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states:
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the people of Afghanistan**

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PEOPLE OF AFGHANISTAN**

OBRIGAÇÕES DE JUS POST BELLUM DOS ESTADOS
INTERVENIENTES: UMA ANÁLISE LEGAL E ÉTICA DO QUE DEVEMOS
AO POVO DO AFGANISTÃO

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Abstract: This essay seeks to answer the question of what obligations intervening states have and why the US/NATO intervention in Afghanistan failed. With Afghanistan as a case study, it will attempt to illuminate the responsibilities and objectives of democratic intervening states in general. While it is too late for any near-term realistic hope of a just peace in Afghanistan, future efforts to create a democratic peace between nations should be built not only on humility about the intervenor's knowledge of foreign peoples and cultures but a deeper understanding of democracy and peace between democracies. Given the ongoing need for asylum and the existence of the Afghani diaspora, it is not too late to learn from the people of Afghanistan as to how to proceed and honor our obligations. The reason why the US government and other NATO intervenors failed to achieve their desired outcome, a just and sustainable peace, is because collectively we not only had an institutionally weak knowledge of Afghanistan and Pakistan, we also had a poor understanding of democracy and peace between democracies. We were not just ignorant; we did not care to learn. This weakness, the misapprehension of democracy as more of a confidently perfected and exportable legal construct and not a humble ethical restriction on laws and knowledge, doomed our path to a just and sustainable peace. This misunderstanding about democracy, a misunderstanding that deepened at the height of American power, is important to correct if we are to achieve solidarity between democracies, and to intervene and choose not to intervene successfully in the future. A humbler approach to democracy-promotion, not an abandonment of it, would have had a higher likelihood of success over the past 20 years, and would still serve us better today in our relations with Afghanistan, Pakistan, and other governments and peoples.

Keywords: Jus Post Bellum; Obligations of Intervening States; Afghanistan; Invasion; Occupation; Post-Occupation; Withdrawal; Transitional Justice; Democracy; United States; NATO; Taliban; Doha Agreement; Sanctions; Recognition; Gender; Sexuality; Human Rights; Explosive Remnants of War; Toxic Remnants of War; Poverty; International Criminal Law; Refugee; Asylum; Counterterrorism; Aid; Political Philosophy

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Resumo: Este artigo visa responder a questão quanto às obrigações que os Estados intervenientes têm e qual a razão pela qual intervenção dos EUA/OTAN no Afeganistão falhou. Utilizando o Afeganistão como estudo de caso, tentar-se-á esclarecer as responsabilidades e os objetivos dos Estados democráticos intervenientes em geral. Embora seja tarde demais para se ter qualquer esperança realista, para uma paz justa no Afeganistão, a curto prazo; os esforços futuros para criar uma paz democrática entre nações devem ser construídos não apenas com humildade sobre o conhecimento do interveniente acerca dos povos e culturas estrangeiras, mas também com uma compreensão mais profunda da democracia, e da paz entre democracias. Dada a necessidade contínua de asilo e a existência de uma diáspora afegã, ainda não é tarde para aprender com o povo afegão sobre como proceder e honrar as nossas obrigações. A razão pela qual o governo dos EUA e outros intervenientes da OTAN não conseguiram alcançar o resultado desejado - uma paz justa e sustentável - é porque, coletivamente, não só tínhamos um conhecimento institucionalmente fraco sobre o Afeganistão e o Paquistão, mas também porque tínhamos uma compreensão pobre sobre a democracia e sobre a paz entre democracias. Não éramos apenas ignorantes - não tentámos sequer aprender. Esta fraqueza, a incorreta perceção sobre a democracia como uma construção legal perfeita fiável e exportável, e não como uma restrição ética humilde às leis e ao conhecimento, condenou o nosso caminho para uma possível paz justa e sustentável. É importante corrigir esta má compreensão sobre a democracia, que se aprofundou no auge do poder americano, se quisermos alcançar a solidariedade entre democracias, e intervir, ou optar por não intervir, com sucesso no futuro. Uma abordagem mais humilde no que se refere à promoção da democracia, e não o seu abandono, teria tido uma maior probabilidade de sucesso nos últimos 20 anos, e ainda nos serviria melhor, hoje, nas nossas relações com o Afeganistão, o Paquistão e outros governos e povos.

Palavras-chave: Jus Post Bellum; Obrigações dos Estados Intervenientes; Afeganistão; Invasão; Ocupação; Pós-Ocupação; Retirada; Justiça Transitória; Democracia; Estados Unidos; OTAN; Talibãs; Acordo de Doha; Sanções; Reconhecimento; Género; Sexualidade; Direitos Humanos; Resíduos Explosivos de Guerra; Resíduos Tóxicos de Guerra; Pobreza; Direito Penal Internacional; Refugiado; Asilo; Contraterrorismo; Auxílio; Filosofia Política

1. Introduction: What do we owe, and to whom do we owe it?

This essay seeks to answer the question of what obligations intervening states have, and seeks to answer it in relation to Afghanistan. The reactions to this question are generally absolute and unhelpful: Either “isn’t it terrible, we owe everything we can” or “nothing, we’ve done enough. We’re out now.” Neither of these is terribly satisfying as a lawyer or an ethicist. The most likely outcome is more likely to be “nothing” than an unspecified “everything.” I think we can improve our answers to the question posed, hopefully with an eye towards improving policy outcomes in Afghanistan going forward. In addition, by using Afghanistan as a case study, it will broaden the analysis to what is generalizable to what obligations intervening states have in general. While it is too late for any near-term realistic hope of a just peace in Afghanistan, future efforts to create a democratic peace between nations should be built not only on humility about the intervenor’s knowledge of foreign peoples and cultures but a deeper understanding of democracy and peace between democracies. Given the ongoing need for asylum and the existence of the Afghani diaspora, it is not too late to learn from the people of Afghanistan as to how to proceed.

This work aims to be accessible. The point of this work is not to litigate the exact cut-off moments when different phases of intervention began or ended. It is sufficient to note that, in part under the auspices of the United Nations, there was an invasion (creating an International Armed Conflict), an occupation, a regime change, a Non-International Armed Conflict, and finally a withdrawal. No special legal, historical, or professional training should be required to understand the arguments made, whether or not you agree or disagree with them. This is an intentional choice by the author, hoping that it will improve the chances of furthering a democratic debate in this area, in keeping with the value the workplaces on open discussion and learning.

1.1. Who are “We”?

When asking what we owe the people of Afghanistan, this work focuses on the obligation of the United States and other NATO intervenors. The scope of this work does not cover all possible “intervenor,” in Afghanistan or elsewhere. When we talk about the obligations of intervening states, we are obviously skipping over the main actor today in the present and future of Afghanistan, namely, the Taliban government. While the ethical and legal obligations of the current government may not be enforceable by outside entities, and while we may have minimal influence over the government, when objectively asked “do they have the obligations” or “are they failing their obligations” the answer has to be “yes” and “yes”. The Taliban “intervened” in a sense, in fact they are repeat “intervenor” in Afghan government. But they are not an intervening state.

It would be entirely reasonable to focus on the obligations of Pakistan as a foreign intervenor. There is a strong case to be made that without the acts and omissions of parts of the State of Pakistan, the Afghan people would not have endured decades of war and a future dominated by human rights abuse and underdevelopment. Pakistan has the same legal obligations it has always had. These include obligations to grant asylum to anyone who crosses its border with a credible fear of persecution (a very sizeable potential population), the obligation to investigate and prosecute those within its borders potentially responsible for atrocity crimes, and the obligation not to allow those within its borders to attack other sovereign

states. It has the obligation not to aid the Taliban government in its human rights abuses. Again, like the Taliban government, the fact that these obligations and their violations are notorious and that there is little in the way of a legal mechanism to enforce these obligations does not mean attention should not be paid.

Nonetheless, this work will not be principally focusing on the State of Pakistan as an intervening state, nor any other “non-western” intervenor. Nor will it focus on interventions outside of Afghanistan much. These subjects are worthy of attention, but mainly for reasons of coherence, this work focuses mainly on the US and other NATO intervenors in Afghanistan. While not without democratic deficits, the US and other NATO intervenors are functional democracies, who should take the obligations and opportunities of democracy seriously. Of course, there are no stronger legal obligations for a state because it is a democracy – but that should not blind a democratic state to its own interests in fostering a democratic peace.

It is reasonable to question whether “intervening states” is a neutral term in how we psychologically receive the framing of foreign state conduct once the State of Afghanistan welcomed in NATO forces. Clearly the overthrow of the Taliban regime was an intervention. An intervention is an interference with what is considered natural or the status quo in a sense. By framing NATO as an “intervening state” by backing the government of Afghanistan in its conflict with the Taliban, it to some degree adopts the Taliban’s framing, implying that a conflict between the Taliban and an isolated government of Afghanistan is natural. From the perspective of the former government in Kabul, help from its allies was natural and Pakistani backing of the Taliban was an unnatural and illegal breach of Afghanistan’s sovereignty.

This work does not pretend a universal, unbiased perspective but it does try to be as objective as possible given the known biases of the author. The author is a U.S. citizen, with education and professional experience in the U.S. and other NATO countries. International law is a broad conversation that should involve perspectives and potentially assent from all states, and ethics ideally a discourse community that incorporates everyone. That said, given the harm, failures, and lost opportunities in Afghanistan, an analysis focused mainly on NATO allies is perhaps a good place to begin. That is why this work will at times refer to “we” – not as a means to exclude, but as a frank admission of a somewhat “internal” conversation already going on. Expanding the discourse community about the role of democracy promotion should certainly be expanded to all of those who approach the subject with a basic commitment to discourse ethics and good will in the long run, but those with access to a conversation within NATO countries should perhaps begin by “cleaning up our own house.”

1.2. What do we mean by “owe”? And to whom do we owe it?

This work is structured as a conversation between a lawyer, an ethical philosopher, and a political philosopher, all speaking in a manner accessible to each other and to a general audience. It begins by approaching the topic as a practical lawyer, then switches hats and discusses what moral obligations might currently exist to those in Afghanistan, and then again switches perspectives and discuss what we might owe ourselves.

Properly understanding what we owe ourselves at the outset could have facilitated a more successful transition to peace for the peoples of

Afghanistan. This will also involve a switch from a more temporal approach – what are our obligations after the war, to a functional approach – what are our obligations were and are to successfully transition to a desired post-war state, to a just sustainable peace. This functional approach to the transition to peace, to *jus post bellum*, started the moment the armed conflict began.

The argument of this work is essentially this: The reason why the US government and other NATO intervenors failed to achieve their desired outcome, a just and sustainable peace, is because collectively we not only had an institutionally weak knowledge of Afghanistan and Pakistan, we also had a poor understanding of democracy and peace between democracies. We were not just ignorant; we did not care to learn. We did not have transitional justice, with humility and reconciliation as key goals, squarely before us. This weakness, the misapprehension of democracy as more of a confidently perfected and exportable legal construct and not a humble ethical restriction on laws and knowledge, doomed our path to a just and sustainable peace.

After hubris, nemesis. The hubris of the George W. Bush administration is often remarked upon but also often taken as a personality quirk of Cheney, Rumsfeld, and others who exhibited a great hunger for war and a blatant disregard for truth and prudence. But it is more than the error of a few old men. Nemesis, the goddess who punishes hubris, has a broader lesson, for the US and for Afghanistan, than “elect better leaders.”

This misunderstanding about democracy, a misunderstanding that deepened at the height of American power, is important to correct if we are to achieve solidarity between democracies in the future, to intervene and choose not to intervene successfully in the future, and to achieve the kind of human-rights respecting peace we all deserve to live in. So, to repeat and amplify: a humbler approach to democracy-promotion, not an abandonment of it, would have had a higher likelihood of success over the past 20 years, and would still serve us better today in our relations with Afghanistan, Pakistan, and other governments and peoples.

1.3. Roadmap

With that larger argument placed on the table, let me turn to the first part of my four-part discussion. In Section 2, this work will approach the subject of “what do we owe, and to whom” from the perspective of a lawyer, looking at the possibilities for several prospective clients. In Section 3 we will turn to ethics, then political philosophy in Section 4. My concluding section (5) will also answer the question “what is *jus post bellum* anyway” and tell you which US president is most responsible for the US’s failed efforts in Afghanistan. But I will begin with my theoretical clients, who want to see if there are any legal obligations that can be enforced against intervening states as we have defined them.

2. Legal Obligations: what we owe legally

I should begin by introducing my prospective clients. These clients include:

- The state of Afghanistan
- An individual sanctioned by the United States

- A former interpreter for the United States military, still in Afghanistan
- A young woman in Afghanistan
- A gay man in Afghanistan
- A victim of US human rights abuse in Afghanistan
- A victim of US violations of the laws of armed conflict in Afghanistan
- A family living near explosive or toxic remnants of war in Afghanistan
- A poor family in Afghanistan

In terms of scope, I am discussing persons and entities in Afghanistan in the present moment. Why am I framing legal obligations this way? Because, of course, legal obligations don't exist in the abstract.

2.1. What are the substantive claims the State of Afghanistan could make against NATO countries?

2.1.1. Treaty or quasi-treaty obligations?

Potential treaty or treaty-like obligations by the US and other NATO members generally fall into two types of obligation: quasi-treaties with the Taliban, and treaties with state of Afghanistan.

First, there may be obligations based on agreements with the Taliban qua the Taliban. There have been a series of agreements between the Taliban and the US. These culminated in the Trump Administration's agreement to, in effect, leave the country in exchange for not being shot at on the way out: The Doha Agreement². This is not an ideal peace agreement process. Normally, what you would hope for in a negotiated peace process would be a series of agreements laying out the conditions of the compromises that could create a sustainable peace with a sense of justice all sides could live with. This is what Christine Bell has wonderfully developed with her work on *lex pacificatoria* (Bell, 2008). We did not get that. We have at best an interrupted process, where some areas of the peace may be open for negotiation at some point, but many issues are effectively foreclosed. The current peace is not based on negotiation so much as complete military victory. At this point, however, and I could be wrong, the US has no substantial quasi-treaty obligations with the Taliban that it has yet to discharge. It left. It is out. Perhaps there is an implicit obligation to stay out. An obligation to refrain from certain actions.

That brings me to my second type of treaty obligation, the obligations for any treaty relationships that survive the regime change. One important such treaty relationship is multilateral – the UN Charter. Assuming, in the fullness of time, the Taliban is recognized by International Organizations including the UN as the government of Afghanistan, then the US will be bound by all of the aspects of that charter with respect to the current government, including of course the obligation not to threaten or use force. They are also bound by parallel customary international law obligations, which restrict the

2. For more on the Doha Agreement, see e.g., Curtis (2021).

US regardless of who is recognized as the government of Afghanistan. This may, of course, seem trite and unexceptional, but given that there have been discussions of using force on an ongoing basis as needed, it is worth noting that this is not invited anymore.

2.1.2. Wrongful invasion

What about damages from previous uses of force? What if the Taliban government feels that reparations are due from the previous invasion? Again, this is the kind of issue that ideally would have been sorted out through a series of peace agreements, but we do not have that. Given that the US and other intervenors will not agree to any form of binding dispute settlement on this point, and given no treaty of friendship or standing compulsory jurisdiction declaration at the International Court of Justice that I know of that would cover such a claim, certainly with the US, all that is left are the classic non-binding dispute resolution mechanisms such as diplomacy and good offices. Frankly, those are unlikely to result in a favorable outcome for my hypothetical client, the state of Afghanistan, not just because of the opinion of the US, but because even though it was not the subject of a peace agreement per se, it was in a sense “settled” by the previous government and by various UN Security Council resolutions.

2.1.3. Damages from the war

What about damages from the war? Not *jus ad bellum* (the law on the use of force overall) damages but *jus in bello* (the law on the specific conduct of armed conflict and occupation) damages. The problem here (for the State of Afghanistan) is that those will generally be covered by the consent of the territorial state, the previous government of Afghanistan. Perhaps the only claim that could conceivably be brought by *the Taliban* that is not covered by consent is conduct by the US outside of the territory of Afghanistan, such as in Pakistan. Objectively, the US foreign intervenor might have an obligation to make reparations for wrongful conduct in the territory of Pakistan. The problem (for the Taliban) is that Pakistan is really the more appropriate entity with standing to bring such a claim, even if at the time the target was the Taliban before they were in government. The legality and whether there was de facto consent of such conduct has been discussed elsewhere,³ but suffice it to say that the current government is unlikely to receive satisfaction. The only conceivable mechanism I can imagine is if the US wanted to address this as part of some sort of grander overture to Pakistan, recognizing that a humble approach to truth finding would be in the interest of a strengthened democracy within Pakistan and the US.

2.1.4. Seizure of assets/Sanctions

The US is currently preventing the state of Afghanistan from full access and use of assets that belong to the State of Afghanistan, a de facto seizure, combined with a sanctions regime. While justified through the rationale that the US may regulate its own financial system, the US may not wish to be seen to abusing this tool to the point where the international financial system develops effective workarounds, lessening the effectiveness of the US's

3. See e.g. Byrne (2016: 97-125).

unique powers in this area. The US may have other, more pressing concerns than continued antagonism with the State of Afghanistan, and so a compromise through negotiation to reach a remedy for the obligation not to permanently deprive a sovereign state of its assets may be possible. It is notable that despite antagonism with Iran, the U.S. managed to formalize a mechanism to resolve claims between the two states⁴.

2.1.5. Failure to recognize

Recognition is a strange chimera. It is a political act, but it is central to our state-based system of international law. Again, while the US and other western intervenors may not have an obligation to make the political choice to recognize the current government, nor may they recognize another government and pretend that the Taliban is not in fact in control of the country. They cannot take the approach Russia took to the Ukraine and pretend consent exists when it does not exist. Like sanctions, this is an area where negotiations could bear fruit in building a more just and sustainable peace. Of course, the existence of international legal obligations are not dependent on the recognition of the Taliban government by other states.

2.1.6. Obligations from dependence

To evaluate whether there are obligations from dependency during occupation, we might turn to the work of Yael Ronen. She argues that in certain cases, such as the Gaza Strip, where the post-occupied entity is dependent on the former occupier, and the former occupier is the only one in a position to respond to that dependence, the former occupier may not simply cut off assistance regardless of the consequences (2014: 428-446). She builds on Eyal Benvenisti's concept of sovereignty as a trusteeship of humanity (Benvenisti, 2004: 124).

If one accepts Ronen's argument, can the analysis regarding Gaza be applied to Afghanistan? Not really. While the dependence of Afghanistan upon foreign states is fairly obvious by the collapse of the former regime when foreign militaries left, as well as the current minimal standard of governance and humanitarian catastrophe, the Taliban's characterization of the former government as an occupation regime is incorrect. Even taken at its strongest, it would be a regime like Turkish Cyprus, not an unwanted, hostile, belligerent occupation. The US has not and is not taking an approach to Afghanistan that Israel is taking to Gaza, in terms of control of borders and airspace. The legitimate government's consent to creation of a state of dependency but not occupation lessens the claim that the suffering created by a withdrawal of support creates a legal obligation for humanitarian support. Ethically it may be demanded, but it is not, in my view, a legal obligation on former intervenors. This again is a disappointing result substantively, and procedurally there would be no means of enforcing it either.

4. See Brower, Brueschke (1998).

2.1.7. Summary

So again, to summarize, regardless of the claim by the state of Afghanistan against intervenor states, the procedures to remedy or enforce these obligations are limited.

International Courts should be assumed to lack jurisdiction unless proven otherwise.

US Courts and other domestic courts are unlikely to recognize such claims.

Thus, diplomacy and good offices of third parties are likeliest mechanisms.

But no mechanism is likely to make much progress merely on the strength of the claim by the state of Afghanistan against a NATO country. Negotiation and compromise, including the State of Afghanistan giving some of what NATO states want, will likely be necessary for any progress on these fronts.

We turn to other potential clients now. These will go a bit quicker, but should again give an idea of the terrain one might map out with the broad question of legal obligations for intervenor states, and the problems with the current transition to peace.

2.2. An individual sanctioned by the United States

There may be people who are sanctioned by the US, or others, whose sanction is unjustified in some manner. At least three legal questions arise: first, is there a way to argue such a sanction is unjustified by the terms of the sanction program itself. Second, is there a violation of international law or other law by the sanction. Third, is there any procedure to remedy a wrong. At least in the US, discretion for who is sanctioned is quite broad. An unjustified sanction is certainly possible, but may be difficult to prove. For a violation of international law, one might try to go through the Inter-American Commission on Human Rights or domestic courts for a remedy, but either option would be slow and uncertain.

2.3. A former interpreter for the United States military, still in Afghanistan

Here, I feel a need to again note the scope of this essay. Ideally there would be no threats to those who worked with the US military. Traditionally, a successful peace process would create an amnesty for the act of participating in the armed conflict, to draw a line between the past and the future. This is the logic of Article 6(5) of Protocol II additional to the Geneva Conventions relating to non-international armed conflicts, which provides that, at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict. The current Afghan government is obliged to respect the rights of people affiliated with the past government. The Taliban's violations of these norms are notorious, but the Taliban's violations of their obligations is not the main focus of this work, merely its backdrop.

The US choice to withdraw without any such assurances has left those who worked with the US as well as many in the former government in a terrible position.

So what has the US done? There has been an expanded use of the US Special Immigrant Visa Program over part of the last two decades to cover people like our former interpreter client, but it has failed far too many. While there was and is a profound ethical and prudential case to maximize efforts to make such allies safe, the present reality is stark. The promises made to these individuals, the use of them without ultimately protecting them, makes the failure to protect them particularly ethically horrific. But legally, there is very little commanding intervening states to do more. Asylum applies universally, and legally does not apply differently when the receiving state has reason to feel guilty.

2.4. A woman or gay man in Afghanistan

Similarly, take the example of a woman or girl in Afghanistan whose rights will be violated throughout the rest of her life in Afghanistan, or a gay man or boy at risk of being murdered by the regime. What obligations do intervening states have to these individuals now? Formally under international law, foreign states do not have any power of diplomatic protection for foreign nationals, nor do they have a legal obligation while they are in Afghanistan's Territory. There has been hesitancy in some jurisdictions, particularly the US, to recognize gender as a basis for asylum. I believe this is because this "social group" is too big for some to stomach, not on the basis of sound legal reasoning. The pioneering work of the Center for Gender and Refugee Studies in California and Karen Musalo specifically is helpful here⁵. Even skeptics of gender as a basis for asylum should make an exception for the current conditions in Afghanistan⁶. Even more so for people with disfavored sexual orientation or identification, who live under the threat of being murdered by the state⁷.

2.5. A victim of US human rights abuse in Afghanistan/ laws of armed conflict in Afghanistan

Here, I think there are concrete obligations for an intervening state. Mere removal of US forces from the territory of Afghanistan does not mean that all past actions of the US are erased. Unfortunately, it may be difficult to access US domestic courts, international courts, or foreign courts with universal jurisdiction to hold the US government or agents of the US government to account. There may be a certain irony to the Taliban invoking diplomatic protection of its citizens to resolve abuses by the US, but that is one way forward. Ideally, there may come a time when the US, other intervening states, alongside Afghanistan perhaps, begins a truth and justice process to come closer to consensus as to what happened and find accountability. There is no time limit for such an effort, although for survivors sooner is better.

5. See Musalo (2002: 777) and, also, Musalo (2010: 46-63).

6. See Bennoune (2022: 1-88).

7. See Leddy (2022: 911-942).

2.6 A family living near explosive or toxic remnants of war in Afghanistan or Pakistan

Here, even if the conduct which created explosive or toxic remnants of war did not violate any international or domestic law (an assessment that would necessarily have to be done on a case-by-case basis), the obligations of foreign intervenors is not necessarily complete. In general, one suspects, the US “has the receipts.” Particularly now that the armed conflict is finished, it could do a better job of being transparent about where strikes have occurred, and assess where pollution has likely occurred. This transparency would cost very little financially except for paying staff to review records, and could be a worthwhile investment in the long term with regards to the US reputation, even if there are also reputational costs. Further, in time, the US may wish to explore the possibility of helping to physically clean up the country. Extraterritorial claims of human rights violations are notoriously hard to make out and not easily enforceable, but this is the kind of activity that ideally could become a quiet but concrete meaningful area of cooperation between the US and Afghanistan, and the international community as a whole.

2.7 A poor family in Afghanistan

This is the largest group of people to whom an obligation might be owed, in a sense, and the most frustrating. The strongest legal argument for an obligation of intervening states to the poor in Afghanistan is the dependency argument already addressed. This is not a special case; it is the norm. People fleeing Afghanistan for purely financial reasons have a weaker claim to asylum than people fleeing from justified fear of persecution. International law is of course extremely unsatisfactory for addressing global poverty in general or poverty in Afghanistan in particular. This is, therefore, a good place to turn to ethical obligations.

3. Ethical obligations: what we owe morally

Jus post bellum should not be seen merely as criminal accountability for the crimes committed during armed conflict. But let’s start there. It is entirely predictable that there will be credible claims against certain individuals affiliated with the Taliban with respect to atrocity crimes. What should be done about this? That is a legal question. Does the goal of establishing a just and sustainable peace help answer this question?

Or take another question, the question of recognition. Who will take over the seat at the UN? At other International Organizations? Who will take over Afghani missions and consulates around the world? Further, who will establish and maintain diplomatic ties in turn, and maintain or reopen embassies and consulates in Kabul? Does the goal of establishing a just and sustainable peace help answer this question? Should there be continued negotiation with, and pressure applied to, the Afghan State to respect, protect and fulfil human rights obligations?

Or if the Taliban asks for help in its fight against ISIS-K, what some would see as the inheritor of the Al Qaeda mantle, should they receive it? Should the US and the Taliban Afghani government become co-belligerents in their fight against terror?

Should there be an expanded aid programme?

Should there be an expanded refugee programme?

These aren't easy questions, and reasonable people may disagree on their answers. I'll try to address them in turn.

3.1. Ethics of pursuing international criminal justice

Many people will see the impunity for Taliban officials as more evidence of the fruitlessness of both international criminal law and *jus post bellum*, however conceived. I respectfully disagree. International Criminal law, as one component of *jus post bellum*, can be patient. Impunity for state officials, be they Taliban or the former President of Sudan, is grating but not necessarily permanent. Even confinement within Afghanistan, as a sort of glorified house arrest, can have its purposes. Limited justice, and delayed justice, is not full justice, but it is not nothing. The best focus of foreign actors at this point may be to focus on domestic investigations and prosecutions, given that the ICC Office of the Prosecutor has declared their focus on the Taliban and ISIS-K⁸. There are still victims who were tortured to death in Bagram whose families have not seen justice. Guantanamo remains open. We should start there, in a long process to build a peace that may be seen as just, sustainable, and trusted by all sides.

3.2. Ethics of recognition

What of recognition and diplomatic relations? Again, I think the goal of a just and sustainable peace is reasonable here. I do think it's reasonable for many states around the world to treat the Taliban government as a whole as in effect *persona non grata*, for now using that leverage to establish what measure of justice is achievable in Afghanistan. A republican form of government such as a modern Kant would have liked is out of reach for the foreseeable future, but that does not mean there is not a compelling reason for *jus post bellum* to operate on the question of recognition and diplomatic relations, even under these difficult circumstances.

3.3. Ethics of counterterrorism

And what of the war on terror? What if there is a, as the phrasing goes, "terrorist group of global reach" that can most easily be targeted with the cooperation of the Taliban? Or conversely, should we continue to strike ISIS-K or Al Qaeda without the permission of the territorial state? The grand tradition in international law and the moral ethics behind it that we now call *jus post bellum* would guide us towards an answer in the negative. Better to abandon the *res*⁹ that has brought so much suffering than to continue down the road we've been on for the last twenty years. For our own sake, as well as those in the theater of operations.

8. Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, 27 September 2021, available at <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>

9. The thing being fought over, or the cause for war.

3.4. Ethics of aid and sanctions

Perhaps most pressing – what approach should be taken to humanitarian aid and broad sanctions? If one is to have a general approach to humanitarian aid, should it be influenced by the past – either by an extra effort to help the Afghan people before other suffering people, or by restricting aid given that it may help the Taliban government in some fashion.

The answer given by the *jus post bellum* tradition and modern experience is to draw a line across the past. The point of a peace treaty was to resolve disputes. They were akin to a final judgement in court – you may not agree with it, but finality has its own virtues. Holding a grudge against the Taliban and making the people of Afghanistan suffer as a result cuts against the wisdom of this tradition. There are cases where arguably broad-based sanctions worked. South Africa. Myanmar. But in those cases, there was a viable domestic movement crying out for those sanctions. One could act in solidarity with the people of those countries even if it meant temporary suffering. Here, that does not apply.

There is also the logic of containment. Isolate the Soviet Union and let it fail. But of course, the two are not very comparable. Afghanistan is not Las Vegas: what happens there will not stay there. Punishing the population as a whole, which is what widespread withholding of aid might amount to, is not justified.

3.5. Ethics of an expanded refugee program

An expanded refugee program has obvious ethical merit. Given the discreet choice of returning an individual to Afghanistan or giving them a chance for a future abroad, the legal and moral obligation of non-refoulement is strong. This is particularly important for Pakistan. As an intervening state with a malignant legacy and as a state with a long border with Afghanistan, Pakistan should be encouraged to welcome Afghanis fleeing from the Taliban regime. International support for Pakistani efforts to welcome refugees might conceivably be an avenue for building a more positive future for those living in Pakistan as well.

In all, compared to the frustrating reality of limited legal obligations and enforcement, ethical obligations are more encouraging, potentially steering intervening states within their zones of policy discretion towards a wiser course. The most difficult challenge is likely summoning the ongoing responsibility towards refugees, given nativist hostility in many receiving countries. Turning from considerations of ethics, it may now be helpful to consider political economy and political philosophy, to see if perhaps we can summon a rationale that will help us make ethical choices.

4. Political philosophy: what we owe ourselves

This essay originally approached the issue of the obligations of the intervening state from the perspective of a client-centered lawyer, then from an ethicist. It will now discuss political philosophy for a moment and see if that is of use. One of the ideas motivating or justifying the invasion and occupation of Afghanistan and Iraq was that the US was both protecting democracy and spreading democracy. The George W. Bush administration thought it understood democracy, without much reflection about the nature

of democracy. Again, my central argument is this: The reason why the US government failed, and other NATO intervenors failed to achieve their desired outcomes, is because collectively we not only had an institutionally weak knowledge of Afghanistan and Pakistan, we also had a poor understanding of democracy and peace between democracies. Let us turn to those questions now.

Classical liberalism has within it an epistemological tension, that is, a split in how it approaches different areas of knowledge. Knowledge over “private” matters is approached with humility, in the sense that it may not be “publicly knowable” or to have a common consensus around a single best way to live one’s private life. Knowledge over “public” matters, in contrast, is thought to be subject to a greater degree of consensus, even if such a consensus is to a degree contingent, contested, and reversible. “Follow the science” in public policy sits with unease next to the rights and liberties of heart and home. These rights include the rights to choose who and how to love and associate, to choose how and whether to worship or raise children, and to control one’s private space and body. Sitting with this tension, managing it, depends on a division between public and private. While there is a more radical humility with regards to the best way to lead one’s private life than with public policy in classical liberalism, even “follow the science” recognizes that science itself is a way of knowing that depends on the gathering of new data and the continual willingness to amend previously held beliefs.

This liberal approach can be contrasted with any form of anti-liberal ideology, which declares the ideology itself as the source of knowledge for the best public policy and the best way to lead one’s life. Anti-liberal ideologies, whether they are theocratic, communist, or something else, tend to obliterate the distinction between public and private. The rights and liberties of heart and home become faded and thin if they are permitted to exist at all, reified only in a limited set of prescribed forms. Along with less epistemological humility, there is not as much epistemological tension. A common set of precepts is thought to govern both public and private, to the degree these realms are considered separate at all. With this approach to epistemology, to ways of knowing things, there is the risk of epistemological fragility – that doubts as to the approach take with regards to knowing one part of the system can easily spread and shatter belief in the entire approach to knowledge in the anti-liberal system.

What does this have to do with Afghanistan specifically? The democracy that was achieved in Afghanistan was thin. Short-term security was emphasized first and foremost, culminating in the ultimate deal of short-term security in the Doha Agreement, which promised the Trump Administration a period of quiet and the Biden Administration an impossible position. If the rhetoric of democracy is merely a handmaiden to cover for underlying “realist” security concerns, it will always tend to lose out to short term considerations. Paying a contractor who pays an armed group for temporary security makes short-term sense, but is in the long-term fatal for both security and democratic self-rule. Without any philosophical or ideological commitment towards democracy as a strategic goal, it will always be given short shrift. Without recognizing that intervenors are not going to export democracy to Afghanistan like an expensive fighter jet that was designed and manufactured elsewhere, but is instead a constant turning towards local communities to see if divisions between groups can be peaceably resolved. In this sense, democracy-building and peacebuilding are essentially synonymous.

Take the classic question of how much should be spent on security versus development in a counterinsurgency environment. Development is good for winning “hearts and minds” as the phrase has it, but tends to find itself second place to security expenditures. Good data on public spending in Afghanistan is incredibly difficult to get, but security expenditures were generally extremely high for a low-income country. Spending in the security sector was as much as 30 percent of economic output, compared to just three percent for most low-income countries (Haque, 2019). Estimates of the cost of US intervention in Afghanistan are as high as two trillion USD, with military aid being in the range of \$82 billion (Tian, 2021). This is in a country with an economy that ranged from 4 to 20 billion USD per year¹⁰.

The Afghan people did not control the expenditure of the two trillion USD. If that resource had been placed at the disposal of the Afghan government, it is unlikely that they would have spent the vast bulk of it to hire the US military and its contractors to win the war and build a just and sustainable peace. If that resource had been placed at the disposal of the people of Afghanistan, they also would likely have spent it differently. Afghanistan has had a population of that has grown from 20 to 40 million¹¹, with an average household size in 2016 of approximately 10 people¹². If very roughly there were 3 million households on average during this period, each household could have received two thirds of a million USD to build a just and sustainable peace in their own way. GDP per capita peaked at \$663 in 2012¹³. According to this math, the US could have given each household more than they would have earned in a century instead of wasting it on a failed effort to win the war. In the US, with a median household income of around \$70,000,¹⁴ that is the equivalent of having seven million USD for every household. If Afghan households had had democratic control over expenditures on their behalf, few of those dollars would have been spent on expensive foreign consultants, contractors, or militaries. Certainly, they would have driven a harder bargain than the US military did with its contractors.

Why is such an expenditure, a massive transfer of funds from the control of the US to the people of Afghanistan, essentially undiscussed? Would it really have been technically unfeasible to provide an income to areas not controlled by the Taliban? Would this not have incentivized people to not be controlled by the Taliban? It was not discussed because there was no understanding of democracy as an empowerment of households and communities to make their own financial choices, including choices involving the balance between development and security. We knew what was best. We knew how to spend the money. We knew how to fight the war. We knew how to win the peace. Except we didn't. We lacked epistemological humility. We didn't listen. We didn't share control where it mattered, in the two trillion dollars of misspent money. Not enough. We behaved with the certainty of anti-liberals in the name of democracy.

Imagine, if just for a moment, what a success would have looked like delivered not primarily through the Department of Defense but through universal basic income. Imagine if the good will after 2001 was built upon instead of squandered. Imagine if we were able to hold out the promise to

10. GDP (current US\$) - Afghanistan. World Bank. Available at <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=AF>

11. See <https://www.macrotrends.net/countries/AFG/afghanistan/population>

12. See <https://globaldatalab.org/areadata/table/hhsize/AFG/>

13. See <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=AF>

14. See Semega, Kollar (2022).

other peoples, during the Arab Spring and beyond, that we would support them with truly substantive financial aid, hold a coming out party for them as a newly freed people, that we would listen and trust them with their own fate. Regardless of whether you question the hypothesis that the more democratic two states are, the less likely they are to go to war... would not such an approach tend to increase our security if it succeeded? As well as being morally laudable? As well as being cheaper than war? Did we owe it ourselves to listen to those we are purportedly trying to save before spending so recklessly and for so long? Would that not have been more democratic?

Thinking of liberalism and anti-liberalism in this way may help us understand better the riddle of democratic peace, which in turn may help us think more clearly about what we owed ourselves and what we owed the people of Afghanistan during and after our long intervention there. It is not too late to recognize that epistemological humility is actually a democratic strength. It is not too late to begin listening and empowering the people of Afghanistan.

5. What is *jus post bellum* anyway? A conclusion and an opening

I will now turn to what may seem like an abstract question legal Latin, but which I believe is helpful for the practical questions of how to proceed. To answer what is the best definition for *jus post bellum*, I would like to put forward what I might call the “naïve temporal” definition and explain why it’s not as useful as a functional approach¹⁵.

A naïve temporal approach to Afghanistan, the way people often approach the tripartite division between *jus ad bellum*, *jus in bello*, and *jus post bellum*, would say we first ask the question *jus ad bellum* (may we use force at all) at the beginning, with the NATO invasion and occupation of the country displacing Taliban rule. After that point, we would be in a twenty-year period of *jus in bello* (how may we use force specifically) where we would not ask questions of *jus ad bellum* or *jus post bellum*. We would not ask *jus ad bellum* questions for two reasons. One is the naïve temporal approach that divides these areas of law by time. The other is that once the conflict was primarily between states and non-state actors the question of *jus ad bellum* is considered inappropriate, as it is deemed to only govern use of force between states. We would not apply *jus post bellum* according to the strictly temporal approach because, well, we are not *post bellum*.

In practice, this temporal approach gets a bit confusing, particularly to a non-lawyer, and I suspect even more particularly to many living in rural Afghanistan. The question of morality and legality regarding whether any side should resort to using force at all did not end once both sides starting using force. The legal justification for the use of force in Afghan territory changed from self-defence to consent for NATO forces once there was a government in Kabul to give consent, but the question itself doesn’t disappear. The beginning and ending of the conflict becomes more complicated as the actors involved multiply. Is there a separate beginning between Al Qaida and the US? NATO and the Taliban? The US and Pakistan? Was there an armed conflict between the US and Pakistan if part of Pakistan grants permission and another part doesn’t? What of other armed groups? In practice, a neat division with a moment where a single armed conflict

15. For more on functional approaches to *jus post bellum*, see e.g. Iverson (2021); Iverson (2013: 413-433).

begins and ends does not mesh with the reality on the ground. Take the most fundamental question – has the armed conflict ended? If so, when? Did it end when a new government was established in Kabul? Did it end, *de facto*, when a ceasefire was established under the Trump Administration? When the US military withdrew? Officially the US is still arguing at the US Supreme Court that it remains authorized to use force under the AUMF. So the use of armed force will likely continue. An armed conflict will likely continue between the Taliban and ISIS-K. With a naïve temporal approach to *jus ad bellum*, *jus in bello*, *jus post bellum* – *jus ad bellum* was a passing moment decades ago, and *jus post bellum* seems as though it may never come. And were it to come, many temporal approaches to *jus post bellum* would essentially leave it as a subset of international criminal law, another way of saying “post conflict criminal justice.” With due respect to Prosecutor Khan’s renewed investigation, that may leave the naïve, temporal, criminal law focused *jus post bellum* with little to actually accomplish in Afghanistan. Actual post conflict justice in Afghanistan is largely going to be done by the Taliban. It is unlikely to be pretty.

That leaves *jus in bello*. *Jus in bello*, the law of armed conflict, international humanitarian law, is wonderful. It is a true and lasting achievement to minimize the avoidable harms of an armed conflict. But it cannot do all the work of organizing the regulation of armed conflict to peace. It has enough to do.

A functional approach to *jus post bellum* looks different than a temporal approach. It would include the negotiations with the Taliban. It would include negotiations with Pakistan. More to the point, it would include the conduct during the armed conflict that was not about targeting. The vaunted effort to “win hearts and minds” is central to counterinsurgency. But it is in many cases not regulated by the temporal view of *jus ad bellum*, *jus in bello*, or *jus post bellum*, outside the temporary situation of occupation. For 20 years, well-past occupation, the temporal approach to *jus ad bellum*, *jus in bello*, and *jus post bellum*, has very little to say about the actual rebuilding of Afghanistan. Building infrastructure, providing social services, ending corruption, these are traditionally regulated, if at all, by the human rights obligations of the territorial state, Afghanistan, leaving the non-occupying but heavily involved foreign states neither forbidden nor obliged to build a road, or fund the police, or buy crops, or build consensus about what the post bellum regime would look like.

What if instead we put every one of these decisions under the interpretive rule of whether it furthered the goal of building a just and sustainable peace after the conflict? Even the operational heart of *jus in bello* in the heat of conflict, targeting, could be adjusted by a functional approach to *jus post bellum*. Targeting a Taliban fighter may be allowed by *jus in bello*. It might be proportionate. It might be a legitimate target. But it might not be worth it. The opportunity cost of the kill, given the alternatives, given budgetary limits, purchasing the crops of an Afghan farmer, employing an Afghan, funding an investigation into existing corruption, not making an enemy of the family of the dead, might do far more to further the possibility of a just and sustainable peace. A functional approach to *jus post bellum* frames these questions not as a sideshow but as the central theatre of operations.

To end, I want to float an idea that I hope can either cut through the inevitable partisan debate of who of the last four presidents “lost” Afghanistan, or maybe just annoy everyone. Was it Bush early on? Was it Biden at the end? Here is my idea. Blame Reagan and Clinton. It is no coincidence, I think, that the great success stories of *jus post bellum*, the

remodeling of Germany and Japan from wicked regimes to modern democracies, happened under the guidance of a US that was not afraid to extend its social safety net, that was not afraid to take a creative and experimental approach to governmental intervention, that was not afraid to see a confident democratic government as the solution to even overwhelming problems. One can't help feel that F.D.R. would have done a better job in Afghanistan than the US had over the last twenty years, in the wake of the skepticism towards American federal social democracy that has haunted us since Reagan. Perhaps before asking how we "lost" Afghanistan, we should ask why we are losing Tunisia, or scores of other struggling young democracies that could use the help of a confident democracy that believes in itself. Perhaps we could breathe life into Kant's vision of perpetual peace if we did a better job of defending and believing in our own democratic institutions.

Given the number of ethical and policy recommendations in this essay, an informed reader is likely to disagree with at least one, and perhaps many of them. I will close with a meta-recommendation, one that informs all of my analysis above. It is not too late to listen to the people of Afghanistan, and have them guide our decisions on how to respond to ongoing policy dilemmas. Should assets remain frozen? Should the Taliban take their seats at International Organizations and in Embassies around the world, and under what conditions? It is no longer possible to have a free election in Afghanistan to resolve these questions, but those outside Afghanistan but identify as part of the people of Afghanistan, they can be asked. Refugees can be welcomed, and they can be an asset in wisely guiding our policies going forward. We can listen to the people of Afghanistan to try to decide how best to proceed. At a bare minimum, we owe them that.

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