

Jus Post Bellum and Responsibilities to Refugees and Asylum Seekers

Written by Laura E. Alexander and Kristopher Norris

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LAURA E. ALEXANDER AND KRISTOPHER NORRIS, FEB 6 2020

In 2019 President Trump cut the United States's annual refugee cap to 18,000. As part of the administration's consistent attempts to limit asylum-seekers, immigrants, and refugees from entering the country, this act severely restricts the available opportunities for those fleeing war and persecution to resettle in the U.S., previously the world's leading destination for refugees. Just three days later at a mass for the World Day of Migrants and Refugees, Pope Francis rebuked states that sell weapons to aid conflicts in other states but refuse to accept refugees displaced by those conflicts. Francis's statements remind his listeners that Catholic clergy and theologians have long been at the forefront of discussions about both just war theory and the treatment of refugees and immigrants. Recent expansions of the just war tradition, in Catholic thought as well as other areas of theological and philosophical scholarship, provide new modes of reasoning that shine light on the issue of responsibility for asylum-seekers and refugees.

This essay applies the emerging theory of *jus post bellum* (justice in the aftermath of war) to the question of responsibility for refugees and asylum-seekers. It argues that the principles of *jus post bellum*, especially the claim that states that participate in a war have a special responsibility to those displaced by that conflict, also extend to broader cases of colonialism and outside military intervention in internal conflicts. First, we examine the principles of *jus post bellum* to show that the victors of wars, especially states that intervene in the affairs of other states, have moral obligations to people who are displaced by those conflicts. Next, in accord with the message of Pope Francis, we extend *jus post bellum* principles to cases of states that send weapons, soldiers, or other forms of interference to aid one side of an internal conflict in a neighboring state. We argue that those states have responsibilities to protect the rights of, and usually to resettle, the refugees and asylum-seekers who flee the violence and instability that has been generated by the interventionist action.

In so arguing, we are nuancing and extending a theory that is still nascent and developing. *Jus post bellum* principles, even those that primarily affect the state in which a war took place, are still in the process of being articulated. But the consequences of war never remain within the boundaries of the state in which it takes place. Applying *jus post bellum* principles not only to obligations to rebuild institutions within a state affected by war, but also to refugee resettlement in other states, helps make better sense of the nature and scope of those principles while articulating a clearer basis for states' responsibilities to refugees and asylum-seekers.

In the following sections, we will first lay out that argument and then concretize it, using the situation of El Salvador as a case study. Specifically, we will argue that the impact of U.S. intervention in El Salvador in previous decades means that the U.S. has a special obligation to accept asylum-seekers from that country, rather than targeting them for removal or cutting the numbers of people who can resettle safely.

Jus Post Bellum

Theorists including Mark Allman and Tobias Winright (2012), Lisa Cahill (2019), and Larry May (2012) have dealt with the question of how justice can be done in the aftermath of war, incorporating perspectives from both Christian just war thought and International Relations and law. Those who study war generally agree that a *just* war should leave behind a more peaceful and well-ordered world. Fighting should, of course, end. When it does, a more just

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order should be established: fair and equitable political and social institutions should be built or rebuilt, and people should be able to live in safety and to have a place and voice in a stable political and social order.

Jus post bellum became popularized in the wake of the failed peace following the 2003 U.S. invasion of Iraq, but it first emerged as a clearly-defined category in 2000 in the scholarship of philosopher Brian Orend. Orend hewed closely to existing principles of *jus ad bellum* and *jus in bello* to articulate a set of principles that place *jus post bellum* in the context of international commitments to self-determination and human rights. Orend (2007: 587) says that the primary aim of a just war is “a *more secure possession of our rights*, both individual and collective.” The most “plausible” principles to govern justice after war are:

- Rights vindication: most importantly, the restoration of individual rights to life and liberty and community rights of territory and sovereignty
- Proportionality and publicity: a measured, clearly articulated and publicly understood peace settlement
- Discrimination between leaders who have violated rights or fought an aggressive war, soldiers who fought, and civilians who should not be punished in sweeping ways
- Proportionate punishment to the rights-violating regime
- Reasonable financial compensation to victims of unjust acts
- Political rehabilitation of a rights-violating or aggressive regime (Orend 2007: 580-81).[i]

Despite ongoing discussion, Orend’s approach has become broadly representative of the state of the discussion in both scholarly and international diplomatic circles.

Theologians who engage in this area generally take, in the words of Adrian Pabst (2007), a less abstract and more embodied approach than Orend does, and they often tilt the emphasis away from a strictly rights-based approach and toward reconciliation and peacebuilding. Allman and Winright (2010), for instance, see just cause as a framing category for three criteria, which are shared between both “minimalists” like Orend and “maximalists”: compensation, punishment, and restoration.

While all parties involved in a war should ideally attend to these three principles, they are understood especially as guides for the conduct of the party who has won. Robert Williams (2014: 175) writes that following the Second World War, the victors of a war “are now widely regarded as having obligations toward the vanquished, or at least toward the people of the losing side who may themselves be considered victims of war.” This includes ensuring people’s right to subsistence. (Williams, 2014: 173). Just combatants must take full responsibility for their share of the material burdens of the conflict’s aftermath (Evans, 2009: 157). In short, if you win a war, even a just war fought against an unjust aggressor, you must provide for the civilians who have been harmed by the war.

One problem, though, is that contemporary conflicts – and even many historical ones – do not always have a clear beginning, and they *very* commonly do not have a clear end. This presents a problem for the use of principles to guide justice “after” war. As early as the seventeenth century, Thomas Hobbes compared war to a storm: conflict may be brewing even when there is no active battle. And recent history has shown us that some trace of a war will often remain. There may be no “aftermath” to war, but only a residual state of conflict and insecurity. This violence is not necessarily conducted by state actors, but it can still be shown to have been directly caused by civil war and outside intervention.

Post-war instability is a particular problem for displaced persons. If a person’s home is gone and their security cannot be guaranteed, even if a war is technically “over,” they do not really have a chance to return to the country they left. This is true in our example of El Salvador: the country had the highest murder rate of a state not actively at war in 2015, and the rate of violence and homicides remains high to this day (Labrador and Renwick, 2018). If human suffering of this sort is to be mitigated, scholars and leaders must get clear on states’ responsibility to refugees from violence, including violence that persists after war.

Responsibility to Refugees

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Using the criterion of restoration (or compensation), some scholars of *jus post bellum* have argued that any state that participates in a war has special obligations to displaced refugees. This special obligation holds regardless of whether the state won or lost the war, though victors may have greater obligations because they are in a better position to fulfill them (Orend 2007: 578). Nor does it matter whether a state was an unjust aggressor or intervened, justly or not, in an ongoing conflict. Anna Floerke Scheid (2012: 155, 164) argues that revolutionaries, too, must be prepared for just post-conflict reconciliation and speaks approvingly of the case of South Africa, where both anti-apartheid revolutionaries and some reformers from the apartheid regime attempted reconciliation.

Allman and Winright, drawing on the report of the International Commission on Intervention and State Sovereignty (ICISS), argue that refugees will often need timely resettlement after war. The ICISS report originated the principle of Responsibility to Protect (R2P) that would be adopted in 2005 by the United Nations, and it has come to influence discussions of sovereignty and responsibility among scholars and diplomats. It says that the obligations of states and international institutions include “ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons.”[ii] Allman and Winright (2010: 163-164) deepen this moral argument by invoking the preferential option for the poor laid out in Catholic Social Teaching. When the preferential option for the poor is allowed to shape the responsibility to rebuild after violent conflict and crimes against humanity, then the need to “safeguard the innocent and vulnerable” in the aftermath of conflict is particularly highlighted. Allman and Winright specifically identify refugees and displaced persons as in need of safeguarding, because these vulnerable groups bear the greatest burdens of war.

Pope Francis (2019) makes a similar argument, also rooted in Catholic Social Teaching, in his address on migration cited at the beginning of this essay. He notes that it is “the poorest of the poor and the most disadvantaged who pay the price” in violent conflicts. Francis argues that a rising ethos of individualism and utilitarianism in “advanced societies” has led them to shirk their broader collective responsibilities for the injustices they cause, especially responsibilities to refugees and displaced people. The responsibility to accept refugees and asylum-seekers obtains more strongly, he claims (2018), for the “destination countries” of those fleeing “countries which cannot guarantee respect for human dignity and fundamental rights,” such as those destabilized by violent conflict or war.

If all states that participate in a war have *some* special obligation to refugees, the obligation is surely even stronger for a state which intervenes militarily upon another. Intervening states fulfill their R2P duty in part by admitting refugees from the country in which the intervention took place. In a sense this is a life-or-death version of the “you break it, you buy it” warning many shops post on their walls. Scholars who work on *jus post bellum* generally approve of the intuition (Orend, 2007: 577-578; Cahill, 2019: 178) that when a state initiates the use of force, it is responsible for the outcome, including to people displaced by force. Veronique Zanetti (2019: 305) recognizes that some obligations rest on the entire international community, but she argues that “states that cause the flight of civilians due to the violent politics of a war should be held accountable in a stronger way, either by taking in refugees of war or by paying more [into a global refugee fund].” Similarly, according to just war theorist Joseph Carens (2013: 195), “Sometimes we have an obligation to admit refugees because of the actions of our own state have contributed in some way to the fact that the refugees are no longer safe in their home country.” This is true even if the situation in which the state intervened was unjust. To take one example that has invigorated discussion of *jus post bellum* principles, the United States clearly had an obligation to secure the country of Iraq and protect its citizens, including refugees, after the 2003 U.S. invasion. That responsibility remains even though the government the U.S. overthrew blatantly disregarded the human rights of its people.

So far we have spoken of war. However, many interventions that fall short of full-out war also cause displacement and violence – sometimes even more than does open war. Examples include covert operations, or one country’s training of another’s military or paramilitary forces during a civil conflict. Given that these sorts of interventions have largely come to define war in the late 20th and early 21st centuries (Cahill, 2019: 170), and that they very often cause ongoing instability (DeLugan, 2005: 236; Fearon and Laitin 2003: 77-78), a state that engages in these actions retains special obligations to people displaced by the conflict it has helped to provoke or prolong, so long as unrest and/or violence continue. Political theorist David Miller (2007: 119, 131) draws on the work of Michael Walzer to claim that responsibilities to displaced persons, as well as victims’ rights to compensation, extend temporally even to future generations.[iii] Some states that have historically been colonizers have acknowledged their obligations, and

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special ties, to people from former colonies which continue to suffer instability traceable to the legacy of colonialism. The United Kingdom and France, for instance, have placed less restrictive policies on immigration and naturalization of people from former colonies (Bleich, 2005: 183).[iv]

Similarly, the United States has intervened in the affairs of multiple Latin American countries in ways that can be accurately described as colonialist, including during the 1980s and 90s, through military training, sales of weapons, military funding, and other forms of aid to oppressive governments (Livingstone, 2013; Grandin, 2006). Thousands of refugees have been displaced by civil war in those countries, including El Salvador and Guatemala. Based on the special obligations interveners in war have to refugees, the U.S. owes refuge to people who have fled conflicts that it participated in, which continue to destabilize those countries to this day.

US Responsibility to El Salvador

When one walks into the chapel at the University of Central America in San Salvador, the site where six Jesuit priests and two caretakers were massacred by members of a U.S.-trained Salvadoran government battalion in 1989, an altar painting depicts the \$1 million per day that the U.S. government gave to the Salvadoran military during the Carter and Reagan administrations. This aid supported the right-wing government during its “dirty war” against Marxist Farabundo Martí National Liberation Front (FMLN) guerillas from 1979-1992. The U.S. cannot be understood as a conventional aggressor nation in the case of El Salvador: it did not declare war or even send troops into El Salvador’s sovereign territory. Yet, with the stated aim of curbing the spread of Communism during the Cold War years, it significantly impacted both the fighting and the outcome of the war through its financial and logistical support (Crandall, 2016).

More than 75,000 lost their lives during the civil war. A United Nations Truth Commission discovered that more than 85% of the killings, kidnappings, and torture were the work of government forces, which included paramilitaries, death squads, and military units trained by the United States. One of the worst atrocities occurred in December 1981 when the Atlacatl Battalion massacred about 900 men, women, and children in the village of El Mozote after a three-month counterinsurgency training course in the United States (Danner, 1993: 49); this was the same battalion that would murder the priests eight years later. The Reagan administration steadfastly denied there had been a massacre by government troops, and the State Department and White House often sought to cover up the brutality. In addition to the significant loss of life and displacement of people, the war also resulted in the loss of many civil society leaders (Bob and Nepstad, 2007: 1381-82), which had a profound impact upon the stability of the society, with the result of maintaining high rates of illiteracy and poverty.

Millions of people displaced by the civil war fled the country, many of whom found a home and employment in the U.S. The displaced youths who came with them, who had grown up only knowing violence and fear, created the MS-13 and 18th Street gangs on the streets of Los Angeles (Wolf, 2012: 70-71). In the late 1990s the U.S. began deporting thousands of convicted gang members back to El Salvador each year. “In the vacuum of weak governance and poverty in their home country,” journalist Jason Motlaugh writes, “gang members reproduced their social structures and tactics and multiplied exponentially.” In the 1990s, President Clinton allowed the “temporary protection status” of many Salvadoran refugees to expire (as Trump now actively seeks to do again), and “thousands of the refugees sent back were young men, who had either deserted from the army or the guerrillas during the war,” writes Raymond Bonner. “And when they got back to El Salvador, with little beyond their fighting skills, they formed the nucleus of the gangs.” With 103 murders per 100,000 people, El Salvador was recently considered to have the highest homicide rate of any country not actively at war (Labrador and Renwick). The gangs now control large swaths of territory in the country, which has spawned hyper-violence and economic despair, effectively imprisoning citizens within their neighborhoods, and “driving tens of thousands of Central Americans north to the U.S.”

U.S. intervention in El Salvador, in tandem with immigration policy, helped stoke a conflict and increased its lethality; denied relief to those fleeing the conflict itself; and, with the deportation of gang members, further intensified violence and terror over decades. The ongoing volatility and forced displacement after the supposed end of the war bears a strong resemblance to the U.S. invasion of Iraq in 2003 that provoked so much thought about *jus post bellum* concerns. The Iraq invasion resulted in instability, ethnic conflict, and insurgent fighting between Shiite and

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Sunni groups, with significant forced displacement beginning three to four years *after* the war concluded; 89% of those displaced claimed that they fled because of sectarian violence that resulted from the instability *following* the invasion, rather than the U.S. invasion itself (Banta, 2008: 269). Similarly, many Salvadorans continued to flee once the official war was over, and as we have shown, U.S. actions played a major role in the displacement of the thousands who have, for decades, ended up in the U.S. or at its border, seeking asylum (Montes, 1988; Hackman and Montes, 2019). As Xochitl Sanchez of the Central American Resource Center (CARECEN) in Los Angeles says, “the US has a moral and social responsibility to this population of immigrants as they are complicit in the creation of the conditions of forced migration from the country.” We have argued that this is, specifically, a *jus post bellum* obligation: the responsibility of a country that intervened in a foreign war, which now “owns” the work of restoration and justice that comes after.

Conclusion

The message of Pope Francis draws on the developing principles of *jus post bellum* to demand that states that intervene militarily in the affairs and conflicts of other states, even by selling weapons or training military, commit themselves to responsibility to those displaced by their intervention. We agree with Francis’s claim and have argued that this responsibility is due even to those who continue to flee the instability that lingers far after the official war has ended. To extend Hobbes’ metaphor, there is not always a calm after the storm of war, and colonialist powers and interventionist states like the U.S. in the situation of El Salvador and other Central American states cannot absolve themselves of responsibility to the instability and injustice that remains because of their action. Instead of closing off the southern border and restricting refugee and asylum numbers, the U.S. is morally obligated to welcome and resettle those fleeing the violence that remains after the storm has passed.

Notes

[i] See also, Orend, “Jus Post Bellum: A Just War Theory Perspective,” in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann Kleffner (Cambridge Univ. Press, 2008), 40-41. His earliest set of principles included: just cause, right intention, public declaration, legitimate authority, discrimination, and proportionality (Orend. (2000). “Jus Post Bellum,” *Journal of Social Philosophy* 31(1); (2002). “Justice After War,” *Ethics and International Affairs* 16; (2002) *War and International Justice: A Kantian Perspective*. Wilfred Laurier University Press).

[ii] Report of the International Commission on Intervention and State Sovereignty (ICISS), “The Responsibility to Protect,” December 2001, 40. The World Summit Outcome document that established R2P at the U.N. does not directly mention refugees.

[iii] Referencing, Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), 297. Just as one inherits the material benefits of one’s national identity, accumulated over time, so one inherits the responsibility of national membership (Miller, 161).

[iv] See <https://www.gov.uk/british-citizenship> and <https://www.gov.uk/guidance/windrush-scheme>.

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