The function of Jus Post Bellum in international law

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Conclusions

Transitions to peace frequently fail. The pause in violence following the cessation of armed conflict often collapses into renewed armed conflict, or continues as a mere "negative" peace,[1] without a just resolution of the causes of the war or accountability for conduct within the conflict. While the international community's approach to restricting the use of force and regulating conduct within armed conflict has matured and consolidated considerably since the Second World War, efforts to systematize and regulate transitions out of armed conflict remain very much a work-in-progress. Restoring *jus post bellum* to the twentieth century framework dominated by *jus in bello* and *jus ad bellum* is difficult and complex. Nonetheless, accomplishments in this field should be recognized, and further efforts are merited. This conclusion will provide a few final remarks on the relative importance of various areas of debate, appraise the research aims of this work, revisit the propositions put forth in the introduction, and offer last thoughts on the subject of the transition to peace.

[1] The concepts of "negative" and "positive" peace were developed by Johan Galtung in his seminal 1964 article: Galtung, J. (1965). An Editorial. *Journal of Peace Research*, 1(1), 1-4. For more on Galtung's work on structural analysis of peace, *see also* Galtung, J. (1969). Violence, Peace and Peace Research. *Journal of Peace Research*, 6 (3), 167-191. Galtung, J. (1981). Social Cosmology and the Concept of Peace. *Journal of Peace Research*, 17 (2), 183-199. Galtung, J. (1985). Twenty-Five Years of Peace Research: Ten Challenges and Some Responses. *Journal of Peace Research*, 22 (2), 141-158. Galtung, J. (1990). Cultural Violence. *Journal of Peace Research*, 27 (3), 291-305.

Before analyzing the research aims and propositions of this work, a comment on the relative importance of certain issues is merited. Many scholars, familiar with the term "*jus post bellum*" or less familiar, may reasonably reject the author's contention that *jus post bellum* is best understood through a hybrid functional approach. The definitional debate is ongoing, and this thesis will not be the last word for all readers. Certain scholars may wish for the term to be abandoned and replaced with another term, perhaps based out of the inherent artificiality of Latin neoterisms in a post-Latin era, or out of a desire to protect the perceived clarity of a bipartite approach; defending *jus post bellum*'s sister terms *jus ad bellum* and *jus in bello* from any confusion introduced by adding another member to the family. Others may wish to keep the term *jus post bellum* but limit it to, for example, post-conflict criminal justice efforts, referring to each of the areas discussed in Chapter 6 by separate terms with no (or an alternate) unifying framework.

What is important to the author, in the final accounting, is not what term is used, but whether laws and principles that *can* be used to guide the successful transition from armed conflict to peace *are* used. Ultimately, the highest priority should be the quality and nature of the lives of those who live through the transition from armed conflict and may spend their days in the peace constructed thereafter. Unless there is an increasingly shared understanding of how laws and principles can be synthesized and synchronized to facilitate the successful and permanent cessation of armed conflict and the construction of a robust, positive peace, opportunities will be lost.

There is a need for what has been described as "*jus post bellum*" in this work. The need for a shared commitment by local actors to the most powerful sovereign forces in the international community to work for a just and sustainable peace, and an understanding that one cannot wait until the armed conflict is finished to apply the laws and principles needed to prevent its return—this commitment and understanding is far more significant than whether one chooses to describe this commitment and understanding as "*jus post bellum*" or any other plausible alternative that facilitates the organization, development, and application of laws and principles to the same end, be it "peacebuilding that begins in war" or "transitional justice as it applies to armed conflict" or "an expanded notion of *lex pacificatoria*."

The debate over the correct terminology can occasionally give the reader a sense that they have stepped through the looking glass, and lost sight of what is actually significant in the real world. This famous passage may spring to mind:

> 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
> 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'[2]

With respect to all of the philosophers of language and reference that have more or less taken Humpty Dumpty's side of the argument, "the question" in the sense of the normative question for those who value a just and sustainable peace, is how and whether

[2] C. L. Dodgson (Lewis Carroll), *Through the Looking-Glass*, in *The Complete Works of Lewis Carroll* (New York, 1936), pp. 213-214.

such a peace can best be achieved in any particular instance. The author believes that the phenomenal growth in scholarship in *jus post bellum* itself provides evidence that the concept of *jus post bellum* may be a good vehicle to organize laws and principles towards a shared and laudable aim, but that the varied use of the term may lead to lost opportunities.

This thesis had three broad aims. First, the thesis evaluated the history of *jus post bellum avant la lettre*, tracing important writings on the transition to peace from Augustine, Aquinas, and Kant to more modern jurists and scholars. Second, it explored definitional aspects of *jus post bellum*, including current its relationship to sister terms and related fields. Third, it explored the current state and possibilities for future development of the law and normative principles that apply to the transition to peace.

In addition to these positive research aims, this work argued against certain ideas. Throughout the thesis, the erroneous suggestion that *jus post bellum* does not exist was rebuffed, as is the idea that it has no content. It situated *jus post bellum* with its sister terms, *jus in bello* and *jus ad bellum* and explored the content and contours of *jus post bellum*. It specifically rejected the idea that transitional justice, post-conflict international criminal law and *jus post bellum* are interchangeable ideas. The claim that the just war tradition is devoid of discussion of the subject matter of *jus post bellum* or that discussing the just war tradition is meritless was specifically rejected. The thrust of this work is not to argue for the use of the term *jus post bellum*, although there are reasons to do so, but

rather to examine the law and principles of the transition to peace regardless of the terminology used.

Often, the term "*jus post bellum"* is used by different authors without a common definition or theoretical approach. Throughout this thesis, this definitional problem has been addressed. This work argues for a hybrid functional (rather than purely temporal) approach to *jus post bellum*, that is, to define an approach to this area of law that focuses on the goal of achieving a just and sustainable peace rather than a mere discussion of law that applies during early peace.

The problems underlying armed conflict cannot be resolved, nor can a positive peace be constructed, without a sustainable foundation of justice and law. This research has clarified the moral and legal framework that applies during the transition from armed conflict to peace, termed by contemporary scholars and practitioners "*jus post bellum*." The need for *jus post bellum* is widely recognized, but given the complexity of the issues, it is unsurprising that there remains a certain lack of consensus about how to approach the principles and law regarding ending armed conflict in a just and sustainable manner. There is a distinct risk that until an enduring consensus emerges that frames and directs scholarship and practice in this area, communities will needlessly suffer the horrors of preventable war.

In order to light the way forward, it is worth considering the works of past jurists who have dedicated themselves to understanding the normative and practical difficulties of war and peace. A review of the works of Augustine and his peers, the Institutes of

Justinian, the Decretals of Gregory IX, Thomas Aquinas, Baldus de Ubaldis, Francisco de Vitoria, Francisco Suarez, Alberico Gentili, Petrus Gudelinus, Hugo Grotius, Emer de Vattel, Christian Wolff and Immanuel Kant provides a rich heritage to guide, but not necessarily constrain, contemporary and future jurists. Perhaps the strongest practical lesson that can be learned is the importance of keeping the goal of a just and sustainable peace at the center of policy-makers' concerns not only after the guns fall silent but whenever war is threatened and throughout the armed conflict itself.

Contemporary *jus post bellum* is rooted in a well-rooted normative and scholarly tradition, and also upon the concepts of *jus ad bellum* and *jus in bello* that remain the core underpinnings of international order. *Jus post bellum* operates within a specific context and foundation regarding the regulation of armed force, and benefits from the power of the general prohibition on recourse to the use of force and the richness and depth of contemporary international humanitarian law. *Jus post bellum* builds upon an extensive body of contemporary law and practice, including procedural fairness, territorial dispute resolution, regulating the consequences of an act of aggression, international territorial administration, territorial transition, state responsibility, responsibility of international organizations, human rights instruments, international criminal law, and odious debt.

The ambition of *jus post bellum* is worth celebrating, but also worth noting with some caution. While *jus ad bellum* primarily seeks to preserve a negative peace between states, and *jus in bello* hopes to preserve a modicum of humanity during hostilities, *jus post bellum* dares to set a difficult additional goal. It demands prioritization of a robust and

desirable solution to the problems that create armed conflict—even when humanitarian concerns are most pressing and the power imbalance between victor and vanquished are at their most extreme. This prioritization can take a variety of legal forms described throughout this work, from the prohibition of annexation, to respect for human rights, to limits on domestic amnesties. The dangers here should be obvious—by pushing too hard for an ideal long-term solution, an unwise or unlucky application of *jus post bellum* principles may risk overlooking the importance of short-term incremental gains, or may risk politicizing approaches that are better left neutral. The answer to these concerns should not be to reject the project of developing *jus post bellum*, but to further ground it in the practical wisdom of those involved in peacemaking, peacebuilding, and peace operations generally.

Shortly before his death, Tony Judt, the great historian and essayist, shared a few thoughts on learning from the history of war in an essay simply titled, "What have we learned, if anything?"

> War was not just a catastrophe in its own right; it brought other horrors in its wake. World War I led to an unprecedented militarization of society, the worship of violence, and a cult of death that long outlasted the war itself and prepared the ground for the political disasters that followed. States and societies seized during and after World War II by Hitler or Stalin (or by both, in sequence) experienced not just occupation and exploitation but degradation and corrosion of the laws and norms of civil society. The very structures of civilized life—regulations, laws, teachers, policemen, judges—disappeared or else took on sinister significance: far from guaranteeing security, the state itself became the leading source of insecurity. Reciprocity and trust, whether in neighbors, colleagues, community, or leaders, collapsed. Behavior that would be aberrant in conventional circumstances—theft, dishonesty, dissemblance, indifference to the misfortune of others, and the opportunistic exploitation of their

> suffering—became not just normal but sometimes the only way to save your family and yourself. Dissent or opposition was stifled by universal fear.
>
> War, in short, prompted behavior that would have been unthinkable as well as dysfunctional in peacetime. It is war, not racism or ethnic antagonism or religious fervor, that leads to atrocity. War—total war—has been the crucial antecedent condition for mass criminality in the modern era. The first primitive concentration camps were set up by the British during the Boer War of 1899–1902. Without World War I there would have been no Armenian genocide and it is highly unlikely that either communism or fascism would have seized hold of modern states. Without World War II there would have been no Holocaust. Absent the forcible involvement of Cambodia in the Vietnam War, we would never have heard of Pol Pot. As for the brutalizing effect of war on ordinary soldiers themselves, this of course has been copiously documented.[3]

The challenge of building peace goes well beyond the cessation of violence. Judt's reminder of the horrific effects of war on individuals and society is helpful, particularly for those temporarily lost in legal abstraction. At the same time, Judt moves the focus beyond the immediate kinetic effect of war to the social devastation it causes. Beyond death and destruction, armed conflict fundamentally replaces trust with fear. This fear in time fuels atrocity beyond war itself, and can cause armed conflict to reoccur. Rebuilding communities and institutions at a core level means restoring trust in a better future and ameliorating fears of a failed peace. This is not done merely through legal prohibition of war, nor through post-conflict justice alone, but rather with Galtung's conception of a positive peace squarely in mind—even before the conflict ends.[4]

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[3] Judt, Tony. "What have we learned, if anything?." *New York Review of Books* 55.7 (2008): 16.

[4] Galtung, Johan. "An Editorial." *Journal of Peace Research* 1(1) (1965):1-4.

Jus post bellum should be further developed to help all participants manage the complex process of ending armed conflict and developing early peace. No peace will be perfect. Some relapse into armed conflict is perhaps close to inevitable. But addressing the problem of transitions to peace as systematically and thoughtfully as possible remains one of the most pressing challenges in contemporary international law and practice. It demands our attention. It compels our effort. While the horrors of past failures should be kept in mind, so should the triumphs. The peace that is enjoyed simply, invisibly, and often thoughtlessly, is in fact the quiet victory of a vision that has inspired society for millennia—that wars must end, and that a just peace must be built to endure.