11

The Gentle Modernizer of the Law of Armed Conflict?

Inger Österdahl*

I. Introduction

The thesis of this chapter is that the emerging *jus post bellum* constitutes an adaptation of the law to the realities of modern armed conflict. The adaptation to the reality of this particular part of the law of armed conflict—relating to the ending of conflict and the period after the end—will carry with it changes in the other parts of the law relating to armed conflict. The emergence of the category of *jus post bellum* itself as well as different aspects of the contents and structure of *jus post bellum* will have spillover effects on related areas of the law. It will also lead to the indirect transformation of the previous two parts of the law of war, namely, *jus ad bellum* and *jus in bello*. The resulting change will be considerable: not only is a new field of armed conflict law crystallizing—*jus post bellum*—but the existing *jus ad bellum* and *jus in bello* will be fundamentally affected as well.1

As it is developing, *jus post bellum* challenges the current conceptual structure of the law of armed conflict. In fact, *jus post bellum* will break up the current conceptual structure and contribute to the creation of new ones along lines sketched in the following sections of this paper. *Jus post bellum* will move the focus of attention of the law away from the beginning towards the middle and end of armed conflict. The perspective of the law of armed conflict will be different and the emphasis of the considerations made within the framework of the law will be different from today. The end will always have to be in sight when a war is launched. The norms surrounding the conduct and the ending of the war will become more important than the norms concerning the beginning of the war.

As to content, the introduction of *jus post bellum* will move the focus away from military necessity toward humanitarian values.2 *Jus post bellum* will also make armed conflict law less state-centered and more people-centered. This contribution will not focus on the normative content of *jus post bellum*, but it will presume that the purpose

---

* Professor in public international law, Uppsala University. Writing this contribution was made possible by a grant from the Bank of Sweden Centenary Fund (Riksbankens jubileumsfond).

1 The “gentle” in the title of this chapter is a reference to the work of Martti Koskenniemi—most immediately the *Gentle Civilizer of Nations* (Cambridge University Press 2002)—which I admire and allow myself to be greatly inspired by, without necessarily sharing the theoretical outlook. The “gentle” in the title of this chapter also refers to the indirectness of the influence of *jus post bellum* on the other two parts of the law on armed conflict. *Jus post bellum* will introduce changes in these other two bodies of law indirectly. On the subject of “gentle,” further, whether the change in the law of war would be “gentle” in any true sense of the term is a different matter; I will come back to aspects of the changes that might be called “gentle.”

2 For a similar, humanitarian, perspective, see Daniel Thürer and Malcolm MacLaren, “‘Jus Post Bellum’ in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law” in Klaus Dicke.
of *jus post bellum* is to achieve a just and stable peace based on democracy, human rights, and the rule of law.\(^3\)

In today’s world, a liberal democratic ideology has developed internationally which includes democracy, human rights, and the rule of law as fundamental building blocks. This ideology has been pushed by Western Europe and the United States and began spreading to other parts of the world after the end of the Cold War. Demands for democracy, human rights, and the rule of law have also been heard from below, most recently during the upheavals in the Arab world in the spring of 2011. Considering the prevailing force of the liberal democratic ideology around the globe, and considering that many international organizations who are and presumably will be important actors in the field of *jus post bellum* are actively promoting these values (and make up part of the explanation of why human rights have gained increasing prominence in the post-Cold War era in the first place) it is difficult to conceive of a *jus post bellum* which did not embrace these values.\(^4\)

Although the exact contours of its content are yet to be defined, it seems clear that *jus post bellum* will have to deal with the organization of post-war society to some extent. This is contrary to *jus ad bellum* and *jus in bello*, which do not involve engaging with the political or administrative organization of society, although one cause of war could theoretically be regime change or democratization. The consequences for *jus ad bellum* and *in bello* are limited of the fundamental political ideology. Neither *jus ad bellum* nor *in bello* are directly concerned with the reconstruction of society after the conflict is over.

If *jus ad bellum* would include regime change intervention as a just cause for war, then *jus ad bellum* would be concerned with the initiation of the reorganization of the society intervened in. Then the political ideology would have more to do with the intent when intervening than with the actual implementation of a body of law laying the foundation for a just and stable peace post-conflict. The initial intent, however, could hardly be anything other than democratic.

That non-democratic values would be willfully promoted by whoever is implementing *jus post bellum* in laying the foundations of a just and stable peace would seem impossible in today’s world. Well aware that democracy, human rights, and the rule of law can be abused, misused and awfully mismanaged, I nonetheless suggest that no

---


\(^4\) But see Roxana Vatanparast, this volume, who argues that embedding these values into *jus post bellum* is problematic.
other ideology can compete with liberal democracy and that willfully organizing societies after war along other ideological lines would be wrong.

This is not to say that *jus post bellum* should not in every instance be tailored to fit each particular post-conflict situation—on the contrary it should—but it is to say that certain fundamental values must and should underlie the conception and implementation of *jus post bellum*. Liberal democracy is the least bad of all prevailing political ideologies on offer today. *Jus post bellum* cannot be purely instrumental or technical and promote any kind of political organization of society post-conflict, but *jus post bellum* has to embody some political principles and today the only viable ideology that could reasonably flow into *jus post bellum* is liberal democracy. From this conception of democracy, human rights and the rule of law follow.

The conceptual changes caused by *jus post bellum* could gradually lead to new organizing principles for the law of armed conflict. First, it might lead to humanitarianism becoming the primary organizing principle of the law of armed conflict, at the cost of military necessity. Secondly, the way *jus post bellum* ties the different parts of the law of armed conflict together, in spite of the strong efforts of law—and policy-makers—to keep them apart, contributes to blurring the lines between the different categories making up the law of armed conflict—*jus ad bellum*, *in bello* and today, *post bellum*. *Jus post bellum* might eventually cause the actual disappearance of the distinct categories in the law of armed conflict. From then on there would only be one body of law of armed conflict and not three. This one body of law might be called the “jus of force.” Humanitarianism would be the red thread running through the law of armed conflict in its entirety. Thirdly, the emerging *jus post bellum* as a category might cause the very conception of just war to change. The components making up a “just war” might change from merely including *ad bellum* aspects, as they do now, to the inclusion of elements both of *jus in bello* and of *jus post bellum*. Thus, a new and more inclusive idea of just war might emerge from the gradual establishment and consolidation of *jus post bellum* with possible effects that will be further discussed below. This new idea of just war might work from the beginning to the end of the armed conflict, but also from the end to the beginning.

Subsequent to the introduction, the remainder of this chapter will be organized in the following way. First, the interaction between *jus post bellum* and *jus ad bellum* will be discussed with an emphasis on the effects that *jus post bellum* will have on *jus ad bellum*. The effects might work in different ways, but a common denominator is that eventually *jus post bellum* will contribute to diminishing the significance of *jus ad bellum* altogether. Secondly, the interaction between *jus post bellum* and *jus in bello* will be addressed, including the ensuing influence of *jus post bellum* on *jus in bello*. The two areas are closely related as concerns content—especially regarding the humanitarianism of in *bello* law—but the post *bellum* law will imply great conceptual and structural challenges to the in *bello* law too. Thirdly, the potentially emerging new organizing principles of the law of armed conflict will be addressed. *Jus post bellum* has the potential to transform the organizing principles considerably, as has been hinted above, and since we are in the beginning of a development, perhaps we should take advantage of the opportunity to form the principles in a way which furthers good values before the transforming principles possibly petrify for the benefit of the bad. Fourthly and finally,
the significance of *jus post bellum* for the notion of just war will be taken up; here also it will be asserted that the significance will be considerable. In fact, it is discussed whether the end is not more significant than the beginning for the notion of just war today and whether the means are not more significant than the end sought, or the cause; in the latter sense, the means might come to justify the end. Be that as it may, whether or not the end or the beginning is most important from the point of view of the eventual assessment of the lawfulness of the war, *jus in bello* in the middle governing the actual conduct of the war will stay equally and arguably gradually more important. In the discussion of just war, the way in which *jus post bellum* indirectly introduces this notion into the non-international war setting will be included.

II. More or Less Difficult to Intervene?

The introduction of *jus post bellum* regulating the situation of relative peace reigning after the war might place additional burdens on a potential intervener or user of armed force. The obligation to implement *jus post bellum* after the military intervention or war is over means imposing new demanding tasks on the intervener. If it is demanded from the intervener to manage the post-conflict phase until a just and stable peace has been achieved respecting human rights, democracy, and the rule of law in the country where the hostilities took place, then this would imply a much greater burden on the war-maker than merely deciding whether there is reason to intervene in the first place and then having to respect *jus in bello* while conducting the armed struggle. The obligations of the initiator of the armed conflict are closely related to the notion of a just war and its possible expansion by the introduction of *jus post bellum*. At this stage we can observe that the prospect of taking on the post-conflict rebuilding of the society intervened in the name of lasting human rights, democracy, and rule of law probably would have a discouraging effect on the party considering intervention.

Apart from pledging that it will fulfill its duties of post-conflict reconstruction, there is little a state could do at the very beginning to show whether it will fulfill its duties under *jus post bellum* or not. *Jus ad bellum* proper can be relatively easily separated from *jus post bellum* at this early stage of the conflict. The criteria listed by the International Commission on Intervention and State Sovereignty (ICISS), for instance, do work as independent criteria for military intervention irrespective of the later course of events in the *post bellum* phase. These are meant as criteria for the authorization of intervention for humanitarian reasons by the UN Security Council under the “responsibility to protect,” but the criteria could also work as criteria for international intervention in general, i.e. for just war, provided that the *jus ad bellum* would allow international intervention, which it does not currently. Of course, self-defense constitutes an independent ground for the international use of force, which is recognized under the current *jus ad bellum*. The criteria for lawful self-defense do not include aspects relating to the period *post bellum*.

---

5 This is discussed in more detail below, see Part III.
7 In the future, however, it is possible that *jus post bellum* will affect even the exercise of the right to self-defense.
The last criterion on the ICISS list that spells out a reasonable prospect of success in order for an intervention to be legal or legitimate,⁸ could lead to thoughts of the *post-bellum* phase where “success” would then mean the successful attainment of a just and durable peace based on human rights, democracy, and the rule of law. “Success” in the ICISS report, however, means the success of the military intervention as such, which must be taken to imply the removal of the most immediate threat to the civilian population or the termination of ongoing serious crimes and not the wider aspect of succeeding in the subsequent building of a good society for the hitherto persecuted people.⁹

The way the intervention is launched may give a hint of whether there is a genuine will on the part of the armed intervener to contribute constructively at some point to the post-conflict development of the state in question, but it is also perfectly possible to lie in words and deeds about one's post-conflict ambitions. Also, the intervener might change positions during the armed conflict, thus either abandoning or adopting the position that the goal of the intervention must be the attainment of a just and durable peace with all the normative and institutional undertaking this entails for the intervener. Moreover, the situation on the ground might change for the worse or for the better with a view to the eventual implementation of *jus post bellum*.

It seems difficult at the moment of the initiation of the intervention to assess whether *jus post bellum* will be respected. Even with an emerging *jus post bellum*, *jus ad bellum* might remain rather unaffected after all at the earliest stages of the conflict; the lawfulness of the war will have to be assessed exclusively under *jus ad bellum* for the time being. A formal undertaking to guarantee that *jus post bellum* will be followed after the conclusion of an intervention or an armed conflict could become part of *jus ad bellum*, but we are far from that situation in the legal developments currently under way, which are more modest. Also, a promise even if formal and legally binding will not guarantee that the requirements of *jus post bellum* will in fact be fulfilled after the conflict. If the parties to the armed conflict are equal, furthermore, it may not be evident who is going to win in the end and thus whose responsibility it will be to see to it that the demands of *jus post bellum* are fulfilled.¹⁰ Every party wishing to take part in an armed conflict could make the promise before they enter the war to implement *jus post bellum*, then the issue of who wins the war will lose in importance with respect to whose responsibility it is to respect *jus post bellum*. Apart from Security Council authorization, however, only one party to a war can lawfully carry out the war under the current *jus ad bellum*.

Some would claim that *jus post bellum* has always made up part of *jus ad bellum* so that it would be wrong to claim both that *jus post bellum* is a novel creation and that *jus post bellum* is just beginning to make itself felt in the traditional sphere of *jus* ad *bellum*.¹⁰

---

⁸ In the case of the UN Security Council.
¹⁰ Depending on who is responsible for the implementation of *jus post bellum*. Intuitively, the winning side would seem the natural place to locate the responsibility to implement *jus post bellum*. The issue, however, is much more complex than that and *post bellum* obligations potentially apply to all parties to a conflict. The implementation of *jus post bellum* regrettably only receives cursory treatment in this chapter.
ad bellum. However, except in a superficial sense, the claim that jus post bellum has made up part of jus ad bellum does not seem convincing, at least not if jus post bellum is regarded through today’s lens with its rather broad aspirations to create a genuinely better society for the people affected by the armed conflict. If the aspiration is merely to impose the norms and values that the intervener considers are the better ones—without any reference to human rights, democracy, and the rule of law for instance—then the claim that jus post bellum, i.e. rules governing the aftermath of armed conflict, have always been present in jus ad bellum is more credible. In the very superficial sense of eventually attaining peace, jus post bellum also might have always been an element of jus ad bellum; it must be presumed that all interveners, conquerors etc. over the years have had as their ultimate goal to reach a state of peace. The question is, however, what kind of peace and on what terms. Jus post bellum of today is not only about order, but also about justice or the content of the order.

Even if the requirement to respect jus post bellum would be regarded as having made up part of jus ad bellum traditionally, the question remains to what extent the eventual fulfillment of jus ad bellum can be guaranteed at the outset of the armed conflict. That is, even if jus post bellum is considered to be a component of the traditional jus ad bellum, it will not be possible for the considerations post bellum to have more than a marginal effect on jus ad bellum calculus at the actual time when the military intervention is initiated.

Therefore, however (un)clear the identity of jus post bellum within traditional just war theory, its effect on the considerations that must be made at the time of the initiation of the military undertaking will be slight. Jus post bellum does place burdens on the initiator of the armed conflict and whether these additional tasks are fulfilled or not may play a role in the eventual overall evaluation of the justice of the war, but at the outset the norms that will come into play at a later stage of the conflict will not and cannot play a big part in the evaluation of the legality of the war at the earlier point in time.

It could be argued that instead of making the use of military force more difficult and therefore less attractive, the introduction of jus post bellum facilitates the initiation of the use of armed force. If the intention to create a just and stable peace after the war is counted as a valid reason for going to war, then the number of just causes for war have been expanded and it will consequently be easier to go to war.

This would hold especially in comparison with today’s legal situation when there are no valid causes for the unilateral use of force in international relations except self-defense. It is easy to claim to intend to create a just and stable peace according to jus post bellum, but as discussed earlier, it is difficult to know whether such a claim will be followed up and it is particularly difficult to make this sure at the outset of the conflict.

11 See Walzer, Just and Unjust Wars (n. 3) 117, 121, 123.
12 See Walzer, Just and Unjust Wars (n. 3) 117; Walzer, Arguing about War (n. 3) 92; Paul Ramsey, The Just War: Force and Political Responsibility (Rowman & Littlefield 2002) 152.
13 Annalisa Koeman (discussing the work of Brian Orend), however, hopes that a pre-commitment to jus post bellum and jus post bellum will serve to constrain the use of force: see “A Realistic and Effective Constraint on the Resort to Force? Pre-commitment to Jus in Bello and Jus Post Bellum as Part of the Criterion of Right Intention” (2007) 6 Journal of Military Ethics 198, 213; Larry May finds support for his “contingent pacifism” in jus post bellum, May, After War Ends (n. 3) 232–4.
One way could be to demand from the intervening state that it places enough funds in a bank account to cover the costs involved in five to ten years of post-conflict peacebuilding in the country intervened in. The sum could be bigger or smaller depending on the military operation; a comprehensive military intervention will probably need comprehensive post-conflict peacebuilding whereas a more limited intervention for a more limited purpose will need a smaller post-conflict peacebuilding undertaking. If the real costs of fulfilling the demands of *jus post bellum* are taken into account, the facilitating aspect of the introduction of *jus post bellum* into the overall calculus of whether to go to war or not will probably diminish. Facing the real costs and taking seriously the tasks involved in following *jus post bellum* will probably discourage rather than encourage the potential intervener.

If it would be enough to claim to have just peace under *jus post bellum* in view as the goal of the initiation of the armed conflict, then *jus post bellum* could work as a facilitator of the use of armed force. Then *jus post bellum* would affect *jus ad bellum* in an expansive direction—*jus contra bellum* would again become a *jus ad bellum*—and the argument based on *jus post bellum* would fit in well with other arguments favoring humanitarian intervention. There has been a strong tendency in the post-Cold War debate on the use of force in favor of humanitarian intervention even lacking a UN Security Council authorization. The responsibility to protect can also be invoked as an argument in favor of humanitarian intervention, although there is no support in the official UN documentation to use the responsibility to protect as a justification for military intervention without a Security Council authorization.

The alleged intention to implement *jus post bellum*—based on human rights, democracy, and the rule of law—as a cause for war would be a strong argument in favor of the use of force if accepted as legally valid. It would provide greater opportunities for using international military force lawfully. That is so even if the understanding of the notions of human rights, democracy, and the rule of law presumed to be underlying *jus post bellum* is limited to the traditional Western liberal way of understanding these concepts. If the ideas of human rights, democracy, and the rule of law are relativized to include also alternative conceptions of human rights, democracy, and the rule of law, then the opportunities for intervening militarily in other countries would be even further expanded.

In any case, there is always the risk of misuse of a justification of war like the one to intend to implement all the good values included in *jus post bellum*. Irrespective of the possibility of abuse, the introduction of the category of *jus post bellum* could either render more difficult or make easier the initiation of armed conflict. Lacking any checks on the claims made in the beginning of an armed conflict, it would seem as if

---

14 See e.g. Allen E. Buchanan, *Human Rights, Legitimacy & The Use of Force* (Oxford University Press 2010).
*jus post bellum* would have a greater potential to facilitate than to render more difficult the initiation of an armed intervention.

III. Is *Jus Ad Bellum* Increasingly Obsolete?

It is presumed in this contribution that *jus post bellum* will have to be put into effect independently of the character and cause of the preceding conflict. The likely result of this in its turn will be that considerations *ad bellum* will diminish in significance overall. The emphasis of the normative perspective on the war will be moved toward the end of the conflict instead of resting mainly with the considerations preceding the initiation of the armed conflict. Whatever the justice of the war itself, *jus post bellum* will have to be carried through.16 This means that the assessment of the (just) causes of the war will diminish in importance overall.

This also means that the question of whether the introduction of a *jus post bellum* category from the normative point of view makes more difficult or facilitates the launch of an armed conflict will also decrease in importance. The ultimate consequences of the carrying into effect of *jus post bellum* will be the same anyway. It might also be that the realization of *jus post bellum* will be more important for the ultimate assessment of the justness of the war than the traditional just causes existing before the launching of the war.

The realization of *jus post bellum* cannot reasonably be dependent on the justice of the war fought since *jus post bellum* arguably exists for the benefit of the people struck by war and not for the states either launching or being the victims, or the site of the armed conflict. The purpose of *jus post bellum* is to re(build) a functioning and good society based on human rights, democracy, and the rule of law, and these are values that must be realized irrespective of whether the original war was just or unjust. The people struck by the armed conflict are suffering equally irrespective of the legal classification of the cause of the war.

In order for peace to be stable, arguably, *jus post bellum* must be implemented and even after a potentially unjust war, a stable peace should be preferable to an unstable peace if the war is over. If two peoples are struck by armed conflict, one people belonging to the state or party who is right and the other people belonging to the state or party who is wrong, as far as the justification of war is concerned, *jus post bellum* should be equally implemented in either case. The people-centeredness of *jus post bellum* makes it independent of the preceding considerations under *jus ad bellum* relating mainly to states. There is no point in making the implementation of *jus post bellum* depend on whether the people who will benefit from the human rights, democracy, and rule of law belong to a state launching a lawful war or whether the people belong to a state launching an unlawful war.

There is no point in not striving to achieve a just and stable peace in a post-conflict society previously presumably lacking human rights and democracy, or in any case

16 However, possibly with varying content depending on whether armed force was used in line with international law or not (see Carsten Stahn, “*Jus post bellum*: Mapping the Discipline(s)” in Stahn and Kleffner (n. 3) 111).
having been devastated by war. People will be better off and even the opposite party or parties in the war will be better off with a state (re)built under the aegis of *jus post bellum*.

Therefore, the relevance of the justice of launching the war itself will diminish as a legal concern in the overall assessment of the war. Once the *post bellum* phase approaches, it approaches irrespective of who launched the war and for what causes. It is the well being of the people and the individual citizens that is the subject of *jus post bellum*. Even if *jus post bellum* concerns will not formally decide *post factum* whether the war was lawful or not, the introduction of *jus post bellum* will in any case contribute to diminishing the relevance of *jus ad bellum*.

In our situation of *jus contra bellum*, the effect of *jus post bellum* will be similar with respect to *jus ad bellum* as what has been argued above. *Jus contra bellum* is one, very restrictive, version of *jus ad bellum*. Currently, under the UN Charter with the sole exception of action in self-defense, no wars are lawful except with the authorization of the UN Security Council. Even if no war is lawful, *jus post bellum* will come into play anyway in the same way as *jus post bellum* would complement *jus ad bellum* had there been other lawful justifications of the use of force.

Thus, *jus contra bellum* will also diminish in normative strength. The consequences as far as *jus contra bellum* is concerned will be the same whether wars are lawful or not in terms of the implementation of *jus post bellum*. Wars are probably inevitable; it is the effects, the results, and the consequences of the war for the people that will matter more.

**IV. Beefing Up or Breaking Down *Jus In Bello*?**

The emerging *jus post bellum* will augment the importance of the scrupulous implementation of *jus in bello*. If consistently carried through, *jus post bellum* will however transform the structure of the *in bello* law in a rather radical way. *Jus in bello* relates to the actual conduct of the armed struggle, on both or all sides of the war and independently of the considerations under *jus ad bellum* relating to the initiation of the war. Both *jus in bello* and *jus post bellum* are independent of *jus ad bellum*, *jus in bello* emphatically so under modern international law.17

It is probably the case that the implementation of *jus post bellum* and the realization of a just and stable peace is relatively easier if the preceding war has been conducted in line with *jus in bello* in comparison with the situation where the war has been conducted in violation of *jus in bello*. Therefore, in order to augment the chances in practice to fulfill

---

the last set of obligations of the parties to the armed conflict, namely \textit{jus post bellum}, the obligations pertaining to the middle, namely \textit{jus in bello}, should be fulfilled.\footnote{See May, \textit{After War Ends} (n. 3) 21.} The more \textit{jus in bello} has been breached, the more demanding it will be on the parties to the conflict \textit{post bellum} to (re)establish a just and lasting peace based on human rights, democracy, and the rule of law. From the point of view of content, the main focus of \textit{in bello} law is the protection of the civilian population, just as with \textit{jus post bellum}. 

Arguably, even before the recent discussion began on an emerging \textit{jus post bellum}, \textit{jus in bello} has been increasingly emphasized more than \textit{jus ad bellum} in the overall evaluation of a war effort.\footnote{For historical precedent, see Jonathan A. Bush, “‘The Supreme Crime’ and Its Origins: The Lost Legislative History of the Crime of Aggressive War” (2002) 102 \textit{Columbia Law Review} 2324, 2330–1; Paul Ramsey, \textit{The Just War: Force and Political Responsibility} (Rowman & Littlefield 2002) 152.} At least states parties to armed conflict are increasingly anxious to show that \textit{jus in bello} is respected—beginning with the precision strikes in the UN authorized war against Iraq in 1991—in order to gain legitimacy for the war effort. This legitimacy is important both with regards to the surrounding international community and with regards to both the people struck by the war as well as at home supporting and ultimately financing the military effort. The actual legitimacy as well as the perception of the legitimacy of the use of force primarily among the people struck by the armed conflict are important, presumably, to the (successful) implementation of \textit{jus post bellum}. If people are sufficiently antagonized by the way the war is fought it may be impossible to realize a just and durable peace, and conversely, as has been argued above, if people perceive the fighting as legitimate it may be relatively easier to implement \textit{jus post bellum}.\footnote{See May, \textit{After War Ends} (n. 3) 21.} The legitimacy in its turn, it is argued here, hinges increasingly on whether \textit{jus in bello} is respected (and decreasingly on the corresponding assessments under the \textit{jus ad bellum}).

In Libya in 2011 it was important for the UN sanctioned coalition to follow and be seen to follow \textit{jus in bello} carefully, even though the troops might not always have succeeded in doing this.\footnote{See Human Rights Watch (HRW), \textit{Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya} (HRW 2012) <http://www.hrw.org/reports/2012/05/13/unacknowledged-deaths> (accessed 1 July 2013).} In this case as in the case of Iraq in 1991, \textit{jus ad bellum} was likewise respected: in the case of Libya in the form of the existence of a preceding decision in the UN Security Council and in Iraq also in the form of a situation of (collective) self-defense. Thus, the respect for \textit{jus ad bellum} was not an issue.\footnote{See, however, the critical Julian M. Lehmann, “All Necessary Means to Protect Civilians: What the Intervention in Libya Says about the Relationship Between the \textit{jus in Bello} and the \textit{jus ad Bellum}” (2012) 17 \textit{Journal of Conflict & Security Law} 117.} Still, showing respect for \textit{jus in bello} was considered important both in the case of Iraq in 1991 and in the case of Libya in 2011 in order to gain additional legitimacy for the respective armed interventions.

It is in internal conflicts that the violations of the humanitarian law will leave the deepest scars, which will be most difficult to heal. This means that it is in internal conflicts that the scrupulous implementation of the \textit{in bello} law would be most important from the point of view of the subsequent working of \textit{jus post bellum}. Paradoxically, it
is with respect to internal conflict that *jus in bello* is least developed, although through practice developing into customary law the body of *jus in bello* applicable in internal armed conflict is growing considerably.\(^2^3\)

It is presumed in this chapter that for its application, *jus post bellum* is not dependent on the legality, or on the character of the preceding conflict. The people for whose benefit *jus post bellum* exists are equally struck by an international as well as internal armed conflict. *Jus post bellum* would thus apply after an internal conflict as well as after an international conflict.\(^2^4\) If anything, the need to build a peace based on human rights, democracy, and the rule of law may be even greater in a country having gone through an internal conflict in comparison with a country having gone through an international conflict. The issue of whose responsibility it would be to implement *jus post bellum* is not addressed in this contribution, but a measure of international third party involvement in the effective implementation of *jus post bellum* would seem inevitable. This would apply in particular after an internal armed conflict.

It is argued here that the implementation of *jus post bellum* would contribute to the erosion of the difference between the different legal categories of conflict internal to *jus in bello*. The different categories of conflict in terms of law is fundamental to *jus in bello* as it currently stands, although as was noted, the customary developments makes the substantive law applicable in different kinds of conflicts—international or internal—more and more similar. As far as the structure of *jus in bello* is concerned, however, the distinction between different kinds of conflict is still significant.

If *jus post bellum* is applied irrespective of what kind of conflict that has reigned, then the significance in law of the distinction between different kinds of conflict will most likely diminish. The question whether the conflict was international, internal, trans-, or non-traditional is insignificant with respect to the application of *jus post bellum* after the end of the conflict. It is assumed here that *jus post bellum* shall be implemented after any armed conflict. What kind of conflict has occurred from the point of view of the law is probably of lesser interest to the population living in the country than the fact that there has been an armed conflict at all and definitely of lesser interest than their wish to resume their lives in a peaceful society based on human rights, democracy, and the rule of law. The efforts made post-conflict, both backward-looking and forward-looking, however, should be based on the general aspiration to attain the highest degree possible of democracy, human rights protection, and rule of law for the future.

In principle, it is suggested, there will not be a *jus post internal armed conflict* and a *jus post international armed conflict* and so on, but one and only one body of *jus post bellum*. There could be sub-categories, but then in terms of actual need and practice *jus post internal bellum* would be the primary category whereas *jus post international bellum* would be secondary, in contrast to the relation between the international and the non-international in *in bello* law. Having said that there will in principle only be one body of *jus post bellum*, still the implementation of *jus post bellum* will always have to be


\(^{24}\) This view is shared by Brian Orend, “Jus Post Bellum: A Just War Theory Perspective” (n. 3) 38.
adapted to the circumstances of each particular case. The contents and actual practice of *jus post bellum*, however, are left aside in this chapter.

Thus, *jus post bellum* in the context of internal conflict will contribute to the erosion of the distinction between different categories of conflict which has been fundamental so far to the *in bello* law. If *jus post bellum* would not be applicable to internal conflicts this would solve the problem with the challenge to the fundamental structure of international humanitarian law. If *jus post bellum* would not be applicable to internal conflicts, however, *jus post bellum* would be inapplicable in the context of most armed conflicts taking place today. In that case, *jus post bellum* would be largely irrelevant and the question is whether *jus post bellum* would or could grow and establish itself as a body of law at all if it would not be applicable after an internal conflict.

One way of evading this cul-de-sac would be to claim that *jus post bellum* could be applicable also post an internal conflict, but only if the UN—or possibly some other international organization—is involved in the management of the post-conflict peacebuilding, or if the *post bellum* phase was preceded by a UN sponsored international intervention. The application of *jus post bellum* in general could also be limited to situations where the UN has been involved in the form of different kinds of peace operations whether the original conflict had been international or internal. In this contribution, however, it is presumed that *jus post bellum* is applicable in the aftermath of internal as well as in the aftermath of international armed conflict and in principle independently of whether the UN, another international organization, or another third party is involved in its implementation or not.

The less one views *jus post bellum* as a project to actually reconstruct the society ravaged by armed conflict and the more one views *jus post bellum* as a set of justice principles or a body of norms to be implemented in all post-conflict environments, the easier it is to figure the applicability of *jus post bellum* in internal post-conflict settings without any international interference either in the preceding conflict or in the post-conflict setting. Already today there are a lot of norms conducive to a constructive post-conflict endeavor that many or most states are bound by, for instance human rights, rule of law, and even democracy promoting international norms.

In practice, it is difficult to imagine that purely internal armed conflicts in particular could be followed by honest and fair implementation of *jus post bellum* for the benefit of the entire population absent any outside involvement in the implementation or in the control of the implementation efforts. This can be due, for instance, to lacking resources even for the implementation of the norms in question, let alone for the (rebuilding) of institutions in society and/or to the continued hostility that may be felt between different groups in the population even after the armed conflict is over and which would have to be neutralized by a third party helping in the implementation of *jus post bellum* norms.

If *jus post bellum* is reduced to the international norms that each and every state is already bound by, in our case with a particular focus on the respect for human rights, democracy, and the rule of law, then there is no difference in principle between *jus post bellum* and ordinary international law of peace.

In practice, *jus post bellum* would also seem likely to have to include an element of post-conflict (re)building of the institutions in society necessary to lay the foundation of a just and stable peace. Such institutional (re)building in its turn is likely in most instances to
require outside assistance in terms of expertise and economic resources. Even if understood in merely normative terms, the equal applicability of *jus post bellum* after internal and international conflict would contribute to reducing the importance of the distinctions between different kinds of conflict in *in bello* law.

In conclusion, the *in bello* law will become more relevant in substance due to the influence of *jus post bellum* while the fundamental structural distinction made in in bello law between international and internal conflicts will erode.

**V. What is the Modernization so Far?**

The modernizing effect of *jus post bellum*, seen from the perspective of *jus ad bellum* and *jus in bello*, is to adapt these two concepts to current realities. The law of armed conflict needs to be adapted to reality in order to stay relevant and meaningful. *Jus post bellum* is by definition dealing with the realities ensuing from the war; it is difficult to conceive of a *jus post bellum* that does not take the actual *post bellum* realities as its point of departure.

The modernization will mean that the focus of the law is shifted away from the military necessities toward the needs of the civilian population and, in the aftermath of the armed conflict, the needs of the population at large. If seen from the perspective of the civilian population, whether the conflict is legal or illegal at the outset is less important. In addition, the conceptions of the legality of the armed conflict will probably vary among the people. Even if the war as such is considered legal, however, this will most likely only marginally ease the suffering of the civilian population. The significant aspect of an armed conflict as to its effects on the civilian population is that the conflict actually takes place, not its normative underpinnings.

Moreover, from a temporal perspective, at the time *jus post bellum* is going to be applied, the legality of the conflict is irrelevant—not from a normative point of view but from a practical point of view. *Jus post bellum* must be applied whether the conflict was launched lawfully or unlawfully. Rather than pondering the issue of who might have been right at the beginning of the armed conflict, the core of *jus post bellum* is looking towards the future. From the normative point of view, the circumstances reigning at the time of the initiation of the use of armed force may play a role in the implementation of certain parts of *jus post bellum*, most evidently responsibility for the crime of aggression, but from the practical but also normative point of view of building a viable peace the exact interpretation of the legal situation when the war begun is of lesser relevance.  

This reinforces the focus on the needs of the population who are the ultimate subjects of *jus post bellum*; it is their society that is going to be reconstructed in the name of a just and stable peace after the war.

If the military interests are promoted strongly during the conflict, it may make it more difficult to rebuild the society, literally and symbolically. This concerns the _ad bellum_ phase to a certain extent—whether military means to achieve a particular

---

25 “[A]bstruse points of international law and treaty interpretation and the seeming ‘he said, she said’ of which side started the fight,” as Bush puts it; Bush, “‘The Supreme Crime’ and Its Origins” (n. 19) 2331; May argues more moderately that due to the “fog of war” the legality of the cause for war may be difficult to actually assess. May, *After War Ends* (n. 3) 231.
purpose are legitimate at all. It also concerns the *in bello* phase, where an emphasis on military necessity may cause so much material and immaterial damage that this may render the reconstruction under *jus post bellum* more difficult than it would otherwise be. Then there is the possible additional difficulty caused by violations of the *in bello* law during the armed conflict. Such violations would also increase the difficulties in the *jus post bellum* phase, it is presumed. Even without widespread and serious violations of international humanitarian law, however, a promotion of the military necessity at the expense of the interests of the civilian population, even though not illegal, would contribute to making the post-conflict peacebuilding phase more difficult.

The modernization of the law of armed conflict as a result of the introduction of *jus post bellum* and its application after all kinds of conflicts thus implies a recognition of the fact that it is the civilian population in modern war which is the entity that suffers most from the war—although under *jus in bello* they should be kept outside the armed conflict completely—and that it is the interest of protecting and later on empowering the civilian population that should be guiding the law. *Jus post bellum* itself takes the vulnerable position of the population into account and for the eventual realization of *jus post bellum* it is necessary that the same humanitarian values are taken into account also in the earlier phases of the conflict. If *jus post bellum* is merely conceived of as repairing the mental and material damage occasioned by and during the armed conflict, it becomes less meaningful and will probably have a lesser effect than if *jus post bellum* is conceived of in a more comprehensive fashion implying a certain outlook on the war as a whole.

The modernization also implies that *jus post bellum* by means of its application in all kinds of conflict will contribute to bringing to the fore the fact that the armed conflicts of today in most cases are internal. The focus of the law of armed conflict consequently should be on internal armed conflict and on solving the problems caused by internal armed conflict.

The protecting wall against outside concern for the suffering and future well being of civilian populations—state sovereignty—will weaken as a result of the modernization of the law of armed conflict. *Jus post bellum* in principle focuses on the population and not on the state. Neither is it possible to leave the decision of whether or not to implement *jus post bellum* to the state; *jus post bellum* in principle must be applicable irrespective of the will of the state as such. It is the interests of the population, and the entire population, which should be in focus and these interests do not necessarily coincide with the interests of the power-holders of the state.

The “statelessness” of *jus post bellum* might become a problem for the realization of this body of law, if the concerned state—or possibly states in case of an international armed conflict—is not favorably disposed to the (re)construction of society along the lines of democracy, human rights, and the rule of law. In principle, however, “statelessness” is a *sine qua non* of the development of *jus post bellum*, premised on the values presumed in this contribution that it is on the side of the people and independent of the state.

If *jus post bellum* would not be premised on those values, the result might be different. It is difficult, however, to imagine a *jus post bellum* in today’s world not premised on democracy, human rights, and the rule of law as the values underpinning the post-conflict
peace building in any society. States who would not agree with these values could not reasonably validly object to *jus post bellum* without negating *jus post bellum* itself. It is difficult to picture an internationally embraced *jus post bellum* premised on dictatorial values; would the UN assist in the (re)construction of a war-torn society along intentionally dictatorial, lines denying people human rights, democracy, and the rule of law? In practice, the high-flown rhetoric on the values inherent in liberal democracy of the international organizations with the UN at the head might not be scrupulously carried into effect in all instances of international assistance. In today’s world, it is still difficult to picture the international community in some form in a post-conflict situation where the reconstruction of an entire society is at issue, explicitly promoting dictatorship as form of government, denial of the protection of human rights, and the denial of rule of law. Besides, most states would be bound by international legal obligations at least to respect human rights, arguably the rule of law, and perhaps even democracy as form of government.

Arguably, even if vulnerable to criticism for being neo-colonial and imposing foreign values on unwilling populations, the current liberal democratic international agenda is more likely to include and let itself be influenced by local preferences and thereby evidently increase the legitimacy of international involvement in the first place, than a post-conflict reconstruction agenda based on strictly authoritarian rule. Here, the voice of the people would be silent or silenced by definition. The extreme version of military dictatorship perhaps combined with severe religious intolerance (irrespective of religion) would probably not allow much local dissent or variation.

The focus on the needs of the civilian population (a “civilianization” or a “humanization” of the law of armed conflict) in combination with a focus on the internal armed conflict (an “internalization”) are the indirect modernizing effects of the introduction of *jus post bellum* on *jus ad bellum* and *jus in bello* foreseen in this contribution. This constitutes an adaptation of the law even if indirect to the current realities; the modernization is also “gentle” in the sense of placing the emphasis on human needs and values rather than on military or state interests and values.

VI. New Organizing Principles for the Law of Armed Conflict?

The introduction of *jus post bellum* might have the effect of ultimately leading to new organizing principles for the law of armed conflict. That is if *jus post bellum*, as is presumed in this contribution, is premised on the values of and is intended to contribute to a society built on human rights, democracy, and the rule of law. Presuming that *jus post bellum* is intended to lay the foundations of a new society characterized by the respect of human rights, democracy, and the rule of law—which might or might not have existed before the war—the focus is on the well-being and rights of the population.

26 “Civilianization” has also been used to denote an eroding distinction between the status of civilian and combatant in modern war for different reasons. This is not what civilianization is intended to mean here; see, e.g., Andreas Wenger and Simon J. A. Mason, “The Civilianization of Armed Conflict: Trends and Implications” (2008) 90 International Review of the Red Cross 835.
As pointed out, measures taken during the actual conflict might make the realization of *jus post bellum* more difficult. In particular, if the realization of a society based on *jus post bellum* with the kind of content presumed in this contribution makes up part of the very justification itself of the war effort or armed intervention, it is even more likely that the prospect of *jus post bellum* will affect the war effort in order for the latter not to be counter-productive with respect to the coming implementation of *jus post bellum*.27

*Jus post bellum*, with its focus on the needs of the population, will contribute to tying together the law relating to the different phases of armed conflict. This implies eroding the borders between the different bodies of the law of armed conflict—which is very controversial—thus creating a closer substantive relationship between *jus ad bellum*, *jus in bello*, and *jus post bellum*. The focus of *jus post bellum* includes both aspects of order and justice. Humanitarianism is the primary value and consequently constitutes an important part of the justice aspect of *jus post bellum*. Humanitarianism thus will be a stronger, if not entirely new, organizing principle for the law of armed conflict.28

This is not to say that wars will be human in any general or conventional sense of the word. The emphasis of the law governing armed conflict, however, is expected here to turn toward more humanitarianism. The attention to the situation, needs, and later on empowerment of the civilian population will tie together the heretofore arguably strictly separated two, and from now on three parts of the law of war.29

In order to illustrate this closer interrelationship between the different bodies of law and in fact their interdependency, the label “*jus of force*” could be used to signify the entire law relating to the use of military force; from the beginning in the form of *jus ad bellum*, by way of the *in bello* law, to the end in the form of *jus post bellum*. This conception of the law would emphasize the continuous aspects of the use of armed force rather than conceiving of the use of force as something made up of distinct phases. The term “*jus of force*” would connect to the well-known concept of “use of force” in international law as well as its currently three legal sub-categories. In principle, the term “international humanitarian law” could also be used as an alternative name of the hypothetically all-encompassing law relating to the use of force, in particular considering the humanitarian perspective promoted in this chapter. Since “international

---


29 There have been suggestions even for a fourth part of the law of war between *in bello* and *post bellum*: the law of war termination. See David Rodin, “Two Emerging Issues of *jus post bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression” in Stahn and Kleffner (eds), *Jus Post Bellum* (n. 3).
humanitarian law” is already established as a legal term and has a distinct significance, the use of “international humanitarian law” to denote the entire spectrum of *jus ad bellum*, *jus in bello*, and *jus post bellum* could be confusing. Irrespective of labels, the view of armed conflict as a continuum probably corresponds better to the reality of armed conflict than the view of armed conflict as evidenced in the current law having a distinct beginning, middle, and end. In terms of chronology, furthermore, it is probably closer with reality to conceive of armed conflict as a continuum rather than conceiving of the different phases of armed conflict as coming in a distinct chronological order; the beginning, middle, and end of the conflict can at times exist simultaneously.30

The difference between war and peace should be obvious, however, so that after the end of hostilities it should be obvious that new conditions reign on the ground. This would constitute the distinct phase in which the norms contained in *jus post bellum* would come into play. Still, there could very well be a logical continuum as far as the law is concerned, from the phase of armed conflict into the peaceful phase since the goal of the law is to consolidate and keep the peace in order to avoid a recurrence of the preceding war.

If *jus post bellum* is not implemented, it must be presumed, there is a greater risk of the armed conflict recurring. Therefore, there is a close connection between the state of armed conflict and the state of peace also as far as the law post bellum is concerned, although by definition *jus post bellum* only comes into play after the conflict has ended. The peace must also be won, as they say; *jus post bellum* links together and forms the bridge between war and stable peace.

Perhaps one could speak of an interregnum between war and peace in the post-conflict phase, where *jus post bellum* would apply. This interregnum constitutes an original state of affairs for which we do not yet have a name but to which we have tried in vain to apply the blunt labels of war and/or peace with limited success. In our standard language, war and peace exclude each other, but in post-conflict situations they might necessarily not. As pointed out, even if genuine peace would happen to reign in the post-conflict phase, there is a strong connection between *jus post bellum* and the preceding parts of the law of armed conflict since *jus post bellum* presumably will prevent the recurrence of the (old) armed conflict.31

30 In terms of legal efforts at categorizing the phenomenon of war, the porosity of the borders between the different fields of law relating to the use of armed force is also illustrated by the discussion by Adam Roberts on the one hand of “a transformative project under the *jus post bellum*” and on the other of occupation law coming under “a new umbrella labeled *jus post bellum*.” Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights” (2006) 100 American Journal of International Law 580, 581, 582. Thus, occupation law could conceivably make up part of either *jus in bello* or *jus post bellum*.

31 In reality, the difference between a state of peace and a state of war might not be evident. For reasons of workability as well as humanitarianism, the idea of having one set of laws governing armed conflict and another set of laws governing peace should perhaps be abandoned (for a similar but further-reaching thought, see Teitel, *Humanity’s Law* (n. 28) 40–2, 224). Then we would no longer discuss the “*jus of force*” with its reference to war-time law, but rather the “*jus of conflict management*” applicable as soon as conflict arises on a larger or lesser scale, within or between societies, irrespective of considerations of state of peace or state of war (see a similar thought expressed in the “unified use of force rule” conceived by Francisco Forrest Martin, “Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict” (2001) 64 Saskatchewan Law Review 347, 372–81). Under the “*jus of conflict*
If *jus post bellum* is implemented in line with the ambitious goals of creating human rights, democracy, and the rule of law, and in line with the responsibility to rebuild under the responsibility to protect, supported in addition by the UN peacebuilding commission, *jus post bellum* will also presumably prevent the occurrence of new armed conflicts, both international and internal, since democracies are presumed not to militarily attack other democracies and democracy generally is presumed to be a more stable form for organizing society than dictatorship.

**VII. Conclusion: New Just War?**

The notion of just war is likely to be influenced by the increasing attention paid to the aftermath of conflict and the resulting emergence of a *jus post bellum*. It is likely that the legitimacy—if not the legality—of a military intervention authorized by the UN will be affected by the post-conflict peacebuilding efforts undertaken or not undertaken by the UN. In the case of a military intervention not authorized by the UN, ambitious post-conflict peacebuilding efforts (for instance carried out by the UN), i.e. the scrupulous implementation of *jus post bellum*, might contribute to the legitimization or even legalization, arguably, of the original intervention.32

*Jus post bellum* may play different roles with respect to the issue of whether a war is just or not.33 *Jus post bellum* can be considered together with the other two parts of the law of armed conflict, in different constellations and with different emphasis on the different components of the respective constellations, i.e. the justice of the war would be assessed on the basis of the implementation of *jus ad bellum*, *jus in bello*, and *jus post bellum*. Or, *jus post bellum* can be considered alone with respect to the issue of a just war; the justice or lawfulness of the war would then be assessed exclusively on the basis of whether *jus post bellum* was implemented or not. In either case, the justice of the war would only be possible to assess in retrospect. Respect for *jus post bellum* may have a retroactive effect on the justice of the war effort as a whole, or it may not. The retroactive effect in its turn may be positive or negative depending on whether *jus post bellum* was respected or not. The two most extreme positions would seem to be that all is well that ends well, i.e. a war after which *jus post bellum* is respected and only a war after in which *jus post bellum* is respected will be a just or lawful war, and conversely that nothing is well that does not end well, i.e. a war after which *jus post bellum* is not respected will not be a just or lawful war, irrespective of the justice or lawfulness of the war in *jus ad bellum* and *in bello* terms. Traditionally, it is under *jus ad bellum* exclusively that issues relating to justice of a war are decided; all is well that begins well, one could say.34

management” the protection and needs of the civilian population would be in focus at all times. Thinking in terms of a “jus of conflict management” would mean abandoning the view of war as something exceptional, something deserving a legal regulation of its own and thus legitimate. Taken one step further, the “jus of conflict management” could include humanitarianism working not only in relation to civilians, but equally in relation to combatants. See Forrest Martin, “Using International Human Rights Law” 371–2.

32 See also Stahn, “Rethinking the Conception of the Law of Armed Force” (n. 10) 931–3.
33 For a discussion of this from a moral philosophical perspective, see Walzer, Arguing about War (n. 3) 162–8.
34 Frédéric Mégret questions the “once and for all” evaluation of the legality of a state’s participation to a war and launches the thought that behavior in war could shed light retroactively on the cause, i.e. that crimes
The exclusion of *jus post bellum* from the just war equation would weaken the position of *jus post bellum*. It will be more difficult to press for *jus post bellum* to be implemented if its implementation is independent of the assessment of whether the war was just.

The fact that efforts aimed at the implementation of *jus post bellum* are very demanding from the point of view of the entity implementing *jus post bellum*, it would seem crucial from the point of view of legal policy to make *jus post bellum* worth the effort in terms of positively effecting the assessment of the previous military effort.\(^{35}\) For the further development and consolidation of the category of *jus post bellum* to take place, strong motives for the implementation of *jus post bellum* would seem necessary. By the military intervention alone, the purpose of the military effort might have been achieved; finding some strong motivation for the further effort to implement *jus post bellum* would seem crucial.

In the wake of the emerging *jus post bellum*, the role of *jus in bello* in the assessment of the justice or legality of a war is likely to increase. In today's world, great care is taken at least on the part of international interveners to show that they abide by the demands of international humanitarian law. This development is conducive to *jus in bello* working itself into the very notion of just war. In terms of substantive content, as has been pointed out, *jus in bello* is closer to *jus post bellum* than it is to *jus ad bellum*. Both *jus in bello* and *jus post bellum* focus on the needs and protection of the civilian population.

Irrespective of whether the implementation of *jus in bello* will come to make up part of the notion of just war, the degree of respect for *jus in bello* during the fighting is likely to affect the prospects of a successful implementation of *jus post bellum* after the war. Grave violations of *jus in bello* is likely to make the implementation of *jus post bellum* more difficult whereas respect for *jus in bello* may make the implementation of *jus post bellum* easier; (re)constructing a society built on human rights, democracy, and the rule of law may be easier if people's trust in each other has not been completely demolished during the war.\(^{36}\) Due to this mutually strengthening relationship, the more the notion of just war is influenced by *jus post bellum*, the greater would be the potential of *jus in bello* of also making it into the just war assessment.

A strong *jus in bello* has the added benefit of potentially strengthening *jus ad bellum* in its current *contra bellum* form as well. The prospect of the scrupulous implementation of the international humanitarian law would arguably serve to discourage the resort to war in the first place.\(^{37}\)

Not only does the emerging *jus post bellum* have the potential to affect the notion of just war in international armed conflicts, *jus post bellum* will also pave the way for just

---

35 Therefore, the view put forward by Brian Orend on the decisiveness of the respect for the *jus ad bellum* is counterproductive from the point of view of *jus post bellum*: “[F]ailure to meet *jus ad bellum* results in automatic failure to meet *jus post bellum* and *jus post bellum*. Once you are an aggressor in war, everything is lost to you, morally,” Orend, “Jus Post Bellum: A Just War Theory Perspective” (n. 3) 38.

36 A similar thought is expressed by May in *After War Ends* (n. 3) 225.

war considerations in the context of internal armed conflict. Presuming like we do here that *jus post bellum* is equally applicable in internal as in international war and presuming that the importance of implementing *jus post bellum* is considered equally great in internal as in international war, the notion of just war will slip into internal war as well.

So far, in internal war situations there is no just war calculus since *jus ad bellum* is not applicable to internal war. *Jus post bellum* as part of the just war assessment would potentially introduce the perspective of just war into internal conflict and this would be of enormous importance of principle. In order for a war to be just, the war-maker would have to fulfill a number of requirements and suddenly the war effort of the state in internal war is no longer just by definition, whereas the efforts of others may indeed be justified, and other actors than the state might justly make war.\(^8\) Irrespective of *jus post bellum* discussion, there are hints of such considerations in the Friendly Relations Declaration on wars of self-determination as well as in Additional Protocol I to the Geneva Conventions with respect to wars of self-determination.\(^9\) It is hinted in these important legal instruments that wars of self-determination are actually just wars, although the context is internal armed conflict and not international armed conflict.\(^{10}\)

*Jus post bellum* has a great potential to contribute to the modification of traditional thinking with respect to internal armed conflict. Resistance against any tendency to introduce the notion of just war into the internal setting might be expected on the part of the states, whose interests would inevitably be relativized as a consequence for the benefit of others. Still, it is in the aftermath of the many internal armed conflicts of today that the need for *jus post bellum* makes itself most felt with a potentially transforming idea of just war in its wake. The idea of just war would become the idea of the potential justice of any armed conflict irrespective of kind or cause.

The just war discussion that will be carried out in the internal war setting will not necessarily, nor is likely, to be carried out in *jus ad bellum* terms, at least not in the

---

8 One of the few authors who have addressed the issue of the possible emergence of a *jus ad bellum* for civil war is Kirsti Samuels, “*Jus ad Bellum* and Civil Conflicts: A Case Study of the International Community’s Approach to Violence in the Conflict in Sierra Leone” (2003) 8 *Journal of Conflict & Security Law* 315. As Frédéric Mégret writes, the *jus ad bellum* as well as *jus post bellum* tells us that war is essentially the preserve of sovereigns, Mégret, “*Jus In Bello* and *Jus Ad Bellum*” (n. 34) 121–2. In the words of Mégret, the *jus ad bellum* and *jus post bellum* are speaking a common grammar of statehood and the primacy of the state in international relations, at 123. Significantly, Torkel Brekke argues that the lack of interest in *jus ad bellum* in the Hindu tradition—as well as all other non-European traditions—depends on the lack of two distinctions crucial to the European concept of war, namely the distinction between external and internal enemies (international v. non-international use of force) and the distinction precisely between public and private violence (sovereigns v. criminals). Torkel Brekke, “The Ethics of War and the Concept of War in India and Europe” (2005) 52 *Numen* 59.


10 In Additional Protocol I, the necessary context of “fighting against colonial domination and alien occupation and against racist regimes” is explicitly pointed out somewhat limiting the reach of self-determination as a justification for internal armed struggle. Additional Protocol I (n. 39). The Definition of Aggression states that “particularly” [but apparently not exclusively] peoples under colonial and racist regimes or other forms of alien domination have the right to struggle for self-determination. Definition of Aggression (n. 39).
short run, since *jus ad bellum* strictly speaking is not applicable to internal war and its potential applicability furthermore would be highly controversial. Under *jus ad bellum* and just war considerations generally, the internal conflict is a blank spot. The just war discussion relating to internal war is more likely to be carried out in terms of *jus in bello* and *jus post bellum*, i.e. an internal armed conflict must fulfill the requirements of *jus in bello* and *jus post bellum* in order to be considered a just war on condition that *jus post bellum* like *jus in bello* is considered applicable in the context of internal armed conflict. Also, the body of human rights indubitably applicable both during, after, and before the war and closely related in terms of substance both to *jus in bello* and *jus post bellum*, will become increasingly important for the evaluation of the justice of war.41

The fact that the justice of wars in the internal conflict setting will be discussed in terms of *jus in bello* and *jus post bellum*, in combination with the fact that it is the internal wars that completely dominate the scene of armed conflict in today’s world, will contribute to increasing further the importance of these two bodies of law for the discussion of just war generally, also outside the context of internal armed conflict, that is in international wars. The scant applicability of *jus ad bellum* given the currently very few international armed conflicts contributes to decreasing the general relevance of *jus ad bellum* even more. In case *jus ad bellum* is applicable, its current *jus contra bellum* form tends to be so blunt as to become useless and ineffective.

It would be a very significant and very controversial change in the law of armed conflict merely to introduce the notion of just or lawful war into the internal conflict setting.42 Irrespective of whether the conflict is international or internal, it would also be very significant and very controversial to let other than *jus ad bellum* components—i.e. notions originating from *jus in bello* and/or *jus post bellum*—enter into the assessment of the justice or legality of armed conflict. Then the means would begin to compete with the end as the primary justifying factor in the assessment of the justice of war. Instead of the end justifying the means as in traditional *jus ad bellum*, the means would justify or partly justify the end. If *jus post bellum* becomes the sole measuring stick for the justice of war, the end in a more concrete sense—the end point, the conclusion of the armed conflict—would again justify the means.

In order to defend its position as the primary framework under which justice of war is assessed, perhaps *jus ad bellum* should hurry to establish itself in the internal war setting. Otherwise it risks being definitively overtaken by *jus in bello* and *jus post bellum* for reasons of irrelevance or uselessness.


As we have seen above, *jus ad bellum* is also losing ground with respect to the assessment of justice or lawfulness of international armed conflict. The normative development sketched here relating to internal armed conflict would strengthen further what is arguably already taking place at the international level. Since most wars are internal it is in the context of internal wars that the need for norms and norm-making is greatest and consequently where the development of norms will take place.

The development of a *jus ad bellum* for internal conflict would be a natural response to the frequent occurrence precisely of internal conflict—and not of international conflict—and a natural response to the existence of a *jus in bello* for internal conflict. The convergence of the law governing international armed conflict on the one hand and internal armed conflict on the other would be the natural next step; in reality there are often strong international links even in conflicts labeled internal. This development is heavily under way in the field of international humanitarian law and the emerging *jus post bellum* arguably contributes to the same development potentially unfolding in the field of *jus ad bellum*.

In whatever way the law of armed conflict develops with respect to the contents of and relationship between *jus ad bellum*, *jus in bello*, and *jus post bellum* in international or internal conflict, it is likely that *jus post bellum* will have a transformative effect on the structure and substance of the other parts of the law of armed conflict. The emerging *jus post bellum* arguably contributes to an amalgamation and rearrangement of the applicability of and relationship between *jus ad bellum*, *jus in bello*, and *jus post bellum* itself. This might go so far as to affect the fundamental notion of just war. The law of armed conflict in its widest sense is an area where new thinking is called for. In this situation a proactive rather than reactive stance on the part of the international community would be preferable with respect to the norms governing just war.