

Jus Post Bellum: Justice at the End of War

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Abstract

Post bellum justice considers vindication of human rights and prosecution on occasion of its violation essential to establish just-peace at the end of war. An inquiry into the interrelationship between justice in the commencement, during, and at the end of war reveals the centrality of human rights and just peace. Conversely, *jus post bellum*'s failure is associated with discrepancies in *jus ad bellum* and *jus in bello* conditions of just-war. The study, therefore, observes an intricate relationship between the three principles of just-war. This correlation is further stressed on the importance of *jus ad bellum* criteria of right-intention and proportionality principle of *jus in bello* to rightly administer judgment for crimes committed during war. To complement the already existing laws of warfare, the paper distinguished crimes based on intention into presumptuous, not-presumptuous, and un-presumptuous. Thus, all three conditions of just-war synergistically work together to justify a just-war claim for right resort to force.

1. Introduction

"Pottery Barn rule": "You break it, you own it."¹

The above statement delivered by Secretary of State Colin Powell after the end of combat operation in the Iraq War and oft-cited by America's European allies best exhibits the nature of justice post-war (Williams & Dan, 2006). *Jus post bellum* evaluation of justice in the aftermath of war aims at what ought to happen at the end of war. In this respect, *jus post bellum* consideration with vindication of human rights and prosecution on occasion of its violation evaluates the interrelationship between the three conditions of JW. Evaluation of *jus post bellum* reveals an intricate relationship between the three principles of just-war. All are

¹ Woodward, B. (2004). *Plan of Attack* at 150.

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contributing toward JW's claim for right resort to force. Where justice at the end of war aims at the vindication of human rights and just prosecution of crimes, this correlation stresses post-war *justice* reliance on *jus ad bellum* criterion of “right-intention” and “proportionality principle” of *jus in bello* in order to rightly administer judgment for crimes committed during war. Conversely, failure of *jus post bellum* aim is associated with discrepancies in *jus ad bellum* and *jus in bello* conditions of just -war. This is apparent in the case of spillage or collateral damage which is the problem of proportionality. The paper claims that the dispensation of justice post-war depends on *jus ad bellum* criterion of “right-intention” and “proportionality principle” of *jus in bello*.

1.1 Theoretical framework

Jus post bellum condition of just-war warrant equal justice at the end of war. Post-war justice considers vindication of human-rights and prosecution on the occasion of its violation essential so as to establish just peace at the end of war. Despite its importance, *jus post bellum* is a neglected condition in a just-war domain (Bass, 2004) (Williams & Dan, 2006) (Frowe & Lang, 2014). While traditionalists consideration of the morality and justness of war has been evolving around *jus ad bellum* and *jus in bello* conditions of JW, much has not been said about what happens after a war ends (Bass, 2004) (Williams & Dan, 2006) (Frowe & Lang, 2014). In fact, the much-needed principle of *jus post bellum* condition is not adequately dealt by just war thinkers of different periods. As such, throughout just war literature, there is an overwhelming neglect to *just post bellum* condition by prominent just-war thinkers. Though Augustine, Aquinas, Suarez, and Grotius have contributed much on improving the laws of war to be more humane, yet these prominent just-war thinkers have more or less left *just post bellum* condition untouched. Similarly, Paul Ramsey, Michael Walzer, James Turner Johnson, and other modern proponents of Just-War Theory seem to have moderately dealt with the principle. Corresponding observation is made about theologians, philosophers, and lawyers who have developed and polished the theory (Williams & Dan, 2006).

1.1.1 Jus post bellum vindication of human rights

Available literature on JW also reveals a link between JWT and human rights as a sound basis of *jus post bellum*. The human rights approach to JWT justifies the undertaking of war

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on occasion of its violation and the laws of warfare. This approach recommends the undertaking of war as a last resort and in order to secure basic rights for life and liberty.

Human rights as a sound basis of *jus post bellum* consider vindication of human rights and prosecution on occasion of its violation essential to establish just-peace at the end of war. Centre to just-war concept is the protection of life, rights, liberty, property, and vindication of human rights (Williams & Dan, 2006). Prominent thinkers of the human rights approach to JW include Michael Joseph Smith (1997), Michael Walzer (2000), Robert E Williams & Dan Caldwell (2006).

JW's concern with the vindication of human rights aims at just peace at the end of war. "A just peace is one that vindicates the human rights of all parties to the conflict" (p.317). Especially of those whose rights have been violated. The subject of human rights includes non-combatants, combatants, and those combatants that have surrendered or are captured. Accordingly, JW is waged for the vindication of human rights that have been violated (Williams & Dan, 2006). Vindication of human rights for just-peace, in turn, requires the pursuit of "equal-justice" and "restoration of the status *quo ante bellum*." The following deals with this issue.

1.1.1.1 Equal justice at the end of war

Jus post bellum vindication requirement of equal justice may be pursued in the process of fair prosecution of war crimes. This means prosecution of war crimes committed on both sides or by all the parties involved and on violation of the rules of war. While, just-war recommends a rightly weighed punishment for the crimes that have been committed, it, on the other hand, prohibits the abuse of criminals or of the punishment of those who are not guilty of committing the crime. JW, therefore, aims to bring about just peace, which is possible when rights are vindicated (Williams & Dan, 2006).

1.1.1.2 Restoration of the status quo ante bellum

Other essential aspects of *jus post bellum* vindication of human rights include returning to a pre-existing condition before war. According to Orend (Orend, 2002), "the proper aim of a just war is the vindication of those rights whose violation grounded the resort to war in the

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first place” (p. 46). Therefore, one of the fundamental aims of *jus post bellum* is “the restoration of the status *quo ante bellum*² with respect to the rights of the victims of aggression”. Following the Christian conception of JW in particular, Jimmy Carter goes beyond to a state of simply returning to a pre-existing condition before war to establishing a kind of peace that clearly improves over what already exists (Bass, 2004). In humanitarian intervention, it means securing the rights of those victims whose rights have been violated by the aggressor state. Thus, the success of war depends on “the vindication of the rights for which the war was fought” (Williams & Dan, 2006, p. 361).

However, despite the importance of the human rights approach JW, this approach suffers from certain loopholes. This approach tends to dissolve human rights and human security for national security (Smith, 1997) (Walzer, 2000). In fact, the psychology of conflict and conflict resolution as "security" has failed to secure peace since it obfuscates the aim of peace with justice. This is apparent because, like never before, "security" today has become a means of fostering, implementing, and justifying draconian laws, aggressions, global control of monopolies, resource war, immigration control, and a new form of racism (Samaddar, 2014).

1.1.2 Research gap

The existing literature, therefore, reveals the following gaps:

1. That there is overwhelming neglect of *jus post bellum* condition of JW (Bass, 2004)(Williams & Dan, 2006) (Frowe & Lang, 2014).
2. That human rights approach to just post bellum tends to dissolve human rights and human security for national security (Smith, 1997) (Walzer, 2000).

1.1.3 Objective

To evaluate *jus post bellum* condition and the associated discrepancies that could have interfered with *post bellum* concern with the vindication of human rights and just prosecution on occasion of its violation.

² The situation as it existed before the war.

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2. Discussion

Since the study reveals an overwhelming neglect of *jus post bellum* condition, associated discrepancies that could have interfered with *post bellum* concern with the vindication of human rights and just prosecution on occasion of its violation will be a subject of the following evaluation.

2.1 Intricate relationship between the three conditions of JW

An inquiry into *jus post bellum* condition reveals an intricate relationship between justice before, during, and at the end of war.

Since central to JWT is human rights, the theory, therefore, not only justifies war on the occasion of human rights violation and the laws of warfare, but the concern for human rights alone could set a limit on unjust military practices. The study, therefore, observes an intricate relationship between the three principles of just-war. In that justice before and during war are important for justice post war. A general correlation between the three conditions of just-war states that any discrepancies in the principle dealing with justice post war are observed to be directly correlated with the first two conditions. This logical connection between the three conditions shows that justice after war follows from justice before and during war. Justice post war thus rests on the consideration of the conditions of justice in the commencement of war and justice during war. Hence, the claim that principles used to judge *jus ad bellum* commencement of war and *jus in bello* conduct of war determine justice at the end of war is most prominent in *jus post bellum*.

2.1.1 Justice post war in “right-intention” and “proportionality” criteria

Where justice at the end of war aims at the vindication of human rights and just prosecution of crimes, this correlation stress post bellum reliance of justice on "right intention" criterion and "proportionality principle" for right administration of judgement for crimes committed during war. *Jus ad bellum* right intention and *jus in bello* proportionality principle are indeed valid for post bellum justice at the end of war. The study further observes that in judgment, the law of proportionality relies on right-intention criterion of *jus ad bellum*. In judgment, while proportionality principle aims to ensure that punishment fits the crime

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(Williams & Dan, 2006), right intention criterion purpose that punishment sanctioned accords with the nature of crime committed.

Jus post bellum efforts to promote justice for crimes committed against peace and for war crimes aim that punishment fits the crime (Williams & Dan, 2006). *Therefore, post bellum* justice at the end of war requires the synthesis of right intention criterion and proportionality principle. Since there is an intricate relationship between the three conditions of JW, both are paramount for justice in the aftermath of war. *Post bellum* justice at the end of war requires right intention. Right intention aims at waging of war for right reason. Augustine, Aquinas, and Hugo Grotius (1583-1645) recommend undertaking war specifically for right reason. The undertaking of war for right reason prescribes that war must not be driven by fear or greed, or cruelty but should be waged to secure peace by coercing the wicked and helping the good. Instead, they recommend war in pursuance of what is right. According to Grotius, war is permissible when “good faith”- honest and sincere intention is maintained (Grotius, 2006) (Vorster, 2015). Proportional standard, on the other hand, requires that war be fought in a manner that represents a proportional response to the wrong to be avenged (Alexander, 2020). The principle is also concerned with right resort to force and therefore asserts proportionality of the means used in achieving a goal (Vorster, 2015) (Seth, 2017).

From the above consideration, we see a complete overlap between right intention and proportionality principle. Therefore, the study notes that right intention is prerequisite in judgment since proportionality principle rests on *jus ad bellum* right intention for its validity.

The study further observes compromise of proportionality principle and right intention responsible for "spillage," which is a military euphemism for collateral damage and for indifference to administer just prosecution for crimes committed. In this regard, the following section will discuss how the compromise of proportionality principle and right intention criterion came about in modern just-war theory (MJWT).

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2.1.2 Compromise of “proportionality principle” and “right intention” criterion

MJWT fails to observe proportionality principle on account of moral indifference (Solomon, 1996) (Vorster, 2015). Further, it is noted that *jus in bello* compromise of proportionality is rooted in the neglect of *jus ad bellum* right intention.

Just-War intention is paramount because true peace can only be based on “right intention” (Sinha, 1984, p. 33). The intention is the act of foreseen consequences yet to be realized. In this sense, intention encompasses the idea of the end and the idea of the means chosen by the self (Sinha, 1984). Despite its importance, right intention criterion is often overlooked. The instance of overlooking is most apparent in modern just-war discourse. For though *just war tradition has been shaped by the teachings of Cicero, Aristotelian philosophy, medieval and Reformational Christian thought, and natural law theory, modern just war discourse seems to have relinquished some of its earlier moral roots* (Vorster, 2015, p. 56). Although traditionalists' strand of thinking highly regarded subjective elements such as virtue and right intention as important criteria for war ethics, modern just-war (MJW) discourse rarely addresses issues of character and, therefore, virtuous practices of warfare. For right intention criterion, the subjective element of JW came to be compromised in contemporary just-war (CJW) discourse when MJW discourse considers the Augustinian condition of "just cause" and "authority" as an adequate criterion over “right intention” (Vorster, 2015). Thus, while traditional JW considers containment of violence within military limits necessary (Alexander, 2020), MJWT justified and legitimized spillage or collateral damage of non-combatants in the idea of double-effect.

2.1.2.1 issue of "spillage" and "double-effect."

Spillage in war is immoral, unnecessary, unlawful, and avoidable (Vorster, 2015) (May 2007). According to Aquinas, “an act may not be intended, yet be regarded as unlawful when proper care is not taken to remove obstacles that might cause unintended injuries” (McDermott, 1997, p. 390). While Aquinas considers spillage as an outcome of negligence, according to Larry May (2007), lack of care in not removing unintentional injuries is but an act of allowing “intentional killing of innocents” (p. 1). This is associated with moral indifference in judgment (Vorster, 2015), which is responsible for the inability of competent institutions to rightly

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administer justice for the crimes committed during war (Solomon, 1996). According to Aquinas, accidental injuries to civilians happen due to a lack of overhaul in ascertaining the absence of unintended injuries. This instance is not simply a case of negligence but is rather an instance of well-intended violence directed toward non-combatants and non-combatants' objectives. For these reasons, the study is highly critical about the principle of double-effect since it not only justifies and legitimizes collateral damage, but the idea itself embodies violation of *jus ad bellum* right-intention criterion and *jus in bello* principle of proportionality. For this reason, external problem, especially a concern with the case of judgment is intrinsic in character. Hence, the inability of competent institutions to administer justice rightly is a case of moral failure. Therefore, it is observed that moral indifference not only allows injustice and unjust practices during war, but the same reason is responsible for injustice in the aftermath of war. Therefore, when it comes to judgment, proportionality principle rests on right intention.

2.1.3 Categories of crimes based on "intention."

Since proportionality principle aims to ensure that punishment fits the crime (Williams & Dan, 2006), right intention is a prerequisite in judgment. Right intention criteria, in turn, aims to ensure that punishment sanctioned accords with the nature of crime committed. Right intention criterion is vital in judgement as moral indifference in judgment render competent institution unable to administer justice post war rightly. For this reason, the thesis recognized three categories of crimes based on intention. The three categories of crimes based on intention include presumptuous sin, not-presumptuous sin, and un-presumptuous sin. These categories of crimes will be discussed in the following.

The presupposition that "All sins are great sins, but yet some sins are greater than others" (Spurgeon, 1857, p. 77) implied different shades of crime. Both sin and crime, in their etymological sense, denote an act of transgression.³ While in the context of religion, "sin" connotes an act of *transgression against divine law*⁴ "crime" in a legal context is considered

³ Transgression or 'Pasha,' a Hebrew term, is a derivative of 'Pesha,' meaning *the willful deviation from a law or a commandment*. It refers to the act of breaking away from the authority in a successive stage of rebellion. Since transgression is to breach the set rules of the law purposely, it is a presumptuous sin [J. Hodges, *What is the difference between iniquity, transgression, trespassing, and sin?* (2010)].

⁴ <https://www.lexico.com/en/definition/sin>.

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*an act of transgression towards civil law*⁵. Sin and crime are thus used interchangeably here. Civil law, which is concerned with the ethical deliberation of its citizens' right and wrong actions, is embedded in religious belief. The idea of natural law *conceived as the ultimate measure of right and wrong, as the pattern of good life ...the touchstone of existing institutions, the justification of conservatism, as well as revolution* (Passerin, 1994, p. 13), is said to have its origin in the idea of justice (Barker, 1948). Justice, in turn, proceeds from the nature of the universe, from the being of God and the reason of man (Barker, 1948). Religion is also considered necessary for the inculcation of morality. Consequently, God's existence, belief in the immortality of human souls, and belief in future rewards and punishments are the doctrine *for the foundation of all morality* (Adams, 1848, pp. 22-23). Moreover, religion and morality are considered indispensable support for “good government, political prosperity and national well-being” (Barton, 2013, p. 7025). David Barton, in his *Original Intent the Courts, the Constitution and Religion* (2013), a well-documented work on the original intent of the American founding fathers, asserted the importance of religion and morality for political prosperity, national stability, and human happiness⁶. This work asserts religion and morality as the lone *principle upon which freedom can securely stand* (Adams, 1776).

In Just-War tradition, Aquinas deliberation on killing did not permit deliberate killing in self-defense. For him, the task of taking life is subject to public authorities acting on behalf of the common good (Aquinas, 1997, p. 390) supports the fact that there are indeed “Degrees of guilt for bloodshed” (Deuteronomy 17:8 NKJV). Thus, based on the criterion of intention, the nature of crime⁷ may be distinguished as Presumptuous, Not-Presumptuous, and Un-presumptuous.

⁵ <https://www.lexico.com/en/definition/crime>.

⁶ In his preparatory declaration, George Washington, President of the United States, called religion and morality the “great pillars of human happiness” (Barton, 2013, p. 7042).

⁷ Constitutive criminology defines “crime” as “the power to deny others their ability to make a difference” (Stuart, 2000, p. 268). In this sense, *crime* is understood as *harm* and is based on “unequal power relations built on the construction of difference” (272). Accordingly, it understood crime as committed against the dignity of a person. For this reason, another facet of crime involves disrespect of people in numerous ways- all having “to do with denying or preventing us from becoming fully social beings.” In the process of social interaction, when “we (*are*

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Presumptuous sin may be defined as that which is “Committed wilfully against manifest light and knowledge” (Spurgeon, 1857, p. 1). An act is presumptuous that is acted out in total disregard to the light of *conscience and the light of affectionate counsel and kind advice* (p.2). This sin is intentional because it has been “committed with the intention of sin” (p. 4). It is “A sin committed with deliberation...with a design of sinning...for sinning’s sake” (p.4). For this reason, “Presumptuous sin” is considered to be “the chief of all sins: they rank head and foremost in the list of iniquities” (p.1).

Contrary to Presumptuous sin is Not-presumptuous sin. This category of sin is not intentional but is born out of ignorance. Its root can be traced back to aggressive human nature (Solomon, 1996). Not-presumptuous sin is not motivated by hatred but is driven by blind forces of human instinct (Deuteronomy 4:41-43). In the words of Spurgeon, “A man does not sin presumptuously, when suddenly overcome by anger, though, without doubt, there is a presumption in his sin unless he strives to correct that passion and keeps it down” (Spurgeon, 1857, p. 3).

The argument for a presumption against injustice led us back to the belief that war is immoral (Solomon, 1996) and can be rationally avoided (Gordon, 2008) (Zwolinski, 2014). This belief necessarily entails the relationship between human nature and war (Solomon, 1996). In Book 1 of *De libero arbitrio* (388-395), Augustine also discussed the role of *human free will* in the origin of evil. According to Augustine, God did not invent evil but what animates evil acts in human beings is the state of their “internal orientation” (Carnahan, 2008) (Vorster, 2015). Thus, “unless that ignorance also be wilful in which case the ignorance itself is presumptuous sin” (Spurgeon, 1857, p. 3). This brings us to Un-Presumptuous sin.

Un-Presumptuous sin is presumptuous, for it is the outcome of self-imputed or self-inflicted ignorance. The degree to which ignorance is intended determines the difference between Not-presumptuous sin and Un-presumptuous sin. Not-Presumptuous sin is a case of

treated or) become less than human; we are harmed”. This field of knowledge also acknowledged the role of human agency in the construction of order and vice-versa.

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unintended ignorance; Un-presumptuous sin, a case of intentional ignorance. Thus, while the former is a state of pure ignorance, the latter is a state of quasi ignorance.

In order to complement the already existing laws of warfare and to ensure that punishment sanctioned accords with the nature of crimes, this paper has distinguished crimes based on right-intention criteria into presumptuous, not-presumptuous, and un-presumptuous, respectively.

Other rules of warfare that were enacted with humanitarian concern and to ensure punishment of war crimes include The Nuremberg Military Tribunal (NMT)[1946]; Geneva Conventions (1949) and the Additional Protocol I (1977); Rome Statute (1998), and like institutions. Correspondingly, International Criminal Court (ICC)- a supra-international tribunal court, has established "crime of genocide", "crime against humanity," "war crimes," and "crime against aggression" as four core international crimes (Court, 2011).

We see that external problems of spillage are subjective or intrinsic by nature. Thus, the study maintains that dispensation of justice post war depends on *jus ad bellum* criteria of right intention and proportionality principle of *jus in bello*.

2.1.4 Danger of neglecting “right-intention” and “proportionality principle.”

Contrary to just-war criteria of right-intention and proportionality is the unjust practice of war. Most of which are prompted by wrong intention. There have been many instances where ‘hatred’ has come to conceptualized war. It has not only predominated the motivation of war but has also come to determine the ethics of war. Book V of Plato’s *Republic* (388-367 BC) captures a discussion between Socrates and Glaucon on the ethics of war. Here, they discussed how the idea of Greek hatred has come to distinguish the Greeks from the non-Greeks and how this idea applies to the code of conduct of war. According to this idea, while the hatred that propels a fight against another Greek may be termed as ‘faction’ for they are by nature friends; the hatred that propels a fight between the Greeks and the barbarians or the non-Greeks, whom the Greeks consider an enemy by nature is term as war proper. The code of military conduct intended between a Greek did not apply while engaging in a fight against a non-Greek (Plato, 2006). War is, therefore, intricately linked to human nature.

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According to Aquinas, the just-war intention is essential because wrong intention could invalidate the justifiability of a war (Yoder, 2009). Cicero justified war on similar ground. Cicero approved of war when his uncompromising faith in peace is challenged by treachery, slavery, and faulty peace. His conception of peace does not involve treachery (Harrer G. A., 1918, p. 27) and obviously not slavery. He says, “The name of peace is sweet, and that condition is salutary, but between peace and slavery, there is a great difference” (p. 38). He is opposed to peace when war is garbed under peace; that is when war is its hidden agenda. Despite his love for peace, and is evident from his statement, “In my opinion, we should always plan for peace, peace which will involve no treachery” (p.27). Cicero justified war when the just-war criterion of “right intention” is not fairly observed. Therefore, war under such circumstances becomes inevitable (Harrer G. A., 1918). For this reason, Aquinas strongly argued that war be waged with the right intention. “War should not be waged out of greed or cruelty but should be aimed towards securing peace, coercing the wicked and helping the good” (Vorster, 2015, p. 62).

Nevertheless, if Just War theory has to survive its standard, it has to maintain its principles, the moral conviction reflected in the just resort to force with the same fervent with which the Pacifists have pursued peace. Writing on Traditional Pacifists, Larry May says that,

They stand out from the mass of society because they do not feel that they have to act as everyone else does. Indeed, it is the single-minded pursuit of what their conscience tells them is the right thing to do that has enhanced Pacifists' moral reputation over the centuries (p.10).

Unless just war adheres to the three conditions of fighting a war justly, Larry May’s contention for the impossibility of future war as just would be true.

3. Conclusion

The study observed an intricate relationship between the three conditions of just-war. This logical connection between the three conditions showed that justice after war follows from justice before and during war. Justice at the end of war, therefore, rests on *jus ad bellum* criterion of “right intention” and “proportionality principle” of *jus in bello*. This is most

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prominent where *jus post bellum* aims to ensure that punishment sanctioned accords with the nature of crimes. To this end, based on the intention criterion, this paper has distinguished crimes into presumptuous, not-presumptuous, and un-presumptuous. If just-war is to maintain its claim for right resort to force, all three conditions of just-war must synergistically work together.

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