

## After the Battle: Can We Restore Justice in Property and Cultural Heritage? Report of the 2014 Jus Post Bellum Conference at the Peace Palace

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Nattier - Allegory of Justice Combatting Injustice

In June 2014, The Grotius Centre at the University of Leiden brought together three panels of academics and practitioners in the “Jus Post Bellum” Project. The project The conference took place, fittingly, in the hallowed Old Library of the Peace Palace, at the Hague was conceived by a team of eminent professors

and academics (Professors Carsen Stahn, Jens Iverson, and Jennifer Easterday) to explore important issues that arose from regions emerging from conflict. The second panel contained three sub-panels that focused on property restitution in the context of displaced homes, cultural heritage & investment. This article summarises

some of the presentations from the 1st, 2nd and 3rd sub-panels.

### **Jus post bellum: concept and practice**

The keynote address was delivered by Rhodri Williams, Rule of Law Program Manager for the International Legal Assistance Consortium (ILAC) in Stockholm, and an Associate of Inclusive Development International (IDI). For Williams, jus post bellum represented the “body of legal and ethical norms that govern the transition from armed conflict to a just and sustainable peace”. It comprises a functional framework, an interpretative code, and a system of rules and principles. Understanding the history of jus post bellum and its development is also instrumental in appreciating and influencing its direction. Jus post bellum, Williams explained, usually starts with a discussion of the “just war versus ethical war” debate and the associated question: “under what circumstances do we have a right to go to war?” Although jus post bellum is linked to other discourses that have been more extensively codified, being the jus ad bellum (international law of intervention, and law of aggression) and the jus in bello (international humanitarian law and the use of force), jus post bellum is nevertheless conceptually distinct. While jus ad bellum and jus in bello are concerned with the validity of the entry into, and conduct of, war, jus post bellum is concerned with the transition to peace. This may have different and sometimes conflicting goals to jus ad bellum and jus in bello. Furthermore, the transition to peace is concerned not only with the restitution of property and amelioration of investment conditions, but with a wider aim: the movement from chaos or dictatorship to democracy, and the rule of law. The result should be to make less likely a violation of, or a return to, the devastation of fundamental human rights. Williams pointed out that while there has been much debate on the interpretative approach, it is not enough to identify the legal framework of jus post bellum and its effects. Rather, the framework itself must accommodate the broader principles of:

1. Proportionality;
2. Accountability of the international community;
3. Accountability to the people most affected (i.e. a fiduciary duty).

According to this “new understanding” of jus post bellum, we must ask ourselves: who is the key stakeholder? Who will demand jus post bellum, and who will drive its development? Viewed from the stakeholders’ perspectives, the jus post bellum creates a sum that is greater than its parts. Similarly, within the so-called body of “restitutionary advocacy”, Williams pointed out that the need to attain a post-conflict justice highlighted a deficit that arises between the law and its implementation. Given that it may be too ambitious to negotiate and pass a new treaty to fill this gap, the intermediate solution is to find generalisations to address the problem.

### **The Jus Post Bellum Project: Discussion Sub-Panels**

The first sub-panel focused on the restitution of property to displaced persons during the post-conflict period, while the second and third sub-panels discussed, in turn, the preservation and repatriation of cultural heritage, a topic that presented a special type of dilemma within the context of jus post bellum, and the role of investment treaties in jus post bellum.

#### **Sub-Panel One: Property Restitution and Administration**

The sub-panel was introduced by Jose Maria Arraiza, former Head of the Property Rights Section in the OSCE Mission in Kosovo. In it, the remedies for persons displaced from their homes in a post-conflict situation were discussed. Property restitution is a critical issue, Arraiza explained, because losing a home is comparable to that of losing a loved one. There is, therefore, no such thing as a “just peace” in such circumstances. This report focuses on the continuation of Williams’ keynote speech, and Massimo Moratti’s presentation.

### **Jus post bellum and property restitution: The Pinheiro Principles**

Williams’ second presentation concentrated on one of the internationally known solutions advanced to address the property restitution implementation problem: the United Nations (UN) Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles) of 2005. Principle 2 states fundamentally that “all refugees and displaced persons have the right to have restored to them any housing, land or property of which they were

arbitrarily or unlawfully deprived...” Although not an official document of the UN, the Pinheiro Principles set out four important rights of affected persons to post-conflict restitution of their property:

1. The right to property (adjudication within legal systems);
2. The right to housing and security of tenure;
3. The right to be free from discrimination with respect to property;
4. (The emerging) right to substantive reparations.

Number (4) is, incidentally, a topic that is prominent in human rights discourse and the discussion of the associated “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005”, or the Van Boven Principles.

While the Pinheiro Principles focus on the need to recognise displaced persons’ right to property, Williams explained that they take mostly a corrective approach. Viewed as such, the Principles are too simplistic for the complex restitution cases that sometimes arise in a post-conflict situation. Restitution is provided as the default rule. Only where restoration of property is impossible, is compensation resorted to. It is a strong statement, and one that finds favour in the ILC Draft Articles of 1996, which likewise give primacy to the restitutionary remedy unless it is “impossible” in the particular case. The use of the term “impossible”, however, may be too ambitious and is too narrow. The apparent conclusion is that property must be “obliterated” in order for restitution to be ineffective. Many cases, however, are much more nuanced; for example, where physical conditions for property’s return may not be conducive to restitution, in protracted conflict situations. Second, property is almost always occupied at the time of the claims, which creates issues as to who has the stronger claim. Sometimes, compromise solutions may prove beneficial, such as negotiating a right to safeguard property or keep it on trust for the rightful owner, until conditions become appropriate for its return. This allows the possessor to enjoy it and the owner to be assured of respect, and that its rightful claim to the property has not been extinguished.

### **Case study: the Greek Cypriots**

In the next part of his keynote address, Williams cited Antoine Buyse, an associate professor and senior researcher at the Netherlands Institute of Human Rights, who said that the claim to property restitution is always strongest when it combines the right to property with the right to possession. In the case of the Greek Cypriots, who were expelled from Cyprus in 1974, the property that was left was allocated to the Turkish Cypriots. In that case, the European Court of Human Rights (ECtHR) expanded the definition of the “right to a home”, to accommodate the strong claims of the Greek Cypriots. Normally, to fall within Article 8 (Right to respect for private and family life, and home) of the European Convention on Human Rights (ECHR), the “home” must be lived in. However, in the Cypriot case, the properties in question were considered to be “homes” in the legal sense of the term, some forty years after the Cypriots fled them. The decision of the Turkish Cypriot Property Commission was recognised by the ECtHR, which ordered Turkey to make amends for the 1974 invasion and the island’s subsequent division. However, even in the ECtHR’s decision, the obligation was to make compensation, and only in exceptional cases, would restitution have been ordered. In other words, the Pinheiro Principles were rebutted, and the “impossibility” concept was not applied. There were two reasons for this. First, the Court held that the parties were collectively responsible for the failure to provide a remedy. Second, the focal point of Article 8 was switched to a “residence” interest. The obligation to make restitution necessarily changes with the passage of time. Williams pointed out, also, the Pinheiro Principles also failed to address the issue of how to combat property misdistribution. In other words, how does one deal with the re-allocation of property that, even prior to the official “cut off date” for reparations purposes, was subject to discriminatory treatment against those who may have had a greater claim than the so-called eventual “rightful owners” for legal purposes? The Pinheiro Principles did not contain guidance for such cases.

Therefore, restitution regimes must be accompanied by a meaningful process of land reform, and locally applied legislation. In the Columbian situation, for

example, key demands of displaced peoples were met with the implementation of legislation dealing with restitution. But while the Pinheiro Principles may be wounded, according to Williams, they were not dead. They focus the attention on property issues in the post-conflict situation, and place them on the map, if nothing else. However, restitution is not necessarily a standard component of a just outcome. It was correct only if there existed a coherent justification for it. Crucially, the concept of *jus post bellum*, in the context of the interpretative approach, must have an internal constituency, and it must provide the tools and create a basis for post-conflict justice.

#### **Case study: the Kosovo and the Bosnian conflicts**

Moratti focused on the Kosovo and the Bosnian conflicts. An international presence was prevalent in both conflicts, and the solution of property disputes was given special consideration. Moratti emphasised that it was important to look beyond the mere percentage and to gain a better understanding as to what the figures actually meant. In such cases, proving ownership of the property, where it was thought to be the initial hurdle, was not the main issue. In Bosnia it was perceived that the pre-conflict property tenure situation was fair. Therefore, it was possible to introduce one cut-off date, 1991, used as the baseline to start the property restitution process. In other words, those who possessed property legally in 1991, and lost possession during the conflict, were entitled to repossess it. In Kosovo, it was more complicated. In the period between 1989 and 1999, it was Albanians who mostly lost their properties, due to discrimination, while after 1999 it was mostly non Albanians who lost properties because of the armed conflict. The process of implementation, Moratti pointed out, was often a greater issue. While domestic or international authorities are entrusted both with deciding and implementing claims, there is no uniform way of accounting for property claims that have been determined, and whether or not the solution is in accordance with applicable human rights standards. Human rights standards currently dictate that either restitution or compensation must be awarded. While in Bosnia 93% of the properties were returned to the pre-conflict occupants, in Kosovo it was only between

30% and 55% of property disputes that were actually solved in accordance with these standards. In all other cases, property disputes were actually closed or deferred, but not actually resolved. The conclusion is that while in Bosnia the local authorities were accountable for their work to a monitoring mechanism created by the international community, in Kosovo, the presence of a UN body to resolve property disputes did not actually result in a more equitable solution.

#### **Sub-Panel Two: Cultural Heritage**

Five themes emerged from cultural heritage discussions on which this author and other speakers presented papers in the course of the second sub-panel.

1. What is cultural heritage? Is there a universally accepted definition?
2. Who owns cultural heritage? Does the burden of proof present insurmountable hurdles?
3. What does ownership imply? Is it necessarily a return of the property in question?
4. How do ownership rights interact with third party claims (for instance, foreign investors)?
5. How do you place a value on cultural heritage, and its preservation?

The present author discussed the issue of repatriation of cultural heritage from Iraq under international law; Maria Papaioannou, the UN and the general responsibility to protect our common heritage; and Elisa Novic, the case of Bosnia-Herzegovina in the treatment of intentionally damaged cultural heritage. This report focuses on some important observations made by Arraiza, who talked about the Kosovo conflict and its effect on cultural heritage.

#### **Case Study: the Kosovo conflict**

By way of an example, Jose Maria Arraiza talked about the Kosovo conflict and its effect on the preservation of cultural heritage. First of all, Arraiza claimed that cultural heritage protection in the post-conflict situation is intimately related with *jus post bellum*, due to its links with restitution, rebuilding and reconciliation processes. Ensuring a fair balance between the protection of property rights and cultural heritage preservation and promotion in highly divided societies is essential. This is because memories of the violent past, added to the

unification of national symbolism and the will to achieve an exclusive ethnic hegemony over land, and the strong emotional impact of displacement, together impede social cohesion. Arraiza quoted Frank Schouten, who wrote that heritage “is not the same as history. Heritage is highly processed through mythology, ideology, nationalism, romantic ideas or just plain marketing into a commodity”. Arraiza then turned to explain the ad hoc mechanism introduced in Kosovo for the protection of Serbian Orthodox heritage. The arrangement is based on “Special Protective Zones”, which are legally defined areas around religious and other sites where the use of property is controlled. Disputes over such restrictions are handled by special multi-stakeholder committees at central and local levels involving the Serbian Orthodox Church, and local and international authorities. He explained the case of the village of Rudesh/Rudes (Istog/Istok) where an overprotective approach to cultural heritage directly clashed with displaced persons’ rights. As a result of the inclusion of a minority community (Kosovo Roma/Ashkali and Egyptians) in a destroyed quarter in the perimeter of a “Special Protective Zone”, on-going return initiatives were abandoned and displaced persons relocated.

### **The importance of jus post bellum principles for cultural heritage protection**

The Jus Post Bellum Project therefore links in with cultural heritage protection at the foundational level: it is the preservation of cultural property viewed as an issue of identity of a population or a community, and not just a right to tangible property. In this way, the “ownership” and the “valuation” dilemmas referred to above, arise. Cultural heritage protection can sometimes clash unavoidably with the objective of property restitution and investment protections. While the dispute mechanisms established for investment protection under treaties exist and are well-used, and protection of physical property is also fairly established under human rights legislation, there are no equivalent protections under conventions for the preservation of cultural heritage, such as the UN World Heritage Convention. This is a point that Valentina Vadi makes in her post-doctoral study, “Cultural Heritage, in International Investment Law and Arbitration”

(Cambridge University Press, 2014). Then there is the issue of the underlying meaning of certain sites, and the tension they can create on religious and ethnic grounds, including with minority communities. In order to protect culturally significant monuments, for example, a post-conflict policy must ensure that these monuments are symbols of beauty and not just of hatred and division. Finally, education on the value of cultural diversity and cultural heritage, Arraiza explained, is crucial. It is not about denying what happened, but rather, accommodating history within the folds of memory.

### **Sub-Panel Three: Investment Treaty Arbitration**

The question that was explored by the third sub-panel was whether investment treaties were likely to facilitate or hinder the transition to peace, and whether a contextual and holistic approach to post-conflict property claims from the investment treaty angle should be considered. The issue of “odious debt” and financing in post-conflict times and the interaction with jus post bellum were also explored. This report focuses on some of the general observations made, taken from a collective appreciation of the individual presentation. The question of whether investment treaties facilitate the transition to a “just peace” has no concrete answer. Given that one has just established that there is often no such thing as a “just peace”, one is then presumably led into a logical thicket. However, to progress the analysis, as a preliminary exercise, one can discern two levels of interaction between treaty law and jus post bellum: on (i) the macro-economic level and (ii) the micro-economic level. The economic development of a country depends on foreign direct investment (FDI). Investment treaties attract FDI. There is a link between peace and FDI. However, the nexus between FDI and peace has mostly been recorded with respect to international conflicts. While, on the localised, micro-economic level, it can be argued that there could be more emphasis on the correlation between FDI and investment treaties in the context of internal conflicts, or civil wars.

Second, the obligation to make reparations in the context of treaty law and jus post bellum is fundamental. There are sensitive issues that can arise, also, in the interplay between those with a legitimate

right to obtain compensation for their expropriated investments, and States with an equally justifiable claim to protection of cultural heritage and historical sites. This is an important issue that Valentina Vadi explores in her book. Again, a division may emerge in terms of approach, between actions against the government by an individual, and actions between governments. Similarly, the obligation to make compensation presents a challenge between competing interests. Specifically, it is vital to ensure that the financial burdens on a country do not make the transition from conflict to peace impossible. Certain questions can emerge from the analysis of the effect of investment considerations on the Jus Post Bellum Project. First, how may one address the problem of awards that are too high? The well-known case of *CME v Czech Republic* case comes to mind, but there are others. Second, how does one find a tribunal that is sufficiently impartial but that also has sufficient knowledge and expertise in relation to the specific case at hand? There are also various traps and escape routes available for a tribunal to apply to a case, such as the “public policy” exceptions, and restrictions imposed by the formal mandate of their instructions. Where did investment treaties sit within the international law domain? Notwithstanding certain of the acknowledged ideological tangles, it is important to take a holistic approach and to cultivate an awareness of the entire web of potential victims when considering investment treaty claims that involved jus post bellum. A de-localised approach fails to appreciate the impact that treaties may have on the whole of the surrounding landscape. In order to combat the recent criticisms of arbitration as having too much “tunnel vision” as a method of dispute settlement in the investment sphere, one should look beyond the intentions of the parties alone and to the wider environment, one in which interests should be sought to be balanced.

### Closing remarks

To bring an end to the discussions, Carsten Stahn provided some closing observations:

1. In some circumstances, a deviation from the strict and traditional “restitution-based” approach of the Pinheiro Principles is justified, where compensation or another solution provides a more just outcome for the

parties concerned.

2. The principle of trusteeship may sometimes solve the tension between true ownership of property by one party and continued “adverse” possession of it by another. In this way, legitimacy can be protected in post-conflict and protracted conflict periods.

3. The principle of leniency, which was explored in the final panel, demonstrates that excessive reparation should not be awarded when it comes to quantifying, financially, the value of “damage” and “loss”. Different approaches in investment law should be considered by tribunals, including equitable considerations, in the effort to reconcile justice with a need to prevent a country being crippled by an overly burdensome duty to make reparations.

4. Jus post bellum may also have a certain procedural utility. In other words, deferred payments may provide a solution, where debts are owed, so as to avoid the need to make unwanted trade-offs.

It was clear that in the space of a single day, it would not be possible to distill the many and complicated components of post-conflict property allocation into one acceptable solution for all stakeholders affected. However, we can at least all agree on one thing. Injustice does not end when the weapons are put down. It is up to the international community, as well as domestic powers, to ensure that it is eradicated, amidst the dust and chaos of the “after-war”.

### *About the Writer*

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