pick one or more of these conditions to assign post war responsibility. For example, Orend argues that the victor is mainly responsible because if ‘you break it, you own it.’<sup>99</sup> Pattison argues for a presumption against belligerents rebuilding, and claims that the most capable rebuilders are remedially responsible instead.<sup>100</sup> However, it seems overly simplistic to rely on one condition and expect that this singles out the appropriate duty bearer in all situations, as these authors do. Neither of these conditions is decisive by itself. Given the international reality of today, and the contemporary view on *jus post bellum*, there is a need for a system that combines both backward and forward looking conditions. It seems right for a comprehensive system to both do justice to the morally relevant considerations, while at the same time remaining focused on the aim of halting post war deprivation. Regarding international problems in general, Miller holds that all six conditions are relevant for remedial responsibility and that they must be balanced in concrete situations. These conditions are relevant for post war deprivation as well, supplemented by the seventh condition that is added to Miller’s taxonomy. However, when these conditions are balanced in concrete post-war situations, it would nevertheless be helpful if we could say something about their relative weight. Therefore, an attempt is made to systemize them.

What would a system for distributing the duty to reconstruct look like? For *jus post bellum*, it became clear that these conditions are not of equal weight and it seems therefore possible to attain a certain hierarchy between them. The condition of capability has the special function of precondition for assigning remedial responsibility. In order to achieve a just and stable peace—the axiomatic goal of *jus post bellum*<sup>101</sup>—it is prerequisite that an actor is capable to achieve (part) of this goal. The condition of capability preselects which actors are potential duty bearers and which are not.<sup>102</sup> An actor cannot be held remedially responsible for reconstruction if it is not capable of achieving that result, even if this actor is connected in other ways with the deprived war torn state. On that basis many poor states are excluded from *post bellum* duties. How do we determine which particular states are excluded? In Miller’s perspective on global justice, duties are generated by basic human rights, which constitute a certain ‘minimum.’ Some

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99. Orend, *supra* note 1 at 49.

100. Given that this actor also has the ‘right’ to rebuild, which is so when there is a just cause for rebuilding and the effort is likely to be effective. Pattison, *supra* note 11 at 652. Pattison further argues that the UN Security Council should generally carry out the rebuilding process after war, an argument of which I am rather skeptical since contemporary reality forces us to be modest in our expectations of existing global institutions. While the UN might be generally perceived as a legitimate actor in the eyes of the deprived nation, it is questionable whether it is indeed the most capable actor to carry out reconstruction. Surely, when the UN and the Peace Building Commission would work as envisioned, they are in a good position to at least oversee post war duties. Exploring this line of global institutional reform would require however more space than is available in this article. Pattison, *supra* note 11 at 656-59.

101. E.g., Evans, *supra* note 4 at 149.

102. Thom Brooks similarly argues that Miller should correct his connection theory of remedial responsibility. He argues that his system is better understood as a ‘two tiered procedure’ asking different questions: “The first tier would ask which nations possess capacity.” Thereafter, we should “select a nation or nations from this pool of nations capable of being remedially responsibly according to Miller’s conditions.” Consequently, “There is an algorithm after all.” Brooks, *supra* note 86 at 200-01.

essential human rights must be fulfilled “if a person is to have a minimally decent life in the society to which he or she belongs.”<sup>103</sup> It seems that this could function as threshold for duties regarding *jus post bellum*: whenever a state is not capable of reconstructing the war torn state without (further) infringing its own citizens’ minimally decent lives, they are not required to do so.

This precondition will thus exclude certain actors from post war duties, but it then obviously also determines the remaining actors as potential duty bearers. Should we try to determine who is most capable and then assume that any state that has the most resources and knowledge is remedially responsible for post war reconstruction? This would seem unlikely. Merely assigning post war duties to the most capable state(s) would not work; capacity cannot function as the sole foundation for assigning remedial responsibility after war, as Pattison suggests. It would mean that the same actors—presumably the richest and most developed states—are always remedially responsible for post war reconstruction around the world. Capacity is the necessary condition, but not the sufficient or decisive condition. For answering the question of which states capable of assuming post-war duties should be picked out in a particular case, one has to look at the other conditions.

War is a human activity involving intentional and collectively inflicted destruction, and because of this great evil of war, moral and outcome responsibility must remain important considerations when assigning the duty to reconstruct. In individual situations, we are considered to be responsible for the consequences of our actions. This means that when we do damage to others, we are liable for that damage. Hart writes: “He is thus liable to be ‘made to pay’ for what he has done.”<sup>104</sup> There is a presumption that actors bear the burdens of their own actions.<sup>105</sup> As we have seen, aggressive states are both morally and outcome responsible for post war deprivation, but just belligerents nonetheless bear responsibility for the outcome as well. This means that there is a presumption that belligerents are themselves responsible for post war reconstruction. What about the relative value of these two conditions? It appears that being merely outcome responsible constitutes a weaker foundation for the duty to reconstruct than being both outcome and morally responsible. Damage and destruction as a result of actions that are justified—and which thus results in outcome responsibility only—are less blameworthy than damage and destruction as a result of evil or unjustified actions—resulting in moral responsibility as well. In the former case, the damage might be foreseen, but it is the side-effect of actions that are in themselves justified. Furthermore, the strength of outcome responsibility depends on whether a war was a ‘matter of choice’ or not: the outcome responsibility of an actor that had no choice but to defend itself is weaker than that of the other defender or humanitarian intervener that chose to get involved and was able to consider the implications of that act, despite their possible good intentions.

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103. See Miller, *supra* note 46 at 391.

104. Hart & Gardner, *supra* note 90 at 215.

105. Miller, *supra* note 30 at 87.

But while moral and outcome responsibility could serve as foundation for post war duties, the precondition of capability might stand in the way. Considering moral responsibility first; while it might be clear who is morally responsible after a self-defense against aggression,<sup>106</sup> that aggressor might not be capable of successfully reconstructing after war, either because of a lack of resources and knowledge, or because the hostility between the former belligerents hinders effective reconstruction. We can imagine, to mention an example, that Kuwaitis would not ravish at the prospect of Iraq being assigned the duty to reconstruct after the 1990 war.<sup>107</sup> After a humanitarian intervention, it might also be difficult to use this condition for the distribution of responsibility. Here the aggressor was the regime that targeted its own population. That population does not have a share in the collective responsibility of the state, for reasons addressed by Miller. And the responsible regime itself was presumably removed by the intervention and unable to bear the duty to reconstruct. As we have seen, while moral responsibility is an intuitively-strong foundation for post war duties, it will be difficult to use it to pin down duty bearers in practice.

Turning to outcome responsibility brings other belligerents into the picture, and as such, it can be used to assign the duty to reconstruct to the ‘other defender’ and the ‘humanitarian intervener’. Presuming that these just belligerents have sufficient resources, they are the likely candidates for bearing the duty to reconstruct because they are partly responsible for that particular outcome. Against the argument that it is unfair or overly demanding to assign reconstruction to these actors, one might argue that this (heavy) burden could and should (under the *ad bellum* condition of reasonable chance of success) have been foreseen in advance. States are indeed required to carefully consider the weight of this burden before they embark on war or intervention. If they are not willing to fulfill their post war duties, the war should not have been undertaken. In this way, it is indeed possible that states who perform morally good actions acquire more responsibilities than they would have had otherwise, as Walzer argues.<sup>108</sup>

Finally, Hart’s concept of role responsibility is an important condition for assigning the remedial duty to reconstruct. This type of responsibility follows either from an *ad bellum* or *in bello* omission to act in accordance with a certain role, or from an *ad bellum* promise that shapes a special role. Moral role responsibility does not exist in all situations of war, for example when a self defense is merely aimed at repelling an aggression. Furthermore, the strength of role responsibility depends on the nature of the promise made: was it made once or repeatedly, was it publicly announced and recorded in official documents, addressed at the actor’s population, and/or at the population of the war torn state directly? The

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106. While this is the case in our example of the first Gulf War, it is surely not always easy to determine whether a self defense is indeed a legitimate self defense. Consider, e.g., preemptive or preventive self defenses: the distinction between a legitimate self defense, a defense before its time, and a war of aggression is not always easy to make.

107. It should be noted that this does not mean that Iraq cannot be held liable for financially compensating Kuwait. But this is a question that is separated from the question as to who is responsible for halting the deprivation and reconstructing the war torn area.

108. Walzer, *supra* note 9 at 40.



stronger the commitment, the stronger the role responsibility. Again, role responsibility is particularly strong in case of a humanitarian intervention, where the intervener assumes the role of rescuer. Inherent in the just cause of the intervener is the adoption of a humanitarian role: the duty to indeed halt the catastrophe and to remedy the deprivation. Provided the humanitarian intervener is capable to help reconstruct after the intervention, which they are whenever they can do so without infringing its own citizens' minimally decent lives, outcome and role responsibility constitute a strong foundation for remedial responsibility.<sup>109</sup> However, when a state is willing but not capable of post war reconstruction, it seems that it should nevertheless be able to justly intervene to prevent or stop a humanitarian catastrophe. Alex Bellamy rightly argues that to claim otherwise "dramatically reduces the number of potential agents who might save strangers in urgent peril".<sup>110</sup> For that reason, humanitarian emergencies are an exception to obligations to build the peace afterwards, according to Bellamy.<sup>111</sup> States can legitimately intervene despite them not having the means to reconstruct after the war. If this should be the case, the intervening state should prevent the creation of legitimate expectations by making statements about their limited aims.

## Conclusion

In this article some steps are made towards developing a comprehensive system of conditions that can serve as foundation for the duty to reconstruct as part of *jus post bellum*. I have argued in favor of a system that combines both backward and forward looking conditions, wherein forward looking capability functions as a precondition. Backward looking moral, outcome and role responsibility function then as the most important conditions, and finally the conditions of benefit and community further help in the distribution of the duty to reconstruct after war. This system thus presumes that belligerents are responsible for reconstruction after war. But while the conditions seem to work quite straightforwardly in theory, real world scenarios are always complex, making it difficult to pin down remedial responsibility to belligerents in practice. Recalling Miller's claim that it is morally unacceptable for people to be left in a deprived situation, "there is a moral requirement that falls on everybody else to provide the help or the resources that are needed."<sup>112</sup> Along with the shift towards a maximalist *jus post bellum*,

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109. It seems to me that when a state is willing but not capable of post war reconstruction, it can nevertheless justly intervene to prevent or stop a humanitarian catastrophe. Alex Bellamy rightly argues that to claim otherwise "dramatically reduces the number of potential agents who might save strangers in urgent peril". Therefore, humanitarian emergencies are an exception to obligations to build the peace afterwards, according to Bellamy. Bellamy, *supra* note 2 at 620-21. If this should be the case, the intervening state should prevent the creation of legitimate expectations by making statements about their limited aims, thereby limiting their role responsibility.

110. Alex Bellamy points to the danger inherent in requiring humanitarian interveners to bear the duty to reconstruct after the intervention: not every intervener has the means to fulfill that duty. Bellamy, *supra* note 2 at 620-21.

111. *Ibid* at 620-21.

112. Miller, *supra* note 30 at 98.

this means that in concrete situations, the aim of halting post war deprivation and building a just and durable peace compels us to widen the scope of responsibility beyond the belligerents. The ‘belligerents rebuilt thesis’ must therefore be understood in a more nuanced way than it initially appeared: belligerents are not solely responsible.<sup>113</sup> If they cannot bear the duty to reconstruct themselves, other actors are remedially responsible instead. In that case, the duty to remedy post-war deprivation does not shift to an indeterminate ‘everybody else’ or ‘international community.’ Rather, the various conditions can be used to assign the duty to reconstruct to other specific actors. One can think of a humanitarian intervention in which the aggressive regime is toppled, while the intervener is not capable of reconstructing the state and securing a just peace (alone). Other states must be assigned the duty to reconstruct based on, e.g., their share in the moral guilt (e.g., by indirectly supporting the aggressive regime), their proximity and received past or future benefits. Ideally, the United Nations and organizations such as the Peace Building Commission have a distinct role in reconstruction after war, mainly one of coordination and overview.

Unfortunately, there are still reasons to be skeptical about the effectiveness of *jus post bellum*. Whereas just war theories’ principles, both *jus ad bellum* and *jus in bello*, are codified in international law to some extent, *jus post bellum* remains essentially a mere moral theory. One can be sympathetic towards Orend’s vivid plea for a new Geneva Convention, but the development of international law takes much time and effort and a new *jus post bellum* treaty is not expected in the near future.<sup>114</sup> Furthermore, even if such treaty would be created, an authority—a ‘global teacher’—to assign remedial responsibility and enforce compliance is absent in the international context. Pattison’s plea for building a stronger UN system so that the responsibility to rebuild can be properly realized is therefore also welcomed.<sup>115</sup> Institutional reform is most urgent. An institutional framework for distributing remedial responsibility would be highly valuable for *jus post bellum*. However, neither is expected in the near future. The reality is that, despite the fact that *jus post bellum* is welcomed as part of just war theory, international law and global institutions fall behind the moral theory. As a result, it remains somewhat noncommittal and duty bearers can ignore their post war responsibility.

Nevertheless, *jus post bellum* can fulfill a useful role as moral framework. And precisely this current absence of a *jus post bellum* Geneva Convention and a capable global teacher makes it even more important to have a well considered system (of which this sketch is merely the beginning) to assign remedial responsibility that can invoke general agreement. But could there be some sort of agreement on who bears the duty to reconstruct and if so, to what extent? As was pointed out, when it comes to real wars and post war situations, with all

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113. In other words: the ‘belligerents rebuild thesis’ is the first right answer, but is it by itself an incomplete answer to questions of responsibility for *jus post bellum*. See further also Pattison, *supra* note 11 at 641.

114. Orend, *supra* note 1 at 52.

115. Pattison, *supra* note 11 at 659.

their nuances, complexities and ambiguities, things become complicated. Due to epistemological difficulties, it can often be difficult to determine the exact value of the various conditions for remedial responsibility. Given these inherent difficulties, it will not be easy to reach agreement between actors on who bears the duty to reconstruct. It is to be expected that the system developed here will not produce clear, self-evident results in concrete situations. Rather, these conditions can be used to 'build a moral case' to form an argument based on which the duty to reconstruct is assigned to specific actors. It is unlikely that one might indisputably determine who is responsible after war, but a case for a certain distribution of responsibility can be made, based on the hierarchy of conditions that is developed here. This means that the existence of *jus post bellum* is not quite secure. Yet, having a better grip on responsibility for *jus post bellum* is certainly helpful, and a necessary tool in the creation of a just and stable peace.