

The *Jus Post Bellum* Project:  
Role and contours of a contemporary  
*Jus Post Bellum*

Project Description



An NWO-funded Vidi project of the Grotius Centre for International Legal Studies  
at the University of Leiden



# THE JUS POST BELLUM PROJECT

## Project Summary

The proper ending of conflict and the organization of post-conflict peace is one of the greatest challenges of contemporary warfare that has resurfaced in the context of modern interventions and their aftermath. Since Grotius' *De Jure Belli ac Pacis*, the rules of international law have been founded upon a distinction between "war" and peace. Warfare has been categorized in the notions of *jus ad bellum* (justification of the use of force) and *jus in bello* (conduct of hostilities) for centuries. The question of how to end hostilities, or to handle their aftermath, *jus post bellum*, however, has not received much attention in the international legal order.

*Jus post bellum* has witnessed a renaissance in military ethics and moral philosophy. It forms part of the ethics of warfare since scholastic writing and classical works on the law of nations. However, as noted above, it has traditionally been neglected in the conceptualization of the laws of war in the 19<sup>th</sup> and 20<sup>th</sup> century, which remains based on the classical division into *jus ad bellum* and *jus in bello*. Taking an inter-disciplinary approach to the study of *jus post bellum*, this project seeks to fill that gap.

This project investigates whether and how a contemporary *jus post bellum* may facilitate greater fairness and sustainability in conflict termination and peacemaking. Pillar 1 seeks to establish the historical and normative foundations of a modern *jus post bellum*, including its distinction from just war theory and its relationship to *jus ad bellum* and *jus in bello*. Pillar 2 aims to identify the contours, operation and impact of this concept, based on analysis of historical peace settlements, contemporary peace agreements and case-studies. Pillar 3 seeks to develop a catalogue of rules and principles of post-conflict peace in order to guide priorities and policy choices in a number of key areas, including: conflict termination and ending of conflict, the interplay between international humanitarian law and human rights law in post-conflict settings, the balance between "local ownership" and foreign authority, reconstruction and rule of law reform, the treatment of individual criminal responsibility in peace settlements, and the allocation of property rights.

The project launch seminar/conference will take place in May 2012, followed by a series of five expert seminars to be held over the next four years on topics related to Pillar 3, and a final conference to be held in 2014. The project will also involve fieldwork in case study countries, which will likely be undertaken in the second and third years of the project. This project will produce two monographs (Pillars 1 and 2) and one collective volume (Pillar 3). Papers of the six expert seminars will be disseminated in the form of working papers. Findings relating to the entire project will be published in international journals.

For more information, please visit the project website at: <http://JusPostBellum.com/>



# THE JUS POST BELLUM PROJECT

## Context

Since Grotius' *De Jure Belli ac Pacis*, the rules of international law have been founded upon a distinction between "war" and "peace." Warfare has been categorized in the notions of *jus ad bellum* (justification of the use of force) and *jus in bello* (conduct of hostilities) for centuries. The foundations of the modern *jus in bello* go back to the major codifications in the 19<sup>th</sup> century. The cornerstones of the contemporary *jus ad bellum* were laid throughout the 20<sup>th</sup> century. The question of how to end hostilities, or to handle their aftermath (*jus post bellum*), however, has not received much attention in the international legal order.

Lawmaking in the 20<sup>th</sup> century has been more concerned with *jus ad bellum* and *jus in bello*, rather than *jus post bellum*. Classical treatises, such as the works by Oppenheim or Phillipson have treated specific elements of the concept (e.g., end of hostilities, conditions of peace treaties, reparation) in a cursory fashion. Individual aspects of *jus post bellum* have been analyzed as single phenomena in law or doctrine. Processes of transition from conflict to peace have been addressed in a *sui generis* and *ad hoc* fashion. Rules and norms have remained focused on conflict termination, rather than peacemaking.

This *status quo* contrasts with just war theory. The restoration of peace has been recognized as an inherent component of just warfare by classical writers, such as St. Augustine, Gentili, Suarez or Kant. These thinkers made a compelling argument: If a war has a just cause, and is fought justly, it must also lead to a just post-war settlement. At the beginning of the 21<sup>st</sup> century, the concept of *jus post bellum* is witnessing a renaissance in moral philosophy. *Jus post bellum* is increasingly viewed as a corollary of *jus ad bellum* and *jus in bello*. It is used as a benchmark to assess the legitimacy and implications of interventions, including moral duties of victors after war.

Recently, the concept has made its entry into legal scholarship. Events such as the intervention in the Balkans, the occupation of Iraq and the expanding role of peace support operations, have brought it to the forefront of international law. Modern interventions and peace operations have been consistently criticized for a lack of sustainability. The experiments of post-conflict reconstruction in Iraq and Afghanistan have highlighted the legal and ethical dilemmas of peacemaking after conflict, including the conflict between domestic ownership and foreign engagement, difficulties in the interplay between different rules (international v. domestic law), legal regimes (UN law, law of occupation, human rights) and institutions. Contemporary UN documents, military doctrines and emerging concepts, such as Responsibility to Protect, (R2P) emphasize the importance of greater planning, coordination and "shared responsibility."

In light of these developments, *jus post bellum* is gaining increased attention in the legal discipline. It is seen as a potential remedy to some of these challenges, i.e., as an instrument to (i) limit the consequences of armed force by a closer consideration of post-conflict peace in decision-making prior to intervention; (ii) to encourage parties not to engage in conflict, or to conduct their hostilities during conflict in a manner so as not to damage the prospects of fair and just peace; and (iii) to facilitate a successful transition to peace, rather than a mere "exit" from conflict. It has been invoked in connection with themes such as occupation, reconstruction



# THE JUS POST BELLUM PROJECT

after conflict, state-building, counter-insurgency strategy, accountability and post-conflict justice or R2P.

Still, *jus post bellum* remains underdeveloped in three ways: its origin and rationale as a legal concept, its distinction from just war theory, and its contemporary content and meaning.

## Objectives

The *Jus Post Bellum* Project is designed to respond to this gap. It seeks to clarify the role and contours of a contemporary *jus post bellum*, including its use as a normative framework for the organization of post-conflict peace, building on existing research in moral philosophy and the legal discipline. It pursues several interrelated objectives:

- to clarify the historical origin, normative basis and meaning of the concept of *jus post bellum* in just war theory and international law, and its contemporary relevance and implications in and across the respective disciplines;
- to investigate whether and how a *jus post bellum* can improve fairness and sustainability of contemporary peacemaking techniques;
- to identify the normative content of a modern *jus post bellum*, based on norms, principles and guidelines derived from contemporary law and practice in the area of peacemaking;
- to elucidate the status and the relationship of different norms, legal regimes and institutions, and to indicate how the international community can make better use, and build on, contemporary legal rules and practice in the area of peacemaking;
- to develop a set of policy principles and “best practices” on post-conflict peace in key areas.

# THE JUS POST BELLUM PROJECT

## Structure

The project is composed of three pillars that respond to specific gaps identified in research, policy documents or practice.

### **Pillar 1: Historical and comparative foundations of a *Jus post bellum***

Pillar 1 (PhD) examines the foundations of *jus post bellum* from the angle of just war theory and international law, including historical criticisms and objections to *jus post bellum*.

In the legal arena, the concept is associated with different phenomena, such as the *lex pacificatoria*, “transformative occupation,” occupation and legislative reform in post-conflict-zones, accountability of international organizations, extraterritorial application of human rights, protection of individuals and civilians, transitional justice and the restoration of the rule of law more generally.

Pillar 1 seeks to shed further light on the definition and operation of *jus post bellum* in contemporary practice. It focuses, *inter alia*, on the following themes:

#### (1) Evolution of the concept of *jus post bellum*

*Jus post bellum* is frequently misrepresented as a new concept. This assumption contrasts with research locating its naissance during the late 14<sup>th</sup> and 15<sup>th</sup> centuries. The project analyses how *jus post bellum* has been defined in classical writings. It examines the treatment of *jus post bellum*, including its conception of warfare and the treatment of victors and vanquished, in the writings of St. Augustine (354-430), Baldus de Ubaldis (1327-1400), Francisco Suarez (1548-1617), Francisco de Victoria (1492 – 1546), Alberico Gentili (1552-1608), Hugo Grotius (1583-1645), Samuel von Pufendorf (1632-1694), Christian Wolff (1679-1754), Emer de Vattel (1714-1767), Immanuel Kant (1724-1804). It then places historical notions (*e.g. jus victoriae, jus ad pacem*) into perspective in relation to modern just war theory and understandings of war and peace in contemporary international law.

#### (2) Trigger of a *jus post bellum*

Modern armed conflict is characterized by a decline of formality in the beginning and ending of conflict. This makes it necessary to re-define the trigger for the application of *jus post bellum*. Taking into account the diversification in contemporary practice (collective security arrangements, modern peace-settlements, cease-fire arrangements, occupation), the project examines when, and under what circumstances *jus post bellum* comes into play, and whether it is necessary to distinguish a *jus post bellum* proper from a further “*jus ex bello*.”

#### (3) Scope of application

Classical *jus post bellum* has been linked to inter-state warfare and international armed conflict. In light of the proliferation of civil wars, and the extension of the laws of war to internal armed conflict, a modern *jus post bellum* must be tied to armed violence, rather than inter-state war. The project seeks to clarify to what extent the concept of *jus post bellum* can be extended to internal armed conflicts and enforcement operations.

# THE JUS POST BELLUM PROJECT

## (4) Relationship between *jus post bellum* and *jus ad bellum*

Just war theory and international law differ in their conceptualization of the relationship between *jus ad bellum* and *jus post bellum*. The two categories are treated as interdependent in the ethics of warfare, but are firmly distinguished in the legal discipline (“principle of distinction”) for practical and normative reasons (*i.e.*, compliance). The project examines contemporary challenges to the principle of distinction. It analyses to what extent the concept of *jus post bellum* is inherent in *jus ad bellum*, and how considerations of *jus post bellum* may inform proportionality assessments and constraints under *jus ad bellum* (*i.e.*, an incentive not to resort to the use of force, or a pre-commitment towards the restoration of peace). It further explores risks inherent in a nexus between *jus ad bellum* and *jus post bellum* (*e.g.*, *ex post facto* validation).

## (5) Relationship between *jus post bellum* and *jus in bello*

The relationship between *jus in bello* and *jus post bellum* is traditionally unexplored. *Jus in bello* is focused on conduct in conflict and provides only a limited gateway for “exit” from conflict. The project examines to what extent the concept of *jus post bellum* may prevent an “artificial overreach” of *jus in bello* (*e.g.*, an extension of occupation law). It explores to what extent *jus post bellum* may impose constraints on *jus in bello* – for example, by introducing a new standard for the assessment of occupation or an obligation to minimize civilian casualties and to avoid an indefinite prolongation of armed conflict (*e.g.*, Israeli-Palestinian).

## (6) Relationship between law and morality

Considerations of law and morality are frequently mixed in the justification of intervention (*e.g.*, by recourse to the “illegal, but legitimate” distinction under *jus ad bellum*) and the definition of rights and duties after conflict (*e.g.*, by the distinction between moral and legal duties in post-conflict reconstruction). The project will examine how findings of the respective disciplines may mutually inform each other, in terms of authority, criteria and clarification of the limits of law in the restoration of peace.

The analysis under Pillar 1 will provide greater clarity on the meaning and scope of application of *jus post bellum*, and its use as a constraint on violence and as an instrument of conflict-management.

## **Pillar 2: Contours, operation and impact of a *Jus Post Bellum***

The core inquiry of Pillar 2 (PhD) is to investigate how *jus post bellum* can improve the fairness and sustainability of the ending of conflict and peace settlements.

### (1) Content

Just war theory and international law differ in their articulation of *jus post bellum* principles. Moral philosophers derive criteria from classical principles of just war theory, *i.e.*, just cause, right intention, legitimate authority. Pillar 2 seeks to develop legal contours of modern *jus post bellum*, based on norms, principles and guidelines derived from contemporary law and practice in the area of peacemaking.

Traces of an emerging regulatory framework can be drawn from different bodies of law, such as the law of occupation, the law of state responsibility, the law of treaties, human rights law,



# THE JUS POST BELLUM PROJECT

international criminal law, and legal practice in the context of peace settlements. The project seeks to refine this framework. It analyses the specificities and the normative quality of principles and rules, taking into account the collective dimension and specific interests and needs in situations of transitions.

This will be done in two steps. The project will first examine how fundamental issues of justice and fairness (*e.g.*, consent and procedural fairness in peace settlements, punishment, reparation, individual accountability, self-determination, human rights protection) have been approached in the major peace settlements of the 20<sup>th</sup> century and contemporary peace treaties. It will then investigate to what extent these practices correspond to or reflect existing rules of international law.

Based on this analysis, the project will seek to identify the normative content of a modern *jus post bellum*. It will differentiate (i) a minimum set of *jus post bellum* standards that ought to be applied in light of their status as “hard law” (*jus cogens*, customary law); and (ii) a more flexible set of principles that are subject to balancing, choice or consent.

## (2) Operation and impact

Pillar 2 will investigate to what extent existing norms and institutions accommodate the realities of conflict and the needs of society. This will be tested on the basis of four case studies that have highlighted contemporary dilemmas in the relationship between intervention and post-conflict peace. The case studies have yet to be determined.

The project will examine different institutional frameworks that have been used to facilitate the transition from conflict to peace (territorial administration, internationalization, military enforcement and policing), as well the operational challenges arising in the implementation, such as the definition and understanding of mandates, sensitivity to domestic values and approaches in international legal frameworks, the accommodation of security, justice and political reconstruction, coordination among actors (international v. domestic, public v. private, military v. civil) and the determination of exit and follow-up strategies.

Based on existing studies, on-site research and interviews with stakeholders, the project will further enquire how specific institutional and normative responses have affected relevant constituencies (*e.g.* domestic judiciary, military, and gender) in the respective situations. This analysis will provide guidance as to the proper choice and targeting of post-conflict responses.

## **Pillar 3: Principles of post-conflict peace**

Post-conflict settings pose specific normative conflicts in light of the interplay of different legal orders, types of actors and competing legal rules and principles. This requires a diversification in the typology of norms and sources, and flexibility in application, *i.e.*, balancing of principles, sequencing of priorities or adjustment to local specificities.

Pillar 3 investigates techniques and policy principles to solve such conflicts, based on expertise and experiences in specific post-conflict situations (case-studies) and practice. It is designed to clarify rules of conflict, guidelines and policy principles in a number of specific areas that are in flux or do not lend themselves to abstract regulation.

# THE JUS POST BELLUM PROJECT

Each of these topics will be discussed in special expert seminars, which will bring together experts from relevant fields (*e.g.*, international humanitarian law, transitional justice, human rights, international politics, gender studies) and institutions (*e.g.*, UN, ICRC, ICTJ, UNHCR, OHCHR, OSCE, domestic judiciaries and institutions, local NGOs).

## (1) Ending of conflict and conflict termination

Armed conflicts are, in reality, not as clearly defined as the legal categories. The protracted nature of modern conflicts and the involvement of numerous armed groups and factions make it difficult to determine a definitive point in time when the laws of war begin and cease to operate. The project will identify indicators for the ending of conflict (occupation, international, internal armed conflict) and guidelines for conflict termination (*e.g.*, exit strategies from conflict).

## (2) Interplay between international humanitarian law and human rights

International humanitarian law and human rights are considered to apply simultaneously in armed conflict. This creates conflicts in a number of areas, such as use of force in peace operations, detention, and law enforcement. The project will identify how these bodies of law intersect in post-conflict situations, and how conflicts between the two can be resolved.

## (3) “Local ownership” and foreign authority

*Jus ad bellum* and *jus in bello* are largely based on top-down approaches and constraints on warring factions. *Jus post bellum*, however, is typically directed towards the restoration of public authority or the empowerment of domestic constituencies. Pillar 3 will explore how foreign or transitional authority can be reconciled most effectively with political reconstruction and sustainable self-government (*e.g.*, transfer of authority, timing of elections).

## (4) Reconstruction and rule of law reform

International standard-setting and internationalization of national law have become integral to the management of post-conflict relations. This methodology may conflict with domestic values and the essence of democratic self-governance. The project will investigate methods to reconcile law reform initiatives with “local ownership” and domestic internalization of norms.

## (5) Individual criminal responsibility

The tension between accountability and demobilization is a recurring problem in peace negotiations. The project will identify institutional and procedural options to reconcile distinct prerogatives, such as criminal responsibility, truth and reconciliation in peace settlements (*e.g.*, through targeted prosecution, forum choices, alternative forms of justice, mitigation of sentences).

## (6) Allocation of property rights

Allocation of housing and property rights is one of the preconditions for reintegration and return of displaced persons. The right to return of displaced persons may conflict with acquired rights or obstacles to restitution or compensation (*e.g.*, lack of public record). The pillar will identify best practices in relation to property allocation based on experiences in contemporary claim proceedings (*e.g.*, Bosnia, Kosovo, Iraq).