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The function of Jus Post Bellum in international law

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3. **Three Approaches to *Jus Post Bellum***

A. *Introduction*

The distinction between the overall choice to use force (*jus ad bellum*) and the choice of conduct within armed conflict (*jus in bellum*) is important, but that distinction does not contain the entire universe of questions on the principles and law governing armed conflict. In Parts B, C, and D, this chapter will outline the fundamental difference between taking a temporal approach or a functional approach to *jus post bellum*, and emphasizes the potential of taking a hybrid functional approach that emphasizes the functional aspects of *jus post bellum* while nonetheless rooting it in a general timeline of transition from armed conflict to peace. In Part E, it will discuss the functioning of *jus post bellum* as a *lex specialis*, and in Part F will examine the intermingling of different aspects of *jus ad bellum*, *jus in bello*, and *jus post bellum*, as well as the co-existence of these concepts with other bodies of law. Part G will map the internal workings of a hybrid approach to *jus post bellum*.

3. Three Approaches to Jus Post Bellum

Temporal Approach

B. Temporal Approach

The simplest explanation of the *jus ad bellum/jus in bello/jus post bellum* tripartite division is that these areas cover the beginning, middle, and end of armed conflict. This might be called a “temporal” tripartite division. It might be thought of as a “horizontal” approach, where *jus ad bellum* covers the moment of entry into armed conflict, the *jus in bello* covers the period during armed conflict, and *jus post bellum* covers the period after armed conflict.

<i>Moment of entry into armed conflict</i>	<i>Armed conflict</i>	<i>Post-armed conflict</i>
<i>Jus ad bellum</i> (laws/principles that apply at the start)	<i>Jus in bello</i> (laws/principles that apply in the middle/during)	<i>Jus post bellum</i> (laws/principles that apply at the end/after)

Caption – temporal/horizontal conception of the tripartite *ad bellum/in bello/post bellum* division

This conception of *jus post bellum* needs little theorization, only a set of assumptions—most strikingly that the temporal boundaries of armed conflict can be clearly defined in all cases. It harkens back to the older conception of armed conflict as its own domain of law. Linguistically, it takes its cue not from “ad bellum” or really “in bello” but from “post bellum” with the “post” tied to the time of application of the law, not the desired end result. The logical extension of this “post bellum” approach might be to rename *jus ad bellum* to “*jus ante bello*” and *jus in bello* to “*jus durante bello*,” and indeed to

3. Three Approaches to Jus Post Bellum

Functional Approach

rename *jus ad bellum* to “*jus ad bello*”. The author does not recommend this renaming, or this approach.

C. Functional Approach

An alternative approach might emphasize the function each division played in addressing armed conflict.

Function	<i>Jus ad bellum (whether force may be used at all)</i>
	<i>Jus in bello (how to fight humanely)</i>
	<i>Jus post bellum (how to transition to a just and sustainable peace)</i>

Caption – functional/vertical conception of the tripartite *ad bellum/in bello/post bellum* division.

With the functional conception, *jus ad bellum*, *jus in bello*, and *jus post bellum* can overlap temporally. They are not fundamentally sequential concepts. Rather, as indicated in the illustration above, they are defined by what they do, not when they do it. It is supported by recognition by the International Criminal Tribunal for the former Yugoslavia that once the existence of an armed conflict has been established,

3. *Three Approaches to Jus Post Bellum* *Hybrid Approach*

international humanitarian law continues to apply beyond the cessation of hostilities.¹ The UN Security Council has made similar findings regarding the territories occupied by Israel.² Linguistically, this focuses on the “ad bellum” and “in bello” language and sees “post bellum” as the *telos* or desired end of the law, not a description of its time of application.

D. Hybrid Approach

After introducing a purely temporal and purely functional approach, one can also readily describe a hybrid approach, one that takes into account both time and function. This approach is most helpfully framed with respect to the concept pioneered by Johan Galtung,³ central to Peace Studies, of “positive peace” (as opposed to “negative peace”). This approach would be temporally limited. It would likely tend to begin with negative peace and ends with positive peace. This approach would also be functionally specific. It is focussed on the construction of positive peace within the context of a negative peace. Negative Peace, in this understanding, is the mere absence of armed conflict, or as Galtung puts it “personal violence.”⁴ Positive Peace, in contrast, is the absence of what

¹ *Kunarac*, IT-96-23-T, Judgment of 22 Feb. 2001, at para. 414.

² See, e.g., U.N. Security Council Resolution 592 (1986). See Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?* *Eur J Int Law* (2008) 19 (1): 161-182 at 164 doi:10.1093/ejil/chm055

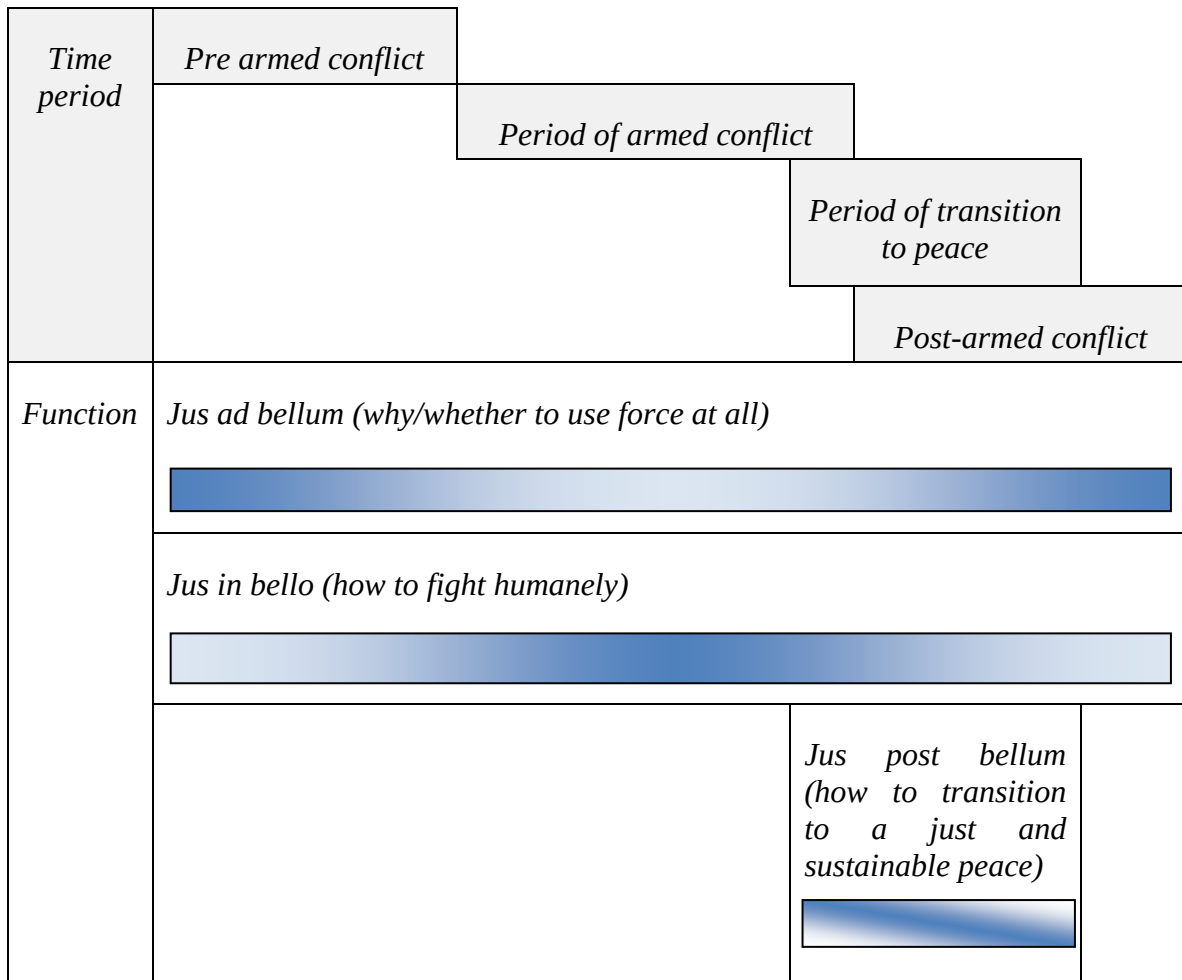
³ See e.g. Johan Galtung, “Violence, Peace, and Peace Research” (1969) 6(3) *Journal of Peace Research* 167–91.

⁴ *Ibid* 183.

3. Three Approaches to Jus Post Bellum

Hybrid Approach

Galtung calls “structural violence.”⁵ This imagines that the end of armed conflict is neat, and that attempts to address “structural violence” are necessarily subsequent to the end of armed conflict.



Caption – hybrid conception of the tripartite *ad bellum/in bello/post bellum* division, with the density of application changing over time but not fundamentally defined by time period.

⁵ Ibid.

3. *Three Approaches to Jus Post Bellum* *Hybrid Approach*

The idea of “density of application” referenced in the caption of the chart *supra* (functional/vertical conception of the tripartite *ad bellum/in bello/post bellum* division), is intended to indicate the likely force and dominance of application of each area of law at any particular point in time. It also is meant as a reminder of the often chaotic, partial, contingent, and reversible nature of the modern transition to peace. Rather than a moment akin to the “eleventh hour of the eleventh day of the eleventh month” that almost mythologically ended the First World War,⁶ modern transitions to peace may involve splintering non-governmental actors with varying approaches, relapses to organized armed violence, and variations over territory—that is, the answer to the existence of an armed conflict may vary over time, identity of the groups, and territory. This is not to say that the divisions between the existence of armed conflict and peace are not relevant. All three operate differently depending on whether there is a state of armed conflict or not, and many actions that can be legal during armed conflict are forbidden during peacetime (types of killing, detention) and there are protections that exist during armed conflict and occupation, for example, that may not exist post-armed conflict and occupation. The point of the chart above is to serve as a reminder that there are aspects of each which apply at various points.

⁶ For more on the final period of the First World War, see Persico, Joseph E. *Eleventh Month, Eleventh Day, Eleventh Hour*. Random House, 2005.

3. Three Approaches to *Jus Post Bellum* *Lex Specialis* and *Lex Generalis*

E. *Lex Specialis* and *Lex Generalis*

The hybrid approach referenced above works well with the idea of clarifying and prioritizing legal claims through the idea that *lex specialis* will be applied in lieu of or to differently interpret *lex generalis*. For example, under a hybrid approach, most battlefield decisions will be governed by *jus in bello*, but there may be situations where *jus post bellum* would constitute *lex specialis*. This could occur for example when the possibility of the return to a just and sustainable peace may be radically changed by what might be otherwise legitimate conduct under *jus in bello*.

Milanovic describes three conceptions of *lex specialis*: “as a rule of *total displacement*; as a rule of *partial displacement* or norm conflict resolution; and as a mere *interpretive tool* or rule of norm conflict avoidance.”⁷ This mechanism helps to resolve potential fragmentation and conflict between different areas of law. *Lex specialis* as total displacement is a functional repetition of the classical divide between the law of war and the law of peace—a divide that applied to *all* of international law.⁸ This position has

⁷ 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>; see generally Marko Milanovic, *Extraterritorial Application Of Human Rights Treaties: Law, Principles, And Policy* (2011).

⁸ 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>; see Stephen Neff, *War and the Law of Nations: A General History* (2005), at 178.

3. Three Approaches to *Jus Post Bellum* *Interplay*

been rejected since the Second World War.⁹ *Lex specialis* as partial displacement indicates that where a norm conflict is unavoidable, the conflict would be resolved by displacing or qualifying the *lex generalis* to the extent required to resolve the conflict.¹⁰ This rests on the premise that states, when authoring laws, could not have intended to legislate hierarchically equal laws that are contradictory. *Lex specialis* as interpretation does not try to resolve a norm conflict so much as avoid it, essentially an articulation of the principle that that in interpreting treaties one takes into account other relevant rules of international law between parties.¹¹

F. *Interplay*

This interplay of what are normally seen as different bodies of law within specialist legal texts (on children, international criminal law, victims, persons with disabilities) should not threaten the coherence of international humanitarian law and international human rights law, rather it extends and clarifies both bodies of law on specific subjects (children, victims, persons with disabilities) and functionalities (the determination of international criminal responsibility before the International Criminal Court). Hopefully, the

⁹ Art 3. ILC Draft Articles on the Effects of Armed Conflict on Treaties, UN Doc. A/66/10, para. 100 (the “existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties: (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not.”); *ibid* para 101.

¹⁰ 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 27. Available at SSRN: <http://ssrn.com/abstract=2463957>.

¹¹ Art. 31(3)(c) of the Vienna Convention on the Law of Treaties.

3. *Three Approaches to Jus Post Bellum Interplay*

determination that aspects of *jus post bellum* can be found not within a discrete corpus of *jus post bellum* treaties but rather within existing legal thinking about the transition to peace will also not be seen as fatal for the legitimacy of *jus post bellum* as an intellectually coherent body of laws and principles. *Jus post bellum* must not only be distinguished from *jus in bello* and *jus ad bellum*, it must also find its place alongside other coherent but related bodies of law such as human rights law, refugee/asylum law, environmental law, investment law, and property law.

It might be helpful to imagine an act that implicated *jus ad bellum*, *jus in bello*, and *jus post bellum* at once, in order to explain the difference in application of each area of law and normative principles. Imagine that the first act that began an armed conflict was a bombing campaign that used cluster munitions that left high levels of unexploded ordinance. The question of whether resort to the use of force was legal at all is a *jus ad bellum* question, answerable by reference to the United Nations Charter, any relevant Security Council resolutions, and perhaps customary law regarding self-defence against an imminent attack. In order to determine whether (or which) violations of *jus in bello* occurred, one would have to consider classic questions of targeting, proportionality, and military necessity, the applicability of both treaty (e.g. Geneva Convention IV, the relevant Additional Protocol, as well as potentially 1980 Convention on Certain Conventional Weapons (CCW) and its Protocol on explosive remnants of war,¹² and the

¹² Protocol V (2003) to the Convention on Certain Conventional Weapons

3. *Three Approaches to Jus Post Bellum Interplay*

2008 Convention on Cluster Munitions¹³) and customary law. The question of whether the act could also be restricted on the basis that it would make the transition to peace unjustifiably difficult pursuant to the 1980 Convention on Certain Conventional Weapons may also be considered a *jus post bellum* question,¹⁴ and the resolution of the *jus ad bellum* and *jus in bello* violations may require *jus post bellum* practice in order to determine accountability for the act, and build a just and sustainable peace.

The example above could be extended further to see how a single act could implicate multiple areas of law without necessarily confusing their application or resulting in legal fragmentation. Environmental damage might violate environmental law. The treatment of refugees created from the attack would be governed by refugee/asylum law. The human rights of those affected by the attack, now and in the future, would implicate international human rights law under the approach taken by the Human Rights Committee with respect to human rights during armed conflict.¹⁵

¹³ Convention on Cluster Munitions (2008)

¹⁴ The CCW is the first treaty to address the post-conflict dangers of the explosive remnants of war. <http://www.icrc.org/eng/war-and-law/weapons/overview-weapons.htm>

¹⁵ See e.g., Schabas, William A. "Lex Specialis-Belt and Suspenders-the Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum." *Isr. L. Rev.* 40 (2007): 592; Droege, Cordula. "Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, The." *Isr. L. Rev.* 40 (2007): 310; Orakhelashvili, Alexander. "The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?." *European Journal of International Law* 19.1 (2008): 161-182; Cassimatis, Anthony E. "International humanitarian law, international human rights law, and fragmentation of international law." *International and Comparative Law Quarterly* 56.03 (2007): 623-639.

3. Three Approaches to Jus Post Bellum

Hybrid approach to jus post bellum

G. Hybrid approach to jus post bellum

What does the hybrid approach to *jus post bellum* mean for *jus post bellum* itself, as opposed to how *jus post bellum* relates to *jus ad bellum* and *jus in bello*? What would a hybrid *jus post bellum* look like, particularly in comparison with a temporal *jus post bellum*? It helps to think of at least two large subcategories of *jus post bellum*: the law of ending the armed conflict (which may be termed *jus terminatio*¹⁶ or, following Christine Bell, *lex pacificatoria*¹⁷) and post-conflict justice and post-conflict peacebuilding.

¹⁶ The primary contemporary promoter and theorizer of this term is David Rodin. See Rodin, David. "Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression." *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*. Ed. Carsten Stahn and Jann K. Kleffner (The Hague: T.M.C. Asser Press, 2008), 53-62; Rodin, David. "Ending war." *Ethics & International Affairs* 25.03 (2011): 359-367; Rodin, David. "The War Trap: Dilemmas of jus terminatio." *Ethics* 125.3 (2015): 674-695. (N.b. he does not use the term "*jus terminationis*").

¹⁷ See e.g. Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

3. Three Approaches to Jus Post Bellum

Hybrid approach to jus post bellum

Under a temporal framework, these two would be neatly divided, as neatly as a hypothesized divide between war and peace. Graphically, it might be depicted as follows:

<i>Armed conflict</i>	<i>Post-armed conflict/early peace</i>	<i>Stabilized peace</i>
<i>Jus terminatio/lex pacificatoria</i> <i>(law/principles that applies before the armed conflict ends to the termination of armed conflict)</i>	<i>Post-conflict justice and peacebuilding</i> <i>(law/principles that applies after the armed conflict ends during early peace. Many of the practices included under the rubric of “Transitional Justice” may happen here, primarily.)</i>	<i>“normal law”/jus pacis</i> <i>(law that applies after the transition to peace is stabilized)</i>

Caption – temporal/horizontal conception of the tripartite division of *jus post bellum*

3. Three Approaches to Jus Post Bellum

Hybrid approach to jus post bellum

A more sophisticated hybrid approach might emphasize the function each subcomponent within *jus post bellum* played in addressing the transition to a just and sustainable peace.

Armed conflict	Post-armed conflict/early peace	Stabilized peace
<i>Jus terminatio/lex pacificatoria</i> (law/principles that applies primarily to the termination of armed conflict and laying the initial foundation of a just and sustainable peace.) 		
<i>Post-conflict justice and peacebuilding</i> (law/principles that applies primarily to the building of peace and resolving justice issues from the armed conflict. Many of the practices included under the rubric of “Transitional Justice” may happen here, primarily.) 		
“normal law” (law that applies to matters primarily unrelated to war) 		

Caption – hybrid conception of the *jus post bellum*, with the density of application likely to change over time but not fundamentally defined by time period.

It is worth noting the change in language as well as the change in structure in the two charts above. Under the temporal conception, *jus terminatio/lex pacificatoria* could be described as the “law and principles that apply before the armed conflict ends to the termination of armed conflict.” Under the hybrid conception, *jus terminatio/lex*

3. Three Approaches to Jus Post Bellum

Hybrid approach to jus post bellum

pacificatoria could be described as the “law and principles that apply primarily to the termination of armed conflict and laying the initial foundation of a just and sustainable peace.” The title is the same, but the definition switches from a temporal focus (defined by when it applies) to a functional focus (defined by what it does) applied with sensitivity as to the timeline of armed conflict (thus hybrid). Under the hybrid approach, *jus terminatio/lex pacificatoria* applies to all stages of the negotiation and implementation of peace agreements, including initial framework discussions before any peace agreement is reached and implementation agreements after the armed conflict has technically ended.

Under the temporal conception, post-conflict justice and peacebuilding could be described as the “law and principles that apply after the armed conflict ends and during early peace.” Under the hybrid conception, post-conflict justice and peacebuilding could be described as the “law and principles that apply primarily to the building of peace and resolving justice issues from the armed conflict.” Under either conception, many of the practices sometimes included under the rubric of “Transitional Justice” may happen as part of post-conflict justice, including criminal prosecutions, truth commissions, reparations programs, gender justice programs, security system reform, “DDR” (disarmament, demobilization, and reintegration), memorialization,¹⁸ vetting (also known as “lustration,” “screening,” “administrative justice,” and “purging”)¹⁹ and education.²⁰

¹⁸ International Center for Transitional Justice (ICTJ), “What is Transitional Justice” available at <http://ictj.org/about/transitional-justice> (accessed 27 May 2016).

¹⁹ Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007).

3. Three Approaches to *Jus Post Bellum* *Hybrid approach to jus post bellum*

(For more explaining the difference between Transitional Justice and *jus post bellum*, properly conceived, see Chapter 4.B, *infra*.)

The hybrid approach to *jus post bellum* allows an exploration of the interaction between temporally overlapping *jus terminatio/lex pacificatoria* and post-conflict justice/peacebuilding efforts. While criminal prosecutions, for example, typically happen after armed conflict has terminated, there is no requirement for that to occur,²¹ and indeed criminal prosecutions are sometimes justified on the basis that they will serve to build the peace through incapacitation and deterrence.²² Disarmament, demobilization, and reintegration may happen after the conflict has ended, but in certain countries such as Uganda, may be an ongoing effort even before the conflict is ended or pushed into other countries. This hybrid approach allows the concept of *jus post bellum* to have a much greater utility, encouraging an exploration of the entire transformation from armed conflict to peace, in all its variety and complexity.

It is important to note that this hybrid approach works whether *jus post bellum* is operating as a body of laws and principles, an interpretive tool, or as a framework. As a

²⁰ See e.g. Elizabeth A. Cole and Judy Barsalou, “Unite or Divide? The Challenges of Teaching History in Societies emerging from Violent Conflict” (United States Institute for Peace 2006) 2 (“History education should be understood as an integral but underutilized part of Transitional Justice and social reconstruction”).

²¹ See, for example, the initial prosecutions at the International Criminal Tribunal for the former Yugoslavia.

²² For an interesting compilation of material on the question of the effect of criminal prosecutions on peace, see Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (2009) http://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf last visited 15 July 2014.

3. *Three Approaches to Jus Post Bellum*
Hybrid approach to jus post bellum

body of laws and principles, *jus post bellum* includes all of the items evaluated *infra* in the chart of relevant laws and norms.

3. Three Approaches to *Jus Post Bellum*

Hybrid approach to *jus post bellum*

General/ Global	• Vienna Convention on the Law of Treaties as applied to Peace Treaties/Customary Law of Treaties • Customary international law of state recognition • Customary international law of government recognition • Treaty and customary international law regarding amnesty and the responsibility to prosecute alleged perpetration of certain crimes • Recognition of states and governments by global international organizations •	• UNSC Resolution 1325 • Customary international law on post-conflict administration • Global judicial bodies jurisprudence relating to <i>jus post bellum</i>	• Customary international law of occupation • Customary international law of state responsibility, particularly with regards to new states • Customary international law on reparations • Global peacekeeping norms
Midrange/ Regional	• Recognition of states and governments by regional international organizations • Multilateral negotiations regarding issues related to <i>jus post bellum</i> • Regional positions regarding amnesty and individual criminal responsibility (e.g. African Union positions on al Bashir) •	• Regional judicial bodies jurisprudence relating to <i>jus post bellum</i> • Multilateral disarmament treaties, including verification	• Regional peacekeeping efforts • Atypical “wars” (e.g. war on terror)
Specific/ Local	• Bilateral regarding issues related to <i>jus post bellum</i> Specific amnesties • Specific state recognition • Specific government recognition • Intrastate/domestic negotiations	• Specific disarmament/demobilization/reintegration efforts, including verification • Domestic judicial bodies jurisprudence relating to <i>jus post bellum</i>	• Particular reparation • State practice regarding state responsibility • State practice regarding occupation • Particular occupation • Specific peacekeeping
	Procedural	Mixed	Substantive

Caption: Schematic depiction of law and norms regarding the transition to peace

3. *Three Approaches to Jus Post Bellum*

Hybrid approach to jus post bellum

This schematic will be used as a useful guide, connective tissue and leitmotif in various points throughout the thesis. It is not intended to be an exhaustive inventory, but rather to guide the reader through the diverse contents of *jus post bellum* as the issue is approached through a variety of perspectives. As an interpretive tool, current laws can be interpreted with the goal of achieving a just and sustainable peace in mind. As a framework, it can help order competing norms and laws to prioritize the successful transition to *jus post bellum*.