

# The Unjustness of the Current Incantation of *Jus Post Bellum*

by Dan G. Cox

**J***us post bellum* was originally conceived as an extension of modern just war theory. Specifically, it was aimed at examining the justness and morality of actions during war, *jus in bello*, in relationship to negotiations for peace in the post-war setting. Under the initial conception of *jus post bellum*, considerations of distinction of enemies from civilians, for example, takes on a more pointed meaning, as one has to calculate how much collateral damage is appropriate given the longer-term end-goal of successful and beneficial peace negotiations. Unfortunately, *jus post bellum* has recently been expanded to mean that the victor in the war is now responsible for the long-term well-being of the people it has defeated. This has led to a concerted outcry for post-war nation-building, which neither leads necessarily to successful negotiations, nor ensures a better or lasting peace. In fact, current conceptions of *jus post bellum* remove national interest from the equation altogether, replacing all military endeavors with one monolithic national interest—liberal imperialism.<sup>1</sup> Further, current incantations of *jus post bellum* obviate the possibility of a punitive strike or punitive expedition, even though this might be exactly what is needed in certain cases to create a better peace than existed prior to conflict.

This article is an exploration of the current incantation of *jus post bellum*. The concept of an incantation was chosen purposively, as proponents of *jus post bellum* are engaging in a dogmatic approach to war termination oblivious to the complexities and realities of conflict and, in fact, in violation of just war theory itself. In particular, *jus post bellum* violates the just war tenet of the state entering into war having a reasonable chance of success.

Because *jus post bellum* is so prescriptive and, thus, so strategically constrictive, almost no military intervention can be justified. Perhaps this is the intent of *jus post bellum* theorists, but if it is not, the current manifestation of this addition to just war theory is simultaneously unrealistic

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and dangerous.

This article will begin with a brief examination of the development of *jus post bellum*, with special emphasis on its liberal imperialist tendencies. This is followed by an explanation of the links between *jus post bellum* and the responsibility to protect. After this, *jus post bellum* is exposed for not properly considering the complexities of war through a brief case study of the unsuccessful intervention in Somalia in 1992.

This information builds to the conclusion that *jus post bellum* is unjust because it underestimates the complexity and reality of war and post-war reconstruction and will therefore create more violence over the long term rather than creating a lasting peace. *Jus post bellum* also violates the *jus ad bellum* notion of “probability of success,” as the post-war undertaking is so massive and so invasive that it is unlikely to succeed.

### **The Development of *Jus Post Bellum*: The Historical Antecedents**

Currently the two main areas of theoretical concern addressed in the just war theory literature are *jus ad bellum* and *jus in bello*. *Jus ad bellum* deals with the justness of a war, especially emphasizing the just declaration of war. *Jus in bello* applies to the way in which the war is fought. The predominant thought currently is that there needs to be a third area of just war theory dealing with the post-conflict and rebuilding and reconstruction phases of war.<sup>2</sup> This area has been dubbed *jus post bellum*.

Philosophers and international legal scholars argue that a tradition of a just peace or justice after combat has ended is not new. They correctly note that early notions of *jus post bellum* extend back to Saint Augustine and Hugo Grotius. However, modern theorists have drawn a distinction between Saint Augustine’s and Hugo Grotius’s conception of a just peace. Carsten Stahn argues that Saint Augustine was one of the

first to link war to a concept of “post-war peace” in the book *City of God*, but it was Hugo Grotius who refined the concept.<sup>3</sup> This is a common and important distinction to explore. Grotius is given primacy over Saint Augustine because Saint Augustine was exploring the concept from a state-interest viewpoint, leading to arguments of being mindful of the destruction of war in order to increase the odds of a successful surrender or peace negotiations once hostilities have ended.

**Much of DoD persists in using a twentieth-century mobilization model when other approaches would preserve limited resources...**

Hugo Grotius is more often linked to concepts such as the responsibility to protect and the current form of *jus post bellum*. Stahn argues Grotius is one of the first to address post-war concepts such as just war termination, rules of surrender, and how peace treaties should be interpreted.<sup>4</sup> Grotius is also one of the first to argue that punitive wars can be undertaken to stop another sovereign ruler from violating the human rights of his people.<sup>5</sup> While there is an obvious corollary between Grotius’s punitive wars and the notion of responsibility to protect, there is a more nuanced implication that is germane to this investigation of *jus post bellum*. Grotius’s comment on punitive strikes implies that post hostilities, the victor has a duty to ensure that the society it leaves behind respects its citizen’s human rights. This becomes the crux of the *jus post bellum* argument and also a major part of the problem with this concept from a just war perspective.

To these two most oft-cited predecessors of *jus post bellum* theory, Brian Orend adds a third, Immanuel Kant. Kant argues that when there is a clear, belligerent, aggressor state which

is successfully defeated, the winning state or coalition has a duty to establish a more peaceful and progressive social order within the defeated state.<sup>6</sup> Further Orend contends Kant is warning that war is not aimed solely at resolving the current conflict, but that it must also “contribute to and strengthen the peace and justice of the international system more broadly.”<sup>7</sup> This, too, has been brought forward into the current conception of *jus post bellum* almost verbatim.

There are other historical theorists who have been linked to *jus post bellum*, but these are the most often cited and most relevant to the current conception. The next section of this article will examine the current state of *jus post bellum* and detail the dangerous flaws with this conception.

## Modern justice after war arguments are often linked back to the peace treaties after World War II.

### Modern *Jus Post Bellum* and the Liberal Imperialism Contained Within

Modern justice after war arguments are often linked back to the peace treaties after World War II. For one of the first times “the peace settlements after WWII contained human rights clauses and provisions for the punishment of human rights abuses.”<sup>8</sup> The key here is the emphasis on human rights and, more specifically, modern scholars’ assertions that international law has matured enough to successfully impose human rights standards and constrain or even outlaw most wars.<sup>9</sup> Carsten Stahn even argues that the historical war/peace dichotomy has lost its meaning “with the outlawry of war and blurring of boundaries between conflict and peace.” The point Stahn makes regarding the blurring of the boundaries between war and peace is salient. This point is echoed in a

broader way by Everett Dolman in his book *Pure Strategy Power and Principal in the Space and Information Age*. Dolman defines strategy as a plan for seeking continuing relative advantage in a process that never ends.<sup>10</sup> If one accepts this definition of strategy, then it would imply that Stahn and others are correct in asserting that there is no hard line between war and peace. However, it does not necessarily follow that a state ought to be **obligated** to attempt to create a lasting peace by seizing the commanding heights and re-engineering a society. This point will be expanded upon further, but what is important to note is that *jus post bellum* proponents have correctly discerned a problem with past conceptions of a clear split between war and peace. They have just extrapolated from this fact incorrectly.

*Jus post bellum* is aimed at addressing broad concepts of conflict termination, peacemaking, and the post-war peace.<sup>11</sup> When a conflict actually ends can be hard to discern, and often extremist factions from the losing side will not abide by peace treaties signed by leaders they recently followed. However, assuming that hostilities have ended, Rebecca Johnson correctly argues that “all become noncombatants and have (or ought to have) their peace-time right to life restored.”<sup>12</sup> This is an uncontroversial statement, but most proponents of justice after war go further, arguing that more than the simple restoration of the basic human right to life is necessary.

Justice after war, according to proponents, has to produce a higher level of human rights protections than existed *prior to war*.<sup>13</sup> The proponents of a better post-war human rights standard do not even engage in the debate between economic and social rights and Western notions of individual human rights. Despite the fact that two separate UN protocols deal with each of these types of rights separately,<sup>14</sup> proponents of justice after war clamor only for individual civil and political human rights. They

blithely ignore not only any local cultural context that might exist, but also any reference to non-Western notions of human rights. Ironically, their arguments fly in the face of the UN covenant on civil and political rights that states, “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Apparently, since a conflict ensued, this right to self-determination no longer applies. There is another insidious assumption with the justice after war movement, namely that the victor will be just. Once a standard of post-war reconstruction of society is engendered, there will be no way to stop an unjust but more powerful society from appealing to it and using it. Justice after war proponents will argue this does not apply to their abstract philosophical claims, but once philosophy is applied to the real world, it will become a very real concern.

### **Imposing Democracy as Well as Human Rights**

Most arguments for *jus post bellum* go further than simply arguing for an imposition of Western civil and political human rights. There is also a call for transforming the conquered nation into a Western-style democratic republic. Inger Osterdahl and Esther van Zadel argue that the only goal of any military intervention should be to leave the state that an individual state or coalition of forces has invaded in “a higher level of human rights protection, accountability, and good governance [sic].”<sup>15</sup>

Similarly, Johnson argues that the occupier must create a “durable peace” in which the defeated state can maintain human rights standards, many argue better rights standards, independently from outside aid or intervention.<sup>16</sup> Orend echoes this sentiment, forcefully arguing that one the main goals of *jus post bellum* is “coercive rehabilitation of a defeated aggressor” in the form of regime change.<sup>17</sup> Orend briefly

seems to flirt with the complex reality of socially constructed communities when he notes that the goal should not be to strive for perfect democratic governance, but instead what he calls a “minimally just political community.” Unfortunately, Orend defines a “minimally just political community” as one that would avoid violating the rights of other such communities. This amounts to the new community refraining from warfare or other invasive interventions in like communities to gain and keep international recognition as a just community and to fully realize the rights of all its citizens.<sup>18</sup> Far from

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being a minimal standard, this is actually an exceedingly high standard that few, if any, states have achieved. This again speaks to the unrealistic and single-solution aspects inherent in arguments laid out by *jus post bellum* advocates. States in the world containing myriad, complex cultures; peoples; terrain; and levels of economic development are unlikely to willingly acquiesce to a foreign invader, even after being defeated. Further, there is no evidence that complex problems are often or even ever successfully dealt with by applying the same solution to every situation. In fact, attempting to force Western-style democracy and human rights standards on non-Western states and peoples could bring about a state of lasting conflict. But even Michael Walzer would lead us down a far more interventionist path. In his seminal work *Just and Un-Just Wars*, he argues that any state that has the ability to stop a mass atrocity or genocide has a right to do so.<sup>19</sup> When this is taken even more forcefully to the modern limits of the

responsibility to protect argument, right turns into duty, and any known mass atrocity must be stopped by outside states with the might to do so. If the logic presented so far is followed through to its natural conclusion, then the U.S. would be bound to intervene in dozens of developing states and force lasting democratic and human rights changes on these peoples whether the local people wanted them or not.

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Some scholars on *jus post bellum* do not subscribe to the post-war intervention outlined above and should be mentioned here. Doug McCready correctly notes that democratic governance is the most desirable end state, but that it currently may not be achievable in many countries. He even argues that forcing democracy on a state could be detrimental to long-term peace and stability. Unfortunately, while he admits that forcing democracy on a system might not work, he still contends that the post-war peace must bring about a “more just society” than existed prior to the war.<sup>20</sup>

Eric De Brabandere is one of the only scholars to acknowledge there can be different reasons and goals for military intervention. He argues that not all intervention implies a post-conflict responsibility. He notes that a war of self-defense not only does not imply a post-war reconstruction responsibility, but the whole notion in this situation becomes incomprehensible.<sup>21</sup> De Brabandere is one of the few post-war scholars who acknowledges at least some level of complexity in warfare.

Punitive military actions also come to mind as a form of warfare between states that may not imply a post-war responsibility. Since the goal of the punitive military action is to punish the other

state, rebuilding that state seems contradictory. Also, the punitive strike can have a particular military capability as its target, and once this capability is destroyed, there is often little reason to attempt to occupy or to continue occupation.

Cyberwarfare, too, seems problematic under this current conception. For example, should the Western nations responsible for the Stuxnet cyberattack have occupied Iran and forced democratic and human rights reforms? This seems ludicrous, but under the current majority scholarly opinion, it is not outside the bounds of responsibility.

Even if one leaves the concerns of varying forms of warfare out of the debate, the complexity of warfare and the social systems that engage in warfare make the strong claims of *jus post bellum* proponents fall apart. The U.S.-led UN intervention in Somalia exemplifies this conclusion.

### **Somalia and *Jus Post Bellum***

One of the most egregious assumptions of *jus post bellum* proponents is that nation-building is easy and appropriate for every post-conflict situation. This false assumption mirrors what one finds in the responsibility to protect camp.<sup>22</sup> The recent history of armed nation-building has shown that it can sow as much disruption and violence as the actual military intervention itself. In some cases, especially in peacekeeping and humanitarian military intervention, forcing democracy and Western human rights standards on the fragile state system can cause more lasting violence than the military intervention. Somalia is a good example of this worst-case scenario and a clear indication of what is likely to happen post-conflict if *jus post bellum* adherents begin to have a larger influence on U.S. foreign policy.

Somalia has had a short but very turbulent post-colonial history. Suffering a long dictatorship under Siad Barre from 1969 to 1991, which did little to increase the economic prosperity of Somalia, the underlying

clan hatreds were ready to boil over almost immediately after his ouster.<sup>23</sup> The level of deterioration of Somalia by 1992 caused many to label Somalia as the world's first modern failed state. The economic privation coupled with a drought caused malnourishment and starvation to become widespread in Somalia.

President George H. W. Bush was moved by the calamity in Somalia and authorized U.S. forces to intervene and distribute much needed food aid into a violent and chaotic situation on the ground. The U.S. eventually sent 28,000 troops to lead a multinational coalition called Operation Restore Hope.<sup>24</sup> The 1992–1993 U.S.-led Somalia mission began as a food aid and humanitarian assistance mission and transformed into a large, multinational, military mission.<sup>25</sup> Even though the commitment to humanitarian aid expanded over time, the result was largely successful, as normalcy began to return to Somalia and the starvation ended.

Unfortunately, besides starvation being alleviated, a multipronged internal conflict had been raging that also began to subside at around the same time that the food crisis was ending. In the Somali capital, Mogadishu, one particularly brutal warlord, Mohamed Farrah Aidid had gained primacy, and the people of Somalia were slowly beginning to recognize Aidid as a national political leader.

In the U.S., Bush was leaving office, and his successor, President Bill Clinton, wanted to enact what amounted to *jus post bellum*. Even though the term had not been coined in 1993, the actions of the Clinton Administration and the U.S.-led nation-building mission, UN Operations in Somalia II (UNOSOM II), mirrored exactly what proponents of justice after war have advocated.<sup>26</sup>

Despite wanting to rebuild and democratize Somalia, Clinton desired some political cover in his first major foreign policy foray. Control of the mission transitioned to the UN. UNSC Resolution 814 dealing with this change in mission was unanimously passed, and

UNOSOM II commenced. Chapter VII of the UN Charter was invoked to continue the foreign military occupation, and the violation of Somali sovereignty was justified given massive human rights abuses and a total breakdown of national governance. This is exactly the situation and response that justice after war proponents clamor for.

UN Resolution 814 was a unique watershed resolution declaring the instability and human rights abuses in Somalia were a threat to international security. Resolution 814 was also unique in tasking a peacekeeping/peacemaking mission with broad economic, social, and political goals. Resolution 814 was a nation-building mandate in Somalia, but Clinton felt that the warlords had to be kept from fighting first. Ironically, Clinton also desired cutting the number of U.S. forces in Somalia and ended up leaving a little more than ten percent of the original 25,000 U. S. troops in place for the post-conflict nation-building and disarmament phase of the operation.<sup>27</sup>

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Unfortunately, the post-conflict, nation-building phase soon erupted into violence. One of the main reasons U.S. and coalition troops under the UN mandate were attacked was that Clinton and the UN refused to allow Aidid to participate in the nation-building effort. Since Aidid's recent military and political gains were tenuous, he saw this slight as a direct threat to his aspirations of becoming the Somali president.<sup>28</sup> Aidid began to portray the UN troops, especially the U.S. soldiers, as colonizers. He was able to convince his supporters to violently resist the UN occupation. The ironic thing about these

events is that Clinton and the UN did exactly what *jus post bellum* argued must occur post-conflict. The UN coalition attempted to reform the economy; democratize the Somali state; and at least refused to acknowledge leaders, such as Aidid, because of their wartime human rights abuses. If anything, justice after war proponents would argue that Aidid should have been hunted down and tried for his crimes immediately.

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After an attack orchestrated by Aidid that resulted in the deaths of four U.S. Army military policemen, Clinton decided to up the effort to capture or kill Aidid. But Central Command General Joseph P. Hoar worried that the odds of capturing and killing Aidid were low, and that his capture would only result in another brutal warlord filling the void Aidid left behind.

Clinton ordered in a special operation force (SOF) consisting of Delta Force commandos, a helicopter detachment, and Army Rangers to capture or kill Aidid. Nation-building had turned into offensive operations against Aidid and his militia. Aidid continued to ramp up the pressure on the UN mission and the U.S. leadership through indirectly attacking affiliated peacekeepers.<sup>29</sup>

Aidid continued to fight the UN forces. In one particularly heinous attack, 24 Pakistani peacekeepers were killed at two separate aid locations on the same day by a mob of Aidid's supporters. The UN and Clinton were shocked at this attack, for UN peacekeepers had been considered off limits from direct attack while on peacekeeping missions. Clinton ordered the SOF in Somalia to ramp up their attempts to capture or kill Aidid.

Aidid and his military advisors correctly identified the Black Hawk helicopters as a key vulnerability in U.S. missions. Not only were Black Hawks lightly armored, the U.S. military was flying them low, near building rooftops and allowing them to linger there to provide supporting fire. Aidid thought that he could bring one down, and that U.S. forces would rush in to aid their fallen comrades. Aidid then planned to shoot at U.S. forces from above creating enough casualties that the U.S. would consider leaving. On October 3, 1993, Aidid's forces experienced monumental success that resulted in two downed Black Hawks and a firefight with U.S. forces that lasted almost two days.

In the end, 18 U.S. soldiers were dead and dozens wounded. Hundreds of Aidid's forces were killed and over one thousand more wounded. After the attack, Aidid ordered his supporters to drag dead U.S. soldiers in front of CNN news cameras in an attempt to shock the American public and American leaders into withdrawal. This media operation worked, and Clinton ordered the immediate withdrawal of all remaining U.S. forces.<sup>30</sup> A token UN peacekeeping force would remain until 1996, and even though Aidid won the day, Somalia has never recovered and remains the penultimate example of a failed and fractured state. The application of *jus post bellum* tenets actually made things worse in Somalia.

## Conclusion

Most *jus post bellum* advocates argue for occupying military forces imposing a Western human rights standard, economic growth, and a Western-style democratic republic. Despite any cultural, economic, historical, or other pre-existing conditions within the occupied state, justice after war adherents believe that all post-war situations can be dealt with the same way. Not only does this prescription fly in the face of the complexity of social systems, it denies the recent history of armed nation-building. Somalia

serves as a case in point of what can happen when the current incantation of *jus post bellum* is forcefully applied. Somalia also shows that what happens post-conflict can actually trigger more violence if improperly handled. By refusing to deal with the next, most likely, political leader, no matter how distasteful, the UN mission was doomed to fail. The U.S. and UN could have left Somalia after the starvation was alleviated without enraging local leaders, but that violates everything currently argued in *jus post bellum*.

For the reasons outlined above, *jus post bellum* is itself unjust. By forcing a single solution on all complex post-war situations, the risk of the post-conflict phase going horribly wrong is extremely high. This means that adhering to the *jus in bello* tenet of “reasonable chance of success” becomes an almost impossible expectation prior to almost any military conflict. Further, restructuring an entire state’s society regardless of the people’s wishes hardly seems proportional in every case of military intervention. Therefore, *jus post bellum* violates the *jus in bello* tenet of proportionality of response.

Beyond this, *jus in bello* assumes there is a silver bullet solution that will create lasting peace within every state. It is a denial of complexity that is hard to comprehend. Often there are no “good guys,” those who have not violated human rights by Western standards, after a protracted internal conflict. Still, justice after war is unmoved by the complexity of modern conflict and the diversity in world cultures. **IAJ**

## NOTES

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2 See for example, Carsten Stahn, “*Jus Post Bellum*: Mapping the Disciplines,” *American University Law Review*, Vol. 23, No. 2, 2007, pp. 311–346; Robert R. Williams and Dan Caldwell, “*Jus Post Bellum*: Just War Theory and the Principles of Just Peace,” *International Studies Perspectives*, No. 7, 2006, pp. 309–320; and Kristen E. Boon, “Obligations of the New Occupier: The Contours of *Jus Post Bellum*,” *Loyola of Los Angeles International Comparative Law Review*, Vol. 31, No. 57, 2009, pp. 57–84.

3 Stahn, p. 313.

4 Ibid.

5 Hugo Grotius, *The Rights of War and Peace*, Richard Tuck, (ed.), Liberty Fund Publishers, Indianapolis, IN, 2005, p. 154.

6 Brian Orend, “*Jus Post Bellum*: The Perspective of a Just-War Theorist,” *Leiden Journal of International Law*, Vol. 20, 2007, p. 575.

7 Ibid.

8 Stahn, p. 318.

9 See for example Annalisa Keoman, “A Realistic and Effective Constraint on the Resort to Force? Pre-Commitment to the *Jus in Bello* and *Jus Post Bellum* as Part of the Criterion of Right Intention,” *Journal of Military Ethics*, Vol. 6, Issue 3, 2007, pp. 199–200, for an argument of pre-commitment constraining war-making abilities of the state, and Orend, 2007, for a broader explanation of the alleged legal constraints of war between states.

10 Everett Dolman, *Pure Strategy: Power and Principal in the Space and Information Age*, Routledge, London, 2004, p. 4.

- 11 See Orend and Stahn.
- 12 Rebecca Johnson, "Jus Post Bellum and Counterinsurgency," *Journal of Military Ethics*, Vol. 7, No. 3, 2008, p. 219.
- 13 Inger Osterdahl and Esther van Zadel, "What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles," *Journal of Conflict and Security Law*, Vol. 14, No. 2, 2009, p. 5; Johnson, p. 220; Orend, p. 581; and Doug McCready, "Ending the War Right: *Jus Post Bellum* and the Just War Tradition," *Journal of Military Ethics*, Vol. 8, No.1, 2009, p. 73. It should be noted that McCready is arguing broadly for a more "just society."
- 14 See the International Covenant on Economic, Social, and Cultural Rights, adopted by the General Assembly of the UN on December 16, 1966, and the International Covenant on Civil and Political Rights, adopted by the General Assembly of the UN on December 19, 1966.
- 15 Osterdahl and van Zadel, p. 5.
- 16 Johnson, p. 220.
- 17 Orend, p. 581.
- 18 Orend, p. 582.
- 19 Michael Walzer, *Just and Un-Just Wars*, 4<sup>th</sup> edition, Basic Books, New York, 2006.
- 20 McCready, p. 73.
- 21 Eric De Bradandere, "The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept," *Vanderbilt Journal of Transnational Law*, Vol. 43, No. 119, 2009, p. 134.
- 22 See, for example, arguments made by responsibility to protect proponents in Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Brookings Institution, Washington, 2008, and Sarah Sewell et al., *Mass Atrocity Response Operations: A Military Planning Handbook*, Harvard Kennedy School Publishers, Harvard, MA, 2010.
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- 29 Stewart, p. 8.
- 30 Baumann and Yates.