
What to Make of Jus Post Bellum: A Response to Antonia Chayes

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Abstract

Post-conflict situations are not exempt from international law. This does not mean that the concept of jus post bellum can descriptively capture the existing regulation based on both general and specific rules. A normative case can however be made for the emergence of a generic obligation to reconstruct incumbent, at least in part, on the victors. This obligation would signal a shift from the Grotian paradigm in the international legal regulation of the post-war phase to a Kantian one.

Proposals for *jus post bellum* may seem a few decades out of date. When the distinction between war and peace and the discreteness of *jus in bello* are called into question, what is the point of inventing a new field of international law defined by the ever more elusive notion of war?¹ Yet, the debate on *jus post bellum* is important because post-war situations pose a unique set of political and strategic challenges. This debate also has more general theoretical relevance. The modern international regulation of the phenomenon of war does not rest on a coherent philosophy: in it Grotius lives alongside Kant. The *jus post bellum* cannot escape the tensions that derive from this improbable, unstable and yet somehow inescapable union.

Antonia Chayes's article deals with the concept of *jus post bellum* from at least three perspectives. First, she argues that as a matter of positive law there is at present no independent *jus post bellum* in international law. Secondly, she asks what moral obligations might govern the sphere of post-war relations – a particularly important question which has been neglected in just war theory for a long time but is now receiving growing attention.² Thirdly, she considers the broader political and strategic context of *post bellum* operations.

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¹ See Greenwood, 'The Concept of War in Modern International Law', 36 *ICLQ* (1987) 283.

² See in particular M. Walzer, *Arguing About War* (2004), especially at 18–22 and 162–168; Bass, 'Jus Post Bellum', 32 *Philosophy & Public Affairs* (2004) 384; Orend, 'Jus Post Bellum: The Perspective of a Just-War Theorist', 20 *Leiden J Int'l L* (2007) 571. Carsten Stahn has brought some of these writings to bear on his analysis in his seminal piece 'Jus ad Bellum, Jus in Bello ... "jus post bellum?" – Rethinking the Conception of the Law of Armed Force', 17 *EJIL* (2006) 921.

Chayes's conclusion on the absence of a *jus post bellum* should not be taken as meaning that post-conflict situations are somehow exempt from the application of international law. This is obviously not the case. The law of armed conflict has a small but important group of rules which extend to *post bellum*.³ Moreover, international human rights obligations, the applicability of which to wartime is now settled as a matter of judicial interpretation at least,⁴ are particularly relevant in the *post bellum* context, as the expanding body of case law arising from post-conflict situations mainly in human rights courts – a *post-bellum* jurisprudence of sorts⁵ – illustrates.

There is also a rich body of state and international institutional practice on post-war situations. In UN practice post-conflict peace-building has been identified as a discrete area of intervention since at least the 1992 Agenda for Peace.⁶ However, while some general trends may be distilled from this practice, it does not generally give rise to binding norms because it fails to satisfy the requisites of generality and uniformity, on the one hand, and *opinio juris*, on the other, necessary for the emergence of a rule of customary international law.

According to Chayes, the key *post bellum* concept that is missing from current international law is a 'generic obligation to reconstruct' incumbent upon the victors.⁷ It might in fact be said that the reason why, conceptually, there is no *jus post bellum*

³ See, e.g., the rules applicable to 'protected persons' who remain in the hands of the detaining state (i.e., Art. 5 of Geneva Convention (III) relative to the Treatment of Prisoners of War (signed 12 Aug. 1949, entered into force 21 Oct. 1950), 75 UNTS 135, and Art. 6 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (signed 12 Aug. 1949, entered into force 21 Oct. 1950) 75 UNTS 287, Art. 3 of Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3). Moreover, there is a duty to repatriate prisoners of war after the cessation of active hostilities (Art. 118 of Geneva Convention III), while the law of occupation continues to apply after the cessation of hostilities (Art. 6 of Geneva Convention IV). In non-international armed conflicts regulated by Protocol II, there is a duty to 'endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained' (Art. 6(5) of Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (signed 12 Dec. 1977, entered into force 7 Dec. 1978) 1125 UNTS 609).

⁴ See *Legality of the Threat or Use of Nuclear Weapons Case* [1996] ICJ Rep 226, at 239–240; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, at 178; *Armed Activities on the Territory of the Congo* [2005] ICJ Rep 116, at 242–243. See also O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011); I have expressed some reservations on the expanding role of human rights in the regulation of armed conflict in Verdirame, 'Human Rights in War: A Framework for Analysis', 6 *European Human Rts L Rev* (2008) 689.

⁵ App. No. 27021/08, *Al-Jedda v. United Kingdom*, ECHR, Judgment (2011); App. Nos. 71412/01 & 78166/01, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, ECHR, Decision on Admissibility (2007), both available at: www.echr.coe.int.

⁶ UN SG Report, 'An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-Keeping', UN Doc A/47/277-S/24111 (June 1992). See also UN SG Report, 'Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations', UN Doc A/50/60-S/1995/1 (Jan. 1995). See also Chayes, 'Chapter VII½: Is Jus Post Bellum Possible?', this vol., at part I 'Legal Basis'.

⁷ Chayes, *supra* note 6, at 3; see also De Brabandere, 'The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept', 43 *Vanderbilt J Int'l L* (2010) 119, at 126–132.

in modern international law comes down to the absence of an obligation – or a set of obligations – which amounts to a distinctive analytical element playing the same function as the prohibition on the use of force in the *jus ad bellum* or the fundamental principles of humanity, military necessity, distinction, and proportionality in the *jus in bello*. The obligation of reconstruction might thus give the *jus post bellum* analytical cohesion. Perhaps more importantly, it would also endow it with a distinctive moral quality.

Key aspects of the legal relationship between the victors and the defeated are already governed by rules of international law. On the front of prohibitions, in particular, it is noteworthy that outcomes of war previously treated as lawful are unlawful under modern international law. For example, war can no longer result in the dissolution or annexation of the vanquished state through *debellatio* or conquest.⁸ Victorious states have, in other words, fewer powers nowadays than in the past.

But an obligation to reconstruct would go further than the existing law. One could make a human rights case in that direction, but it would be an implausible one. At most human rights law might be taken as far as to justify the proposition that every individual is entitled to the reconstruction of a political, legal, and economic order in which he can enjoy his rights but the obligations that correspond to those rights belong to the defeated state.

A generic obligation to reconstruct would also sit uncomfortably with aspects of the law of occupation. The kind of government that occupying powers are obliged to put in place is ill-suited to the complex task of post-war reconstruction, unless by reconstruction we mean simply the rebuilding of damaged infrastructure. Beyond that, occupying powers would be limited in undertaking reconstruction because, for example, they are obliged to respect the laws in force before the occupation (Hague Regulation 43); they cannot expect allegiance from populations in occupied territories (Hague Regulation 45); and they must act ‘only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State’ (Hague Regulation 55). These restrictions are in line with the idea that extraordinary administration, whereof a significant measure would be required for the purpose of reconstruction, is not generally within the purview of an occupying power.

There are situations where obligations of assistance will arise between victors and defeated. Self-determination is the key principle in this context. Vanquished peoples,

⁸ Art. 4 of Additional Protocol I reaffirms the principle that occupation of a territory does not affect its legal status. On the prohibition to annex occupied territory see Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’, 100 *AJIL* (2006) 580, at 583 and E. Benvenisti, *The International Law of Occupation* (1993), at 94–96. On the inapplicability of *debellatio* in contemporary international law see Schmitt, ‘Debellatio’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), also available at: www.mpepil.com, at para. 17 ([the] characterization of *debellatio* as termination of the existing State has generally been rejected by contemporary commentators and there is no recent State practice to suggest survival of the notion). Cf. Y. Dinstein, *War, Aggression and Self-Defence* (2003), at 75–76 (arguing with regard to *debellatio* that ‘[e]ven though the extinction of an existing State as a result of war is not to be lightly assumed, there comes a time when it can no longer be denied’). See also Dinstein’s discussion on the prohibition of annexation in cases of *debellatio*, *ibid.*, at 152–155.

including those under belligerent occupation,⁹ remain entitled to self-determination: they cannot lose their collective liberty as a result of military defeat. A consequence of wars is that they often bring former enemies closer together, in some cases for quite long periods – Germany and the Allies after 1945; Israel and the Palestinians since 1967; the West and Afghanistan since 2001; and the US and Iraq since 2003. The closer the bond, the more exacting the specific legal obligations that self-determination, human rights law, and, in situations of occupation, the law of armed conflict will impose on the victors.

In modern international law general obligations of assistance may even arise between parties to an armed conflict, as the Israeli High Court of Justice held in its judgment on the provision of electric power to Gaza.¹⁰ The key passage read:

[T]he State of Israel has no obligation to allow the passage of an unlimited quantity of electricity and fuel to the Gaza Strip, in circumstances in which some of these products are actually used by terrorist organizations to harm Israeli citizens. The obligation imposed on it is derived from the vital humanitarian needs of the residents of the Gaza Strip. The Respondents must meet the obligations imposed on it under international humanitarian law, whereby they must allow into the Gaza Strip only those goods necessary to meet the vital humanitarian needs of the civilian population.¹¹

Under international law there is, therefore, already some scope for obligations of assistance both during an armed conflict and in the aftermath of one, although there is no overarching obligation of post-war reconstruction.

In *lex ferenda* terms, the obligation to reconstruct rests on the idea that there is a moral duty to restore peace and that the victors, being in a position of greater power, carry a special responsibility. A similar idea was advanced by Kant in the *Metaphysics of Morals*.¹² Kant saw a logical continuum between limitations that apply to the conduct of warfare and those that apply in the aftermath of war. The cardinal principle in the Kantian *jus in bello* is that war has to be waged ‘in accordance with principles that always leave open the possibility of leaving the state of nature among states ... and entering a rightful condition’.¹³ Once the war is over, the victor should negotiate peace ‘not ... from any right he pretends to have because of the wrong his opponent is supposed to have done him; instead, he lets this question drop [*indem er diese Frage auf sich beruhen lässt*] and relies on his own force [*Gewalt*]’. The ‘concept of a peace treaty’ – Kant adds – ‘already contains the provision that an amnesty goes

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 4, at paras 88 and 118.

¹⁰ HCJ 9132/07 *Gaber Albasyouni Ahmad et al. v. The Prime Minister et al.* (decided 30 Jan. 2007), available at: http://elyon1.court.gov.il/Files_ENG/07/320/091/N25/07091320.nN25.pdf.

¹¹ *Ibid.*, at para. 11.

¹² This is also the view of Carsten Stahn, *supra* note 2, at 935. Augustine anticipated this view when he wrote, ‘peace is the desired end of war. In fact, every man, even in making war, seeks peace’: Augustine, *De Civitate Dei*, Bk XIX, Chap. 12. See also Bass, *supra* note 2, at 387–390.

¹³ Kant, *Metaphysics of Morals*, 6:347, in P. Gruyer and A. Wood (eds), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (1996), at 485. On Kant and international law see Perreau-Saussine, ‘Immanuel Kant on International Law’, in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (2010), at 53.

along with it'.¹⁴ Echoes of the Kantian approach are found in the Lieber Code and in Rawls, who maintained that 'once peace is securely reestablished, the enemy society is to be granted an autonomous well-ordered regime of its own'.¹⁵

The Grotian view of the regulation of war fundamentally differs from the Kantian one. As explained in an important passage in the *Prolegomena to De Jure Belli ac Pacis*, for Grotius war is a juridical institute.¹⁶ He maintained that wars had to be conducted 'no less conscientiously [*non minori religione*] than is normal in judicial proceedings'.¹⁷ Grotius, unlike Kant, sees no antithesis between law and war. *Post-bellum* is in a Grotian perspective simply the transition from one juridical state to another, although the consequences of war are still relevant to the determination of certain legal relationships – for example, those concerning the treatment of prisoners of war.¹⁸

Seen in this philosophical perspective, it is hard to think of the emergence of an obligation to reconstruct incumbent upon the victors as a superficial addition to the existing law. It would rather signal a paradigm shift in the legal regulation of war: from a Grotian approach to a Kantian one.

Interestingly, this paradigm shift would not be disconnected from state practice. The punitive approach to the defeated that informed much of the Treaty of Versailles has fallen out of favour with states. The recognition of the futility of this approach may be part of a broader trend towards the recognition of the futility of war in general.¹⁹ It would not be an exaggeration to say that one of the keys to the lasting peace achieved in Western Europe after the Second World War was the decision – as Kant would have put it – to lay to rest the question of who had done what to whom. Better to let the defeated ponder their own guilt than impose a sentiment of guilt on them.

So the times may be ripe for embracing the paradigm shift from a Grotian to a Kantian conception and elevate reconstruction, the importance of which seems to have been accepted by policy-makers and strategists, to the status of principle of international law which would then provide the foundations for the *jus post bellum*. The pragmatic principle, expressed by Colin Powell with the pottery barn rule 'if you break it, you own it', could thus pave the way for a normative shift in the legal principles governing reconstruction obligations after the conflict is over.

The *lex ferenda* case for a *jus post bellum*, defined in an analytical and moral sense by an obligation to reconstruct, would thus seem quite powerful. But there is one caveat.

In this discussion we should not lose sight of what it is within the power of victors to accomplish. Although the states that won a conflict, and the international

¹⁴ Kant, *Metaphysics*, 6:348, *supra* note 13, at 486. Kant also anticipated the view, which forms part of current international law, that a 'defeated state or its subjects do not lose their civil freedom [*staatsbürgerliche Freiheit*] through the conquest of their country': Kant, *Metaphysics*, 6:349, *ibid*.

¹⁵ J. Rawls, *The Law of Peoples* (1999), at 98. See also Article 16 of the Lieber Code where it reads: '... military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult'.

¹⁶ Grotius, *De Jure Belli ac Pacis*, Prolegomena: 25–26.

¹⁷ *Ibid*.

¹⁸ Grotius, *supra* note 16, Bk 3, Chap. 7.

¹⁹ On this point see the illuminating research carried out by Ned Lebow in *Why Nations Fight: Past and Future Motives for War* (2010).

community in general, may help with reconstruction, success does not ultimately depend on them. It would be unfair to impose an obligation of result on the victors where that result is one that they cannot deliver. It might even be counterproductive if it ended up supporting the perception among the defeated that reconstruction is the responsibility of others. Ultimately, unless people acquire a sense of political ownership and moral urgency about their future, there can be reconstruction only in the most superficial of senses. The pottery barn rule must therefore be clarified: if you break it, you have a duty to help fix it but you still do not own it.

The recent experience of warfare can provide important insight into the assessment of the *lex ferenda* case for a *jus post bellum* centred on the obligation to reconstruct. The counter-insurgency doctrine that emerged from the Iraqi and Afghan conflict, focused on the ‘clear, hold, build’ trilogy, supports the idea that reconstruction responds not only to a moral imperative, but also to a strategic necessity. However, it has been shown that,²⁰ while this military doctrine has produced important results, other obstacles can impede the transformation of the important operational successes secured through this doctrine into an overall strategic victory.²¹

In a strategic sense, reconstruction might be the key to a paradox: on the one hand, sustainable reconstruction and, in general, the effective management of the post-war phase have become necessary conditions to transform a military victory into a political one, but they are conditions which the victors cannot fulfil on their own. To win a war in the 21st century you need your (former) enemy. To reflect this reality, proposals for the strengthening of *jus post bellum* should move beyond the obligation to reconstruct, which places the entire burden of victory on the victors, and suggest instead a broader principle of cooperation between the victors and the defeated.

The *jus post bellum* also requires us to re-open the vexed legal question of the end of an armed conflict.²² When the legal concept of war was the cornerstone of the regulation of war in international law, there was greater clarity on this question.²³ In Geneva law, provisions on the end of an armed conflict are found in Article 6 of Geneva Convention IV and Article 3(b) of Additional Protocol I which stipulate that the application of the conventions ‘shall cease on general close of military operations’. The commentaries to Geneva Convention IV opine that ‘[i]t must be agreed that in most cases the general close of military operations will be the final end of all fighting

²⁰ Chaudhuri and Farrell, ‘Campaign Disconnect: Operational Progress and Strategic Obstacles in Afghanistan, 2009–2011’, 87 *Int'l Affairs* (2011) 271.

²¹ ‘The problem is that continued progress at the operational level cannot address the three strategic obstacles to campaign success: a corrupt and unreliable national government, declining domestic political support for the war in NATO countries, and insurgent safe havens in Pakistan. For all the assistance that NATO provides to Afghanistan, there is only so much the US and its allies can do about Afghan government corruption’: *ibid.*, at 293. As Chayes laconically puts it in relation to the ‘build’ phase, ‘[w]hat they build is resentment’: Chayes, *supra* note 6, at 10.

²² Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in E. Wilmschurst (ed.), *Classification of Conflicts* (2012), at 11–13; Greenwood, ‘Scope of Application of Humanitarian Law’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), at 70–72.

²³ See Milanović and Hadži-Vidanović, ‘A Taxonomy of Armed Conflict’, in N. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (forthcoming 2013), at 9–11 available at: <http://ssrn.com/abstract=1988915>.

between all those concerned'.²⁴ The Appeals Chamber of the ICTY in the *Tadic* case (Appeal on Jurisdiction), however, articulated a formula on the temporal scope of armed conflicts that follows a different approach:

International humanitarian law applies from the initiation of such armed conflicts (IAC or NIAC) and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²⁵

An in-depth assessment of the question of the end of an armed conflict is beyond the scope of this article, but it should be noted that adopting the *Tadic* formula would risk extending the application of IHL and recasting the conceptual terms of the *jus post bellum*.²⁶

These difficulties are not merely definitional. The *in bello* and *post bellum* phases must be kept clearly distinct. The dangerous euphemism 'international humanitarian law' conceals the very limited moral basis of the *jus in bello*: 'law in war' can exist only through a compromise illustrated with the proposition that the law of armed conflict is the one area of the law where lawful may still mean awful.²⁷ In other words, the *jus in bello* applies to a phenomenon – war – which, even when contained through law, cannot but negate the principle of cooperation on which international law normally rests. By contrast, the essence of the *jus post bellum* should be the return of former enemies to the framework of cooperation, centred on the immediate challenge of reconstruction.

²⁴ J. Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (1958), at 62.

²⁵ *Prosecutor v. Tadic* (Jurisdiction Appeal), ICTY Appeals Chamber, (2 Oct. 1995), Case No. IT-94-1-AR72, at para. 70.

²⁶ Brian Orend has argued that, in spite of the difficulties with the 'precise diagnosis of "post" ... by no means should this difficulty be thought to be a good reason to give up entirely on the task of providing belligerents with guidance during the termination phase': Orend, *supra* note 2, at 573–574.

²⁷ As I have argued elsewhere, this is also the reason why the law of armed conflict should continue to exist as a discrete area and why the conflation of human rights law and the law of armed conflict should be approached with the greatest caution (Verdirame, *supra* note 4).