# *Jus ex Bello* in Afghanistan

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In the ten-year period that the war in Afghanistan has been prosecuted, regrettably few articles have been written that both apply an understanding of just war theorizing and pay careful attention to the facts on the ground. For this reason, in addition to the importance of its criticisms of the war, Richard W. Miller's article "The Ethics of America's Afghan War" in this issue of *Ethics & International Affairs* commands our attention.

The focus of my comments is on Miller's understanding of just war theory and its application to the war in Afghanistan. I agree that just war theory is limited when it comes to judging whether and how to end a war—regardless of whether or not the war satisfies the criteria of *jus ad bellum*. I have argued that point in some detail elsewhere.[1] But I think that Miller fails to understand adequately what these limitations are and the extent to which they can be addressed within just war theory. Moreover, his application of the considerations of just war theory is inadequate to the task of assessing the war options confronting the United States today.

I shall not oppose Professor Miller's claim that the United States should seek a political settlement with the Taliban in the Pashtun South and East. But I shall take issue with some of his moral reasoning, including which criteria are relevant to the judgment about whether and how to end the war and how the relevant criteria should be employed. And, as will become clear, I have less confidence than he does in his arguments that support the recommendation to seek a settlement—an argument that rests heavily, as it must, on empirical forecasts about the likely outcomes of various policy options. I do not think that his arguments provide convincing support for his claim that the foremost responsibility of citizens in relation to the war is to contribute to a movement calling for rapid withdrawal of U.S. troops.

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## *Jus ex Bello*

In the just war tradition considerations of *jus ad bellum* govern the morality of resorting to war, while those of *jus in bello* govern the means of prosecuting the war. Recently, several theorists have looked carefully at another set of moral questions, which concern the morality of the postwar order and the constraints that this order places on the terms of peace. This is the doctrine of *jus post bellum*.[2] None of these accounts is well suited to inform judgment about whether and how to end a war.[3] And confusions can result if this is not kept in mind.

Miller's approach to the morality of ending the war in Afghanistan seems to be to apply considerations of *jus ad bellum*. He does not give an independent justification of the criteria that he uses, and his use is sometimes implicit and not always quite on the mark, as I shall argue in the next section. His focus is mainly on the criterion of just cause, but in discussing just cause he often rests heavily, although not explicitly, on considerations of the likelihood of success and proportionality.

Just cause, the likelihood of success, and proportionality are familiar elements in the doctrine of *jus ad bellum*. But consideration of these criteria when deciding whether and how to end a war calls on different judgments than those used in deliberation about whether to initiate a war. One reason for this is that the just cause may change. A war to decisively defeat a genocidal regime might become downgraded to a war to create an area of protection for those threatened, or downgraded further still to a war to protect a subset of the population, such as those who have come to rely on the protection of combatants in the course of the war.

The calculation of proportionality can also change once a war has begun, both because of the possibility of a changed justifying cause and because what must be done to remedy the cause often becomes clearer during the course of a war. The likelihood of success must be a factor in the moral appraisal of war for two reasons. First, no rational calculus of proportionality can be made without assigning probabilities to the various outcomes.[4] In the absence of certainty about outcomes, to argue on proportionality grounds requires a kind of calculus of expected utilities (broadly conceived), which can only be had if likelihoods are included in the calculation. If a war is unlikely to succeed in rectifying the injustice that provides just cause, it can hardly be a proportional response to the injustice. Second, the likelihood of success has special moral importance in conditions of modern warfare, given the pervasive killing of civilians and destruction of the



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infrastructure (both public and private) of civilian life. As with proportionality, the calculus of the likelihood of success changes once a war begins, both because the cause might change and because civilian support for or opposition to the war as well as results on the battlefield can alter probabilities of victory.

Last resort, which requires significant attempts at peaceful means in pursuit of the just cause prior to going to war, is an important criterion in *jus ad bellum*. War must come last. But it is too late to avert war by a peaceful pursuit of the just cause after it has started. Still, something analogous to last resort is applicable to the matter of whether to end a war. This might be called "the principle of the pursuit of diplomatic remedies," which holds that a war may be continued only if a satisfactory diplomatic remedy to the just cause is not available. The support for this principle is of the same kind as that for last resort prior to war. War is a great evil that people are entitled not to have to suffer if there are peaceful means to a just end. With that idea in mind, the principle would seem to enjoin active pursuit of the circumstances propitious to discussing and reaching an agreement on the terms of a satisfactory peace. Taking this requirement seriously offers significant support to the pursuit of a diplomatic settlement, as endorsed by Miller. But grounds for ending a war on this criterion require that the peace available serve the just cause.

These four considerations seem to me to be most relevant in considering the morality of *whether* to end a war. They, in addition to considerations about *how* to end a war (considerations that I address below), comprise a skeletal doctrine of *jus ex bello*.

## Miller on the Justice of the War in Afghanistan

In the section of his article entitled "Failed Causes," Miller applies just war considerations to the prospect of a prolonged war of counterinsurgency in pursuit of a final victory over the Taliban. He considers two plausibly just causes for continuing the war: national self-defense against terrorism and the rescue of Afghans from grave systemic injustice due to Taliban rule, both of which were available at the initiation of the war. I have two sets of comments about Miller's argument in this section. One is about his treatment of the criteria of just war theory. The second concerns the kinds of moral duties that arise if his judgments are correct.

After surveying some of the evidence regarding the extent to which a prolonged war against the Taliban would reduce the threat of terrorism in the West, Miller



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concludes as follows: "the difference that extensive U.S. combat in Afghanistan, as opposed to targeted counterterrorism, would make to homeland security is inadequate to justify the substantial increase in killing and maiming and the continued destruction of the fabric of Afghan life" (p. 113). And (in the next section) in the course of discussing the grave injustices that Taliban rule would doubtless perpetrate on women, girls, minorities, and dissidents, Miller pessimistically forecasts that "a long, terrible conflict in the wake of the failure of accommodation would reveal an Afghan array of forces, interests, and passions sufficiently favorable to the Taliban to make them an unappeasable force with enduring nationwide strength" (p. 115). I note that Miller is deeply and appropriately concerned with the failures to protect innocents against terrorist attacks and the people of Afghanistan from the iniquities of Taliban rule.

It is easy to confuse the character and implications of Miller's arguments—a confusion that is encouraged by the title of the section. His argument is not that protection against terrorism and Taliban-imposed systemic injustice fail to provide just cause for the war. Rather, he argues that, on the assumption that these are just causes, the war is unjustified on grounds of the unlikelihood of success and disproportionality. Assessing these grounds, unlike assessing just cause, necessarily involves careful consideration of the projected outcome of various options.

Why does it matter that the argument for the injustice of a prolonged war of counterinsurgency rests on empirical forecasts, rather than an assessment of the justice of the causes? I will discuss this in detail below, but one reason is that, even if Miller's judgments are correct, our confidence in the forecasts affects our confidence in the criticism of the morality of the war in a manner unlike the criticisms of a war on grounds of unjust cause. To the extent that a criticism of prolonging the war fails to distinguish grounds based on the injustice of the cause from grounds based on the unlikelihood of success or disproportionality, it obscures this difference in confidence. Another reason that the argument's reliance on forecast matters is that any judgment of the morality of the war that rests on such a basis is only as reliable as the comparative predictions made. We do well, then, to consider carefully the reasons for Miller's claims that defense against terrorism and protection from the Taliban injustice by means of war are either unlikely or would come at disproportional costs.

I turn first to Miller's argument in relation to the cause of national self-protection. He makes three points. The first is about proportionality: The aim



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of disrupting terror networks in Afghanistan could be accomplished with less lethal force—for example, by means of Special Forces and drones. Although this may be true, it is asserted and not argued. His second point is that the real action of terrorist coordination is not in Afghanistan in any case, but instead in Hamburg, London, and New York. If this is true, as seems plausible, it counts against the likelihood of success—and by implication, proportionality—only if the war is not preventing the region from reverting to a center of terrorist planning, which he has not argued is the case.

Miller's third point is also directed toward the likelihood of success and, by implication, proportionality. He claims that a prolonged war serves to inflame outrage against the United States in the Muslim world and thereby aids in recruitment to terrorism. This is a plausible claim, the implications of which could be either appeasement or smarter counterterrorism, depending on what one thinks is possible. Miller does not say. But the claim also does not express a necessary truth. And in assessing it one must think carefully about what sorts of alternative policies could serve to counteract the tendency toward outrage-inspired terrorism. Is the only available policy lever the Afghan war? Or would a different policy toward Palestine help? What of greater support for democratic movements in the Middle East?

Now I consider Miller's arguments in relation to the cause of rescuing the people of Afghanistan from Taliban injustice. His argument against pursuing this cause combines considerations of the likelihood of success and proportionality: "Indeed, relentless counterinsurgency might well produce an increase in repressive or predatory Taliban violence. . . . If the supposition about greater human costs of striving for victory is right, nationwide counterinsurgency to combat grave and systematic injustice would be a travesty of justice" (p. 114). In addition to this speculation about the likelihood of success and proportionality, Miller contends that even under a non-Taliban Afghan regime, due to traditional norms and practices regarding women, there would be significant injustice. Hence, if the Taliban were to rule, "the consequent losses in justice in the Pashtun belt would probably be small" (p. 114).

One of the documents Miller cites in support of this dismal conclusion, "Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan," by the United Nations Assistance Mission in Afghanistan (UNAMA), offers plenty of evidence of terrible traditional practices that are not at all dependent on the authority of the Taliban.[5] Does this



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establish that the likely loss of justice to women would be small under Taliban rule? It would seem so only if one thought that progress was no more likely under non-Taliban rule. But that is questionable. The UNAMA document discusses in considerable detail the legal framework and religious norms that put pressure on these traditional practices. These include the 2004 constitution's recognition of the Universal Declaration of Human Rights, the 2009 Law on Elimination of Violence against Women, and Koranic passages that support gender equality in education and access to health care. Presumably, such influences would be considerably reduced in an autonomous Pashtun region governed by the Taliban. Moreover, it is likely that a Taliban-ruled society would be much less susceptible to international pressures to equalize gender relations than one that is at least legally committed to this goal.

Adding to Miller's judgment of the unlikelihood of success of rescuing the people of Afghanistan from Taliban injustice are his projections that continued counterinsurgency might be counterproductive because it creates conditions ripe for insurgency led by fanatics and thugs and contributes to expanded Taliban influence in northern Pashtun-dominated areas. It is remarkably difficult to predict the course of a counterinsurgency war. For example, the surge in Iraq was very controversial on strategic grounds, but it met with some success. Miller might be correct, but it is difficult to see why the limited support that he provides for his claims should be expected to settle the matter.

In his application of just war theory in this section, Miller is on the mark to raise questions of the likelihood of success and proportionality. A ten-year war raises reasonable doubts about its fulfillment of these two criteria. But he attends insufficiently to the empirical considerations that are essential to settle matters.

My second set of comments about Miller's argument in this section concern his neglect of issues regarding the morality of how to end a war that would be unjust to continue. This raises another class of considerations of *jus ex bello*—considerations not about whether the war should continue, but about what is required in bringing it to an end.[6] In general, when ending a war, policy-makers and military leaders should seek not to increase the evils that make ending the war obligatory. For example, the timing of a troop drawdown should not increase civilian casualties or expose people to other injustices. Since Miller offers support for a temporary surge in Afghanistan (p. 113), there would presumably be sensitive issues of timing a drawdown so as not to erase the expected security gains of the surge. Thus, it is unclear why he is led to support a "rapid U.S. withdrawal from the



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South" in the event of a failure to negotiate a peace with the Taliban (p. 115). A full moral defense of the drawdown from the Pashtun South and East would need to address the moral issues associated with timing. The moral case for withdrawal is distinct from the moral case for a *rapid* withdrawal.

In addition to the consideration raised above regarding ending wars in general, there is a peculiar, and possibly more important, moral issue that arises when a war that satisfies just cause should be ended on grounds of the unlikelihood of success or disproportionality. For to end such a war is to admit failure for the cause of justice. Justice either cannot be achieved or only at excessively high moral costs. But the considerations that make the cause just also serve to make it appropriate to mitigate the resulting injustices of failure, to whatever extent this can be done within the constraints of the likelihood of success and proportionality. On the assumption, then, that national protection against terrorist attacks and rescuing the Afghan people from Taliban domination are just causes for continued prosecution of the war, an argument on behalf of ending the war should pay attention to the manner in which the resultant injustices—such as greater room for terrorist organizations to operate freely and poorer prospects for women, girls, minorities, and dissidents—might be mitigated. Since Miller advocates rapid withdrawal in the event that negotiations either do not occur or come to an impasse, he apparently is advocating bringing no conditions for minimizing injustice to the negotiations. But if a more robust just peace is unavailable because of the assumed unavailability of a proportional military victory, some pursuit of a partially just peace at the negotiating table is still required.

## The Responsibilities of Citizens

The arguments of the previous section have implications for Miller's moral counsel when he writes, "Our foremost responsibility is to call for an end to America's Afghan war, contributing to a movement that imposes maximum pressure to cease fire, make concessions, reduce forces, and depart" (p. 126). The danger of qualifying a call for withdrawal, according to Miller, is that it would be manipulated by generals and presidents. True as this may be, in the absence of convincing evidence about the likelihood of success, ordinary people also face the twin dangers of calling for a withdrawal from a war in which a proportional victory for justice is possible and of calling for a rapid withdrawal when a measured one is what they owe those who have come to rely on the protection of their military.



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A call for a rapid and unconditional cessation of the war risks allowing injustices that could have been minimized in a comprehensive negotiated settlement. Consequently, even if Miller is right about the moral merits of seeking a negotiated settlement with the Taliban for the Pashtun South and East, it by no means follows that the morally responsible citizen must be active in the cause of demanding an immediate withdrawal from these areas, regardless of what occurs in peace negotiations.

## Strategy and Morality

Miller writes that "current just war theory does not provide sufficient guidance in crucial tasks," such as "American conduct in Afghanistan" (p. 103). I am somewhat puzzled by Miller's discussion of geopolitical concerns and the moral plausibility of realist considerations. He seems to defend the credibility of a set of justifying considerations not normally thought of as providing just cause for warfare. These are the strategic considerations of the maintenance of the credibility of the threat of U.S. force, the geopolitical significance of Afghanistan's territory to the United States, and the global competition between the United States and an ascendant China. Miller combines these into a general consideration regarding maintaining the current balance of power in which the United States is militarily preeminent. He seems to believe that, in principle at least, this kind of consideration can justify war-making, although he ultimately rejects this idea in the case of the U.S. war in Afghanistan because of the lack of a credible claim that maintaining U.S. military preeminence is a morally worthy goal, all things considered. Miller notes that just war theorizing is traditionally hostile to balance-of-power-type justifications for war since the whole point of just war theory is to limit the justified use of warfare. And if the maintenance of the balance of power were a just cause for war,

> A critic who is guided by traditional just war theory might deny that the requirement of a just cause for war is met. Certainly, the preservation of the balance of power should not be on the list of just causes in the quasi-legal formulary of public justifications and criticisms by governments. In this discourse, only the pressure to fit a violent initiative into a very short list of diplomatically endorsed just causes constrains government action in practice, and if this cause were included in the list, dominant powers would be unconstrained. (pp. 120–21)

This is, of course, exactly right. Rules of war that allow the maintenance of a balance of power or the prerogatives associated with spheres of influence give the



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moral game away to the powerful. These are the rules that the winners, the globally or locally hegemonic, would establish because it would allow them to use their force whenever necessary to defend their privileges. The only constraints on war making would then be those placed on the weak.

Nonetheless, Miller believes it appropriate to allow, at least in principle, justifications of war on grounds of a balance of power. He seems to have two reasons. One is that incremental shifts in the balance of power can accumulate to produce significant consequences. The idea is that if these consequences are sufficiently morally deleterious, then a war of early prevention is justified. His constraint that the grand consequence of the accumulation of incremental shifts must be morally important is supposed to rule out war simply for hegemonic purposes. A moral justification must involve the familiar worry that the falling dominoes would result ultimately in the collapse of freedom and democracy. This mollifies the criticism that balance-of-power arguments simply serve the interests of the powerful; more precisely, such an argument must serve the interests of the powerful who are also good. Additionally, the constraint that the strategy serves the good also allows Miller to employ balance-of-power arguments to mount a criticism of the moral costs of the strategy of U.S. military preeminence.

This is a version of the doctrine of preventive war, an idea notoriously permissive of war-making. Unless the powerful who are good are of angelic intent and in possession of God-like foreknowledge in the estimation of consequences, they too are subject to the corruption of power and the fallibility of the intellect. This is a good reason to think that each war needs to be judged on its own merits, not the merits of the grand strategic objective of which it is a part. We are not arguing here about what those merits are, but about their range of application. There still seems to be plenty of practical wisdom in the just war tradition's limitation that it is the merits of each war, not the strategic project as a whole, that are relevant for the moral evaluation of the war. Moreover, Miller can employ the evidence that he does to criticize the moral costs of U.S. military preeminence without introducing the in-principle justification of wars by the strategy that they serve.

## Conclusion

Miller's discussion of just war theory is wanting in several ways. He does not distinguish the grounds of moral criticism clearly enough. This, I think, leads him to underestimate the importance of comparative empirical forecasts when just cause



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is not the central concern. Moreover, a discussion of whether and how to end a war calls upon distinct moral considerations. And even if Miller is right about the "whether" question, the matter of "how" seems underappreciated. Finally, his willingness to take realist considerations seriously as a matter of just cause seems gratuitous. None of this is to argue against Miller's substantive recommendation to seek a settlement, but I am doubtful about his recommendation of the political demand of an unconditional settlement. And, in general, it is also worth remembering that arguments against war that rest heavily on the comparative assessment of empirical forecasts might be sound, but still fail to produce the kind of rational confidence in the rectitude of the cause that mass political mobilization needs. I believe that this is the case with respect to Miller's arguments. Curiously, he amplifies the confidence problem by endorsing the pursuit of a temporary surge. His general conclusion that a negotiated settlement is morally required might be right, but the arguments that he provides do not inspire confidence.

NOTES

[1] Darrel Moellendorf, "Jus ex Bello," *Journal of Political Philosophy* 16, no. 2 (2008), pp. 123–36.
[2] Examples of *jus post bellum* theorizing can be found in Gary J. Bass, "Jus Post Bellum," *Philosophy and Public Affairs* 32, no. 4 (2004), pp. 384–412; and Brian Orend, *The Morality of War* (Peterborough, Ontario: Broadview Press, 2006).
[3] This is the thesis of Moellendorf, "Jus ex Bello."
[4] See Darrel Moellendorf, "Is the War in Afghanistan Just?" *Imprints: A Journal of Analytical Socialism* 6, no. 2 (2002); available at eis.bris.ac.uk/~plcdib/imprints/moellendorf.html.
[5] United Nations Assistance Mission in Afghanistan, "Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan," Kabul, December 2010; available at unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf.
[6] See Moellendorf, "Jus ex Bello," pp. 134–35.



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