The function of Jus Post Bellum in international law

Iverson, J.M.; Iverson J.M.

2. Exploration of Sister Terms

Only with a basic understanding of the *jus ad bellum*/*jus in bello* dichotomy can an exploration of a *jus ad bellum*/*jus in bello*/*jus post bellum* trichotomy properly begin. Before examining the suggestion that the *jus ad bellum*/*jus in bello* dichotomy be replaced with a *jus ad bellum*/*jus in bello*/*jus post bellum* trichotomy, this section will further introduce and critically explore *jus post bellum*'s more established "sister terms," *jus in bello* and *jus ad bellum*. Each term will be described in more detail, and then the import for *jus post bellum* and the *jus ad bellum*/*jus in bello*/*jus post bellum* trichotomy will be explored.

A. Jus in bello

Jus in bello addresses many issues. *Jus in bello* now includes, *inter alia*, regulations protecting and regulating civilians, civilian objects, refugees,[1] women,[2] children,[3] military medical personnel, military religious personnel, military prisoners, civilian prisoners, surrendering combatants, incapacitated combatants, and members of the

[1] E.g., Fourth Geneva Convention and Additional Protocol I.

[2] E.g., GCIII, Arts 14, 16; GCIII, Art 25; GCIV, Art27; API, Art 76(2); APII, Art 4(2).

[3] E.g., Geneva Conventions; The Optional Protocol on the Involvement of Children in Armed Conflict (2000), UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000 (UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000), an amendment to the Convention on the Rights of the Child (1989) UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with article 49.)

International Committee of the Red Cross. It requires collecting and caring for the wounded and sick.[4] Modern *jus in bello* regulates armed conflicts between states ("International Armed Conflicts") and other conflicts ("Non-International Armed Conflicts"). *Jus in bello* regulates active combat,[5] and also law making and administration during and after belligerent occupation.[6] (Belligerent occupation occurs during an International Armed Conflict when a territory is no longer under the control of the sovereign territorial state and is not part of the front line of active combat).[7] It includes certain protections for armed forces on land,[8] in the air,[9] and at sea.[10] It includes certain duties that may occur during peacetime, such as the duty to disseminate the texts of the Geneva Convention and educate the military and civilian populations in the principles of *jus in bello*[11] and the duty to determine whether a new weapon, means or

[4] E.g., Common Article III

[5] E.g., GC I/II, AP I/II.

[6] E.g., GC IV.

[7] See generally, Benvenisti, The International Law of Occupation (2nd ed 2012 OUP); Yoram Dinstein, The International Law of Belligerent Occupation (CUP 2009).

[8] E.g., GC I.

[9] E.g., AP I Article 42.

[10] E.g., GC II.

[11] E.g., GC I/II/III/IV, Arts. 47/48/127/144):

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

method of warfare violates Additional Protocol I or any other applicable rule of International Law.[12]

Jus in bello restricts not only the general conduct of combatants but also the specific means and methods of warfare, including weapons. The use of exploding projectiles weighing less than 400 grams was prohibited in 1868,[13] and bullets that flatten upon entering the human body were prohibited in 1899.[14] Poison and poisoned weapons were banned in the 1907 Hague Regulations.[15] The use of chemical weapons and bacteriological methods were banned in the 1925 Geneva Protocol,[16] a ban updated by the 1972 Biological Weapons Convention[17] and the 1993 Chemical Weapons

[12] Art. 36 AP I

[13] Short title: Declaration of Saint Petersburg (1868); Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, adopted 11 December 1868, D.Schindler and J.Toman, The Laws of Armed Conflicts, Martinus Nihjoff Publisher, 1988, p.102.

[14] Short title: Hague Declaration (1899); International Peace Conference 1899, Declaration (IV,3) concerning Expanding Bullets. The Hague, adopted 29 July 1899, (entry into force 4 September 1900).

[15] Short title: Hague Regulations (1907); International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

[16] Short title: Geneva Protocol (1925); United Nations, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925 (Entry into force: 8 February 1928).

[17] Short title: 1972 Biological Weapons Convention; 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1015 UNTS 163 / [1977] ATS 23 / 11 ILM 309 (1972) , 10 April 1972 (Entry into force: 26 March 1975).

Convention[18] (extending the prohibition beyond use to development, production, acquisition, stockpiling, retention, and transfer of biological and chemical weapons). The 1980 Convention on Certain Conventional Weapons (CCW)[19] and its Protocols regulate a number of weapons, including incendiary weapons,[20] mines,[21] booby traps,[22] blinding laser weapons,[23] explosive remnants of war,[24] and munitions that create fragments not detectable by X-ray.[25] Interestingly, the CCW is the first treaty to address the post-

[18] Short title: Convention on the prohibition of chemical weapons (1993); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992 (Entry into force: 29 April 1997); *see also* UN General Assembly, Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction: Resolution adopted by the General Assembly, 17 December 2003, A/RES/58/52.

[19] Short title: Convention on Certain Conventional Weapons; United Nations, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137 (Entry into force: 2 December 1983; Registered No. 22495).

[20] Short title: Protocol III (1980) to the Convention on Certain Conventional Weapons; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980 (Entry into force: 2 December 1983).

[21] Short title: Protocol II, as amended (1996), to the Convention on Certain Conventional Weapons; Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Geneva, 10 October 1980 (Entry into force: 2 December 1983).

[22] Ibid.

[23] Short title: Protocol IV (1995) to the Convention on Certain Conventional Weapons; Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995 (Entry into force: 30 July 1998).

[24] Short title: Protocol V (2003) to the Convention on Certain Conventional Weapons; Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention), 28 November 2003 (Entry into force: 12 November.2006).

[25] Short title: Protocol I (1980) to the Convention on Certain Conventional Weapons; Protocol on Non-Detectable Fragments (Protocol I). Geneva, 10 October 1980 (Entry into force: 2 December 1983).

conflict dangers of the explosive remnants of war. The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction[26] describes itself well, and was followed up logically by the 2008 Convention on Cluster Munitions.[27] The 2013 Arms Trade Treaty[28] regulating the international trade in conventional weapons entered into force 24 December 2014.

These types of treaties, focused on weapons, are considered to be in the domain of *jus in bello* or, to use the more modern term (discussed *infra*) International Humanitarian Law. But not all regulations of weaponry are considered to be *jus in bello*. The regulation of nuclear weapons in terms of disarmament, non-proliferation, testing restriction, and nuclear-free zones are generally considered to be in a category of its own (or series of categories), with such nuclear weapons treaties not considered primarily as a subset of International Humanitarian Law,[29] even though the International Court of Justice has concluded that their use would generally be contrary to the rules of International Humanitarian Law.[30] The ICRC finds it difficult to envisage how nuclear weapons use

[26] Short title: Convention on the Prohibition of Anti-Personnel Mines (Ottawa Treaty) (1997); The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction (Entry into force: 1 March 1999).

[27] Convention on Cluster Munitions, Dublin Diplomatic Conference on Cluster Munitions, 30 May 2008 (Entry into force: 1 August 2010).

[28] United Nations, Arms Trade Treaty, 2 April 2013 (Entry into force: 24 December 2014).

[29] Nystuen, Gro, Stuart Casey-Maslen, and Annie Golden Bersagel, eds. Nuclear Weapons Under International Law. Cambridge University Press, 2014, particularly Part V "International Disarmament Law."

[30] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996.

could be compatible with International Humanitarian Law.[31] Nonetheless, bilateral treaties such as Strategic Arms Limitation Treaty (I and II) or multilateral treaties such as the Convention on the Physical Protection of Nuclear Material[32] are often considered outside of *jus in bello*. Similarly, United Nations Security Council Resolutions on arms control[33] or domestic restrictions on arms or defence[34] (let alone small arms) are not generally considered part of *jus in bello*. From expanding bullets to nuclear weapons, *jus in bello* serves a regulatory role with regards to weapons, but as shown with respect to nuclear weapons, United Nations Security Council Resolutions or domestic restrictions, *jus in bello* does not occupy the field with regard to weapons regulation.

Does this broad body of law, *jus in bello*, cohere? To the degree it does, why does it cohere? The answer to this may be found in the terms used somewhat interchangeably to refer to the same body of law. The term *jus in bello* is often used interchangeably in an English-language context with "the law of armed conflict," "International Humanitarian Law" and analogous terms in other languages. "Laws of war" is also sometimes used.

[31] See *Who will assist the victims of nuclear weapons?* Statement by Peter Maurer, President of the ICRC, International conference on the humanitarian impact of nuclear weapons, Oslo, 4-5 March 2013, available at http://www.icrc.org/eng/resources/documents/statement/2013/13-03-04-nuclear-weapons.htm, last visited 18 August 2014.

[32] UN General Assembly, Convention on the Physical Protection of Nuclear Material, 26 October 1979, No. 24631, (Entry into force: 8 February 1987).

[33] For example, the restrictions on Iraq, Iran (July 2006 (1696), December 2006 (1737), March 2007 (1747), March 2008 (1803), September 2008 (1835) and June 2010 (1929)), North Korea, or Syria.

[34] For example, the restrictions in Germany or Japan after the First World War, or domestically in Nicaragua or at times in Haiti.

While these non-Latin phrases have the considerable advantage for those not fluent in Latin of being comprehensible in a common tongue, but they have their own drawbacks. The term "International Humanitarian Law" emphasizes a particular normative value which can provide coherence to the many strands of *jus in bello*: humanitarianism, or the saving of lives and reducing of suffering.

Before continuing further, a brief note on methodology and tools for the analysis of *jus post bellum* and related terms might be helpful. This thesis includes both very traditional methods such as literature review and close readings of important legal and historical texts, but also what is increasingly called in the Humanities the varied methodology and tools of the "digital Humanities."[35] Each general category of methodology has its strengths and weaknesses, and may be most effective in combination. A strength of using the tool of a digitized collection of millions of books and constructing a visual representation of the quantitative data derived from that collection (namely the frequency of works using a phrase as a percentage of the works published in that year) is the comprehensiveness of this approach. While surely imperfect, it is also far more comprehensive an approach than could ever be attempted by a single researcher, or indeed by any team of researchers not using the tools of digitalization, optical character recognition, and automated linguistic analysis. It also reduces questions of objectivity that might be present with traditional approaches. That said, traditional approaches are

[35] Patrik Svensson, The Landscape of Digital Humanities, Digital Humanities Quarterly, 2010 Volume 4 Number 1, available at http://digitalhumanities.org/dhq/vol/4/1/000080/000080.html last visited 16 July 2014.

far superior with respect to actually reading and comprehending key works, deriving the meaning and influence of those works, and providing historical and intellectual context for the ideas expressed.

These terms, "*jus in bello*," "the law of armed conflict" and "International Humanitarian Law", are all largely 20th century terms. This is perhaps not surprising with respect to the use of the term "humanitarian," which during the 19th century was often used contemptuously in the sense of sentimentality.[36] This chart shows the usage of the terms as a percentage of all terms in an extremely large body of scanned work since 1500.[37]

[36] Shorter Oxford English Dictionary, Vol. 1, (Oxford University Press 1973), p. 995

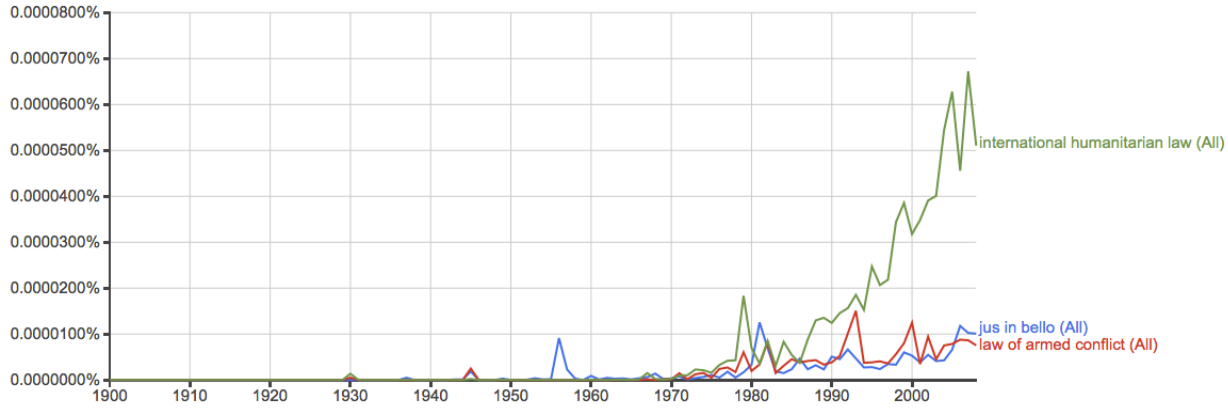
[37] The author recognizes that the graphical representations of historical data is not universally appreciated, but hopes for those who find it illuminating these graphs are of some use. This data uses the unequalled dataset of millions of books digitized by Google. A digitized book is usually a physical book that has been scanned, including the identification of characters through optical character recognition. Words are identified, and from those words two-word phrases ("bigrams") three-word phrases ("trigrams") and other phrases are identified and made viewable through Google's "NGram viewer." The results are normalized by year, so the y axis represents a percentage of the books published in that year that have include the searched-for phrase. If this were not done, the acceleration in the rate of publication would make the results more difficult to interpret meaningfully. More information can be found at https://books.google.com/ngrams/info [last visited 27 June 2014] and http://googleresearch.blogspot.nl/2012/10/ngram-viewer-20.html [last visited 27 June 2014]. Unless otherwise noted, the 2012 English language dataset is used, comprising over 20 million works. The original paper explaining the dataset used for these graphs is Jean-Baptiste Michel*, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden*. Quantitative Analysis of Culture Using Millions of Digitized Books. Science (Published online ahead of print: 12/16/2010). Regarding point of speech tagging, see Yuri Lin, Jean-Baptiste Michel, Erez Lieberman Aiden, Jon Orwant, William Brockman, Slav Petrov. Syntactic Annotations for the Google Books Ngram Corpus. Proceedings of the 50th Annual Meeting of the Association for Computational Linguistics Volume 2: Demo Papers (ACL '12) (2012).

Caption: Frequency of the use of "*jus in bello*," "the law of armed conflict" and "International Humanitarian Law" in millions of volumes published in English since 1500.[38]

Concentrating on usage since 1900, one gets the following picture:

38

https://books.google.com/ngrams/graph?content=jus+in+bello%2Claw+of+armed+conflict%2Cinternational+humanitarian+law&case_insensitive=on&year_start=1500&year_end=2008&corpus=15&smoothing=0&share=&direct_url=t4%3B%2Cjus%20in%20bello%3B%2Cc0%3B%2Cs0%3B%3Bjus%20in%20bello%3B%2Cc0%3B%3BJus%20in%20bello%3B%2Cc0%3B%3BJus%20in%20Bello%3B%2Cc0%3B%3BJUS%20IN%20BELLO%3B%2Cc0%3B.t4%3B%2Claw%20of%20armed%20conflict%3B%2Cc0%3B%2Cs0%3B%3Blaw%20of%20armed%20conflict%3B%2Cc0%3B%3BLaw%20of%20Armed%20Conflict%3B%2Cc0%3B%3BLAW%20OF%20ARMED%20CONFLICT%3B%2Cc0%3B%3BLaw%20of%20armed%20conflict%3B%2Cc0%3B.t4%3B%2Cinternational%20humanitarian%20law%3B%2Cc0%3B%2Cs0%3B%3Binternational%20humanitarian%20law%3B%2Cc0%3B%3BInternational%20Humanitarian%20Law%3B%2Cc0%3B%3BInternational%20humanitarian%20law%3B%2Cc0%3B%3BINTERNATIONAL%20HUMANITARIAN%20LAW%3B%2Cc0#t4%3B%2Cjus%20in%20bello%3B%2Cc0%3B%2Cs0%3B%3Bjus%20in%20bello%3B%2Cc0%3B%3BJus%20in%20bello%3B%2Cc0%3B%3BJus%20in%20Bello%3B%2Cc0%3B%3BJUS%20IN%20BELLO%3B%2Cc0%3B.t4%3B%2Claw%20of%20armed%20conflict%3B%2Cc0%3B%2Cs0%3B%3Blaw%20of%20armed%20conflict%3B%2Cc0%3B%3BLaw%20of%20Armed%20Conflict%3B%2Cc0%3B%3BLAW%20OF%20ARMED%20CONFLICT%3B%2Cc0%3B%3BLaw%20of%20armed%20conflict%3B%2Cc0%3B.t4%3B%2Cinternational%20humanitarian%20law%3B%2Cc0%3B%2Cs0%3B%3Binternational%20humanitarian%20law%3B%2Cc0%3B%3BInternational%20Humanitarian%20Law%3B%2Cc0%3B%3BInternational%20humanitarian%20law%3B%2Cc0%3B%3BINTERNATIONAL%20HUMANITARIAN%20LAW%3B%2Cc0 (Last viewed 9 May 2016). N.B. The long URL is provided here in case the algorithm changes, it should be able to be recreated with the embedded search terms.



Caption: Frequency of the use of "*jus in bello*," "the law of armed conflict" and "International Humanitarian Law" in millions of volumes published in English since 1900[39]

Similarly, if one were to focus on a more limited dataset that might reveal popular usage rather than all published materials, one sees a similar pattern. The following chart shows the number of articles in the New York Times mentioning "law of war", "law of armed conflict", and "humanitarian law" since 1850.

39

https://books.google.com/ngrams/graph?content=jus+in+bello%2Claw+of+armed+conflict%2Cinternational+humanitarian+law&case_insensitive=on&year_start=1900&year_end=2008&corpus=15&smoothing=0&share=&direct_url=t4%3B%2Cjus%20in%20bello%3B%2Cc0%3B%2Cs0%3B%3Bjus%20in%20bello%3B%2Cc0%3B%3BJus%20in%20bello%3B%2Cc0%3B%3BJus%20in%20Bello%3B%2Cc0%3B%3BJUS%20IN%20BELLO%3B%2Cc0%3B.t4%3B%2Claw%20of%20armed%20conflict%3B%2Cc0%3B%2Cs0%3B%3Blaw%20of%20armed%20conflict%3B%2Cc0%3B%3BLaw%20of%20Armed%20Conflict%3B%2Cc0%3B%3BLAW%20OF%20ARMED%20CONFLICT%3B%2Cc0%3B%3BLaw%20of%20armed%20conflict%3B%2Cc0%3B.t4%3B%2Cinternational%20humanitarian%20law%3B%2Cc0%3B%2Cs0%3B%3Binternational%20humanitarian%20law%3B%2Cc0%3B%3BInternational%20Humanitarian%20Law%3B%2Cc0%3B%3BInternational%20humanitarian%20law%3B%2Cc0%3B%3BINTERNATIONAL%20HUMANITARIAN%20LAW%3B%2Cc0 (Last viewed 9 May 2016). N.B. The long URL is provided here in case the algorithm changes, it should be able to be recreated with the embedded search terms.

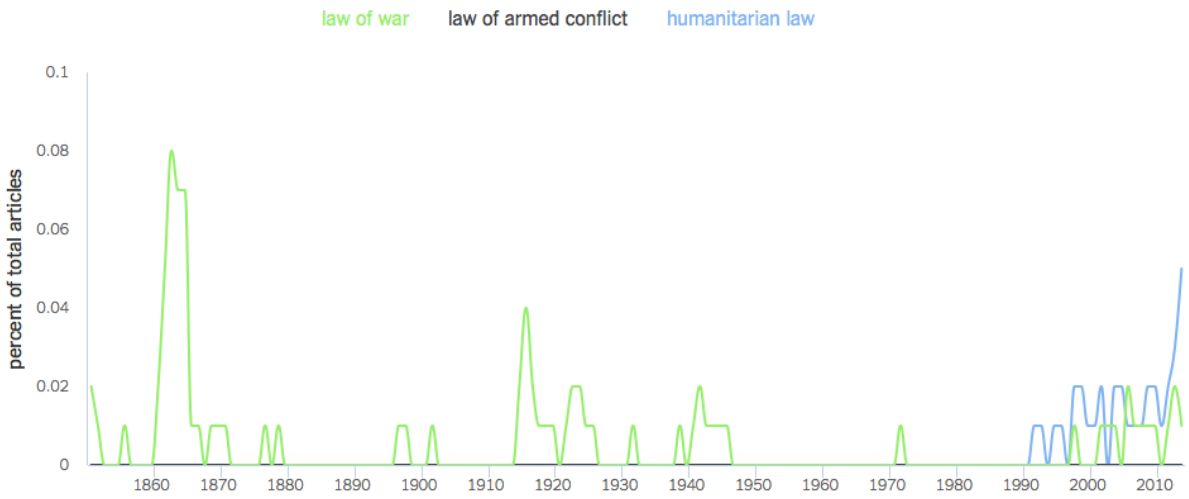
Caption: number of articles in the New York Times mentioning "law of war", "law of armed conflict", and "humanitarian law".[40]

In this New York Times dataset, there is almost no usage of *jus ad bellum*, *jus in bello*, or *jus post bellum*, but there are spikes in usage of "law of war" during the US Civil War, World War I, World War II, and since 2001. There is a tremendous increase in usage of the phrase "humanitarian law" in the post-Cold War era, and particularly since 2010.

A more telling graph in terms of interest in the subject as a whole may be found if the y-axis is percentage of articles published instead of the absolute number:

40

http://chronicle.nytlabs.com/?keyword=humanitarian%20law.law%20of%20war.law%20of%20armed%20conflict&format=count (Last viewed 9 May 2016).



Caption: percent of total articles published by the New York Times in a given year mentioning "law of war", "law of armed conflict", and "humanitarian law".[41]

This shows, again, the great interest in the subject in the pages of the New York Times during the U.S. Civil War, World War I, World War II, and in the post-Cold War Era, with the interest now (expressed now more as "humanitarian law" than "law of war") exceeding any period since the U.S. Civil War.

The charts above show a few interesting trends. First, the dominant term at present is clearly "international humanitarian law."[42] "International humanitarian law" is used approximately five times as much as "*jus in bello*" or "law of armed conflict." This seems to have happened due to a large increase in the use of the term since the mid-

41 http://chronicle.nytlabs.com/?keyword=humanitarian%20law.law%20of%20war.law%20of%20armed%20conflict&format=percent (Last viewed 9 May 2016).

42 In the present discussion, all references to the terms "international humanitarian law", "jus in bello", and "law of armed conflict" are referring to their usage with major forms of capitalization combined into a single set of statistics, combining for example uncapitalized (e.g." jus in bello",) first letter of each word capitalized (e.g. "Jus In Bello"), and all-caps (e.g. "JUS IN BELLO").

1980s. There seems to have been spikes in the use of "*jus in bello*" in the mid-1950s and early 1980s. It is interesting to note this happened approximately five years after the Geneva Conventions of 1949 and Additional Protocols of 1977. There was a general increase in the use of the term "law of armed conflict" since the 1990s. This is a term more frequently preferred by the military and is also the term favored in the Geneva Conventions of 1949.[43] "*Jus in bello*" and the "law of armed conflict" are not in disuse; rather published references to "international humanitarian law" have shot upwards without necessarily being at the expense of these related terms.

Of potential note in the development and conceptualization of this terminology are the major initiatives in the late 1960s and 1970s by the International Commission of Jurists and other NGOs.[44] These launched a process that ultimately led to the rebranding of the law of war as international humanitarian law, and indeed the negotiation and adoption of the 1977 additional protocols.[45] Twenty years after the Universal Declaration of Human Rights was promulgated, in 1968, the International Conference on Human Rights adopted Resolution XXIII on Human Rights in Armed Conflicts.[46] This Resolution invited the

[43] *See*, Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War, p. 26; also personal communications with military lawyers.

[44] Milanovic, Marko, The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law (July 9, 2014). Theoretical Boundaries of Armed Conflict and Human Rights, Jens David Ohlin ed., Cambridge University Press, Forthcoming, at 15. Available at SSRN: http://ssrn.com/abstract=2463957

[45] Ibid.

[46] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).

General Assembly of the UN to invite the Secretary-General of the UN to study "The need for additional humanitarian international conventions or for possible revision of existing Conventions".[47] As a result the Secretary-General produced two reports,[48] the second of which dealt extensively with the derogation clauses of human rights treaties and the *travaux* of the ICCPR, and concluded that killing that is lawful under International Humanitarian Law would not be considered an arbitrary deprivation of life under Article 6 of the ICCPR. This effort to integrate human rights law and international humanitarian law must be seen as a historically bounded and contingent process, not an absolute, ahistorical legal truth. As Marko Milanovic puts it "The whole point of the integrationist project was that the newly rebranded IHL was somehow an extension of human rights to armed conflict, or an exceptional, specialized part of IHRL."[49]

While they may be synonyms or near synonyms, the terms evoke differing responses and allude to differing organizing principles. If *jus post bellum* is to be understood in part in relation to *jus in bello*, *jus in bello* must also be understood in relation and to some degree in distinction from similar terms. Why might one term be used over another? What does the relative triumph of "international humanitarian law" say about differing organizing principles and their weight in the discourse about the regulation of armed conflict? What

[47] Ibid, para. 1.b.

[48] Respect for Human Rights in Armed Conflicts, UN Doc. A/7 720, 20 November 1969; Respect for Human Rights in Armed Conflict, UN Doc. A/8052, 18 September 1970.

[49] Milanovic, Marko, The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law (July 9, 2014). Theoretical Boundaries of Armed Conflict and Human Rights, Jens David Ohlin ed., Cambridge University Press, Forthcoming, at 24. Available at SSRN: http://ssrn.com/abstract=2463957

is *jus post bellum* in an age of "international humanitarian law" (rather than "*jus in bello*")?

The main point of *jus in bello* can be said to be its distinction from *jus ad bellum*, underlining the argument that regardless of the merits (or lack thereof) of the *jus ad bellum* justification for the resort to the use of armed force, the laws and principles known as *jus in bello* still apply. Thus, discussions of *jus in bello* can be said to be inherently reinforcing the importance of neutral application of the laws between the parties (particularly in International Armed Conflicts, the traditional area of application for this field).

The organizing principle of "international humanitarian law" is humanitarianism, or the saving of lives and reducing of suffering. It did not emerge from the struggle of rights-claimants, but from a sense of charity – *inter arma caritas*.[50] The Martens Clause, in the Preamble to the Hague Conventions on the Laws and Customs of War on Land, is sometimes given credit as the point of entry into international law of the concept of a humanitarian law.[51] As formulated in 1899, the Marten clause stated:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the

[50] "In war, charity." Now the motto of the International Committee of the Red Cross. *See* 40 Isr. L. Rev. 313 (2007) Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, The; Droege, Cordula.

[51] Meron, Theodor. "The Martens Clause, principles of humanity, and dictates of public conscience." American Journal of International Law (2000): 78-89; Johnson, James Turner, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton University Press 1975), p. 262.

> Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[52]

The influence of the Martens Clause is broad and deep.[53] "Humanitarian" groups such as national Red Cross/Red Crescent societies provide humanitarian services during natural and man-made catastrophes, during war and peace. They are the first responders, and are given a central place in the narrative of the Geneva Conventions of 1949 and additional protocols of 1977. The International Committee of the Red Cross has developed the "egg

[52] Hague Convention No. II of 1899 with Respect to the Laws and Customs of War on Land, with annex of regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

[53] The Martens Clause was restated in slightly different versions in the Hague Convention of 1907, (International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907), the Geneva Conventions of 1949 (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 63, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 62, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 142, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 158, 6 UST 3516, 75 UNTS 287), the 1977 Additional Protocols to the Geneva Conventions (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 1(2), 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, pmbl., para. 4, 1125 UNTS 609), and the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, pmbl., para. 5, 1342 UNTS 137. It is paraphrased in Resolution XXIII of the of the Tehran Conference on Human Rights of 1968, and is cited or referred to in various military manuals such as the US (DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, para. 6 (Field Manual No. 27-10, 1956); U.S. DEPT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 1-7(b) (AFP No. 110-31, 1976)), the United Kingdom (UNITED KINGDOM WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW, paras. 2, 3, 5 (1958)), and Germany (FEDERAL MINISTRY OF DEFENSE, HUMANITARIAN LAW IN ARMED CONFLICT-MANUAL, para. 129 (ZAv 15/2, 1992).

model" which emerged from interagency discussions on protection.[54] It posits three spheres of protective action from the point of violation: responsive action, remedial action, and environment-building action.[55] Responsive action is closest to the victims of a violation—action that aims to stop, prevent, or alleviate the worst and most immediate effects of abuse.[56] Remedial action is more restorative and is aimed at helping people recover and live with subsequent effects.[57] Environment-building action focuses more on societal structures and norms that will prevent or limit current and future violations and abuses; it aims to consolidate political, social, cultural and institutional norms conducive to protection.[58] This model recognizes that deprivation through impoverishment, dispossession, destitution, disease and sheer exhaustion are responsible for the majority of civilian deaths in war—that throughout the 1990s, "most civilians died *from war* rather than violently *in war*."[59] Humanitarian action tends to focus on responsive action. Remedial action is the traditional sphere of human rights work, although part of the expanding sphere of humanitarian groups. Environment-building tends to be associated more with development and "rule of law" work. It all centers on the victim and the

[54] Giossi Caverzasio, Sylvie (2001) Strengthening Protection in War: a Search for Professional Standards. Geneva: ICRC.

[55] Hugo Slim Andrew Bonwick, Protection: An ALNAP guide for humanitarian agencies (Overseas Development Institute, London, 2005), p. 42.

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] Ibid 25.

pattern of abuse of that victim. This pattern of abuse is not necessarily identical to the action of the organized armed group. For such groups, fighting in an armed conflict is in a sense "normal" and legitimate as long as within regulated limits.

Caption: "Egg model" of humanitarian response[60]

The bulk of what is commonly referred to as "international humanitarian law" is codified in six treaties, namely the four Geneva Conventions of 1949 and the two additional protocols of 1977. The most authoritative contemporary definition of the term comes from the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949:

> International humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically

[60] Ibid. 43.

> intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and properly that are, or may be, affected by conflict[.][61]

This definition emphasizes the unifying telos of humanitarianism around international humanitarian law. It does not emphasize the distinction with *jus ad bellum*. Again, it is the dominant term used for this area of law, showing a great increase in usage in recent decades.

Caption: Graph of all works published in English from 1950 to 2008 using the phrase "international humanitarian law" regardless of capitalization[62]

[61] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987, p. xxvii.

[62] https://books.google.com/ngrams/graph?content=International+Humanitarian+Law&case_insensitive=on&year_start=1950&year_end=2014&corpus=15&smoothing=0&share=&direct_url=t4%3B%2CInternational%20Humanitarian%20Law%3B%2Cc0%3B%2Cs0%3B%3Binternational%20humanitarian%20law%3B%2Cc0%3B%3BInternational%20Humanitarian%20Law%3B%2Cc0%3B%3BInternational%20humanitarian%20law%3B%2Cc0%3B%3BINTERNATIONAL%20HUMANITARIAN%20LAW%3B%2Cc0#t4%3B%2CInternational%20Humanitarian%20Law%3B%2Cc0%3B%2Cs1%3B%3Binternational%20humanitarian%20law%3B%2Cc0%3B%3BIntern

As mentioned previously, the "law of armed conflict" is the term that tends to be favoured by the armed forces themselves. In contrast with "international humanitarian law", it evokes more the image of military manuals than manuals for groups working hand in glove (or yolk in egg-white) with human rights and development groups. While it recognizes that there is law that applies to armed conflict (armed conflict is not *beyond* the law), it also implicitly recognizes that armed conflict can be legal (armed conflict is not inherently *against* the law). It lacks the automatic emphasis on the distinction between *jus ad bellum* and *jus in bello* that "*jus in bello*" has within it. While "international humanitarian law" is clearly a term of art with a relatively specific meaning for a specialist community, the "law of armed conflict" may be more immediately understood as a general matter by the general community. It could, however, cause more confusion if it tends to blur the *jus ad bellum*/*jus in bello* distinction. This might happen particularly if the "law of armed conflict" is used synonymously with the "law of war"[63]—a term even more apparently plain but possibly confusing. The "law of war" has historically and currently been used to refer both to *jus ad bellum* and *jus in bello* concerns. Since "armed conflict" is often thought of as synonymous with "war" among non-specialists, and there is a long history of trying to

ational%20Humanitarian%20Law%3B%2Cc0%3B%3BInternational%20humanitarian%20law%3B%2Cc0%3B%3BINTERNATIONAL%20HUMANITARIAN%20LAW%3B%2Cc0 (Last viewed 9 May 2016). N.B. The long URL is provided here in case the algorithm changes, it should be able to be recreated with the embedded search terms.

[63] *See*, Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War, p. 26; also personal communications with military lawyers.

divide the application of the law into periods of "war" and "peace,"[64] it may make sense for non-specialists to conflate the "law of armed conflict" with both *jus ad bellum* and *jus in bello* concerns.

Jus in bello or international humanitarian law is not merely what Sir Hersch Lauterpacht has called "the rules of warfare *pendent bello*",[65] that is, "during war" or more formally (1) While engaged in a formal war or (2) During the course of an armed conflict.[66] It covers peacetime obligations as well, such as the duty to disseminate the texts of the Geneva Convention and educate the military and civilian populations in the principles of *jus in bello*[67] and the duty to determine whether a new weapon, means or method of warfare violates Additional Protocol I or any other applicable rule of International Law.[68]

---

[64] *See e.g. Grotius, Hugo, and Jean Barbeyrac. The Rights of War and Peace, in Three Books: Wherein are Explained, the Law of Nature and Nations, and the Principal Points Relating to Government. The Lawbook Exchange, Ltd., 1738.*

[65] 'The Limits Of The Operation Of The Law Of War', H. Lauterpacht, 30 Brit. Y.B. Int'l L. 206 1953, p. 211. See also, "The dispossession of the lawful government by the invader pendente bello is no more than an incident of military occupation." Hersch Lauterpacht, Recognition of States in International Law, 53 Yale L.J. 385, 412 n.63 (1944).

[66] Guide to Latin in International Law, (OUP 2009 (print edition) 2011 (online edition) Aaron X. Fellmeth and Maurice Horwitz, available at http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1581 last visited 5 August 2014.

[67] E.g., GC I/II/III/IV, Arts. 47/48/127/144):

"The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population"

[68] Art. 36 AP I

The principle characteristic of *jus in bello*, historically, is the contrast it makes with *jus ad bellum.*

B. Jus ad bellum

What of *jus ad bellum*? The term "*jus ad bellum*" does not have the same competition for conceptual dominance as "*jus in bello*" does with "law of armed conflict" or "international humanitarian law." Many would say that the *jus ad bellum* became largely *jus contra bellum* on or before the establishment of the U.N. Charter (with self-defence and action under Chapter 7 of the U.N. Charter as notable exceptions to the general rule).[69] Generally, as a matter of international law, resort to armed force is forbidden[70] unless it falls within two narrow exceptions, self-defence (individual or collective)[71] or authorization by the Security Council pursuant to a resolution under Chapter 7 authority. War is no longer a legal regime in the way it was before the restrictions of the 20th century were developed. Instead of war representing a separate legal regime diametrically opposed to and hermetically sealed from the regime of peace,[72] war was described as a factual reality—armed conflict—regulated by various bodies of law.

---

[69] *See e.g.* Kolb, Robert. "Origin of the twin terms jus ad bellum/jus in bello."*International Review of the Red Cross* 37.320 (1997): 553-562; Sharma, Serena K. "The Legacy of Jus Contra Bellum: Echoes of Pacifism in Contemporary Just War Thought." *Journal of Military Ethics* 8.3 (2009): 217-230; Dinstein, Yoram. "Comments on War." *Harv. JL & Pub. Pol'y* 27 (2003): 877.

[70] *See* Article 2 UN Charter, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1 153 (entered into force 24 October 1945).

[71] *See* ibid, Article 51

[72] See Stephen Neff, War and the Law of Nations (2005), at 177-196.

One landmark academic source on this change in the nature of war is the article by Hersch Lauterpacht entitled *The Limits of the Operation of the Law of War*.[73] Published in 1953 and building upon "Rules of War in an Unlawful War,"[74] Lauterpacht reviews the effect that the change in the legal nature of war has on other areas of law. He notes the "basic international obligation prohibiting recourse to war as an instrument of national policy"[75] making some wars, wars of aggression, illegal. He explains that:

> [A]s the result of some general international treaties of a legislative character adopted after the First and Second World Wars, the place of war in the system of international law has undergone a fundamental change. This is so for the reason that, in consequence of the successive renunciation and prohibition of war in such instruments as the Covenant of the League of Nations and, in particular, the Pact of Paris and the Charter of the United Nations, war has ceased to be a right which sovereign States are entitled to exercise at their unfettered discretion. War undertaken in violation of these enactments is an unlawful and criminal—and not only an immoral—act. The true nature of that change has been obscured, in the popular estimation by the repeated violations of these undertakings in the past and the widely felt danger of their being disregarded in the future.[76]

Lauterpacht asserts that, before the Covenant of the League of Nations, the General Treaty for the Renunciation of War, and the Charter of the United Nations, the justice or

[73] Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 Brit. Y.B. Int'l L. 206 (1953).

[74] Hersch Lauterpacht, "Rules of War in an Unlawful War," *Law and Politics in the World Community* 89 (Lipsky, ed., 1953).

[75] Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 Brit. Y.B. Int'l L. 206 (1953), at 206.

[76] Ibid 208.

legality of a war was separate from the applicability of the rules of warfare.[77] He cites Johann Kaspar Blutschli's *Das modern kriegsrecht der zivilisierten Staaten*[78] for this preposition, quoting the following assertion: "The law of war civilizes on a fully equal footing both the legal and illegal war. It is only because it ignores that distinction that it is in the position to secure its general application"[79] This quote does establish the that the distinction between *jus ad bellum* and *jus in bello* was present *avant la lettre*. Blutschli was influential scholar and co-founder of the Institute of International Law who sought to replace religion and ethics with positive legal norms as sources of law. [80] His introduction to *Das modern Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt,*[81] addressed to Francis Lieber, stated "[m]y codification can gain authority to the extent that today's civilized world recognizes in it a timely and genuine expression of its legal consciousness, and to the extent that the powers that be heed public opinion."[82]

[77] Ibid 210.

[78] Johann Kaspar Blutschli, *Das modern kriegsrecht der zivilisierten Staaten als Rechtsbuch dargestellt* (1866).

[79] Johann Kaspar Blutschli, *Das modern kriegsrecht der zivilisierten Staaten als Rechtsbuch dargestellt* (1866) at 519, as cited by Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 Brit. Y.B. Int'l L. 206 (1953), at 210.

[80] For more on Blutschli, see e.g. Betsy Baker, The 'Civilized Nation' in the work of Johann Caspar Blutschli, in Kremer, Markus, and Hans-Richard Reuter, eds. Macht und Moral: politisches Denken im 17. und 18. Jahrhundert. Vol. 31. W. Kohlhammer Verlag, 2007 at 342.

[81] Johann Kaspar Blutschli, *Das modern Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (1868).

[82] Johann Kaspar Blutschli, *Das modern Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (1868), as cited in Betsy Baker, The 'Civilized Nation' in the work of Johann Caspar Blutschli, in Kremer, Markus, and Hans-Richard Reuter, eds. Macht und Moral: politisches Denken im 17. und 18. Jahrhundert. Vol. 31. W. Kohlhammer Verlag, 2007 at 342.

Blutschli's writings were ahead of his time, dealing in part with *lex lata*[83] and in part with *lex ferenda*.[84]

Is *jus ad bellum* a coherent body of law? *Jus ad bellum* is often referenced with various translations into English, from a right to wage war or right to war, to justification for use of force, reasons for war, prevention of war, or simply "just war theory." In practice, as with *jus in bello*, some rules dealing with the legality and justifications for entering into and participating in armed conflict that could theoretically be considered part of *jus ad bellum* are not generally considered to be part of *jus ad bellum*. While United Nations Security Council resolutions that authorize the use of force may be considered part of the modern *jus ad bellum* calculus (in evaluating whether there has been a violation of Article 2 of the United Nations Charter), restrictions on action, such as resolutions demanding a ceasefire,[85] demanding withdrawal of forces,[86] or otherwise forbidding the use of force[87] are *not* generally considered to be part of *jus ad bellum*.[88] Nor are General Assembly resolutions condemning or restricting participation in armed conflict generally considered part of *jus ad bellum*, although arguably the "Uniting for Peace"

[83] Law as it exists.

[84] Law as it should be.

[85] E.g. UNSC Res. 1701 (2006).

[86] E.g. UNSC Res. 1559 (2004).

[87] E.g. UNSC Res. 688 (1991).

[88] See generally, Moore, John Norton. "Jus Ad Bellum Before the International Court of Justice."*Va. J. Int'l L.* 52 (2011): 903.

Resolution(s)[89] have been considered part of *jus ad bellum*. Treaty obligations may be considered as part of the *jus ad bellum* calculations (in order to determine what qualifies as collective self-defence) but those treaties themselves[90] are not generally considered to be part of *jus ad bellum*. Domestic law, even domestic law imposed as a result of international armed conflict with the objective of preventing further international armed conflict such as German and Japanese law, is not generally considered part of *jus ad bellum*. While United Nations Security Council or General Assembly authorization for the use of armed force may be considered part of the *jus ad bellum* calculus, domestic judicial, parliamentary, and administrative decisions authorizing participation in an armed conflict are generally not considered part of *jus ad bellum*.

The historical background of *jus ad bellum* as a normative, natural law, perhaps more so than *jus in bello*, retains a clear and resounding connection between positive law and normative principles. Nowhere is this truer than with the controversial subject of humanitarian intervention, recently reframed as the "responsibility to protect." *Jus ad bellum*'s historical emphasis on such factors as just cause, right intention, final resort, legitimate authority, proportional means, and reasonable prospect are directly replicated in legal and normative debates regarding humanitarian intervention. For those

[89] 'Uniting for Peace' UNGA Res 377 (V) (3 November 1950) UN Doc A/1775, 10. Since 1950, ten emergency special sessions have been convened in accordance with the conditions stipulated in UNGA Resolution 377 (V). Christina Binder, Uniting for Peace Resolution (1950), Max Planck Encyclopedia of Public International Law, last accessed 19 August 2014.

[90] E.g. North Atlantic Treaty (signed 4 April 1949, entered into force 24 August 1949) 34 UNTS 243.

advocating humanitarian intervention, lawyers ought to lead towards a world order that can prevent atrocity crimes—with the U.N. Security Council if possible, non-violently if possible, but without such authorization and with force if necessary. This is not necessarily calling for radical change, but rather reflects frustration with the likely impossibility of any profound structural change under the current U.N. Charter without reinterpretation, perhaps echoing Edmund Burke's maxim—"A state without the means of change is without the means of its conservation."[91] If international lawyers do not discover a way to change the international system to prevent atrocity crimes, it is a threat to the conservation of the international system itself, and an abdication of duty. If the law of war is at the vanishing point of international law,[92] unresolved issues of preventing atrocity crime and the massive loss of life, using force if necessary, is at the normative center of international relations and foreign policy. *Jus ad bellum* has not, historically, been purely a legal domain. Rather, it contains a strong normative component as part of its basic functioning. This remains the case with current *jus ad bellum* debates.

C. Import for jus post bellum *and the trichotomy*

What are the implications for *jus post bellum* in this analysis? The use of the term "*jus post bellum*" inherently references *jus ad bellum* and *jus in bello*. On a surface level, this might reinforce the distinction between *jus in bello* and *jus ad bellum* and the importance of equal application of the laws of armed conflict. On a deeper level, however, the term

[91] Edmund Burke, Reflections on the Revolution in France, 1790.

[92] See Lauterpacht, H, The Problem of the Revision of the Law of War, *British Year Book of International Law* 29 (1952) 360, 381-2.

"*jus post bellum*" may create a tension with that organizing principle. Some influential *jus post bellum* scholars such as Brian Orend have come out directly against the normative distinction between *jus ad bellum* and *jus in bello*, holding that all is lost for a side, normatively, that is waging war wrongly in terms of *jus ad bellum*.[93] Brian Orend remains in a small minority on this point. Nonetheless, *jus post bellum* will often need to address *both* the legality and norms of each side fighting at all, as well as questions of regarding how they fought. Peace agreements imposed by a victorious party may accuse the losing party both of aggression and war crimes. While it is possible to address issues of *jus ad bellum* and *jus in bello* while strictly maintaining the distinction between the two during the transition to peace, doing so will not always be straightforward or simple.

As discussed *infra* in Chapter 3 (*Three Theories of Jus Post Bellum*), a hybrid functional theory of *jus post bellum* includes both peacemaking and post-conflict justice. Post-conflict justice is broader than criminal justice, resolving group and institutional claims and responsibilities, and many of the issues often dealt with under the rubric of "transitional justice." (Differentiating transitional justice and *jus post bellum* is the subject of much of Chapter 4.B.) The process of peace making, what Christine Bell calls the *lex pacificatoria*,[94] inherently has to choose whether and how to address issues of *jus ad bellum* and *jus in bello*. The question of whether the *res*, the thing that is being fought

[93] *See e.g.* Orend, Brian. War and international justice: A Kantian perspective. Wilfrid Laurier Univ. Press, 2000; Orend, Brian. The morality of war. Broadview Press, 2013.

[94] *See e.g.* Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

over, has been achieved, might be both part of the peace making process and post-conflict justice. Questions regarding amnesty are vital for a successful transition to peace, but the underlying substance of alleged violations are not *jus post bellum* but either *jus ad bellum* or *jus in bello*: for violations of the law of armed conflict, (*jus in bello*) for the crime of aggression in international armed conflicts (*jus ad bellum*) or for treason in a non-international armed conflict. Amnesties may be given recognizing that there were violations of *jus in bello* but that accountability for those violations may not be judged to be worth pursuing given the wish to resolve issues that drove the war (*jus ad bellum*) and thus build a just and lasting peace (*jus post bellum*, although some would question the justice of such an arrangement). Questions of right authority, a *jus ad bellum* concept, might come in to play with early negotiations as to who can sit around the peacemaking table, or whether peace negotiations happen at all.

Even without the application of international criminal law during the transition to peace, the questions of why the war was fought and how the war was fought will almost inevitably be part of the transition to peace. While in *jus in bello* analysis it is possible to both temporally and functionally separate the analysis from *jus ad bello* questions, in *jus post bellum* the analysis may overlap with *jus in bello* temporally and connect with *jus ad bellum* and *jus in bello* functionally.

While these issues can be interrelated in practice, as described in the paragraphs *supra*, this makes conceptual clarity all the more important. That does not mean that each concept cannot be somewhat complicated, problematic, or historically contingent, as

discussed in the sections *supra*. The history of j*us in bello* would seem to include the prohibition of dum dum bullets[95] and efforts to ban explosives dropped from hot air balloons, but not necessarily efforts to limit nuclear weapons. Modern *jus ad bellum* is generally recognized to cover the United Nations Charter prohibition on the resort to armed force without Security Council authorization (excepting self-defence until that authorization is obtained) but is not generally discussed in terms of additional restrictions on the use of force, whether under international or domestic law. *Jus post bellum* in practice is even more complicated, but that does not mean that it is not coherent or conceptually sound.

[95] The language of the 1899 Hague Declaration is "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." Short title: Hague Declaration (1899); International Peace Conference 1899, Declaration (IV,3) concerning Expanding Bullets. The Hague, adopted 29 July 1899, (entry into force 4 September 1900).