The function of Jus Post Bellum in international law

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4. Present – An Exploration of Contemporary Usage

A. The Existing Matrix of Definitions: A review of contemporary scholarship

1. Introduction

What is "*jus post bellum*"? *Jus post bellum* is often described in shorthand as "law after war" or "the law of transition from war to peace." This chapter addresses the question of *jus post bellum*'s meaning in scholarship. Supplementing this empirical analysis, this chapter takes a comparative look specifically at the temporal dimension of *jus post bellum*, Transitional Justice, and International Criminal Law. Together, these analyses provide a clearer picture of what "jus post bellum" means for those who use term. The picture is not simple. But without oversimplifying, it can be made more comprehensible. This chapter clarifies not only current usage, but also identifies the problems that scholars and practitioners are addressing when identifying laws and principles under the rubric of *jus post bellum*.

In many respects, the definition of *jus post bellum* is clear. To those familiar with the terms, *jus post bellum* is obviously tied to *jus ad bellum* and *jus in bello*, traditional categories of international law dealing with armed force and more broadly the norms of the just war tradition. *Jus ad bellum*

[1] seeks to limit resort to the use of force between states. *Jus in bello* seeks to limit the

suffering caused by war.[2] Again, *jus post bellum* is often described in shorthand as "law after war" or "the law of transition from war to peace." It is seen as completing the effort, begun with *jus ad bellum* and *jus in bello*, to apply law and norms to the difficult area of armed conflict. *Jus post bellum* can be clearly distinguished on a number of levels from similar terms such as "Transitional Justice." Transitional Justice can be usefully defined as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[3] The concept of Transitional Justice emerged organically from the intense focus on transitions to democracy from the 1970s through the 1990s. The post-Cold War questions of transformative occupation, peacebuilding, and international territorial administration set the frame for *jus post bellum*. The content of *jus post bellum* can be usefully plotted in a matrix, ranging from laws and norms that are more substantive to more procedural in nature, and from more local to more global. This matrix has already been employed in Chapter 3.H. to orient the reader, and should provide continuity in this section as well.

In at least one key aspect, however, the definition of *jus post bellum* is unsettled. That respect has to do with the relative importance or unimportance of fixing the definition by

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1 Some prefer (or use as an equivalent) the term *jus contra bellum*, law against war/armed conflict.

2 See e.g. IHL and other legal regimes – jus ad bellum and jus in bello available at http://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm last viewed 17 October 2012.

3 Ruti Teitel, Transitional Justice Geneology, 16 Harvard Human Rights J., Spring 2003, p. 69 (internal citations omitted).

using a timeline with sharp divisions marking the end of armed conflict, which this chapter refers to as the "temporal aspect" or "temporal dimension" of *jus post bellum*. The temporal aspect of *jus post bellum* is not a mere technical concern. When analyzed properly, the question "what is '*jus post bellum*'" ultimately brings us to the question: "Why use the term '*jus post bellum*?'" It brings those interested in the subject of *jus post bellum* to the question of what, if anything, we are trying to accomplish.

This work responds to these questions, albeit in a manner that seeks to open further avenues for research rather than close the questions with a "definitive" answer. The short definitions given above, "law after war" or "the laws of transition from war to peace" turn out to contain important differences. "Law after war" implies a timeline with a sharp division marking the end of war (or to use the more commonly used and more useful term for modern practitioners, armed conflict). In contrast, the "laws of transition from armed conflict to peace" language does not depend on any clean division between periods of armed conflict and peace, sitting more comfortably with a *status mixtus*,[4] or a period in which armed conflict starts and stops before resolving into a sustainable peace. Without clarifying this divide, the status of critical subject areas (such as peace negotiations and agreements that can occur before peace is established, belligerent occupation, counter-insurgency, and laws applying to non-state actors) remains unclear, as they may or may not fall under *jus post bellum*.

[4] *See* Schwarzenberger, Georg, *Jus pacis ac belli? Prolegomena to a sociology of International Law*, 37 Am. J. Int'l L. 460 (1943), 470.

Identifying that *jus post bellum* does not have a single, consolidated definition but rather a matrix of definitions that have changed over time is a critical step if that matrix of definitions is to be properly analyzed. What follows is an assessment of this matrix. The empirical section focuses on the temporal-functional dichotomy *within* the body of work addressing *jus post bellum*. In addition to looking at usage from *within* the limited corpus of work using of one phrase ("*jus post bellum*"), it is helpful to look at usage from *without*—that is, in comparative perspective. By looking at the scholarship on *jus post bellum* from the "inside" and the "outside", empirically and comparatively, the definition of *jus post bellum* is clarified.

2. Identifying the Definitional Dichotomy — Functional vs. Temporal

This subject has been treated in more detail on a theoretical level *supra*. Here, the methodology of evaluating contemporary scholarship is reviewed. Emphasis on the functional-temporal dichotomy was not something arrived at *a priori*, as it were, but rather through observations of the literature by the author. It appeared that there was a divide emerging without any clear awareness by legal scholars of that split. The divide is between those who placed their primary definitional emphasis on the body of laws and norms bounded by time (a temporal emphasis) and those who placed their primary definitional emphasis on the body of laws and norms oriented around the function of transitioning from armed conflict to peace (a functional emphasis). The author hoped to verify the existence of and clarify the nature of that divide. The hybrid functional

approach outlined in this work *supra*, namely, one that emphasizes the *functional* aspects of *jus post bellum* (establishing a just and lasting peace) while nonetheless rooting it in a general timeline of transition from armed conflict to peace, is an attempt to recognize this dichotomy and to the degree possible achieve synthesis.

An example may be helpful to dramatize the difference between the two approaches. Imagine a targeting decision during an armed conflict. A military target is within or proximate to an important cultural site in a manner such that attacking the target would destroy the cultural site. There is existing law on the legality of such an attack, but it is unclear whether *jus post bellum* would have anything to say about the question. A temporal emphasis would clearly rule out *jus post bellum* playing a role. Under a temporal emphasis, the armed conflict is ongoing, so *jus post bellum* has not begun. A hybrid functional emphasis may allow *jus post bellum* to speak, even (or especially) if the temporal context is taken into account. Specifically, if avoiding the destruction of the cultural site is particularly important for the process of eventually establishing a sustainable peace, then the norms of a functionally-focused *jus post bellum* are implicated. While the normal application of *jus in bello* principles of proportionality and distinction might permit destruction of a cultural site in some instances, the simultaneous application of *jus post bellum* principles, either as a second-order method of interpretation (giving more substantive meaning to the principle of proportionality) or as a first-order application of discrete rules, might forbid the destruction of the site.

Proportionality in targeting is actually a notoriously difficult area to operationalize given that it involves a comparison between military advantage and the inherent value of protected persons and objects. By emphasizing the weight given to protected objects if their preservation increases the likelihood of the eventual construction of a just and sustainable peace, legal certainty may be increased in targeting decisions that are of colorable illegality. This does not necessarily create more legal uncertainty, given that it may move a marginal targeting decision from uncertain legality (given the amorphousness of *jus in bello* proportionality calculations) to fairly certain illegality, but it does potentially make the process of evaluating a target more complex.

The unclear definition of *jus post bellum* might be described as its original sin. Take the following quote from Brian Orend's foundational essay, *Jus Post Bellum*.

> It seems, then, that just war theorists must consider the justice not only of the resort to war in the first place, and not only of the conduct within war, once it has begun, but also of the termination phase of the war, in terms of the cessation of hostilities and the move back from war to peace. It seems, in short, that we also need to detail a set of just war norms or rules for what we might call *jus post bellum*: justice after war.[5]

On one hand, Orend refers to the termination phase of the war and the move back from war to peace. On the other hand, he speaks of "justice after war," which taken literally, would not obviously include the termination of phase of the war and the move back from war to peace. This ambiguity has been there from the beginning.

[5] Orend, Brian, *Jus Post Bellum*, Journal of Social Philosophy, Vol. 31 No. 1, Spring 2000, 117–137.

Many of the works analyzed for this chapter are only ambiguously categorizable as using a temporal or functional definition of *jus post bellum*. Some are not categorizable one way or another. No work represents a Weberian "ideal type" of self-consciously using a temporal or functional definition of *jus post bellum*. Thus, it might be helpful to provide an ideal type of an article that exemplifies adopting one definition and rejecting another.

The "ideal type" of a work adopting a temporal definition of *jus post bellum* would have the following characteristics. It would discuss *jus post bellum* as "law after war" or something similar. It would indicate that the term applied when, *and only when*, armed conflict had ceased. It would effectively be discussing the law that applied during "early peace." There would be little or no emphasis on the function of the area of law. The focus would be on what happens "after war/armed conflict," or "in the aftermath of war/armed conflict." The areas of law and practice focused on in such an article would deal with implementing peace treaties and agreements[6] during peacetime, but not the negotiation of peace agreements or the peace agreements themselves. Peace-time peacebuilding would be emphasized, but not peacekeeping amidst intermittent conflict. Environmental law would not be subject to *jus post bellum* principles until after armed conflict had ended. The law regarding belligerent occupation would not be subject to *jus post bellum* principles until after the armed conflict had ended. Similarly, concerns regarding counter-insurgency in a *status mixtus* or intermittent conflict would not be

[6] Hereinafter, this chapter will merely reference "peace agreements" instead of "peace treaties and peace agreements" under the rationale that peace treaties can be thought of as a specific subset of peace agreements, specifically those that relate to agreements between states.

addressed. Law relating to non-state actors would only apply if the armed conflict had ceased. Such an article would not envisage *jus post bellum* dealing with the entire transition from armed conflict to a sustainable peace.

The "ideal type" of a work adopting a functional definition of *jus post bellum* would have the following characteristics. It would discuss *jus post bellum* as the body of law applying to the "transition to peace" or something similar. It would focus on whether the law was intended to or had an important role in transitioning from armed conflict to a sustainable peace. It would include laws that applied during armed conflict if they played that function. It may not include laws that happen to occur shortly after armed conflict ends if they do not focus on or contribute to the transition to a sustainable peace. It would conceive of *jus post bellum* as including the entire process of negotiating, agreeing to, implementing, and modifying peace agreements. Peacekeeping and peacebuilding would be included. Environmental law and the protection of cultural goods could apply during armed conflict if they substantially related to the transition to a sustainable peace. The questions of belligerent occupation and the question of transformative occupation would be squarely addressed. The work would explicitly consider *jus post bellum* in a *status mixtus* or a situation of intermittent conflict. It could apply to law applying to non-state actors if it was part of the law of transition to a just and sustainable peace. It would not place primary emphasis on the moment of ending armed conflict.

Both the temporal and functional approaches involve an analysis very cognizant of the passage of time. While the functional approach is not as focused on fixing the moment

when war ends, it is still very focused on the forward progression of events—a transition towards a sustainable peace. With the functional approach, the focus is forward looking, as with the *post bellum* being an aspiration of the *jus*, rather than a description of it. The purpose or *telos* of the law—post bellum—is embedded in the name, under the functional approach. It is unclear if the temporal approach has the same sort of internal purpose, although perhaps simply establishing the law during early peace is purpose enough.

The works analyzed in this chapter provides real-world examples of what these definitions look like in practice. They do not resemble exhaustive checklists, but they will provide meat for the theoretical bones provided by the above ideal types. For example, take *Obligations of the New Occupier: The Contours of a Jus Post Bellum* by Kristen E. Boon (2009).[7] This work indicates that there is no clear temporal division between war and peace. Boon states "Yet with the exception of the law of belligerent occupation, neither jus ad bellum nor jus in bello provide much guidance on temporary interventions after war and before peace."[8] This understanding pushes against a simple temporal definition, starting with the end of armed conflict. The focus is on the process of transitioning out of armed conflict into peace.

The reason for the focus on the temporal-functional dichotomy is because it is not only one of the most important divides in the conception of *jus post bellum*, but also because it

[7] Boon, Kristen E., Obligations of the New Occupier: The Contours of a Jus Post Bellum (June, 29 2009). Loyola of Los Angeles International and Comparative Law Review, Vol. 31, No. 2, 2008.

[8] Ibid 102.

is one of the least well understood. There is no published literature squarely addressing the dichotomy, although it is hinted at through much of the literature, as evidenced by the empirical analysis below. By addressing the dichotomy, the author addresses a number of problems: the problem the dichotomy holds to the discourse/interpretive community concerned with *jus post bellum*; the problem the dichotomy holds as a matter of law; and the problem the dichotomy holds for research.

3. Problems of the Dichotomy

a. The problem as a discourse community or interpretive community

Erik Borg contrasted the terms "discourse community" and "interpretive community" as follows:

> We do not generally use language to communicate with the world at large, but with individuals or groups of individuals. As in life, for discussion and analysis in applied linguistics these groups are gathered into communities. One such grouping that is widely used to analyse written communication is *discourse community*. John Swales, an influential analyst of written communication, described discourse communities as groups that have goals or purposes, and use communication to achieve these goals. […] 'Interpretive community' (Fish 1980), on the other hand, refers not to a gathering of individuals, but to an open network of people who share ways of reading texts[…] [U]nlike an interpretive community, members of a discourse community actively share goals and communicate with other members to pursue those goals.[9]

[9] Borg, Erik, *Discourse Community*, ELT Journal, Volume 57/4, October 2003, Oxford University Press, p. 398.

If people use multiple definitions of the same term, particularly without realizing it, the clarity of their communications lessens. This is true in an interpretive community or a discourse community. If asked (and the terms were defined), some groups scholars and practitioners using the term *jus post bellum* might categorize themselves as part of the interpretive community, others might call themselves part of a discourse community. The functional-temporal dichotomy is a particular problem for a discourse community. If a discourse community cannot agree on fundamental aspects of the central concept of their community, not only will they be unable to communicate clearly, but they will also be unable to agree on the goals they should actively share.

b. The problem as law

Ambiguity in definitions can be a problem with any interpretive community or discourse community. The author suggests it is a particular problem when the community centers on legal issues. From an normative point of view, legal ambiguity can mean an arbitrary and counter-normative application of law.[10] From an analytical point of view, the ambiguity with respect to an area of law may prevent particular potentially legal rules from being recognized as law and thus objectively fail to be, objectively, law.[11]

[10] *See generally e.g.*, Schauer, Frederick F., *Playing by the rules: a philosophical examination of rule-based decision-making in law and in life* (1991) Oxford University Press.

[11] On the idea of the "rule of recognition," *see* Hart, H.L.A., *The concept of law*, 1961, Oxford University Press.

c. The problem for research

What would be helpful for a researcher trying to map this definitional dichotomy would be a database containing sample sets of available research on the issue that have been analyzed to see how the term *jus post bellum* is used in contemporary literature. As no such database existed, the author has created such a database. The database contains both the actual research literature (the text of the articles) and metadata describing that literature. The database was developed with the assistance of the Living Lab Project at Leiden University and is hosted online using a Virtual Research Environment platform.[12] More about the database will be explained in Annex A.

There are, of course, potential opportunities for the practitioners or experts in a term with an amorphous definition. One can look to the term "Transitional Justice" as an example of this phenomenon. Transitional Justice practitioners have arguably been able to expand the portfolio of their work over time as their underlying concept became broader and less defined. In fact, "Transitional Justice" has been redefined by some to include not only "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes,"13 but also "transitions from war to peace," which is a fundamentally different concept—one which threatens to confuse Transitional Justice with *jus post bellum*, particularly if the

[12] The database is currently hosted at https://vre.leidenuniv.nl/vre/jpb/definitions/default.aspx. For full access, please see the author.

[13] Ruti Teitel, Transitional Justice Geneology, 16 Harvard Human Rights J., Spring 2003, p. 69 (internal citations omitted).

contrast in temporal aspects remain unexamined. There is as yet no published systematic analysis of the temporal aspect of Transitional Justice or *jus post bellum*, so clarifying this critical aspect remains crucial. Accordingly, Part IV provides a systematic analysis of the temporal aspect of these two concepts, and tries to draw overall conclusions for the better understanding when two possible understandings are proffered.

4. Importance

As stated before, when analyzed properly, the question "what is 'jus post bellum'" ultimately brings us to the question: "Why use the term 'jus post bellum?'" It brings those interested in the subject of *jus post bellum* to the question of what, if anything, we are trying to accomplish.

It may be that we are merely attempting to describe what law applies at a certain time period during early peace. An alternative effort would be to describe both the *lex lata* and the *lex ferenda* with respect to the function of establishing a sustainable peace. If the underlying goal is to establish a sustainable peace after armed conflict, then ignoring or diminishing the laws that apply to efforts to establish a sustainable peace *during* armed conflict will leave an incomplete area of law. It is possible, however, that in searching for completeness, clarity (or at least simplicity) will suffer.

5. Empirical Analysis

For a granular analysis of the works analysed, please see Annex A. The summary results are as follows. There has been a steady expansion of references *to jus post bellum* in a

variety of journals. With the expansion of references, there has been an increase of ambiguity, not a consolidation around a consensus definition. The trend in the less-legally focused dataset (SSRN articles) is away from an emphasis on functional aspects and towards temporal aspects. The overall trend is hard to discern, but for articles with more than a glancing reference to *jus post bellum* there seems to be an arc that went from a functional definition, towards, a temporal definition, and with a renewed legal interest back towards a more functional definition. Whether a consensus will be achieved, and what that consensus might be, is as yet unclear. Again, for a full analysis of the empirical data gathered, please see Annex A.

The question asked influences the truth found. By emphasizing the question of the *goal* of the discourse around the term "*jus post bellum*", a functional definition may already be framed in a more flattering light. A functional definition, giving *jus post bellum* a *telos* or ultimate object, naturally answers the question of the goal of *jus post bellum* discourse more clearly than a temporal definition.

Another way to phrase the question is whether *jus post bellum* is essentially a *nominal* idea. That is, is *jus post bellum* simply old wine in a new bottle, a new collection of old concepts, or a branding exercise?[14] None of these ways of describing a nominal idea is inherently negative, but neither are they particularly inspiring. Fundamentally, if the

[14] Österdahl, Inger, and Esther Van Zadel. "What will jus post bellum mean? Of new wine and old bottles." *Journal of Conflict and Security Law* 14.2 (2009): 175-207.

transition from armed conflict to a sustainable peace is a worthwhile goal, then there is an opportunity cost if *jus post bellum* could focus explicitly on that goal but does not.

There are a great number of terms used by scholars and practitioners that mean something along the lines of *jus post bellum*: including "post-conflict justice," peacekeeping, or an (in the author's opinion) overly broad definition of Transitional Justice. The relatively obvious virtue of using the term *jus post bellum* is that it brings *jus ad bellum* and *jus in bello* to mind. It invites those grappling with the difficulties of establishing a sustainable peace to integrate their conceptual framework into the larger just war tradition. It invites those familiar with the law of armed conflict and norms on aggression to consider the return to peace from the beginning.

It is worth responding to the suggestion that the entire body of law applying to the transition from armed conflict to sustainable peace *in parts*, with for example the part during armed conflict discussed under one rubric and the part in early peace under the rubric of *jus post bellum*. This, for example, is the approach of David Rodin, who suggests the term *jus terminatio* (or Termination Law) for the law of ending armed conflict and suggests limiting the term of *jus post bellum* to the obligations of combatants after war.[15] With respect, the author finds this approach lacking. While it may be useful to discuss *jus terminatio* as part of a broader *jus post bellum*, dividing the law into the law

[15] *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.

of ending armed conflict and the law of obligations of combatants after war does not cover the entire process of transition to a sustainable peace. It does not work well with Christine Bell's conception of a *lex pacificatoria*[16] or law of peacemakers, which bridges the various types of peace agreements, including post-conflict implementation agreements. Rodin's *lex terminatio* would presumably stop in the midst of the *lex pacificatoria*, with a different framework for different peace agreements. Rodin's *jus post bellum* would not cover any law dealing with non-combatant obligations, for example. It certainly would not help to inform the question of choices during armed conflict that would make a sustainable peace more difficult to achieve—as in the example of bombing a cultural monument occupied by an enemy force given earlier in this article.

It is also worth responding to the argument that a hybrid functional approach lessens the clarity of the concept. The temporal approach may appear at first glance to be clearer conceptually, a binary application—either on or off—depending on whether the armed conflict has ended or not . In reality, because the reality of a *status mixtus* is messy, the apparent conceptual clarity of the temporal approach is likely to be illusory in practice. Particularly in the context of counter-insurgency, non-state actors, factions, and low-level conflicts, evaluating whether armed conflict has ended or not is neither simple, nor final—the transition to a sustainable peace can be uncertain and uneven over time and geography and across groups. In addition to not necessarily being clearer to apply in practice, the temporal approach lessens the power of the concept and limits the problems

16 Bell, Christine, *Peace Agreements: Their Nature and Legal Status*, p. 407.

it can address. The hybrid functional approach, focusing on the full process of transition to a sustainable peace, is more likely to comprehensively and successfully address the problems of that transition.

B. Contrasting Jus Post Bellum and Transitional Justice

1. Introduction

In the Introduction to this work and in Chapter 3 (Three Theories of *Jus Post Bellum*) *supra*, a hybrid functional approach to *jus post bellum* is propounded that serves the function of organizing the effort to transition from armed conflict to a just and sustainable peace while retaining an awareness of temporal context.[17] Functional subcomponents of this effort were identified as peacemaking or *lex pacificatoria* and post-conflict justice. A major component of post-conflict justice is international criminal law, but there are also aspects to post-conflict justice that are often described under the rubric of transitional justice. Yet *jus post bellum*, and transitional justice are separate concepts. For the benefit of both ideas, it is extremely important to clarify the distinctions and interactions between them.

Ninety years ago, even amongst the invisible college of international law scholars, the phrases "Transitional Justice" and "*jus post bellum*" would have been met with

[17] This sub-chapter builds upon Iverson, Jens. "Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum: Outlining the Matrix of Definitions in Comparative Perspective": 80-101." *Jus Post Bellum: Mapping the Normative Foundations. New York: OUP* (2014); and Iverson, Jens. "Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics. "*International Journal of Transitional Justice* 7.3 (2013): 413-433.

uncertainty. The terms were unknown. Perhaps more surprisingly, *jus post bellum*'s sister terms "*jus ad bellum*" and "*jus in bello*," now enshrined as central and seemingly immovable pillars of the law of armed conflict, would also have prompted few knowing nods of recognition, only blank stares.[18] Academic neoterisms—innovations in language such as a new word or term—can tell us something about the historical moment of their origin, and the tradition within which they emerge. The focus on *jus ad bellum* and *jus in bello* after the horrors of the First World War is hardly surprising. The concept of Transitional Justice emerged organically from the intense focus on transitions to democracy from the 1970s through the 1990s. The post-Cold War questions of transformative occupation, peacebuilding, and international territorial administration set the frame for *jus post bellum.*

It is impossible to tell whether Transitional Justice and *jus post bellum* will seize the collective imagination of those who concern themselves with international law in an enduring manner, or whether these concepts will quickly fade. The longevity of a term depends largely on how that term may be used in unknowable, future contexts. But it also may depend at least in part on the internal coherence of the body of concepts referenced by the term, and whether this coherence is maintained over time by its practitioners and advocates. Those invested in the success of a philosophy underlying a term have the most

[18] Robert Kolb, "Origin of the Twin Terms Jus Ad Bellum/Jus In Bello" (1997) 37 *International Review of the Red Cross* 553; Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)" (2008) 23 *American University International Law Review* 311, 312.

to gain from an effort to closely analyze the meanings of a term, and where necessary draw distinctions between related concepts.

2. The Grotian Tradition

Both Transitional Justice and *jus post bellum* are products not only of the decades in which they emerged, but also part of what Hersch Lauterpacht identified as "the Grotian tradition."[19] Both the specific historical moments and the wider tradition are examined below.

In 1933, Hersch Lauterpacht famously described "The Function of Law in the International Community." This work, which Martti Koskenniemi has described as the most important book in English in the twentieth century,[20] concerned itself, *inter alia*, with whether international law was a comprehensive system, capable of settling disputes brought to international judicial fora. Lauterpacht forcefully argued for a conception of international law as a complete system, with the function and duty of international legal practitioners to settle disputes. For Lauterpacht, there existed a prohibition of judicial *non liquet* (in essence, a ruling that there was no law to apply to determine a dispute), admitting no exception.[21] In the same way that a court, faced with a claim of property

[19] Hersch Lauterpacht, "The Grotian Tradition in International Law" (1946) 23 *British Year Book of International Law* 1.

[20] Martti Koskenniemi, "The Function of Law in the International Community: 75 Years After" (2008) 79 *British Year Book of International Law* 353.

[21] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933) 134.

ownership, would have to make a determination as to that property claim regardless of the uncertainty surrounding the claim, the history of international judicial settlement provided "continuous proof"[22] of the capacity of international law to address "so-called gaps."[23]

Lauterpacht's argument is in contrast with, for example, Hans Morgenthau, from the perspective of international relations, with his contrast between political "tensions" not amenable to legal resolution and "disputes" that were amenable to legal resolution.[24] Lauterpacht's perspective is also in contrast with the "Vienna School" of Hans Kelsen who essentially advocated a positivist model that limited the role of law in the international community.[25] Lauterpacht's work was both a conception of what international law was and a project to define what law should do—to extend the process of dispute settlement through law. The issue of whether gaps exist in the fabric of international law, and what approach should be taken if apparent lacunae are highlighted, remains an enduring problem.

What was Lauterpacht's goal in enshrining these goals as part of the Grotian tradition? The article *The Grotian Tradition in International Law* seeks to selectively praise Hugo

[22] Ibid.

[23] Ibid.

[24] Koskenniemi, "The Function of Law in the International Community: 75 Years After".

[25] See e.g. Joseph Kunz, "The 'Vienna School' and International Law" (1933–34) 11 *New York University Law Quarterly Review* 370.

Grotius,[26] not to bury him—it suggests that despite the flaws in argument and substance of *De jure belli ac pacis* (1625), Grotius' enduring fame and influence is deserved because of the tradition he established. The tradition, as framed by Lauterpacht, appears to be a series of goals for international law. Unsurprisingly, these goals appear to be largely shared by Lauterpacht, although Lauterpacht may not have used the term "goals" but insisted that they were an accurate description of international law. Lauterpacht's insistence on a complete system of international law, one that would broach no judicial *non liquet*, is strengthened by the idea that there is a tradition insisting on *The Subjection of the Totality of International Relations to the Rule of Law*[27] and *The Rejection of "Reason of State."*[28] Should there have been areas of International Relations to which no laws could apply, perhaps due to an assertion of *Raison d'État*, the system of international law would clearly be incomplete, and rulings based on a finding of *non liquet* would clearly be expected.

In a sense, both Transitional Justice and *jus post bellum* represent attempts to fill apparent lacunae. Transitional Justice practitioners, as a general rule, are committed to the "fight against impunity." This impunity is seen as an unwanted gap. Transitional Justice seeks primarily to respond to the real-world gap in the universality of human rights as applied—a universality that is fundamental to the project of human rights. These rights

[26] As Hugo de Groot is generally referred to by his Latin eponym, I will follow that practice in this chapter.

[27] Lauterpacht, "The Grotian Tradition in International Law" 19.

[28] Ibid 30.

are not derived from an individual's status *vis-à-vis* a state but solely due to being human, as a result of shared humanity. An apparent gap in the universality of international human rights protections caused by a change in regime (perhaps with amnesties for previous regime officials) or by the mere existence of unpunished systematic or widespread human rights abuses may cry out to be addressed by Transitional Justice practitioners. Additionally, uncovering and establishing the truth of past human rights abuses may be seen as filling a historical lacuna, which itself may serve as a form of reparation for victims. The idea that there should always be a purposeful (legal and otherwise) response to human rights abuses is very much in line with Lauterpacht's vision of the Grotian Tradition.

Jus post bellum, on its face, appears to be responding to the need to complete the temporal story of the law of armed conflict—with *jus ad bellum* governing the beginning of armed conflict, *just in bello* governing the conflict itself, and *jus post bellum* governing its aftermath. While there is certainly power behind this simple depiction, a deeper understanding of the history of international law as it applies to law and peace reveals a more fundamental gap that *jus post bellum* can help to fill. Filling these lacunae is best understood with reference to what Lauterpacht called "The Grotian Tradition in International Law."[29] Lauterpacht identifies several features of the Grotian tradition that are potentially pertinent. He suggests that the Grotian tradition includes *The Subjection of*

[29] Ibid.

the Totality of International Relations to the Rule of Law;[30] *The Rejection of "Reason of State"*;[31] *The Distinction between Just and Unjust Wars*;[32] *The Fundamental Rights and Freedoms of the Individual*;[33] and *The Idea of Peace*.[34] By *The Idea of Peace*, Lauterpacht means Grotius's strong preference for peace, and the lack of praise for war as somehow beneficial or strengthening in character.[35] In particular, *The Subjection of the Totality of International Relations to the Rule of Law* and *The Rejection of "Reason of State"*; is relevant to the creation of *jus ad bellum*, *jus in bello*, and eventually *jus post bellum.* These themes certainly echo Lauterpacht's split from his teacher Hans Kelsen.[36]

To use the term "*jus post bellum*" is itself to make an assertion, namely that a set of laws exists that applies to the transition to peace. Because the term is a recent arrival in contemporary legal discourse (see Chapter 4.B.8 below), the claim may seem controversial. One might ask how a body of law could have been constructed without, until recently, a name. Further, one might ask whether those using the term are really

[30] Ibid 19.

[31] Ibid 30.

[32] Ibid 35.

[33] Ibid 43.

[34] Ibid 46.

[35] Ibid.

[36] See Martti Koskenniemi, "Lauterpacht: The Victorian Tradition in International Law" (1997) 8 *European Journal of International Law* 215, 217–18.

advocating restraints upon the peacemakers and erecting barriers to peace.[37] After all, if this chapter claims that *jus post bellum* is a continuance and completion of the Grotian Tradition, and embedded in the Grotian Tradition is a strong preference for peace, then how can barriers to peace be appropriate?

With respect to the first concern about the implausibility of a heretofore "nameless" body of law, the history of the terms *jus ad bellum* and *jus in bello* stand as an answer. The concerns and laws of *jus post bellum*, like those of *jus ad bellum* and *jus in bello*, predate the terms themselves. For example, Brian Orend argues that the concept of *jus post bellum* should be credited to Immanuel Kant.[38] Regardless of its provenance, it is important to note the relative humility of the concept. The term "*jus post bellum*" does not seek to displace *jus ad bellum* or *jus in bello*, but rather to complement them. It does not seek to supplant the separate frameworks of humanitarian law, human rights law, or international criminal law,[39] and indeed to challenge the entire notion of public international law as traditionally understood,[40] but simply to integrate the law applicable to a particular phenomenon, the transition to a sustainable peace, into a more coherent whole.

[37] Eric De Brabandere, "The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept" (2010) 43 *Vanderbilt Journal of Transnational Law* 119.

[38] Brian Orend, *War And International Justice: A Kantian Perspective* (Wilfrid Laurier University Press 2000) 57.

[39] See e.g. Ruti Teitel, *Humanity's Law* (Oxford University Press 2011).

[40] Ibid.

With respect to the second concern regarding the possible drawbacks of clarifying and even extending the law applicable to the transition to a sustainable peace, one need only look to the atrocities that have historically followed military victory to understand the *prima facie* need for *jus post bellum*. No longer is it acceptable and commonplace to exterminate or enslave the defeated population. The prohibition on the annexation of territory is central not only in determining the legality of particular post-conflict settlement, but also in underpinning the entire order of stable and pacific interstate relations. An abhorrence of regulation and insistence on the "freedom" from law of those involved in the transition to a sustainable peace is effectively an application of the rationale of *Raison d'État* to the ending of conflict and the reestablishment of peace—to assert that a dispute regarding the legality of actions taken in the transition to a sustainable peace would be met with a judicial *non liquet*. This is not to say that there is a tight constraint in all circumstance or no role for discretion. There are many choices between equally legal options during the transition to sustainable peace. Regardless of one's view as to the function of law in the international community, a vision of the reestablishment of peace as a law-free or law-poor zone is likely to result in an impoverished peace that does not tend to acceptably resolve the problems underlying the conflict or lay the foundation for a robust, positive peace.

Perhaps more directly relevant for analysis of Lauterpacht's claim of a Grotian Tradition are the works of Grotius himself. In Grotius's 1604 work, *De iure praedae commentarius* (*Commentary on the law of prize and booty*), Grotius plainly asks in the first sentence of Chapter 3: "*De praeda igitur dicturis primum belli quaestio expedienda*

est, possitne scilicet bellum aliquod justum esse."[41] ("Accordingly, before we enter into a discussion of prize and booty, we must dispose of a certain question regarding war, namely: Can any war be just?")[42] Grotius asks four questions:

1) Is any war just?

2) Is any war just for Christians?

3) Is any war just for Christians, against Christians?

4) Is any war just for Christians, against Christians, from the standpoint of all law?

The first question helps to connection Grotius's work to the contemporary questions of the legality of resorting to armed force, that is, *jus ad bellum*. The remaining, Christianity-focused questions help to illustrate the difference between the context in which Grotius worked and the more secular world of contemporary law.

The colorful history of this work, *De iure praedae commentarius*, in some ways echoes the "lost and found" nature of just war theory being downplayed by positivists who emphasized *Raison d'État*, only to be restored and translated into a modern context by those who wished to outlaw (or at least minimize) war in the late 19th and 20th centuries. *De iure praedae commentarius* was not published during Grotius' lifetime, or indeed for

[41] Grotius, Hugo, *De iure praedae commentarius*, Martinum Nijhoff, (written 1604-1608, published 1868), p. 31.

[42] Hugo Grotius, Commentary on the Law of Prize and Booty (*De Jure Praedae Commentarius*), eds. Gwladys L. Williams and W. H. Zeydel (Oxford: Clarendon Press, 1950), vol. 1: A Translation of the Original Manuscript of 1604 by Gwladys L. Williams, with the collaboration of Walter H. Zeydel, p. 51.

the two subsequent centuries, only reemerging in 1864, published in Latin in 1868 by Martinus Nijhoff, and finally being translated and publish in English in 1950.[43]

Grotius' fame and influence was not, of course, based on a work misplaced for so long but rather on the work that was well known even during his lifetime, particularly *De iure belli ac pacis* ("The Rights of War and Peace"). In *De iure belli ac pacis*, Book I, Chapter 2, Grotius asks the same question: "Whether it is ever lawful to make War."[44] This question is the starting point of the contemporary *jus ad bellum* discourse. Similarly, in *De iure belli ac pacis*, Book III, Grotius considers "what is allowable in War, and how far, and in what Circumstances it is so."[45] While his conception is far removed from contemporary law, perhaps exemplified most notoriously in his declaration in the title of Book III, Chapter 1, Section 2 that "In War all Things necessary to the End are lawful."[46] Notwithstanding this difference, the fact that these subjects were central to Grotius' thinking and reputation shows their importance in the Grotian tradition.

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[43] Grotius, Hugo, *Commentary on the Law of Prize and Booty*, Martine Julia van Ittersum (ed.), Liberty Fund (2006), p. xxiii; *See also* Van Ittersum, Martine Julia, *Dating the manuscript of De Jure Praedae (1604–1608): What watermarks, foliation and quire divisions can tell us about Hugo Grotius' development as a natural rights and natural law theorist*, History of European Ideas, Vol. 35, Issue 2, June 2009, p. 125-193, ISSN 0191-6599, 10.1016/j.histeuroideas.2009.01.004, available at http://www.sciencedirect.com/science/article/pii/S0191659909000175.

[44] Grotius, Hugo, *The Rights of War and Peace*, Richard Tuck (ed.), Indianapolis: Liberty Fund (2005). Vol. 1, p. 180 (emphasis removed).

[45] Ibid 1185.

[46] Ibid 1186 (emphasis removed).

3. Basic Definitions

a. Transitional justice

In *Transitional Justice Genealogy*,[47] Ruti Teitel begins with a definition, stating, "Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[48] This definition, adopted very carefully in a self-reflective article by the individual often credited with coining the term, is a good place to start.

The substantive emphasis of Transitional Justice is on justice for human rights violations.[49] Temporally, the emphasis is on subjecting the acts that occurred during the predecessor regime to a toolbox of responses within the time period of the successor regime. The term contains an aspirational element—that a transition toward justice is possible in line with the political change in the wake of a change in regime. There is no assumption of armed conflict, nor is there a denial of the possibility of armed conflict. Armed conflict has only a potential, secondary importance in Transitional Justice—an importance derived not from the effects of armed conflict, nor the thing itself. These

[47] Ruti Teitel, "Transitional Justice Genealogy" (2003) 16 *Harvard Human Rights Journal* 69; see also Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 3.

[48] Ruti Teitel, "Transitional Justice Genealogy".

[49] Sections of this chapter draw partly from Jens Iverson, "Transitional Justice, Jus Post Bellum, and International Criminal Law: Differentiating the Usages, History, and Dynamics" (2013) *International Journal of Transitional Justice*.

potential effects, human rights violations and regime change, may each occur with or without armed conflict. The goals of Transitional Justice are fundamentally tied to the aspiration of transition, both toward justice for past violations and toward a cementing of a new political order that will prevent the old order, with its attendant human rights violations, from returning.

b. *Jus post bellum*

There is, as yet, no authoritative definition for *jus post bellum*, although many have been proffered. For the purposes of this chapter, for reasons that are explained *supra*, the term *jus post bellum* is defined as the body of legal norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace.[50]

Jus post bellum must be understood in the context of its sister terms, *jus ad bellum* and *jus in bello*. None of these terms make sense without armed conflict. They are concerned with the use of armed force as a matter of primary, central importance. Collectively, they seek to describe the constraints and rights regarding whether armed force may be used at all, the constraints and rights related to the use of armed force during armed conflict (how

[50] See e.g. Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (*The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, originally published 1887, tr. W. Hastie, The Lawbook Exchange 2002) (emphasis added) 214 ("The Right of Nations in relation to the State of War may be divided into: 1. The Right of *going to* War; 2. Right *during* War; and 3. Right *after* War, the object of which is to constrain the nations mutually *to pass from this state of war, and to found a common Constitution establishing Perpetual Peace.*") The definition of a "just and sustainable peace" is itself an extremely interesting research topic, involving what many have termed "positive peace" vs. "negative peace," and definitions of sustainable peace not in terms of the relations of two states but in terms of the international system as a whole.

it may be used), and the constraints and rights related to the transition from armed conflict to a sustainable peace.

The substantive emphasis of *jus post bellum* is broader than human rights violations. It also clearly includes, *inter alia*, violations of the laws of armed conflict, the rights and privileges that spring from the laws of armed conflict, environmental law (including legal access to natural resources and regulating the toxic remnants of war), state responsibility outside of the realm of human rights, recognition of states and governments, laws and norms applicable to peace treaties and peace agreements, peacekeeping, occupation, and post-conflict peace building—laws that directly or through interpretation regulate and enable the transition to a just and sustainable peace.

The conceptual foundations for *jus post bellum* (the third component of the just war tradition that, unlike *jus ad bellum* and *jus in bello*, applies to the transition from armed conflict to peace), like International Criminal Law, have deep historical roots, reaching back to the ancient just war tradition, but has re-emerged as a contemporary neoterism in recent decades in the context of peacebuilding and the end of the Cold War. It represents an approach most likely to push conduct at the crucial period of transitioning from armed conflict to peace in the direction of a just and sustainable solution to the underlying problems that caused the conflict.

4. Contrasting the Content of Transitional Justice and *Jus Post Bellum*

a. General contrast

The basic definition of Transitional Justice provided in the Basic Definitions section above is not the only definition worth considering. Again, in *Transitional Justice Genealogy*,[51] Teitel states, "Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[52] In contrast, the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) defines Transitional Justice as:

> [. . .] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[53]

Similarly, the stocktaking report of the same name *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2011) describes Transitional Justice as follows:

[51] Teitel, "Transitional Justice Genealogy" 3.

[52] Ibid 69.

[53] UN Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General" (23 August 2004) UN Doc. S/2004/616, 4.

> Transitional justice initiatives promote accountability, reinforce respect for human rights and are critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance. Transitional justice initiatives may encompass both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals.[54]

Transitional Justice practitioners may know about and concern themselves with issues outside of human rights violations, such as violations of the laws of armed conflict, the rights and privileges that spring from the laws of armed conflict, state responsibility outside of the realm of human rights, recognition of states and governments, laws and norms applicable to peace treaties and peace agreements, occupation, and particularly post-conflict peace building. That said, these subjects are not the fundamental concern of Transitional Justice properly speaking. They are the fundamental concern of *jus post bellum*.

While *jus post bellum* is substantively broader than Transitional Justice in many respects, *jus post bellum* is also clearly inapplicable in certain scenarios where Transitional Justice is applicable. Following a peaceful, non-violent revolution or regime change, the principles of *jus post bellum* may apply by analogy, but not directly.

Similarly, one can imagine a change in regime in which no significant human rights violations were perpetrated by the previous regime, deposed by armed conflict. Armed conflicts happen without massive human rights violations. (The 1982 conflict in the

[54] Ibid 6.

Falkland/Malvinas Islands might provide such an example, the involvement of two 17-year-old armed service members notwithstanding.)[55] Additionally, armed conflicts occur without regime change. In these instances, Transitional Justice would tend not to apply, but *jus post bellum* would.

Just as *jus post bellum* is necessarily connected to an armed conflict, to the degree that *jus post bellum* has an aspirational character, it must relate in part to questions of war and peace. One would think that *jus post bellum* is tied to the contemporary aspirational character of *jus ad bellum* and *jus in bello*: to constrain the use of armed force. In addition to that negative goal of reducing the effects of unfettered armed force, practitioners of *jus post bellum* generally seek to build a "positive peace."[56] This builds upon Lauterpacht's idea that part of the Grotian Tradition is *The Idea of Peace*.[57] Again, by *The Idea of Peace*, Lauterpacht is invoking Grotius's strong preference for peace, and the lack of praise for war as somehow beneficial or strengthening in character.[58] Sustainable peace is a central aspirational norm of *jus post bellum*, following a long but not uncontested tradition in international law.

[55] Amnesty International, "United Kingdom: Summary of Concerns Raised with the Human Rights Committee" (1 November 2001) available at https://www.amnesty.org/download/Documents/128000/eur450242001en.pdf (last accessed 2 June 2016).

[56] See e.g. Johan Galtung, "Violence, Peace, and Peace Research" (1969) 6(3) *Journal of Peace Research* 167–91.

[57] Lauterpacht, "Grotian Tradition in International Law" 46.

[58] Ibid.

This is not to say that human rights are not central to *jus post bellum*—they are. As ably demonstrated in such works as *Transitional Justice in the Twenty-first Century: Beyond Truth Versus Justice*[59] and *Selling Justice Short: Why Accountability Matters for Peace*[60] the supposed tension between different maximands such as peace and justice or truth and justice is frequently overblown. Discovering the truth about human rights violations and achieving justice for those violations is widely recognized as important in building a positive peace. But there will be responses to human rights violations that are not properly the concern of *jus post bellum*.

b. Substance of Transitional Justice

Transitional Justice practitioners are interested in the application of a collection of responses to human rights violations (sometimes referred to as a "toolbox" or "package" of mechanisms)[61] including criminal prosecutions, truth commissions, reparations programs, gender justice programs, security system reform, memorialization,[62] vetting

[59] Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-first Century: Beyond Truth Versus Justice* (Cambridge University Press 2006).

[60] Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (July 2009) available at http://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf (accessed 20 August 2014).

[61] See e.g. Naomi Roht-Arriaza, "Transitional Justice and Peace Agreements" (2005) *Working Paper, International Council on Human Rights Policy* 3, 5 available at http://www.ichrp.org/files/papers/63/128_-_Transitional_Justice_and_Peace_Agreements_Roht-Arriaza__Naomi__2005.pdf (accessed 20 August 2014).

[62] International Center for Transitional Justice (ICTJ), "What is Transitional Justice" available at http://ictj.org/about/transitional-justice (accessed 27 May 2016).

(also known as "lustration," "screening," "administrative justice," and "purging")[63] and education.[64] These responses will also likely be of interest to scholars and practitioners of *jus post bellum*, particularly during the period after the cessation of armed conflict. The emphasis, however, may be different. Those coming from the Transitional Justice perspective may share the natural primary concern of responding to human rights violations, while those coming from the tradition of emphasizing the importance of transitioning to a stable peace may highlight other areas, albeit often through responding to human rights violations. The content of what is called Transitional Justice has expanded as practitioners have looked for pragmatic problems to the difficult challenges inherent in the aftermath of human rights violations by a previous regime. The question of what qualifies as "Transitional Justice" is a pragmatic, and in some ways inherently political question, as it depends at least in part on what is considered useful in making a successful political transition.

It is not particularly useful to apply the term "Transitional Justice" to efforts that use the tools or approaches used in Transitional Justice but which bear no relationship to a distinct transition in political regime. If, at the present moment, there was a truth commission or memorialization effort for the deaths of more than 12,000 prisoners of war housed at the Confederate Andersonville Prisoner of War Camp during the US Civil War,

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

[64] 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").

it is hard to see how it is helpful to call these "Transitional Justice," even in light of the political changes that occurred as a result of the armed conflict. A truth commission or memorial to victims does not necessarily imply a "transition" in the sense that is normally implicated by the term "Transitional Justice." Applying the term to the post-conflict trial and execution of Henry Wirz, commander of the Andersonville Prison, as well as the 1908 monument to Wirz by the United Daughters of the Confederacy and continuing memorialization[65] would also constitute an unjustified enlargement of the term "Transitional Justice." While both the trial and the monument may have had (conflicting) political implications or intents, the trial was hardly looking towards any sort of regime change in the US federal government, and the misplaced valorization of Wirz has more to do with denial of Confederate crimes than establishment of accountability for human rights violation of a previous regime. While some may feel that stretching the term is somehow innovative or exciting, overstretching the term tends to lead to the term lacking specific meaning and force. As Seneca the Younger noted: *Nusquam est qui ubique est* (roughly translated, "Nowhere is the one who is everywhere" or "to be everywhere is to be nowhere").[66]

To take perhaps a more controversial example, it seems unhelpful to use the term "Transitional Justice" in application to the serial truth commissions in Uganda, including the Commission of Inquiry into the Disappearances of People in Uganda since 25 January

[65] Glen W. LaForce, "The Trial of Major Henry Wirz—A National Disgrace" (1988) *1988 Army Law* 3.

[66] Seneca the Younger, *Epistula Ad Lucilium II*, Book 1, Letter 2, line 2.

1971 established by Idi Amin Dada and the 1986 Commission of Inquiry into Violations of Human Rights.[67] While these Truth Commissions, along with various efforts at memorialization and even the International Crimes Division within the High Court of Uganda technically fit with the type of broad definition such as "a response to systematic or widespread violations of human rights"[68] they should not be considered to be Transitional Justice mechanisms, properly conceived. These are not the type of "conception of justice associated with periods of political change"[69] traditionally and properly associated with the term Transitional Justice. Discussing these institutions as "Transitional Justice" should at a minimum be done critically and cautiously, noting that they are not clearly part of a transition to a more democratic and accountable regime. They are, in each instance, a one-sided exercise of a regime not clearly moving toward ongoing accountability for their own human rights abuses. If the term "Transitional Justice" simply means an institutionalized allegation of abuse by the losing party in a conflict, even an allegation by a regime not in the process of transitioning to a superior approach toward human rights, it is unclear why "Transitional Justice" should retain its widespread support, or why the term would endure.

This is not to say that Transitional Justice efforts have to be without flaw or criticism to merit the title of "Transitional Justice." As a phenomenon associated with political

[67] Joanna R. Quinn, "Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda" (Autumn/Winter 2009) 14(2) *International Journal of Peace Studies* 35–53.

[68] International Center for Transitional Justice (ICTJ), "What is Transitional Justice" available at http://ictj.org/about/transitional-justice (accessed 27 May 2016).

[69] Teitel, "Transitional Justice Genealogy" 69.

change, carried out by fallible humans, any instance of Transitional Justice will inevitably be flawed. Rather, calling an effort "Transitional Justice" should necessarily be an assertion that the substance of that effort contains the aspiration of transition to a new regime of accountability for human rights abuses.

Noémie Turgis in *What is Transitional Justice?* begins and ends with a warning regarding broadening the scope of transitional justice.[70] As she puts it:

> The risk of broadening the meaning of the concept is to dilute it and turning it into something meaningless. [. . .] The core element of transitional justice is here: offering a "toolbox" filled with elements designed to deal with the violations of human rights from a predecessor regime to form the basis of an order to prevent their reoccurrence.[71]

This is well put, although some might object to the "toolbox" metaphor given that it may tend to reduce complex problems to simpler plumbing analogues. The content of Transitional Justice is rooted in a transformative response to a predecessor regime's human rights violations in order to prevent further violations.

c. More substantive in nature

Contemporary international law specifically outlaws many acts that may be (and historically have been) carried out during the transition from armed conflict to peace.

[70] Noémie Turgis, "What is Transitional Justice?" (2010) 1 *International Journal of Law, Transitional Justice and Human Rights* 9, 14.

[71] Turgis, "What is Transitional Justice?" 14.

Christine Bell provides a helpful table in *Peace Agreements and Human Rights*[72] with respect to "political strategies for dealing with minorities." The table can usefully be generalized with application to the international law prescription for a variety of acts that are regulated by *jus post bellum*.

A party to the conflict may frame the conflict as caused by the existence or power of another group, and wish to act upon that second group in prohibited ways. For instance, a party to the conflict may adopt a strategy of eliminating the second group, through genocide, expulsion, or voluntary expatriation. The first two are specifically outlawed under international law,[73] the third is unclear but likely suspect if attached to the goal of elimination, as the "voluntary" nature will be in doubt in light of the potential crime of persecution. If the strategy of domination is adopted, the likely method of implementing of that strategy discrimination against a minority is specifically outlawed. This, of course, includes the prohibition of slavery.

A party to the conflict may also frame the cause of the conflict as caused by the relationship of another group to others, and choose to act upon that second group in ways that are regulated but not necessarily prohibited by international law. If the strategy of

[72] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 17.

[73] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 17; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff 1995).

assimilation is adopted, the increased recognition of minority rights in international law[74] may constrain any attempt to eliminate communal differences. Separate treatment may depend upon the particular provisions and the balance between individual rights and collective rights, including whether the treatment is more in the form of recognition and accommodation for vulnerable minorities or discrimination against minority groups.[75] Many conflicts are framed in terms of self-determination, whether it is a demand for internal autonomy or outright secession. The question of the legality of self-determination is inextricably tied to the rights of territorial integrity and the rights of minorities and individuals within the new framework.[76]

All of the substantive legal norms listed thus far are binding directly as part of non-derogable international human rights regimes that apply in times of peace, armed conflict, and periods that could be described as *status mixtus*,[77] but may have special and distinctive characteristics during the transition from armed conflict to peace. Most particularly, these norms bind those crafting peace agreements and those who enjoy transitional governmental authority. Bell suggests that international law applying to peace processes (including the crafting of peace agreements) should reflect the distinctive

[74] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 17; see also Nātān Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff 2003).

[75] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 17.

[76] Ibid.

[77] See Georg Schwarzenberger, "Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law" (1943) 37 *American Journal of International Law* 460, 470.

nature of these acts, including: a distinctive self-determination role bound to questions of state legitimacy and human rights protections; hybrid international/domestic legal status based on a distinctive mix of state and non-state categories; obligations that may need to be interpreted from both a treaty or contract law framework and a constitutional law framework; and distinctive types of third-party delegation.[78]

Certain areas of *jus ad bellum* and *jus in bello* are also heavily implicated in a body of law governing the transition from armed conflict to peace. The prohibition of annexation as the result of armed conflict is tied to the prohibition of acts of aggression, a clear *jus ad bellum* concern. Acts of aggression also raise the question of response in the transition to peace, including the question of reparations—an issue that implicates the law of state responsibility. United Nations Security Council resolutions under Chapter VII authority frequently provide specific binding law that applies to particular transitions from armed conflict to peace.

All of the limits of the law of armed conflict applying to belligerent occupation under the law of armed conflict are traditionally classified as *jus in bello* (including Geneva Convention IV, Additional Protocol I, and Article 42 of the 1907 Hague Regulations[79]). The reality and legal restraints of "transformative occupation" requires a complementary

[78] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 407; see also Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

[79] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910), 36 Stat. 2277, 1 Bevans 631, 205 Consol TS 277, Art. 42.

understanding of *jus post bellum* to reconcile current practice (including the endorsement of some practitioners of transitional justice) and the Conservation Principle of *jus in bello* (prohibiting major changes in the institutions of the occupied territory). The tradition of *jus post bellum* covering occupation goes back to Immanuel Kant's exception to the Conservation Principle when it comes to the constitution of warlike states.[80] Arguably, if a *legitimate* new government is established and widely recognized, belligerent occupation (where a foreign state exercises effective control over another state's territory without the latter state's consent) may become pacific occupation (occupation with the latter state's consent) or international territorial administration,[81] such as the United Nations Transitional Authority in Cambodia.[82] This is, of course, a highly problematic, charged, and contested issue, but one that cannot be ignored. Merely placing a compliant puppet or satellite state should not remove the obligations of the occupier under *jus in bello*. The legitimacy of post-belligerent occupation is clearly tied to the validity of consent free from the threat of use of force as guaranteed by the Article 52 of the Vienna Convention on the Law of Treaties—*jus post bellum* law that is more procedural in nature, to which we shall turn shortly.

[80] See e.g. Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre (The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, originally published 1887, tr. W. Hastie, The Lawbook Exchange 2002)

[81] See e.g. Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press 2008); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2010).

[82] See e.g. Steven R. Ratner, "The Cambodia Settlement Agreements" (1993) 87 *American Journal of International Law* 1.

The international law applicable to state responsibility,[83] particularly with regards to new states created through conflict, is also an area of law that must be referenced by a body of law applicable to the transition from armed conflict to peace. State responsibilities also can provide the framework for considering the responsibility of international organizations and institutions.

The international law applicable to peacekeeping operations in the aftermath of armed conflict must also be considered in a comprehensive body of law applicable to the transition to peace. Similarly, status of armed forces on foreign territory agreements (SOFAs) are implicated by a *jus post bellum* regime.

Criminal law, both international and domestic, as well as laws regarding reparations (whether included as part of a criminal law regime or not) are also an important part of *jus post bellum*, if those laws have application to the transition from armed conflict to peace. The important criterion for their inclusion is not the venue (international or domestic) nor the source, but their applicability to the transition to peace.

Environmental law, particularly with respect to the rights and obligations relating to repairing and rebuilding the environmental damage from the conflict, but also resolving any resource disputes related to the conflict, may be implicated in the transition to a sustainable peace.

[83] See International Law Commission (ILC), "Draft Articles on Responsibility of States for Internationally Wrongful Acts" in ILC, "Report of the International Law Commission on the Work of its Fifty-third Session" (2001) UN GAOR 56th Session Supplement 10, 43; UN Doc. A/56/10.

The Responsibility to Protect doctrine[84] includes the Responsibility to Prevent, Responsibility to Respond, and the Responsibility to Rebuild. Of the three norms within the Responsibility to Protection doctrine, the Responsibility to Respond has received the most attention and has the most bearing on questions related to *jus ad bellum* and *jus in bello*, as it seeks to replace the rhetoric of humanitarian intervention with guidelines of responses short of the use of armed force and constraints on the resort to armed force and how it is used. The Responsibility to Prevent and the Responsibility to Rebuild are more tightly tied to *jus post bellum*.

d. More procedural in nature

Article 52 of the Vienna Convention on the Law of Treaties states in full: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[85] This is a particular area of concern for *jus post bellum*. First a note on terminology: use of the term "peace treaty" indicates an agreement exclusively between states, unlike the term "peace agreement," which is used for agreements not exclusively between states. Consider a

[84] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 39–45; see also United Nations Secretary General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change* (2004) 65–7; United Nations General Assembly, *2005 World Summit Outcome*, UN Doc. A/60/L.1 (15 September 2005) paras 138–9; United Nations General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677 (12 January 2009) para. 48.

[85] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 52.

generic, hypothetical peace treaty. Article 52 of the Vienna Convention on the Law of Treaties implies that the validity of that peace treaty, the foundation of a transition from interstate armed conflict to peace, depends on whether there has been an illegal threat or use of force to procure that treaty. In other words, the legal validity of the foundation of the transition to peace depends on what is typically considered a question of *jus ad bellum*, the legality of the use or threat of force. This connection between *jus ad bellum* and *jus post bellum* emerges not through an analysis of *substantive* rights and restrictions during the transition to peace, but through an analysis of the legitimate procedure for creating a peace treaty.

Recognition is also a critical question in *jus post bellum*. In order to apply *jus post bellum*, practitioners must be able to identify states and governments. This can be a contested issue, particularly for states in the case of secession (e.g. Bangladesh) and for governments in the case of contested legitimacy of a new regime (e.g. post-Democratic Kampuchea Cambodia). The law regarding recognition of states and recognition of governments is clearly implicated in the transition to peace.

The procedural law applicable to substantive criminal and civil law are also part of the transition to peace. This is not only with respect to the high profile, highly contested issues such as amnesties for the perpetration of alleged crimes related to the armed conflict. It includes questions of jurisdiction, immunities, statutes of limitation, and other questions of admissibility.

e. Mixed substantive and procedural in nature

Some subjects are very difficult to characterize as mostly substantive or procedural, or at least require further analysis to distinguish particular aspects that are more substantive or procedural. For example, the United Nations Security Council Resolution 1325[86] enunciates both procedural norms for the resolution of armed conflict[87] and norms for the substance of peace agreements.[88]

f. Summarizing the contrast in content

Transitional Justice has evolved into a robust body of law and practice involving a wide variety of tools to respond to the challenges of responding to widespread or systematic human rights abuses in the context of a political transition to a new regime. *Jus post bellum* implicates a rich variety of legal traditions and regimes, applied to the particular situation of the transition from an armed conflict to a sustainable peace.

[86] UNSC Res. 1325 (31 October 2000) UN Doc. S/RES/1325.

[87] "1. Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict[.]".

[88] "8. Calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary[.]"

5. Temporal Contrast – the dynamics

a. Introduction: Time Within the Concepts

This section analyses the dynamics of Transitional Justice, *jus post bellum*, and International Criminal Law, that is, how each concept operates over time. As stated earlier, "Transitional Justice" has been redefined by some to include not only "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes"[89] but also "transition from conflict," which is a fundamentally different concept. This threatens to confuse Transitional Justice with *jus post bellum*, particularly if the contrast in temporal aspects remains unexamined. Discussing how time operates within a concept provides a more granular approach than a broad historical analysis—allowing for a discussion of the internal functioning of a concept.

What role each concept can play depends in part on *when* one asks the question. Transitional Justice comes to the fore in consolidating a transition to a new, human-rights-centered regime or political order. *Jus post bellum* applies throughout the transition to peace, but will focus on different questions at different times. International Criminal Law on principle takes an unchanging stance with respect to determining criminal culpability regardless of domestic regime or a state of war—but is particularly constrained with respect to *ex post facto* application of the law. Understanding the

[89] Teitel, *Transitional Justice Genealogy*, p. 69 (internal citations omitted).

dynamics of each concept, how it works and orients itself over time, provides a more comprehensive guide to the role each concept can play and how they can be integrated in particular situations.

b. Dynamics of Transitional Justice

i. The double beginning of Transitional Justice

Due to the emphasis on responding to human right violations of repressive predecessor regimes, Transitional Justice in practice largely begins after a change in regime and responds to the actions of a previous regime, which may or may not correspond to a period of armed conflict. That is, the practice of Transitional Justice tends to begin after a change in regime, or at least a dramatic political shift. The subject of that practice, however, is largely focused on responding to the acts taken in the previous regime. Transitional Justice thus tends to have a double beginning – the subject matter (or referent) and the response to the subject matter. The first beginning occurs during the repressive predecessor regime, the second begins during the succeeding, presumably non-repressive, regime.

There are, of course, potential complications with the working guideline above. One critical complication is the ever-present, heated question of amnesty for violations of human rights committed before the peace agreement is signed. Transitional Justice practitioners, whether they are external or domestic, are certainly interested in whether such amnesties are included in these peace agreements. Whether or not that interest

makes the negotiation of peace agreements part of an intellectually coherent phenomenon called "Transitional Justice" is somewhat doubtful, however. Including this within the ambit of "Transitional Justice" deviates from the definition given by its practitioners "conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." [90]

It is important to emphasize that despite the blanketing rhetoric against "amnesty" and a "culture of impunity," a rhetoric driven by valid human rights concerns, certain amnesties are not only permitted, but also suggested by the laws of armed conflict. The most obvious case is when someone has participated in the conflict as a legal combatant under international humanitarian law, but his or her participation is considered illegal under domestic law (either directly or through criminalizing activities such as carrying arms.) Article 10.1 of Additional Protocol II of the Geneva Conventions, to take a more specific example, forbids punishment of ethical medical care even if it supports an insurgency: "Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom." An amnesty provision covering such activities may well be necessary, given the increasingly overbroad domestic legislation covering aiding or abetting administratively determined terrorist groups, for example. The virtues of certain forms of amnesty are perhaps more likely to be emphasized by those focusing on *jus post bellum* than those

[90] Ruti Teitel, Transitional Justice Geneology, 16 Harvard Human Rights J., Spring 2003, p. 69 (internal citations omitted).

focusing on Transitional Justice, again underlining the need for both terms to be focused and both areas of practice to be further developed.

One might inquire if peace agreement negotiation was part of Transitional Justice despite the "predecessor regime" not yet being a predecessor regime, whether all human rights activism during a repressive regime is also part of Transitional Justice. In fact, it may become difficult to differentiate Transitional Justice from anything touching upon human rights once the definition begins to expand. That is not to say that such concerns are not of interest, in the same way that someone interested in human rights might not also be interested in the specific rights flowing from an individual's nationality.

Similarly, one might point to international criminal law efforts that begin before a change in regime, and are not necessarily predicated on a regime change. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Court have not necessarily waited for a change in regime to proceed, although such regime changes or at changes in government have proven helpful. One might ask if this does not complicate the temporal definition of Transitional Justice. But again, if one does not provide a clear definition that follows coherently from the definition given by practitioners, Transitional Justice may end up including all of International Criminal Law. This is, at a minimum, not helpful.

When determining the temporal limits of Transitional Justice in terms of when it begins, it is important to specify whether the human rights violations or the reactions to those violations are being discussed. The human rights violations of the preceding regime may

(or may not) stretch to the beginning of that regime. The reactions, as part of Transitional Justice, may begin with the new succeeding regime, or they may begin substantially later.

ii. Immediacy and Sequencing

Once an iniquitous regime has fallen, one would expect that the subject matter of Transitional Justice (the human rights violations of the previous regime) would be over. There is, however, a complication to the idea of a double beginning of Transitional Justice that deserves mention, one that highlights the questions of immediacy and sequencing. Some patterns of human rights violations are considered ongoing as long as the information about the crime is withheld. This complicates the analysis of transitional justice because the work of Transitional Justice is entangled in the subject matter of Transitional Justice—disclosing the truth about the initial act becomes a matter of immediate and pressing obligation for the successor regime to avoid participating in an ongoing human rights violation. In general, a successor regime using a model of Transitional Justice premised on political change will wish to maximize the perceived distance between it and the previous regime, but with a "composite act" such as forced disappearance, the successor regime may be considered responsible even if it did not initiate the wrongful act.[91]

[91] *See* Art. 15.1 of International Law Commission, Draft *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Adopted by the General Assembly in resolution 56/83 of 12 December 2001, corrected by a/56/49(Vol. I)/Corr. 4.): "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."

Some crimes themselves are not concluded until the disclosure of certain information is complete. [92] The crime most often referenced in this context is the crime of "forced" or "enforced" [93] disappearance. [94] The basic idea is that as long as the fate or whereabouts of the victim has not been established, the crime has a continuous character.[95] This temporal framing may allow procedural or jurisdictional limits (such as statutes of limitations, amnesties tied to a time period, or the entry into force of the Rome Statute) to be circumvented. More generally, it points to the difficulty of drawing clean temporal lines when applying a variety of laws to a variety of factual situations.

Sequencing is often discussed more prospectively than historically, with specialists suggesting, for example, that a country might try a truth commission, followed by criminal prosecution, followed by memorialisation efforts. What may be recommended by for one situation may differ for another. The critical theoretical point when analyzing

[92] *See* La Fontaine, Fannie, *No Amnesty or Statute of Limitation for Enforced Disappearances: the Sandoval Case before the Supreme Court of Chile*, 3 J. Int'l Crim. Just. 469 (2005).

[93] *See ibid*., p. 470. La Fontaine reports that the Supreme Court of Chile has said that the domestic crime of "aggravated abduction" (*secuestro calificado*) is the equivalent of forced disappearance.

[94] The definition of"Enforced disappearance of persons" given by Art. 7(2)(i) of the Rome Statute is "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Rome Statute of the International Criminal Court art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90. *See also e.g. Inter-American Convention On Forced Disappearance Of Persons* available at http://www.oas.org/juridico/english/treaties/a-60.html . For more on the historical basis of the crime, *see* Finucane, Brian, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War* Yale Journal of International Law, Vol. 35, 171, 2010.

[95] Ibid.

the temporal dimension of Transitional Justice is that different tools may have different timelines, both by design and because of historical and social forces. Because of the various "tools in the toolbox," determining the *overall* timeline in any particular instance of Transitional Justice can be very difficult. In practice, the timeline may not be a one-direction narrative of progress, but instead involve reversals and pauses, sometimes repeatedly.

The question of the timeline in Transitional Justice is inherently tied to the question of political change, as is appropriate for a field focused on responses to past abuses in the context of political change. In *The Law and Politics of Contemporary Transitional Justice*,[96] Teitel discusses the sequencing and immediacy in situations of diminished legitimacy, such as the responses to the Saddam Hussein regime after the change of regime in Iraq.[97] She characterizes the application of criminal law as aimed at promoting political transition,[98] a process complicated by certain deficiencies of both the trials[99] and the political transition itself.[100] She suggests that the International Criminal Tribunal for the Former Yugoslavia (ICTY) offers a cautionary tale of Transitional Justice causing a

[96] Teitel, Ruti, *The Law and Politics of Contemporary Transitional Justice*, Cornell Int. Law Journal 38 (2005), 837.

[97] Ibid 846.

[98] Ibid.

[99] Ibid 848.

[100] Ibid 849.

nationalist backlash, which may have hindered, in her view, political change.[101] While Teitel's evaluation of the ICTY may be qualified in light of subsequent political change, the fundamental point of linking the understanding of the timeline of Transitional Justice, particularly with respect to sequencing and immediacy, must be viewed in light of the political realities at the heart of the conception of Transitional Justice.

One phenomenon that also must be noted in order to understand the dynamics of Transitional Justice is what has been called a "justice cascade."[102] A justice cascade refers more generally to how one legal proceeding, often abroad, can trigger subsequent domestic proceedings, and how the creation of a critical mass of efforts to prosecute can reach a tipping point so that prosecution is the norm, rather than impunity. [103]

Regardless of whether some of the crimes allegedly perpetrated under the previous regime are of an ongoing nature, the practice of Transitional Justice may not begin immediately. The mode of transition matters. An overthrow or complete military victory over the previous regime (*e.g.* Post-World War II France) may create the possibility for unfettered and immediate criminal prosecutions.[104] In other circumstances those who had power within the previous regime may retain significant power even after the transition to

[101] Ibid 846.

[102] *See* Lutz, Ellen and Sikkink, Kathryn, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 Chi. J. Int'l L. 1 (2001); Sikkink, Kathryn, The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics (2011).

[103] Ibid 2.

[104] *See* Kritz, Neil J., *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, US Institute of Peace Press (1995), p. 114.

a new regime is well under way[105] or pressure for Transitional Justice mechanisms may be weak.[106] It can take years, even decades, for the practice of Transitional Justice to begin. One contemporary example is the controversy rather regarding the response to human rights violations during the 1936-1975 Francisco Franco dictatorship in Spain. Decades later, it is unclear whether the proper beginning of Transitional Justice in Spain is still effectively in the future.

Another, arguably more complex example is in post-Khmer Rouge Cambodia. Between 1975 and 1979, the Democratic Kampuchea regime murdered millions through forced labor, starvation and execution. Among many others, the jurists of Cambodia were killed. An estimated six to ten legal professionals survived.[107] The Democratic Kampuchea regime's crimes eradicated the institutions and people who could normally attempt to address those injustices through criminal law. In 1979 Vietnam reacted to a pattern of atrocities by the Khmer Rouge in Vietnam along the border and occupied the country. The new regime held a trial in absentia for the top Khmer Rouge leaders, Pol Pot and Ieng Sary. A new government was set up by 1981, but the international community largely refused to recognize it. Cambodia remained plagued by guerrilla warfare. Hundreds of thousands of people became refugees. The mass movement represented by the "National Front" ("Renakse") included mass membership

105 Ibid

106 Ibid.

107 Rebuilding Cambodia: human resources, human rights, and law: three essays by Dolores A. Donovan, Sidney Jones and Dinah PoKempner, Robert J. Muscat; editor, (1993), p. 69.

organizations of Buddhist monks, nuns, women, youth, workers, and other categories. Renakse organized the "petitions" or "million documents" which remains the only nationwide opportunity for survivors of the Khmer Rouge regime to describe atrocities they suffered. The million documents were the result of the Renakse research committee that interviewed survivors throughout the country. Various efforts at memorialisation occurred, including famously at Tuol Sleng, Choeung Ek, and the annual May 20th activities often known as the "Day of Hatred". In 1990, Vietnam left and the United Nations entered. The Paris Peace Accords were signed between the government and Khmer Rouge, amongst others, in 1991. In 1993 the United Nations mandate ended with first general elections.

Where does the timeline for Transitional Justice begin for Cambodia? In 1979, with the occupation of the country? The Khmer Rouge had been driven from Phnom Penh, but the Khmer Rouge endured on the Thai border, and the conflict continued through the 1980s. In 1979, with the trial in absentia, and various efforts at memorialization? The years 1981, 1991, 1993, also present themselves, as well as the 2003 agreement between the United Nations and the Cambodian government to establish the Extraordinary Chambers in the Courts of Cambodia to try Khmer Rouge officials. Analyzing the question of where the timeline for Transitional Justice begins highlights the need to keep in mind the dual beginnings of Transitional Justice, as described above. Clearly the referent or substance of Transitional Justice has a different beginning than the practice of Transitional Justice. Analyzing the timeline also highlights the issues of immediacy and sequencing. Does the occupying forces' show trial in absentia qualify as immediate

response, or was Cambodia an instance where efforts were made too late, allowing most alleged perpetrators to die of old age? Did the sequencing of memorialisation help to make the Extraordinary Chambers in the Courts of Cambodia possible, or did it make the evidence unreliable, or both?

iii. The unclear ending of the transition in Transitional Justice

Even in the case of seemingly immediate and unfettered instances of Transitional Justice, such as in post-World War II France, determining when Transitional Justice ends can be difficult. France has long wrestled with the issue of collaboration, producing an early wave of executions and humiliations, stretching and repeating through the relatively recent trial (1995-1998) of Maurice Papon.[108] Given Papon's alleged crimes in Algeria, was a trial for Vichy era crimes Transitional Justice for Vichy or a proxy for Transitional Justice for the Fourth Republic? As with Cambodia, when the practice of Transitional Justice has a referent of arguably more than one regime in the past (*e.g.*, the post-United Nations Transitional Authority in Cambodia (UNTAC) Cambodian government holding trials not with respect to what happened under the current regime, nor UNTAC, nor the period of post-occupation, nor the period of occupation, but for the Democratic Kampuchea regime before the occupation), the question of what political change is involved gets considerably more complex. In Cambodia, given that the current Prime

[108] *See e.g.* Curran, Vivian, *The Politics of Memory/Errinerungspolitik and the Use and Propriety of Law in the Process of Memory Construction*, Law and Critique, 19 October 2003, Springer, 316.

Minister Hun Sen has retained power through multiple putative regime changes, the particular political goal of a transition to democracy is made more problematic.

Whether the Extraordinary Chambers in the Courts of Cambodia or trials for crimes under the Vichy regime in the 1990s count as Transitional Justice or not depend in part on whether the political change *implicated* in the referent material is complete, or at least complete enough that there is a consensus that the new political system is seen as normal. As this a matter of debate and political self-definition within each polity, the temporal dimension of Transitional Justice is once again as much a political determination as a legal one. Unlike International Criminal Law, Transitional Justice must look to an analysis of the society and political system in transition to determine if Transitional Justice must look to an analysis of the society and political system in transition to determine if Transitional Justice is "over"—to see if the needed transition has actually occurred.

c. Dynamics of Jus Post Bellum

i. Beginning with the effort to end conflict, not the end of conflict

Despite the most facile reading of its name, *jus post bellum* should not be overly defined by reference to the time a conflict ends. The term *jus post bellum* may naturally lead to an emphasis on the temporal boundaries of the armed conflict—as though the question of whether the norms of *jus post bellum* can be applied can always be clearly demarcated by

an event.[109] The proper study of *jus post bellum* should complicate and enrich this overly-neat temporal picture by emphasising the links between the areas of *jus post bellum* and *jus ad bellum* as well as between *jus post bellum* and *jus in bello*.

The question of whether demands for unconditional surrender are permissible,[110] for example, is a query asked of a period well before the guns are silenced—and is an issue that links the traditional criteria of *jus ad bellum* (*e.g.* just cause) to traditional concerns of *jus post bellum* or *jus victoriae*[111] as to the rights and responsibilities of the victors. Increased attention to *jus post bellum* should highlight that demarcating when a conflict terminates is frequently difficult, particularly when non-state actors may splinter, transform, or lie temporarily dormant. *Jus post bellum* should not be marked off and isolated from other bodies of legal norms on the basis of time, but rather seen as part of a comprehensive framework for managing an interconnected set of problems related to armed conflict.[112]

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[109] *See e.g.* Österdahl, Inger and Esther van Zadel, *What Will Jus Post Bellum Mean? Of New Wine and Old Bottles,* Journal of Conflict & Security Law (2009), Vol. 14 No. 2, 185, 176.

[110] *See* Brian Orend, "*Jus Post Bellum*: A Just War Theory Perspective" in *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), 39-40. *See also* Orend, Brian, *Jus Post Bellum*: The Perspective of a Just-War Theorist, Leiden Journal of International Law, 20 (2007), 579-580. Orend suggests that demands for surrender and the terms of those demands must be linked to the original just cause of those making the demand.

[111] *See* Stephen C. Neff, "Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective" in *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), 77-91.

[112] *See* Brian Orend, "*Jus Post Bellum*: A Just War Theory Perspective" in *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), 36.

Not all contemporary scholars agree on the definition. David Rodin, for example, defines *jus post bellum* narrowly (limited to the obligations of combatants after war) as a separate subject from what he describes as *termination* law or *jus terminatio* (covering the transition from war to peace).[113] Rodin's terminology conflicts with the definition previously adopted for this Chapter, where *jus post bellum* legitimately defines norms applicable to the transition from armed conflict to a just and sustainable peace. The more comprehensive approach with respect to terminology is more similar to Carsten Stahn's, who suggests that *jus post bellum* must be understood in a holistic sense.[114] He decries the frequent fragmented approach in which practitioners of international humanitarian law, criminal law, human rights law, and those supporting specific agendas such as the "responsibility to protect" speak past each other.[115] Christine Bell's conception of a *lex*

[113] *See* David Rodin, "Two Emerging Issues of *Jus Post Bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression" in *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.

[114] *See* Carsten Stahn, "*Jus Post Bellum*, Mapping the Discipline(s)" in *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), 105. *See also* Stahn, Carsten, *Jus Post Bellum*: Mapping the Discipline(s), 23 Am. U. Int'l L. Rev., 332, 2007-2008; Stahn, Carsten "*Jus Ad Bellum*," "*Jus In Bello*," "*Jus Post Bellum*?" Rethinking the Conception of the Law of Armed Force, ASIL Proceedings, 2006, 159; Österdahl, Inger and Esther van Zadel, *What Will Jus Post Bellum Mean? Of New Wine and Old Bottles*, Journal of Conflict & Security Law (2009), Vol. 14 No. 2, 178.

[115] *See* Carsten Stahn, "*Jus Post Bellum*, Mapping the Discipline(s)" in *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), 105. *See also* Stahn, Carsten, *Jus Post Bellum*: Mapping the Discipline(s), 23 Am. U. Int'l L. Rev., 332, 2007-2008; Stahn, Carsten "*Jus Ad Bellum*," "*Jus In Bello*," "*Jus Post Bellum*?" Rethinking the Conception of the Law of Armed Force, ASIL Proceedings, 2006, 159.

pacificatoria[116] or law of peacemakers (echoing *lex mercatoria* for merchants) which bridges the various types of peace agreements, including post-conflict implementation agreements, clashes with Rodin's *lex terminatio*, which would presumably stop in the midst of the *lex pacificatoria*, with a different framework for different peace agreements. While the definition used in this Chapter may differ from Rodin's, the division between norms focusing on the process of termination of conflict and the norms involved focusing on the process of building a sustainable peace is useful.

ii. Peace Agreement as a Process

A peace agreement is usually seen as a noun, a document created at a specific point that marks the temporal division between "wartime" and "peacetime."[117] This division between periods of war and peace is extremely important, but it can be overstated. There are often periods that could be described as *status mixtus*,[118] where the status and durability of a hoped for peace is uncertain, particularly without at the benefit of hindsight. What is of increased interest at those moments from a *jus post bellum* perspective is not whether or not a status of *post bellum* has technically been achieved, but rather whether legal norms are being applied with *post bellum* as the goal. It is this

[116] Bell, Christine, *Peace Agreements: Their Nature and Legal Status*, p. 407.

[117] For a fascinating, in-depth analysis of the idea of "wartime" as a legal and cultural construct, particularly with respect to the United States, *see* Dudziak, Mary L. *War time: An idea, its history, its* consequences, (2013) Oxford University Press. *See also* Dudziak, Mary L., *Law, War, and the History of Time*, 98 Cal. L. Rev. 1669 (2010).

[118] *See* Schwarzenberger, Georg, *Jus pacis ac belli? Prolegomena to a sociology of International Law*, 37 Am. J. Int'l L. 460 (1943), 470.

orientation towards the creation of a just and sustainable peace that separates *jus post bellum* from other strands of just war theory. The law of making peace agreements or "law of peacemakers", what Christine Bell has called *lex pacificatoria*[119] is a crucial part of *jus post bellum*. In operation it often spans periods of armed conflict and peace, because modern peace agreements often come in series, with preliminary agreements paving the way for "comprehensive" peace agreements that often need to be followed by implementing steps. Other crucial subject areas of *jus post bellum*, including environmental law and resource allocation issues during the transition to peace, regulation of state responsibility, recognition of states and governments, and occupation law are often tightly tied to the successful coming to the agreements necessary to build a just and sustainable peace. Coming to lasting agreements about peace is better understood as a dynamic process rather than an equation that is solved a particular moment.

iii. Temporal Relation to jus ad bellum and jus in bello: Two examples of complications

It may be helpful, when confronting the temporal expectations surrounding the terms *jus ad bellum*, *jus in bello*, and *jus post bellum* to reflect further on the perhaps surprisingly complex temporal dimensions of *jus ad bellum* and *jus in bello* in certain instances. These examples are not intended to be exhaustive, merely illustrative.

[119] *See inter alia*, Bell, Christine, 'Peace Agreements: Their Nature and Legal Status', (2006) 100 American Journal of International Law 373.

The contemporary difference between an armistice and a peace treaty supplies an example of an apparent oddity in the neat timeline of *jus ad bellum* followed by *jus in bello*, and concluded by *jus post bellum*. The simple narrative puts *jus ad bellum* at the beginning of the story of a state of peace turning to a state of war. An armistice, under contemporary usage, ends a conflict between belligerent states, but does not establish peace in the sense that a full peace treaty provides—a full normalization of relations.[120] Once an armistice has been agreed to, the author would suggest that considerations of *jus ad bellum* come into play when considering whether there is any restriction in international law or just war theory on either side breaking the armistice. This means that in every instance where an armistice leads to a peace treaty, *jus ad bellum* considerations apply both at the beginning and the end of the full story of the conflict, stretching from peace to peace. *Jus ad bellum* considerations, in these instances, are intimately connected to the transition to peace. One cannot understand a body of law that covers the transition from armed conflict to peace without understanding *jus ad bellum.* One cannot understand *jus post bellum* without *jus ad bellum.*

Belligerent occupation provides another example of a situation where the overly neat timeline of temporally self-contained areas of *ad bellum, in bello, post bellum* must be reconsidered. Belligerent occupation does not require active resistance, and may lead to a sustained peace without shots being fired. Nonetheless, at least since the Geneva Conventions of 1949 belligerent occupation is included as a time period and circumstance

[120] Dinstein, Yoram, *War, Aggression and Self-Defence* (3rd ed.) Cambridge (2001), pp. 39-43.

in which what has been termed *jus in bello* applies. Geneva Convention IV and Additional Protocol I are particularly important for determining the law of armed conflict in a belligerent occupation. (While the term *jus in bello* may not have been applied at the time, the modern understanding of occupation is rooted in Article 42 of the 1907 Hague Regulations[121] and the identical text in the 1874 Brussels Declaration.[122]) Should the transition to peace via preliminary peace negotiations occur during belligerent occupation, should this period be considered *jus in bello* or *jus post bellum*? It makes more sense to consider that both regimes apply during the same time period than to try to determine a fine line between the two.

iv. The Endpoint of *Jus post bellum*

As with Transitional Justice, the endpoint of *jus post bellum* defined as regulating a transition to a *just and sustainable* peace can be difficult to identify. While a situation may be analysed retrospectively to determine whether a peace is sustained, the law must be applied without the benefit of future hindsight. The question of whether the current situation is *sustainable* at a particular moment (as opposed to sustained as a matter of historical fact) is a matter of political science and other areas of social science besides law. The question of whether a peace is *just* may lie more in an normative analysis, likely grounded in human rights and the Just War Tradition, as much as positive law.

[121] Hague Convention (Date signed: 18th October 1907), IV (Convention Relating to the Laws and Customs of War on Land), Annex (Regulations respecting the Laws and Customs of War on Land), Section III (Military Authority over the Territory of the Hostile State), Art. 42.

[122] Project of an International Declaration concerning the Laws and Customs of War ((signed 27 August 1874) (1873-74) 65 BFSP 1005 (1907) 1 AJIL 96)

While the focus of Transitional Justice is on the accomplishment of a particular conception of justice more than the realization of a sustainable peace, the experience of Transitional Justice practitioners may be helpful in using various social sciences to analyse the result of applying an area of law or legal approach to a particular instance.

d. Summarizing the Contrast in Temporal Aspects

Many of the differences in the temporal aspects of each concept have been highlighted above. International Criminal Law may in general serve the purposes of Transitional Justice and *jus post bellum*, but because of the inherent importance of the human rights of the accused and the fallibility of state power, the actual practice of International Criminal Law should as far as possible not be instrumentalized to secure a new domestic human rights-protective regime or sustainable peace.

The importance placed by Transitional Justice practitioners on looking to the past and establishing the historical truth of past human rights abuses provides a useful reminder that those applying *jus post bellum* should keep in mind the perceived causes of the armed conflict. Resource conflicts may require particular concern for environmental law, context-specific reparation including access to natural resources, and environmental remediation and concern for the environment in post-conflict rebuilding. Conflicts based primarily on perceptions of human rights violations may require an extra emphasis on the application of human rights norms during the closing of the armed conflict and during the post-conflict phase. Successful application of *jus post bellum* norms requires specific understanding of the local views of history.

The need to pay attention to the sequence of responses in Transitional Justice and sometimes not-so-immediate application of the law also holds lessons for *jus post bellum*. Application of the law regarding to the recognition of states or governments may need to precede the application of laws regarding foreign or international efforts in post-conflict rebuilding, for the very practical reason and evident need of identifying legitimate local authorities to work with. Bell's framework[123] for identifying different stages of peace making including the implementation of peace agreements also emphasises the sequencing of agreements in order for the peace-making process to work.

6. Specific to Global Contrast

a. The national and international dimensions of transitional justice

One phenomenon that must be addressed with respect to the national and international dimensions of Transitional Justice is what has been called a "justice cascade."[124] This term was coined to describe the dynamics behind the transnational effort to try Augusto Pinochet for alleged crimes under his regime, specifically "what changed between 1982

[123] Bell, Christine, Peace Settlements and International Law: From Lex Pacificatoria to Jus Post Bellum (May 17, 2012). Edinburgh School of Law Research Paper No. 2012/16. Available at SSRN: http://ssrn.com/abstract=2061706 or http://dx.doi.org/10.2139/ssrn.2061706

[124] See Ellen Lutz and Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America" (2001) 2 *Chicago Journal of International Law* 1; see also Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Co. 2011).

and 1999 that made Pinochet's arrest in Britain possible,"[125] and refers more generally to how one legal proceeding, often abroad, can trigger domestic proceedings. It is clear that to understand how and why Transitional Justice works, one must keep in mind the sequence of Transitional Justice efforts, not only in terms of domestic application of Transitional Justice tools, but in terms of steps taken internationally and in domestic fora.

While there are *international* tools of transitional justice, notably international fact-finding missions and particular investigations and criminal prosecutions in international fora, there could also be international criminal prosecutions that should not be considered transitional justice. Such prosecutions could take place in a time that had effectively no particular reference to the transition in regime, such as a prosecution for crimes that happened several regimes ago, as well as international criminal prosecutions that do not implicate human rights violations (for example a prosecution purely for the crime of aggression or a war crime that did not implicate a human rights violation) or a change in political regime (such as a failed coup or election-related violence).

To return to the "justice cascade" phenomenon, it is clear that while transitional justice has historically been largely focused on *domestic* responses to crimes of previous regimes, the picture of modern transitional justice is not complete without awareness of how the geographic scope of Transitional Justice may cross national borders. Tightly linked to the idea of a "justice cascade" in which judicial action in one (foreign) forum

[125] Lutz and Sikkink, "The Justice Cascade" 2.

can result in judicial action in another forum is the idea of the "Pinochet Effect."[126] The Pinochet Effect emphasizes the transnational change in tone across Latin America and the world due to the effective fight against impunity by leaders of previous regimes. This idea of the international climate or zeitgeist influencing transitional justice is helpful in order to understand the interplay between the domestic, regional, and international arenas.

b. Plotting the content of *jus post bellum*: specific to global

The idea of *jus post bellum* as international law may lead one to believe that local context is largely irrelevant to the law; that it is a universal standard that applies to varied local and specific facts, but that the law itself does not change. In other words, while the assumption of Transitional Justice may be local actors working locally, the assumption with respect to *jus post bellum* may be that international norms, international fora, and the international perspective is all that fundamentally matters. This is not the case. In addition to the global or international level, it is also helpful to consider regional or mid-range level and local or specific levels of analysis.

On the regional or mid-range level, a few examples may be helpful. Substantively, in addition to UN peacekeeping efforts, there exist regional peacekeeping efforts that may be subject to specific regional guidelines and governance. To take an example of what may be a mid-level rather than a regional set of *jus post bellum* problems, the particular

[126] See Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2006).

problems of resolving such atypical and contested armed conflicts such as the so-called "war on terror" (spanning multiple, non-contiguous countries) or the "war on drugs" (involving massive loss of life in northern Mexico, civil wars in Colombia and Afghanistan, etc.)—conflicts which often cross national borders or exist transnationally in disparate networks with little reference to national borders. Of course, traditional conflicts also have important specific regional contexts, whether in the great lakes region of Africa or the central-south Asian context of Afghanistan and Pakistan. Procedurally, regional international organizations are also faced with the question of recognition of states and governments after conflicts. Multilateral negotiations to end armed conflict and build a sustainable peace are often regional (rather than global or bilateral) in scope. Regional positions regarding procedural issues such as immunity, for example the African Union positions on Sudanese President al Bashir, are obviously neither global nor local in scope. Mixed procedural and substantive regional or mid-level applications of *jus post bellum* include the jurisprudence of regional judicial bodies and multilateral treaties regarding disarmament, including procedures for verification. On the specific or local level, more substantive examples of *jus post bellum* in practice might include particular instances of reparation; post-conflict resolution of a particular *res* or just cause under just war theory; particular instances of state practice regarding state responsibility, occupation, and peacekeeping. Instances of local more procedural *jus post bellum* might include bilateral or purely domestic/intrastate agreements, specific amnesties, and specific state and government recognition. Mixed substantive and procedural local *jus post bellum* can be found in specific disarmament, demobilization, or reintegration

efforts, including verification; and jurisprudence from domestic judicial bodies relating to *jus post bellum*. The astute reader will note that this analysis of geographic scope builds upon the dimension of "more substantive" or "more procedural" used in the analysis of the content of *jus post bellum*. Together, these analyses allow a two-dimensional plotting of *jus post bellum*.

7. Legal Contrast

Jus post bellum, like *jus gentium* or *jus civile,* is best understood as *by definition* primarily a system or body of law and related principles. The term "*jus*," used in this context, dates back to Roman law. A *jus* is "one particular system or body of particular law."[127] While *jus post bellum* in practice always exists in a particular political context, the thing in itself is fundamentally legal in nature, not political. It is a primarily legal concept (of the existence of a body of law) with political implications. *Jus post bellum* can also legitimately be used to reference the aspects of just war theory that apply to the transition from armed conflict to peace that are philosophical in nature, as is the case with its sister terms *jus ad bellum* and *jus in bello*.

Transitional Justice weds a legal idea—human rights—to the political change that makes human rights enforcement possible and necessary. Transitional Justice is tied to the change in regime and a change in enforcement. For Transitional Justice to work, it is necessary to create a distinction between the old culture of impunity and the new norms

[127] *Black's Law Dictionary* (6th edn, West Group, 1991). The alternative definition of *jus* as "a right," that is, "a power, privilege, faculty, or demand inherent in one person and incident upon another" is not applicable in this instance.

of justice. Transitional Justice is political in the sense of bringing a full political awareness to the project of securing political-legal system that respects and enforces human rights norms. The International Center for Transitional Justice takes pains to emphasize that Transitional Justice "is not a 'special' kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression."[128]

Contrasting *jus post bellum* and Transitional Justice with respect to how political or legal in nature each concept is may suggest—*contra* Lauterpacht—that some actions, from a political perspective, are impossible to call legal or illegal, but are instead out of the realm of law and into the realm of politics, in the manner espoused by Morgenthau and Kelsen. This suggestion is not the intent of the author. Identifying the political nature or political implications of a concept should not imply that any act cannot be analyzed from a legal perspective. Transitional Justice practitioners are rooted in a specific legal regime—International Human Rights Law.

One concept that deserves mention in this context is the idea of "meta-conflict,"[129] or "the conflict about what the conflict is about." Different narrative frames to understand an armed conflict will often be political in nature. This has implications for the politicization of *jus post bellum*. Because the true causes of the conflict are almost inevitably contested, the steps that need to be taken to resolve those causes and create a sustainable peace are also likely to be contested.

[128] International Center for Transitional Justice (ICTJ), "What is Transitional Justice" available at http://ictj.org/about/transitional-justice (accessed 27 May 2016).

[129] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 15.

8. Historical Foundations

The value of placing an idea within a specific historical context is at least twofold. First, knowing the environment in which a concept emerged helps understand the idea. Second, the fact that an idea crystalized and grew at a particular time allows reasonable inferences to be made about the wider international system at that time. For *jus post bellum* and Transitional Justice particularly, these are concepts with time and a dynamic view of events at their core. Their relatively recent emergence and popularity allows the inference that recent periods are more receptive to the idea of dynamic change. The emergence and development in content of these concepts should change how the international system is regarded, from a more static to a more dynamic entity. That dynamism, with inherent emphasis on change over time, means that time has become a more critical factor in understanding how the international system works.

A comparative analysis of the historical foundations of Transitional Justice, *jus post bellum*, and International Criminal Law demonstrates the particularities of each concept—how each concept is separately rooted in a particular context. International Criminal Law is helpful to include in a comparative study because the concept of post-conflict criminal justice is often confused with *jus post bellum.* The fact that International Criminal Law *strictu sensu* was not institutionalized from the Treaties of Westphalia to World War II, but has flowered since the end of the Cold War, suggests an incompatibility between a conception of International Law that directly addresses the criminal culpability of natural persons and the dominant conception of International Law

during the aforementioned period. The idea that International Law can reach down to the individual, potentially including governmental officials, did not reach a receptive audience until the period after World War II.

Similarly, the historical foundation of Transitional Justice in contemporary transitions to democracy reveals why the concept did not take root earlier. The idea of bias towards transitions to democracy or at least human rights protective regimes would have been anathema to an international order that was protective of the status quo and dominated by non-democracies.

Finally, it is true that particularly in the aftermath of the conflicts of the late 19th Century and World War I, sovereign states could consent to limitations to the resort to armed force and the methods of warfare encapsulated in the concepts of *jus ad bellum* and *jus in bello*. That said, the idea of restricting a victorious state with normatively-grounded law as an armed conflict concludes, a moment typically left entirely to politics and the facts on the ground, meant that the normative teachings of the Just War Tradition regarding the transition from armed conflict to peace were not fully developed into international law.

An analysis of the temporal dimensions of each concept assists in understanding the systematic effect of the concepts on the international system as a whole. Transitional Justice, with its framework assuming a new political-legal system that can evaluate a previous political-legal system, embraces a normative vision that rejects a status quo of sovereign supremacy at the expense of accountability for human rights violations. Regimes in charge of sovereign states that do not protect human rights are not likely to

embrace a concept that suggests that there should be a transition to a new regime that would hold previous regime actors accountable for mass human rights violations.

Jus post bellum seeks to constrain armed groups at the moment they are may be most difficult to constrain—emerging victorious, with potential opposition exhausted. The idea that agreements are void "if its conclusion has been procured by the threat or use of force in violation of the principles of international law"[130] would have invalidated many peace agreements if taken literally during the Westphalian era, and certainly would have posed problems with agreements that formed the legal cover for much of the colonial era.

The systemic effects of International Criminal Law may reach beyond the purposes of Transitional Justice and *jus post bellum* by focusing International Law more on natural persons and less on states. Like Transitional Justice, International Criminal Law can be retrospective in evaluation of past events, and prospective in terms of improving the future through deterrence, incapacitation, rehabilitation, education, and reconciliation. Where the purpose of International Criminal Law is not future-oriented, it strikes directly at a model of international law that leaves sovereign states as the sole subjects and objects, with criminal law reserved for municipal law. The supremacy of sovereignty is left subtly challenged on multiple levels—no longer is a regime expected to go unchallenged by internal challenges to its political-legal system, challenges as it concludes a conflict and sets up a new legal system to govern the peace, or challenges over its monopoly on penal law.

[130] Article 52, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

These challenges to the supremacy of sovereignty may not continue. International Criminal Law may fail to meet its promise if institutional budgets are throttled back by the states that the institutions rely upon. Transitional Justice may lose its focus and become in part a tool of abusive regimes. *Jus post bellum* may fail to establish itself with its sister terms, be depreciated and lose currency. But the tide of history since World War II seems to be flowing towards concepts that reconfigure sovereignty, while still depending on sovereign states for operation. A proper understanding of the historic and current role of each concept, and how they work together to change the international system, is essential for those who wish these concepts to endure.

Transitional Justice challenges the bias towards the status quo and against regime change arguably inherent in the international system—instead seeking to end a climate of impunity and secure durable political and legal systems that protect human rights.

International Criminal Law challenges a jealous view of sovereignty by suggesting that international law directly criminalizes individual conduct. *Jus post bellum* challenges sovereign authority even up to the supreme moment of sovereignty when one state has emerged as victorious in a conflict with another state.

a. Transitional Justice

The term is rooted in political transitions of Latin American and Eastern Europe in the late 1980s and early 1990s, with the term “transition” emphasizing the change from

authoritarian rule to democracy.[131] Teitel links the withdrawal of support from the USSR to guerilla forces in the late 1970s to the eventual end of military rule in South America.[132] The transitions in Eastern Europe after 1989 were obviously tied to the collapse of the Soviet Union. Transitional Justice, as a concept, cannot be understood without reference to the domestic political transition. As a historical phenomenon, it cannot be understood without reference to international power politics and foreign relations. Teitel suggests that the phase of post-Cold War Transitional Justice has been replaced with a new phase associated with globalization and heightened political instability.[133] A full exposition of the history of Transitional Justice is outside the scope of this chapter, but even a brief look at its history emphasizes the point emphasized by the International Center for Transitional Justice that Transitional Justice "is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse."[134]

[131] International Center for Transitional Justice (ICTJ), "What is Transitional Justice" available at http://ictj.org/about/transitional-justice (accessed 27 May 2016); see also Juan Linz, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996); Guilermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* Vol. 4 (Johns Hopkins University Press 1986).

[132] Teitel, "Transitional Justice Genealogy" 71.

[133] Teitel, "Transitional Justice Genealogy" 71.

[134] International Center for Transitional Justice (ICTJ), "What is Transitional Justice" available at http://ictj.org/about/transitional-justice (accessed 27 May 2016).

b. *Jus post bellum*

Understanding the historical foundations of *jus post bellum* requires an analysis of the contemporary division between *jus ad bellum* and *jus in bello*, as well as looking at the treatment of the concept of law applying to the transition to peace as well. Robert Kolb tentatively credited Josef Kunz with coining the terms *jus ad bellum* and *jus in bello* in their contemporary sense in 1934.[135] Stahn has identified the emergence of the terms in the 1920s,[136] with Guiliano Enriques using the term *jus ad bellum* in 1928.[137]

The interwar period was hardly the first time concepts of *jus ad bellum* and *jus in bello* were in play. Indeed, the reason for the success of these terms was not only because of their usefulness in discussing the law as it was at the time, but to discuss the history of international law on these issues.

The traditional division in classical international law between the law of war and the law of peace was a sharp one. War, generally speaking, discontinued the application of what might be called the "ordinary" international law that occurred during periods of peace. Treaties, formed in peacetime between non-belligerents, were abrogated when states became belligerents. During the classical positivist era, even the naturalist constraints on the power to wage war were downplayed. The pre-First World War Hague Conventions

[135] Kolb, "Origin of the Twin Terms Jus Ad Bellum/Jus In Bello" 561.

[136] Stahn, "*Jus Post Bellum*: Mapping the Discipline(s)" 312.

[137] See Giuliano Enriques, "*Considerazioni sulla teoria della Guerra nel diritto Internazionale"* (Considerations on the Theory of War in International Law) (1928) 7 *Rivista Di Diritto Internazionale (Journal of International Law)* 172.

of 1899 and 1907 and the post-First World War efforts such as the League of Nations and the Kellogg-Briand pact can be seen as part of an effort to lessen (and ultimately eradicate) the possibility of war ceasing the application of the international law of peace. Of particular interest is the Pacific Settlement of International Disputes (Hague I) of 18 October 1907.

The terms *jus ad bellum* and *jus in bello* arose in the context framed by the pre- and post-First World War efforts to address the question of the power to wage war, and indeed on Lauterpacht's framing of the function of law in the international community as a comprehensive system. Those using the terms built on a rich tradition, and in many ways surpassed the classical naturalists in establishing rules to constrain armed conflict. Armed conflict, regardless of whether it was adorned with the trappings of formal declarations or recognitions of a state of war, was increasingly going to be considered less of a reason for a suspension of the "ordinary" functions of law in the international community, the functions that pertain during peace.

Robert Kolb, in the "Origin of the twin terms jus ad bellum/jus in bello," leads one to an irony in the origins of the creation of a fundamental aspect of *jus in bello*—that it applies regardless of the justness of the cause of either side, generally applying to all belligerents. The strength of the idea of the *Reason of State* depreciated the question of the justness of a war during the nineteenth century.[138] Kolb suggests, following Peter Haggenmacher,[139]

[138] Kolb, "Origin of the Twin Terms Jus Ad Bellum/Jus In Bello" 556.

that the idea of the *Reason of State* allowed a focus on the *de facto* and *de jure* conduct of hostilities, regardless of the justness of the resort to armed force. A critical function of the emergence of these two terms is the emphasis on the separate operation of these two terms—underlining the idea that one can (and should) objectively evaluate the rights and duties pertaining to the conduct of armed force separately from the legality of resorting to armed force, and *vice versa*.

In the context of the Grotian tradition as identified by Lauterpacht, there is an irony that the apparent failure of one aspect of the Grotian tradition enabled the success of another aspect of the Grotian tradition. Namely, the failure of the *Rejection of "Reason of State"*[140] with respect to the resort to armed force enabled *The Subjection of the Totality of International Relations to the Rule of Law*[141] with respect to what might be seen as one of the most difficult areas to apply the Rule of Law—the rights and duties *durante bello*, when international relations between the belligerents has been reduced to armed conflict. This, in a sense, is an important part of the story Kolb tells about the emergence of the terms *jus ad bellum* and *jus in bello.*

It is also the story that needs to be told of *jus post bellum*—the subjection of the totality of international relations to the rule of law, even at the moment when a victorious state would be expected to leave law and normative principles behind and follow only the

[139] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France 1983) 599.

[140] Lauterpacht, "The Grotian Tradition in International Law" 30.

[141] Ibid 19.

mandates of politics and force. Seen historically, *jus post bellum* represents the last frontier of subjecting relations between states to the rule of law, not only in times of established peace or established armed conflict but during the difficult *status mixtus* periods when new states and new political-legal structures are born.

As Randall Lesaffer notes, interest in the history of international law has waxed and waned, with an increase during the First and Second World Wars followed by a subsequent decline.[142] This last peak in interest generally coincides with the coining of *jus ad bellum* and *jus in bello*, in addition to Lauterpacht's framing of the Grotian Tradition. Lesaffer suggests that we are in the midst of a new surge of interest in international history, perhaps preparing the ground for adoption and development of a new term, *jus post bellum*.

9. Going Forward – Continuing the Grotian Tradition

Those interested in *jus post bellum* would be well served to pay attention to Transitional Justice for a variety of reasons. Transitional Justice will often be applied simultaneously with *jus post bellum*. The area of law at the heart of Transitional Justice, International Human Rights Law, is critical to understanding the law applicable to the ending of conflict and the building of peace—from the treatment of amnesties in peace agreements to the protection of human rights in constitutional documents. The success of Transitional Justice advocates in placing human rights and the fight against impunity at the center of

[142] Randall Lesaffer, *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge University Press 2004) 2.

global governance should be lauded and emulated. At the same time, those interested in *jus post bellum* may wish to take note of the danger in definitional creep, particularly using a relatively new term such as "Transitional Justice" and applying it without a change in regime, particularly in a one-sided manner by a human rights-abusing regime.

Whether Transitional Justice and *jus post bellum* continue to grow and endure as useful concepts depends in part on whether these terms are defined with sufficient rigor. Because both terms deal with complex phenomena and benefit from scholarly interest from disparate fields and traditions, coming closer to a consensus on the definition of these terms is difficult. Since Transitional Justice and *jus post bellum* will often (but not always) apply simultaneously, it is all the more important to attempt this difficult task—to define both terms clearly and develop them in accordance with contemporary realities. It is important to recognize that multiple maximands will co-exist, rooted in the separate but related traditions, sometimes in tension, but hopefully almost always carried forward with good will.

The observant reader may have noted that, in contrast with other scholars, the definition of Transitional Justice embraced by this chapter is *narrower* than the increasingly broad definitions commonly used, while the definition of *jus post bellum* is broader. I do not see this as a contradiction, but rather a reflection of the separate problems each concept is designed to address.

Transitional Justice, as a specific conception of justice responding to the particular problems of political change and confronting the wrongdoings of repressive predecessor

regimes, allows for establishing a new political compact that pledges an end to impunity for human rights abuses, including by new elites. Focusing on that specific problem and specific concept makes the term more useful than a general euphemism for anything alleging human rights abuses, regardless of political circumstance.

Jus post bellum recognizes the problem of systematically applying international law to the difficult area of transitioning from armed conflict to a sustainable peace. A narrow focus on one aspect of the transition to a sustainable peace misses the challenge implied by the term "*jus*," that the effort of those involved must be to find the connections between various legal obligations and discover what is systematic about the law that applies to the process of achieving a sustainable peace.

There is, perhaps, an irony in suggesting that the Grotian Tradition as identified by Lauterpacht is "continuing" with the development of *jus post bellum* as a system of law pertaining to the transition from armed conflict to a sustainable peace. Lauterpacht did not portray international law as an inkspot that had spread to some areas but not others. Should disputes have arisen in his era as to the legality of acts taken during the transition to a sustainable peace, he surely would have felt those disputes could have arisen.

Yet embracing the concept that there should be no judicial *non liquet* in international law permits the idea that international law changes and develops, clarifies and matures. In a sense, uncovering the normative and historical foundations of *jus post bellum* is a project of construction as much as genealogy or archaeology. Application of international law in the transition to sustainable peace may be more or less part of a coherent and integrated

system. The vision of Transitional Justice practitioners of their field as not a "special" field of law but a "holistic" practice of judicial and non-judicial approaches to a particular circumstance[143] surely provides some guidance and reassurance to those approaching the definitional questions of *jus post bellum*.

While I maintain that *jus post bellum* is best viewed primarily as a system of law, it is not yet as tightly internally integrated as its sister systems of law, *jus ad bellum*, and *jus in bello*. Conversely, *jus post bellum* is probably more tightly connected to diverse fields of law that operate during times of transition from armed conflict and during other circumstances. This is not a threat to the legitimacy of the concept of studying the international law that exists during the circumstance of transition to a sustainable peace, rather it is an opportunity and a challenge to discern the operations of law in this complex and varied environment.

[143] International Center for Transitional Justice (ICTJ), "What is Transitional Justice" available at http://ictj.org/about/transitional-justice (accessed 27 May 2016).