

Jus **Post** Bellum

Towards a Law of Transition From Conflict to Peace

Carsten Stahn | Jann K. Kleffner
editors



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FOREWORD

Ever since Hugo Grotius' seminal work *De jure belli ac pacis* (1625), the main distinction in international law is between *jus pacis* and *jus in bello*. Throughout time many works have been written on the law in times of peace (including *jus ad bellum*) and the law in times of armed conflict. This book departs from these established categories and enters new and partly uncharted waters. It explores the present-day merits and foundations of an old, yet timely idea: the concept of *jus post bellum*. This notion has an established background in just war doctrine. But it has significant potential in its application to the situation following modern armed conflicts, irrespective whether of an interstate or intrastate nature.

This book marks the first work which treats the origins, contents and contemporary challenges of *jus post bellum*. It offers new analysis and fresh thinking on one of the greatest challenges of warfare and armed force: the management and restoration of peace after conflict.

Twentieth century warfare and modern interventions have shown that the use of armed force is all too often followed by chaos and legal uncertainty after conflict. International law is still struggling to find the proper legal and institutional responses to these challenges. Fundamental issues, such as the extraterritorial application of human rights obligations, the accountability of occupying powers and international organizations and approaches towards justice and reconciliation, are at the heart of contemporary debate. New concepts, such as the notion of responsibility to protect are gradually emerging. This book addresses these issues from a novel perspective. It identifies legal gaps and policy challenges and inquires to what extent they may be addressed under a common normative umbrella: *jus post bellum*.

The individual contributions in this book are based on presentations and papers delivered at a joint research seminar in Leiden in February 2007, which was organized by the Grotius Centre for International Legal Studies of the University of Leiden and the Amsterdam Center for International Law of the University of Amsterdam. The seminar was organized with support of the Hague Institute for the Internationalisation of Law and the Netherlands Ministry of Foreign Affairs.

The seminar, and this resulting publication, included international speakers and participants from the disciplines of philosophy, legal history, political science and international law.

Part one of the book examines the historical and conceptual foundations of *jus post bellum* from a theoretical perspective. The individual chapters provide valuable insights on the origin and content of *jus post bellum* and peacemaking. They reveal both the existing synergies as well as differences between just war theory and international law.

Part two bridges the gap between theory and practice. The opening contributions analyze the contemporary policy and legitimacy challenges arising in transitions from conflict to peace. The subsequent chapters provide a useful stocktaking and critical review of the law in selected areas such as the law of occupation, human rights law, responsibility of international organizations and transitional justice.

Most of the individual contributions do not attempt to provide conclusive answers. But they pose the right questions and offer guidance on shortcomings, directions and possible avenues of reform. In this way, they make an important contribution to scholarship. It is our hope that this book will encourage further research and cooperation in this area, which is still largely unexplored.

Amsterdam/Leiden, January 2008

Prof. dr. André NOLLKAEMPER
University of Amsterdam

Prof. dr. Nico SCHRIJVER
University of Leiden

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
All ER	All England Law Reports
AP	Additional Protocol
ASIL	American Society of International Law
BiH	Bosnia-Herzegovina
BYIL	British Yearbook of International Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CIVPOL	Civilian Police
CoE	Council of Europe
CPA	Coalition Provisional Authority
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment
CRC	Convention on the Rights of the Child
CTS	Commonwealth Treaty Series
DAC	Development Assistance Committee
DFID	Department for International Development
Duke J. Comp. & Int'l L	Duke Journal of Comparative and International Law
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ETS	European Treaties Series
EWHC	England and Wales High Court
FCNM	Framework Convention for the Protection of National Minorities
GA Res. (United Nations)	General Assembly Resolutions
GDP	Gross domestic product
HRC	Human Rights Committee
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFI	International financial institution
IFOR	Implementation Force
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labor Organization
ILR	International Law Reports
IPTF	International Police Task Force
ILSA J Int'l & Comp. L.	International Law Students Association Journal of International and Comparative Law
IRA	Irish Republican Army
IRRC	International Review of the Red Cross
J. Conflict & Security L.	Journal of Conflict and Security Law
KFOR	Kosovo Force
LJIL	Leiden Journal of International Law
LN Off. J.	League of Nations Official Journal
MoU	Memorandum of understanding
MSU	Multinational Specialised Unit
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organization
NILR	Netherlands International Law Review
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
OHR	Office of the High Representative
ONUC	United Nations Operation in the Congo
OSCE	Organisation for Security and Cooperation in Europe
RIAA	Reports of International Arbitral Awards
RS	Republika Srpska
SC Res.	Security Council Resolution
SFOR	Stabilisation Force in Bosnia and Herzegovina

SIPRI	Stockholm International Peace Research Institute
SOFA/SOMA	Status of Forces/Mission Agreements
SRSg	Special Representative of the Secretary-General
SSR	Security Sector Reform
TAL	Transitional Administrative Law
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UNDP	United Nations Development Programme
UN-DPKO	United Nations Department of Peacekeeping Operations
UNEF	United Nations Emergency Force (in the Sinai)
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNGA	United Nations General Assembly
UNICEF	United Nations (International) Children's (Emergency) Fund
UN GAOR	United Nations General Assembly Official Records
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Interim Administration Mission in Kosovo
UNPROFOR	United Nations Protection Force
UNOSOM	United Nations Missions in Somalia
UNTS	United Nations Treaty Series
UST	United States Treaties
VAT	Value added tax
WW	World War
YIHL	Yearbook of International Humanitarian Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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Introduction

FROM HERE TO THERE... AND THE LAW IN THE MIDDLE

Jann K. Kleffner*

The question how to move from armed conflict to a durable peace, be it between or within states, features prominently amongst the most fundamental issues that have confronted the international community in the past and continues to do so today. Only a random look at the daily news readily demonstrates the contemporary pertinence of that question as much as such a look reveals the absence of a 'one size fits all' recipe for peace. At the time of writing, the populations of Iraq and Afghanistan continue to struggle with the consequences of foreign intervention, followed and preceded by internal armed conflicts. At the same time, Uganda is making an attempt at ending a long and drawn out armed conflict with the Lord's Resistance Army. Colombia, embroiled in a non-international armed conflict for more than 40 years, has thus far remained unsuccessful in its various endeavours to putting an end to organized armed violence, inspired by an explosive yet resilient mix of narco-trafficking and other forms of organized crime and political motives. And in Nepal, a fragile peace between the Maoist insurgents and the government is far from consolidated, while in Kosovo, it remains unclear how a situation, which evolved from a period of repression and insurrection, to an armed conflict and foreign 'humanitarian' intervention to transitional administration by the United Nations, will eventually be resolved so as to ensure human security and stability in the region.

The structures of these randomly picked conflicts, the parties and their political, economic and other agendas differ considerably. Yet, one question binds all of them together: how to move from conflict to peace? A first preliminary factor in that equation is to conceptualize the 'here' and the 'there' and clarify at least a basic understanding of what is meant with 'conflict' and 'peace'. Neither the former nor the latter are static 'situations'. Rather, they are dynamic processes, which makes it difficult not only to pinpoint precisely when a transition from conflict to peace is taking place, but, more fundamentally, also bears the risk of misconceiving both ends and means. But even if one were to succeed in achieving a basic consensus on what 'peace' signifies, the way(s) to achieve it are far from obvious. States and their

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