

THE AFTERMATH OF WAR

Reflections on *Jus Post Bellum*

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New Thinking in Just War Theory

AS A DISTINCT CATEGORY, *jus post bellum* is not part of classic just war theory. But it isn't entirely missing from the theory either. The original idea was probably that *post bellum* justice was included in the criteria for *ad bellum* justice. The inclusion would have been twofold: first, a war can only be considered just if there is a strong possibility of success, and in order to judge that possibility, political leaders must have some idea of what success would look like. And, second, the requirement of a just intention means that whatever is taken to constitute success has to be not merely possible but also morally defensible; it has to be, if only in prospect, a just outcome. So arguments about what would come after the war were a crucial part of the arguments about whether the war should or should not be fought in the first place. *Ad bellum* anticipated *post bellum*.

But there is another sense in which the just outcome of the war is supposed to be anticipated in its beginnings. The standard understanding of aggression holds that it is a violation of the status quo ante. The world was at peace, in such and such an arrangement of states and borders—which was presumed to be just insofar as it was established, conventional, widely accepted, and also insofar as its stability made for regional (or global) peace. The aggressor violently disrupts this arrangement, moving

an army across the existing border, and then a just war restores the arrangement and the border. Justice after the war is the same as justice before the war. The idea of reparations gains its force from this understanding. The breaking of the old order has to be repaired. Though the violence of the aggression and the human damage that it produced cannot be undone, we can compensate the surviving victims and rebuild the ruined cities. We insist that the aggressor state make things, as much as it can, just like they were before. And that, on this view, which I take to be the classic view, is the definition of a just outcome.

It is worth noting that the early modern idea of a political revolution derived from this conception of a just war. The tyrant started the revolutionary process by breaking the established constitutional order, attacking his subjects, and violating their rights. Tyranny was understood as a kind of aggression. The people, organized perhaps by the lesser magistrates of the realm, justly defended themselves and restored the constitution. The movement was circular, ending where it began. A revolution that didn't end in a restoration would not have revolved completely.

Just war and revolution are deeply conservative ideas, though what they aim to conserve is the peacefulness of the status quo ante—not its particular political arrangements, which may indeed need to be changed, but only through normal politics, not through war. There are always state leaders who believe that their country's borders aren't where they should be or that the division of colonial possessions and spheres of influence or the access to natural resources is fundamentally unjust. That may or may not be so (the status quo is usually unjust, though not in the way state leaders believe it to be); in any case, just war theory holds that war is not a permissible remedy. When Francisco de Vitoria said that the only justification for war is “an injury received,” he meant a recent injury that violated the existing conventions and arrangements, not an injury received a hundred years before that had long ago been incorporated into the existing conventions and arrangements.¹ Territorial irredentism was no more an excuse for war than imperial ambition. Violent disruptions of the status quo were, almost by definition, unjust.

The 1991 Gulf War provides a nice example of the classic understanding of *post bellum* justice: restoration for both sides; reparations for one side. The first Bush administration thought that its war was justly concluded when Kuwait was liberated from the Iraqi occupation—and Saddam Hussein, his aggression defeated, was still in power back in Baghdad

and able to pay reparations to Kuwait. Justice did not extend to regime change. It did extend to the imposition of restraints on the Iraqi regime, but the purpose of those, or at least their initial purpose, was to make the old border safe. This was a contested view at the time, especially because President Bush had called for rebellions against the Baghdad regime, and when these occurred and were savagely suppressed he did nothing to help the rebels. Still, stopping the war after the liberation of Kuwait was in accord with the classic view of a just ending and a just peace.

There is much to be said for this view: Think of how many lives would have been saved if the Korean War had ended as soon as American and South Korean forces had repelled the North Korean invasion and restored the old boundary—however unsatisfactory that boundary was. Or imagine what the Middle East would look like today had Israel, after winning the Six Day War in 1967, immediately restored the Gaza Strip to Egypt and the West Bank to Jordan. In both these cases, the ambition for a better peace than the status quo ante produced outcomes that were (and remain) arguably worse.

One might say, as Avishai Margalit has recently suggested, that the actual goal of just war theory is not a just peace but “just a peace”—that peace itself, as it existed before the war began and as it might exist after the war ends, is the actual goal, without regard to its substantive justice.² Given the awfulness of war, peace is what just warriors should seek. But is this, in fact, just any peace? Suppose that the aggressor state wins the war and establishes a peace that is not like the status quo ante but is still peace in the literal sense: the absence of war. Do we have to accept this kind of peace, or oppose it only politically, or is it morally permissible or even necessary to renew the just war at the first opportunity? How long does it take before the new peace constitutes a status quo that it would be unjust to disrupt? We need some understanding of how peace and justice connect in order to answer these questions. I would suggest that the connection must be strong but minimalist—so as to sustain the recognition that peace itself is a value at which we can justly aim and sometimes live with, even if it is unjust. But in this chapter I am going to assume the victory of the just warriors and ask what their responsibilities are after victory. Sometimes, I want to argue—but not all the time—they must aim at an outcome that is different from the status quo *ante* and that is more than just a peace.

Restoration and reparation may be right for the victims of aggression but may not be the right way to deal with the aggressor regime, which they leave intact and in power. What if the act of aggression is inherent in the nature of the regime—as in the case of Nazi Germany? No one on the Allied side imagined that the war could end justly with Hitler still in power, even if his government then paid reparations to all its victims. The 1939 status quo was nobody's goal; the Allied commitment to a just peace in Europe took precedence over the old European conventions and arrangements, and this meant military occupation and regime change for Germany. Though these weren't entirely new ideas, World War II made them into defensible versions of *jus post bellum*.

The experience of Nazism also provided another argument for regime change. It seems astonishing today, but there were lawyers in Britain and the United States who argued in 1945 that the Nazi leaders could be put on trial for crimes against Poles and Russians but not for crimes against German citizens. "The killing and persecution of German Jews," Gary Bass reports in his historical study of war crimes trials, "seemed protected by German sovereignty."³ Not justified by sovereignty, but protected from international scrutiny and indictment. That argument was rejected in the run-up to Nuremberg and again at the actual trials. State officials are not answerable only to their own courts when they massacre their own citizens. Other states can—and I would argue that they should—intervene to stop the killing, and the officials responsible for the killing can then be brought to justice before international courts. The movement of military forces across an international frontier to stop a massacre is not aggression; it is more like law enforcement. We refer to it as humanitarian intervention, and it should be obvious that its goal can't be to stop the killing and leave the killers, or the killer regime, in power. Had African or European states acted to stop mass murder in Rwanda in 1994, for example, they would have had to overthrow the party of Hutu Power, which ruled the country—and then they would have had to find other rulers. An intervention in Darfur in 2007 or 2008 would have had to replace the Khartoum government, at least in Darfur. In the case of humanitarian intervention, *jus post bellum* involves the creation of a new regime, which is, minimally, nonmurderous. And it is more than likely that the creation of a new regime will require some period, perhaps an extended period, of military

occupation. These possibilities raise the question of *jus post bellum* in a new way.

Was Saddam Hussein's savage suppression of Shi'ite and Kurdish rebels protected by Iraqi sovereignty? Or did *post bellum* justice in 1991 require a march on Baghdad and the overthrow of the Baathist regime? I didn't think so at the time, though it does seem in retrospect that regime change and occupation could more easily have been justified in the circumstances of 1991 than in those of 2003. But that is not the argument that I want to pursue here. I only want to insist that the classic view of *post bellum* justice is now subject to revision whenever we encounter inherently aggressive and murderous regimes. The identification of these encounters will be contested, but these are contests that we cannot avoid.

Similar questions arise in antiterrorist wars like that of the United States in Afghanistan. The invasion of Afghanistan has led to a long-term American military presence in the country—after what looked like, but wasn't, a quick military victory. In Afghanistan (and in Iraq too), the creation of a new regime did not come, as planned, after the war was over but in its midst. What does *post bellum* justice mean when wars don't end? What are the obligations that come with staying on and fighting on in these circumstances? And what are the obligations that determine the timing and character of getting out? These are new questions to which I have no clear answers.

Jus Post Bellum and Obligation

Jus post bellum is an aspect of justice generally, and like justice generally, it imposes obligations on its subjects. Before I discuss what these obligations are, I want to address the issue of subjection itself: On whom do the *post bellum* obligations fall? Consider a historical case: In Cambodia in 1974, a maniacal left-wing regime was systematically murdering its own people. The government of Vietnam sent its army across the border to overthrow the regime and stop the killing. No doubt it had geopolitical reasons for doing this, in addition to the obvious moral reasons, but whatever the mix of its motives, stopping the killing was a good thing to do. China, by contrast, along with many other states (indeed, along with all other states) did nothing to stop the killing. China sat and watched. And

yet, after the invasion, the Vietnamese had further *post bellum* obligations in Cambodia, and the Chinese did not.

This is an odd, though familiar, feature of moral life. People who do good in the world have more obligations than people who don't do anything. Volunteer for some worthy task, and you are quickly entangled in a web of obligations; you hardly have a minute to yourself, while the men and women who never volunteer for anything can do what they like with their evenings. The case is the same with states as it is with individuals. Once the Vietnamese had sent an army into Cambodia for the best of reasons, to save human lives (whatever their other reasons), they were bound to keep on saving lives in Cambodia. They had to secure and maintain some kind of law and order and establish a nonmurderous government to replace the one they had overthrown. And when they didn't act selflessly to do that, but served their own interests by setting up a puppet government, they were rightly subject to strong criticism.

Among just war theorists there is some uneasiness about states that remain neutral in wars between an aggressor and a victim (think of Sweden in World War II)—and perhaps also about states, like China in my example, that remain passive in the face of mass murder in a neighboring country. Still, in international law, neutrality and passivity are rights that come along with sovereignty. And if sovereignty by itself doesn't seem a sufficient cover for inaction, many political theorists and moral philosophers would recognize the same right-not-to-act on the ground that states cannot be obligated to put the lives of their citizens at risk, just as individuals are not bound to put their own lives at risk to save the lives of strangers. Therefore, it is only the state that makes the positive *ad bellum* decision that acquires the positive *post bellum* obligations. If we assume that the positive decision is just, then, once again, doing the right thing brings with it the obligation to do many more right things. There is no escaping the dire consequences of good behavior—though I should add that bad behavior, in contrast to doing nothing at all, also brings obligations in its wake, as the idea of reparations suggests.

Of course, if all *ad bellum* decisions were made multilaterally, the dire consequences would be shared; *post bellum* justice would be a collective responsibility. But this is not possible in practice, since the forms of multilateral decision making available in contemporary international society are notoriously unreliable. Neither the Security Council nor the General

Assembly of the UN, for example, would have backed the Vietnamese decision to invade Cambodia. And, similarly, the Indian decision to invade East Pakistan (now Bangladesh) would never have been authorized by the UN; nor would the Tanzanian decision to invade Uganda and rescue its people from the murderous regime of Idi Amin. And yet these were just—and, it seems to me, morally necessary—invasions. When a massacre is in progress, unilateral military action may not be the best response, but it is often the only possible response. And then the state responsible for the invasion and the rescue will also be responsible for the political and social reconstruction of the invaded country.

We can imagine an arrangement by which the second of these responsibilities could be taken on by states that had been unwilling to take on the first. They weren't prepared to fight and put their soldiers at risk, but they might be prepared to participate in the work of peacekeeping and reconstruction. Even if the *ad bellum* decision was unilateral, *post bellum* decision making could be multilateral. Of course, the state that had risked its own soldiers' lives might think that it was entitled to make all the decisions in the occupied country, starting with the security decisions. On the other hand, occupation and reconstruction are costly undertakings, and the intervening state might be eager to share those costs and therefore willing to share some of its decision making power. It might look for help, however, and find that other countries feel no obligation to help—after all, they didn't invade someone else's country. How might we go about freeing the rescuers from the ongoing burdens of the rescue? If we believe that multilateralism leads to a better version of *post bellum* justice, we will have to make it a political project.

Does it lead to a better version? Are obligations formally accepted by many states more likely to be fulfilled than unilateral obligations? There are well-known collective action problems here: Each state thinks that the others should do more, or it thinks that it can shirk its obligations because the others are already doing enough, or one state's withdrawal or failure to perform brings the whole effort down, as each of the others refuses to pick up its share. The work of a single state might go better, especially if, in exchange for material support, it accepted some form of international regulation—as in a trusteeship system, if there were such a system. That too would be a project, and a difficult one, given the history of trusteeship under the League of Nations. And it might seem especially hard not only

to insist that intervening states have acquired obligations, but also that performance of those obligations should be monitored by an international organization. Nonetheless, it isn't a bad idea.

Justice after War's End

What are the obligations of *post bellum* justice? I have described reparations as the obvious obligation of the aggressor state. Reparations can be extracted forcibly by the victors; they can also be the subject of negotiations not so much between winners and losers as between the victims and their heirs, on the one side, and the aggressors and their heirs, on the other (consider the negotiations between Israel and Germany after World War II). The heirs come into it because of the post-ness of the justice: *Jus post bellum* is, in part at least, justice for children. It is important to recognize that reparations are a form of collective punishment, since the burden is distributed through the tax system to all the members of the aggressor state including those who opposed the aggression and those who were too young, as the Bible says, "to know their right hand from their left." The collectivism is simply the consequence of citizenship, and I think that it can be justified—though the enslavement of those same people, forced to work for the victims of their state, would not be justified. We penalize innocent people, including children, in the aggressor state in a constrained way, in order to benefit innocent people in the state that was unjustly attacked. And that is *jus post bellum*: not perfect, but as good as it can be.

But I am more interested here in the newer obligations that go along with occupation and reconstruction. These can be extensive and demanding, but they also have limits, and it may be useful to start with those. The limits are of two sorts, practical and moral. States are not bound to do (or to try to do) what they are not able to do. The probability of success, which plays a critical role in *jus ad bellum*, plays the same role in *jus post bellum*. The United States is not obligated to create a Swedish-style social democracy in Afghanistan (I am not claiming that that was ever our intention) for the simple reason that we can't do that. Obligations are closely connected to capabilities. Often states try to do more than they can do because what they can do isn't exciting enough to win the support

necessary for doing it. Or, they pretend to be aiming at great but impossible achievements in order to cover their real, interest-driven goals. In any case, impossibility is a critical limit, and if we recognize it we will be more capable of making realistic choices and of criticizing partisan and aggrandizing projects.

The moral limits of *post bellum* obligations have their primary source in the people to whom the obligations are owed—the people who have been rescued, for example, by the military intervention or the people whose brutal and aggressive regime has been overthrown. The intervening state can't then impose its version of a just politics without regard to their version. It isn't bound to do what its own citizens think is best. The local understanding of political legitimacy is a critical constraint on what just warriors can attempt. But it isn't an absolute constraint. During the occupation of Japan after World War II, the Americans pretty much wrote a constitution for the Japanese; this was certainly achieved with consultation, but without much readiness to bow to Japanese political or social norms. One of the clearest examples of not bowing was the inclusion of an article that mandated gender equality—which had no place in Japanese political culture as it then was. But since the constitution created a democratic regime and since it allowed for its own amendment, this seems to me a legitimate imposition. We might even say that the existing local norms and some minimal conception of human rights are competing constraints on what the intervening state can do.

The local norms are critically important because the goal of regime change is a regime that can govern without the massive use of coercive power. It must be politically strong enough to survive the withdrawal of the state and army that set it up; its legitimacy must be recognized by its citizens; it must be able to collect taxes and provide the services that its citizens expect. These are constraining requirements. They rule out puppet governments that will be forever dependent on the firepower of a foreign army—like those created in Eastern Europe after World War II. But they also rule out certain kinds of idealistic politics, when the ideals are ours but not theirs.

The positive obligations of just warriors after they overthrow an aggressive or murderous regime and stop the killing begin with what we can think of as provision. They have to provide law and order, food and shelter, schools and jobs. Of course, they will do this, insofar as they can,

through local agents—members of the old civil service and the old army who weren't involved in the crimes of the genocidal regime and also internal opponents of the regime and returning exiles. But ultimate responsibility belongs to the occupying forces. The American army in Iraq in 2003 was radically unready to take on this responsibility after the overthrow of the Baathist regime. We can take this unreadiness as a useful example: It was a clear violation of the norms of *jus post bellum*. This is true whatever the justice of the invasion and however the war was fought. *Post bellum* justice is independent of *ad bellum* and *in bello* justice—in the same way as these latter two are independent of each other. An unjust war can lead to a just outcome, and a just war can lead to an unjust outcome.

Once immediate necessities are provided, the critical obligation of the invading and occupying forces is political reconstruction. The obligation is the same whether a single state has supplied the forces, or a coalition of states, or an international agency. It is a difficult obligation because what is required is the creation of a regime that can dispense with its creators—that can, literally, order them to leave. The goal of reconstruction is a sovereign state, legitimate in the eyes of its own citizens, and an equal member of the international society of states. As soon as that goal is reached, the occupying forces will probably be asked to leave, and they should leave. It will be a test of their virtue, and of the justice of the occupation, that they have not created a puppet government and that they make no claim to permanent military bases or to economic privileges and contracts unavailable to other states. Though they can aim at a friendly government (it is hard to imagine them doing anything else), this must be a friendly government fully capable of acting in its own interests.

Should they aim at a democratically elected government? I want to say yes to this question, not because democracy is the best regime (though I think it is), but because it has historically been the regime least likely to turn on its own people. I can imagine ways less formal than elections to produce a responsible government—in a tribal society, for example, customary forms of consultation may still be robust and effective. But democracy is generally to be preferred for the sake of its inclusiveness. Modern democracy includes everyone, men and women, rich and poor, majorities and minorities, and so it offers greater protection than a regime of oligarchs, patriarchal chiefs, or clerics of the dominant religion. Protecting women—or, better, empowering them so that they can protect

themselves—is especially important, since they are often the first civilian victims of war and the last beneficiaries of reconstruction. Giving them the vote is only a first step, but it is an important step toward guaranteeing their security.

Jus post bellum is most importantly about social justice in its minimal sense: the creation of a safe and decent society. But it is also about justice in its other sense—about doing justice to the perpetrators of tyranny, aggression, mass murder, and ethnic cleansing. I have already alluded to the Nuremberg precedent for the establishment of international tribunals—followed with mixed results in cases like the former Yugoslavia, Rwanda, and Sierra Leone. “Do justice even if the heavens fall” is not a good idea in the aftermath of war; *jus post bellum*’s first aim, as I have been arguing, is to stop the heavens from falling. Sometimes a clear judicial repudiation of mass murder and the punishment of the murderers is the best way to forge a secure peace. Sometimes security might require amnesties and public forgetfulness. Sometimes, the simple exposure and acknowledgment of crimes may point the way to reconciliation. In these life and death cases, the idea of just a peace takes precedence over a just peace—though we should certainly try to bring the two together.

Finally, there are certain lingering obligations that may affect the timing and character of getting out. The invading and occupying forces must make sure that the new regime is in fact nonmurderous, committed to defend and capable of defending the most vulnerable of its citizens. And they must make sure that the men and women who cooperated with the occupation in any capacity will be safe in its aftermath—and if any of them are not safe, they must be given the opportunity to leave with the occupying forces and be taken in by the occupying state. This obligation holds whether the intervention and the occupation were just or unjust. The French after the Algerian war were bound to take in the Harkis (Arab soldiers who fought in the French army), and the Americans after Vietnam were bound to take in the so-called boat people—indeed, the people who took to the boats should have been helped to leave before they had to resort to that. John Rawls’s argument about privileging the worst-off in domestic society has an analogy here: We must attend to those most at risk when ending the occupation of a foreign country.

War is a time of killing and being killed. The crucial requirement of *jus post bellum* is the preservation of life. That is the minimalist reason

that I have given for trying to set up a democratic regime, and it is the reason for everything else that invading and occupying armies must do—for the provision of necessities, for special attention to vulnerable minorities, for movement toward gender equality, for something as close as possible to justice for war criminals and murderers. There is work here that foreign forces can do, but ultimately the work has to be taken over and sustained by the locals. The post in *jus post bellum* is not of indefinite duration. Moral and political requirements must be met over whatever time it takes. But the shorter the time, the better.

Notes

1. Francisco Vitona, *Political Writings*, edited by Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 324.
2. Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton, NJ: Princeton University Press, 2011), chapter 1.
3. Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000).

CHAPTER 3

JUS ANTE AND POST BELLUM

Completing the Circle, Breaking the Cycle

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Just Wars and Irregular Wars

NATURE OFFERS TWO VERSIONS of what the noted astronomer Sir Arthur Eddington called the “arrow of time”—namely, physical processes that are either irreversible or reversible. Irreversible processes embody the linear vector that Eddington himself had in mind with this phrase. They are linear in that they have a definite temporal direction, a concrete origin, some well-defined temporal duration, and a terminus, and, consequently (as the eminent English-American philosopher A. N. Whitehead put it), a “perpetual perishing.” Indeed, as Whitehead remarked, “time itself is a perpetual perishing”—a metaphor that seems especially apt for war.¹

But nature also exhibits other processes that are enduring, repetitive, cyclical, ongoing, and hence reversible. Temporally speaking, as the equally eminent German philosopher Hegel observed regarding their circularity, these processes “have no beginning and no end,” a metaphor that, in darker moments, seems equally apt for war.² War presents itself as linear: a vector with an origin, a duration, a terminus, and with damage done over its temporal duration that often seems irreversible. War’s effects cannot be undone, and in that sense they seem linear. But wars that do not end well threaten to beget new wars that, as progeny of the old, perpetuate a cycle of violence and destruction that is unending. It is that