



JUS POST BELLUM

The missing link of Just War Theory: A theoretical examination of what is justice after the war?

Farhatul Mustamirrah Mahamad Aziz¹, Mohd Rizal Yaaqub¹

¹Fakulti Sains Sosial dan Kemanusiaan, Universiti Kebangsaan Malaysia, Bangi 43600, Selangor

Correspondence: Farhatul Mustamirrah Mahamad Aziz (email: nnhasuna@gmail.com)

Abstract

This theoretical study emphasizes on the missing link of Just War Theory that is justice after the war, *jus post bellum*. The argument revolves around the reasons *jus post bellum* should be given the same degree of attention enjoyed by *jus in bello* (justice in war) in order to fulfil the purpose of Just War Theory in guiding war to achieve peace and justice. The discussion consists of two parts. The first part examines the reasons why *jus post bellum* was neglected. The second part examines the developing principles of *jus post bellum* with the emphasis that presently there is no coherent and complete principles of *jus post bellum*. Results of the examination indicate that more scholarly works should be done in developing the principles of *jus post bellum* for the restoration of human rights order after the war thus achieving justice after the war. Research is limited because it depends only on existing scholarly works done on *jus post bellum*. A better developed principle of *jus post bellum* is important as a way of stigmatizing conquest, of discouraging foreign policy crusades, and of imposing order on post-war reconstruction. The addition of *jus post bellum* as a category creates a third condition for a just war thus restricting the occurrence of war.

Keywords: human rights, *jus in bello*, *jus post bellum*, justice, just war theory, war

Introduction

Traces of a tripartite conception may be found in different traditions of thought. St Augustine linked war to the postwar goal of peace in his book *City of God* which became one of the most respected and frequently-cited books of Church history (Bettenson, 1984). St Augustine believes that peace is the instinctive aim of all creatures, and is even the ultimate purpose of war (Bettenson, 1984).

This thinking was refined by proponents of the just war theory, such as Francisco de Vitoria, the founder of the School of Salamanca, and scholastic Spanish philosopher and theologian Francisco Suarez where these scholars made a compelling argument: If a war has a just cause, and is fought justly, it must also lead to a just post-war settlements (Scott and Nys, 1917). Hugo Grotius in his Book III of *On the Law of War and Peace* includes not only rules governing the conduct of war, but practical principles on just war termination, such as rules on surrender, good faith, and interpretation of peace treaties (Scott and Kelsey, 1925).

Immanuel Kant associated the “law of war” with substantive principles of justice, such as fairness of peace settlements, respect of the sovereignty of the vanquished state, and limits on the punishment of people (Hastie, 2003). However, according to Orend (2000), this “third leg” in the theory of warfare disappeared in the conceptualization of the laws of war in the nineteenth and twentieth centuries. Thus, *jus in bello* was codified, then *jus ad bellum* (McCoubrey & White, 1992). In contrast, *jus post bellum*

did not receive much attention and most treaties at the beginning of the twentieth century treated the concept in a cursory fashion, if at all (Oppenheim, 1906).

Why *Jus Post Bellum* was neglected?

The omission of *jus post bellum* may be explained by several historical factors- the gradual development of international law and the case-by-case treatment of major peace settlements in the twentieth century- but at the same time, it has some deeper structural reasons (Clark, 2005; Stahn, 2007).

At the beginning of the twentieth century, it was difficult to conceive of the period of transition from war to peace as a separate normative paradigm because international law itself was seen as bipolar system focused on the strict distinction between states of war and peace (Stahn, 2007). The law of peace was understood as the body of law governing the normal state of affairs between states, while war was viewed as a distinct concept which gave rise to a different body of legal rules governing the relation between belligerents (Neff, 2005).

Orend (2008) believes that the rejection of *jus post bellum* is simply the inertia of tradition: just war theory began along the two established tracks of thought regarding *jus ad bellum* and *jus in bello*, and there has been a rather unreflective unwillingness to break out of the two categories.

Another reason for the neglect of *jus post bellum* has been the tendency, amongst those just war theorists who do refer to *jus post bellum*, to subsume it under *jus ad bellum* (Orend, 2008). Even Walzer (1977) in his book *Just and Unjust Wars* writes a section of *jus post bellum* under the section of *jus ad bellum*.

Another reason explained by Orend (2008) has been the conviction that post-war justice ought to be limited to war crime trials. Just war theorists are only concern with the trial and punishment of those who have violated the laws and norms of *jus ad bellum* and *jus in bello* without giving any attention to postwar issues.

Developing Principles of *Jus Post Bellum*

Concerns were expressed about a number of post war problems, including lack of security, increased sectarian violence, destroyed vital infrastructure, widespread corruption, and insufficient reconstruction efforts (Allman & Winright, 2007). Nivat (2005) writes “the people of Iraq and Afghanistan have difficulty understanding that such is the price of ‘liberation’.”

Principles regarding *jus post bellum* are at present incomplete and subject to considerable argument. Orend (2007) asks the question, what are the ends or goals of a just war? He provides the following answer:

“The general answer is a more secure possession of our rights, both individual and collective. The aim of a just and lawful war, we know, is the resistance of aggression and the vindication of the fundamental rights of societies, ultimately on behalf of the human rights of their individual citizens. These values revolve around the concept of a minimally just and hence legitimate community. Such a community is one which does all it reasonably can to: (i) gain recognition as being legitimate in the eyes of its own people and the international community: (ii) adhere to basic rules of international justice and good international citizenship, notably non-aggression: and (iii) satisfy the human rights of its individual member (to security, subsistence, liberty, equality and recognition.” (Orend, 2007)

Allman and Winright (2007) propose four *jus post bellum* criteria that complement the *jus ad bellum* and *jus in bello* categories of the just war theory: just cause, reconciliation, punishment and rehabilitation. These postwar ethics are a natural extension of, and share some commonalities with the ad

bellum and in bello categories (Allman and Winright, 2007). Orend (2006) offers the following principles of *jus post bellum*: proportionality and publicity of the peace settlement, rights vindication, discrimination, punishment, compensation and rehabilitation. Bass (2004) suggests that a *jus post bellum* should encompass the conduct of war crimes trials, compensatory reparation, and the “duty to respect to the greatest extent possible the sovereignty of the defeated nation and seek the consent of the defeated in any project for reconstruction,” which would require “that victorious states...to render themselves accountable to the population they purport to assist, seeking to gain their consent for the actions taken on their behalf.”

1. The just cause principle

The telos of just war according to Augustine, is not simply victory on the battlefield, but the tranquillity that comes from order, in other words, a just and lasting peace. Classical just war theory identifies self-defense, defense of human rights (for example, humanitarian intervention), restitution (regaining what was wrongfully taken), redress (taking possession of what is wrongfully withheld), and legitimate punishment as the only “just causes” for going to war (Kleiderer, 2006).

Jus post bellum is connected with *jus ad bellum*, for instance, in that the declared ends that justify a war – whether stopping genocide or preventing aggression- impose obligations on belligerent powers to try, even after the conclusion of the war, to bring about the desired outcome (Bass, 2004). Orend (2000) states that the end of any just war must be the accomplishment of the objectives that served as the grounds for “just cause” in the *ad bellum* phase. Thus, the goal of a just war must be to establish social, political, and economic conditions that are substantially more stable, more just, and less prone to chaos than what existed prior to the fighting (Allman & Winright, 2007).

The just cause principle has three primary objectives: First, it holds the party claiming to fight a just war accountable. This principle, as emphasizes by Bass (2004), makes parties claiming to fight for a just cause stay the course until the mission is accomplished.

Second, this principle restrains parties from seeking additional gains, that is, to go beyond what was identified as the just cause would be an act of aggression (Allman & Winright, 2007). Once a nation has achieved its declared mission, the conflict must end and any additional gains would be unjust (Allman & Winright, 2007). This principle is in line with rights vindication as proposed by Orend. Rights vindication indicates that the settlement should secure those basic rights whose violation triggered the justified war (Orend, 2007).

Third, this principle seeks to ensure proportional (meaning measured and restrained) post bellum behaviour by the victors (Allman & Winright, 2007). As Orend (2002) observes:

“It prevents war from spilling over into something like a crusade, which demands the utter destruction of the demonized enemy. The very essence of justice in and after war is about being firm limits and constraints upon its aims and conduct.”

Orend (2007) also adds publicity to the principle of proportionality. It stresses that the peace settlement should be measured and reasonable, as well as publicly proclaimed. Orend (2007) claims that to make a settlement serve as an instrument of revenge is to make a volatile bed one day be forced to sleep in later, thus ruling out insistence on unconditional surrender. Another aspect proposed by Orend that can complement proportionality is discrimination.

In short, the just cause principle acts as a tenet of restraint and accountability and a concrete step in achieving *jus post bellum*.

2. The reconciliation phase

According to Allman and Winright (2007), the goal of reconciliation is to transform a relationship of animosity, fear, and hatred into one of tolerance, if not respect; to turn enemies into friends and bring emotional healing to the victims of war.

Kellogg (2002) objects to making reconciliation an aim of the post bellum phase by arguing that by seeking and forcing reconciliation trivializes the brutality of war by reducing the crimes of war to an area of disputation and fails to recognize war as a violent crime. Ellis (2001) also argues that it is the height of presumption to imagine that victims of the crime of aggression and of war crimes should ever forgive their attackers. Allman and Winright (2007) objects Kellogg and Ellis by stating that such detractors operate out of an impoverished understanding of reconciliation, seeing it primarily as a “forgive and forget” approach, whereas a richer understanding or reconciliation demands acknowledgment of guilt, reparations (penance), and only then absolution. Thus the process of reconciliation includes three key areas: cease-fire agreements, postwar celebrations, and postwar settlement processes couples with apologies (Allman & Winright, 2007).

Iasiello (2004) stresses the importance of an honourable surrender in creating a healing mind set for cease-fire agreements. Restraint in postwar celebrations can also contribute to the reconciliatory aims of this phase. Plato warned that constructing monuments to victors can harden the hearts of the vanquished (Iasiello, 2004). Schuck (1994) states that it is normal to celebrate the end of the war and the return of soldiers; however, when victors celebrate not only the end of war but the defeat of their enemy as well, they fail to recognize the moral and non-moral evils that accompany all war, including just wars. The little good that can be found in war needs to be publicly acknowledged so all sides might come to see that their former enemy includes decent, kind, brave, and virtuous people (Allman, 2005). The postwar settlement process must be as public and transparent as possible and negotiated by parties widely recognized as having the authority to do so. Victors in battle ought not to assume that they, by virtue of victory, are the most competent authority to negotiate postwar settlements thus a third party state is needed (Allman & Winright, 2007).

If the primary goal of a just war is a just and lasting peace, and if the primary goal of the reconciliation phase is to transform adversarial relationships into ones of respect, trust and ultimately friendship, then a formal apology is a necessary condition of the settlement process (Allman and Winright, 2007). Allman and Winright (2007) also states that admissions of guilt are not the same as admissions of criminal activity, which must be punished, thus mutual admissions of guilt are a necessary first step and augment the long term healing process of reconciliation.

3. The punishment phase

The punishment phase primary objectives are justice, accountability, and restitution. According to Allman and Winright (2007) the legitimacy of punishment depends on: publicity and transparency, proportionality and discrimination and competent authority (independent authority to avoid bias). The punishment phase comprises two principal parts: compensation and war crime trials.

Compensation in a form of financial restitution may be mandated, subject to both proportionality and discrimination (Orend, 2008). Orend (2008) also stresses that a post-war toll tax on civilians is thus generally impermissible, and there needs to be enough resources left so that the defeated country can begin its own reconstruction. Walzer (1977) and Orend (2002) agree that the political and military elite of the unjust aggressor nation bear the primary responsibilities of compensation and that the personal wealth of the architects of the aggression should be seized in order to compensate the victims of their crime. Walzer (1977), however, argues if the private wealth of these architects is not enough, then it is legitimate to tax the population of the aggressor nation for maintaining national sovereignty. Bass (2004) rightly expands the list of who ought to pay to include the profiteers of an unjust war. Orend (2008) disagrees with Walzer:

“Respect for discrimination entails taking a reasonable amount of compensation only from those sources that can afford it and that were materially linked to the aggression in a morally culpable way.” (Orend, 2008)

For Orend, taxing the populace amounts to guilt by association (Allman & Winright, 2007). Bass (2004) states that the motivating principles behind compensation are restitution (returning whatever one has unjustly seized and paying for what one has unjustly destroyed) and the practical concern that war, just like any other crime, ought not to pay. Allman and Winright (2007) also stresses that by forcing the architects and profiteers of unjust aggression to compensate their victims and by constructing reparations agreements in a way that does not unduly burden those who were not “materially linked to the aggression in a morally culpable way,” the crime aggression can, in part, be properly punished and effectively discouraged in the future.

War crimes trials are an essential and longstanding component to postwar justice. War crimes are of two categories: *jus ad bellum* crimes and *jus in bello* crimes. *Jus ad bellum* crimes include unjust aggression or what Nuremberg prosecutors called, “crimes against peace,” such as “planning, preparing, initiating and waging” a war of aggression, genocide, and crimes against humanity (Walzer, 1977). Bass (2004) states that *jus ad bellum* war crimes trials are essential to postwar justice because they “strip away the veneer of statehood to reveal human beings making choices.” Failure to prosecute war crimes is a form of passive endorsement and violates the just cause principle (Kellogg, 2002). Yet, according to Allman and Winright (2007), a dose of realism is needed to temper this idealism because sometimes perfect justice must be sacrificed on the altar of peace. Bass (2004), however, stresses that the fact that sometimes one must reluctantly sell out justice for the sake of peace does not mean that there should never be justice.

Jus in bello crimes include such acts as disproportionate uses of force, failure to discriminate between soldiers and civilians, or engaging in inherently immoral acts (rape, torture, using civilians and shields and so on). On a practical level prosecution and punishment of *in bello* war criminals is necessary for post bellum justice simply because it “gets the thugs off the streets” and it is also a basic demand of justice (Allman & Winright, 2007). Commanding officers, by virtue of their rank, experience, and training should be held to a higher level of responsibility than lower-ranking soldiers in the field (Orend, 2002). Post bellum justice must not simply execute justice, but be publicly acknowledged as independent and free of prejudice.

According to Allman (2005) the just war theory’s lack of robust *jus post bellum* criteria. While most scholars and jurists readily identify *jus ad bellum* and *jus in bello* crimes, none identify *jus post bellum* crimes (Allman & Winright, 2007). War leaves a wake of destruction. It wreaks havoc on people, cultures, the environment, and the social, political, and economic infrastructure. Those that engage in war must be held responsible for the effects of their actions.

4. The restoration phase

If the principal aim of a just war is a just and lasting peace, then the goal of a just war is not simply the cessation of violence, but political, economic, social, and ecological conditions that allow citizens to flourish (Allman & Winright, 2007). There are five components to the restoration phase as organized by Allman and Winright (2007): security and policing, political reform, economic recovery, social rehabilitation, and environmental clean-up.

Security and policing

Himes (2004) states that an expansion of the principle of restoration would entail the work of securing domestic peace through protection of civil liberties and human rights, as well as helping to organize

police and judicial institutions so that the necessary social space is created for men and women to begin the work of restoring public life.

Establishing a secure postwar condition is a crucial step because other developments that will follow will not be successful without security. O'Connor (2006), stresses that the rule of law is recognized as an inherent element in ensuring long-term sustainable peace, economic, and political development in post-conflict states. According to Day (1998), in a post-conflict country, the transition to a just peace proceeds in three phases: order, law and order, and finally, law and order with justice. As stated by Iasiello (2004) while victors retain primary responsibility for the planning and the execution of security, a conscientious effort must be made to include members of the defeated society in the process. This involvement might accelerate the healing process and instil a sense of trust and confidence at this critical stage of occupation.

Political reform

Bass (2004) identifies sovereignty, territorial integrity, and political autonomy of the vanquished as key concerns of political reform.

“Since sovereignty is the bedrock of international relations, victors must limit their occupation to the shortest possible period, but not end it prematurely, meaning before internal and external security is established and a functioning civil society is in place... Victorious states have no right to impose puppet regimes, or reconstruct a polity for the victor’s economic, military, or political gain.” (Bass, 2004)

Iasiello (2004) states that just restoration is complete when full sovereignty is returned to a once defeated people and former enemies become allies.

“...the return of its sovereignty and re-entry into the community of nations. In this period, all aspects of political, economic and social life are returned to the control of the indigenous population. Interim political authorities are eventually replaced by elected officials, and these political figures assume full responsibility for security, critical infrastructure, and nation building.” (Iasiello, 2004)

Economic recovery

War interrupts normal commerce, manufacturing, transportation, and financial markets and forces a host of industries to shift their production efforts to accommodate the war effort (Allman and Winright, 2007).

Returning to prewar economic life after war is very essential. The development of economy is essential in order to maintain peace. A concerted effort by governmental and non governmental agencies, international aid groups (such as the World Bank or the International Monetary Fund), and private industry must be courted to invest in infrastructure reconstruction and development (including roads, ports, electrical grids, and so on) and vocational training (Allman and Winright, 2007).

Social rehabilitation

Iasiello (2004) identifies the need to safeguard the innocent a vital component to post bellum social rehabilitation.

Children in war zones suffer the direct and indirect consequences of conflict; they lose family, friends, life-support mechanisms, and a sense of normality. Iasiello (2004) stresses that the victors in war should focus special attention on children in the post bellum phase of war as well as other at-risk groups and those who cannot easily care for themselves, most notably the sick, the elderly, and some groups of women.

Displacements peoples, especially children, women and disable are vulnerable and they often become targets for rape, sexual exploitation, prostitution and slavery. War diminishes normalcy and security for these (supposed to be protected and nurtured) groups of people. They were sometimes denied basic needs such as food, water, medicine and shelter as the result of displacement during war. Iasiello (2004) states that, basic resources become even scarcer if in post bellum times, more influential or powerful segments of a society appropriate these items for themselves. Social rehabilitation thus is very important for continuity of generations.

Environmental clean-up

A new class of weaponry compels the just war theory to develop post bellum criteria as these weapons of long-term destruction (WLTDs) extend the pernicious effects of war into the future.

The U.K. Atomic Energy Authority estimates that a half-million people in Kuwait and Iraq could die from the use of depleted uranium shells in the first Gulf War alone (Westerman, 2006). A thirty-year study by Humanitarian International found that cluster bombs have claimed over 100,000 lives, with 98 percent of the victims of cluster bombs being civilians (mostly children), due to the fact that the munitions leave unexploded bomblets on the ground, which civilians later detonate by accident (Winright, 2006). WLTDs thus challenge the just war theory to consider the countless future victims of war, most of whom are civilians and some of whom have not yet even been born, thereby extending the effect and moral responsibilities of war well beyond active combat (Allman & Winright, 2007). Boelaert-Suominen (2000) writes that there is no commonly accepted definition of the concept of environment in international law.

All sides in war have a responsibility to protect the environment wherever possible. Naval doctrine (1997) addresses this issue prescriptively:

“The commander has...an obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. To that end, and so far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited.” (Naval Doctrine, 1997)

The principle of restoration requires that those who employ WLTDs be held responsible for postwar clean-up efforts. Those who resort to WLTDs must return the environment to its prewar condition and make every effort to rehabilitate those affected by WLTDs (Allman and Winright, 2007). On practical grounds, such a requirement would discourage the use of such weapons since the clean-up efforts are prohibitively expensive.

Collectively, these restoration obligations are expensive and laborious and it is a good thing according to Allman and Winright (2007). Waging war is without doubt one the most destructive and evil human activities. By burdening those who engage in war with these post bellum processes: security and policing, political reform, economic recovery, social rehabilitation, and environmental clean-up, the true cost of war (at least those that can be counted and revived) would be taken into account because war is and ought to be expensive (Allman & Winright, 2007).

Conclusion

Jus post bellum should now be given more attention in developing its principles in ensuring smooth transition from the state of war to the state of peace. The principles of *jus ad bellum* and *jus in bello* alone are not enough in determining just and unjust wars. Since the purpose of just war is to acquire peace, the moment which a war ends is equally crucial.

A better developed principle of jus post bellum is important as a way of stigmatizing conquest, of discouraging foreign policy crusades, and of imposing order on postwar reconstruction. The addition of jus post bellum as a category creates a third condition for a just war thus restricting the occurrence of war.

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