

# *Jus post bellum:* Scope and assessment of the applicable legal framework

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## Abstract

*This article aims to highlight the importance of determining the temporal scope of the transition from armed conflict to peace. It will also consider the emergence of a new legal paradigm, jus post bellum, applicable to the post-conflict period, and the associated need for an appropriate regulatory framework. Given the unavoidable impact of armed conflict, the post-conflict period deserves particular attention, especially with regard to the need for a legal framework to facilitate the sustainable reconstruction of communities torn apart by conflict and ensure a lasting peace. After any kind of armed conflict, a solid legal framework is essential to finalize the end of hostilities, begin a sustainable peace process, build a united society and address the rifts caused by armed violence.*

**Keywords:** *jus post bellum*, post-war law, transitional justice, reconstruction, sustainable peace.

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## Introduction

Determining when international humanitarian law (IHL) ceases to apply is far from straightforward. In a similar vein, it is difficult to establish when the *jus post bellum* phase begins. Moreover, given the lack of a clear legislative framework covering this period, determining the applicable legal regime is an extremely delicate and ambiguous endeavour.

There is no doubt that a framework is needed, covering the principles, rules or models required to rebuild society in the aftermath of an armed conflict, on the basis of IHL. However, it is thought that existing provisions of IHL, international treaties and other legal texts are not sufficient to ensure post-conflict reconstruction or build a lasting peace. As a result, a transitional regulatory framework is needed to cover the period of transition from conflict to peace.

This study aims to develop several lines of enquiry. Firstly, it will outline the concept of *jus post bellum*, including by determining its limits, examining the measures that may be implemented during this period and assessing whether transitional justice forms part of *jus post bellum* or constitutes a separate, independent mechanism.

Next, the article will consider *jus post bellum* as a direct legal consequence of armed conflict itself. To this end, it will seek to establish when IHL ceases to apply and examine whether *jus post bellum* constitutes an offshoot of IHL, whether the two bodies of law are complementary, and whether a new set of norms comes into play during the post-conflict period.

Lastly, the article will analyze *jus post bellum* as a body of law. More specifically, it will try to determine the legal framework applicable and to identify the position adopted by the Geneva Conventions of 12 August 1949 on *jus post bellum*, considering the importance of regulating the transition period between the end of armed conflict and the beginning of the path towards peace.

This approach will be of significant interest to readers of the *Review*, as well as anyone interested in the law of armed conflict. While existing literature on *jus post bellum* has focused mainly on the concepts behind it, this article seeks to examine the applicable normative framework and the need to regulate the post-conflict period.

## Concept and definition of *jus post bellum*

Debates on IHL have tended to focus primarily on the right to wage war and on regulating the conduct of hostilities.<sup>1</sup> *Jus post bellum* is a new branch of law that has emerged alongside, and as a direct result of, *jus ad bellum* and *jus in bello*.<sup>2</sup>

- 1 Vincent Bernard, "Editorial: Delineating the Boundaries of Violence", *International Review of the Red Cross*, Vol. 96, No. 893, 2015. See also Hajer Gueldich, *Cours de droit international humanitaire: Questions générales*, University of Carthage, Academic Year 2019–2020, p. 29, available at: [www.academia.edu/40460334/COURS\\_DROIT\\_INTERNATIONAL\\_HUMANITAIRE\\_QUESTIONS\\_GENERALES](http://www.academia.edu/40460334/COURS_DROIT_INTERNATIONAL_HUMANITAIRE_QUESTIONS_GENERALES) (all internet references were accessed in April 2024).
- 2 Marcin Lech, "Modern *Jus post Bellum* – Finding a New Branch of International Justice And Law", *Polish Review of International and European Law*, Vol. 9, No. 2, 2020, p. 9.

In the following section, the article will attempt to shed some light on the concept of *jus post bellum*, its scope, and the measures that need to be implemented during the post-conflict period.

## The complex concept of *jus post bellum*

*Jus post bellum* is understood as a set of legal norms designed to regulate the transition from armed conflict to a just and lasting peace.<sup>3</sup> In other words, it clearly corresponds to the transitional period between the end of an armed conflict and peacetime. Thus, *jus post bellum* needs to clearly set out the criteria and principles governing the termination of an armed conflict, the post-war period and the just reconstruction of war-torn communities.<sup>4</sup> However, as this branch of international law has yet to be regulated, it remains a controversial, complex and abstract concept.

Despite its crucial role in rebuilding communities ripped apart by armed conflict, *jus post bellum* has yet to attract the attention of legal practitioners, the international community or political decision-makers. Nevertheless, it is an important concept, encompassing the principles or rules for ending hostilities, protecting belligerents (especially those on the defeated side), ensuring the exchange of prisoners of war (PoWs), holding the parties to the conflict to account, prosecuting criminals and other measures.

To summarize, *jus post bellum* remains a poorly defined, abstract and ambiguous concept. Furthermore, determining the end of an armed conflict and the start of the period during which *jus post bellum* applies is a complex challenge; no international texts explicitly articulate when *jus post bellum* becomes applicable, what it covers, or the measures that need to be implemented during this period. By contrast, well-established regulatory frameworks exist relating to *jus ad bellum* (the right to wage war, an action which is largely prohibited<sup>5</sup>), and *jus in bello* (the law of armed conflict, comprising the rules governing the conduct of hostilities).

The following section will examine the measures that need to be implemented during the post-conflict period, and the rules for establishing accountability for crimes perpetrated during this period.

3 Jens Iverson, *Jus post bellum: La redécouverte, les fondements et l'avenir du droit de transformer la guerre en paix*, Brill, Leiden, 2021, p. 145.

4 Colleen Murphy, "Political Reconciliation, *Jus post Bellum*, and Asymmetric Conflict", *Theoria*, Vol. 62, No. 4, 2015, p. 5.

5 At present, States do not have the right to wage war; exceptions to this principle are provided in case of self-defence or following a decision adopted by the United Nations (UN) Security Council. See Charter of the United Nations, 1 UNTS xvi, 26 June 1945 (entered into force 24 October 1945) (UN Charter), Art. 2 (4), which states that any use of force, of which war is but an extreme form, is prohibited: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The exceptions to this principle are laid out in Articles 51–53 of the Charter.

## Measures to be implemented during the period covered by *jus post bellum*

A number of questions typically arise concerning the transition from armed conflict to peace. Are any limits set on the powers of those in charge during the post-conflict period? Will the victors abuse their power or exact revenge? Will they mete out punitive justice to the vanquished without any oversight? Will inter-community, regional, ethnic or religious tensions be resolved? What measures will be taken to protect the right to housing, property or natural resources of people on the losing side? How will compensation to victims of crimes committed during the armed conflict be regulated, and who will be held to account for crimes perpetrated? These are all issues on which *jus post bellum* should provide guidance. Unfortunately, despite the fact that this period gives rise to hopes for peace and efforts to rebuild war-torn communities, no regulatory framework currently exists to cover the post-conflict phase.

Nevertheless, it is clear that international, intergovernmental organizations of a global, regional or subregional nature have an important role to play in managing conflicts.<sup>6</sup> Various measures are often implemented to transform post-war settings and communities,<sup>7</sup> including new regulations to improve the living conditions of the population. Intergovernmental organizations also often adopt resolutions on post-war military or humanitarian involvement, in order to build peace through political reform and economic development of societies embroiled in violence.

States emerging from conflict need to implement a wide range of measures, including those aimed at re-establishing social, cultural and political order, promoting reconciliation and social reintegration, providing compensation to victims and ensuring the administration of transitional justice. Measures taken in the immediate aftermath of an armed conflict also include organizing the repatriation of refugees, facilitating the social integration of internally displaced persons, organizing the exchange of PoWs and prosecuting past crimes.<sup>8</sup> Furthermore, *jus post bellum* should establish the permissible conditions for terminating an armed conflict, including disarmament, armistice or unconditional surrender.

In short, restoring peace involves establishing a new regulatory framework that reflects the new realities in the State and serves to protect vulnerable groups, ensure the release and repatriation of PoWs, locate displaced people, promote respect for human rights, ensure that war criminals are dealt with justly and

6 During the period covered by *jus post bellum*, intergovernmental organizations may take steps to – *inter alia* – implement peacekeeping missions, adopt resolutions on the establishment of a transitional government, transitional justice mechanisms and national reconciliation.

7 Christian Nadeau, “Quelle justice après la guerre? Éléments pour une théorie de la justice transitionnelle”, 23 March 2009, available at: <https://laviedesidees.fr/Quelle-justice-apres-la-guerre>.

8 Brian Orend and Jean-Claude Héberlé, “La justice après la guerre: Pour une nouvelle Convention de Genève appliquée au *jus post bellum*”, *Raisons Politiques*, Vol. 45, No. 1, 2012.

fairly, and manage the disarmament process and the disposal of mines and small arms.

The concept of transitional justice, one of the most common and successful approaches to tackling these challenges, will be analyzed in greater detail in the following section.

### Transitional justice: The first green shoot and part of *jus post bellum*

The concept of transitional justice is associated with periods of political change, in response to wrongs committed by former regimes.<sup>9</sup> It inevitably comes into play following armed conflicts, including civil wars and armed conflicts of an international and non-international nature. Transitional justice processes seek to implement structural change in areas relating to justice.<sup>10</sup> This form of post-conflict justice generally deals with prosecuting past crimes and rebuilding democratic institutions in a post-war context, as well as the need to interlink transitional justice with democratization and pacification.<sup>11</sup>

Both *jus post bellum* and transitional justice, which is considered a subset of the former, are well-established post-conflict concepts and share a common goal: establishing peace.<sup>12</sup> Broadly speaking, transitional justice may be viewed as a component of *jus post bellum*, or as a measure implemented during the post-conflict period. This interpretation implies that *jus post bellum* is a much broader concept than transitional justice.

*Jus post bellum* focuses primarily on ensuring a return to normality, establishing a sustainable peace and ensuring the administration of justice in a post-conflict context.<sup>13</sup> It provides guidance on the moral aspects of the post-conflict transition process,<sup>14</sup> involving a plethora of laws applicable to the transition from armed conflict to a just and lasting peace.<sup>15</sup>

Thus, transitional justice can be understood as one of the objectives of *jus post bellum*. Indeed, it is during the post-conflict period that appropriate ways of dealing with violations of both *jus ad bellum* and *jus in bello* are assessed. During the period covered by *jus post bellum*, transitional justice processes aim to address these violations and establish appropriate approaches to handling them.<sup>16</sup> Moreover, *jus post bellum* also encompasses the moral aspects of post-war reconstruction.

9 C. Nadeau, above note 7.

10 Issy Macchia Valdés and Iliana Rodríguez Santibañez, “La necesidad de un marco normativo postconflicto o ius post bellum para lograr la paz”, *Anuario Mexicano de Derecho Internacional*, Vol. 22, 2022, p. 226.

11 Tristan Boursier, “La paix impossible: Évaluation théorique-normative de la paix juste”, master’s thesis, Faculty of Social Sciences, Department of Political Sciences and International Relations, University of Geneva, 2017, p. 25.

12 C. Nadeau, above note 7.

13 *Ibid.*, p. 9.

14 *Ibid.*

15 J. Iverson, above note 3.

16 C. Murphy, above note 4, pp. 43–59.

Although both transitional justice and *jus post bellum* are well-known concepts, they are – unfortunately – not clearly defined. Certain gaps remain with regard to their interpretation and how they relate to each other.<sup>17</sup>

*Jus post bellum* and transitional justice both raise the question of how communities should address the crimes of the past.<sup>18</sup> As Kirsten Fisher points out, that task involves knowing how to dismantle the structures of the old regime in order to build a new and better system in the future, and how to deal with the victims and perpetrators of the old regime.<sup>19</sup>

## ***Jus post bellum*: A direct consequence of armed conflict**

Armed conflicts have a range of far-reaching consequences. Managing or addressing those consequences is a complex and challenging task, given that regulations governing this period remain ambiguous and obscure. All conflicts leave their mark; it is therefore vital to establish a legislative framework to address the aftermath of armed conflict, and to manage or regulate the measures that may be implemented during the post-conflict period. In this regard, determining the end date of an armed conflict is vital to establishing the start of the period covered by *jus post bellum*, and the applicable legal rules or principles.

### **Determining when IHL ceases to apply**

Establishing precisely when an armed conflict ends and IHL ceases to apply is a challenging endeavour; consequently, it is also difficult to determine the start of the period covered by *jus post bellum*. Peace is certainly not restored as soon as a conflict ends. In order to establish peace, it is necessary – in addition to ending hostilities – to ensure social reintegration, repatriate refugees, foster reconciliation and re-establish political, economic, social and cultural order.<sup>20</sup>

While criteria exist for determining when IHL becomes applicable, establishing when it ceases to apply remains a delicate task.<sup>21</sup> In the case of both international and non-international armed conflicts, two basic, cumulative criteria need to be met for IHL to apply: namely, hostilities must reach a certain level of intensity and the parties involved must be sufficiently organized. However, no international instrument provides clarification or sets out the criteria for assessing those thresholds.<sup>22</sup>

17 Kirsten J. Fisher, “Defining a Relationship between Transitional Justice and *Jus post Bellum*: A Call and an Opportunity for Post-Conflict Justice”, *Journal of International Political Theory*, Vol. 16, No. 3, 2018.

18 Gary J. Bass, “Jus post Bellum”, *Philosophy and Public Affairs*, Vol. 32, No. 4, 2004.

19 K. J. Fisher, above note 17.

20 Eric De Brabandere, “The Concept of *Jus post Bellum* in International Law: A Normative Critique”, in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds.), *Jus post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford, 2014, pp. 124–127.

21 Julia Grignon, “The Beginning of Application of International Humanitarian Law: A Discussion of a Few Challenges”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014.

22 Marko Milanovic, “The End of Application of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 893, 2015, p. 179.

## *Determining when IHL ceases to apply in the context of an international armed conflict*

No international text sets out criteria to unequivocally establish when IHL ceases to apply.<sup>23</sup> The few provisions that do refer to the temporal scope of IHL envisage that it ceases to apply when a territory is occupied by a foreign power.

The 1907 Hague Convention IV on War on Land and its annexed Regulations (Hague Regulations) was the first international text to envisage when IHL might cease to apply.<sup>24</sup> In addition, the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV) stipulates that IHL ceases to apply on the general close of military operations.<sup>25</sup> Its provisions, along with those of Geneva Convention III relative to the Treatment of Prisoners of War (GC III), refer to the general principle that IHL applies only in the context of an armed conflict. Both conventions clearly state, however, that IHL continues to apply even after the general end of military operations, for as long as protected persons remain in the hands of the enemy and have not been released or repatriated.<sup>26</sup> Ultimately, IHL ceases to apply when a peace treaty, an armistice or a similar document is signed.

Additional Protocol I to the four Geneva Conventions (AP I) stipulates quite clearly in Article 3(b) that

the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.<sup>27</sup>

As a rule, international armed conflicts (IACs) terminate with the general close of military operations.<sup>28</sup> Consequently, when an IAC ends, the rules of IHL regulating

<sup>23</sup> J. Grignon, above note 21.

<sup>24</sup> Article 36 of the Hague Regulations specifically outlines the circumstances in which a temporary cessation of war may occur. See Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land, 205 CTS 277, 18 October 1907 (entered into force 27 January 1910) (Hague Regulations), Art. 36: "An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice."

<sup>25</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 6(2), provides that "in the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations".

<sup>26</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 5; GC IV, Art. 6(4).

<sup>27</sup> Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 3(b).

<sup>28</sup> C. Nadeau, above note 7, pp. 2–16. It should be noted, however, that even after the general close of military operations, there is a high probability of hostilities resuming.



the conduct of hostilities also cease to apply. Moreover, the right conferred by IHL to place combatants or civilians in preventive detention also ceases to apply.<sup>29</sup>

Certain IHL obligations extend beyond the end of an armed conflict and may even be triggered by the (imminent) termination of that conflict, such as the obligation to repatriate PoWs. Those who remain in the hands of the enemy continue to benefit from the protection afforded to them under IHL until their repatriation or release. This protection includes, *inter alia*, the right for the International Committee of the Red Cross (ICRC) to be granted access to these people, even where their ongoing detention is no longer authorized under IHL.<sup>30</sup> These various guarantees are supplemented by the provisions of international human rights law. Occupation may end when the foreign power loses control of the territory through the unilateral withdrawal of troops, defeat by the displaced government of the occupied territory or owing to outside involvement, or an insurrection in the occupied territory.

### *Extending the temporal scope of application of IHL to the post-conflict period*

It is certainly not the case that IHL definitively ceases to apply once an armed conflict ends. Indeed, *jus post bellum* – namely, post-conflict law or the branch of law relating to emergence from situations of armed conflict – has enduring, close ties to IHL.<sup>31</sup> Given that the provisions of IHL are closely linked to maintaining or restoring a lasting peace, certain associated obligations clearly extend beyond the end of an armed conflict to address the peacebuilding process.<sup>32</sup>

The issue of *jus in bello* is inseparable from that of *jus post bellum*.<sup>33</sup> Moreover, post-conflict justice, including the prosecution of crimes committed during the conflict, is merely one of the outcomes or consequences of armed conflict. Thus, IHL remains intimately linked to, and clarifies and complements, *jus post bellum*.

The United Nations (UN) General Assembly plays an important role during the post-conflict period. Indeed, under the provisions of the UN Charter, it has the important task of drawing up the principles governing the disarmament process and the regulation of armaments. Article 11 of the Charter states:

The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make

29 Jelena Pejic, “Terrorist Acts and Groups: A Role for International Law?”, *British Yearbook of International Law*, Vol. 75, 2004, pp. 78, 81.

30 These individual will continue to benefit from the fundamental guarantees set out in Article 75(6) of AP I, which stipulates that “[p]ersons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict”.

31 E. De Brabandere, above note 20, pp. 124–127.

32 I. Macchia Valdés and I. Rodríguez Santibáñez, above note 10, p. 226.

33 *Ibid.*



recommendations with regard to such principles to the Members or to the Security Council or to both.

Unfortunately, this provision is poorly implemented; there is a lack of rules or guiding principles governing the post-conflict period, or for ending an armed conflict. This legal vacuum has serious and wide-ranging repercussions, as the victorious parties always seek to mete out justice and the outbreak of new conflicts is inevitable. When there is no legal framework in place to manage the process of conflict resolution, or when transitional justice, reconstruction and peacebuilding mechanisms are not effectively regulated, it is a certainty that new conflicts will break out. The General Assembly is therefore necessarily obliged to set out the applicable principles and rules for the post-conflict period.

### *Determining when IHL ceases to apply in the context of a non-international armed conflict*

To trigger the application of IHL, the armed violence needs to reach a minimum level of intensity and the belligerent parties must be sufficiently organised.<sup>34</sup> As with IACs, determining when IHL ceases to apply in a non-international armed conflict (NIAC) is a challenging task.<sup>35</sup>

No specific legislative provisions trigger the application of Article 3 common to the four Geneva Conventions (common Article 3); that article applies as soon as an armed conflict breaks out between a State and a non-State armed group – or between two or more non-State armed groups – that meets the criteria of intensity and organization of a NIAC.

In the same way that it is important to establish when a NIAC begins, determining when it ends has significant consequences. The jurisprudence of the international criminal courts affirms that IHL applies from the moment that an armed conflict breaks out and extends beyond the cessation of hostilities, until a peace settlement is reached.<sup>36</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY), meanwhile, has ruled that the assessment of when a NIAC ends and when a peace settlement has been reached needs to be based on factual analysis.<sup>37</sup> A NIAC may be brought to an end in several ways: one of the parties to the conflict may simply cease to exist, whether following a comprehensive military defeat, the demobilization of a non-State party, or by some other means. Even if isolated or sporadic acts of violence continue to be perpetrated by loyal members of the dissolved party to the conflict, the armed conflict itself will end.

34 J. Grignon, above note 21, p. 115. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić aka "Dule"*, Case No. IT-94-1-A, Judgment (Trial Chamber II), 7 May 1997, paras 1–565.

35 M. Milanovic, above note 22, p. 178.

36 ICTY, *The Prosecutor v. Duško Tadić aka "Dule"*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

37 See ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 293.

Other means of ending an armed conflict include a formal ceasefire, armistice or peace settlement, or a unilateral declaration to that effect.

### *Extending the applicability of common Article 3 beyond the end of a non-international armed conflict*

Under certain circumstances, IHL continues to apply beyond the end of a NIAC. Although the text of common Article 3 – which applies to such conflicts – is not explicit in this regard, it is clear that some of its provisions remain applicable. A commission of experts convened in 1962 by the ICRC to examine the issue of aid to the victims of internal conflicts concluded that

the obligations described in Article 3 should be respected in all circumstances, at all times and in all places. The provisions of Article 3 therefore remain applicable to situations arising from the conflict and to the participants in that conflict.<sup>38</sup>

As the ICTY noted in its first case,

the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting.<sup>39</sup>

Protocol Additional II to the Geneva Conventions (AP II) provides that, at the end of an armed conflict, all people who have been deprived of their liberty or whose liberty has been restricted for reasons related to the conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 of AP II until the end of such deprivation or restriction of liberty.<sup>40</sup>

Common Article 3 establishes crucial guarantees for victims of NIACs, including after the cessation of the conflict.<sup>41</sup> These guarantees are binding on both States and non-State actors in armed conflict. Common Article 3 extends continuing protection to persons affected by the conflict for as long as they remain in situations requiring such protection:<sup>42</sup> individuals in a detained situation related to the conflict must be treated with humanity after the conflict has ended, prohibiting torture and cruel treatment and guaranteeing a

38 ICRC, “Humanitarian Aid to the Victims of Internal Conflicts: Meeting of a Commission of Experts in Geneva, 25–30 October 1962=”, *International Review of the Red Cross*, Vol. 3, No. 23, 1963, pp. 79–83.

39 ICTY, *Tadić*, above note 36, para. 67.

40 ICRC, “Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949”, *International Review of the Red Cross*, Vol. 26, No. 254, 1986.

41 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, Art. 3, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=undefined>.

42 *Ibid.*

fair trial.<sup>43</sup> If a return to the ordinary legal framework offers superior protection, it must be applied to persons protected by common Article 3.

### *Jus post bellum*: Offshoot of IHL or complementary legal instrument?

*Jus post bellum* can certainly be viewed as both an offshoot and a natural extension of IHL. Moreover, certain aspects of IHL continue to apply during the legal vacuum of the post-conflict period. Many of the various international texts and conventions that regulate the start and conduct of hostilities<sup>44</sup> adopt both a strategic and moral approach.<sup>45</sup> Just as the rules relating to the right to wage war (*jus ad bellum*) and the conduct of hostilities (*jus in bello*) are designed to guide the behaviour of belligerents,<sup>46</sup> those relating to *jus post bellum* aim to provide guidance in the aftermath of an armed conflict to both the victorious and the vanquished sides.

The main challenge of developing and ratifying a legal framework of obligations to that end relates to transposing *jus post bellum* from the realm of abstract theory into tangible political reality.<sup>47</sup> Clear rules are needed to identify the victorious and vanquished parties to a conflict and to bring an end to the conflict.

To complete our analysis of the impact of armed conflict at the international level, we must also consider the end phase of a conflict.<sup>48</sup> While it is important to consider the outbreak and the course of an armed conflict, it is also essential to consider what happens as it draws to a close.

### ***Jus post bellum*: The emergence of a new, post-conflict body of law**

To date, debate has focused primarily on *jus ad bellum* and *jus in bello* in both international and non-international armed conflicts, thus neglecting the end phase of such conflicts. While theories relating to *jus ad bellum* and *jus in bello* have long taken centre stage, a new legal concept is now emerging: *jus post bellum*.<sup>49</sup> Unfortunately, the associated normative framework is still lacking. In the following section, we will focus on the need for a regulatory framework relating to *jus post bellum*.

43 Article 2(2) of AP II does not limit the temporal scope of the protection provided by its Articles 5 and 6 to the duration of the conflict: see Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 2(2). Persons who are deprived of their liberty, or whose liberty has been restricted, for reasons related to the conflict, continue to benefit from the protection provided under Article 2(2) after the end of the conflict. Parties to a NIAC, within the meaning of common Article 3, that has ended may also wish to ensure the continuity of such protection, in accordance with the provisions of common Article 3.

44 See the Geneva Conventions of 1949 and their Additional Protocols.

45 Albert W. Klein, "Attaining Post-Conflict Peace Using the *Jus post Bellum* Concept", *Religions*, Vol. 11, No. 4, 2020, p. 173, available at: [www.mdpi.com/2077-1444/11/4/173](http://www.mdpi.com/2077-1444/11/4/173).

46 B. Orend and J.-C. Héberlé, above note 8, p. 164.

47 *Ibid.*

48 *Ibid.*, p. 186.

49 Dan G. Cox, "The Unjustness of the Current Incantation of *Jus post Bellum*", *InterAgency Journal*, Vol. 7, No. 1, 2016, p. 29.

## Jus post bellum: Applicable legal framework

Aside from a few of the provisions of the Hague Regulations and the Geneva Conventions and their Additional Protocols relating to the post-conflict phase of IACs (in the event of military occupation), there is currently no specific regulatory framework covering the post-conflict period. As a result, there is no clear legal process for terminating an armed conflict and, once hostilities have ended, restoring lasting peace and establishing strong political, economic, social and cultural institutions that promote social cohesion.

*Jus post bellum* has emerged as a new legal aspect of the law of armed conflict;<sup>50</sup> thus, it can be viewed as a new branch of law relating to armed conflict or the post-conflict period.<sup>51</sup> Unfortunately, the concept of *jus post bellum* remains complicated and far from clear.<sup>52</sup> Current attempts to conceptualize *jus post bellum* as a legal notion and to regulate the problems that arise during the post-conflict period add very little to the existing legal framework in this field.

Consequently, it is vitally important to develop an appropriate legal framework for *jus post bellum*, as this will have a significant impact on its application, on the basis of comparative law and on our analysis of the law of armed conflict.<sup>53</sup>

It also makes sense, in the current context, to connect *jus post bellum* with the established legal concepts of *jus ad bellum* and *jus in bello*. This approach will significantly influence how the concept of *jus post bellum* is understood and how the rules applicable during this period are determined.

## The position adopted by IHL and the Geneva Conventions on *jus post bellum*

Certain provisions of IHL, in particular those of the Hague Regulations and GC IV, are key to determining the legal obligations that apply beyond the end of an armed conflict.

During a military occupation in the context of an IAC, the Occupying Power is obliged to maintain the laws in force in the occupied territory. Under the provisions of Article 43 of the Hague Regulations, occupation does not confer sovereignty on the Occupying Power. Thus, during the period of occupation, the sovereignty of the occupied State becomes inactive, and the Occupying Power exercises *de facto* authority while recognizing the permanent but displaced sovereignty of the occupied State. The Occupying Power is therefore obliged to protect the civilian population and to ensure its protection,<sup>54</sup> acting as a proxy for the occupied State's government and ensuring respect for fundamental political rights.<sup>55</sup>

50 *Ibid.*, p. 25.

51 *Ibid.*

52 E. De Brabandere, above note 20, pp. 124–126.

53 D. G. Cox, above note 49, p. 26.

54 See GC III, Art. 5(1); GC IV, Art. 6(4); Hague Regulations, Art. 42.

55 See AP I, Art. 75; GC III, Art. 4(2). See also GC III, Arts 9, 126; GC IV, Arts 10, 143; AP I, Art. 81.

Although IHL is an important body of law, its applicability during the post-conflict period remains limited in scope.<sup>56</sup> Most of its provisions cease to apply after the end of an armed conflict. Moreover, the majority of the provisions of the four Geneva Conventions do not apply to internal conflicts, peacekeeping missions or the post-conflict period.

As IHL is designed to either prevent armed conflict or regulate the conduct of hostilities, it is – by its very nature – not applicable to the period covered by *jus post bellum*. As the consequences of armed conflict are inevitable and foreseeable, there is an urgent need to develop a body of law that complements IHL and is specific to the period covered by the concept of *jus post bellum*. The provisions of Article 49 of AP I apply to the post-conflict period, but only to a very limited extent.<sup>57</sup> Article 6(3) of GC IV stipulates that its provisions shall cease to apply after one year after the general close of military operations, defined by the committee involved in drafting the Geneva Conventions as “the last shot fired”. It therefore seems that a relatively strict interpretation was adopted.

The starting point of the time limit set out in Article 6(3) presupposes that all hostilities between belligerents have ceased. In that regard, the concept of “military operations” largely overlaps with that of an IAC. However, under IHL, an IAC may arise even from a relatively low level of violence. It is sufficient, for example, for an exchange of fire to take place between opposing, organized armed forces.<sup>58</sup> The criterion that triggers the application of the Convention (an IAC) is the same as that used for determining when certain provisions cease to apply after the end of military operations.<sup>59</sup>

As IHL is a body of law designed to regulate armed conflicts, it should be self-evident that its provisions will cease to apply as soon as the conflict that gave rise to its application ends. As with many aspects of IHL, however, the situation is less straightforward than it might seem and conceals a range of complex legal problems.

## The importance of a regulatory framework for the transition from armed conflict to peace

The post-conflict period is crucial to ensuring protection for former combatants, particularly on the losing side. During this period, all efforts focus on – *inter alia* – rebuilding communities torn apart by conflict, organizing compensation for victims, repatriating refugees and facilitating the social integration of displaced persons and the exchange of PoWs.

56 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11, 2015, pp. 10–16.

57 George R. Lucas (ed.), *Routledge Handbook of Military Ethics*, Routledge, London, 2015, p. 36. See also Florian Morilhat, *Éthique et puissance aérienne*, Paris, Economica, 2020, p. 8.

58 Robert Kolb and Sylvain Vite, “L’applicabilité ‘ratione temporis’ du droit de l’occupation de guerre: Le début et la fin de l’occupation”, in Vincent Chetail (ed.), *Permanence et mutation du droit des conflits armés*, Bruylant, Brussels, 2013, p. 121.

59 *Ibid.*

However, the end of a conflict does not automatically lead to lasting peace, security and political stability. In contemporary conflicts, the end of hostilities does not necessarily entail a return to a state of security.<sup>60</sup> Armistices, ceasefires, peace agreements or other measures relating to disarmament do not necessarily significantly enhance the safety of civilians or former combatants.<sup>61</sup>

According to Dan G. Cox, the concept of *jus post bellum* was initially considered to be an extension of modern just war theory, focusing on assessing the morality of actions during war and their relationship to post-conflict negotiations.<sup>62</sup> This implied a specific analysis of the distinctions between combatants and civilians in order to assess collateral damage and promote successful and sustainable peace negotiations.<sup>63</sup> However, *jus post bellum* has recently been extended to include the victor's responsibility for the long-term well-being of the defeated populations, which has raised concerns about its impact on post-conflict reconstruction and the sustainability of peace.<sup>64</sup>

Thus, there is an urgent need to better define the legal framework applicable during the transition from conflict to peace. To that end, new normative mechanisms to promote peacebuilding and post-conflict reconstruction are required. Broad legal reforms are also needed to find solutions to a whole range of problems that IHL is unable to address; in addition to the existing body of law on armed conflict, there is a need for an appropriate regulatory framework to address the consequences of conflict and other related problems.

## Conclusion

Given the scope of *jus post bellum*, and its important role in ending conflict and rebuilding a lasting peace, an appropriate legal framework must be established for the post-conflict period. As things stand, *jus post bellum* is an abstract and confused legal concept that leaves a number of crucial questions unanswered. As *jus post bellum* is a direct legal consequence of armed conflict, a new normative framework is needed, linking it to both *jus ad bellum* and *jus in bello*. This would facilitate the conclusion of armed conflicts, support efforts to re-establish a lasting peace, ensure the impartial administration of post-conflict justice, bring an end to hostilities and kindle hopes for a peaceful society.

New, specifically tailored rules and guidelines that take into account the relationship between *jus ad bellum*, *jus in bello* and *jus post bellum* need to be developed, covering the transition from armed conflict to peace. This new legal framework should focus on regulating the post-conflict period and creating the appropriate conditions for building a lasting peace.

60 ICRC, above note 56, pp. 10–16.

61 *Ibid.*, p. 11.

62 D. G. Cox, above note 49, p. 29.

63 *Ibid.*

64 *Ibid.*