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JUS POST BELLUM

Mapping the Normative Foundations



Edited by Carsten Stahn,
Jennifer S. Easterday, and Jens Iverson



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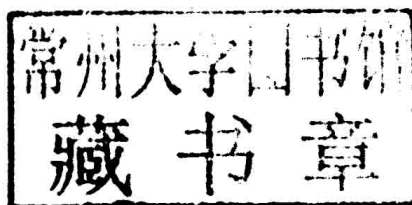
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Preface

Recently, there has been an explosion of interest in the ethics of war and peace. Part of this has been spurred on by recent wars, part by new weapons technology, and part by the heightened attention of some of the most talented and productive moral, political, and legal thinkers. One of the major new issues, in this regard, is that of *jus post bellum* or “justice after war.” Though jurists like Grotius and Vitoria briefly mentioned *jus post bellum*, and though philosophers like Kant gave some extended and creative contributions to the subject (e.g. in his *Perpetual Peace*), it has not been until very recently that this subject has emerged with the kind of importance and focus that it deserves.

I will leave it to others to speculate on why this has been the case. I only note that the recent interest is a good thing. After all, war has three phases—beginning, middle, and end—and, if we’ve crafted rules in connection with the beginning (*jus ad bellum*) and middle (*jus in bello*), then consistency demands we consider justice at the conclusion of a conflict, and how best to transition from violence back into a better peace. My focus here, in this brief preface, is to applaud this emerging interest in *jus post bellum*, and to suggest where I think future research on this subject is going, and should be going. The following seven points stand out:

1. *Jus post bellum* needs to be made as strong—and as well-considered, rule-focused, and well-developed—as the other two categories of *jus ad bellum* and *jus in bello*. Moreover, the robust and complex inter-connections between the three categories need to be developed and explored. For example, how does the justice of the start of war impact the termination process? How does the deployment of force, and the behavior of troops, during war affect and constrain what needs to be done at war’s end? What do the interconnections imply in terms of proper authority for acting during each of the three phases?

2. Relatedly, if the other two just war categories have been codified into law, in the form of many charters and treaties, then it stands to reason that the rules of *jus post bellum* should likewise, at some point, be codified into effective international law. I have argued extensively on the need, and rationale, for a new Geneva Convention devoted exclusively to the issues of just conduct in the aftermath of armed conflict. The movement for such could, and should, resemble the recent movement to solidify the Responsibility to Protect (R2P) norms, and one can imagine an effective group of allies coming together to support such a thing, not only for the sake of ideals but also for the foreign policy benefits which would accrue to countries supporting such principled clarity regarding post-war obligations. (Even powerful war-winners like America should want to know the extent of their post-war duties following victory on the ground and the removal of an aggressive regime.)

3. But laws are not enough. Even though the crafting of *jus post bellum* laws would constitute important progress, we all know that laws must actually be enforced and realized. Thus, a massive avenue for further inquiry in *jus post bellum* involves

consideration of what new and existing international institutions would be required to do, to realize fully the values of post-war justice.

4. There is a clash of values regarding the nature of post-war justice. Generally speaking, this is a clash between those favoring retribution (i.e. making a defeated aggressor *worse off* than prior to the war) and those favoring rehabilitation (i.e. making such an aggressor *better off* than prior to the war). A fuller fleshing out of these rival theories needs to happen, alongside consideration of relevant examples, and perhaps above all exploring a common ground between them, which could be labeled a kind of Rawlsian over-lapping consensus—or “thin theory”—of post-war justice. The thin theory may well represent the best hope for effective codification and institutionalization.

5. *Jus post bellum* hooks into some of the deepest and most interesting issues in contemporary political theory and social practice, and these hooks need to be made deeper, more empirically rich, and sorted out. These hooks include those into: constitution-making; nation-building; capability-building; the rule of law; international aid and development; gender issues; multiculturalism; global governance; the democratic peace thesis; and human rights. And it perhaps goes without saying that we need as many accurate historical case studies of post-war experience as we can possibly get our hands on.

6. *Jus post bellum* assumes that there is a “post” in question—a genuine aftermath—and this volume raises interesting questions about when we know whether we have, in fact, reached the termination phase of a conflict. A further challenge involves that of protracted wars: armed conflicts that last decades, or even more. Protracted wars can actually seem to be wars-without-end, such as for instance the Arab-Israeli conflict. Can the norms of *jus post bellum* nevertheless hold relevance for such interminable struggles, or can such only be guided by *jus in bello*? My hunch and hope is that *jus post bellum* can be of substantial aid to such conflicts too, but that much work needs to be done in terms of showing exactly how.

7. Finally, *jus post bellum* must remain as open to critical challenges, self-reflection, and potential for revision and growth as have been *jus ad bellum* (witness the recent debates on anticipatory attack and R2P) and *jus in bello* (the recent clashes on the moral equality of soldiers and the new weaponry of drones and cyber-strikes). Complete closure is never to be expected, nor even desired.

The editors of this volume have put together some superb essays which advance the state of the art on *jus post bellum*, one of the most cutting-edge issues in today's ethics of war and peace. I wish the reader intellectual stimulation as s/he engages with some of the most fertile minds wrestling with the manifest problems, and opportunities, of post-war justice.

Brian Orend
author of *The Morality of War*
July 2013

Acknowledgments

This volume is the continuation of an ongoing, collaborative research effort led by the editors, known as the *Jus Post Bellum* Project. This project investigates whether and how a contemporary *jus post bellum* may facilitate greater fairness and sustainability in conflict termination and peacemaking.

Many of the contributions grew out of discussions held at the Launch Conference of the project at the Peace Palace in May and June 2012. The conference and the project were made possible by the kind support of the Netherlands Organization for Scientific Research (NWO) who provided the funding for this research through a Vidi grant for the *Jus Post Bellum* Project. The research is part of the broader research strand of the Leiden Law School on "Interaction between Legal Systems."

We would like to thank all contributors to this volume for their care, dedication, and efforts to provide fresh thinking on the theme of *jus post bellum*, and their openness to editorial suggestions. We would also like to express our gratitude to other individuals who contributed to the creation of this volume, including Sara Kendall, Sergi Mansilla, Katharine Orlovsky, and Joseph Powderly. This work would not be possible without the support of the Grotius Centre for International Legal Studies at the University of Leiden, which hosts the Project. In particular we would like to thank Astrid de Vries, Teodora Jugrin, and Peter Verhaar for their invaluable assistance.

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We hope that this work will contribute to broader discourse on this theme across scholarly disciplines.

Carsten Stahn, Jennifer S. Easterday, and Jens Iverson
The Hague
July 2013

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List of Abbreviations

ACHR	American Convention on Human Rights
ADB	Asian Development Bank
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
ArCHR	Arab Charter on Human Rights
AU	African Union
BINUCA	United Nations Integrated Peacebuilding Office in the Central African Republic
BITs	Bilateral Investment Treaties
BNUP	United Nations Office in Burundi
CDO	Common but Differentiated Obligations
CEDAW	United Nations Committee on the Elimination of Discrimination against Women
CERD	United Nations Committee on the Elimination of Racial Discrimination
CERP	Commander's Emergency Response Program
CPA	(Iraqi) Coalition Provisional Authority
CPA	Comprehensive Peace Agreement
DAC	Organization for Economic Co-operation and Development, Development and Assistance Committee
DDR	Demobilization, Disarmament, and Reintegration
DRC	Democratic Republic of Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	UN Economic and Social Council
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECSI	European Convention on State Immunity
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
ENMOD	Convention on Military or Any Other Hostile Use of Environmental Modification Techniques
EU	European Union
FARC	Revolutionary Armed Forces of Colombia
FRY	Federal Republic of Yugoslavia
GC IV	1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War
GSP	World Trade Organization, Generalized System of Preferences
HRC	United Nations Human Rights Committee
HRW	Human Rights Watch
IACs	International Armed Conflicts
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IDRC	International Development Research Centre
IFIs	International Financial Institutions
IFOR	NATO-led Implementation Force
IGC	Iraqi Governing Council
IHL	International Humanitarian Law
IISS	International Institute for Strategic Studies
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
IMPP	Integrated Mission Planning Process
INGO	International Non-Governmental Organization
IO(s)	International Organization(s)
IOM	Institute of Medicine
ISAF	International Security Assistance Force
JICA	Japan International Cooperation Agency
KFOR	NATO-led Kosovo Force
KLA	Kosovo Liberation Army
LTTE	Tamil Tigers
MCC	Millennium Challenge Corporation
MDTF	Multi-Donor Trust Fund
MEAs	Multilateral Environmental Agreements
MINUSMA	United Nations Stabilization Mission in Mali
MINUSTAH	United Nations Stabilization Mission in Haiti
MNF	Multinational Force
MPEPIL	Max Planck Encyclopedia of Public International Law
MTA	Military Technical Agreement
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organizations
NIACs	Non-International Armed Conflicts
NTC	Libyan National Transitional Council
OECD	Organization for Economic Cooperation and Development
OHR	Office of the High Representative
PBC	United Nations Peacebuilding Commission
PCIJ	Permanent Court of International Justice
PKK	Kurdish Working Party
POW	Prisoners of War
R2P	Responsibility to Protect