
Chapter VII½: Is Jus Post Bellum Possible?

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Abstract

This article addresses the question whether victory in war implies a post-conflict obligation to rebuild the vanquished society after war. And, if it does, what is the nature of that obligation? Is it legal, or moral, or a practical necessity for self-protection of the intervening international community? This article demonstrates that no legal requirement exists, and suggests that, while perhaps there should be a moral imperative, no such norm has yet been established. A dominant motivation seems to be to prevent recurrence of conflict that will threaten the international community. In other words, reconstruction efforts are aimed more at protection of the interveners than at the host-nation population. Paradoxically, even when support for military intervention has been lacking, international support does develop, although unevenly, for assisting social and physical reconstruction. But it is hard to find the type of action that might assure that conflict will not recur. Social and reconstruction activities seem haphazard and poorly planned. Policies seem to result from compromises among many political and economic interests. There is an obvious need for more effective planning and execution to achieve even the limited and self-interested goals that motivate the efforts in the first place.

The unusually prompt UN Security Council action to protect people under threat of extreme violence both in Libya and in Côte d'Ivoire by authorizing or reinforcing the use of force under Chapter VII of the UN Charter offered hope and optimism to many.¹ These actions elevate the importance of humanitarian protection and underscore its legality. But what comes after a successful military intervention? William Martel in his book *Victory in War* suggests that victory, whether or not it has achieved its objectives, 'imposes political, economic, human and moral responsibilities – on the victorious state'.² Because of the tremendous open-endedness of any such 'obligation', it

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¹ UN SC Res (Libya); S/RES/1973, available at: <http://daccess-dds.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf> and (Côte D'Ivoire) S/RES/1975, and <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/284/76/PDF/N1128476.pdf>.

² W.C. Martel, *Victory in War* (2011), at 5.

is important to understand what might be the basis for it – as well as when and how it ever ends. Does victory in war imply a post-conflict obligation to rebuild the vanquished society after war?³ And, if so, what is the nature of that obligation. Is it legal, or moral, or a practical necessity for self-protection?

I argue here that no legal requirement exists, and while perhaps there should be a moral imperative, no such norm is yet established. Although official language and commentary may imply an obligation to reconstruct, the reality seems more instrumental to self-interested ends. Attempts have been made to impose a moral requirement by both philosophers and statesmen, as discussed below. But the results in actual situations have been half-hearted, misguided, or woefully short-term. Nevertheless some effort at post-conflict rebuilding now does seem to be accepted as a necessary part of engaging in military action. My conclusion is that the dominant motivation is not altruistic, but self-protective. A nation that engages in war to be rid of an assumed threat will take measures to ensure that the threat will not return. The international community has an interest in preventing violence from recurring or spreading, especially when states have invested ‘blood and treasure’ in ending the violence. Festering internal conflict can lead to threats to a widening area, as the Great Lakes region of Africa and the Balkans have shown, as well as the historic case of post-World War I Europe. Even when support for military intervention has been lacking, support does develop – although unevenly – for assisting social and physical reconstruction. I call this Chapter VII½, as a parallel to peacekeeping, known as chapter VI½, since that concept was also nowhere explicit in the UN Charter.⁴ However, it would take far more in the way of both state practice and verbal reinforcement to turn ‘Chapter VII ½’ from what may be interpreted as permitted action to required behaviour.

Post-conflict reconstruction actions may be increasingly common, but do they serve to protect either the intervening or the host nation? I raise some serious questions about whether they do. I conclude with some suggestions that might better serve both war-torn societies and self-protection. Perhaps the process of illuminating how and why nations engage in peacebuilding and further, statebuilding may help to give meaningful content to thinking about a normative concept of *jus post bellum*.

1 Legal Basis

It is hard to situate a post-conflict obligation in international legal requirements, although there are rules that govern occupation that date back to the 19th century. In the first instance we would look to Chapter VII of the UN Charter. The only Articles that might be relevant are, first, Article 39 stating that the Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and

³ Where the outcome is inconclusive but the intervener has caused damage, the moral argument would not differ logically from an obligation after victory.

⁴ The concept of peacekeeping was created out of a felt need by Secretary General Dag Hammarskjöld and Ralph Bunche and enshrined in the World Court opinion in *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962 [1962] ICJ, Rep 151.

shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. The key words for post-conflict reconstruction are ‘maintain or restore’. Articles 41 and 42 are broad and unrestricting, providing wide leeway for Security Council action. We would also look to Article 51, permitting self-defence. On the theory that what is not forbidden is permitted,⁵ one can argue that the power to engage in post-conflict reconstruction is implied as a way to finish the task that was authorized in the first place. But that is legal *permission*, not obligation. UN Security Council Resolutions that prescribe post-conflict reconstruction, and even those that develop elaborate administrative structures, do not use the language of obligation. They often express humanitarian concerns, especially for refugee resettlement, but speak equally to the prevention of recurrence and deal specifically with transition from a fragile peace to a functioning government.⁶ I am in agreement with Eric De Brabandere in his argument that there is no independent legal basis for *jus post bellum*.⁷

Humanitarian concern is certainly found in many of the treaties that pertain to the laws of war. The Fourth Geneva Convention⁸ increased the rights and duties of occupiers laid out in the Hague Regulations of 1899 and 1907. But they do not set up an obligation to reconstruct. By and large, these provisions represent limitations on occupation forces to ensure that they treat occupied people in a humane manner, and do not assume or usurp sovereignty or pillage the resources of the occupied nation. They provide for minimum human rights for the conquered.⁹ And, undeniably, the World Court interpreted these treaty obligations broadly in its 2004 decision in *The Wall in the Occupied Palestinian Territory*.¹⁰ In that case, the Court held that Israel is subject to its obligations under the international human rights treaties to which it is party in the territories that it occupies.¹¹ This interpretation of the Fourth Geneva Convention and Hague Regulations expanded the obligations of military occupiers,

⁵ See *SS Lotus (Fr. v. Turk.)* [1927] PCIJ (ser. A) No. 10 (7 Sept.).

⁶ See, e.g. SC Res. S/RES/1244 (10 June 1999), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf>, para. 9 (Kosovo).

⁷ De Brabandere, ‘The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept’, 43 *Vanderbilt J Transnat’l L* (2010) 119, at 126–132.

⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, referred to as Fourth Geneva Convention.

⁹ See Hague Regs (Arts 42–56 on occupation) and Fourth Geneva Convention (Arts 3, 27–34 and 47–78 on occupation). See also Kristen Boon’s discussion of the notion of trusteeship: Boon, ‘Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers’, 50 *McGill LJ* (2005) 285, at 295.

¹⁰ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ. Rep 136 (referred to as *Wall Opinion*).

¹¹ *Ibid.*, especially paras 106–113 and 120–135.

¹² SC Res. S/RES/1483 (22 May 2003), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf>, confirmed the US and UK and thus the Coalition Provisional Authority (CPA) as occupying powers with the primary responsibility for the administration of Iraq. The SC considerably extended the CPA’s powers by calling upon it ‘to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future’ (para. 4).

although the Palestinian situation may be somewhat unique.¹² Yet while there may be some expansion in specific post-conflict requirements for occupation forces and even greatly increased post-conflict reconstruction activity mandated by the UN Security Council, these efforts do not create a generic obligation to reconstruct.

It is certainly true, as Gabriella Blum argues, that after World War II, beginning with the Universal Declaration on Human Rights and followed by a variety of human rights treaties over the next 30–40 years, the individual has become much more of a focus of appropriate concern during and after kinetic action. She states, ‘This universal benevolence manifests itself in weaker tolerance for civilian casualties, a greater concern over the abuse of human rights everywhere, and a demand from national governments to take a stance and fight against deliberate harm to individuals anywhere around the globe.’¹³ Yet none of these human rights treaties provide a specific basis for military intervention, nor do they create a legal obligation to reconstruct. At best, they may have slightly shifted the balance from the state to the individual in the inherent tension within the UN Charter itself between respect for state sovereignty and respect for human rights.¹⁴ Even the remarkable Security Council Resolution 1973 of 17 March 2011 authorizing the use of force against the Libyan government, which expressed ‘its determination to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel’,¹⁵ exhibited that continuing tension and ambivalence. Russia, China, India, and Brazil, plus Germany, abstained. They represent the governments with the largest percentage of the world’s population.

Reparations have also been a legal requirement – not of the victor, but rather of the vanquished, from the days of Achilles. The crushing burden imposed by the harsh reparations demanded of Germany after World War I is much commented upon as a cause of the rise of Hitler and, ultimately, of World War II. And as recently as the first Iraq war, Kuwait was given compensation for damage done by Iraq.¹⁶ But this has not yet proven to be a legal path to the creation of a general obligation. It may be more of an interesting historical trajectory that proceeds from (a) to the victor goes the spoils, to (b) the vanquished pays the victor, to (c) the vanquished is not expected to pay an

¹³ Blum, ‘The Fog of Victory’, in this issue, at 391.

¹⁴ Compare the preamble to the UN Charter: ‘We the peoples of the United Nations determined – to reaffirm faith in fundamental human rights, in the dignity and worth of the human person’ – with Art. 2(7): ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the jurisdiction of any state.’ The question is whether there is justification for intervention in cases where a government denies the human rights of its citizens. Thus far, the ‘Responsibility to Protect’ has not been justified absent a vote of the SC under Chap. VII, although it has been argued that in the Libya case such a vote was based on that doctrine.

¹⁵ See SC Res. S/RES/1973 (17 Mar. 2011), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf>.

¹⁶ See SC Res. S/RES/687 (3 Apr. 1991), paras 16 and 18, available at: <http://www.un.org/Depts/unmovic/documents/687.pdf>: ‘[r]eaffirms that Iraq, ... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait;’ and ‘[d]ecides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund’.

indemnity nor sacrifice territory; thus maintaining the *status quo ante*, to (d) the victor pays the vanquished.¹⁷ But there is no legal link, as de Brabandere points out: '[m]oreover, recent practice has shown that military intervention does not necessarily imply postconflict responsibility'.¹⁸

The most far-reaching claim for human security and human rights in war, and after war, was formulated by the International Commission on Intervention and State Sovereignty in 2001 and accepted by the High Level Panel on Threats, Challenges and Change in 2004. This panel of distinguished statesmen and leaders from crucial UN member states¹⁹ accepted the concept of the 'Responsibility to Protect' (known now as 'R2P'): that the international community must respond to crises of human security and help to end them, but within the legal framework of the UN Charter.²⁰ Most relevant here is that the responsibility to rebuild is an integral part of this reformulation.²¹ While the report treated R2P as 'an emerging norm',²² the Report's language makes clear that the Panel considers the intervention part of R2P a ground for Chapter VII action, not an independent legal claim. The legal processes necessary to secure UN Security Council approval for military action remain the same. The World Summit Outcome of 2005 endorsed R2P, without, however, mentioning the obligation to rebuild. In general, it further underscored the importance of following the UN Charter on the use of force. But it weakened efforts to create a norm of the responsibility to rebuild.²³ In general, R2P may have somewhat altered consciousness, but not the law.

Has the alleged weakening of the UN Charter strictures on the use of force in any way affected or created legal obligations in the aftermath of war? I do not see convincing evidence. There are cases that arguably were based mostly on humanitarian concerns – protection of the Kurds in the north of Iraq in 1991 (Operation Provide Comfort), the bombing of Kosovo in 1999, and recently the no-fly zone and aerial attacks on Libya in 2011 that seem motivated by humanitarian concerns.²⁴ The first two cases ignored the legal requirements of the UN Charter. While I would not go so far as Michael Glennon in stating that the law restricting the use of force is inoperative, I believe he is correct in arguing that it has suffered from 'vagueness and malleability'

¹⁷ Prof. Alan Wachman of the Fletcher School of Law and Diplomacy, Tufts University, suggested this observation to me.

¹⁸ De Brabandere, *supra* note 7.

¹⁹ The participants included notable experts such as Gareth Evans, Michael Ignatieff, Lee Hamilton, and Mohamed Sahnoun. See International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, App. A (Dec. 2001) and The High Level Panel on Threats, Challenges and Change (2004), available at: www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents.

²⁰ 'A More Secure World: Our Shared Responsibility', Report of the High Level Panel on Threats, Challenges and Change (2004), available at: www.un.org/secureworld, at paras 200–201.

²¹ *Ibid.*, at para. 201.

²² *Ibid.*, at paras 202–203.

²³ See 2005 World Summit Outcome, paras 77, 138, 139 (UN GA A/res/60/1, 24 Oct. 2005, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf>) and the excellent discussion by Hannum, 'The Responsibility to Protect: Paradigm or Pastiche?', 60 *NI Legal Q* (2009) 135.

²⁴ See the argument made by T. Franck in *Recourse to Force* (2003), at 135–173.

²⁵ Michael Glennon has argued for some years that the restraints on military intervention are so routinely ignored that the rules suffers from desuetude and no longer bind: see M. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (2010) at 29.

and is ‘outcome oriented’.²⁵ Yet the Libyan case, even with its five abstainers, does indicate residual vitality in the Charter. In that case, Arab League nations, NATO nations, and others on the Security Council coalesced to produce UNSC Resolution 1973, allowing for use of force to protect the people of Libya against Ghaddafi’s attacks, as mentioned. But the record on reconstruction after such cases remains equivocal. The ways in which Chapter VII and Article 51 may be stretched, ignored, or reaffirmed do not seem to affect the legal obligations to reconstruct thereafter.

2 A Moral Obligation?

If no legal obligation exists, is there a moral obligation to reconstruct that has emerged as a new norm? It cannot be the task of this article to enter into the vast and complex philosophical debates about the nature of moral obligation itself. For my purposes it is sufficient to understand moral obligation as contrasted with both legal obligation and self-interest: moral obligation is often consistent with self-interest, but willing to diverge from it when humanitarian concerns override self-interest, even in cases where there is no legal obligation. As much as I would find it just and proper to base post-conflict intervention on moral considerations, I would question whether the evidence of state behaviour or even rhetoric fully supports the emergence of agreement on moral obligation as a basis for reconstruction. In part, it is doubtful that there has been sufficient political discourse to agree on which moral norms should be defended.²⁶ Colin Powell’s Pottery Barn Rule – ‘if you break it, you own it’ – seems at least to be an expression of a moral obligation to reconstruct, although it may serve more as a caution not to enter into a war without considering the full implications of victory.²⁷

Michael Walzer clearly poses a moral obligation in his formulation of *jus post bellum*: ‘[t]he argument about endings is similar to the argument about risk: once we have acted in ways that have significant negative consequences for other people (even if there are also positive consequences), we cannot just walk away. Imagine a humanitarian intervention that ends with the massacres stopped and the murderous regime overthrown, but the country is devastated, the economy in ruins, the people hungry and afraid: there is neither law nor order nor any effective authority. The forces that intervened did well, but they are not finished. How can this be?’²⁸

²⁶ In an interview, this was the view expressed by Dr Susan Neiman, director of the Einstein Forum, Berlin, and author of *Moral Clarity for Grown-up Idealists* (rev’d edn, 2009), *Evil in Modern Thought: An Alternative History of Philosophy* (2004), and *The Unity of Reason: Rereading Kant* (1997).

²⁷ It is in keeping with his general approach of considering the full consequences and costs of action before embarking on it. See, e.g., Colin Powell stating in his memoirs regarding the First Gulf War, ‘It would not contribute to the stability we want in the Middle East to have Iraq fragmented into separate Sunni, Shia, and Kurd political entities. The only way to have avoided this outcome was to have undertaken a largely U.S. conquest and occupation of a remote nation of twenty million people. I don’t think that is what the American people signed up for. Of course, we would have loved to see Saddam overthrown by his own people for the death and destruction he had brought down on them. But that did not happen. And the President’s demonizing of Saddam as the devil incarnate did not help the public understand why he was allowed to stay in power’: C. Powell, *My American Journey* (1995), at 527.

²⁸ M. Walzer, *Arguing about War* (2004), at 20.

It certainly seems intuitively just to demand that the victor in war provide humanitarian assistance to the vanquished people, who themselves may have been tyrannized by the previous regime. Moreover, it is possible to construct a case for an even broader humanitarian impulse than the ‘pottery barn’ rule. Unlike in Kosovo and Iraq post-2003, where interveners did cause the damage, rebuilding efforts may also be assumed even in cases where the damage was not inflicted primarily by interveners.²⁹ The international community may be blamed for failure to prevent the Bosnian tragedy, but most of the war damage was inflicted by the people themselves, apart from NATO air strikes towards the end of the war. Yet Europeans and Americans, whose main effort was to stop the violence, have paid and are still paying the price of a war they did not start. East Timor is another such case.³⁰ Thus, when an apparently humanitarian response occurs, it seems to develop regardless of fault.³¹ But even if some actions seem to be guided by humanitarian impulses, where is the empirical evidence that most post-conflict societal rebuilding is in fact based on an ethical or moral imperative? If we ‘can’t just walk away’, we do turn away, either sooner or later, as the international community did in Haiti in the mid-1990s. Nor have the industrialized democracies responded in the same way to African devastation as they have to that in Europe or elsewhere. As President Obama pointed out in his address on 28 March 2011, consistency in intervention cannot be expected when multiple and simultaneous crises occur. It takes a subtle confluence of events to foster action. But African crises seem to have been met with less international attention and funding than conflict elsewhere, although I do not now have empirical evidence to demonstrate this impression, which is widespread. One can debate whether it is racism, lack of self-interest, or even the daunting level of poverty and development that explains a low level of concern. The pitiable conditions of human beings in Darfur failed to evoke the attention, commitment, and funds that the Balkans did. Nor was there any western physical intervention, except by NGOs. The story of the neglect of Rwanda’s genocide is widely discussed, but the continuing devastation in the Congo is not given much international attention.³² International reconstruction efforts after war have been too inconsistent over too many years to make a strong case that a norm has yet emerged.

²⁹ The US was responsible for a good part of the devastation of the 2003 war in Iraq, but years of sanctions and Saddam Hussein’s greed accounted for more. This can be inferred from the indirect comparison of the damage of sanctions and the 2003 war in Iraq in Sen, ‘Iraq Watching Briefs – Overview Report’, UNICEF (July 2003), at pp. ii–x. See also J. Gordon, *Invisible War: The United States and the Iraq Sanctions* (2003).

³⁰ In the first 5 years following the end of conflict, aid accounted for a significant percentage of GDP *per capita*: 61% in East Timor, 40% in Mozambique, 34.5% in Nicaragua, and 25% in Bosnia: see Rohland and Cliffe, ‘The East Timor Reconstruction Program: Successes, Programs and Tradeoffs’, World Bank Conflict Prevention and Reconstruction Unit, Working Paper No. 2, Nov. 2002, Table 1 at 7.

³¹ See, e.g., K.R. Monroe, *The Heart of Altruism: Perceptions of a Common Humanity* (1996), who see altruism characterized by a ‘shared perception of common humanity ... a very simple but deeply felt recognition that we all share certain characteristics and are entitled to certain rights, merely by virtue of our common humanity’ (at 206). See also M. Giugni and F. Passy (eds), *Political Altruism?: Solidarity Movements in International Perspective* (2001); J.J. Mansbridge (ed.), *Beyond Self-interest* (1990).

³² According to widely cited estimates by the International Rescue Committee (IRC), between 1998 and 2007 there were 3.1–7.6 million casualties due to civil strife in the Congo: see IRC, ‘Measuring Mortality

3 How Do Policies of Self Protection Develop?

The dramatic rise in irregular warfare since 9/11 has further clarified the self-protective nature of post-conflict reconstruction. No clear dividing line marks the beginning of a peace process. A state of violence often continues even when war ends. In irregular warfare, the rationale for humanitarian efforts, economic development, and helping to create governing institutions seems even more instrumental than altruistic. Thus a dominant motivation seems to be to help to develop or ensure a host government that can provide stability; that will not threaten (if not satisfy) its people – and, most important, a government that will not permit threats to the international community. Under counterinsurgency doctrine (COIN) moreover, post-conflict responsibilities are assumed not only to ensure post-war stability, but also as part of a war-winning strategy.³³ COIN strategy which became fully articulated in this era is simplified to a ‘clear, hold, build’ trilogy. The interveners in irregular warfare, such as Iraq and Afghanistan, see post-conflict reconstruction as a military necessity. In these wars, political and economic development has become a component of a still active, if sporadic, war with non-state actors. Blum sums it up: ‘[a]s counterinsurgency action often seeks long-term structural changes, political and economic developments are necessary components of victory, not merely optional post-war missions’.³⁴ This ongoing kinetic atmosphere, Rupert Smith’s ‘war among the people’,³⁵ and the battle for hearts and minds against non-state actors do not suggest a tone of moral obligation to rebuild, but a requirement to do so to achieve and consolidate the aims of battle.

The language of military doctrine makes that clear. US manual FM3-07 on stability operations has little to do with a norm of humanitarian response. This Army document, along with the versions of counterinsurgency doctrine, represents a practical, creative response to an ongoing threat.

The drivers of conflict emerge as numerous symptoms of crises worldwide. In this era of persistent conflict, rapidly evolving terrorist structures, transnational crime and ethnic conflict continue to complicate international relations. These conditions create belts of state fragility and instability that present a grave threat to national security. While journeying into this uncertain future, leaders will increasingly call on stability operations to reduce the drivers of conflict and instability and build local institutional capacity to forge sustainable peace, security, and economic growth.³⁶

in the Democratic Republic of the Congo’, available at: www.rescue.org/sites/default/files/resource-file/IRC_DRCMortalityFacts.pdf. During the civil war in Sierra Leone, 50,000 of a population of 6 million died, according to IRC estimates: see www.rescue.org/where/sierra_leone, and in Liberia 250,000 died during the 2002–2005 civil war; BBC News, ‘Liberia Country Profile’, available at: http://news.bbc.co.uk/2/hi/africa/country_profiles/1043500.stm#facts.

³³ ‘Increasingly, analysts argue that Al Qaeda-inspired Salafist terrorism network is functioning as a modern-day global insurgency. Any effective campaign against terrorism must include paramilitary, political, economic, psychological, and civic actions along with military efforts. It will at least superficially resemble a counterinsurgency effort’: Sewall, ‘Introduction to the University of Chicago Press edition. *A Radical Field Manual*’, in *The US Army/Marine Corps Counterinsurgency Field Manual* (US Army and US Marine Corps edn, 2007), at xlii.

³⁴ Blum, *supra* note 13, at 408.

³⁵ R. Smith, *The Utility of Force: The Art of War in the Modern World* (2008), at 269–374.

³⁶ Headquarters Department of the Army, ‘Stability Operations’, US Army FM 3-07, Oct. 2008, at 2–3.

The Army-Marines Field Manual³⁷ and its follow-on, 'Tactics in Counterinsurgency',³⁸ make it clear that stability operations represent a critical part of the thinking about winning an insurgency. It is a complex exercise, requiring both top-level strategy and day-to-day tactics down to field level. As Sarah Sewall has written in her introduction to the US Counterinsurgency Field Manual, 'counterinsurgency is predominantly political'.³⁹

The McChrystal Assessment of August 2009 on Afghanistan had at least a sprinkling of humanitarian concerns in its recommendations, using such language as 'protecting the people means shielding them from *all* threats'.⁴⁰ What he proposed was a robust, well-resourced counterinsurgency (COIN) activity. But in 2009, in his West Point address, President Obama was more limited. He stated, 'We will pursue the following objectives within Afghanistan. We must deny al Qaeda a safe-haven. We must reverse the Taliban's momentum and deny it the ability to overthrow the government. And we must strengthen the capacity of Afghanistan's Security Forces and government, so that they can take lead responsibility for Afghanistan's future.'⁴¹ Limited goals were stated in the 2010 National Security Strategy as well as the 2010 Afghanistan Review.⁴² Although a robust COIN approach to protecting the civilian population as expressed by General McChrystal, and the later, more modest COIN strategy represent different levels of effort and commitment, both are means to the overarching goal of protecting American and western national security.

The predominant concern is not protection of the Afghan people, but protection of our own people. The current widespread use of the words 'stabilization' and 'stability operations' is a clue. Subsequent speeches and analysis from American government officials make clear that 'stability operations' are an integral part of the effort to prevent recurrence or reversal – consolidating the gains of prior battle efforts. This is not to ignore the truly altruistic efforts involved in disaster relief, and even in some war recovery, particularly in its immediate aftermath. And altruism dominates many humanitarian NGOs. But it is hard to find such selfless motives on the part of major state donors. One needs only to look at both record and rhetoric. There is less emphasis on human security and human rights than one would expect if a moral obligation to rebuild were the dominant motive. Actual and threatened cuts in the US Agency for

³⁷ The US Army/Marine Corps, 'Counterinsurgency Field Manual', US Army FM 3-24, Marine Corps Warfighting publication 3-33.5 (Aug. 2007).

³⁸ US Department of the Army, 'Tactics in Counterinsurgency: The Official U.S. Army/Marine Corps Field Manual', US Army FM 3-24.2 (FM 90-8, FM 7-98) (Apr. 2009).

³⁹ Sewall, *supra* note 33, at xl.

⁴⁰ McChrystal, 'Commander's Initial Assessment', (30 Aug 2009), at 1–3, available at: http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf.

⁴¹ Obama, 'Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan', The White House Office of the Press Secretary (1 Dec. 2009), available at: www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan.

⁴² See The White House, 'National Security Strategy', Mar. 2010, at 19 and The White House, 'Overview of the Afghanistan and Pakistan Annual Review', 16 Dec. 2010. Later there were rumours of a committee called 'Afghanistan good enough' further limiting the post-conflict commitments in contemplation of a firm 2014 withdrawal.

International Development (US AID) budget are inconsistent with any strong obligation to reconstruct societies devastated by war. The low public esteem for, and exaggerated public perception of costs of, foreign assistance seem to bely any emerging norm.⁴³ Yet, when US aid flows through the Department of Defense in the form of Commanders' Emergency Response Program (CERP) grants, it is not subject to the same budgetary complaints.

If self-protection is the dominant motive for assistance to war-torn societies beyond an immediate humanitarian phase, one would expect careful, informed efforts to help effectively, especially with so much international post-conflict experience after the 1990s. However, rational self-protective action is also hard to find. The state does not respond as a monolithic actor, as posited by classical realists. Policies seem to result from compromises among many political and economic interests. Bargaining among members of Congress and the executive results in trade-offs that may not be rationally optimal for a specific situation. In my view, domestic politics explains much of the somewhat inconsistent American response to post conflict situations – and probably that of Western Europe.⁴⁴ US policy certainly involves many levels of political bargaining, and contains many extraneous issues, including the election cycle, war fatigue, and budgetary concerns. 'The CNN effect' helped to support costly reconstruction efforts in Bosnia. Negative public opinion, such as that expressed in the ABC-Washington Post poll in 2011 may be equally influential.⁴⁵ It indicated that 64 per cent of Americans felt that the Afghan war was not worth the cost in resources and human life. Concern about the deficit and continuing high joblessness will also shape post-conflict reconstruction efforts. War weariness may precipitate an irrational early withdrawal of troops, or a reduction in assistance resources. Many policy decisions do not seem to be rationally designed to prevent recurrence of conflict, nor to prevent the spread of threats to the homeland. Neglect of Haiti in the mid to late 1990s could predictably have given rise to future problems. In some cases, the effort to rebuild may even seem excessive. Neither the Europeans nor the Americans wanted to see a resurgence of violence in the Balkans that could spread and send thousands of refugees throughout Europe. But the large expenditure seems disproportionate to the risks. Estimates have been made that between seven and 10 billion Euros were spent on Bosnia between 1996 and 2005.

Domestic politics may prompt premature, ill-considered peace negotiations, or support for a despised government. New crises, such as those in North Africa and the

⁴³ A Nov. 2010 survey by worldpublicopinion.org, available at: www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/670.php, revealed that public opinion grossly overestimates the percentage of GDP that goes to foreign aid. The average response was 27%, while actual US spending on foreign aid is about 1%: see Worldpublicopinion.org, 'American Public Opinion on Foreign Aid', 30 Nov. 2010, and Kessler, 'Four pinocchios for the American public on the budget', *Washington Post*, 2 Mar. 2011, available at: http://voices.washingtonpost.com/fact-checker/2011/03/four_pinocchios_for_the_america.html.

⁴⁴ See Putnam, 'Diplomacy Domestic Politics: The Logic of Two-Level Games', 42 *Int'l Org* (1988) 427, at 427–460, and Trachtman, 'International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law', 11 *Chicago J Int'l L* (2010) 129, at 129–160.

⁴⁵ Washington Post–ABC News Poll, conducted 10–13 Mar. 2011. Results are available at: www.washingtonpost.com/wp-srv/politics/polls/postpoll_03142011.html.

Middle East, demand immediate attention, and human ‘bandwidth’ is limited. When policies are distorted by domestic pressures, decision-making is unlikely to further either the host country’s people’s or the donors’ interests.⁴⁶ These extraneous discontents may narrow both the goals and the options for any administration. And they certainly stifle any remaining altruistic concerns.

4 Self-interest is Poorly Served

Thus it may be an unfortunate irony that even if post-war reconstruction is undertaken more for the benefit of members of the international community than for the host nation, those very interests are not well served. In COIN terms, the ‘build’ phase, even with narrow objectives, may not succeed. Serious flaws in the approaches currently pursued may undermine the entire effort to rebuild. What they build is resentment. Lack of success may be another reason for the lack of development of a robust moral obligation to reconstruct after conflict.

Marina Ottoway argues against maximalism in situations where attempts to build western-type democracies fail because the host nation lacks a near-term political basis for success and donors lack the funds and patience to persist.⁴⁷ But it is not clear what the minimum is in a situation where the threat of recurrence exists. Susan Woodward summarizes the problem well in arguing that the attempt to rebuild state machinery after conflict often lacks ‘local legitimacy’. She argues that domestic legitimacy of peacebuilding and statebuilding efforts is derivative, secondary only to the primary goal of building an internationally acceptable state.⁴⁸ She states further that ‘[d]onors decide what to fund in terms of their own national or organizational interests, without local consultation’.⁴⁹ By so doing, they may doom the effort to failure, or at least reach unpalatable results. They also create hostility and resistance to the interveners. Astri Suhrke underscores this position with her analysis of the failure of international donors to carry out an adequate needs assessment, arguing that ‘assessment of needs is typically based on selective criteria that prominently include assessments of likely availability of funding’.⁵⁰

This view has been further substantiated by a number of field studies, particularly those recently completed by members of the Feinstein Center on Afghanistan.⁵¹ Paul

⁴⁶ See Putnam, and Trachtman, both *supra* note 44.

⁴⁷ Ottoway, ‘Promoting Democracy after Conflict, The Difficult Choices’, 4 *Int’l Studies Perspectives* (2003) 231, at 314–322.

⁴⁸ Woodward, ‘National versus International Legitimacy in State Building Operations’, *Critique Internationale, Centre des Etudes et Recherche Internationale* (No. 28, July–Sept. 2005), at 1.

⁴⁹ *Ibid.*, at 4.

⁵⁰ Suhrke and Strand, ‘The Logic of Conflictual Peacebuilding’, in S. Barakat (ed.), *After the Conflict: Reconstruction and Development in the Aftermath of War* (2005), at 141–154.

⁵¹ See, e.g., Donini *et al.*, ‘Humanitarian Agenda 2015: Final Report, The State of the Humanitarian Enterprise’, Feinstein International Center, Mar. 2008, available at: <http://sites.tufts.edu/feinstein/2008/humanitarian-agenda-2015-the-state-of-the-humanitarian-enterprise> and Wilder and Lister, ‘State-Building at the Subnational Level in Afghanistan – A Missed Opportunity’, in W. Danspeckgruber and R.P. Finn (eds), *Building State and Security in Afghanistan* (2007).

Fishstein's study, completed in 2011, looked at Balkh Province, one of the more successful ones from the viewpoint of progress towards stability, and found:

There was a near-universal expressed perception that aid projects and organizations are performing poorly. Projects were seen to be insufficient, both in terms of quantity (not enough) and of quality (wrong kind or poorly implemented). A sense that the north had been left out of development assistance pervaded nearly all interviews.⁵²

Along these same lines, David Mansfield's studies on poppy eradication suggest that a greater effort to work with local farmers and local officials to offer feasible alternative livelihoods earlier would have come closer to achieving both local and international legitimacy.⁵³ Sometimes the 'build phase' does seem to work to achieve the goals of stability, as some recent research on efforts in Afghanistan has indicated.⁵⁴ There has even been some progress in Iraq, although the road remains bumpy, and the outcome increasingly uncertain. Moreover, many other factors have been at work in Iraq – natural resources, a more sophisticated infrastructure than in other conflict areas, and an educated population.⁵⁵ Nor is the problem just that development projects are ill-adapted to circumstances in the host nation. Even when projects are needed, they are sometimes shoddy, not completed, or not well thought through – like clinics without doctors; schools without teachers, and new roads without security. We hear of electrical system repairs that do not work or may actually electrocute people; water mains that burst, and new roads that buckle.⁵⁶ There are plain ineptitude and incompetence that produce mistakes – well-meaning or venal. These do not go unnoticed by the people. They are resented.

There are many ways in which the ambitious reconstruction goals can and do go wrong, and the reasons may become apparent only in retrospect. A few examples can only give the flavour of the burgeoning analytical and critical literature.⁵⁷ Serious mistakes have been made in Kosovo and Afghanistan in not holding leaders accountable.

⁵² Fishstein, 'Winning Hearts and Minds? Examining the Relationship between Aid and Security in Afghanistan's Balkh Province', Feinstein International Center (Nov. 2010), at 28, available at: <http://sites.tufts.edu/feinstein/2010/winning-hearts-and-minds-examining-the-relationship-between-aid-and-security-in-balkh-province>.

⁵³ Mansfield, 'Beyond the Metrics: Understanding the Nature of Change in the Rural Livelihoods of Opium Poppy Growing Households in the 2006/07 Growing Season', A Report for the Afghan Drugs Inter Departmental Unit of the UK Government (May 2007), available at: www.gtz.de/de/dokumente/Final-Divers-0607.pdf.

⁵⁴ Christia, 'Winning Hearts and Minds through Development: Evidence from a Field Experiment in Afghanistan', MIT Political Science Department, Working Paper 2011-14, 13 Apr. 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809677 (accessed 8 Nov. 2012).

⁵⁵ A country's baseline may have more predictive power with respect to success than the effort undertaken by intervening actors, and would require empirical investigation, Dipali Mukhopadhyay pointed out to me.

⁵⁶ Shadid, 'Thousands protest electricity shortage in Iraq', *NY Times*, 19 June 2010, available at: www.nytimes.com/2010/06/20/world/middleeast/20iraq.html.

⁵⁷ See, e.g., R. Paris, *At War's End: Building Peace after Civil Conflict* (2004); A.K. Jarstad and T.Sisk, *From War to Peacebuilding* (2008); J. Stromseth et al., *Can Might Make Rights?: Building the Rule of Law after Military Interventions* (2007); M. Berdal and D.M. Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (2000); Barakat (ed.), *supra* note 52.

And in Iraq legitimacy has yet to be achieved, even though some recovery from the early disasters that fuelled the insurgency has taken place. Ensuring temporary governmental stability may mean turning a blind eye to its corruption, wherein aid funds for the people have been funnelled out of the country or absorbed in bribes to officials. This may have the perverse effect of alienating the people and fuelling the insurgency.⁵⁸

Sometimes the ongoing violent atmosphere undercuts the entire effort at acceptable reconstruction. Important efforts made to take out pockets of harmful insurgent activity often have unintended harmful effects on the population. Where parts of villages have been destroyed and tanks and bulldozers have eradicated cherished agricultural development, even generous reconstruction funding cannot compensate displaced residents who may not be able to prove ownership. Some behaviour is simply insensitive, such as putting a military road through the middle of an irrigated agricultural property in Kandahar, razing fruit-bearing trees that represent a farmer's livelihood. 'Fruit trees have been felled, vines uprooted, and fields and barns flattened – to Afghans, the land represents not only their livelihood – but also their family honor'.⁵⁹

There are too few civilian workers for the reconstruction tasks needed, and too many of them are poorly trained.⁶⁰ Organizations remain 'stovepiped', making their own interpretations of the overall mission. The skills, country knowledge, and expertise are not readily to hand, and turnover is a major problem. Just as officials begin to understand the host country's problems and can address them they are rotated out. As a result, there is less appreciation of either international or local goals. Even worse, the lack of civilian personnel has given rise to the large number of contractors whose motivation is neither humanitarian nor national security, but personal and organizational profit. And they too are not held accountable except in the most egregious cases.⁶¹ Civilian contractors and inexperienced military people are trying to undertake the tasks of institutional rebuilding with little experience and little knowledge of the country. They are not able to be adequately responsive to local needs. It is often painting by the dots. It may be possible to find stark differences in both attitude and quality of work between non-profit-making development organizations and contractors, but NGO presence is simply

⁵⁸ Shane, Mazzetti, and Filkins, 'Cables Depict Afghan Graft, Starting at Top', *NY Times*, 2 Dec. 2010, available at: www.nytimes.com/2010/12/03/world/asia/03wikileaks-corruption.html. See S. Chayes, *The Punishment of Virtue: Inside Afghanistan After the Taliban* (2006).

⁵⁹ Gall and Khapalwak, 'Winning Hearts While Flattening Vineyards is Rather Tricky', *NY Times*, 11 Mar. 2011, available at: www.nytimes.com/2011/03/12/world/asia/12panjwai.html.

⁶⁰ See Franke, 'The Peacebuilding Dilemma: Civil-Military Cooperation in Stability Operation', 11 *Int'l J Peace Studies* (2006) 1, at 5–25. The lack of civilian experts becomes clear when comparing staff levels of the Department of State (DOS) and the Department of Defense in Afghanistan. In 2009, DoS had 300 civilian experts on the ground, which it was able to increase to 1,000 in early 2010; Source: Office of the Special Representative for Afghanistan and Pakistan, 'Afghanistan and Pakistan Regional Stabilization Strategy', Department of State, updated Feb. 2010, at 3, available at: www.state.gov/documents/organization/135728.pdf. DoD, in contrast, in Mar. 2010 had 79,100 personnel and 112,092 contractors in Afghanistan; Source: Schwartz, 'Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis', Congressional Research Service, July 2010, Table 1 at 5.

⁶¹ S. Chesterman and A. Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (2010); J. Freeman and M. Minow (eds), *Government by Contract: Outsourcing and American Democracy* (2009).

too thin to accomplish all the tasks needed. Moreover, they cannot function in a kinetic environment, and may be especially targeted even when they are acting independently of the military.⁶² Many NGOs set an excellent example of selfless work, and they should be encouraged and supported, but they too suffer from turnover and burnout, and harbour the belief that any contact with the military will lead to taint and personal harm.

Military–civilian cooperation may result in some well-coordinated outcomes, but, as Andrea Strimling’s extensive interview research in Afghanistan has shown, it is rare, considering the resource investment.⁶³ Richard Shultz’ work on Iraq also stresses the need for well-trained civilians to help to make the rebuilding phase effective and acceptable to the population.⁶⁴

Self-interested motivation may explain why post-conflict reconstruction and state-building are attempted in the first place, but even self-centered aims will not be achieved without vast improvements and a more modest, context-sensitive attitude. Perhaps if the pronouncements about a moral obligation to rebuild began to be matched by serious intent, some criteria for *jus post bellum* might evolve.

5 What Would Help to Create a More Robust Obligation, if Not a *Jus Post Bellum*?

In any attempt to help to rebuild a war-torn society, international interveners can begin by following the doctor’s Hippocratic oath – do no harm. Sarah Chayes argues that we must live our values, and assume that most people share them. The Tunisian, Egyptian, and other peaceful uprisings underscore that. Helping people to realize their yearnings is different from trying to build a democracy-in-a-box. Caution against cultural relativism is necessary. Brian Orend, a just war theorist, uses an analogy:

Metaphorically, a war, justly prosecuted, is something like radical surgery: an extreme yet necessary measure to be taken in defense of fundamental values, such as human rights, against severe threats to them, such as violent aggression. And if just war, justly prosecuted, is like radical surgery, then the justified conclusion to such a war can only be akin to the rehabilitation and therapy required after the surgery be akin to the rehabilitation and therapy required after the surgery.⁶⁵

His argument in general is a logical theoretical development from just war theory as presently understood. He develops criteria that relate to the principles of *jus ad bello* and *jus in bello*, but goes on to make some sweeping recommendations for giving concrete content to *jus post bellum*.⁶⁶ He moves beyond the preservation of human rights into demilitarization, punishment of war criminals, and forms of governance. Each of his

⁶² E.g., the massacre of UN workers in Mazar-i-sharif in response to a Florida pastor’s Koran burning in Mar. 2011: Najafizada and Nordland, ‘Afghans Avenge Florida Koran Burning, Killing 12’, *NY Times*, 1 Apr. 2011, available at: www.nytimes.com/2011/04/02/world/asia/02afghanistan.html.

⁶³ Strimling, unpublished draft Fletcher PhD dissertation (Apr. 2011).

⁶⁴ R. Schultz and A. Dew, *Insurgents, Terrorists and Militias: The Warriors of Contemporary Combat* (2009).

⁶⁵ Orend, ‘*Jus Post Bellum: The Perspective of a Just War Theorist*’, 20 *Leiden J Int’l L* (2007) 571, at 581.

⁶⁶ Eric De Brabandere makes a strong argument that even a third normative framework, if developed, should not be linked to *jus ad bellum* or *jus in bello*: see de Brabandere, *supra* note 7.

prescriptions deserves to be addressed at length – that is beyond the scope of this article. Overall, I worry that many of them are unrelated to particular contexts and to the priorities of the host nation. Therefore, they would be subject to many of the objections made by Woodward and Suhrke as lacking local legitimacy. Orend's criteria demand scope and ambitions that could never be realized, as Ottaway argues. Without attempting an alternative blueprint, I would only make a few general observations here.

Most people do not well tolerate having to bribe officials to perform their duties; they do not swallow kleptocracy without seeking an alternative. The uprisings in the Middle East and North Africa bear witness to the fact that people want a voice in the fairness of their governance. If the developed world fails to pay attention to that yearning, the alternative may be extremism and violence. When international interveners try to assist countries recovering from war, they need to pay attention to the values on the ground, and not assume that such yearnings do not exist, when supporting a government in the interest of stability. Nor does it go unnoticed that America and other western democracies have cut corners on human and civil rights in their concern about terrorism. A great nation sets an example by its actions.

Lessons can be learned from past failures and successes. The international community needs to invest more in training and mentoring civil servants of the host country, and to work with them for as long as it takes to help build a government that performs for its people. Such investments are cheaper than maintaining an occupation force for years beyond local tolerance. Donor priority must give way to local needs, and an ongoing dialogue must exist between the internationals and the host country at all levels. Both local officials and international actors should be held accountable – for resources and progress. And the process of cooperative civil–military planning at every level from the beginning to the end of operations needs to be strengthened and made second nature to officials at all levels.

State-building is a long, bloody, ugly, messy process in which foreign actors are often bit players, the sources of both capital and coercion that manipulate and are manipulated. The complexities that we see on the ground in Iraq and Afghanistan should perhaps force both civilians and military leaders to think about what it means to 'win' in irregular war before making the initial commitment. Or, as Secretary Gates so bluntly put it, 'any future defense secretary who advises the president to again send a big American land army into Asia or into the Middle East or Africa should "have his head examined," as General MacArthur so delicately put it'.⁶⁷

The realization of victory in terms of COIN doctrine might conceivably begin to coincide with a hoped-for step in creating a moral norm of *jus post bellum*. But such a development is unlikely. It could occur only if the rebuilding process encompassed careful, thoughtful, and accountable efforts to help a still-troubled society create a government on its own terms that truly supported and protected its people. There is little history of the necessary long-term investments and careful analysis that would help attain such a goal when competing national priorities dictate otherwise.

⁶⁷ Robert M. Gates' address to West Point cadets, 25 Feb 2011, available at: www.defense.gov/speeches/speech.aspx?speechid=1539.

