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MODERN *JUS POST BELLUM* – FINDING A NEW BRANCH OF INTERNATIONAL JUSTICE AND LAW

War itself is a great evil. Remembering dead soldiers we respect the peace. In this way, we also remember that our duty is to build a Europe that is based on a sense of liability for peace. However, peace and prosperity are not given forever.¹

General Stanisław Maczek

Abstract: The arguments put forward in this article concern ideas about *jus post bellum* as an urgently needed and hopefully emerging branch of a new international legal order based on fully reasoned ethical principles. The presented views refer to justifying this new international legal order with respect to the necessary parallel transformation of the utility of armed response and, particularly, lethal force to meet modern-day and future conflicts. While it is possible to find at least partial answers, many more questions for future development will emerge in order to truly establish what promotes and fulfils the actual achievement of a stable, safe, lasting, and just peace. Therefore, the object of this research into the legal and ethical

¹ During a speech in Breda, The Netherlands in 1944. General Stanisław Maczek commanded the 1st Polish Armoured Division in the 1944 D-Day landings in Normandy and in the subsequent liberation of Western Europe.

possibilities is primarily to assess the quality of a new conceptualisation of international justice and law. This allows for the formation of new law *jus post bellum* and the nature of peace, which might induce the necessary socio-political transformation to sustain a just peace. The exclusive reference to moral obligations in the theorisation of the transition from conflict to peace too often fails to recognise the existing framework of the legal rules and principles involved. While analysed from the perspective of International Humanitarian Law and the perspective of the independence of nation-states, it characterises asymmetric warfare and the question about the causes driving states' and other communities' actions, particularly *casus belli*. The new interdisciplinary rethinking exposed below can only result in a complex conclusion because *jus post bellum* in the age of global transitional justice could prepare new judicial frameworks, as well as true and real justice after the end of war.

Keywords: *jus post bellum*, transitional justice, peace, law of armed conflict, just war, just war theory

1. Introduction

The arguments put forward in this article concern ideas about *jus post bellum* as an urgently needed and hopefully emerging branch of a new international legal order based on fully reasoned ethical principles. The presented views refer to justifying this new international legal order with respect to the necessary parallel transformation of the utility of armed response and, particularly, lethal force to meet modern-day and future conflicts. While it is possible to find at least partial answers, many more questions for its future development will emerge in order to truly establish what promotes and fulfils the actual achievement of a stable, safe, lasting, and just peace.

The idea of a just peace after conflict, which is the essence of *jus post bellum*, is considered a natural follow-up, if not an integral part, of Just War Theory (JWT) in International Humanitarian Law (IHL) formed over many centuries. Therefore, any new conceptualisation of *jus post bellum* must reflect upon both legal and ethical principles, if such can be agreed upon, self-evidently to end wars and bring a just and lasting peace.

Currently, the overall goal of JWT is a significant part of legal and political philosophy, as well as the leading normative theory on war and

the nature of peace. This traditional theory currently consists of two well-established branches, namely *jus ad bellum* and *jus in bello*. As Lonneke Peperkamp points out, aside from regulating the initiation of war and conduct in war, there is now growing interest in regulating the aftermath of war. In this way, the emerging doctrine of *jus post bellum* could become a much needed third branch of JWT.²

In many respects, this has to be acknowledged as *lex ferenda*, future law based on propositions and hypotheses, with some expectation that it will become *lex lata*, current law, in due course. However, it is necessary to remember, that *lex* and *jus*, law and justice, are not the same thing. Justice informs laws (*lex*) before enactment; judgements and punishments follow. Justice (*jus*) is the effect after law. Thus, causes and effects cannot be ignored. Second, searching for justice *post bellum* requires original thought, from first causes and newly constructed principles, as well as deep, empirical research. This means revisiting the philosophy of justice and law, namely jurisprudence. Therefore, creating laws from ideas of future justice is an activity fraught with many difficulties. Moreover, the present tentative overall and detailed concept of *jus post bellum* touches upon many categories and branches of IHL, politics, international relations, and socio-cultural studies, not only the law of armed conflict. How can progress be achieved?

First, a broad analysis based on general IHL should be conducted and, second, a comparative law analysis into the law of armed conflict needs to take place in the spirit of jurisprudence as the philosophy of law-making. This might well go beyond the framework of this study. The main point here would be to consider whether the separation of a category of IHL behaviour under the name *jus post bellum* has even tendentious justification in the present state of the law of armed conflict (LOAC) and, if so, how to establish newly thoughtout justification amongst established concepts of *jus ad bellum*, *jus contra bellum*, *jus in bello* and *jus pacis*. Furthermore, what is its scope in the search for future possible normative considerations as firm principles to contribute to *jus post bellum*?

Therefore, this analysis will attempt to determine, first, a broad conceptual understanding of a new paradigm of IHL *jus post bellum* derived from its historical tradition, and second, formally and materially, to establish a set of possibly applicable, specific norms for IHL to articulate.

² L. Peperkamp, *Jus Post Bellum and the Nature of Peace*, Wolf Legal Publishers, Oisterwijk 2017, p. 274.

Such norms and principles could govern an understanding of *jus post bellum* in connection with the ending of the very many armed conflicts in the medium- to long-term future, as well as building the basis for a safe peace, moderate restitution, and ensuring fair legal retribution and avoiding extreme post-war punishment and victors' justice.

The object of this research into legal and ethical possibilities is primarily to assess the quality of a new conceptualisation of international justice and law. This allows for the formation of a new *jus post bellum* and the nature of peace, which might induce the necessary socio-political transformation to sustain a just peace.³ The exclusive reference to moral obligations in the theorisation of transition from conflict to peace too often fails to recognise the existing framework of the legal rules and principles involved. While analysed from the perspective of IHL and the perspective of the independence of nation-states, it also characterises asymmetric warfare and the question about the causes driving states' and other communities' activities,⁴ particularly *casus belli*.

The new interdisciplinary rethinking exposed below can only result in complex conclusions because *jus post bellum* in the age of global transitional justice has to prepare for new judicial frameworks, as well as true and real justice, after the end of war.

2. The essential significance of the tradition of JWT for the present shape of *jus post bellum* doctrine

2.1 The right to wage war and the legality of the use of force regarding peace treaties throughout the centuries

The contemporary doctrine of *jus post bellum*, itself emerged from the tradition of JWT, follows through different historical stages, such

³ P. Allan, A. Keller (eds.), *What is a Just Peace?*, Oxford University Press, Oxford 2008, pp. 12-34.

⁴ M. Lech, *Wojna hybrydowa na Ukrainie w perspektywie jus post bellum – nowego międzynarodowego prawa transformacji konfliktów zbrojnych* [Hybrid war in Ukraine in the perspective of jus post bellum - a new international law of transformation of armed conflicts], [in:] B. Pacek, J.A. Grochocka (eds.), 'Konflikt Hybrydowy na Ukrainie – aspekty teoretyczne i praktyczne' [The Hybrid Conflict in Ukraine - theoretical and practical aspects], Wydawnictwo Uniwersytetu Jana Kochanowskiego w Kielcach, Filia w Piotrkowie Trybunalskim 2017, pp. 56-108.

as the conflict-escalation phase and the post-ceasefire phase. For more than two thousand years, the just war tradition shows a critical analysis of moral wars and military operations. In international law, one could distinguish only law of peace (*jus pacis*) and law of war (*jus bellum*). In this regard, the grandiose work of Hugo Grotius *De jure belli ac pacis* proves this distinction. Formed over centuries, the modern law of armed conflict is divided into the legality of the use of armed force, *jus ad bellum*, and law in times of armed conflict, *jus in bello*, including laws regarding the occupation of territory by occupying forces. These two orders of international law are, however, unrelated to each other. For example, the application of *jus in bello* / *jus durante bello* does not depend upon the legality of military intervention.⁵ Until the 20th century, the law of war was perceived as being primarily concerned with conflicts between States. The right to war was considered the prerogative of the State itself, e.g., the right to conclude treaties (fulfilling certain conditions), which, for many centuries, were associated with the concept of just war (*bellum justum*).⁶ Since ancient times, especially since the medieval period, the law of war was primarily considered as *jus ad bellum* (in the formula *bellum justum*) and then as *jus in bello*. Nevertheless, in the doctrine, it is believed that the concept of just peace after a conflict, which is the essence of contemporary *jus post bellum*, was considered a natural complement to the idea of a just war: just peace was to be the result of a just war.⁷

⁵ Å. Prandler, *The concept of responsibility to protect as an emerging norm versus humanitarian intervention*, [in:] I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds.), 'International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner', Koninklijke Brill NV, The Hague 2008, pp. 711-727.

⁶ D.J. Bederman, *International law in antiquity*, Cambridge University Press, Cambridge 2001, p. 231. R. Lessafer, *Too Much History: From War to the Sanction As sanctioning of War*, [in:] M. Weller (ed.), 'The Oxford Handbook of the Use of Force in International Law', Oxford University Press, Oxford 2015, p. 35; C. Mik, *Kongres wiedeński a współczesne koncepcje ius post bellum* [The Vienna Congress and modern concepts of ius post bellum], [in:] J. Menkes, E. Cała-Wacinkiewicz, J. Nowakowska-Małusecka, W. Pęksa, W. Sz. Staszewski (eds.), 'Idee, normy instytucje Kongresu wiedeńskiego 200 lat później – perspektywa prawnomiędzynarodowa' [Ideas, standards institutions of the Vienna Congress 200 years later – an international legal perspective], C.H. Beck, Warszawa 2017, pp. 215-218; N. Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 'Columbia Journal of Transnational Law' 2004, vol. 43, p. 4.

⁷ J. Bellinger III, V.M. Padmanabhan, *Detention operations in contemporary conflicts: The four challenges for the Geneva Conventions and other law*, 'The American Journal of International Law' 2011, vol. 105, pp. 201-243; I. Österdahl, *Just War, Just Peace and*

In fact, the right to war and the legality of the use of force in the perspective of peace treaties during the centuries leading up to the 20th century show that the question of the end of a war and its definition was consequently reflected in peace treaties. Although the content of peace treaties evolved, it was always a part of them, peace was supposed to be perpetual in the sense that the reasons underlying it could not be appointed again to start new armed forces. Peace treaties were seen directly as transactions between the parties.⁸

In this respect, they did not differ from contemporary international treaties of armed conflicts. Peace treaties often also contained a specific clause of friendship and peace (perpetual), usually placed first or in one of the first articles. Incidentally, peace treaties were built by peace and friendship clauses, sometimes linked to confirmatory arrangements and previous treaties, including peace treaties, as well as amnesty. However, peace treaties in general did not contain elimination clauses, the causes of war and the building of lasting peace after conflict.⁹

2.2 The abandonment of JWT regulating peace treaties in the 19th century until 1945

The 19th century and the first half of the 20th century brought changes. The concept of just war was abandoned. *Jus ad bellum* lost its legal basis. At the end of the 19th century, in its place, there appeared some treaty regulations that limit the right to war by emphasising and refining the peace obligation dispute resolution. At first, the Hague conferences of 1899 and 1907 did not argue that this is an absolute obligation—formal rules are defined dealing with the start of war. After the First World War, a treaty mechanism was created in the world so as not to resort to war (the League of Nations), leaving only condemnation and renunciation of war as means of resolving international disputes (Briand-Kellogg Pact of 27.8.1928; Pact Saavedra-Lamas for the Americas from 10.10.1933), meaning that the duty of peaceful resolution of disputes became absolute

the Jus Post Bellum, 'Nordic Journal of International Law' 2002, vol. 81, p. 282; M.J. Schuck, *When the Shooting Stops: Missing Elements in the Just War Theory*, 'The Christian Century' 26.9.1994, p. 12; J. Rawls, *The Law of Peoples*, Harvard University Press 1999, pp. 122-126.

⁸ C. Mik, *Kongres wiedeński...*, pp. 215-216.

⁹ *Ibidem*, pp. 216-217.

(General Act of Peaceful Resolution of Disputes of 26.9.1928). Therefore, *jus ad bellum* lost its traditional legal basis.

3. The Second World War experience and the foundations of a new legal order under the United Nations

The Second World War brought more experience, verifying the current status of the international community and international law. The basis of the new international order became the United Nations Charter, maintaining international peace and security. It became the statute of the United Nations Organization (UN).¹⁰ The rules of the Charter of the United Nations have been made to resolve international disputes peacefully (Article 2(4) and 3).¹¹ The use of force becomes legal only under the conditions set out in the Charter, under the authority of the UN Security Council, in the form of a military sanction (Article 42) or collective self-defence (Article 51). However, not every use of military force is considered an armed conflict.¹² Individual or collective use of armed force, especially in the form of a war of aggression, was also linked to the pursuit of arms control and, ultimately, to universal and total disarmament (Article 11 of the Charter).

Moreover, after the Second World War (including all four Geneva Conventions on the Law of Armed Conflict of 12.8.1949), more rights of a humanitarian character were granted (e.g., protection of victims of wars, especially civilians). This was considered in times of armed conflict, which applies not only to the classical law of armed conflict but also to international law, human rights, or environmental protection rules (Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques of 1977, case law of the International Court of Justice, as well as recently, the work of the International Law Commission).

The experience of the Second World War showed also that local and internal conflicts can become a serious problem. At the end of the 20th century, the phenomenon of crisis emerged in some countries, partly caused

¹⁰ Article 1 'a' and 'b' of the UN Charter (<http://www.un.org>).

¹¹ See <http://www.un.org/2017/07.20/> (accessed: 22.12.2018).

¹² See a critique of legal solutions in the UN Charter: M.J. Glennon, *The Limitations of Traditional Rules and Institutions Relating to The Use of Force*, [in:] M. Weller (ed), 'The Oxford Handbook of the Use of Force in International Law', Oxford University Press, Oxford 2015, pp. 90-95.

by armed conflict and partly generating them. The identified conflicts and crises in states were conducive to military interventions. Despite building the foundations of a new international order, the Cold War significantly reduced the possibility of finding solutions concerning the establishment of a just peace after a conflict. It was only after the end of the Cold War that the situation began to change, and in any case, it was influenced by a correction of the existing control optics. More attention was focused on the broadly understood state after an armed conflict as the principal premise of lasting peace. In this context, the place for a new legal order, namely *jus post bellum*, emerged, where *jus ad bellum* and *jus in bello* still define the contemporary debate over the fundamental problem, in essence, whether war is just and moral.

In this way, the foundations of the right to counteract war (*jus contra bellum*) were formed. Thus, the analysis of the concept of *jus post bellum* seems to be particularly justified at a time when contemporary international law is in the process of transition from *jus ad bellum* to *jus contra bellum*. Moreover, the present practice of states at the same time determines the limits of *jus contra bellum* in order to expand the meaning of concepts such as self-defence, humanitarian intervention, the intervention of the UN, or the introduction of exercises (according to *jus post bellum*) and combating international terrorism.¹³ Inherent in some cases is the perception of these concepts in a semantic context: 'only' or 'legal' causes of struggle, against serious and immoral evil.¹⁴ This justifies the thesis going beyond IHL boundaries.

¹³ M. Lech, *New security strategies and development of international cooperation against terrorism in the light of the legal order of the United Nations*, 'The Polish Journal of Criminology' 2015, vol. 1, pp. 13-35, <http://www.pjoc.pl/2017/07/20/> (accessed: 22.03.2019); M. Lech, *Ochrona prawna społeczności międzynarodowej wobec zagrożenia terroryzmem – studium międzynarodowego prawa antyterrorystycznego* [Legal protection of the international community against the threat of terrorism - study of international counter-terrorism law], Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2014.

¹⁴ R.D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 'The Yale Journal of International Law' 2009, vol. 34, p. 57; J. von Elbe, *The Evolution of the Concept of the Just War in International Law*, 'American Journal of International Law' 1939, vol. 33, pp. 666-667; A. Nussbaum, *Just War – A Legal Concept?*, 'Michigan Law Review' 1943, vol. 42, p. 454; M. Mantovani, *Bellum iustum. Die idee des gerechten Krieges in der römischen Kaiserzeit*, Peter Lang, Bern 1990, pp. 34-69; M. Evans, *Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of Just Occupation*, 'Millennium Journal of International Studies' 2008, vol. 36,

Therefore, the classical distinction between *jus ad bellum* and *jus in bello* becomes a kind of antithesis of the JWT, which subordinates *jus in bello* and *jus ad bellum* considerations. This separation rule foresees that IHL binds all warring parties, regardless of who is the aggressor. This difference, however, has been questioned in recent years, aiming to merge these two legal entities.

Despite the desire to eliminate war in international practice, there still are some situations of an armed aspect referred to as interventions. They often lead to a kind of armed conflict in which the position of the international community and international law is not unequivocal. These include, among others, an intervention warning, especially against terrorism, humanitarian intervention, intervention in defence of a democratic system or a state's own citizens, or even interventions of a police nature (e.g., due to the immediate threat of armed attack), and, lastly, invitation to intervention. This makes some experts in international relations and international law begin to return, in the changed formula in the 20th century, to the concepts of just war and *jus ad bellum*.

4. The contemporary perception of *jus post bellum* in the international legal order

4.1 Ensuring in the world a positive peace as the main aim of *jus post bellum* doctrine

Traditionally, peace is perceived as the absence of war (*est pax absentia belli*). Although the UN Charter does not uphold this understanding unequivocally, some of the provisions contained therein include this notion.

A full, deep analysis of the *jus post bellum* doctrine shows that its main factor, namely world peace, is the most important challenge for the contemporary international community. This new figure of international law, with its complex character, seen not only from the UN perspective, proves that today, peace is not only the absence of war (armed conflict) but a much more demanding situation within the framework of this law.¹⁵ Therefore, the perception of *jus post bellum* must also show

no. 3, pp. 533-544; M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York 1984, p. 866.

¹⁵ M. Koskeniemi, *The politics of international law*, 'The European Journal of International Law' 1990, vol. 1, p. 4; W.M. Reisman, *Assessing Claims to Revise*

conflict as a dynamic phenomenon. It is a situation in which conditions for the subjective and safe development of humanity in a stable, natural environment are ensured, a state of multidimensional and multi-level cooperation between states and societies in a spirit of trust and solidarity.

The end of the Cold War made it possible to reinterpret the peace described in the UN Charter towards the positive. At the same time, positive peace requires facing not only military challenges and threats but also, primarily, other spheres of international relations. Removing these threats is not only a matter of preventing armed conflict but also of peacebuilding after armed conflict. The expression of positive peace became, among others, the Declaration of the General Assembly on the Culture of Peace on 13.9.1999. As noted by the Chairman of the UN Security Council in a statement on 31.1.1992, at the end of the Council meeting first held in the composition of Heads of State or Government, 'The absence of war and military conflicts between states does not in itself ensure international peace and security. Threats to peace and security are becoming sources of instability without military character in the economic, social, humanitarian and ecological areas'.¹⁶ In this way of thinking, the present revision of *jus post bellum*, especially in an age of global transitional justice, nowadays plays an important role and requires preparation of justice after the end of a war.

the Laws of War, 'The American Journal of International Law' 2003, vol. 97, pp. 82-87; H. Lauterpacht, *The problem of the revision of the law of war*, 'The British Yearbook of International Law' 1952, vol. 29, p. 382; Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge 1988, pp. 168-188; N.J. Wheeler, *Saving Strangers. Humanitarian Intervention in International Society*, Oxford University Press, Oxford 2000, pp. 33-65; M.N. Schmitt, *Green War: An Assessment of the Environmental Law of the Law of Armed Conflict*, 'Yale Journal of International Law' 1997, vol. 22, pp. 52-56; Th. Seto, *The morality of terrorism*, 'Loyola of Los Angeles Law Review' 2002, vol. 35, p. 1227; O. Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 'Houston Journal of International Law' 1989, vol. 11, pp. 309-315.

¹⁶ Note by the President of the Security Council, 3046th meeting of the Security Council, S/23500, 31.1.1992.

4.2 The significance of the complex legal research for the contemporary shape of the *jus post bellum* doctrine

For the legal research of the modern doctrine of just war, especially *jus ad bellum* and *jus in bello*,¹⁷ one should take into consideration the concept of a new and complex department of international law, which is *jus post bellum*. However, an analysis of the doctrine of international law on the subject dealing with the need to ensure peace after a conflict indicates that *jus post bellum* in its present interpretation was not known in the doctrine of this law. Nowadays, *jus ad bellum* and *jus in bello* represent a fundamental legal basis for creating a fully legitimate, legal *jus post bellum*. The existing distinction between *ad bellum* and *in bello* in the modern law of armed conflict significantly affects the current concept of the new department of international law, *jus post bellum*, a legal order which could be responsible in the nearest future for enacting and justifying armed-conflict transformation from its completion to the establishment and achievement of a stable and just peace.

This complex process would lead to the creation of a normative shape of *jus post bellum* and the nature of peace.¹⁸ This third branch, like *jus post bellum*, is broadly precepted and supposed to offer similar norms for the complex aftermath of war; its satisfaction justifies peace after war. Due to the urgent need for such a coherent and effective body of norms governing the situation after a war, just war theorists note that the theory is incomplete. In this light, the subject of this complex legal research should

¹⁷ J.L. Kunz, *Bellum Justum and Bellum Legale*, 'The American Journal of International Law' 1951, vol. 45, pp. 528-530; Y. Benbaji, *A Defence of the Traditional War Convention*, 'Ethics' 2008, vol. 11, pp. 464-466; R. Kolb, *The Origin of the twin terms jus ad bellum and jus in bello*, 'International Review of the Red Cross' 1997, vol. 320, p. 554; S.R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 'The American Journal of International Law' 2002, vol. 96, pp. 905-921; C. Greenwood, *The Relationship between jus ad bellum and jus in bello*, 'Review of International Studies' 1983, vol. 9, pp. 221-234; Yearbook of the International Law Commission (United Nations, New York 1949), para. 18, p. 281; J. Moussa, *Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law*, 'International Review of the Red Cross' 2008, vol. 872, December 2008, pp. 963-976; F. Bugnion, *Just Wars, Wars of Aggression and International Humanitarian Law*, 'International Review of the Red Cross' 2002, vol. 847, pp. 22-24.

¹⁸ A. Orakhelashvili, *Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello*, 'Journal of Conflict & Security Law' 2007, vol. 12, no. 2, Oxford University Press, Oxford 2007, pp. 157-196.

be considered: post war justice in JWT or *jus post bellum*.¹⁹ On the other hand, *jus post bellum* modern scholars, at the threshold of the 21st century, perceived the need to create a new post-war order of law because the classic dichotomy of *jus ad bellum* and *jus in bello* was partially overturned by the system to create a new post-war law.²⁰ It was recognised that post-war societies needed help in avoiding conflict and chaos. A branch called *jus ante bellum*, as a preventive peacekeeping branch, then appears to precede *jus ad bellum*. Its norms would apply in peacetime and in the absence of a particular war or threat of war.

In this context, the following legal research questions arise: What *jus post bellum* should be created and what is meant by it? What are the sources of such law? Is this the widely understood responsibility to protect (R2P) meant to change the rather sceptical attitude of many governments and parties towards peace-building through the UN, and above all the idea of creating a new and stable *jus post bellum*? Is there a place for a new *jus post bellum* in the doctrine of international law?²¹ An open and broad answer to all these research questions is as complex as the question is complicated, because what is generally 'good' is hugely complex, and not a single thing, even if it is about what 'ought to be' rather than what 'is' (reflecting the ideas of Plato and Kant rather than Aristotle), is the 'ideal' rather than the 'reality'. Moreover, what should be underlined in this place are, of course, the legal terms for this in national and international jurisprudential languages.

Therefore, first of all, it has to be pointed out that the broadly understood R2P is widely welcomed by many parties, especially by both international legal scholars and philosophers of just war, but that the progress in codifying such a process/procedure is usually slow, and

¹⁹ L. Pepperkamp, *Jus Post Bellum and the Nature of Peace...*, p. 235.

²⁰ J. Pattison, *Jus Post Bellum and the Responsibility to Rebuild*, Cambridge University Press, Cambridge 2013, pp. 5-29; B. Orend, *War and International Justice: A Kantian Perspective*, Wilfried Laurier University Press 2000, pp. 217-263.

²¹ C. Stahn, *Jus ad bellum, jus in bello... jus post bellum? – Rethinking the Conception of the Law of Armed Force*, 'The European Journal of International Law' 2017, vol. 17, pp. 921-943; G. Verdirame, *What to Make of Jus Post Bellum: A Response to Antonia Chayes*, 'The European Journal of International Law' 2013, vol. 24, no. 1, pp. 307-313; J. Carter, *Just War - or Just a War*, 'The New York Times' 9.3.2003, p. 13.

to some players, ineffectual, and that it is unlikely to be easily established in terms of norms or customary law.²²

Second, in the context of the issues presented, which are the main reasons for *jus post bellum*, one will claim that only a stable, sustainable, and decent peace guaranteeing international justice can be escorted on the basis of the peaceful intentions of belligerents. In this situation, looking at the doctrine of *jus post bellum*, first of all, on the point of view of B. Orend, who has called for treaties and protocols in international law, there does not exist as yet a firm 'body' of customary international law to put to governments and parties to make them responsible for bringing about the desired outcomes.²³ All wars, conflicts, and military operations are experimental for all parties. Bringing about peace is often far more difficult than going to war in the first place. The legal actions of governments and responsible parties certainly might make it possible to fully conclude a stable peace treaty in light of the international law on the use of force, among others.²⁴ Then, it shall be very awaited by

²² The above-mentioned problems dealing with the process of the creation of *jus post bellum*, especially its sources, have their background in the substance of international law and its components, which has been one of the main challenges to scholars of international law throughout the years. Two major problems in defining international law are the lack of a higher centralised legislator in international law and that the subjects creating the law coincide with the subjects bound by the law. The legal basis of international law nowadays is twofold—freewill agreements between states and customary rules based on state practice formulate the applicable rules. Consequently, no sole legislature exists in international law. The agreements do, thereby, not necessarily follow a systematic structure or hierarchy. Thus, a new agreement between states can touch upon fields of law not before included in international law or create a new institutional framework to handle a given problem. Every such agreement between states gives rise to new questions regarding the hierarchy between sources and the relationship between different norms and agreements. As international law expands, it becomes more and more specialised and diverged and the predictability of the system tends to decrease. The more fragmented international law gets, the higher the likelihood of norm conflicts. Each new multilateral or bilateral agreement between states may contribute to the fragmentation of international law.

²³ B. Orend, *The Morality of War*, 2nd ed., Broadview Press, Peterborough 2013, pp. 45-66.

²⁴ However, it must be underlined in this situation that there might be a possibility for states to set up a stable peace treaty that, for example, excludes general international law on a specific field of secondary rules thereby exists. Most of the fields of international law that have been alleged to be self-contained regimes probably do not qualify as such, but even if no treaty in international law as of today constitutes a self-contained regime,

the international community whether this legal process will become in due course fully possible within the newly established *jus post bellum*, based on the legal order's own fundamental principles and institutions.

Third, in scientific works dealing with armed conflict, typically the problem was usually limited to ways of dealing with ending war and entering into agreements between the warring parties, including the analysis of peace treaties and possibly also criminal liability for international crimes.²⁵ Also, at present, *jus post bellum* is hardly making its way to the general awareness of international lawyers, as revealed, among others in publications on the use of force in international law or in the latest textbooks of international law.²⁶

Fourth, it should be underlined that the complex legal research dealing with this new and not yet established doctrine of law should, however, be very aware of the controversial nature of some legal aspects of the use of military force and the rules regulating the initiation and conduct of wars in international law. In this context, contemporary research about the legality of military action and the conditions for introducing more peace revolve more around the idea of just war than refer to applicable provisions of law. It may seem that the modern law of armed conflict does not fit into reality, and the theory of just war, known for centuries, is

such a treaty may be agreed upon by a number of states any time in the future. Such a possible treaty or a number of treaties can embrace a full, exhaustive and definite set of secondary rules with the intention to exclude the application of general international law in a given field of secondary rules. This intention can be established in three possible ways, by a cluster of norms with a *lex specialis* character, by a single norm in the treaty that explicitly excludes the applicability of general international law, or by a structure, object and purpose of a treaty that implicate exclusion. Even if the purpose of establishing a self-contained regime is to exclude the application of general international law, the general law might be applied through a fallback if the self-contained regime is unable to handle a given problem in an effective way and/or is unable to fulfil its given object and purpose. See also: M. Runersten, *Defining 'Self-contained Regime'*, <https://lup.lub.lu.se/luur/download> (accessed 21.02.2018); R.E. Williams, D. Caldwell, *Jus Post Bellum: Just War Theory and the Principles of Just Peace*, 'International Studies Perspectives' 2006, vol. 7, pp. 309-320.

²⁵ M. Schmitt, *Green War...*, pp. 52-56; Th. Seto, *The morality...*, p. 1227.

²⁶ P. Hilpold, *Jus Post Bellum and the Responsibility to Rebuild*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443272 (accessed: 18.06.2018); M. Lech, *An Academic Perspective of International Law and International Relations as a New Interdisciplinary Scholarship – Selected Issues*, Special Edition, 2013, Sonderpublikation der Landesverteidigungsakademie, Wien 2013, pp. 52-87.

a response to the doubts that arise when trying to assess individual cases of force. In recent years, there has been a noticeable increase in the number of publications referring to the idea of a fair war when evaluating the validity of contemporary IHL, the use of force or, finally, the analysis of concrete examples of armed activity.²⁷

Therefore, and fifth, in this way of scientific deduction, the subject of legal research undertaken should be primarily taken as a comprehensive assessment of the quality of contemporary international conflict law. In this regard, significant emphasis is placed on the presentation of contemporary law and basic standards of creating a new law of *jus post bellum*, which penalises the transformation from the end of armed conflict to sustainable peace. The scope of research interests includes, therefore, the mechanisms of creation of a modern law of war. It concerns the contemporary existing international law and the tripartite nature of *jus ad bellum*, *jus in bello*, and *jus post bellum*, in accordance with the requirements of the standards currently operating IHL with its specific axiological system of rules and institutions. All these factors will show the essence of this research approach, which is the complexity of the new phenomena of international law characterised by a multi-plane nature and the coexistence of the analysed legal orders. It will prove the formulation of postulates and the legal basis for the establishment of an analysed new legal order.

However, for the above-mentioned considerations dealing with the correct positioning of *jus post bellum* in the system of international law with considered legal orders, there is the broadly discussed complexity of this system in dealing with the problem of putting *jus post bellum* within the scheme of current international law. The present doctrine of *jus post bellum* bring a broad context of analysis. Many international lawyers discuss *jus post bellum* also with configurations behind discussed legal orders.

²⁷ B. Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 'The European Journal of International Law' 1999, vol. 10, pp. 1-22; J. Zajadło, *Humanitarian intervention and humanitarian law: the duty to act cum diligentia maxima*, [in:] M. Lubiszewski, T. Jasudowicz, R. Fordoński (eds.), 'Selected current problems of international humanitarian law,' Olsztyn 2005, p. 66; M. Lech, *Die-NATO Operation auf dem Balkan - eine völkerrechtliche Perspektive*, [in:] P.G. Ertl, M. Lech (eds.), 'Juristische und philosophische analyse angewandten Völkerrechts, Eine Case-Study zur Operation Deliberate Force', 'Schriftenreihe der Landesverteidigungsakademie' 17/2013 Wien 2013, pp. 31-60; M. Lech, *Smart Defense im Rahmen des heutigen Völkerrechts* [in:] G. Ebner (ed.), 'Interkulturelle Kompetenz und Deren Notwendigkeit für Einsatz und Führung', Workshopbeiträge 2013, 'Schriftenreihe der Landesverteidigungsakademie', Wien 2013, pp. 79-96.

Among them, there are relationships of *jus post bellum* with *jus contra bellum*, *jus ex bello*, *international criminal law*, and *jus pacis*.²⁸

Therefore, the present legal research on this new figure of international law shows that not only is the above-mentioned comprehensive assessment of the quality of contemporary international conflict law needed but also a complex analysis at the level of comparative law. In the context of *jus post bellum*, the fundamental question to be asked in the form of comparative law can be formulated as follows: whether, in spite of the diversity of systems, regimes, and legal orders, and taking into account their multidimensional nature, there is unity and universality of law, international law,²⁹ especially in the context of formulating the new normative basis of *jus post bellum*? The proper answer should not give only a dogmatic method but primarily a systemic and functional one leading to the synthesis needed to conduct such research. This legal research will, therefore, show a critical analysis of the new law as the law of the transformation of *jus post bellum*, presented from the perspective of international law.³⁰ The premise of the new legal order proves that the main goal of this law is to achieve sustainable and lasting peace after an armed conflict.

5. Modern *jus post bellum* as a new branch of international law

5.1 Dilemmas in defining the complexity of *jus post bellum* paradigm as a new figure of international law within *bellum justum*

Analysing the prospect of *jus post bellum* as a new figure of international law in the context of dilemmas dealing with its definition, it must be observed, first, that the period of transition from war to peace is not specified as a separate normative paradigm in international law. However, the modern

²⁸ Sh. Sullivan, *Jus Post Bellum: Post War Perspectives*, 'Graduate Liberal Studies,' April 2015, pp. 1-40.

²⁹ J. Gilas emphasises that 'their essence can be determined only on the basis of comparative law', see: J. Gilas, *Prawo międzynarodowe gospodarcze* [International economic law], Bydgoszcz 1998, p. 47.

³⁰ E. De Brabandere, *The Concept of Jus Post Bellum in International Law: A Normative Critique*, [in:] C. Stahn, J. Easterday, J. Iverson (eds.), 'Jus Post Bellum. Mapping Normative Foundations', Oxford University Press, Oxford 2014, pp. 123-126.

development of the law of armed conflict proves that the concept of *jus post bellum* primarily can create such a new legal paradigm, both in the context of JWT and in the context of the contemporary system of international law. It proves that in this way *jus post bellum* might constitute a new branch of this legal order.

In creation of a discussed paradigm, it should be noted that the concept of *jus post bellum* can be based on historical tradition, which may mean that the legal and moral paradigms will not be identical. The theory of morality and legal science are separate from the source of the mutual and reciprocal relationship existing between *jus ad bellum*, *jus in bello*, and *jus post bellum*. Law and morality, however, cannot remain in mutual isolation, and the *jus post bellum* mutual relations existing between the law and morality might be the main basis for creating legal principles and rules of this new department of international law.³¹ Therefore, this situation is very essential in the construction of the shape of the *jus post bellum* framework. This means that where some arguments or points of view for the creation of a new law may be ethically correct, they will not have to be necessarily correct from the legal perspective. This assumption has been very true since the advent of legal positivism, where there has come a strong separation between ethical considerations and legal considerations. This period set the stage for modern international law, with an enormous growth of codified legal rules. This is also true of the laws of war. Questions of war and peace were considered from a purely legal framework, and moral JWT became marginalised. Therefore, the separation is all too complex, slippery, problematic, and vague. Some can then point out these problems because *jus ad bellum* and *jus in bello* in themselves do not necessarily provide a legal basis for settling *jus post bellum* as a state of 'safe and lasting peace'.

Moreover, analysing such a situation, it might also be true that, ethically speaking, there exists an obligation on the part of the international community (however defined) to protect the innocent who has fallen victim to some genocidal war, yet it is quite something else to suggest, particularly without further explanation, that there exists a legally binding obligation to protect many things in law. Again, the same appears to be true for the just war 'tradition'. It is, however, a tradition not in law. The just war tradition existed in moral philosophy and in moral theology, but most

³¹ J.T. Johnson, *Morality and Contemporary Warfare*, New Haven, Yale University Press 1999, pp. 27-38.

lawyers after Grotius do not feel that it was ever of much relevance for legal purposes.

Therefore, looking at the complex and problematic situation dealing with the process of the creation of such a paradigm, the exclusive reference to moral obligations in the theorisation of transitions from conflict to peace fails to recognise the existing net of legal rules and principles in this area. Therefore, with the definition of a new law, it will be essential to establish a framework of a strict and reciprocal relationship between law and morality, which will have a significant impact on the actual definition of the future of *jus post bellum*, created on the basis of the above-mentioned comparative law and analysis of conflict law.

Also reasonable in this situation is to define the modern order of analysed law, which considers the tripartite nature of *jus ad bellum*, *jus in bello*, and *jus post bellum* and which now require operating standards of IHL. The doctrine of international law therefore seeks the appropriate legal and institutional solutions to these challenges. Fundamental issues such as the extraterritorial application of human rights obligations, the responsibility of occupying forces and international organisations, and access to full justice are central to the doctrinal debate on international law.³² This doctrinal debate in international law, which will have a big influence on the definition of *jus post bellum*, concerns also the fundamental problem of establishing this law generally as a new branch of international law when dealing with activity after the end of armed conflict.³³ The problem might happen in case of formulating a time period of *jus post bellum* regulation and positive indication *de lege lata* of specific rules governing only the end of a conflict.

Therefore, now, the most important challenge for the military and peacekeeping organisation becomes the shape of the new *jus post bellum*

³² M. Sassòli, *Jus ad Bellum and Jus in Bello – The Separation Between the Legality of the Use of Force and Humanitarian Rules To Be Respected in Warfare: Crucial or Outdated*, [in:] M. Schmitt, J. Pejic, 'International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein', Brill, Nijhoff Publishers 2007, p. 241; R. Giladi, *The Jus Ad Bellum / Jus In Bello Distinction and the Law of Occupation*, 'The Israel Law Review' 2008, vol. 41, p. 246; S.K. Sharma, *Reconsidering the Jus ad Bellum / Jus in Bello distinction*, [in:] C. Stahn, J.K. Kleffner (eds.), 'Jus Post Bellum, Towards a Law of Transition From Conflict to Peace', TMC Asser Press, The Hague 2008, pp. 9-30.

³³ Ch. Bell, *Post-Conflict Accountability and the Reshaping of Human Rights and Humanitarian Law*, [in:] O. Ben-Naftali (eds.), 'International Humanitarian Law and International Human Rights Law', New York, Oxford 2011, pp. 328-370.

management and recovery after an armed conflict. This complex issue will be important under the rules of this law and its application to the post-conflict situation of the modern era. However, the realisation of this aim will be possible only after defining the legal character of *jus post bellum*, its legal sources, and the regulation scope of this legal order. This is important to underline that following this analysis of the doctrine and practice of conducting warfare, internationalists are moving closer to perceiving each of these categories as autonomous principles of behaviour combined with the maximisation of human dignity. Therefore, the normative theory of *jus post bellum* seems too limited, given the framework for the conduct of war and the situation of armed conflict.

In addition, an evident lack of legal principles and rules has led to a situation in which the concept of international law was conceived as *jus inter gentes*, rather than as *jus gentium*. So far, the legal order was focused on the interests of states and relations between them, and the process of peace-building was based on the recognition of certain states. However, the main objective of the sustainable development of peacekeeping operations has ‘overshadowed’ the political interests of many countries (*Machtpolitik*), conceived in the category of force. Therefore, the actual process of establishing the post-war peace was never codified in the interwar period, and when analysed, the above *jus ad bellum* and *jus in bello* become applicable law.

The complexity of the new figure of international law is also characterised by a multifaceted nature and the coexistence of several legal orders that can be applied in the law of war—the process of transformation—including not only the analysed areas of law but the whole of modern IHL and human rights. In light of the lack of consistency in the occurrence of these legal orders, or to identify the main actors of *jus post bellum*, functioning according to its own principles and rule of law, this situation can promote legal conflicts. Taking these threats into consideration, it is legitimate to establish a specific typology of norms and sources of law and universal principles, bearing in mind the various contemporary legal orders. However, the order of contemporary international law must be paramount in this analysis.

The creation of such a category of law may involve also some risk. *Jus post bellum* can bypass certain functioning legal systems and their structures. This may adversely affect a solution to a post-war conflict in the context of, for example, peacekeeping operations. Unfortunately, there is concern that the category of *jus post bellum* can be blurred by the boundaries of normative human rights and peace. Another challenge

associated with defining *jus post bellum* is the timeframe of the application of this law. One may conclude, however, when analysing *jus post bellum*, that it will be a temporary department of law. For example, today's post-war peacebuilding, after many contemporary, ongoing armed conflicts, in an independent review will lead to a new understanding of *jus post bellum* and its development.

A new definitional element of the new *jus post bellum* will also be a certain group of entities, or rather the addressees of this law. This problem can lead to certain normative dilemmas. A certain legal norm may, for example, be required for the legal regime applicable to peacekeepers while flexible rules may apply to the selection of the forum for liability and post-war justice. However, only time and the changing international realities write the most accurate *jus post bellum* for the 21st century, to the full protection of the international community in the framework of the post-war lasting peace.

5.2 Possible normative conception of *jus post bellum* within the framework of the contemporary law of armed conflict

A normative conception of *jus post bellum* is one of the most important contemporary research problems of the modern science of international law, as well as for its representatives in international practice.³⁴ Numerous publications and the ongoing intellectual debate on this subject show the great importance of this concept in the perspective of a sustainable sanction in a situation after armed conflict.³⁵ Many scholars describing the normative character of *jus post bellum* refer to it as a 'new discipline' or 'new category of international law, which is currently in the process of creation'.³⁶ In this context, contemporary international practice realises that further debate on justice and morality of military action within the international community is impossible without establishing a system

³⁴ L. May, *After War Ends, A Philosophical Perspective*, Cambridge University Press, Cambridge 2012, pp. 12-248.

³⁵ K. Del Mar, *The Requirement of Belonging under International Humanitarian Law*, "The European Journal of International Law" 2010, vol. 21, no. 1, pp. 105-124; Th. Meron, *The Humanization of Humanitarian Law*, "The American Journal of International Law" 2000, vol. 94, p. 239.

³⁶ L. May, *Jus Post Bellum, Grotius and Meionexia*, [in:] J.S. Easterday, J. Iverson, C. Stahn (eds.), 'Jus Post Bellum', Oxford University Press, Oxford 2014, pp. 45-55.

of norms of post-war law, *jus post bellum*, which will enable a smooth transition from the end of armed conflict to sustainable peace.³⁷

However, it is important to stress, looking at contemporary international law, that it is sometimes apparent that there are 'emerging norms' of international law, albeit poorly defined as yet in law, which appear to suggest that there may be a legal responsibility on the occupying power and/or administering power that it should engage in some form of reconstruction of the defeated nation in order to promote a peaceful transition in case of *jus post bellum*. Reconstruction, however, is desirable in many fields, whether political, legal, economic, social or security, to name the obvious ones. There have been so many live 'case studies', if we call these experiments in peace-making such, yet each 'case' is unique in the causes and effects of the fighting, and the experiences of the often large number of parties involved on two or more sides.

The creation of a new law of transformation, which *jus post bellum* means, might take place within the contemporary international legal order functioning as a separate division.³⁸ In this way of analysis, *jus post bellum sensu stricto* cannot be seen only as a kind of complement to *jus ad bellum* and *jus in bello*, basing on *de lege lata* postulates, but first of all, it has to guarantee constructive *de lege ferenda* normative postulates. Modern *jus post bellum* must become an objective and independent structure of international law with the full articulation of rules of conduct concerning the termination of armed conflict and creating the nature of peace in the transformation process. The concept of *jus post bellum* concerns several categories of operating rights. Potential norms and principles can be derived from the principles of many areas of contemporary doctrine of international law, such as human rights, for example, or transitional justice. Therefore, the concept of *jus post bellum* in such a normative construction can contribute greater clarity to the doctrine of international law.

On the other hand, contemporary analysis of the main objectives of normative legal *jus post bellum* also proves that the theory of just war

³⁷ R. Teitel, *Rethinking Jus Post Bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May*, 'The European Journal of International Law' 2013, vol. 24, pp. 335-342; R.P. DiMeglio, *The evolution of the just war tradition: defining just post bellum*, 'Military Law Review' 2005, vol. 186, pp. 116-163; E. Patterson (ed.), *Ethics Beyond War's End*, Washington D.C., Georgetown University Press 2012, pp. 24-256; P. Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 'The European Journal of International Law' 2001, vol. 12, p. 467.

³⁸ M. Lech, *Wojna hybrydowa...*, pp. 86-97.

and political science are definitely ahead of the science of international law and legal practice in this area. In this regard, the new law must meet one of the main doctrinal questions forming *jus post bellum* in its normative shape: who and why is it to serve the peaceful end of the war? This concerns the principles and rules that will apply to the participants of the war who intend to end the armed conflict justly. However, not all participants in such wars have the intention of realising international practice. In this case, breaking the rules and principles of *jus post bellum* will have much greater consequences than the legal systems of *jus ad bellum* and *jus in bello*. Therefore, in the context of this normative situation, there are other fundamental problems of *jus post bellum*: who will be the main actors of *jus post bellum*? Will it be the winner or the international community? Is it the local community? For all these research questions, one will find answers only in the light of positive-rights standards or guidelines of the new law of *jus post bellum* post-war, post-war scenarios' sanctioning.

Therefore, assuming contemporary doctrine, *jus post bellum* itself constitutes a big challenge from a normative point of view and creates a process of modern fine law *jus post bellum* of a tripartite character.³⁹ This newly constructed regime shall take into account *jus ad bellum*, *jus in bello*, and *jus post bellum* in accordance with the requirements of currently existing rules of international law, as absolutely binding *jus cogens*,⁴⁰ forming effective legal obligations *erga omnes*. This situation could build much clearer and new relationships between these three areas of the law of war. The justification for war, especially where humanitarian justice considerations are prominent, will set the stage for higher expectations of humanitarianism, both in relations to how war is waged and the responsibilities of the victors post-conflict.⁴¹

³⁹ C. Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 'American University International Law Review' 2007, vol. 23, pp. 311-347.

⁴⁰ *Jus cogens* norms are those accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The principle of *jus cogens* is to be found in Article 53 of the Vienna Convention on the Law of Treaties (VCLT), stating that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

⁴¹ Ch. Tomuschat, *Human Rights and International Humanitarian Law*, 'The European Journal of International Law' 2010, vol. 21, no. 1, pp. 15-23; A. Szpak, *O wykładni międzynarodowego prawa traktatowego i zwyczajowego (z uwzględnieniem międzynarodowego prawa humanitarnego)* [On the interpretation of international treaty and customary

The essence of this approach is then the full complexity of this new phenomenon of international law. This legal order shall be characterised by the coexistence of multiplexity and the several legal systems that can be used in the law of war, containing not only the analysed field of law but the whole regulation of contemporary IHL and human rights. However, first of all, it should concern the norms of law of a just and stable peace.

The subject matter will determine whether, formally and materially, it is appropriate to isolate a set of quality norms of international law that would regulate the conduct of the subjects of *jus post bellum* in the context of the end of armed conflict and the building of a basis for peace after an armed conflict. A comprehensive assessment of quality norms of international law of armed conflict will form a specific typology of norms *jus post bellum*. This legal process will be appropriate to establish sources of this law and its universal principles, bearing in mind the various contemporary legal orders. However, the order of contemporary international law must be paramount in this analysis. In this way, the abovementioned legal process will create clear mechanisms of the modern law of war *jus post bellum* obviously based on the specific axiology system of rules and institutions.

In this context, besides international legal norms forming *jus post bellum*, the importance in the process of construction of a specific axiology system of these norms, principles and institutions will be played by the norms of contemporary, existing IHL. These norms would formulate the basis for the future fundamental principles of *jus post bellum*, which will have definitely a modern character compared to general international legal regulation. All these elements will come together to build the complex legal order of *jus post bellum*. They all are developed in the course of the evolution of the customary laws of war, subsequently included in international treaties and repeatedly cited in the decrees and judgments of international and domestic courts, the aforesaid rules constituting the foundation on which the entire structure of humanitarian law is built.⁴² Nowadays, the following norms are identified and universally acknowledged as the underlying principles of IHL: the principle of humanity, the principle of military necessity, the principle of distinction and the principle of proportionality.

law (including international humanitarian law)], 'Ruch prawniczy, ekonomiczny i socjologiczny' 2008, vol. LXX, no. 1, pp. 73-86.

⁴² I. Etzersdorfer, *Krieg, Eine Einführung in die Theorie bewaffneter Konflikte*, Wien-Köln-Weimar, Böhlau Verlag 2007, pp. 34-55.

With the same reasoning, contemporary literature suggests that it is time to take the concept *jus post bellum* seriously, both in the context of JWT and within the legal community.⁴³ Therefore, this issue is analysed not only in the light of current contemporary international law but also, first of all, it can be explained by the guidelines of this law and some structural grounds that are rooted in the development of contemporary international law aiming for sanctioning world peace.

6. The future of *jus post bellum* doctrine in international justice and law — final remarks

The complex analysis of the principles and factors for bringing about justice after wars, *jus post bellum*, shows that just peace is not only the absence of war (armed conflict) but a much more demanding situation—indeed the biggest challenge of the international community. This analysis of a potential modern branch of IHL has shown a number of steps for analysis. Essential are philosophical and legal ideas, then strategic considerations, which are necessary for the practical foundations of post-war justice. However, the all-important considerations dealing with *jus post bellum* as a new branch of IHL show that the main aim of *jus post bellum* is the concept of enacting and the justification of a new transformative international legal order of armed conflict as part of a continuation of JWT. Moreover, international state practice realises that further debate on justice and morality of military action within the international community is simply impossible without establishing legitimate post-war law, *jus post bellum*, which will enable a smooth, safe and sustainable transition after the end of armed conflict. Unfortunately, the central problem is the vagueness and lack of clarity of the *jus post bellum* doctrine. This must be overcome by international consensus, taking advice from legal and ‘moral philosophy’ (ethical) experts.

⁴³ C. Murphy, L. Radzik, *Jus Post Bellum and Political Reconciliation*, [in:] E. Edenberg, L. May (eds.), ‘Jus Post Bellum and Transitional Justice’, Cambridge University Press, Cambridge 2014, pp. 305-325; D. Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation*, Oxford University Press, Oxford 2012, pp. 14-226; D. Schindler, *International humanitarian law and internationalized internal armed conflicts*, ‘International Review of the Red Cross’ 1982, vol. 230, p. 255.

Therefore, a legal analysis that fully includes ethical considerations allows for the formulation of complex conclusions dealing with the perspective of *jus post bellum*. Law and morality will be the basis for creating legal definitions of many factors. In this way of thinking, this modern branch of IHL should tentatively create a new legal paradigm, both in the context of JWT theory and in the context of the post-1945 system of IHL. With the established definition of this new law, it will be essential to create the framework of a strict and reciprocal relationship between law and morality, which will have a significant impact on the established definition of the future of *jus post bellum*. The present international practise will, however, write its own scenario, although anticipating surprises is a 'new norm'.

The complexity of the modern understanding of *jus post bellum* will have a tripartite character within the framework of contemporary JWT. In this case, breaking the rules and principles of *jus post bellum* will have much greater consequences than in the legal systems of *jus ad bellum* and *jus in bello* or, when analysed in the contemporary doctrine of IHL, *jus pacis*, *jus contra bellum*, *jus ex bello*, or even international criminal law. However, it must be underlined that modern *jus post bellum* cannot be seen only as a kind of *addendum* to *jus ad bellum* and *jus in bello*. A comprehensive assessment of the coexistence quality of the norms of IHL of armed conflict and several legal systems might form a specific typology of norms *jus post bellum* with near-binding *jus cogens* and effective legal obligations *erga omnes*. Therefore, this process should legitimise the establishment of a specific typology of norms and sources of law and universal principles, bearing in mind the variety of contemporary legal systems and jurisdictions. However, the order of contemporary IHL must be a starting point for this analysis. Therefore, *jus post bellum* should also be consistent with JWT as a whole, forming a coherent body of norms that should then be applicable for the political realities of today and effective in limiting the many negative aspects of war.

The present rethinking of *jus post bellum*, especially in an age of global transitional justice, will play an important role nowadays in preparing for justice after the end of a war. Therefore, the basic element of the definition of *jus post bellum* as a new paradigm of IHL must become an objective and independent structure of international law, in which the articulation of rules of conduct concern the fundamental principles of *jus post bellum*, bringing about the termination of armed conflicts and creating peace as a result of the transformation process.

The truly fundamental question of *jus post bellum* to be asked can be formulated as follows: whether, in spite of the diversity of different legal systems, regimes, and legal orders, and taking into account their multidimensional nature, can there be any unity and universality of IHL, especially in the context of formulating a new normative basis of *jus post bellum*? The broad answer to this question will bring further legal research on *jus post bellum* as a new paradigm of IHL, which should be continued and presented at the level of comparative-law and conflict-law analysis. The legal research method on *jus post bellum* as a new figure of IHL will be complex and dogmatic, but primarily systemic and functional, leading to synthesis on the level of general international law, comparative law, and the comprehensive assessment of international conflict law.

Finally, well-established peacekeeping organisations—mainly professional armies—might become new *jus post bellum* management and recovery systems after an armed conflict. Therefore, *jus post bellum* and the nature of peace should consist of a complex legal order of transition guaranteeing a stable, just, safe, and lasting peace after war. It also has to be remembered that while being internally coherent and when broadly argued, *jus post bellum* considerations can add to JWT and tradition, but only to a limited extent in restraining the truly horrific effects of war.⁴⁴

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⁴⁴ L. Peperkamp, *Jus Post Bellum and the Nature of Peace...*, p. 272.

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