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Right to Land, Housing, and Property

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I. Introduction

In post-conflict situations, there is growing concern for the question of safeguarding the right of refugees and displaced persons to return to their homes, land, and property. A clear example of this trend is the adoption, in November 2016, of the peace agreement between Colombia and the Fuerzas Armadas Revolucionarias de Colombia (FARC) after 52 years of internal armed conflict, in which the first issue addressed was comprehensive land reform. This considered that access to land, the transformation of the countryside, and the development of agriculture create welfare for the rural population and contribute to building stable and lasting peace.

In this context, the adoption of the Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons by the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations, in 2005 (Pinheiro Principles),[1] was an important step forward, in order to provide further guidance on the effective implementation of programmes and mechanisms for the restitution of housing, land, and property. The right to land cannot be regarded as a universally recognized human right, but land is related to other human rights such as the right to adequate housing, the right to food, the right to health, the right to self-determination, the right to participate in cultural life, the right to water, and the right to work. The jurisprudence of regional bodies for protection of human rights in the Inter-American and African system has dealt with issues of land in relation to the rights of indigenous peoples, including the right to life, property, and many economic, social, and cultural rights.

While the right to property and the right to housing are expressly set out in various international human rights instruments, post-conflict regions face similar problems arising with the right to land. That is why they are treated together in this paper. The right to property is often associated with certain Western and liberal values that are not necessarily found in other parts of the world,[2] which explains why the 'right to private property' is absent in the

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[1] Sub-Commission on the Promotion and Protection of Human Rights, 'Principles on housing and property restitution for refugees and displaced persons', Final report of the Special Rapporteur, Paulo Sérgio Pinheiro (28 June 2005) UN Doc. E/CN.4/Sub.2/2005/17.

[2] Miriam J. Anderson 'The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (The Pinheiro Principles): Suggestions for Improved Applicability' (2011) 24 *Journal of Refugee Studies* 305.

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most important international human rights treaties (including the International Covenants of Human Rights). Accordingly, in this contribution the term 'right to land, housing, and property' will be used to address these issues in a broad sense, in order to include the different legal systems. While the rights to housing and land are intended to ensure that every person has a safe place to live in peace and dignity (including non-owners), the right to property aims to protect the rights of owners, especially from deprivation of their homes or goods. In summary, treatment of housing, land, and property in post-conflict situations is complex and does not have a fixed solution which covers the restitution of land and property, with economic compensation or offering an alternative house or land, where restitution is not possible. In any case, securing access to land is a crucial factor in the recovery and reconstruction of a country after violent conflict[3].

As a result, the right to land and property should merit special attention, particularly within the *jus post bellum* discussion.[4] This is for two main reasons: firstly, as mentioned above, the right to land contributes to the enjoyment of other human rights and helps victims of conflicts to secure a place to live, to grow food and earn income and, at the same time, enables people to rebuild economic and social relationships[5]. Secondly, the right to land can be linked to positive peace, a concept that goes beyond the mere absence of violence, and which since the 1960s has been understood from the peace research approach as a necessary condition for the establishment and consolidation of a true, just, and lasting peace.[6] This interpretation, in terms of the *jus post bellum* debate, goes beyond the mere absence of violence, which means more than a 'mere exit' of the conflict.[7] Therefore, in a context of conflict resolution and *jus post bellum*, strengthening the right to land, housing, and property (understood as a legal implementation of the principle of positive peace) can be an important component in attaining a just and sustainable peace.

This essay seeks to examine to what extent adequate protection and guarantee of socio-economic rights—such as the right to land, housing, and property, in post-conflict settlements—contributes to a just and lasting peace, understood also as positive peace. Section II explores the evolution of the concept of peace, introducing the concept of positive peace and the values that are associated with it. Section III and IV examine the treatment of socioeconomic rights in post-conflict situations from the *jus post bellum* and transitional justice perspective, focusing on the right to land, housing and property as one of the key elements for reconstruction and lasting peace. At least, the conclusions show that positive peace and addressing socio-economic rights in a post-conflict context appear jointly, like two sides of the same coin, to comprise an important principle of the *jus post bellum* that contributes to just and sustainable peace.

[3] FAO, 'Access to rural land and land administration after violent conflicts', FAO Land Tenure Studies, Rome, 2005.

[4] Senjou Kang, 'Post-conflict economic development and sustaining the peace', in David T. Mason and James D. Meernik (eds), *Conflict prevention and peacebuilding in Post-war societies: Sustaining the peace* (Routledge 2006).

[5] FAO (n 3).

[6] Heidi Burgess and Guy M. Burgess, *Encyclopedia of conflict resolution* (ABC-CLIO 1997) 233–4.

[7] Dominik Zaum, 'The Norms and Politics of Exit: Ending Post-Conflict Transitional Administrations' (2009) *Ethics & International Affairs* 189.

II. From Negative Peace to Positive Peace: Building a Just and Sustainable Peace

The definition of 'peace' has been long discussed and that is why this paper will examine, briefly, the evolution of this concept towards the notion of a just and lasting peace. To this end, the definition of peace presents two characteristics: difficulty and importance. The difficulty is due to the huge number of meanings and dimensions that one can find behind the concept. The importance is because of the relationship that peace has in the 'war-and-peace' debates.[8] Finally, the definition of peace will be framed in the discussion of *jus post bellum*, stressing the need to promote a positive peace[9].

The starting point for a notion of peace may be the etymological one, which relates peace to social construction arising from a social covenant,[10] and gives rise to the *pax-pactum* conception.[11] Moving forward, it is interesting to highlight the proposal that Christopher Pieper sets up in the *Encyclopedia of Violence, Peace and Conflict,*[12] where the author distinguishes between a descriptive and a prescriptive definition of peace. The first notion considers only the material and formal conditions needed to define peace, that is, the mere absence of violence and hostilities, or a non-war state. In this regard, it is noted that if war is usually defined positively, peace is defined (as a first approach) as the negative of war, that is: as those times when there is no war, understood as political confrontation through armed struggle between two similar groups[13] or, along similar lines, as, 'more or less lasting suspension of violent forms of rivalry between political units'.[14] Thus, while war has been defined as the strong concept of the equation,[15] peace appears at first as the dependent concept. In short, and in the term of Thomas Hobbes, the concept of (negative) peace can be defined as 'the time that is not war'.[16]

The negative notion of peace (peace as non-war) has been advancing and expanding to include other elements, such as welfare, justice, individual peacefulness, and social stability, which has resulted in a reconfiguration of the concept of peace. From this perspective, the prescriptive notion of peace includes new aspects and has its own meaning; it becomes a non-dependent value. As a result of this process of adding new dimensions and conditions, a concept of positive peace emerged,[17]

The evolution of the concept of peace can be found in the classic work of Quincy Wright, *A Study of War*, where the author describes peace 'as the condition of a community in which order and justice prevail, internally among its members and externally in its relations with other communities'.[18] This definition contains two important aspects: on the one hand, the

[8] Martin Caedel, *Thinking about peace and war* (Oxford University Press 1987).

[9] Robert E. Williams Jr and Dan Caldwell, 'Jus Post Bellum: Just War Theory and the Principles of Just Peace' (2006) 7 *International Studies Perspectives* 309.

[10] Duane Cady, 'Backing into Pacifism' (1984) 10 *Philosophy and Social Criticism* 174.

[11] In other words, peace is built on the basis of dialogue between humans and the potential capacity to reach agreements (peace pacts). An alternative to the traditional, hegemonic and realistic perspective of *si vis pacem para bellum*.

[12] Christopher Pieper, 'Peace, Definitions and concepts', in Lester Kurtz (ed.) *Encyclopedia of Violence, Peace and Conflict* (Elsevier 2008) 1548–57.

[13] Norberto Bobbio, *El problema de la guerra y las vías de la paz* (Gedisa 1992) 160.

[14] Raymond Aron, *Paix et guerre entre les nations* (Calman-Levy 1962) 192.

[15] Norberto Bobbio, *Teoría general de la política* (Trotta 2009) 549.

[16] Thomas Hobbes, *Elements of law, natural and politics* (Barnes & Noble 1969 [1650]) I, 14, and 11.

[17] David Cortright, *Peace: a history of movements and ideas* (Cambridge University Press 2008) 6.

[18] Quincy Wright, *A study of war* (University of Chicago Press 1942) 174.

relevance of 'order' as something related to law (at the national and international level); and, on the other hand, the importance of justice. Therefore, the definition of peace is conditioned by the content and meaning that is given to the concept of justice. Later on, Johan Galtung, at the end of the 1960s, introduced an epistemological shift within international studies through developing a different conception of conflict, and, as a result, a redefinition of the concepts of peace and violence, thereby producing one of the first, and most important, impacts of peace research as a scientific discipline.[19] As a result of this, the concepts of positive peace and negative peace will be explained together and will be clearly linked to a specific definition and characterization of the notion of violence, based on the redefinition of the concept of conflict achieved by the peace research studies.

A. Redefining Conflict: Direct Violence, Structural Violence, and Cultural Violence

For decades, even centuries, conflict was defined and understood as something to avoid; as something bad, in itself. Regarding this interpretation, peace research studies have developed a different version of conflict which has been the one used in the social sciences.[20] That is, a perspective that interprets conflict as something natural and inherent to human communities and therefore not strictly with negative implications. It is a different conceptualization of conflict, based on a positive and creative perspective. In other words, a different understanding of conflict based on Arendt[21] and Habermas[22] perspective of politics and the human condition. This proposal runs counter to the antagonistic proposal of Carl Schmitt (built on the friend–enemy dichotomy) and the classical Thomas Hobbes' realistic perspective. In this context, and also drawing on peace research studies, the concept of violence will also undergo a redefinition based on new dimensions to consider:[23] direct violence, structural violence, and cultural violence. Three forms of violence that, later, will allow a better understanding of the concepts of negative peace (linked to direct violence) and positive peace (linked to structural and cultural violence).

The first type of violence, direct violence, refers to physical violence. This could be defined as the violence exercised by a group of individuals over another group (or an individual over another individual) through any type of instrument, means or technology. That could range, for example, from using physical force to the use of drones.

The second type of violence, indirect violence, includes structural (or institutional) violence and cultural violence. This second type of violence, with two different expressions, could be defined as that violence 'that makes humans want to harm one another without a

[19] Johan Galtung. 'Violence, Peace and Peace Research' (1969) 6 *Journal of Peace Research* 167. Last contributions from peace research regarding the definition of the concept of peace, working on the imperfect peace concept. A new point of view based on the interaction between negative and positive visions. A hybrid version that places the debate on another level of discussion considering conditions of social and political conflict, which is a realistic arrangement that takes into account the possibilities of building effective peaceful scenarios. See also Chapter 4 in this book.

[20] Johan Galtung and Charles Webel, *Handbook of peace and conflict studies* (Routledge, Taylor and Francis Group 2007).

[21] Hannah Arendt. *The human condition* (University of Chicago Press 1998).

[22] Jürgen Habermas, *The Theory of Communicative Action* (Beacon Press 1984).

[23] Johan Galtung. 'Cultural Violence' (1990) 27 *Journal of Peace Research* 291.

direct confrontation or even will to harm'.[24] Thus, structural or institutional violence refers to those structures and social relations that hinder the development of the potential capabilities of each individual. So, there is structural violence as a result of a 'difference between the potential and the real'.[25] Meanwhile, cultural violence refers to legitimating systems, speeches, and ideologies that justify (and support) the existence of direct and structural violence.[26] Consequently, there are three types of violence that will complete the redefinition of conflict and the concepts of negative and positive peace developed by the peace research tradition.

B. Positive Peace

In this context, positive peace must be placed at a higher level than negative peace and direct violence. In fact, the concept of positive peace (and therefore also of structural violence) emerges within peace research as a result of efforts to understand the conflict in all its features. A need produced by the classical explanations of conflict and violence (Clausewitz[27] or Morgenthau,[28] for example) being seen as insufficient to understand conflict and the 'war-and-peace' debate.

Nonetheless, one might wonder about some possible scenarios of direct violence without structural violence. Two examples can be put forward: the case of extreme violence against a particular ethnic group, and an episode of confrontation within the borders of a state that, despite having consolidated high levels of welfare thanks to an efficient system of redistribution of wealth, harbours an explicit armed conflict between organized groups. In the first case, the literature that supports the concept of positive peace (and therefore of structural violence) will refer to the concept also as cultural violence, understood as the dissemination of a speech or extension of a public opinion that legitimizes the use of violence. In this sense, cultural violence will become part of the structural component. On the other hand, in the second case, the answer from the peace research approach would insist on the existence, even if it was in the sphere of the latent, of some kind of structural conflict that was curtailing the free development of the capacities of each human being (such as national identity, job insecurity as a result of temporality, externalization of services, and ultimately, an effective loss of social and political rights), as an explanation for violent confrontation; beyond the ongoing development of an effective and efficient welfare state.

In summary, a positive notion of peace has emerged from a definition of peace as the negative of war, in which the mere absence of violence has to be combined with a minimum of social welfare, fundamental freedoms, justice or what is the same, the lack of cultural violence (cultural discourse or dialectic construction that legitimizes violence) and, most importantly, the complete absence of structural violence. A kind of violence that, as shown above, occurs in situations of social impoverishment, political repression, lack of respect for human rights, or disregard of the right to self-determination.[29] Thus, peace is no longer

[24] Kathleen M. Weigert, 'Structural Violence', in Lester Kurtz (ed.) *Encyclopedia of violence, peace and conflict* (Elsevier 2008) 2007–10.
[25] Jean Paul Lederach, *El abecé de la paz y los conflictos* (Catarata 2000) 32.
[26] Galtung 'Cultural violence' (n 23).
[27] Carl von Clausewitz, *On war* (Penguin Books 1968).
[28] Hans J. Morgenthau, *Politics among nations. The struggle for power and peace* (Alfred A. Knof 1978).
[29] Cortright (n 17) 7 and Galtung 'Cultural violence' (n 23).

considered as the mere absence of violence (in the strict sense of physical violence, injury, or pain) but other conditions are required to be able to speak of the existence of peace.[30] So, the concept of positive peace can be directly linked to the notion of just and sustainable peace in the context of the *jus post bellum* debate.[31]

III. Socio-Economic Rights in Post-Conflict Situations: The Role of *Jus Post Bellum*

The *jus post bellum* doctrine has been traditionally linked to the just war theory,[32] where if a war has a just cause and is fought justly, it must also achieve a just post-conflict settlement.[33] The notion of *jus post bellum* has been subject to discussion and has no authoritative definition yet, but can be described as a 'body of legal and prudential norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace'.[34] Other authors refer to *jus post bellum* as 'moral and legal considerations that apply to situations where a war or armed conflict has come to an end,[35] while Stahn offers a tripartite conception of armed conflict that would include *jus ad bellum*, *jus in bello*, and *jus post bellum* where international actors might consider the impact of their decisions on post-conflict situations before embarking on an intervention with the use of force.[36]

Moreover, transitional justice addresses the legacies of the past in post-conflict situations or in the transition from an authoritarian regime towards a state based on the rule of law and respect for human rights. The United Nations Secretary-General describes transitional justice as comprising 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[37] In order for a state to address the atrocities committed in the past, transitional justice provides different mechanisms aimed at attaining the right to know, the right to justice, the right to reparation and guarantees of non-repetition.[38] These four elements are complementary and not mutually exclusive and need to be interpreted in a holistic manner.[39] Along similar lines, some studies show that a

[30] Adam Curle, *Conflict and peace* (Herder 1978) 88.

[31] T. David Mason and James D. Meernik (eds), *Conflict prevention and peacebuilding in post-war societies. Sustaining the peace* (Routledge 2006).

[32] Brian Orend, 'Jus Post Bellum' (2000) 31 *Journal of Social Philosophy* 117 and Gary J. Bass 'Jus Post Bellum' (2004) 32 *Philosophy & Public Affairs* 384.

[33] Francisco de Vitoria, *Relecciones de Indis y De iure Belli* (Unión Panamericana, 1963 [1539]) 250–75; Immanuel Kant, *La metafísica de las costumbres* (Tecnos, 1989 [1797]) 187–8; and Michael Walzer, *Guerras justas e injustas: una aproximación moral con ejemplos históricos* (Paidós Estado y Michael sociedad, 2001 [1977]) 381–432.

[34] Jens Iverson, 'Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) 7 *International Journal of Transitional Justice* 420.

[35] Larry May and Elizabeth Edenberg, *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2013).

[36] Carsten Stahn 'Jus post bellum: mapping the discipline(s)', in Carsten Stahn and Jan K. Kleffner, *Jus post bellum: Towards a law of transition from conflict to peace* (TMC Asser Press, 2008) 102.

[37] UN Secretary-General report, *The rule of law and transitional justice in conflict and post-conflict societies* (23 August 2004) UN Doc. S/2004/616.

[38] UN Commission on Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc. E/CN.4/2005/102/Add.1.

[39] UN Secretary-General (n 37) 9.

combination of trials and amnesties, as well as trials, amnesties, and truth commissions, has a positive impact on democracy and human rights.[40]

By contrast, the inherited notion of *jus post bellum* aims at a return to the legal *status quo ante*, but that can be considered too restrictive an approach, because following an internal armed conflict it does not make sense to go back to the situation that caused the conflict.[41] Thus, the concept of *jus post bellum* should focus on a just and sustainable peace and not just aim for the end of the violence. Therefore, *jus post bellum*, like transitional justice, should be both backward- and forward-looking,[42] and in the case of socio-economic rights, forward-looking to a positive peace.

In this context, *jus post bellum* and transitional justice have in common the existence of a legacy of mass abuse.[43] Insofar as their goals are different 'there is a significant overlap between transitional justice and *jus post bellum* since the kind of peace sought in *jus post bellum* is a just peace, and that almost always means one that is less oppressive than that what existed before'[44]. However, transitional justice can be considered the broader concept because it applies in a context of transition not only from conflict but also from an authoritarian regime, whereas *jus post bellum* only relates to the end of armed conflict progressing towards peace.

Within the transitional justice field, some voices have highlighted the importance of addressing socio-economic rights (in addition to civil and political rights) in post-conflict situations, not only as the site of human rights violations but also as the roots of conflict: 'a comprehensive strategy for transitional justice would, therefore, address the gross violations for *all* human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place'.[45] Along similar lines, Mani advocates for a transitional justice that would have more impact in the reduction of socio-economic injustices by addressing social injustice as the underlying cause of armed conflict, through truth commissions or collective reparations.[46] While Sharp brings forward a 'fourth generation' of transitional justice that would include, among other aspects, economic violence; defined as violations of economic, social and cultural rights, corruption, plunder of natural resources, and other economic crimes.[47] Accordingly, transitional justice would go beyond retributive justice to promote social justice by addressing socio-economic rights. However, some scholars are against this trend, claiming that transitional justice is of a temporary and exceptional character and has limited resources,[48] and therefore, socio-economic rights should be addressed within a development or reconstruction framework.

[40] Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32 *Human Rights Quarterly* 982.

[41] Stahn (n 36) 106–7.

[42] Ruti Teiel, 'Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May' (2013) 24 *The European Journal of International Law* 335.

[43] Mark Freeman and Darko Djukic, '*Jus Post Bellum* and Transitional Justice', in Carsten Stahn and Jan K. Kleffner (eds), *Jus post bellum: towards a law of transition from conflict to peace*. (TMC Asser Press, 2008) 218.

[44] May and Edenberg (n 35) 12.

[45] Louise Arbor, 'Economic and Social Justice for Societies in Transition' (2007) 40 *International Law and Politics* 26.

[46] Rama Mani, 'Editorial Dilemmas of Expanding Transitional justice, or Forging the Nexus Between Transitional Justice and Development' (2008) 2 *International Journal of Transitional Justice* 253.

[47] Dustin N. Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2013) 26 *Harvard Human Rights Journal* 169.

[48] Lorna McGregor, 'Transitional Justice and the Prevention of Torture' (2013) 7 *International Journal of Transitional Justice* 29; Tafadzwa Pasipandoya, 'Economic and Social Justice as Transitional Justice in Nepal'

Therefore, *jus post bellum* could help to fill transitional justice's gaps and limitations to ensure a successful peacebuilding process,[49] and embrace socio-economic rights in order to achieve a just and sustainable peace. A peace based on its positive version, as discussed above, in the sense that it includes a real will to guarantee the absence of structural violence and also cultural violence. In other words, a new state of peace that does not involve a return to the *status quo ante* and that generates the largest number of guarantees and trusts for a lasting, just and sustainable peace.

IV. Right to Land, Housing, and Property in the Post-Conflict Context

The question of restitution of land, housing, and property is particularly relevant in relation to refugees and people who want to return to their homes, land of origin, or former habitual residence after the armed conflict ends. The international community recognizes the right of refugees and internally displaced persons (IDPs) to return voluntarily, in safe conditions and with dignity.[50] This decision should be based on a free, informed, individual choice and refugees and displaced persons must have adequate information to make the decision. Regardless of the cause of a conflict, people that have been displaced need to have their land, housing, and property restituted or must be resettled elsewhere because 'without addressing these problems in the short-term, the peace process is likely to be restricted'.[51]

The adoption of the Pinheiro Principles has contributed to strengthening the right to restitution of property in a post-conflict context and provides a set of standards on property repossession that is applicable worldwide.[52] Likewise, the 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, adopted by the General Assembly of United Nations in 2005, establish that victims have the right to restitution which implies, whenever possible, the duty to 'restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred' and stresses, among other goals, the 'return to one's place of residence' and the 'return of property'.[53]

(2008) 2 *International Journal of Transitional Justice* 378–97; and Naomi Roth-Arriaza, 'The New Landscape of Transitional Justice', in Naomi Roth-Arriaza and Javier Mariezcurre (eds), *Transitional Justice in the Twenty-First Century* (Cambridge University Press 2006).

[49] Freeman and Djukic (n 43) 227.

[50] UNHCR, Handbook on Voluntary Repatriation: international protection (Geneva 1996) 6–11.

[51] FAO (n 3) 32.

[52] Anderson (n 2) 305 and Sharanya Sai Mohan, 'The Battle after the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution' (2011) 36 *Yale Journal of International Law* 461. The African Commission on Human and People's Rights considers that the Pinheiro Principles are 'emerging principles in international human rights jurisprudence'. See, among others, *Centre on Housing Rights and Evictions (COHRE) vs. Sudan*, Communication No. 296/2005, 29 July 2010, para. 204.

[53] UN Basic Principles and Guidelines, 2005, para. 19.

A. International Legal Framework

The right to land is expressly enshrined in international instruments concerning indigenous and tribal peoples, such as the International Labour Organisation (ILO) Convention No. 169 of 1989 and the Declaration on the Rights of Indigenous Peoples of 2007,[54] which recognize the importance of land for those people who own it collectively and for whom it is part of their culture. These instruments create mechanisms to protect the lands and natural resources vital to their subsistence, such as the obligation of states to consult and inform indigenous peoples before moving or displacing them, including a just and fair compensation and, where possible, the option to return to their lands.

Moreover, the right to housing is recognized in Article 25 of the Universal Declaration of Human Rights (1948) (UDHR) which provides that every person has the right to an adequate standard of living, including 'food, clothing and housing'. Furthermore, the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) establishes 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

The right to property, established in article 17 of the UDHR, entails that everyone has 'the right to own property alone as well as in association with others' and that 'no one shall be arbitrarily deprived of his property'. Nonetheless, this right cannot be considered universally recognized because neither the International Covenant on Civil and Political Rights (1966) (ICCPR) nor the ICESCR includes the right to property; they only refer to it indirectly in Article 1.2, which provides that 'in no case may a people be deprived of its own means of subsistence'. Still, the right to property could be understood as part of the right to an adequate standard of living established in Article 11 of the ICESCR, to the extent that it is related to the right to food and to adequate housing. At the regional level, the right to property is recognized in Article 1 of the Additional Protocol to the European Convention of Human Rights, in Article 14 of the African Charter on Human and People's Rights (1981), in article 21 of the American Convention on Human Rights (1969) and Article 31 of the Arab Charter on Human Rights (2004).

In a context of armed conflict, international humanitarian law does not regulate expressly the right to land, housing, or property but contains some provisions that refer to the protection of objects indispensable to the survival of the civilian population:

> It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.[55]

[54] ILO Convention No. 169 of 1989, see part II about Land, Arts 13–19; UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, Res. 61/295, 13 September 2007, see, among others, Arts 8, 10, 26, 27, and 28.

[55] Article 54 of the Additional Protocol I to the Geneva Conventions of 12 August, and relating to the protection of victims of international armed conflict, of 8 June 1977 and Art. 14 of Additional Protocol II to the Geneva

This prohibition may be considered customary law applicable in situations of both international and internal armed conflict, and is related to the prohibition of starvation as a method of warfare.[56]

At the regional level, the Convention of the African Union for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009, provides for the obligation by state parties to protect those displaced communities with special attachment to, and dependency on, land, due to their particular culture and spiritual values (Art. 4.5), to adopt necessary measures to protect individual, collective and cultural property left behind by IDPs (Art. 9.2.i), and to promote satisfactory conditions for voluntary return, local reintegration or relocation on a sustainable basis and in circumstances of safety and dignity (Art. 11).

The international legal framework reflects the trend towards recognition of a right to restitution of housing, land, and property that have been confiscated as a result of armed conflict. Next, we will examine to what extent peace agreements have addressed the issue of land and property restitution, and we then analyse what are the main obstacles and difficulties in implementing these provisions of the peace agreements and the importance of a global approach to these issues in order to achieve a lasting peace.

B. The Right to Restitution

In recent decades, the international community has focused on the question of restitution of housing, land, and property primarily in the context of the right of return of refugees and displaced persons. This attention is largely due to the unique role that restitution of housing, land, and property plays to ensure the voluntary, safe, and dignified return of refugees and displaced persons to their homes and to their places of original residence.[57]

However, the study of peace agreements shows that, from 1990 to 2019, only 217 of the 1,832 peace settlements adopted in relation to 150 peace processes included land reform and rights, which represents 11.8% of the total. Figures decrease even more if we only look at property return and restitution, finding only 108 peace agreements, which is the 5.8% of the total, according to the Pa-X Database.[58]

Peace agreements that explicitly address property return and restitution are, for example, those of Bosnia and Herzegovina, Colombia, Democratic Republic of Congo, El Salvador, India, Myanmar, Nepal, Rwanda, South Sudan, Sudan, and Sri Lanka. This is due, in part, to the predominance of reconstruction programmes and initiatives of justice in post-conflict situations that are still based on the paradigms of state security and criminal prosecution,

Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflict, of 8 June 1977.

[56] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules,* ICRC (Cambridge University Press 2005) see rule 54.

[57] UN Sub-Commission on The Promotion and Protection of Human Rights, Housing and property restitution in the context of the return of refugees and internally displaced persons, Preliminary report of the Special Rapporteur, Paulo Sérgio Pinheiro (16 June 2003) UN Doc. E/CN.4/Sub.2/2003/11 para. 4.

[58] Christine Bell, Sanja Badanjak, Robert Forster, Astrid Jamar, Kevin McNicholl, Kathryn Nash, Jan Pospisil, and Laura Wise, *PA-X Codebook, Version 3. Political Settlements Research Programme* (University of Edinburgh 2020), available at <www.peaceagrements.org> accessed 31 May 2020.

without paying attention to the dimension of social justice;[59] leaving the causes of conflict in the background.

Thus, according to a study on Post-Conflict Justice,[60] based on a Uppsala Conflict Data Program (UCDP)/Peace Research Institute Oslo (PRIO) dataset that included 357 armed conflict episodes between 1946 and 2006, there are six different forms of addressing the harm which took place during the conflict, reparations being one of them. The study concludes that the majority of reparations refer to property or money and in lesser proportion to general community compensation, which includes the right to return to land—or if impossible, fair compensation—to refugees and internally displaced persons.[61]

From the *jus post bellum* perspective, Stahn sketches post-conflict law as comprising six principles: fairness and inclusiveness of peace settlements, punishment of aggression, humanization of reparations and sanctions, the move from collective responsibility to individual responsibility, a combined justice and reconciliation model, and people-centred governance.[62] On the other hand, May understands that the *jus post bellum* principles are retribution, reconciliation, rebuilding, restitution, reparations, and proportionality,[63] aimed at securing a just and sustainable peace at the end of war or conflict. Although *jus post bellum* principles are under discussion, the restitution of land could fit perfectly within the restitution or reparation principle. For example, the peace agreement of Colombia with the FARC in 2016, not only deals with land reform as the first issue of concern but, in the chapter on victims, also covers the restitution of land and promotes the collective return and relocation of IDPs under voluntary, safe, and dignified conditions.[64]

An example of good practice in the restoration of housing, land, and property is the case of Bosnia and Herzegovina, where, a decade after the war ended, 90% of approximately 200,000 claims for property restitution for refugees and displaced persons had been resolved.[65] In part, one of the reasons for the success of the case of Bosnia and Herzegovina is the change of approach from 'return based on restitution' to 'restitution based on the right', which led to the depoliticization of the process of implementing laws relating to property,[66] and facilitated the restitution of housing, land and property to refugees and IDPs. However, in Kosovo, although restitution was the preferred solution, in practice, most people who had demanded the restitution of their property preferred to sell their properties after

[59] Gaby Oré Aguilar and Felipe Gomez Isa (eds), *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (Intersentia 2011) 3.

[60] Post-conflict justice is defined in this study as 'any process initiated within five years following an armed conflict that attempts to address wrongdoings which took place as part of the conflict'.

[61] Helga Malmin Binningsbø, Cyanne E. Loyle, Scott Gates, and Jon Elster, 'Armed Conflict and Post-Conflict Justice, 1946–2006: A Dataset' (2012) 49 *Journal of Peace Research* 735.

[62] Carsten Stahn, 'Jus ad bellum, jus in bello … just post bellum?: Rethinking the Conception of the Law of Armed Forced' (2006) 15 *European Journal of International Law* 938–41.

[63] May and Edenberg (n 35) 3.

[64] *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*, 24 November 2016, paras 5.1.3.5 and 5.1.3.6.

[65] Charles B. Philpott, 'From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina' (2006) 18 *International Journal of Refugee Law* 31.

[66] Rohdri Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice' (2004) 37 *New York University Journal of International Law and Politics* 553.

recovery, which raises the question of whether restitution is always the solution that best suits displaced persons.[67]

Hence, the Pinheiro Principles recognize that the right of refugees and displaced persons to restitution of housing, land, and property, with the broader aim of peacebuilding in post-conflict contexts, is essential to achieve a lasting and sustainable peace:

> All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal. (Principle 2.1)

While in a post-conflict context the restitution of land, housing, and property to refugees and displaced persons should be the preferred solution and the ultimate goal, sometimes the combination of restitution with economic compensation can be the best option.[68] Thus, the restitution may consist of a combination of assisted return with a sale of the properties to which the refugees or displaced persons do not want to return, but to which they have rights, provided they receive an adequate amount of compensation. Whatever the case may be, the will of refugees and displaced persons has to be taken into account to prevent states from resorting to compensation as an easy solution when they are not willing to promote the return of these persons.

Therefore, the right to restitution is considered by the Pinheiro Principles as an autonomous right separate from the return or non-return of the refugees or IDPs:

> The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution. (Principle 2.2)

A number of peace agreements have created ad hoc committees to resolve disputes on the return of land and property to refugees and displaced persons who decide to return to their homes and whose land has been confiscated by the government itself or acquired or occupied by other persons.[69] In other situations, land restitution, following displacement because of armed conflict, mainly affects indigenous communities, as is the case of Guatemala, where the peace agreements of 1996 provide for the establishment of a Joint Commission on Land Rights, formed by members of the government and indigenous communities,[70]

[67] Jose Maria Arraiza and Massimo Moratti, 'Getting the Property Questions Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999–2009)' (2009) 21 *International Journal of Refugee Law* 432.

[68] OCAH/DIDI, UN-HABITAT, ACNUR, FAO, ACNUDH y el CNR, Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the 'Pinheiro Principles', March 2007, 27–8.

[69] See Bosnia and Herzegovina cases, Dayton Peace Agreement of 21 November (1995), annex 7, ch. II: 'The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return'. In the case of Sudan, the Comprehensive Peace Agreement of 2005, establishes Chapter III, on the ownership of land and natural resources by a National Land Commission; also, in the Darfur Peace Agreement of 2006, set out in Article 20, a Committee on Land whereby: 'Without prejudice to the jurisdiction of courts, there shall be established a (state/regional) Land Commission to address issues related to traditional and historical rights to land and to review land use management and natural resource development processes'.

[70] The agreement on the timetable for implementation, compliance, and verification of the peace accords, 29 December 1996, provides for the establishment of a Joint Commission on Land Rights.

It is also possible to leave the resolution of conflicts over the restitution of housing, land, and property in the hands of local courts; however, judicial institutions are often weak or virtually non-existent after an armed conflict. Moreover, in cases where it is estimated that many people can claim restitution of their housing, land, and property, local courts may be overwhelmed which means that they cannot address all complaints with the necessary effectiveness.[71]

Consequently, a way to resolve disputes generated around the restitution of housing, land, and property of refugees and displaced persons is through the combination of three mechanisms: specialized courts on the issue of land, ordinary courts, and traditional authorities applying local custom. Nevertheless, an ad hoc committee can not only alleviate the workload of the courts but may also offer an effective solution in terms of cost and time to those affected, who in most cases cannot afford the payments required in a procedural court which can take months, even years, to recognize their rights.[72]

The right to restitution, given that often refugees and IDPs are outside their country of origin for years and even decades, may be restricted or limited in time by their own peace agreements or property laws adopted later. In some cases, such as Rwanda, peace agreements recognized the right to restitution of land to refugees who had not been abroad for more than ten years,[73] but did not apply this threshold to the Tutsi refugees who had fled since 1959 as a result of massacres and discrimination.[74] On the other hand, in South Africa, restitution claims could be submitted by any person who had been dispossessed of their land for any reason of discrimination from 1913 to the end of apartheid.[75] After World War II, Czechoslovakia limited the restitution of housing, land, and property confiscated during the communist regime to residents and excluded those who did not have Czech citizenship.[76]

[71] Arraiza and Moratti (n 67) 441.

[72] P. De Wit and J. Hatcher, 'Sudan's Comprehensive Peace Agreement. An Opportunity for Coherently Addressing Housing, Land and Property Issues?', in Scott Leckie (ed.) *Housing, Land and Property Rights in Post-Conflict United Nations and Other Peace Operations: A comprehensive survey and proposal of Reform* (Cambridge University Press 2009) 287.

[73] Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons, Arusha, 9 June 1993 (art. 4): 'The right to property is a fundamental right for all the people of Rwanda. All refugees shall therefore have the right to repossess their property on return. The two parties recommend, however, that in order to promote social harmony and national reconciliation, *refugees who left the country more than 10 years ago should not reclaim their properties*, which might have been occupied by other people. The Government shall compensate them by putting land at their disposal and shall help them to resettle. As for estates which have been occupied by the Government, the returnee shall have the right for an equitable compensation by the Government'.

[74] Chris Huggins 'Peacekeeping and HLP Rights in the Great Lake Region of Africa', in Scott Leckie (ed.) *Housing, Land and Property Rights in Post-Conflict United Nations and Other Peace Operations. A comprehensive survey and proposal of Reform* (Cambridge University Press, 2009) 198.

[75] Restitution of Land Rights Act No. 22, 25 November 1994, art. 2.3.

[76] The Human Rights Committee considered in *Des Fours v. Czech Republic*, Communication No. 747/1997, of 30 October 2001, that the distinction based on citizenship as a condition for the restitution of property confiscated by the authorities during the communist regime was arbitrary and discriminatory, violating art. 26 of the Covenant, para. 8.4; see among others *Simunek v. Czech Republic*, Communication 516/1992 of 31 July 1995; *Adam v. Czech Republic*, Communication 586/1994 of 25 July 1995 and *Blazek et al. v. Czech Republic*, Communication 857/1999, of 9 August 2001.

V. Conclusion

The rights to housing, land, and property involve complex issues that need to be addressed at various stages of a post-conflict situation to achieve a profound transformation, reconstruction, and sustainable peace. Often these issues are also the roots of armed conflict and, therefore, it is important to tackle injustices of the past to attain reconciliation and (re)formulate domestic law in accordance with the standards of international law.

Socio-economic rights in post-conflict situations, and land tenure in particular, have been generally ignored during the process of reconstruction and peacebuilding, since only the 18.3% of peace agreements include economic, social, and cultural rights, and among them, only 10% include land issues. For this reason, it is important to include the right to restitution of land, housing, and property in the peace settlements, albeit that is not a sufficient guarantee that these agreements will be implemented effectively and appropriately. Often, peace agreements provide for the establishment of ad hoc committees to take charge of the demands of refugees and displaced persons to return to their homes, lands, and property that have been stripped arbitrarily as a result of an armed conflict. These committees must coexist with ordinary courts and local and traditional authorities, sometimes leading to the application of different laws that may even be contradictory. Refugees and displaced persons who have had their homes, land, and property confiscated are entitled to restitution, and when this is not possible, the offer of economic compensation.

However, a combination of restitution and compensation can sometimes be the best option, depending on each case and where the return of refugees and displaced persons in safety and dignity is guaranteed. As an example, the conflict resolution in Colombia has addressed land reform in the first stage of the peace settlement to promote the restitution of abandoned and arbitrarily deprived land because of armed conflict, not only to recognize the victims but also to move from a context of violence to a context of peace with social justice.

While some authors consider that transitional justice cannot address socio-economic rights due to its temporary character and limited resources, *jus post bellum* could help to fill transitional justice's gaps and restrictions to ensure successful peacebuilding and to achieve a just and sustainable peace. A positive peace, as discussed above, would include a guarantee of the absence of structural and cultural violence and attain a new state of peace; one that would not imply a return to the *status quo ante*, but is forward-looking to a just and sustainable peace.

On the other hand, positive peace and addressing socio-economic rights in a post-conflict context appear jointly, like two sides of the same coin, as an important principle of *jus post bellum* that contributes to just and lasting peace. Moreover, the Pinheiro Principles can be used as a set of standards to be taken into account in conflict resolution and also to strengthen the right to restitution of land, housing, and property in a post-conflict context, in terms of positive peace. Thus, the concept of positive peace could be interpreted as an important statement of a future *jus post bellum* policy and included within the restitution or reparation principle, focused in particular on the allocation of property rights as one of the preconditions for reintegration and return of displaced persons.

Accordingly, the positive peace concept in *jus post bellum* debate can be an opportunity (and also a challenge) on the way to a real peacekeeping, peacebuilding, and peacemaking

process, because positive peace allows for consideration of the post-conflict process beyond the mere resolution of conflict. As a result, *jus post bellum* can benefit from the insights of transitional justice and peace research studies to depart from just war theory. These two legal, social, political, and (also) moral frameworks could provide specific content and meaning to *jus post bellum* that would allow us to further define the contours of this field in modern international law.