
Jus Post Bellum *Proportionality* and the Fog of War

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Abstract

This article begins by briefly discussing the general idea of jus post bellum norms before turning to discuss some of Michael Walzer's ideas about jus post bellum, particularly what he says, or could be construed to infer, about post-war proportionality. It also re-examines Walzer's discussion of the problems of post-war retribution and reconciliation. The article seeks to formulate and defend a post-war principle of proportionality, discussing how it relates to other proportionality principles, as well as to other jus post bellum principles. This leads to an examination of the fog of war, especially concerning Robert McNamara's calculations about the application of the principle of proportionality to the firebombing of Tokyo. I outline a general account of contingent pacifism that seems to me to follow from careful consideration of the jus post bellum principle of proportionality. The article closes by initiating a discussion of the prospects for the end of war in light of considerations about the justice of how particular wars should end.

For the last 2,000 years, a philosophical and theological tradition has dominated discussions about war, the Just War tradition. Augustine of Hippo is often credited with starting that tradition as he argued against the early Church Fathers who were largely pacifists. Augustine argued that wars could be justified if they were either waged to protect the innocent or for self-defence, since such wars were really not aggressive but rather defensive. Pacifists argued that even defensive wars risked the killing of people, most especially the innocent. But the Just War tradition has maintained that in order to minimize the killing of the innocent, some wars need to be fought, just as police must sometimes use violent force to prevent greater violence in society. And this argument is generally thought to carry the day against pacifists. In this article I will discuss one of the *jus post bellum* principles, proportionality, and relate it to the idea that has emerged in recent years called contingent pacifism.

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Since it seems that war will be with us for the foreseeable future, we not only need rules for when war should be fought, and rules for how to fight wars, but we also need rules for how to achieve a just peace after wars are concluded. And by considering the post-war rules, it turns out that pacifism, at least in its contingent form, becomes more plausible again. This was what the United Nations Charter seemingly promised, when it was announced in the Preamble that the People of the United Nations were ‘determined to save succeeding generations from the scourge of war’. We will see that proportionality calls for the kind of assessment that calls into question many, if not most, wars.

The article will proceed as follows. In the first section, I will briefly discuss the general idea of *jus post bellum* norms. In the second section, I will discuss some of Michael Walzer’s ideas about *jus post bellum*, especially what he says, or could be construed to infer, about post war proportionality. In the third section, I will re-examine Walzer’s discussion of the problems of post-war retribution and reconciliation. In the fourth section, I will try to formulate and defend a post-war principle of proportionality, discussing how it relates to other proportionality principles, as well as to other *jus post bellum* principles. In the fifth section I examine the fog of war, especially concerning Robert McNamara’s calculations about the application of the principle of proportionality to the firebombing of Tokyo. In the sixth section I outline a general account of contingent pacifism that seems to me to follow from careful consideration of the *jus post bellum* principle of proportionality. In the seventh section, I begin a discussion about the prospects for the end of war in light of considerations about the justice of how particular wars should end.

1 How Should We Understand *Jus Post Bellum*?

In this introductory section I will set out what I take to be the underlying basis of what I have identified as the six normative principles of *jus post bellum*: rebuilding, retribution, reconciliation, restitution, and reparation, as well as proportionality. Before getting into a discussion of the specific principles that should govern the situation after war ends, we need to think hard about what is involved in *jus post bellum* normative considerations. And the first place to start is with the idea of what ‘post’-war means. This is a more difficult issue than one might initially imagine. Think of the Second Gulf War, which began in March of 2003. By May of 2003, US President George W. Bush declared victory in this war. At that time only a few hundred US soldiers had been killed. By August of 2010, when US President Barack Obama declared an end of combat operations, nearly 3,000 more US troops had died since Bush declared victory. And even as late as the end of 2010, nearly 50,000 US troops were still in Iraq.

When did the Iraq War move into its ‘post’ phase? Surely it was not when Bush declared victory since combat – with 3,000 US casualties – continued for seven more years. When Obama declared an end to combat operations, perhaps then the Iraq War ended. But what of all the troops left behind – with casualties continuing even though these troops were not directly involved in combat? Then remember that after the ‘end’ of the Second World War, large groups of US troops remained in Germany and Japan

– indeed, US troops remain there to this day. So, it is hard to tell when war has ended just by looking at when major combat operations have ended, or when troops have returned home.

The ‘post’ in post-war discussions may refer to when serious questions of peace building occur.¹ Typically this is after hostilities have ceased and when there has been some kind of truce or peace treaty. But there will be many wars where there is never a formal peace treaty and yet where surely there is an end of the war. And in other cases there will never be ‘peace building’ at all. For this reason, and reasons given in the previous paragraph, I think that we should be flexible in how we regard the ‘post’ in *jus post bellum*.

Helen Stacy has suggested that rather than try to give a definitive statement of what ‘post’ means, we should instead simply use the term ‘mopping up’. On this creative, and somewhat whimsical, way to resolve this thorny conceptual issue, *jus post bellum* refers to any principles that govern the mopping up efforts, namely, the efforts at the end and after the end of war that lead into a position of peace. In this way, we do not have to decide precisely when war ends, but only when the practices of mopping up begin. It is conceivable that mopping up efforts occur even while it is pretty clear that war is still waging, although often this will be a very dangerous thing to do. Later I will argue that certain decisions both about whether to go to war, *jus ad bellum*, and how to wage war, *jus in bello*, should indeed be influenced by considerations of *jus post bellum*. In this sense, the borders of these three Just War branches are permeable anyway, so it should come as no surprise that ‘post’ war is difficult to define exactly.

Another issue to think about is whether we can separate further the practices that lead to a war’s end from the practices that are instrumental in re-establishing the peace. I follow David Rodin’s helpful categorization of the way a war is brought to an end, called *jus ad terminationem belli*, or *bellum terminatio* for short, which concerns ‘victory, defeat, stalemate, or intervention by a third party’. He distinguishes *bellum terminatio* from ‘*jus post bellum* proper, which concerns the moral principles after a transition from war to peace has been achieved’.² I will say very little about *bellum terminatio*, even though past theorists of the Just War tradition were quite concerned about the terms of peace treaties, for instance. I will restrict myself to the justice-based considerations after war ends, since this topic has been greatly under-examined, and yet is of the highest importance today.

Although the morality of peace treaties, for instance, is not of high priority today, the exception is whether to accept, as just, amnesty provisions of those treaties, especially when the amnesties are directed at the leaders of the aggressor or genocide-inducing state. I will also not say anything about this issue of amnesties but have addressed it elsewhere.³ What is today called transitional justice is thus misnamed if we accept Rodin’s suggestion, since it concerns pretty much the same as *jus post bellum*

¹ I thank Hilary Charlesworth for this suggestion.

² Rodin, ‘Two Emerging Issues of *Jus Post Bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression’, in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (2008), at 52, 54.

³ See L. May, *Crimes Against Humanity: A Normative Account* (2005), ch. 13.

proper.⁴ A good book is yet to be written about how to regard *bellum terminatio*, but I will not attempt to write it here.

A further issue is whether the normative principles are conceived as moral or legal or some combination of these two. The *jus post bellum*, as well as the other branches of the Just War, was first discussed by the Medieval theorists who were largely natural law theorists. According to natural law doctrine, there is not a clear line drawn between the moral and the legal. Both moral law and positive law participate in the natural law governing all that transpires on earth; and the natural law participates in God's eternal law. The positive law may be somewhat narrower in scope than the moral law, but there is a sense that law and morality cannot diverge much from each other since they are based in the same natural law.

Contemporary adherents of natural law theory hold that morality informs and limits the positive law. And the laws of war thus end up being both moral and legal. My view is that *jus post bellum* principles are primarily moral principles that are meant to inform decisions about how international law is best to be established down the road. Here it is important to note that on this construal, *jus post bellum* principles are not legal principles themselves. *Jus post bellum* principles are normative in that they should become law. But until there is some law-making act, such as an international convention (multi-lateral treaty), what I will identify as *jus post bellum* principles are primarily moral norms that have strong force in deliberations about what norms should be enacted into international law.

Legal theorists have been somewhat confused about the other two branches of the Just War tradition, the *jus ad bellum* and *jus in bello*, because they both have moral force and they have already been instituted as law by multilateral treaties, such as the four Geneva Conventions of 1948. But these other two branches of the Just War tradition, like the *jus post bellum*, are in my view primarily moral norms. In setting out a group of *jus post bellum* principles I am making a plea for them to become instituted, but my arguments in favour of having them become legal norms should not be confused with thinking that they already have legal status. One of the *jus post bellum* principles, the principle of proportionality, is really a meta-norm in that it is meant to function as a qualification on the other norms. And in this sense it is not as readily able to be instituted as a legal norm.⁵ Yet, it is also true that such a principle of *jus post bellum* will strongly inform which international norms become instituted.

Finally, it might be asked, who is the intended addressee of these *jus post bellum* principles? Here the answer is also not as easy as one might think. It would be easy to say that the addressee is any political leader who contemplates taking his or her country into war. But it is rare indeed when political leaders consider the Just War tradition in their war-making decisions, let alone in their decisions on how to act after war is over. Rather it is more likely that it is the average citizen of a state that is about to embark on war or is already enmeshed in war who would consider the morality and legality of

⁴ The exception is Ruti Teitel, who is concerned with both the transition from war to peace and the justice of the peace, in her book, *Transitional Justice* (2000).

⁵ I am grateful to Jovana Davidovic for discussion of this point.

how wars ought to end. And the average citizen is the one who will have to say no to wars that are fought in such a way that peace is unlikely to result from the war that a state's leaders are mounting. As has been true of the Just War tradition throughout its existence, *jus post bellum* is primarily addressed to those who are already predisposed to act morally and who care about peace.

Indeed, it seems to me that this is all that can be hoped for, namely to add to the conscientious and careful deliberations of members of the citizenry of a state that is on the verge of, or already embarked on, a path to war. Like all writing about morality, it is not obvious who is included in the intended target audience. But this much seems clear: in cases of *jus post bellum* reflection, the audience is largely humanity, with special attention to those members of humanity who can make a difference in decisions about how to act at war's end.

2 Walzer on the Ends of War

In Michael Walzer's otherwise comprehensive book, *Just and Unjust Wars*, he specifically deals with the *jus post bellum* in the chapter, 'War's Ends and the Importance of Winning', of Section II on the 'Theory of Aggression'. Thus, Walzer seems to subsume *jus post bellum* considerations under *jus ad bellum* ones. And even at that, he focuses his attention during these 16 pages only on what David Rodin has called, *jus ad terminationem belli*.⁶ Even in his later collection of essays, *Arguing About War*,⁷ Walzer only devotes scattered references to the *jus post bellum* proper.

Walzer recognizes that the end, or point, of a just war is to achieve a 'better state of peace',⁸ which is a crucial point for *jus post bellum*. But soon thereafter he spells out the ends of war in terms of the 'rights of nations, even of enemy nations, to continued national existence'.⁹ Yet, it is unclear how the continued existence of nations advances the end of peace, especially a just peace. And his only discussion of *jus post bellum* proportionality comes from the need 'to balance the costs of continued fighting against the value of punishing the aggressors'.¹⁰ There is very little discussion of proportionality of reparations,¹¹ and reconciliation does not appear in the index to his book.

Despite these problems, let us look at Walzer's often telling comments about proportionality. In Walzer's short chapter on 'War's Ends' there is a wonderful comment on the principle of proportionality:

The argument at this point might be put in terms of proportionality, a doctrine often said to fix firm limits to the length of wars and the shape of settlements. In this instance, we would have to balance the costs of continuing to fight against the value of punishing the aggressors ... it is characteristic of arguments of this sort that an equally strong case could have been made on

⁶ Rodin, *supra* note 2, at 54.

⁷ M. Walzer, *Arguing About War* (2004).

⁸ M. Walzer, *Just and Unjust Wars* (1977), at 121.

⁹ *Ibid.*, at 123.

¹⁰ *Ibid.*, at 119.

¹¹ *Ibid.*, at 297, is an exception.

the other side, simply by enlarging our conception of the purposes of the war. Proportionality is a matter of adjusting means to ends, but as the Israeli philosopher Yehuda Melzer has pointed out, there is an overwhelming tendency in wartime to adjust ends to means instead, that is to redefine initially narrow goals in order to fit the available military forces and technologies. ... It is necessary in such arguments to *hold ends constant*, but how does one do that? In practice, the inflation of ends is probably inevitable unless it is barred by considerations of justice itself.¹²

Here we have quite a lot of good material in this passage for understanding proportionality generally and also for proportionality in its three specific Just War forms: *ad bellum*, *in bello*, and *post bellum*. I will focus on each of these, but most especially its relevance for *jus post bellum* proportionality.

Walzer is surely right that in calculating whether or not a given response is proportionate we have to ascertain what the ends are and put a value on the various things that result from pursuing these ends. Ends are not pre-given; they are recognized from among a proliferation of possibilities. This is indeed a serious difficulty in proportionality assessments. And, in my view, it is because proportionality calculations are so hard that we should be very cautious about endorsing any particular war or tactic. Indeed, caution of this sort opens the door for serious reflection on pacifism as an alternative to Just War.

In the case of *jus post bellum* proportionality, there is an important pre-given end, namely, a just and lasting peace. It is true that there are various means to this end, but *jus post bellum* considerations do not have to contend with a proliferation of possible ends – only one is relevant. Of course, this does not mean that the value of this end is pre-given. And we still have the problem of how to value the consequences of using various means to pursue this end. But perhaps things are not so relativistic in *jus post bellum* proportionality as Walzer suggests to be true of *jus ad bellum* proportionality. War may achieve many ends, but the justice considerations at war's end are all of one sort. But if peace is the central end of war, then one wonders why Just War theorists have been so dismissive of pacifism over the centuries.

Despite agreement about the end of *jus post bellum* reflections, there is a problem in *jus post bellum* proportionality calculations. The problem is that the end of a just and lasting peace is not of infinite value, and so we will need to know how valuable it is if we are to weigh its value against the disvalue to be produced by the particular means being proposed to accomplish this end. If the end is of infinite value, then any means could be justified that lead to that end, even killing very many people. But that seems counter-intuitive. Surely, killing most of a population so that a small remnant can live in a just peace cannot be countenanced. And if predictions are very difficult, one might well wonder why initiating war to achieve a better peace, when peace is already at hand, is not much more controversial than it is normally understood to be.

3 Retribution and Reconciliation

This problem of indeterminacy is especially difficult when one considers the *jus post bellum* principle of retribution. Prosecuting a state's leaders for aggression or war

¹² Walzer, *supra* note 8, at 119–120.

crimes is of major importance, but it can sometimes make the achievement of a just and lasting peace much harder than before. So, there must be some way to assess the value of holding people accountable against the value of achieving a just and lasting peace. Proportionality seems to feature prominently as we attempt to make such an assessment, but we will need to ascertain the relevant values, and what are the limits of the values.¹³

We can perhaps make some progress on the problem sketched so far by considering another passage by Walzer on proportionality:

What is being prohibited here [by Sidgwick] is excessive harm. Two criteria are proposed for the determination of excess. The first is that of victory itself, or what is usually called military necessity. The second depends upon some notion of proportionality: we are to weigh 'the mischief done', which presumably means not only the immediate harm to individuals but also any injury to the permanent interests of mankind, against the contribution that mischief makes to the end of victory. The argument as stated, however, sets the interests of individuals and of mankind at a lesser value than the victory that is being sought. ... Once again proportionality turns out to be a hard criterion to apply, for there is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured.¹⁴

Walzer says that Sidgwick thinks this is an inescapable problem because he relies on the relativity of utilitarian calculations. To remedy this problem, Walzer argues that we should turn to a theory of rights.

Specifically, Walzer says that a 'legitimate act of war is one that does not violate the rights of the people against whom it is directed'.¹⁵ He singles out the ban on civilian rape and murder during war as an attempt to mark these violations of human rights as of supreme disvalue. But he also claims that if a person has done 'some act of his own' whereby 'he has surrendered or lost his rights', then rights to liberty, and also life, can be infringed during war. Of course, Walzer needs this proviso because otherwise war could never be just since it always involves the violation of the right to life of soldiers (as well as civilians).

But, to my mind, Walzer then makes a counter-intuitive move when he embraces, at least tentatively, the Napoleonic dictum that soldiers 'are made to be killed'.¹⁶ I partially support Walzer's 'moral equality of soldiers', that is, the view that soldiers are all to be treated the same regardless of whether they fight on the just or unjust side of a war, as I have argued elsewhere.¹⁷ But I do not support this abrogation of the rights of soldiers, especially their right to life. In part, it is my disagreement with Walzer about such matters that has caused me to embrace contingent pacifism rather than to remain within the confines of a Walzerian Just War perspective. So, there

¹³ This is sometimes referred to as the double currency problem. In economics it is common to have goods that are valued in one currency being proposed for trade for goods that are valued in a second currency. For the trade to be effected, there must be some way to translate values in one currency into values in another. For a useful discussion of this problem as it arises in bioethics see Selgelid, 'A Moderate Pluralist Approach to Public Health Policy and Ethics', 2 *Public Health Ethics* (2009) 195.

¹⁴ Walzer, *supra* note 8, at 129.

¹⁵ *Ibid.*, at 135.

¹⁶ *Ibid.*, at 136.

¹⁷ See L. May, *War Crimes and Just War* (2007).

are alternative accounts of rights and their importance that make it not true that an appeal to rights can solve all of the proportionality problems identified above.

In the case of retribution, there are the rights of the victims to consider, and perhaps to be weighed against the utilitarian value of achieving peace, modified by the non-utilitarian qualifier of the peace being just. The value of a specific peace is not the same as that of some other peace. At least in part, as Walzer also suggests, we are looking for a peace that is better than before the war started.

'The object in war is a better state of peace.' And *better*, within the confines of the argument for justice, means more secure than the *status quo ante bellum*, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations. ... The theory of ends in war is shaped by the same rights that justify the fighting in the first place – most importantly, by the rights of nations, even of enemy nations, to continued national existence and, except in extreme circumstances, to the political prerogatives of nationality.¹⁸

Here we are still in the domain of the calculations of proportionality, where the end of war that has to do with a just peace is to be valued relative to the peace in the *status quo ante bellum*. This is an important start at understanding *jus post bellum* proportionality, but so far it is only a start.

What Walzer singles out as the ends worth pursuing through war will not sound today like the ends that are most important. For Walzer downplays what he refers to as humanitarian concerns as merely matters of 'kindness'.¹⁹ He is mainly interested in the self-determination of states, and other 'rights of nations'. In this he seems to be a proponent of a statist, as he has called himself, as opposed to a cosmopolitan position on the morality of war.²⁰ The ends of war, for Walzer, are about protection of rights, but primarily they are the protection of the rights of Nations. Of course, nations have rights insofar as they protect the rights of their citizens, on Walzer's account. But, in his view, it is collective rights rather than individual ones that wars are aimed to secure.

There is a fascinating discussion of reconciliation concerning the annexation of Alsace-Lorraine in 1871 in Walzer's section on *jus in bello*. Here is what he says:

It is important, then, to make sure that victory is also in some sense and for some period of time a settlement among belligerents. And if that is to be possible, the war must be fought, as Sidgwick says, so as to avoid 'the danger of provoking reprisals and of causing bitterness that will long outlast' the fighting. The bitterness that Sidgwick has in mind might, of course, be the consequence of an outcome thought to be unjust ... but it may also result from military conduct thought to be unnecessary, brutal, or unfair or simply 'against the rules'. So long as defeat follows from what are widely regarded as legitimate acts of war, it is at least possible that it will leave behind no festering resentment ...²¹

¹⁸ Walzer, *supra* note 8, at 121–123.

¹⁹ *Ibid.*, at 135. He somewhat modifies this view in Walzer, *supra* note 7, at 76–77.

²⁰ There is a third alternative, often referred to as the 'Society of States' perspective. I think Walzer fits better into this category, as do I. See my discussion and defence of this view in L. May, *Global Justice and Due Process* (2011).

²¹ Walzer, *supra* note 8, at 132.

Walzer then uses an analogy to family life, of how to bring a feud to a peaceful end, and argues that confining war within minimal moral limits means that the ‘possibility of reconciliation remains open’.²² And he ends this discussion by saying, ‘Some limits must be commonly accepted, and more or less consistently maintained, if there is ever to be a peace short of the complete submission of one of the belligerents’.²³

If there is to be any hope of achieving post-war reconciliation, then retribution and other acts that would provoke bitterness or reprisals need to be limited. But there is more here as well, giving a post-war view of how to see *jus in bello*. The tactics used during war, especially ones that are in violation of the rules of war, will have detrimental effects on the likelihood of a lasting peace. Despite nationalist fervour that would impel a state to use whatever tactics look as if they could increase the chance of victory, these tactics are likely to make lasting peace much more difficult than if they were not used.

Can there be an explanation within the Just War tradition for giving more weight to one’s own civilians than to those of the enemy, even more than to civilians of the enemy state? One possible strategy is to argue that when a state or state-like party engages in unjust war the injustice of its aggression taints all other aspects of the war, including *jus in bello* considerations such as civilian immunity. This strategy has been suggested by at least one author recently,²⁴ and seems to be supported by Walzer as well.

Even if one is tempted by such a strategy, there are important *jus post bellum* considerations that should also be brought into the discussion that would bring the issue of casualties back to a position where all lives are kept in highest regard, that is, where the value of human life was before nationalist sentiments entered in. In post-war reconciliation it is important that one side in a war not appear to disfavour, and even attack, innocent civilians just because they fell on what appeared to be the unjust side of a war. One could contend that civilians on an unjust side, especially those who could have stopped the war but did not act to stop it, are not truly innocent. This is hardly true of all civilians, in any event – think of very young children – but the key *jus post bellum* consideration is that the non-combatants on the enemy side were not being treated with the respect and dignity they deserved. In the post-war situation, if people have not been treated rightly during the war, it will make reconciliation vastly more difficult than if they were afforded some respect, especially if they were innocent. And the form of disfavour that is based on nationalism is the most difficult to counteract or outweigh in convincing people now to act peaceably toward each other.

4 Rethinking Proportionality

The principle of proportionality is typically said to have two parts, one part about how wars can be initiated and one part about how wars should be fought. The first

²² *Ibid.*, at 133.

²³ *Ibid.*, at 133.

²⁴ Rodin, *supra* note 2, at 67.

proportionality principle, often called the political principle of proportionality, says that ‘a war cannot be just unless the evil that can reasonably be expected to ensue from the war is less than the evil that can reasonably be expected to ensue if the war is not fought’. The second principle, often called the military principle of proportionality, says that ‘the amount of destruction permitted in pursuit of a military objective must be proportionate to the importance of the objective’.²⁵ In my view, these two proportionality principles, one aimed at the initiation of war and the other aimed at tactics, are very hard to calculate in a way that would support a given war.

Douglas Lackey says, ‘Given the destructiveness of war, the rule of proportionality ... would declare that almost all wars, even wars with just causes, have been unjust wars’. Lackey then proposes that, to avoid ‘antiwar pacifism’, the proportionality principle be amended to say that a practice passes the proportionality tests ‘unless it produces a *great deal more harm than good*’.²⁶ When Walzer comes to address *in bello* proportionality, he says, also because of difficulty in calculating, that it should be understood as ruling out ‘*only purposeless or wanton violence*’.²⁷ In *Arguing About War*, Walzer is even clearer: ‘[n]onintervention gives way to proportionality only in cases of massacre or in cases of politically induced famine and epidemic, when the costs are unbearable’.²⁸ For both Walzer and Lackey, *ad bellum* and *in bello* proportionality do not do any work except in marginal cases. Walzer, like Lackey, is concerned that an otherwise intuitively sound proportionality principle would lead Just War adherents to embrace pacifism. Both Walzer and Lackey thus consistently support the justice of wars and dismiss pacifism. But I think we must not redefine principles so as to get a pre-determined result, especially concerning the third proportionality principle.

The third proportionality principle concerning *jus post bellum* involves the conditions necessary for rebuilding: they cannot impose more harm on a population than the harm that is alleviated by these post-war plans.²⁹ This third proportionality principle is premised on the idea that post-war efforts to achieve a just and lasting peace should not inflict more harm than good on the populations affected. And in this sense, *jus post bellum* proportionality is grounded in the same considerations as the *jus ad bellum* and *jus in bello* proportionality principles. But it is also true that the *jus post bellum* proportionality principle forces us to confront a larger issue, of the total effect of a war, in ways that the other two proportionality principles do not.

The *jus post bellum* proportionality principle forces us to think about what the effects of the war have been, and about what it will take to reverse some of the most harmful effects by rebuilding efforts, both the rebuilding of damaged property and the rebuilding of the kind of mutual respect that is necessary for the rule of law. In this way, the third proportionality principle is in my view at least as significant as the other two

²⁵ D.P. Lackey, *Ethics of War and Peace* (1988).

²⁶ *Ibid.*, at 40–41.

²⁷ Walzer, *supra* note 8, at 129.

²⁸ Walzer, *supra* note 7, at 92.

²⁹ See Orend, ‘Jus Post Bellum: A Just War Theory Perspective’, in Stahn and Kleffner (eds), *supra* note 2, at 40.

proportionality principles, and can be used to shed light on how best to understand these other *jus ad bellum* and *jus in bello* proportionality calculations.

I propose two normative *jus post bellum* proportionality principles as a bridge into the proper application of *jus ad bellum* and *jus in bello* proportionality principles:

Whatever is required by the application of other normative principles of *jus post bellum* must not impose more harm on the population of a party to a war than the harm that is alleviated by the application of the other post war principles.

This is what might be called the domestic *jus post bellum* proportionality principle. There is also its international variation:

Whatever is required by the application of other *jus post bellum* principles must not impose more harm on the peoples of the world than is alleviated by the application of these principles.

We should treat these as distinct principles since they have different addressees.

The problems that Walzer identified with proportionality in general, especially the difficulty of determining what the ends are and what their comparative values are, is still evident in *jus post bellum* proportionality. Indeed, the major problem of how nationalist sentiments colour our perceptions and provide a fog over all aspects of war is apparent also in *jus post bellum*. As we will see, some of the uncertainties are lessened when we add *jus post bellum* proportionality concerns, but other problems will still remain. It is for these and similar reasons that I will argue in favour of contingent pacifism rather than a Just War approach.

Walzer spends very little time on pacifism in *Just and Unjust Wars*, instead devoting his final chapter to non-violent resistance, but not to larger issues of pacifism. I subscribe to a view, commonly called contingent pacifism, that holds that war is so likely to involve the killing of the innocent that the moral risks of serving in any given war are normally not worth engaging in war. Walzer would presumably be opposed to this view for similar reasons that he is opposed to non-violent resistance, namely that it is not a realistic alternative to war in cases where there is a war-mongering state. Contingent pacifists can admit that in principle such cases might exist but deny that there are many, if any, in real life. The example that Walzer refers to the most, the war of the Allies against Nazi Germany,³⁰ seems to support his view, but there are not many others in Walzer's book, and there are unlikely to be many especially in light of the problems of the fog of war that we will next explore.

5 The Fog of War and the Firebombing of Tokyo

At this stage, I wish to consider an extended example from real life: an intriguing and revealing documentary film from 2004. 'The Fog of War: Eleven Lessons from the Life of Robert McNamara' was an award winning film produced and directed by Errol Morris. The subject of the film, Robert Strange McNamara, is best known as defence secretary of the United States during the beginning of the Vietnam War, often referred

³⁰ Walzer, *supra* note 8, at xvi.

to at the time as McNamara's War. He is less well-known as the person largely responsible for the US decision to fire-bomb Tokyo near the end of World War II. The film is mainly an interview with McNamara about his experiences during war. McNamara maintains that one of the first lessons he learned was '[t]he human race will not eliminate war in this century but we can reduce war, the level of killing, by adhering to the principles of just war, in particular proportionality'.

When political leaders like McNamara reflect back on their careers, they tend to portray themselves in the best possible light, and McNamara is no exception. It was especially telling in the discussion of Lesson 5 of the film: '[p]roportionality should be a guideline of war', what McNamara says about his role in the US war against Japan. He describes quite coldly the fact that in one night the US firebombed Tokyo, killing over 100,000 civilians. He attempts to defend this action by saying that such a strategy prevented the loss of many US soldiers if the war had gone on longer, even as he recognizes that his judgement is clouded by the fog of war.

This is clearly not a proper proportionality argument. For it to be so, McNamara would have to explain what was gained that was equivalent to such a horrible loss of innocent life – after all, these were 100,000 men, women, and children who were not soldiers and who were burned to death, an especially awful way to die. And, more importantly, McNamara would have to explain why he thinks that proportionality calculations can be made whereby civilian lives, even very many civilian lives, can be outweighed by the lives of soldiers, especially a lesser number of lost soldiers' lives.

McNamara's own emotional reactions are also telling here. He does not express remorse or regret for the deaths of the civilians, as I said describing them quite calmly and coldly. But when, in the same scene he recalls that one US pilot was killed during those firebombing raids, he gets teary eyed and has trouble speaking. While the loss of a single soldier during war is of course also regrettable – on grounds of proportionality it surely pales by comparison with 100,000 civilians burned to death. Yet McNamara seems to be more upset by the loss of one US soldier than the loss of 100,000 Japanese civilians. This is hardly to show a concern for the *jus in bello* principle of proportionality, unless enemy lives, especially civilian lives, are discounted, even more than the lives of soldiers are normally discounted, when they are on the unjust side of a war.

Here is where a proper consideration of the *jus post bellum* proportionality principle would help. The effects of the firebombing of the civilian population of Japan made reconciliation much harder than would have been true of the loss of one US soldier's life. Nationalism may make McNamara think that one of his fellow compatriots' lives is of incredibly high value. But *jus post bellum* considerations make us discount, and quite heavily, these nationalistic concerns, since nationalistic concerns are some of the most invidious motivations standing in the way of post-war reconciliation. The Japanese cannot be expected to engage in reconciliation if they believe, rightly, that Americans treated Japanese civilian lives so cavalierly. And it appears that this was indeed true of post-war Japan.³¹ The fog of war does not cloud everything, although it does make Just War calculations harder than is normally admitted.

³¹ See I. Buruma, *Wages of Guilt: Memories of War in Germany and Japan* (1995).

McNamara is also simply wrong to think that the political or military leaders of a state that goes to war can shield themselves from moral or legal responsibility by pointing to those higher up the chain of command as the truly responsible ones. But there is an interesting question raised here about whether political and military leaders who launch an illegal aggressive war should be held to a higher standard of responsibility for the destruction that war generates than those political and military leaders who launch a just and defensive war. In *jus ad bellum* terms there certainly should be different standards, and indeed the leaders on the just side would not be prosecutable at all. But in *jus post bellum* terms, I believe that both sides should have responsibilities in the aftermath of war, and that the fact of which side one was on should not make a major difference either for moral or legal responsibility.

Political and military leaders have to understand the rules of war (at the initiation of war, the conduct during war, and the aftermath of war) as true restraints on their behaviour, not as things to be got round by clever arguments of the sort McNamara employed at various points in the film. This idea, that some, although very few, wars can be justified, is the cornerstone of the United Nations Charter, the founding document of international law today. The Charter says that all armed conflict that violates the territorial integrity or sovereignty of a state is forbidden, and the 1948 Geneva Conventions similarly set the tactical rules for the waging of war. Only wars of individual or collective self-defence can be justified in international law today, and only those that are necessary for self-defence until the United Nations itself is ready to take action.³²

The debates about the UN Charter and the Geneva Conventions show that just war theory played a profound role in the thinking of the founders of these seminal documents on the international rules of war. Today, we have international courts that attempt to enforce these provisions. And these courts have made it clear that what they are largely enforcing are principles that one can trace back at least into the Middle Ages of the Just War tradition. Indeed, the very same Latin terms: *jus ad bellum* – justice of war, and *jus in bello* – justice in war, are used by both the Just War tradition and contemporary international law. I think that the term *jus post bellum* should also come into the legal lexicon and take up some of the ground covered already by the category of transitional justice, but with an eye towards distinctly moral principles. But doing so is complicated by the fog of war.

In one sense, the fog of war is a metaphor for the way nationalist sentiments and the drive for victory cloud judgement during wartime. Even well-intentioned people have a hard time discerning what the right thing to do during wartime is. Decisions to send young men and women into battle, knowing many are likely never to come home, would seem to be hard decisions to make in the best of circumstances. But during war, political leaders sometimes seem to make these decisions effortlessly. At least in part this is because the normal judgements of people are clouded by the abovementioned nationalist sentiments.

In another sense, the fog of war is a metaphor for the unpredictability of war. Wars often seem to have clear rationales and even clear paths to victory at the outset. But

³² See the UN Charter, Arts 2(4) and 51.

wars rarely proceed as predicted, and even the initial rationales change significantly during the course of a war. Consider the second Iraq war. The US and its allies invaded Iraq to stop it from using weapons of mass destruction. Once it became clear that there were no weapons of this sort, the rationale for the war was changed several times. Even the cause of war sits in this domain of unpredictable ‘fog’. And nearly every other aspect of war is also often hard to predict in advance. During wartime, or during the lead-up to war, we can see where we are at the moment, but because of the fog we cannot see very far into the future. This matters because tactical and end-game assessments become unreliable, as Walzer and Lackey admitted.

The ‘fog of war’ makes the principles of each of the parts of the Just War tradition hard to apply. *Jus ad bellum* principles call for wars to be waged only for just causes. If the causes change during the course of the war, perhaps because it was insufficiently clear what conditions would be found on the ground when the war in a distant part of the world actually is begun, then the principle of just cause, the lynchpin of *jus ad bellum*, is made very difficult to apply. *Jus in bello* principles call for a prediction of what are the likely casualties in a given strategy of war. If the number of casualties is very difficult to predict then the principle of proportionality, a cornerstone of *jus in bello*, will be very difficult to apply. Finally, *jus post bellum* principles call for ascertaining whether, for instance, criminal trials will increase or decrease human rights abuse in a given society. If it is difficult to predict what will be the effects of indicting, arresting, and prosecuting a sitting head of state, in human rights terms, then it will be very difficult to apply *jus post bellum* principles as well. And we will not be helped by adopting a Just War position as much as might have been hoped.

It is undeniable that the ‘fog of war’ makes the normative principle against civilian targeting very difficult to apply. In one sense the fog of war does not matter, namely concerning the intentions of the military actors in ordering a particular tactic to be used. But in another sense the fog of war creeps back in. This is because the choice of tactics is premised on achieving certain results, as well as what is thought to be true of the likelihood of civilians not being in a certain area where the tactic is to be employed. The fog of war can interfere with such calculations, and hence with the moral basis of these intentional actions.

In addition, the fog of war can make the assignments of value to civilian lives more difficult to do in any kind of objective manner since such factors as nationalism will make one more likely to assign less value to civilian lives associated with the enemy forces, and more value to civilian lives associated with one’s own side in a war. So, the fog of war will cloud judgements and make it less likely that the loss of civilian lives will be given its due, treating the lives of one’s own soldiers as more important than those of the civilians on the enemy side. As I have argued, this will make reconciliation and other post-war goals very difficult to achieve. And, once again, I am led to wonder about the option of pacifism rather than continue to deal with the indeterminacies within Just War thinking.

6 Contingent Pacifism

Contingent pacifism is the best response for soldiers who are contemplating participating in wars. Today, some people who are pacifists do not have absolute principled

reasons to oppose violence, or even to oppose all wars. Rather they are opposed to war because of a concern that war will be likely to involve killing the innocent or on grounds of other moral risks of participation in modern wars. Contingent pacifism calls for a case-by-case assessment of whether a given war involves the moral risks that make participation in that war morally problematic. As with others who have argued for this position, sometimes called 'just war pacifism', I look to the Just War tradition for the criteria by which war is to be judged morally problematic. And, like other recent pacifists, I focus on the killing of the innocent in war as that which makes war most problematic.³³ Indeed, this way of thinking of pacifism makes it a common sense view rather than a view that is 'unworldly'. Just War adherents will need to counter the seeming common sense of the contingent pacifist's advice to soldiers.

In my view, we should encourage *all* soldiers to resist going to war unless they strongly believe that it is a just war. This is consistent with the Just War tradition. What marks the Just War tradition off from contingent pacifism is the further claim that such strong belief will rarely, if ever, be warranted. Then the contingent pacifist makes the following move. Since it is so hard to determine whether wars are just, and hence for soldiers to take the moral risk that their actions will turn out to be instances of unjustified killing, the better strategy for soldiers is not to participate in war at all. Even when one country attacks another country, there is serious risk that the attacking country may have been provoked. Hence, soldiers on both sides normally should not take the moral risk that they may be put in a position of killing the innocent. Most importantly, soldiers on one side cannot rest assured that the people they will be expected to kill are not innocent.

So, there are a variety of moral risks, especially in light of the fog of war, which a soldier should consider, and that jointly support contingent pacifism. First, a soldier risks killing civilians, and many of these civilians, increasingly so in modern wars, are innocent. Secondly, a soldier risks wrongfully participating in a known unjust war, even if what he or she does in such a war is to follow legitimate orders. Thirdly, a soldier runs the risk that what he or she thought was a just war was actually an unjust war, and hence that he or she is participating in an unjust war after all. Fourthly, even among those soldiers fighting in a just war, a soldier risks unjustified killing since not all enemy soldiers are liable to be attacked and killed, assuming the moral equality of soldiers does not obtain. And, in any event, soldiers run the risk of killing civilians who are innocent. Thus the moral risks of participating in war are great. But these moral risks can be overridden by other moral considerations. Hence, the soldier still needs to examine each war on a case-by-case basis.

Transitional justice is implicated in all of these debates in that it is often the case that reconciliation is made harder when some people feel as if they are entitled to attack others, especially if they believe that those attacked have no right to complain. Assessing wars as a matter of objective moral judgement, rather than from the

³³ See J. Teichman, *Pacifism and the Just War* (1986), especially ch. 7; R.L. Holmes, *On War and Morality* (1989), especially ch. 6; and Sterba, 'Reconciling Pacifists and Just War Theorists', 18 *Social Theory and Practice* (1992) 21.

subjective perspective of those who participate in war, sometimes makes reconciliation in the aftermath of war very difficult, especially in cases of civil war, which are increasingly the wars that are faced today. Even if the war is between states, given the high degree of globalization today, returning to an isolated existence where one can simply continue to hate an enemy that one never again encounters is increasingly unlikely. In the aftermath of war, people need to resume thinking of each other as fellow citizens, or at least as fellow humans, and to break the cycle of mutual hatred. For all of its other faults, the moral equality of soldiers fostered reconciliation since soldiers were not seen as guilty for having fought, and could return home and be more easily assimilated than if they came home and were treated as somehow guilty.³⁴

In line with contingent pacifism, opening up the possibility of greater conscientious refusal options means that those who do fight are those who have indeed chosen to do so because they do not think that fighting is morally risky, or because they think the risk is worth it. When these soldiers return home they are less likely to be resentful of having been exposed to personal risk for their communities. And those who did not serve should not be resentful of those who did either, since all acted on what they conscientiously believed to be the right course. It is my belief that this will make for more harmonious relations after the war is over. In my view, such considerations should count quite a lot, even though they are not overriding, and may make the project of figuring out what is the right way to think about the issues we have been addressing not as simple as one might otherwise think.

One could object that when large numbers of young men and women can get out of military service by means of conscientious refusal, then those who do fight might be resentful of those who refuse to fight. But when all are doing what seems to them to be the morally right thing to do, resentment need not occur. And it may turn out that those who stayed at home because of serious conscientious misgivings about participating in the war are seen as similar to those who followed their consciences and participated in war. Indeed, especially if people do not think that those who fought or those who stayed behind are somehow guilty, it may be possible for a dialogue between both groups to open that may actually promote reconciliation. Of course it may also lead to greater numbers refusing to fight in the next war, but that is a price that societies need to be willing to pay. Such a result is not necessarily at odds with either traditional pacifism or just war. We need to think more about how various proposals affect reconciliation and other *jus post bellum* goals.

The form of contingent pacifism I support tries to give the benefit of the doubt to all, and not to treat soldiers or conscientious objectors as somehow guilty for what they have done. Such a strategy will make reconciliation easier. Indeed, it seems to me that one principle of *jus post bellum* is that one should employ the principle of charity especially towards soldiers who thought that their participation in war was merely the patriotically responsible thing to do. Contingent pacifists need not condemn or blame such returning soldiers, even as we try to counsel them that not participating in war is often the morally less risky option. I invite those who oppose contingent pacifism to

³⁴ See May, *supra* note 3, last ch.

explain what sort of reaction to such soldiers, in light of concerns about *jus post bellum*, their own theories countenance.

7 The End of War

Lesson Eleven of the McNamara film, the last lesson, is succinctly put: '[y]ou can't change human nature'. Reflecting on the fog of war, especially in light of unchanging human nature, should make us have questions about the end of war. By this I mean to refer to two meanings of the end of war. I have elsewhere written quite a bit about the normative principles that should guide us at the end of a particular war.³⁵ But I now want to begin to raise questions about another meaning of the end of war, when wars will come to an end, namely when people will choose to settle their disagreements by other means than the organized use of violence that is the mainstay of war.

In light of the fog of war, and especially the likely skewing of facts by nationalist fervour that seems endemic to human nature, it seems unrealistic to think that the leaders of states will be able appropriately to predict what the facts will be and how the principles of the Just War tradition should be applied. In such circumstances, surely the better option is not even to contemplate war as a means of dispute resolution. Such considerations would not put an end to war altogether, but as a contingent matter we may then be at the point where talk of the end of war makes more sense than it does for most people today. It is unclear to me why Walzer does not come to a similar conclusion, given his forthright assessment of the difficulties of making proportionality assessments at all stages of war. He does occasionally express his uncertainty about the morality of war, as when he says 'I am not sure the morality of war is wholly coherent',³⁶ but 'pacifism' does not arise in the index to *Just and Unjust Wars*. Considering the problems of the fog of war should make us all take a closer look at the idea of the end of war.

In his more recent book, *Arguing About War*, Walzer does take up the recent movement by some former Just War supporters toward various versions of pacifism. Here is how he characterizes this move:

The move involves a new stress upon two maxims of the [Just War] theory: first, that war must be a 'last resort,' and second, that its anticipated costs to soldiers and civilians alike must not be disproportionate to (greater than) the value of its ends. I do not think that either maxim helps us much in making moral distinctions that we need to make.³⁷

Above I have tried to give reasons to reject this assessment by Walzer.

In my view, the fog of war offers some of the best reasons for supporting contingent pacifism rather than the Just War approach epitomized by Walzer. As soldiers face increased difficulty of understanding whether the war they are asked to fight is a just war, the moral riskiness of fighting in an unjust war should make soldiers increasingly cautious. And as the causes of wars are harder and harder to discern through the fog

³⁵ See L. May, *After War Ends – A Philosophical Perspective* (2011).

³⁶ Walzer, *supra* note 8, at 22.

³⁷ Walzer, *supra* note 7, at 86.

of war, the reasonable strategy for soldiers is to decline to fight lest they find themselves in the morally unpalatable position of being unjust combatants.

The end of war is probably utopian if this is meant as the literal once and for all end of wars ever being fought.³⁸ But the end of war need not be thought of in this utopian way – we can think of it in light of contingent pacifism. Wars can be so unlikely to be justifiably fought that the default position is not to fight, and this will mean as a contingent matter that we stop seeing the end of war as an instrument of foreign policy and also not see war as one thing to contemplate in dispute resolution, other than in the direst cases of last resort. If political and military leaders come to think of war only as an absolute last resort, and even then as something that should be regretted rather than celebrated, then the promise of the guiding ideas of the Preamble to the Charter of the UN will perhaps be implemented.

Paradoxically, reflecting on the fog of war leads me once again to think hard about the challenge of the pacifists, from the earliest of times when theorists contemplated the idea of war. And in this respect, the traditional pacifists may have been too utopian in proposing a literal end to war. But the position of contingent pacifism seems to me to follow easily on the heels of contemplating the fog of war. The fog of war brings home to us the idea that precise predictions can rarely be made due to the strong sentiments that cloud judgement when war is contemplated. And the ability to know that one is fighting a just war diminishes in the fog. If rules need to be followed for war to be justified, and if it is very difficult to follow these rules, or even to discern the facts, due to the fog of war, then accepting the need to follow these rules leads to a kind of stalemate. In this stalemate the end of war, and the plausibility of pacifism, at least as a contingent matter, seems to have the upper hand.

Throughout these deliberations I have been guided by an interest in seeing how the *jus post bellum* might be conceptualized and how such considerations would affect the well-known principles of the other two branches of the Just War. And my assessment is that the *jus post bellum* principles will change the way we view those other Just War principles. Indeed, I have suggested that reflecting on the *jus post bellum* brings the Just War deliberations very close to those of the contingent pacifist. And this should be no great surprise, since *jus post bellum* considerations force us to think more seriously about peace than the other two branches of the Just War, and of course this is just what pacifism in all of its forms has also called for.

Proportionality assessments disclose how difficult any of the Just War principles are to apply to actual wartime situations. This conclusion is the beginning of a discussion of whether Just War principles, especially *post bellum* principles, can be accommodated so that a given war can indeed be called a just war. If the calculations are too difficult to work out in advance, the better strategy may be not to initiate or wage war in the first place. Soldiers, and their leaders, should be very reluctant to engage in war since it is so hard to figure out whether any given war is a just war. And *jus post bellum* considerations, especially concerning rebuilding, make these assessments even harder.

³⁸ See Walzer, *supra* note 8, at 329.

It is important to take account of the variety of forms of pacifism, especially contingent pacifism that has been endorsed by scholars such as John Rawls.³⁹ What was needed, according to Augustine, was fairly clear rules for the waging of war. Many believe that with relatively clear rules, one might say today, even the fog of war can be seen through, and the possibility of atrocities or horrible harms to civilian populations will be avoided. But even with clear rules the fog of war persists, in that it is difficult to know how precisely to apply these rules since the facts are often obscured. It is for this reason that caution is called for. Again, I wish to emphasize that the kind of pacifism I support is not significantly different from what is now considered nearly the orthodox interpretation of the meaning of the United Nations' Preamble. I will close by once again quoting from that document:

We the People of the United Nations [are] Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.

Such a position is consistent with the idea of a Just War, but the UN Preamble is increasingly better supported by the idea of contingent pacifism, given the reality of wars such as we have known them.

³⁹ See J. Rawls, *A Theory of Justice* (1971), at 382, where Rawls said he was a 'contingent pacifist' because he 'conceded the possibility of a just war' 'but not under present circumstances'.