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Rethinking Jus Post Bellum *in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May*

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Abstract

Taking Michael Walzer's and Larry May's reflections on jus post bellum *as a point of departure, I explore here some of the limits of what might be called the inherited notion of* jus post bellum. *I then articulate a broader perspective for* jus post bellum, *influenced by thinking on transitional justice. I argue that, given the nature of modern warfare and the evident shift to wars of humanitarian intervention, the contemporary understanding is no longer limited to restorative* ex post *justice, but must also include forward-looking aims, and for this purpose the discourse of transitional justice is better suited.*

Larry May involves Michael Walzer's *Just and Unjust Wars* to articulate a conception of justice at the end of war which is appropriate to our contemporary situation. Taking Walzer's and May's observations on these issues as a point of departure, I will here explore some of the limits of what might be called the inherited notion of *jus post bellum.* I will then articulate a broader perspective for *jus post bellum*, influenced by thinking on transitional justice. This perspective, like transitional justice itself, is both backward- and forward-looking. By contrast, the inherited notion of *jus post bellum* tends to view conflict as the interruption of a putatively just or stable *status quo ante*, which is to be restored to the fullest extent possible.[1] Given the nature of modern warfare and the evident shift to wars of liberal intervention, the contemporary understanding is no longer limited to restorative *ex post* justice, but must also include

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1 See M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, 2006); and Bass, 'Jus Post Bellum', 32 *Philosophy & Public Affairs* (2004) 384.

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Wars are being waged within a highly developed set of constraints under human rights and international humanitarian law, as well as expectations of democratization. There is thus an extraordinarily high demand for *post bellum* justice, whilst the guiding principles and values for such remain controversial.

May observes that, in relation to the larger law of war, the issue of *jus post bellum* is under-theorized. He notes that 'Walzer seems to subsume *jus post bellum* considerations under *jus ad bellum*'.[2] Of course, this is in and of itself a significant normative statement about the meaning of *jus post bellum*: i.e., there are limited post-war norms and, moreover, that these are most crucially connected to the principles which guide the initiation of war. Accordingly, the focus in the *post bellum* here is in response to aggressive war. The just aftermath is one that imposes constraints following such wars.

May draws from Walzer's articulation of the just war tradition the guiding principle that there ought to be a thoroughgoing proportionality regarding *jus post bellum*. Moreover, he reasons that such a calculus might well lead to 'contingent pacifism'.[3] The application of the principle of proportionality, he argues, should move us in the direction of trying to avoid war altogether – a utopian direction.

On the 35th anniversary of Michael Walzer's *Just and Unjust Wars*, there is a growing appreciation of the potential importance of the area of the law of war known as *jus post bellum*. Yet the relationship of law to conflict today is a complex one, and contemporary circumstances hardly reflect May's utopianism. Rather, one might perhaps see the current legal panorama as constituting a new view of peace – in the just war analysis – namely one that moves away from that associated with inter-state conflict to a calculus which reconceives a just peace in terms of *human* security, with implications for a transformed understanding of the meaning and role of justice during such periods. I have discussed this framework at greater length elsewhere.[4] Below, I outline some of the changes in *post bellum* expectations and the ways in which these are best captured by a more comprehensive concept and vocabulary associated with these periods of political flux: transitional justice.

1 Just and Unjust Wars – Half a Century On

To begin, post-conflict justice is, as Walzer himself would admit, hardly a central theme in *Just and Unjust Wars*. Insofar as he addresses *jus post bellum* at all, it is through the problem of 'settlements', as well as the question of responsibility, where he brings to bear other strands of the just war tradition, particularly those norms concerning the justification of war at the outset (*jus ad bellum*). As Walzer subsequently observed

[2] May, '*Jus Post Bellum* Proportionality and the Fog of War', in this issue, at 315.

[3] L. May, *After War Ends: A Philosophical Perspective* (2012), at 219 ff.

[4] See R. Teitel, *Humanity's Law* (2011).

in his most recent book, *Arguing about War*, written after the war in Iraq, *jus post bellum* was not a central concern until after World War II, and more recently with decolonization and later transitions.

What is owed to Iraq or to other peoples who are the 'beneficiaries' of wars of supposed liberation?[5] This is the burning question of the last decade in Iraq, Afghanistan, and most recently Libya. Where a war is justified on humanitarian grounds, i.e., a *just* war, what are the implications of this justice in the *ad bellum* for *jus post bellum*? One might well pose the question: What is the relationship of *jus post bellum* to *jus ad bellum*? On the other hand, might the injustice of a war's beginning imply greater post-war duties? Or does the logic work the other way around? In the event that a war is initiated for humanitarian reasons might that well imply added duties, whether during or after the conflict?[6] Just how does post-war justice relate to the broader questions concerning the meaning and direction of the justice of war? To what extent does the contemporary iteration of the just war tradition, its principles and values, help to guide the question of what must be done following a conflict? In his post-Iraq book, which elaborates upon the just war tradition in light of more recent wars, Walzer poses the problem of 'aftermaths', in particular those following an unjust war. In his words, '[j]ust how is postwar justice related to the just war tradition', i.e., the justice of the war itself and the conduct of its battles?[7]

2 Getting Beyond the Restoration of the *Status Quo Ante*

With the end of the Cold War we have seen a return to wars of intervention, with implications for the scope and character of *jus post bellum*. There is a need to rethink the earlier classical approach to post-war justice as being fundamentally restorative. Posing the question today of what values and related principles regarding rights and duties should apply, *post bellum* inevitably constitutes a departure from a focus on restoration (which takes implicitly or explicitly the pre-war *status quo* as a decisive normative benchmark). Historically, this area was dominated by a preoccupation with unjust wars and the settlements that followed those wars, focusing on restraining or regulating the punishment of the aggressor for disrupting the *status quo ante*.

In this context, victors were free to punish, within determined constraints – limits on collective punishment, spoils of war, plunder, return of prisoners of war, occupied territory, etc. This was often complemented by amnesties and reparation schemes animated by restorative objectives. The post-World War I settlement at Versailles was widely regarded as an instance of failed justice and, even worse, as having the effect of promoting the return of war.[8]

5 See N. Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (2004).
6 See Teitel, 'The Wages of Just War', 39 *Cornell Int'l LJ* (2006) 689.
7 M. Walzer, *Arguing About War* (2004), at 164.
8 N. Ferguson, *The Pity of War: Explaining World War I* (1995).

For Walzer, even enemy nations guilty of aggression have a right to their continued existence.[9] Building on Walzer,[10] May offers proportionality as a 'metanorm'.[11] One could conceive this view of *post bellum* in historical or retrospective terms – where what is at stake is responsibility in a backward-looking way, as guided by the justice of the war purpose itself and the goal of returning to the *pre bellum* or *status quo ante*.

Now, however, we can see that we are moving away from this traditional approach to *jus post bellum* in a number of ways: first, there is a move away from the dominant concern of *jus post bellum* conceived as a backward-looking enterprise, and as restraint, to a broader framework involving a host of duties that relate not just to the past but also to an often protracted present, as well as forward-looking goals for a peaceful future. The aegis or subject of *post bellum* norms has become greatly expanded.

Many questions today concerning what obligations attend aftermaths are being raised in the context of transition, sometimes following conflict, but just as often not. For a number of reasons, this view increasingly overlaps with conflict. At a time of persistent smaller conflicts, i.e., of pervasive violence, often of ongoing internal conflicts where there is no clear end,[12] and which are not even clearly about state-building or democratization, this inquiry leads to a questioning of the meaning of '*post bellum*' in *jus post bellum*. As May concedes, the parameters of *post bellum* have become murky.[13]

Along similar lines, there has been a shift in our understanding of responsibility away from the state-centric view as the singularly relevant subject of *jus post bellum*, as the older view of restoration assumed the state to be the relevant object of restoration. At the same time, there has been a move away from collective sanctions levied upon a state or its people. Individualized punishment is clearly on the rise, most dramatically through international criminal justice.[14]

3 Towards an Alternative Paradigm: What Normative Framework Should Apply?

In the current context, justice considerations enter the picture from the outset, consider that humanitarian considerations have been invoked as a justification for war itself. In today's wars of liberation internal ethnic conflicts are often involved; the issue is as much or more to do with settling scores with fellow citizens as punishing a foreign aggressor. Clearly, this brings transitional justice to the fore.

9 See Walzer, *supra* note 1, at 123.

10 See Walzer, *supra* note 1, at 119–120.

11 See May, *supra* note 3, at 6.

12 On the new wars see M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (2nd edn, 2007).

13 See May, *supra* note 3, at 2–3.

14 See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (ICTY, 7 May 1997). The recent ICJ rulings in *Bosnia v. Serbia* and *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* Judgment, 3 Feb. 2012, available at: www.icj-cij.org/docket/files/143/16883.pdf can be viewed as setting or reinforcing limits to post-war collective guilt or responsibility.

Insofar as the new wars are often conflicts animated by the values of liberalization, freedom, and so on, we can see ways in which the aegis of *jus post bellum* overlaps with the aims of transitional justice. Justice is not conceived as strictly punishment oriented, as assumed in the legalist paradigm. Nor is it confined to restitution and the restorative dimension implied by the earlier understanding of post-war justice. Indeed, it could well take in the full context and modalities of transition and transformation. The issue is being reconceived in terms of justice as security. Within the evolving framework, there is a concern to identify responsibility beyond the state to private actors as well. There are duties that follow even when a war is just.

Thus, '*post bellum*' seems too limited or inappropriate today because of the unstable or undetermined boundaries between conflict and post-conflict situations.[15] Transitional justice is arguably more capacious because it allows for purposes beyond those associated with a war's beginning, such as transformation, namely purposes going beyond retributive or restorative justice.

Rethinking the regulation of conflict in contemporary circumstances entails the challenge of integrating and recalibrating the norms that were shaped traditionally by their strict association or co-relation with a defined point in the course of the conflict – *ad bellum, in bello, post bellum*. Today we see that international humanitarian law or *jus in bello* applies during armed conflict and beyond. At least one tribunal has declared that it extends beyond this point.[16] While *jus ad bellum* was generally seen to relate to the beginning of conflict, and therefore to guide questions of the legitimacy of the use of force in international law, today we can see that the traditional inquiry regarding aggression has given way to a broader inquiry regarding the treatment of civilians, human security, etc. Moreover, the question of *jus ad bellum* – whether a war is unjust or just – evidently has ramifications for the duties of justice in the aftermath.

With the complexity of the new phenomena, one can see that multiple legal orders are arguably applicable in guiding the law of war, including *post bellum* and *in bello*, i.e., international humanitarian law, as well as occupation law and human rights law. This implies specific requirements associated with each of these areas, for instance, *jus in bello*, or the norms regarding the treatment of prisoners and other non-combatants set out in the Geneva Conventions. Occupation law, too, is generally the guiding principle for the protection of the *status quo* in occupied territories.[17] Lastly, human rights law, while generally associated with the guarantees a state gives its citizens in peacetime, also now applies in situations of conflict along with the law of war.[18] Other specific guarantees in certain situations may be in tension with one another.[19] To what extent are there broader guiding values?

[15] See UN Development Programme, *World Development Report 2011: Conflict, Security, and Development*, at 2–8 (discussing the 'challenge of repeated cycles of violence'). See I. Rangelov and M. Theros, *Field Notes from Afghanistan: Perceptions of Insecurity and Conflict Dynamics*, LSE Global Governance, Working Paper No. WP 01/2010, Apr. 2010.

[16] See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 69 (ICTY, 2 Oct. 1995).

[17] See Ben-Naftali, Gross, and Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 23 *Berkeley J Int'l L* (2005) 551.

[18] See App. No. 57950/00, *Isayeva v. Russia*, 41 ECHR (2005) 38.

[19] *Ibid.* (discussing the tensions involved in applying human rights law in occupied territories).

For Walzer, '[d]emocratic political theory … provides the central principles of the account'.[20] Yet one is inclined to suggest that the values ultimately underpinning Walzer's proposal are broader, namely those of human protection and security. He thus elaborates, 'What determines the overall justice of a military occupation is less its planning or its length than its political direction and the distribution of the benefits it provides.'[21] The question becomes: To what extent are people's lives improved? Consider in this regard the significance of various measures such as de-baathification (in Iraq) and the equal treatment of various groups, which involve commitments beyond pure or simple democracy.

I employed the term 'transitional justice' in 1991 to represent a move away from the discourse that associated such phenomena purely with the law of conflict.[22] The idea was that the aims of such processes were in part forward-looking – involving democratization – and not backward-looking and associated with war. Moreover, the use of the term 'transitional justice' also addressed the central issue of the time: the extent to which the relevant democratization processes seemed less revolutionary and more gradual, more *transitional,* often taking decades, for example in post-dirty war Latin America. We now have a rich set of illustrations from the post-Soviet bloc, Asia, and the Middle East.

4 The Peace v. Justice Debate

By contrast, it is in the dynamic contemporary context that questions of conflict-related justice are being confronted today; namely, situations in which conflict has not completely ceased and where there are multiple actors and aims. Let us return now to May's proposal that the *post bellum* context be guided by the principle of proportionality.[23] What does it mean to apply the principle of proportionality in *jus post bellum*? Today this question has gained in traction. Applying the proportionality principle requires thinking through the likely effects of *jus post bellum* strategies in periods of substantial flux. What is the likely impact of criminal justice on the consolidation of human rights protection in a given society? The first rule is that it should do no harm: '[w]hatever 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'.[24]

The respective roles of trials and amnesties in the transition from war to peace have been examined by political scientists within an instrumentalist framework that understands proportionality in terms of trade-offs. For Jack Snyder and Leslie Vinjamuri,[25] the inquiry regarding proportionality is essentially about the extent to which justice

[20] See Walzer, *supra* note 7, at 164.

[21] *Ibid.*, at 165.

[22] See Luban, 'Reviewing John Ester, Closing the Books. Transitional Justice in Historical Perspective (2004)', 116 *Ethics* (2006) 409; and R. Teitel, *Transitional Justice* (2000).

[23] May, *supra* note 2, at 324–325.

[24] See May, *supra* note 3, at 14.

[25] See Snyder and Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', 28 *International Security* (2003/04).5.

advances or undermines peace, where the critical variable or objective is peace; marshalling for the primacy of peace considerations over justice.[26] Some analysts are simply sceptical about criminal trials, and see them as threatening the objective of peace, while Leigh Payne, based on an empirical study of transitional justice outcomes in a wide range of situations, views a mix or balance of trials, truth commissions, and amnesties as more likely to produce outcomes supportive of the rule of law and peaceful democratic transition.[27]

5 *Jus post bellum* as Transitional Justice

The increasingly pervasive involvement of courts and tribunals in matters of post-conflict justice demands a conception of proportionality that is not simply political but also jurisprudential. This is far from being limited to criminal trials. One also thinks of Alien Torts Claims actions in the United States and the role of the Inter-American Court of Human Rights and the European Court of Human Rights in post-conflict accountability. We can see that justice has gone from a prerogative of the victor, which needs restraining, to a shared international obligation. This development in and of itself informs the meaning of the new proportionality.

The constitutive instruments of the *ad hoc* criminal tribunals and the International Criminal Court reflect this change. Their preambles assert that their purpose includes guarding the peace. Meanwhile they also function in a more traditional way, offering constraints on victors' justice – because the many rules as to the scope and jurisdiction of tribunals and offences are fixed – thereby defining the very parameters of the offence. Through these tribunals we have moved away from traditional post-war judgments which were expressly disconnected from the end of war, and away from the focus on the accountability of any one state, i.e, the victor. This was made very clear by the International Criminal Tribunal for the former Yugoslavia, as it was established during wartime and contemplated prosecution of actors on all sides of the conflict, with evenhandedness with respect to nationality and ethnicity.[28] This move depoliticizes and entrenches a timeless approach to *jus post bellum*. The response is punitive, but the punishment is individualized not collective. This is the fundamental challenge of *jus post bellum* as criminal justice: How can individualized punishment address the systematic wrongs of war waged between collectivities?

Increasingly, the normative regime pertaining to war is also peace-related. It has become heavily regulated by a new area of law – international criminal law – and institutionalized via the new tribunals. The *ad hoc* criminal tribunals, beginning with the ICTY, were instituted to 'maintain or restore international peace and security',[29]

[26] *Ibid*.

[27] T.D. Olsen, L.A. Payne and A.G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (2010).

[28] See ICTY, Office of the Prosecutor, press release, 25 July 1995, at 3; see also 'Statement by Justice Richard Goldstone', 24 Apr. 1995.

[29] See Statute of the ICTY.

i.e., to manage war. The tribunals were intended to operate – and did operate – during the course of the conflict, but with a view to facilitating its end. Here the controversy is not about victor's justice but about justice being imposed by the 'international community' on the region. The approach of the tribunals, reflected in the purposes stated in their constitutive instruments, suggests that there are no tragic choices or trade-offs between peace and justice, but only positive synergies. There is thus clearly a tension between this legal project of international criminal accountability and the perspective of pragmatic peace-building in the work of the political scientists discussed above.

6 Conclusion

There is a new relationship between the three strands of the law of war. The justification for war, especially where humanitarian justice considerations are prominent, sets the stage for higher expectations of humanitarianism, both in relation to how war is waged and the responsibilities of the victors post-conflict. If one understands humanitarianism in terms of the demand or aspiration for human security, then there is indeed a potential to evolve a notion of proportionality that navigates, so to speak, between the legalist and pragmatist perspectives. Going to war for the purposes of countering or preventing violations of humanitarian norms is normatively incoherent from both of these perspectives if the ultimate result is a reduction rather than an increase in human security, either because of the inherent impossibility of achieving the humanitarian goals through methods that themselves are adequately respectful of humanitarian norms or because of the exorbitant costs of establishing human security in the post-conflict environment (for instance, Iraq). This notion of proportionality demands a consonance of purposes, means, and consequences that straddles *jus ad bellum*, *jus in bello*, and *jus post bellum*.

With renewed demands for military intervention, interest in *post bellum* justice has never been greater. Given the human rights revolution, interventions are both justified on human security grounds but also waged in the context of new constraints, of human rights and international humanitarian law, as well as expectations of democratization. This goes some way to explaining the extraordinarily high demands for *post bellum* justice, which has now transcended its earlier limits to cover a larger period associated with conflict and to address the security, not just of states, but of persons and peoples.