

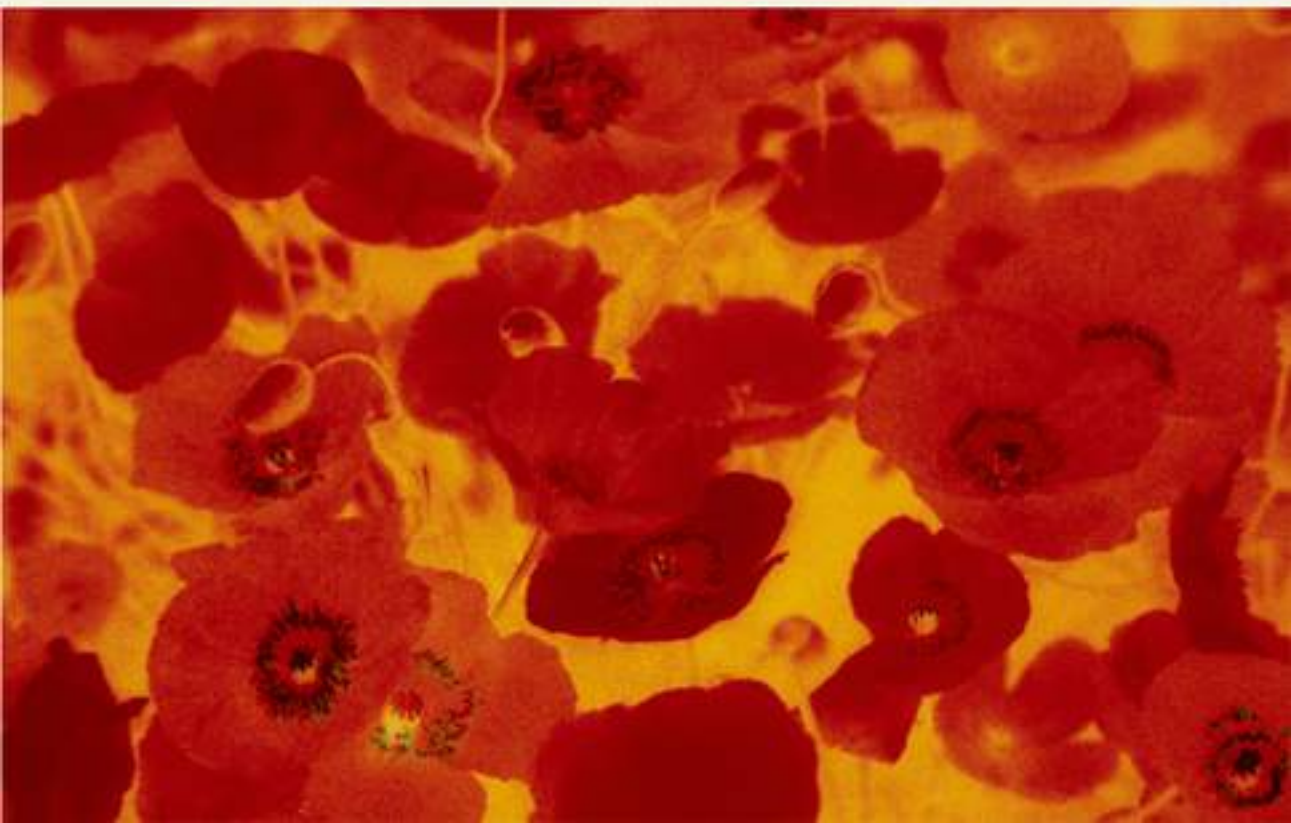
OXFORD

# JUS POST BELLUM

Mapping the Normative Foundations



Edited by Carsten Stahn,  
Jennifer S. Easterday, and Jens Iverson





*JUS POST BELLUM*



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*Mapping the Normative Foundations*

Edited by

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*For my parents and my family*

*C.S.*

*For my family*

*J.S.E.*

*For my parents, my wife, and my daughter*

*J.I.*





# Preface

Recently, there has been an explosion of interest in the ethics of war and peace. Part of this has been spurred on by recent wars, part by new weapons technology, and part by the heightened attention of some of the most talented and productive moral, political, and legal thinkers. One of the major new issues, in this regard, is that of *jus post bellum* or “justice after war.” Though jurists like Grotius and Vitoria briefly mentioned *jus post bellum*, and though philosophers like Kant gave some extended and creative contributions to the subject (e.g. in his *Perpetual Peace*), it has not been until very recently that this subject has emerged with the kind of importance and focus that it deserves.

I will leave it to others to speculate on why this has been the case. I only note that the recent interest is a good thing. After all, war has three phases—beginning, middle, and end—and, if we’ve crafted rules in connection with the beginning (*jus ad bellum*) and middle (*jus in bello*), then consistency demands we consider justice at the conclusion of a conflict, and how best to transition from violence back into a better peace. My focus here, in this brief preface, is to applaud this emerging interest in *jus post bellum*, and to suggest where I think future research on this subject is going, and should be going. The following seven points stand out:

1. *Jus post bellum* needs to be made as strong—and as well-considered, rule-focused, and well-developed—as the other two categories of *jus ad bellum* and *jus in bello*. Moreover, the robust and complex inter-connections between the three categories need to be developed and explored. For example, how does the justice of the start of war impact the termination process? How does the deployment of force, and the behavior of troops, during war affect and constrain what needs to be done at war’s end? What do the interconnections imply in terms of proper authority for acting during each of the three phases?

2. Relatedly, if the other two just war categories have been codified into law, in the form of many charters and treaties, then it stands to reason that the rules of *jus post bellum* should likewise, at some point, be codified into effective international law. I have argued extensively on the need, and rationale, for a new Geneva Convention devoted exclusively to the issues of just conduct in the aftermath of armed conflict. The movement for such could, and should, resemble the recent movement to solidify the Responsibility to Protect (R2P) norms, and one can imagine an effective group of allies coming together to support such a thing, not only for the sake of ideals but also for the foreign policy benefits which would accrue to countries supporting such principled clarity regarding post-war obligations. (Even powerful war-winners like America should want to know the extent of their post-war duties following victory on the ground and the removal of an aggressive regime.)

3. But laws are not enough. Even though the crafting of *jus post bellum* laws would constitute important progress, we all know that laws must actually be enforced and realized. Thus, a massive avenue for further inquiry in *jus post bellum* involves

consideration of what new and existing international institutions would be required to do, to realize fully the values of post-war justice.

4. There is a clash of values regarding the nature of post-war justice. Generally speaking, this is a clash between those favoring retribution (i.e. making a defeated aggressor *worse off* than prior to the war) and those favoring rehabilitation (i.e. making such an aggressor *better off* than prior to the war). A fuller fleshing out of these rival theories needs to happen, alongside consideration of relevant examples, and perhaps above all exploring a common ground between them, which could be labeled a kind of Rawlsian over-lapping consensus—or “thin theory”—of post-war justice. The thin theory may well represent the best hope for effective codification and institutionalization.

5. *Jus post bellum* hooks into some of the deepest and most interesting issues in contemporary political theory and social practice, and these hooks need to be made deeper, more empirically rich, and sorted out. These hooks include those into: constitution-making; nation-building; capability-building; the rule of law; international aid and development; gender issues; multiculturalism; global governance; the democratic peace thesis; and human rights. And it perhaps goes without saying that we need as many accurate historical case studies of post-war experience as we can possibly get our hands on.

6. *Jus post bellum* assumes that there is a “post” in question—a genuine aftermath—and this volume raises interesting questions about when we know whether we have, in fact, reached the termination phase of a conflict. A further challenge involves that of protracted wars: armed conflicts that last decades, or even more. Protracted wars can actually seem to be wars-without-end, such as for instance the Arab-Israeli conflict. Can the norms of *jus post bellum* nevertheless hold relevance for such interminable struggles, or can such only be guided by *jus in bello*? My hunch and hope is that *jus post bellum* can be of substantial aid to such conflicts too, but that much work needs to be done in terms of showing exactly how.

7. Finally, *jus post bellum* must remain as open to critical challenges, self-reflection, and potential for revision and growth as have been *jus ad bellum* (witness the recent debates on anticipatory attack and R2P) and *jus in bello* (the recent clashes on the moral equality of soldiers and the new weaponry of drones and cyber-strikes). Complete closure is never to be expected, nor even desired.

The editors of this volume have put together some superb essays which advance the state of the art on *jus post bellum*, one of the most cutting-edge issues in today’s ethics of war and peace. I wish the reader intellectual stimulation as s/he engages with some of the most fertile minds wrestling with the manifest problems, and opportunities, of post-war justice.

Brian Orend  
author of *The Morality of War*  
July 2013

## Acknowledgments

This volume is the continuation of an ongoing, collaborative research effort led by the editors, known as the *Jus Post Bellum* Project. This project investigates whether and how a contemporary *jus post bellum* may facilitate greater fairness and sustainability in conflict termination and peacemaking.

Many of the contributions grew out of discussions held at the Launch Conference of the project at the Peace Palace in May and June 2012. The conference and the project were made possible by the kind support of the Netherlands Organization for Scientific Research (NWO) who provided the funding for this research through a Vidi grant for the *Jus Post Bellum* Project. The research is part of the broader research strand of the Leiden Law School on “Interaction between Legal Systems.”

We would like to thank all contributors to this volume for their care, dedication, and efforts to provide fresh thinking on the theme of *jus post bellum*, and their openness to editorial suggestions. We would also like to express our gratitude to other individuals who contributed to the creation of this volume, including Sara Kendall, Sergi Mansilla, Katharine Orlovsky, and Joseph Powderly. This work would not be possible without the support of the Grotius Centre for International Legal Studies at the University of Leiden, which hosts the Project. In particular we would like to thank Astrid de Vries, Teodora Jugrin, and Peter Verhaar for their invaluable assistance.

At Oxford University Press we would like to thank Anthony Hinton and Merel Alstein for supporting this project and ensuring publication of this volume.

We hope that this work will contribute to broader discourse on this theme across scholarly disciplines.

Carsten Stahn, Jennifer S. Easterday, and Jens Iverson  
*The Hague*  
July 2013



# Contents

<i>Table of Cases</i>	xix
<i>Table of Authorities</i>	xxiii
<i>List of Abbreviations</i>	xxix
<i>List of Contributors</i>	xxxiii

<b>Exploring the Normative Foundations of <i>Jus Post Bellum</i>: An Introduction</b>	<b>1</b>
<i>Jennifer S. Easterday, Jens Iverson, and Carsten Stahn</i>	
I. Perspectives on <i>Jus Post Bellum</i>	1
II. Definitions	3
III. Themes	5
IV. Conclusion	10

## PART 1. FOUNDATION AND CONCEPTIONS OF *JUS POST BELLUM*

### I. Foundation, Concept, and Function

<b>1. <i>Jus Post Bellum</i>, Grotius, and <i>Meionexia</i></b>	<b>15</b>
<i>Larry May</i>	
I. Historical Roots of <i>Jus Post Bellum</i> Principles	16
II. <i>Meionexia</i> and <i>Post Bellum</i> Justice	19
III. A Brief Note on the Question: Is <i>Jus Post Bellum</i> Binding Law?	23
IV. Transitional Justice and <i>Jus Post Bellum</i>	24
<b>2. At War's End: Time to Turn to <i>Jus Post Bellum</i>?</b>	<b>26</b>
<i>Mark Evans</i>	
I. Towards a Conceptual Toolkit for <i>Jus Post Bellum</i>	26
II. What Might We Mean by "Justice"?	28
III. <i>Jus Post Bellum</i> and the Pursuit of a Just Peace	32
IV. Prematurely Ending a Just War Justly?	36
V. What Does it Matter if We Call it "Justice"?	40
<b>3. <i>Jus Post Bellum</i> as a Partly Independent Legal Framework</b>	<b>43</b>
<i>Dieter Fleck</i>	
I. Introduction	43
II. Typical Rules of <i>Jus Post Bellum</i>	44
III. Gaps in Legal Regulation	51
IV. A Tentative Look at the Nature of <i>Jus Post Bellum</i> Rules	53
V. Conclusions	56
<b>4. <i>Jus Post Bellum</i>: An Interpretive Framework</b>	<b>58</b>
<i>James Gallen</i>	
I. Introduction	58

II.	The Role of <i>Jus Post Bellum</i> : Three Dimensions of Evaluation	60
III.	Why a Unified Framework? Interdependence in Transitions	65
IV.	<i>Jus Post Bellum</i> as the Application of Integrity	68
V.	Principles of Integrity as <i>Jus Post Bellum</i>	71
VI.	Conclusion	79
II. <i>Jus Post Bellum</i> and Related Concepts		
5.	<b>Contrasting the Normative and Historical Foundations of Transitional Justice and <i>Jus Post Bellum</i>: Outlining the Matrix of Definitions in Comparative Perspective</b>	80
	<i>Jens Iverson</i>	
I.	Introduction	80
II.	The Grotian Tradition	81
III.	Basic Definitions	85
IV.	Legal Contrast	86
V.	Contrasting the Content of Transitional Justice and <i>Jus Post Bellum</i>	87
VI.	Specific to Global Contrast	95
VII.	Historical Foundations	97
VIII.	Current Usage	99
IX.	Going Forward—Continuing the Grotian Tradition	100
6.	<b>R2P and <i>Jus Post Bellum</i>: Towards a Polycentric Approach</b>	102
	<i>Carsten Stahn</i>	
I.	Introduction	102
II.	Context	105
III.	The Relationship Between R2P and <i>Jus Post Bellum</i> : Contemporary Notions and Narratives	107
IV.	Towards a Polycentric Vision	110
V.	Conclusion	121
III. <i>Jus Post Bellum</i> and Its Discontents		
7.	<b>The Concept of <i>Jus Post Bellum</i> in International Law: A Normative Critique</b>	123
	<i>Eric De Brabandere</i>	
I.	Introduction	123
II.	Normative Propositions of Contemporary <i>Jus Post Bellum</i> Theories	125
III.	<i>Jus Post Bellum</i> in International Law: A Critical Appraisal	128
IV.	Conclusion	140
8.	<b>Waging Peace: Ambiguities, Contradictions, and Problems of a <i>Jus Post Bellum</i> Legal Framework</b>	142
	<i>Roxana Vatanparast</i>	
I.	Introduction	142
II.	What Is <i>Jus Post Bellum</i> ?	143
III.	Ambiguities Regarding the Temporal Applicability of <i>Jus Post Bellum</i>	145
IV.	Contradictions and Problems	151
V.	Conclusion	159

<b>9. The Compatibility of Justice for Women with <i>Jus Post Bellum</i> Analysis</b>	<b>161</b>
<i>Fionnuala Ní Aoláin and Dina Francesca Haynes</i>	
I. Introduction	161
II. Utilizing the Post-Conflict Temporal Period to Advance Women's Interests and Positioning	162
III. What Work Does <i>Jus Post Bellum</i> Do in Post-Conflict Settings?	170
IV. Current International Legal Responses to the Gender Dimensions of Conflict and Post-Conflict Processes	172
V. What <i>Jus Post Bellum</i> Might Add	174
VI. Conclusion	176
PART 2. RECONCEPTUALIZING "BELLUM" AND "PAX"	
<b>10. Of <i>Jus Post Bellum</i> and <i>Lex Pacificatoria</i>: What's in a Name?</b>	<b>181</b>
<i>Christine Bell</i>	
I. Introduction	181
II. Pushing International Law's Boundaries: Negotiating Peace Settlements	182
III. From <i>Lex Pacificatoria</i> to <i>Jus Post Bellum</i> ?	193
IV. Situating <i>Jus Post Bellum</i> within Wider Discussions of International Law's Future Directions	201
V. Conclusion	204
<b>11. The Gentle Modernizer of the Law of Armed Conflict?</b>	<b>207</b>
<i>Inger Österdahl</i>	
I. Introduction	207
II. More or Less Difficult to Intervene?	210
III. Is <i>Jus Ad Bellum</i> Increasingly Obsolete?	214
IV. Beefing Up or Breaking Down <i>Jus In Bello</i> ?	215
V. What is the Modernization so Far?	219
VI. New Organizing Principles for the Law of Armed Conflict?	221
VII. Conclusion: New Just War?	224
<b>12. Navigating the Unilateral/Multilateral Divide</b>	<b>229</b>
<i>Gregory H. Fox</i>	
I. Introduction	229
II. Proposition I: Existing Legal Regimes Applicable to the Post-Conflict Period are Almost Exclusively State-Centric	231
III. Proposition II: The Security Council Can Alter These State-Centric Rules in Important Ways	240
IV. Proposition III: The International Community has Effectively Multilateralized the Post-Conflict Period	243
V. Which Direction for a <i>Jus Post Bellum</i> ?	244
VI. An Alternative Path?	245
VII. Consequences of a Unified <i>Jus Post Bellum</i>	248
VIII. Conclusions	256

<b>13. The Application of <i>Jus Post Bellum</i> in Non-International Armed Conflicts</b>	<b>259</b>
<i>Kristen E. Boon</i>	
I. Introduction	259
II. International vs. Non-International Armed Conflicts: What is the Difference?	260
III. Minimizing the Distinction between International and Non-International Armed Conflict and Implications for <i>Jus Post Bellum</i>	262
IV. Limitations to <i>Jus Post Bellum</i> in Situations of NIAC	265
V. Conclusion	268
<b>14. Post-War States: Differentiating Patterns of Peace</b>	<b>269</b>
<i>Astri Suhrke</i>	
I. Introduction	269
II. The International Peacebuilding Regime	270
III. Implications for Norms and Practice	272
IV. Post-War States	275
V. Conclusions	283
PART 3. DILEMMAS OF THE “POST”	
I. Dilemmas of Classification	
<b>15. Towards a Functional Conceptualization of the Temporal Scope of <i>Jus Post Bellum</i></b>	<b>287</b>
<i>Jann K. Kleffner</i>	
I. Introduction	287
II. The Beginning of Applicability	287
III. The End of Applicability	293
IV. Towards a Functional Conceptualization of the Temporal Scope of <i>Jus Post Bellum</i>	295
<b>16. From <i>Jus In Bello</i> to <i>Jus Post Bellum</i>: When do Non-International Armed Conflicts End?</b>	<b>297</b>
<i>Rogier Bartels</i>	
I. Introduction	297
II. Is There Guidance to be Found in (Case) Law?	300
III. Using the Lower Threshold Criteria	303
IV. Relevance of the Factors and Indicators for Determining the End of a NIAC	309
V. Challenges in Applying the Threshold Criteria	312
VI. Concluding Remarks	314
II. Institutional Dilemmas and Strategies	
<b>17. Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the “Post”</b>	<b>315</b>
<i>Martin Wählisch</i>	
I. Introduction	315



II.	Conceptual Challenges	317
III.	Case Studies	324
IV.	Conclusion: Acknowledging the Sum of Endpoints	330
<b>18.</b>	<b><i>Jus Post Bellum</i> and the Politics of Exit</b>	<b>334</b>
	<i>Dominik Zaum</i>	
I.	Introduction	334
II.	The Evolution of Exit Debates and Practices	337
III.	<i>Jus Post Bellum</i> and Exit Mechanisms	339
IV.	The Timing of Exit	342
V.	Conclusion	344
<b>19.</b>	<b>Facilitating Post-Conflict Reconstruction: Is the UN Peacebuilding Commission Successfully Filling an Institutional Gap or Marking a Missed Opportunity?</b>	<b>346</b>
	<i>Freya Baetens</i>	
I.	Introduction	346
II.	Legal and Operative Framework of the Peacebuilding Commission	347
III.	Reviewing the 2010 Review Report	357
IV.	Conclusion	372
<b>PART 4. THE “JUS” IN <i>JUS POST BELLUM</i></b>		
<b>20.</b>	<b>Peace Agreements as a Framework for <i>Jus Post Bellum</i></b>	<b>379</b>
	<i>Jennifer S. Easterday</i>	
I.	Introduction	379
II.	Towards a Broad Conception of <i>Jus Post Bellum</i>	380
III.	Constitutional Peace Agreements as a Framework for <i>Jus Post Bellum</i>	386
IV.	Gaps and Risks	406
V.	Constitutional Peace Agreements and <i>Jus Post Bellum</i>	412
<b>21.</b>	<b>Targeting the State in <i>Jus Post Bellum</i>: Towards a Theory of Integrated Sovereignties</b>	<b>416</b>
	<i>Dov Jacobs</i>	
I.	Introduction	416
II.	Sovereignty, International Law, and <i>Jus Post Bellum</i>	417
III.	Contextualizing and Conceptualizing Sovereignty	421
IV.	Conclusion: From Sovereignty to Integrated Sovereignties	425
<b>22.</b>	<b>Post-Occupation Law</b>	<b>428</b>
	<i>Yaël Ronen</i>	
I.	Introduction	428
II.	The Phenomenon of Dependence on a Former Occupant	429
III.	The Role of Post-Occupation Law	431
IV.	Sources for Post-Occupation Law	433
V.	Concluding Observations	445

<b>23. Creating Popular Governments in Post-Conflict Situations: The Role of International Law</b>	<b>447</b>
<i>Matthew Saul</i>	
I. Introduction	447
II. The Value and Complexity of Popular Governance in the Aftermath of War	449
III. International Legal Regulation of the Development of a Popular Mandate for Governance	452
IV. The Practice of Developing a Popular Mandate for Governance in Sierra Leone	460
V. Conclusion	464
<b>24. The Status of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles</b>	<b>467</b>
<i>Aurel Sari</i>	
I. Introduction	467
II. The Status of Foreign Forces: No Self-Contained Regime	469
III. General Principles	475
IV. The Principles of <i>Jus Post Bellum</i>	481
V. Presence and Status under <i>Jus Post Bellum</i>	484
VI. Balancing Competing Interests under <i>Jus Post Bellum</i>	492
VII. Conclusion	499
<b>25. The Norm of Environmental Integrity in Post-Conflict Legal Regimes</b>	<b>502</b>
<i>Cymie R. Payne</i>	
I. Introduction	502
II. Environmental Integrity	505
III. <i>Jus Post Bellum</i> and Environmental Integrity	513
IV. Conclusion	518
<b>26. Should Rebels Be Amnestied?</b>	<b>519</b>
<i>Frédéric Mégret</i>	
I. Introduction	519
II. The Ambiguities of the Humanitarian Law of Amnesty in Non-International Armed Conflict	521
III. Amnesties in Non-International Armed Conflict: A Brief Critique	523
IV. Non-Humanitarian Foundations for Amnesties	525
V. The Weakness of Humanitarian Foundations for Amnesties	527
VI. The Foundation of the Privilege of Belligerency in International Armed Conflict	529
VII. Extending the Privilege of Belligerency to Rebels by Analogy?	533
VIII. The Problem With the Privilege of Belligerency in an Age of <i>Jus Contra Bellum</i>	534
IX. Amnesties and the Possibility of a Non-State <i>Jus Ad Bellum</i>	535
X. Just Rebellion?	537
XI. Conclusion	539

<b>Epilogue: <i>Jus Post Bellum</i>—Strategic Analysis and Future Directions</b>	<b>542</b>
<i>Jens Iverson, Jennifer S. Easterday, and Carsten Stahn</i>	
I. Introduction	542
II. Strengths, Weaknesses, Opportunities, Threats	544
III. Conclusion: Advancing the Concept in Scholarship and Practice	553
<i>Index</i>	555



# Table of Cases

## EUROPEAN COURT OF HUMAN RIGHTS

<i>Adamsons v. Latvia</i> , App. no. 3669/03, Judgment, 24 June 2008	198
<i>Al-Jedda v. United Kingdom</i> , App. No. 27021/08, Judgment, 7 July 2011	190, 469
<i>Al-Saadoon and Mufdhi v. the United Kingdom</i> , App. No. 61498/08, Judgment, 2 March 2010	469
<i>Al Skeini and others v. the United Kingdom</i> , App. No. 55721/07, Judgment, 7 July 2011	437, 486
<i>Behrami and Behrami v. France and Saramati v. France, Germany and Norway</i> , App. No. 71412/01 and 78166/01, Decision, 2 May 2007	238, 486
<i>Berić and others v. Bosnia and Herzegovina</i> , App. No. 36357/04, Decision, 16 October 2007	121
<i>Ilaşcu and others v. Moldova and Russia</i> , App. No. 48787/99, Judgment, 8 July 2004	437
<i>Isayeva v. Russia</i> , App. No. 57950/00, Judgment, 24 February 2005	469
<i>Isayeva, Yusupova and Bazayeva v. Russia</i> , App. No. 57947/00, 57948/00, and 57949/00, Judgment, 24 February 2005	469
<i>Issa and others v. Turkey</i> , App. No. 31821/96, Judgment, 16 November 2004	469
<i>Loizidou v. Turkey</i> , App. No. 15318/89, Judgment, 23 March 1995	469
<i>McElhinney v. Ireland</i> , App. No. 31253/96, Judgment, 21 November 2001	478
<i>Sejdić and Finci v. Bosnia and Herzegovina</i> , App. Nos. 27996/06 and 34836/06, Judgment, 22 December 2009	198, 325–6
<i>Tănase v. Moldova</i> , App. No. 7/08, Judgment, 27 April 2010	198
<i>Ždanoka v. Latvia</i> , App. No. 58278/00, Judgment, 16 March 2006	198

## EUROPEAN COURT OF JUSTICE

<i>Kadi and Al Barakaat International Foundation v. Council and Commission</i> , Joined Cases C-402 and 415/05P, ECR I-6351, 2008	242
<i>Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms</i> , ECR I-01759, 1996	237

## INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

<i>Juan Carlos Abella v. Argentina</i> , Case No. 11.137, Report No. 55/97, 18 November 1997	299, 305
--	----------

## INTER-AMERICAN COURT OF HUMAN RIGHTS

<i>Case of the Massacres of El Mozote and Nearby Places v. El Salvador</i> , Merits, Reparations and Costs, Judgment, Series C No. 252, 25 October 2012	187, 192
---	----------

## INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

<i>Antoine Goetz and others v. Republic of Burundi</i> , ICSID Case No. ARB/95/3	365
<i>Antoine Goetz and others v. Republic of Burundi</i> , ICSID Case No. ARB/01/2	365
<i>Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea</i> , ICSID Case No. ARB/84/1	365
<i>Diamond Fields Liberia, Inc. v. Republic of Liberia</i> , ICSID Case No. ARB/11/14	365
<i>Getma International and others v. Republic of Guinea</i> , ICSID Case No. ARB/11/29	365
<i>International Trust Company of Liberia v. Republic of Liberia</i> , ICSID Case No. ARB/98/3	365
<i>Joseph Houben v. Republic of Burundi</i> , ICSID Case No. ARB/13/7	365

<i>Liberian Eastern Timber Corporation v. Republic of Liberia</i> , ICSID Case No. ARB/83/2 .....	365
<i>Maritime International Nominees Establishment v. Republic of Guinea</i> , ICSID Case No. ARB/84/4 .....	365
<i>M. Meerapfel Söhne AG v. Central African Republic</i> , ICSID Case No. ARB/07/10 .....	365
<i>RSM Production Corporation v. Central African Republic</i> , ICSID Case No. ARB/07/2 .....	365
<i>Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan</i> , ICSID Case No. ARB/02/13 (Decision of the Tribunal on Jurisdiction of 29 November 2004) (2005) 20 ICSID Rev/FILJ 148 .....	365
<i>Shareholders of SESAM v. Central African Republic</i> , ICSID Case No. CONC/07/1 .....	365
<i>Société Civile Immobilière de Gaëta v. Republic of Guinea</i> , ICSID Case No. ARB/12/36 .....	365
<i>Société Industrielle des Boissons de Guinée v. Republic of Guinea</i> , ICSID Case No. ARB/12/8 .....	365

#### INTERNATIONAL COURT OF JUSTICE

<i>Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo</i> , Advisory Opinion [2010] ICJ Rep. 403 .....	418–19, 425
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)</i> , Judgment [2007] ICJ Rep. 43 .....	443
<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i> , Judgment [2005] ICJ Rep. 168 .....	233, 289, 290, 469, 504
<i>Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)</i> , (Second Phase) [1970] ICJ Rep. 3 .....	473
<i>Case Concerning East Timor (Portugal v. Australia)</i> , Judgment [1995] ICJ Rep. 43 .....	417
<i>Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)</i> , Judgment [2012] .....	472, 474
<i>Case Concerning the United States Diplomatic and Consular Staff in Tehran (USA v. Iran)</i> , Judgment [1980] ICJ Rep. 3 .....	470
<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i> , Advisory Opinion [2004] ICJ Rep. 136 .....	233, 264, 469
<i>Legality of the Threat or Use of Nuclear Weapons</i> , Advisory Opinion [1996] ICJ Rep. 226 .....	118, 225, 503, 505, 512
<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)</i> , Merits, Judgment [1986] ICJ Rep. 14 .....	312
<i>North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)</i> , Judgment [1969] ICJ Rep. 3 .....	473
<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)</i> , Provisional Measures, Order of 14 April 1992 ICJ Rep. 114 .....	241
<i>Reparation for Injuries Suffered in the Service of the United Nations</i> , Advisory Opinion [1949] ICJ Rep. 174 .....	247
<i>Reservations to the Convention on Genocide</i> , Advisory Opinion [1951] ICJ Rep. 15 .....	422

#### INTERNATIONAL CRIMINAL COURT

<i>Prosecutor v. Lubanga</i> , ICC-01/04-01/06, Judgment, 14 March 2012 ( <i>Lubanga Trial Judgment</i> ) .....	299, 306, 308
---	---------------

#### INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

<i>Prosecutor v. Boškoski and Tarčulovski</i> , IT-04-82-T, Judgment, 10 July 2008 ( <i>Boškoski Trial Judgment</i> ) .....	262, 299, 305–8
---	-----------------

<i>Prosecutor v. Boškoski and Tarčulovski</i> , IT-04-82-A, Appeals Hearing Transcript, 29 October 2009 .....	306
<i>Prosecutor v. Boškoski and Tarčulovski</i> , IT-04-82-A, Judgment, 19 May 2010 (Boškoski Appeal Judgment) .....	305–6
<i>Prosecutor v. Delalić, Mucić, Delić and Landžo</i> , IT-96-21-T, Judgment, 16 November 1998 (Delalić Trial Judgment) .....	305, 313
<i>Prosecutor v. Đorđević</i> , IT-05-89/1-T, Judgment, 23 February 2011 (Đorđević Trial Judgment) .....	313
<i>Prosecutor v. Gotovina, Čermak and Markač</i> , IT-06-90-T, Judgment, 15 April 2011 (Gotovina Trial Judgment) .....	303, 310
<i>Prosecutor v. Haradinaj, Balaj and Brahimaj</i> , IT-04-84-T, Judgment, 3 April 2008 (Haradinaj Trial Judgment) .....	299, 305
<i>Prosecutor v. Kordić and Čerkez</i> , IT-95-14/2-A, Judgment, 17 December 2004 (Kordić Appeal Judgment) .....	305
<i>Prosecutor v. Limaj, Bala and Musliu</i> , IT-03-66-T, Judgment, 30 November 2005 (Limaj Trial Judgment) .....	262, 290, 299, 304–5
<i>Prosecutor v. Milosević</i> , IT-02-54-T, Decision On Motion for Judgment of Acquittal, 16 June 2004 (Milosević Decision on Motion for Acquittal) .....	262
<i>Prosecutor v. Tadić</i> , ICTY-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (Tadić Decision on Interlocutory Appeal on Jurisdiction) .....	288, 291, 300–1
<i>Prosecutor v. Tadić</i> , IT-94-1-T, Judgment, 7 May 1997 (Tadić Trial Judgment) .....	262, 305
<i>Prosecutor v. Tadić</i> , IT-94-1-A, Judgment, 15 July 1999 (Tadić Appeal Judgment) .....	314

#### INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

<i>Prosecutor v. Akayesu</i> , ICTR-96-4-T, Judgment, 2 September 1998 (Akayesu Trial Judgment) .....	305
<i>Prosecutor v. Musema</i> , ICTR-96-13-T, Judgment and Sentence, 27 January 2000 (Musema Trial Judgment) .....	305

#### PERMANENT COURT OF ARBITRATION

<i>Island of Palmas Case (Netherlands v. United States of America)</i> (1928) 22 AJIL 875, Arbitral Award, 4 April 1928 .....	129, 475
---	----------

#### PERMANENT COURT OF INTERNATIONAL JUSTICE

<i>Case Concerning the Factory at Chorzów (Germany v. Poland)</i> , Merits, Judgment [1928] PCIJ Rep. Series A, No. 17 .....	508
--	-----

#### SPECIAL COURT FOR SIERRA LEONE

<i>Prosecutor v. Kallon and Kamara</i> , SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 .....	191
---	-----

#### UNITED NATIONS HUMAN RIGHTS COMMITTEE

<i>Chiiko Bwalya v. Zambia</i> , Communication No. 314/1988, UN Doc. CPR/C/48/D/314/1988, 14 July 1993 .....	456
<i>Lopez Burgos v. Uruguay</i> , Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40) 176 (1981), 6 June 1979 .....	437

<i>Mabel Pereira Montero v. Uruguay</i> , Communication No. 106/1981, UN Doc. CCPR/C/18/D/106/1981, 31 March 1983 .....	437
---	-----

### WORLD TRADE ORGANIZATION

<i>Brazil—Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 4.11 of the SCM Agreement</i> , WT/DS46/ARB, Decision by the Arbitrators, 28 August 2000 .....	78
---	----

### NATIONAL CASES

#### Germany

<i>Judgment 2 AZR 163/11</i> , German Federal Labor Court, 25 May 2012, .....	479
---	-----

#### Israel

<i>Abu Ita and others v. Commander of Judea and Samaria and others</i> , HCJ 69/81, 37(2) Piskei Din 197 .....	429
<i>Christian Society for the Sacred Places v. Minister of Defense</i> , HCJ 337/91, (1972) 26(1) Piskei Din 574, 1972 .....	429
<i>Electricity Co. for Jerusalem District v. Minister of Defense</i> , HCJ 258/72, (1972) 27(1) Piskei Din 124 .....	434
<i>Jaber Al-Bassiouni Ahmed and others v. Prime Minister et al.</i> , HCJ 9132/07, 27 January 2008 .....	117, 428
<i>Public Committee Against Torture et al. v. Government of Israel et al.</i> , HC J 769/02, 13 December 2006 .....	311

#### Italy

<i>Ferrini v. Germany</i> , Court of Cassation, Judgment No. 5044/04, 6 November 2003 .....	474
<i>Italy v. Mario Luiz Lozano</i> , Court of Assizes, Rome, Judgment No. 07/21, 14 October 2007 .....	493, 494, 495, 496, 498
<i>Mario Luiz Lozano</i> , Court of Cassation, 91 RDI 1223; ILDC 1085 (IT 2008), Judgment No. 31171/2008, 24 July 2008 .....	479

#### United Kingdom

<i>Al-Jedda v. Secretary of State for Defense</i> [2007] UKHL 58 .....	190
<i>Littrell v. United States of America</i> (No. 2) [1995] 1 WLR 82 (CA) .....	479
<i>Trendtex Trading Corp v. Central Bank of Nigeria</i> [1977] QB 529 (CA) .....	479

#### United States of America

<i>Bennett v. Davis</i> (1959) 267 F.2d 15 .....	480
<i>Hamdan v. Rumsfeld</i> (2006) 548 US 557 .....	312
<i>Laker Airways v. Sabena and KLM</i> (1948) 731 F.2d 909 .....	477
<i>The Schooner Exchange v. McFaddon</i> (1812) 11 US 116 .....	475



# Table of Authorities

Abuja Ceasefire Agreement between the Government of Sierra Leone and the RUF 2000	460	Article 2(2)	421
Additional Protocol I, <i>see</i> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts 1977		Article 2(4)	105, 185, 232, 476
Additional Protocol II, <i>see</i> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating the Protection of Victims of Non-International Armed Conflicts 1977		Article 24(1)	242
Agreement on the Principles (Peace Plan) to Move toward a Resolution of the Kosovo Crisis Presented to the Leadership of the FRY by the President of Finland, Mr. Ahtisaari, Representing the European Union, and Mr. Chernomyrdin, Special Representative of the President of the Russian Federation, 3 June 1999	485, 488	Article 25...	47
Agreement Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (Eritrea–Ethiopia)	508	Article 51	232, 475
American Convention on Human Rights 1969	321	Article 53	233
Article 27(1)	322	Article 78...	92
Article 27(2)	455	Article 103	47, 240–41
Arab Charter on Human Rights 2004	321	Article 105	240
Article 4(1)	322	Chapter VII	486, 489
Arusha Peace and Reconciliation Agreement for Burundi 2000	187	Chapter VIII	63
Beijing Declaration and Plan of Action on the Advancement of Women 1995	407	Coalition Provisional Authority Regulation No. 6 2003	253
Bonn Agreement 2001	250	Coalition Provisional Authority Order No. 17 (Revised) 2004	480, 490–91, 495, 497
Charter of the United Nations 1945 (UN Charter)	512	Comprehensive Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) 2006	187
Article 1(1)	317	Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army 2004	50
Article 1(2)	417	Constitution of the Republic of South Africa 1996	392
		Convention on Biological Diversity 1992	369
		Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993	506
		Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) 1972	512
		Convention on the Law of the Non-navigational Uses of International Watercourses 1997	512
		Convention on the Prevention and Punishment of the Crime of Genocide 1948	91
		Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter 1972	369

Convention on the Privileges and Immunities of the UN 1946 . . . . .	72	Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 . . . . .	93
Section 22 . . . . .	498	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 . . . . .	237, 321
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1976 . . . . .	510	Article 15 . . . . .	288
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects 1980 . . . . .	298	Article 15(1) . . . . .	322
Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 . . . . .	298	European Convention on State Immunity 1972 . . . . .	471, 472
Convention on the Rights of Persons with Disabilities 2006 . . . . .	237	Framework Convention on the Protection of National Minorities 1995 . . . . .	185
Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention) . . . . .	365	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva Convention I/GC I/ First Geneva Convention) . . . . .	298
Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 (Ramsar Convention) . . . . .	506	Article 5 . . . . .	301
Dayton Peace Agreement for Bosnia and Herzegovina 1995 . . . . .	184, 323	Article 47 . . . . .	297
Annex 1A (Agreement on the Military Aspects of the Peace Settlement) . . . . .	476	Article 49 . . . . .	117
Annex 7, Article 1 . . . . .	187	Article 53 . . . . .	297
Declaration on the Elimination of Violence against Women 1993 . . . . .	173	Common Article 2 . . . . .	234, 260, 288, 298, 312, 477
Declaration on Environment and Development 1992 . . . . .	246	Common Article 3 . . . . .	26, 298, 304
Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 . . . . .	185, 342	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (Geneva Convention II/GC II) . . . . .	298
Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970 . . . . .	185, 226	Common Article 2 <i>see</i> Geneva Convention (I)	
Declaration on Rights of Indigenous Peoples 2007 . . . . .	185	Common Article 3 <i>see</i> Geneva Convention (I)	
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992 . . . . .	185	Article 44 . . . . .	297
		Article 45 . . . . .	297
		Article 48 . . . . .	297
		Article 50 . . . . .	117
		Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV/GC IV) . . . . .	298, 436, 478
		Common Article 2 <i>see</i> Geneva Convention (I)	
		Article 6 . . . . .	301, 333, 429, 436
		Article 6(3) . . . . .	302
		Articles 27–34 . . . . .	130
		Articles 47–78 . . . . .	130
		Article 64 . . . . .	44, 235, 429, 478
		Article 67 . . . . .	538
		Article 68 . . . . .	538
		Article 146 . . . . .	117

- Geneva Convention Relative to the Treatment of Prisoners of War 1949 (Geneva Convention III/GC III)
- Common Article 2 *see* Geneva Convention (I)
- Common Article 3 *see* Geneva Convention (I)
- Article 4(2) . . . . . 531
- Article 5 . . . . . 301
- Article 85 . . . . . 479
- Article 129 . . . . . 117
- German Administrative Procedure Act 1976 (VwVfG) . . . . . 317
- German Civil Code 2002 (BGB) . . . . . 317
- German Criminal Code 1998 (StGB) . . . . . 317
- Hague Convention (II) Respecting the Laws and Customs of War on Land 1899, Preamble . . . . . 23
- Hague Regulations Concerning the Laws and Customs of War on Land 1907 . . . . . 44, 62, 190, 302, 435, 478
- Article 43 . . . . . 44, 115, 235, 429, 478, 512
- Article 42 . . . . . 93, 130, 288
- Section III . . . . . 130
- Inter-American Convention on Human Rights 1969 . . . . . 288
- International Covenant on Civil and Political Rights 1966 . . . . . 134, 237, 264, 458–9
- Article 1 . . . . . 185, 417, 447
- Article 2 . . . . . 447, 454
- Article 4 . . . . . 264, 288, 455
- Article 4(1) . . . . . 320, 322
- Article 4(2) . . . . . 78
- Article 12(3) . . . . . 187
- Article 25 . . . . . 447, 453–7
- International Covenant on Economic, Social and Cultural Rights 1966
- Article 1 . . . . . 417
- Article 2(1) . . . . . 246
- International Law Commission Reports—
- Report of the International Law Commission: Fifty-third session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001) . . . . . 507
- Article 48 . . . . . 457
- Article 54 . . . . . 458
- Report of the International Law Commission: Sixty-first session, Draft Articles on the Responsibility of International Organizations, UN Doc. A/64/10 (2009) . . . . . 73, 239
- Report of the International Law Commission: Sixty-third Session, Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/66/10 (2011) . . . . . 503, 512
- Iraqi Constitution 2005 . . . . . 392
- Justice and Security (Northern Ireland) Act 2007 . . . . . 323
- Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 . . . . . 368
- Lomé Cease Fire Agreement 1999 . . . . . 303
- Lomé Peace Accord 1999 . . . . . 303, 460
- Montevideo Convention on the Rights and Duties of States 1933 . . . . . 418
- Montreal Protocol on Substances that Deplete the Ozone Layer 1987 . . . . . 369
- Optional Protocol to the International Covenant on Civil and Political Rights 1966 . . . . . 458–9
- Optional Protocol to the United Nations Convention on the Safety of United Nations and Associated Personnel 2005 . . . . . 49
- Paris Minimum Standards of Human Rights Norms in a State of Emergency 1985 (Paris Minimum Standards) . . . . . 322
- Partnership for Peace Status of Forces Agreement 1995 . . . . . 473
- Principles for Good International Engagement in Fragile States and Situations 2007 . . . . . 269, 271, 273–4
- Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention . . . . . 238
- Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977 (Additional Protocol I/AP I) . . . . . 263, 298, 302, 521–2, 537

Article 1(4) .....	226, 317	Article 3 .....	471
Article 3(a) .....	317	Article 12 .....	472
Article 3(b) .....	291	United Nations Convention on the Law of the Sea 1982 .....	369
Article 35 (1) .....	509	United Nations Convention on the Safety of United Nations and Associated Personnel 1994 (UN Safety Convention) .....	48
Article 35(3) .....	509	United Nations Framework Convention on Climate Change 1992 .....	368
Article 37 .....	190	Vienna Convention on the Law of Treaties 1969	
Article 51(5)(b) .....	113	Article 6 .....	234
Article 55 .....	113, 509	Article 34 .....	120
Article 57 .....	113	Article 52 .....	94
Article 57(1) .....	113	Article 53 .....	242
Article 57(2) .....	113	Article 75 .....	512
Article 58 .....	113	Vienna Convention on Law of Treaties Between States and International Organizations or Between International Organizations 1986 .....	234
Article 85(3)(b) .....	113	UN Resolutions—	
Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts 1977 (Additional Protocol II/AP II) .....	57, 298, 302, 521–2, 526, 529, 536, 538	General Assembly Resolutions—	
Article 1(1) .....	317	GA Res. 2074 (XX) (1965) .....	439
Article 2(2) .....	291, 300	GA Res. 3314 (XXIX) (1974) Annex, Article 7 .....	226
Article 5 .....	297	Article 3(a) .....	476
Article 6(5) .....	187, 522, 526, 534–6	Article 3(e) .....	476, 496
Article 25 .....	300	GA Res. 34/169 (1979) Annex .....	47
Rome Statute 1988, <i>see</i> Statute of the International Criminal Court 1998		GA Res. 60/1 (2005) .....	213, 346, 442, 444
Statute of the International Criminal Court 1998 (Rome Statute/ICC Statute)		GA Res. 60/180 (2005) .....	46, 347–50
Article 1 .....	420	GA Res. 62/214 (2008) .....	73
Article 7 .....	263	GA Res. 65/290 (2011) .....	53
Article 8(2)(b)(iv) .....	113	GA Res. 67/85 (2013) .....	50
Article 8(2)(c) .....	263	Security Council Resolutions—	
Article 8(2)(d) .....	422	SC Res. 687 (1991) .....	509
Article 8(2)(e) .....	263	SC Res. 757 (1992) .....	240
Article 8(3) .....	422	SC Res. 917 (1994) .....	240
Article 17 .....	420	SC Res. 1009 (1995) .....	309
Article 19(1) .....	420	SC Res. 1127 (1997) .....	240
Article 19(2) .....	420	SC Res. 1244 (1999) .....	236, 485–6, 488
Article 53 .....	420	SC Res. 1267 (1999) .....	240
Stockholm Declaration 1972 .....	246, 368	SC Res. 1272 (1999) .....	236, 249
Supplementary Protocol No. 2 to the Convention on the OECD 1960 .....	72	SC Res. 1325 (2000) .....	95, 164, 173–4, 186
Taif Accords 1989 .....	327	SC Res. 1378 (2001) .....	250
Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-defense 1948 .....	497	SC Res. 1383 (2001) .....	250
Treaty on European Union, <i>see</i> Treaty of Maastricht		SC Res. 1386 (2001) .....	250
Treaty of Maastricht 1992 .....	238	SC Res. 1401 (2002) .....	250
United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 .....	471	SC Res. 1483 (2003) .....	116, 241, 252–3
		SC Res. 1500 (2003) .....	254
		SC Res. 1502 (2003) .....	50
		SC Res. 1510 (2003) .....	250
		SC Res. 1511 (2003) .....	252–4
		SC Res. 1546 (2004) .....	254, 491, 493–5

SC Res. 1645 (2005) . . . . .	46, 244, 347, 350	SC Res. 2009 (2011) . . . . .	255, 256
SC Res. 1674 (2006) . . . . .	104	SC Res. 2016 (2011) . . . . .	329
SC Res. 1776 (2007) . . . . .	250	SC Res. 2019 (2011) . . . . .	326
SC Res. 1778 (2007) . . . . .	50	SC Res. 2033 (2012) . . . . .	48
SC Res. 1820 (2008) . . . . .	407	SC Res. 2086 (2013) . . . . .	48–9
SC Res. 1888 (2009) . . . . .	407	SC Res. 2098 (2013) . . . . .	158
SC Res. 1889 (2009) . . . . .	407	SC Res. 2100 (2013) . . . . .	235
SC Res. 1970 (2011) . . . . .	255	Universal Declaration on Human Rights 1948	
SC Res. 1973 (2011) . . . . .	104, 233, 255, 328	Article 13 . . . . .	187



## *List of Abbreviations*

ACHR	American Convention on Human Rights
ADB	Asian Development Bank
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
ArCHR	Arab Charter on Human Rights
AU	African Union
BINUCA	United Nations Integrated Peacebuilding Office in the Central African Republic
BITs	Bilateral Investment Treaties
BNUP	United Nations Office in Burundi
CDO	Common but Differentiated Obligations
CEDAW	United Nations Committee on the Elimination of Discrimination against Women
CERD	United Nations Committee on the Elimination of Racial Discrimination
CERP	Commander's Emergency Response Program
CPA	(Iraqi) Coalition Provisional Authority
CPA	Comprehensive Peace Agreement
DAC	Organization for Economic Co-operation and Development, Development and Assistance Committee
DDR	Demobilization, Disarmament, and Reintegration
DRC	Democratic Republic of Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	UN Economic and Social Council
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECSI	European Convention on State Immunity
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
ENMOD	Convention on Military or Any Other Hostile Use of Environmental Modification Techniques
EU	European Union
FARC	Revolutionary Armed Forces of Colombia
FRY	Federal Republic of Yugoslavia
GC IV	1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War
GSP	World Trade Organization, Generalized System of Preferences
HRC	United Nations Human Rights Committee
HRW	Human Rights Watch
IACs	International Armed Conflicts
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IDRC	International Development Research Centre
IFIs	International Financial Institutions
IFOR	NATO-led Implementation Force
IGC	Iraqi Governing Council
IHL	International Humanitarian Law
IISS	International Institute for Strategic Studies
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
IMPP	Integrated Mission Planning Process
INGO	International Non-Governmental Organization
IO(s)	International Organization(s)
IOM	Institute of Medicine
ISAF	International Security Assistance Force
JICA	Japan International Cooperation Agency
KFOR	NATO-led Kosovo Force
KLA	Kosovo Liberation Army
LTTE	Tamil Tigers
MCC	Millennium Challenge Corporation
MDTF	Multi-Donor Trust Fund
MEAs	Multilateral Environmental Agreements
MINUSMA	United Nations Stabilization Mission in Mali
MINUSTAH	United Nations Stabilization Mission in Haiti
MNF	Multinational Force
MPEPIL	Max Planck Encyclopedia of Public International Law
MTA	Military Technical Agreement
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organizations
NIACs	Non-International Armed Conflicts
NTC	Libyan National Transitional Council
OECD	Organization for Economic Cooperation and Development
OHR	Office of the High Representative
PBC	United Nations Peacebuilding Commission
PCIJ	Permanent Court of International Justice
PKK	Kurdish Working Party
POW	Prisoners of War
R2P	Responsibility to Protect



RUF	Revolutionary United Front
SEA/VAM	Sexual Exploitation and Abuse Victim Assistance Mechanism
SLPP	Sierra Leone People's Party
SOFAs	Status of Armed Forces on Foreign Territory Agreements/Status of Forces or Mission Agreements
SOMAs	Status of Forces or Mission Agreements
SPM	Special Political Mission
SRSG	Special Representative to the United Nations Secretary-General
SSR	Security Sector Reform
SSRC	Social Science Research Council
UKHL	United Kingdom House of Lords
UN	United Nations
UNAMA	United Nations Assistance Mission to Afghanistan
UNAMI	United Nations Assistance Mission for Iraq
UNAMSIL	United Nations Assistance Mission in Sierra Leone
UNCC	United Nations Compensation Commission
UNCHR	United Nations Commission on Human Rights
UNCESI	United Nations Convention on Jurisdictional Immunities of States and Their Property
UNDP	United Nations Development Program
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNIOGBIS	United Nations Integrated Peacebuilding Office in Guinea-Bissau
UNIOSIL	United Nations Integrated Office in Sierra Leone
UNIPSIL	United Nations Integrated Peacebuilding Office in Sierra Leone
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMISET	United Nations Mission of Support in East Timor
UNMIT	United Nations Integrated Mission in Timor-Leste
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission in Libya
UNTAET	United Nations Transitional Administration of East Timor
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization



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# Exploring the Normative Foundations of *Jus Post Bellum*: An Introduction

Jennifer S. Easterday, Jens Iverson, and Carsten Stahn

## I. Perspectives on *Jus Post Bellum*

The successful transition from armed conflict to peace is one of the greatest challenges of contemporary warfare. It raises moral, legal, and practical problems that are the focus of intense interest across disciplines. The laws and norms of justice that apply to the process of ending war and building peace, or “*jus post bellum*,” is a central and growing concern. An inquiry into *jus post bellum* has occupied a significant space in the philosophical study of “just war theory,” but has been sidelined in international law and other fields. This volume thus has a foundational role: to examine the potential merits and criticisms of *jus post bellum*—not from one disciplinary standpoint, but from the angle of multiple disciplines and perspectives.

*Jus post bellum* has its most traditional and systemic grounding in just war theory. Brian Orend has defined *jus post bellum* as a natural corollary of *jus ad bellum* and *jus in bello*. He writes:

It seems, then, that just war theorists must consider the justice not only of the resort to war in the first place, and not only of the conduct within war, once it has begun, but also of the termination phase of the war, in terms of the cessation of hostilities and the move back from war to peace. It seems, in short, that we also need to detail a set of just war norms or rules for what we might call *jus post bellum*: justice after war.<sup>1</sup>

In this context, it is part of a structural framework spanning the temporal phases of conflict (before, during, and after), but remains one of the least developed branches of this area of moral thinking.<sup>2</sup> Larry May’s book *After War End* provides a first attempt to take a modern account of organizing philosophical principles for post-conflict peace. He proposes six primarily moral norms as the basis for *jus post bellum*: rebuilding, retribution, reconciliation, restitution, reparation, and proportionality.<sup>3</sup> But the question remains: (how) are those moral norms reflected in international law?

Outside of just war theory, the concept is even more *terra nova*. The concept has slowly gained attention in scholarship in different fields, emerging incrementally in different contexts: in peacebuilding and post-conflict reconstruction literature, the areas

<sup>1</sup> Brian Orend, “*Jus Post Bellum*” (2000) 31 *Journal of Social Philosophy* 117.

<sup>2</sup> Michael Walzer, *Just and Unjust Wars* (4th edn, Basic Books 2006).

<sup>3</sup> Larry May, *After War Ends* (Cambridge University Press 2012).

of international humanitarian law<sup>4</sup> or international security law,<sup>5</sup> and in scholarship addressing “Transitional Justice” and the “*lex pacificatoria*”<sup>6</sup> more generally. Here there is friction over whether the concept of *jus post bellum* should be construed to mean what the law *is* (or *is not*) (*lex lata*), or what the law *should be* (*lex ferenda*). Is there a current “law” of *jus post bellum*, or is it an aspirational normative framework? Is it based on existing bodies of law, customary international law, or does it depend on the creation of a new *jus post bellum* treaty? Answers to these questions and (legal) definitions of the concept diverge, raising several unanswered questions.

For example, one useful definition derived within the context of post-conflict peacebuilding suggests:

[*Jus post bellum* can be generally defined as the set of norms applicable at the end of an armed conflict—whether internal or international—with a view to establishing sustainable peace. [...] [T]he grouping of disparate standards within the same frame of reference underscores the need for a comprehensive and coordinated approach to the numerous rules governing post-conflict situations. From a systemic perspective, it paves the way for a contextualized interpretation—and, by extension, a contextualized application—of existing norms in order to better take into account the specificities which characterize the difficult transition from war to peace.<sup>7</sup>

However, this leaves several open questions. Which norms fit within *jus post bellum*? Are there secondary norms as well as primary norms? What are the sources of these norms? Do they apply equally in all types of armed conflict (whether internal, international, or something else)? Do they apply equally across all temporal phases of a conflict? Do they apply equally (or at all) to non-state actors, coalitions of states, as well as states? How does a contextualized approach work in practice? How do they interact with other related normative frameworks? How would *jus post bellum* impact different constituencies, such as women, local populations, or insurgents? What is the value of a common frame of reference and a cohesive approach to peacebuilding?

These questions and others give rise to skepticism and calls for caution with respect to the concept.<sup>8</sup> Some of the distinctions from other paradigms, such as Transitional Justice or the Responsibility to Protect, are contested.<sup>9</sup> Its very essence and added value are open to inquiry, both structurally and conceptually.

<sup>4</sup> Adam Roberts, “The End of Occupation: Iraq 2004” (2005) 1 *International and Comparative Law Quarterly* 27.

<sup>5</sup> Nigel White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013).

<sup>6</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

<sup>7</sup> Vincent Chetail, “Introduction” in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press 2009).

<sup>8</sup> See e.g. Eric de Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 43 *Vanderbilt Journal of Transnational Law* 119; Robert Cryer, “Law and The *Jus Post Bellum*: Counseling Caution” in Larry May and Andrew Forchimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012).

<sup>9</sup> “*Jus post bellum*” has overlaps with R2P, Transitional Justice and the Law of Peace. It may to some extent draw insights from the “global administrative law” debate. It is sometimes even argued that *jus post bellum* forms part of these concepts (e.g. “transitional justice”). But there are obvious differences. Let us take R2P, for instance. R2P defines a general behavioral norm, such as a communitarian duty to assist or

## II. Definitions

In an attempt to address these questions, gaps, and debates, this volume aims to provide a comprehensive multi-disciplinary examination of the foundation, application, and content of *jus post bellum*. To begin, it is important to define and clarify the terms of the discussion. Although scholars contend that *jus post bellum* can create more coherence in approaches to peacebuilding, one of the features of current discourse is that there are almost as many conceptions of *jus post bellum* as scholars, within and across disciplines. It is referred to as a “right way to end a war”<sup>10</sup> or as “post-war-justice”<sup>11</sup> in the just war tradition, and is associated with different paradigms such the “the law of peacebuilding,” constitutional transformation<sup>12</sup> or “transformative occupation”<sup>13</sup> in legal doctrine. The discussion thus sometimes bears traces of the “Tower of Babel” syndrome.

This volume sets out to explore the contours and impact of this concept, with two caveats:

- (1) not to assume the existence or merits of a full-fledged *jus post bellum*, but to explore its potential meaning, content and risks; and
- (2) not to restore the pieces of a “pre-Babelian” mosaic, but to re-think its potential fragments from a contemporary perspective.

The authors in this volume grapple directly with the definition and meaning of *jus post bellum*, taking the concept further than in previous scholarship. Several distinct conceptions are offered. Building on the historical and philosophical foundations of the concept, Larry May argues that *jus post bellum* “concerns the moral and legal considerations that pertain to situations where a war or armed conflict has come to an end.”<sup>14</sup> He links the moral and legal, suggesting that it might be useful to consider *jus post bellum* as *lex ferenda* and arguing that, even if its principles are not codified in “black letter law,” it can still be binding from a moral standpoint.<sup>15</sup> Mark Evans contends that it is “the account of what justice permits and/or requires in the ending and aftermath of war.”<sup>16</sup> He distinguishes two related treatments of this definition: a “legal” treatment and a “moral” treatment, and in his chapter attempts to establish conceptual clarity so that the two areas of scholarship can come into closer dialogue.

even to rebuild. “*Jus post bellum*,” by contrast, may provide a framework for its operationalization through “hard law,” “soft law,” and practice, and its evaluation and “judgment.” In some cases, a pattern of conduct, such as continued international presence, may be warranted by R2P, but sanctioned under *jus post bellum* due to lack of consent.

<sup>10</sup> Richard M. O’Meara, “*Jus Post Bellum*: Reflections on the Right Way to End a War” (2011) 6 *Journal on Terrorism and Security Analysis* 35.

<sup>11</sup> Walzer, *Just and Unjust Wars* (n. 2).

<sup>12</sup> Nehal Bhuta, “New Modes and Orders: The Difficulties of a *Jus Post Bellum* of Constitutional Transformation” (2012) 60 *University of Toronto Law Journal* 799.

<sup>13</sup> Roberts, “The End of Occupation: Iraq 2004” (n. 4).

<sup>14</sup> Larry May, text to n. 36 in ch. 1, this volume.

<sup>15</sup> Larry May, text to n. 35 in ch. 1, this volume.

<sup>16</sup> Mark Evans, ch. 2, this volume.

Dieter Fleck presents a “legal” definition of *jus post bellum*, arguing that the complexity of post-conflict settings may justify the consideration of *jus post bellum* as a distinct legal branch, or a “partly independent legal framework.”<sup>17</sup> He posits, however, that establishing *jus post bellum* norms will require both formal and informal approaches, cooperative action, and “creative flexibility.” Indeed, Fleck proposes a number of (non-legal) principles that he suggests should be a part of *jus post bellum* in addition to international legal rules. Jens Iverson takes this concept further, arguing that *jus post bellum* is best understood as “by definition primarily a system or body of law.”<sup>18</sup> Several other authors take a similar approach, and analyze *jus post bellum* as the body of legal principles and norms that apply during the transition from conflict to peace.<sup>19</sup>

However, there are other ways to think about *jus post bellum* as a concept. Rather than viewing *jus post bellum* as a set rules that dictate certain outcomes, *jus post bellum* could be considered from a broader, functional point of view that captures more aspects of an area rich with potential theoretical, legal, and practical scholarship. James Gallen presents the novel suggestion that *jus post bellum* might most effectively operate as an interpretive framework based on Dworkin’s principle of integrity.<sup>20</sup> He suggests that *jus post bellum* could be used to interpret and evaluate the actions and political decisions of actors in transitional societies to determine to what extent they contribute to restoring civic trust and rule of law. Gallen posits that “the task of *jus post bellum* as integrity is to therefore offer a description of the existing international law, policy, and theory as applied to given transitions and seek to justify this practice by reference to its value goals in a unified or coherent fashion.”<sup>21</sup> Taking this dynamic approach to *jus post bellum*, Gallen argues, would promote coherent post-conflict responses and emphasize the mutually supporting relationship between different frameworks that apply in post-conflict settings, such as Transitional Justice, peacebuilding, security sector reform, and development. Jennifer Easterday presents another view of *jus post bellum*, taking a broad “inter-public” approach to law in *jus post bellum*.<sup>22</sup> This view considers that the “law” of *jus post bellum* is comprised of not only the laws and norms stemming from settled bodies of international law, but also of developing normative practices of non-state actors and organizations. In addition to utilizing these areas of law during the transition from conflict to peace, Easterday also considers *jus post bellum* from a functional perspective, arguing that it creates valuable sites of coordination and discourse in post-conflict situations. Easterday argues that this holistic view of *jus post bellum* would fill gaps currently found in the law and practice of post-conflict peacebuilding.

However, each of these proposed definitions needs to be explored and further debated. Indeed, the book starts from the premise that “(re-)construction” requires partial “deconstruction.” Each of the core components of the concept, namely, the

<sup>17</sup> Dieter Fleck, text to n. 51 in ch. 3, this volume.

<sup>18</sup> See e.g. Jens Iverson, text to n. 29 in ch. 5, this volume.

<sup>19</sup> See, inter alia, Gregory Fox, ch. 12; Kristen Boon, ch. 13; and Aurel Sari, ch. 24, this volume.

<sup>20</sup> James Gallen, ch. 4, this volume.

<sup>21</sup> James Gallen, text to n. 63 in ch. 4, this volume.

<sup>22</sup> Jennifer Easterday, ch. 20, this volume. See also Liliana Lyra Jubilut, “Towards a New *Jus Post Bellum*: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability” (2011) 20 *Minnesota Journal of International Law* 26, 57.



meanings of “jus,” “post,” and “bellum,” must be critically examined and virtually “re-translated” into a modern context in order to have contemporary relevance.

This book pursues several objectives:

- (1) to critically investigate the contours, meaning, and critiques of *jus post bellum*, including its relationship to related paradigms;
- (2) to analyze the treatment of the concept across disciplines, and to explore how it connects to causes of armed conflict and strategies and critiques of peacebuilding, including the very definitions of “armed conflict” and “peace”;
- (3) to clarify different legal meanings and components of the concept, including its implications for contemporary politics and practice and its relationship to “*jus ad bellum*” and “*jus in bello*”;
- (4) to highlight dilemmas in relation to the ending of conflict, including the distinction between “conflict” and “post-conflict” (i.e. indicators for the ending of conflicts, “exit” strategies, the relationship to sustainable peace and prevention strategies);
- (5) to distil a set of principles in key areas (sovereignty, consent, reconstruction, derogation, environmental protection, accountability) that inform the creation and sustainability of resilient and peaceful post-conflict societies; and
- (6) to clarify the function of, need for, and opportunities for developing the study of *jus post bellum*.

### III. Themes

The book is organized along key themes, which aim to set out fundamental aspects of the concept of *jus post bellum*. The themes addressed are by no means exhaustive, but provide an example of the breadth and depth of scholarship emerging around this concept.

#### A. Foundation and conceptions of *jus post bellum*

Part 1 deals with the nature of *jus post bellum* as a concept in different disciplines. As noted above, *jus post bellum* is receiving fresh attention in just war theory scholarship, but is treated distinctly across disciplines and receives less attention and support from international law or international relations scholars. It is still unclear whether *jus post bellum* is a construct, a strand of research, or a sub-discipline of existing paradigms. *Jus post bellum* also serves both as a conceptual ground for the development and re-thinking of existing or emerging principles and theories (such as international humanitarian law, Transitional Justice, and the Responsibility to Protect). Part 1 explores these foundational issues in order to critically investigate the concept of *jus post bellum*.

In just war theory, *jus post bellum* is usually associated with the notion of “justice.” In a legal setting, the concept takes on a different dimension. Currently, there is a spectrum of different propositions. According to a maximalist conception, *jus post bellum* might be said to form a system or body of norms. It would thus provide a coherent and

predictable framework, which would be applicable as a minimum standard.<sup>23</sup> A different conception of *jus post bellum* is its qualification as a framework to evaluate action and assess a legitimate ending of conflict, and to establish a public context for debate. *Jus post bellum* might also be understood in a more functional sense, i.e. as an ordering principle to regulate and coordinate the interplay of different bodies of law, or as a theory or interpretive device that informs a context-specific interpretation of certain normative concepts, such as military necessity or the principle of proportionality.<sup>24</sup> *Jus post bellum* could also be conceived of as a site of discourse that could create more cohesion and consistency amongst peacebuilding initiatives.

These different notions of *jus post bellum* interact with existing theories and approaches to post-conflict peacebuilding. The concept has met with criticism as unnecessary and warranting caution. Therefore, Part I also clarifies the relationship of *jus post bellum* to related paradigms and includes chapters on contemporary criticisms and risks of *jus post bellum*.

The first subsection, *Foundation, Concept, and Function*, includes chapters from Larry May, Mark Evans, Dieter Fleck, and James Gallen. Larry May connects the current debate to the concepts of sixteenth- and seventeenth-century theorists, developing a concept of justice in *jus post bellum* that is rooted in traditional humility and modern skepticism towards humanitarian wars and their aftermath. May builds on his earlier work to craft a synthesis of practicality and the virtue of compassion. Mark Evans presents a typology of *jus post bellum* conceptions ranging from the restricted to the extended. Evans tackles two pressing challenges to *jus post bellum*: differentiating justice before and after the end of war and the tension between backward-looking and forward-looking goals after conflict. Dieter Fleck emphasizes the differences in contents, purpose, and regulation between *jus post bellum* and other branches of international law. His idea of a “partly independent legal framework” provides an innovative way to place *jus post bellum* within a wider context. James Gallen explores, for the first time, the concept of *jus post bellum* as an interpretive framework. He investigates to what extent such an understanding might avoid fragmentation between related fields in the transition out of armed conflict. Together, these chapters explore what *jus post bellum* is and analyze the broad foundations and specific functions of the concept.

The second subsection, *Jus Post Bellum and Related Concepts*, includes chapters from Jens Iverson and Carsten Stahn. Jens Iverson contrasts Transitional Justice and *jus post bellum* in order to create a clearer definition and understanding of each, with a highly particular and concrete emphasis on the differentiated substantive focus, temporal aspects, geographical scope, legal or political nature, historical foundations, and current usage. Iverson clarifies where Transitional Justice can be helpful to the study of *jus post bellum*, and emphasizes the need for Transitional Justice practitioners to

<sup>23</sup> This conception is the most contested one. It is subject to some of the systemic criticisms that have arisen in the debate as to whether on international law is “law.” What are its foundational rules and principles? Can it constitute a system, if it borrows norms from other bodies of law? Is it precise enough in terms of its scope of application? Can it be a system if its norms are not binding or not enforced?

<sup>24</sup> It might, for instance introduce a novel end in relation to the conduct of hostilities, namely the objective not to preclude the goal of sustainable peace through the conduct of warfare.

refocus their field. Carsten Stahn challenges the assumption that *jus post bellum* and the Responsibility to Protect are without tension, highlighting both reinforcing and contradicting tendencies. Stahn posits that only with a polycentric vision of the international order can the relationship between the two concepts be properly understood. This subsection builds upon the first subsection, providing clear contrasts with related but distinguishable paradigms.

The third subsection, *Jus Post Bellum and Its Discontents*, includes chapters from Eric de Brabandere, Roxana Vatanparast, and Fionnuala Ní Aoláin and Dina Haynes. Eric de Brabandere launches a two-pronged attack against *jus post bellum*, asserting that it is limited both in usefulness and accuracy. De Brabandere's critical analysis goes beyond definitional quibbling to examine the real problems that may emerge with respect to post-conflict reconstruction as a result of the *jus post bellum* concept. He agrees that the idea of *jus post bellum* as an "interpretive framework" has some value. But he questions whether this understanding might be in line with the original idea of the concept. Roxana Vatanparast analyzes the idea and suggested content of *jus post bellum* through the lens of critical legal theory and international relations scholarship. Vatanparast warns of manipulation and instrumentalization of the legal framework by international actors, as well as the embedding and legitimation of neo-colonial projects through law. Fionnuala Ní Aoláin and Dina Haynes provide a gender perspective on post-conflict frameworks, cautioning against an emphasis on a "universal" citizen and inquiring how *jus post bellum* might address the needs and challenges of women in conflict and post-conflict settings. This subsection provides the crucial, critical perspective all too often missing in analysis of the concept of *jus post bellum*.

## B. Reconceptualizing "bellum" and "pax"

A further line of inquiry addressed in the volume relates to the interplay between *jus post bellum*, *jus ad bellum*, *jus in bello*, and peace. The relationship of *jus post bellum* to traditional international humanitarian law has been discussed in modern just war theory, but remains underexplored conceptually and legally. Thus, Part 2 re-thinks the concept of "bellum," in particular its relevance to internal armed conflicts. It further explores the potential impact of *jus post bellum* on conduct and laws *ad bellum* or *in bello*. It also sheds closer light on the relationship of *jus post bellum* to the concept of "peace." By thus partially "deconstructing" the notions of bellum and pax, this section aims to re-translate these ideas into the modern context as they relate to *jus post bellum*.

This section includes chapters from Christine Bell, Inger Österdahl, Gregory Fox, Kristen Boon, and Astri Suhrke. Christine Bell inquires whether a new *jus post bellum* regime operating across different types of conflict is possible and desirable. If not, she asks, how should we best situate and respond to contemporary developments in international law relating to terminating intra-state conflict? Bell's study of the legal creation of peace draws upon extensive analysis of the actual practice of peace negotiations and agreements to understand the importance of the chosen goals of international law in the contemporary globalized context. She argues that while the discussion of *jus post bellum* provides a useful way to explore gaps in how international law deals

with peace settlements and the implementation issues they raise, it is neither possible nor desirable to develop emerging legal innovations into a fully-fledged legal regime. Inger Österdahl argues that *jus post bellum* is necessary in order to cope constructively with the consequences of armed conflict, and that the introduction of a systematic and comprehensive *jus post bellum* will challenge the traditional conceptual categories relating to the law on the use of force. She suggests that it might move the focus away from the beginning of a conflict towards the middle and end of armed conflict. Moreover, Österdahl contends, *jus post bellum* will create a more human-centered law of armed conflict.

Gregory Fox illustrates how *jus post bellum* could either be limited by a traditional state-centric focus or could pose a controversial constraint on both sub-state and international organizations, including the United Nations Security Council. This contribution demonstrates in a novel way the potentially unexpected power of *jus post bellum*. Kristen Boon focuses on the differences between *jus post bellum* in international and non-international armed conflict. She suggests that in the context of non-international armed conflicts, *jus post bellum* should incorporate the idea of “bounded discretion” and should show deference to local authorities in certain areas. Astri Suhrke’s empirical analysis of different types of post-war “peaces” negates the assumption that there is a homogenous or even predominant post-war situation. Suhrke’s chapter provides an incisive political science perspective that should fundamentally change the way scholars and practitioners approach *jus post bellum*. This section helps clarify the different ways *jus post bellum* can influence an analysis of the law of armed conflict and how it could potentially change the field.

### C. Dilemmas of the “Post”

The third part of the book deals with different dimensions of the conception and management of the “post” in existing scholarship and practice. It examines three crucial aspects of the “post” in greater detail: (i) the validity of the “conflict”/“post-conflict” distinction, (ii) its role in defining the temporal scope of application of *jus post bellum*, as well as (iii) techniques and strategies used to deal with the uncertainties of the “post” in transitions. This section highlights problems in relation to the ending of conflict, including indicators for the end of modern conflicts, exit strategies, and institutional responses to developing sustainable peace “post” conflict.

The first subsection, *Dilemmas of Classification*, includes chapters by Jann Kleffner, Rogier Bartels, and Martin Wählisch. Jann Kleffner focuses on the temporal dimension of *jus post bellum* regarding where, how, and whether to draw the dividing line between *jus post bellum* and the law of peace. Kleffner emphasizes the need for a functional approach that allows for temporal overlap with other areas of law. He argues that the alternative would perpetuate the division of public international law into the law of armed conflict and the law of peace—which he contends is inappropriate for *jus post bellum*, which by its nature transcends this division. Rogier Bartels focuses precisely on the transition from *jus in bello* to *jus post bellum* in the context of non-international armed conflict. Surprisingly, the question of how to determine when non-international armed conflicts end is still unresolved, but, Bartels argues, remains critical to

determining when *jus post bellum* applies and what it means on the ground. Using jurisprudence from the International Criminal Tribunal for the former Yugoslavia (ICTY), he proposes using a case-by-case application of factors and indicators about the organization and intensity required to find the existence of a non-international armed conflict to determine the end of such conflicts. Martin Wählisch scrutinizes indicators set by international human rights institutions for characterizing the necessity of suspended human rights provisions in post-conflict phases. He looks at both the beginning and the end of the temporal scope of *jus post bellum*, proposing a list of indicators that suggest the beginning and end of *jus post bellum*. Together, these chapters ask hard questions about classifying the temporal limits of armed conflict and peace and analyze the implications for *jus post bellum*.

The second subsection, *Institutional Dilemmas and Strategies*, explores institutional and practical problems that arise when attempting to make temporal distinctions related to the concept of “post” bellum. It includes chapters by Dominik Zaum and Freya Baetens. Dominik Zaum focuses on the challenges of ending post-conflict transitional administrations and potential lessons for institutional approaches in the operationalization of *jus post bellum*. He looks at the influence of *jus post bellum* concerns on exit mechanisms and policies. Zaum suggests that *jus post bellum* norms have affected key exit practices, sometimes with unintended consequences. However, he concludes that *jus post bellum* does not provide a general framework for exit, which tends to focus on technical issues that, at their core, are deeply political. Freya Baetens discusses the UN Peacebuilding Commission, which has been created to facilitate transitions from conflict to peace. She argues that it could fill an institutional gap in the coordination of post-conflict peacebuilding efforts. However, Baetens contends, the Peacebuilding Commission has missed an opportunity to foster important *jus post bellum* norms, including local ownership, mutual accountability, and sustainable development. These chapters discuss the institutional realities and challenges of *jus post bellum*.

#### D. The “Jus” in *Jus Post Bellum*

Part 4 examines the meaning of “jus” in *jus post bellum*. It treats different notions of the “jus,” including its goals, “functional” meaning, and its relationship to norms and principles. Then, it seeks to define contours of a “jus,” drawing on disparate bodies and sources of international law such as peace agreements, treaty law, self-determination, rules governing the status of foreign armed forces in post-conflict situations, environmental law, and amnesty law. This analysis clarifies how the concept of *jus post bellum* influences the treatment of core principles of international law and international relations in situations of transition: for example, sovereignty, constitutionalism, gender, consent, democracy, environmental protection, and accountability. This section attempts to distil a set of principles that inform the creation and sustainability of resilient and peaceful post-conflict societies.

Part 4 includes chapters by Jennifer Easterday, Dov Jacobs, Yaël Ronen, Matthew Saul, Aurel Sari, Cymie Payne, and Frédéric Mégret. Jennifer Easterday suggests that *jus post bellum* should be considered as a broad holistic concept that provides a normative and interpretive framework for post-conflict transitions to peace as well as a site

of coordination and a site of discourse. She argues that peace agreements and the *lex pacificatoria* can inform the *jus post bellum* paradigm and provides an empirical review of peace agreements to distil core norms and principles that are important to *jus post bellum*. Dov Jacobs emphasizes the importance of sovereignty, asserting that one of the main goals of *jus post bellum* should be to *relegitimize* sovereignty rather than *bypass* it. Jacobs proposes an innovative inversion of Scelle's *dualité fonctionnelle* by discussing how international institutions should be conceptually analyzed as organs of the national legal order, rather than the opposite. Yaël Ronen explores the idea of "*jus post-occupation*," exploring the difficulties of post-occupation obligations and the obligations of former occupants. She suggests that post-occupation law should address both individual and collective interests. Matthew Saul asks whether there is a role for *jus post bellum* in creating post-conflict governments. Saul focuses on the international law of political participation, which specifies an electoral process as a means for public participation in governance, and questions whether it is adequately suited to deal with the complexities of post-conflict settings. He asserts that this law must balance two competing interests: the importance of context-specific nature of the approach taken and the importance of accountability.

Aurel Sari, Cymie Payne, and Frédéric Mégret explore specific questions of *jus post bellum* norms. Sari addresses the normative foundations of the legal status of foreign armed forces deployed in post-conflict environments. Sari derives principles of general application from various sources of international law regarding the status of foreign armed forces, and compares them with *jus post bellum* priorities. He then examines consensual and non-consensual presence of foreign troops and the balance between the competing legal interests of sending and host states. Sari contends that *jus post bellum* should be conceived of as a process of transition rather than simply a set of norms, and that this process should be flexible and context-specific in order to adequately address the variation in legal and factual circumstances of different post-conflict scenarios. Payne considers the norm of environmental integrity and queries the relationship between this norm and *jus post bellum*. She argues that in order to realize environmental integrity, *jus post bellum* must incorporate reparations, collective concern, and reconstruction. Mégret focuses on justifications for insurgent amnesties and asks whether the aim of reconciliation is a clear enough motive to extend amnesties to all insurgents. Noting amnesties as a challenge for *jus post bellum*, Mégret argues for a principled approach to amnesties for insurgents. This approach should accept that insurgencies can be legitimate, Mégret contends, particularly when they are against a regime engaged in massive abuses of human rights or violations of international law. Part 4 makes concrete the all-too-often abstract discussions of the substance of "jus" in *jus post bellum*. This section further offers a new perspective on the "jus" by exploring it from a legal rather than moral or accountability-centered perspective.

#### IV. Conclusion

Together, these chapters offer a comprehensive view of what could be termed the "spectrum" of *jus post bellum*. Authors present maximalist and minimalist conceptions of *jus post bellum*. They describe *jus post bellum* theory and practice as well as general

and specific applications of the concept. Some authors focus on the *lex lata* (what the law is) while others focus on the *lex ferenda* (what the law should be) with relation to post-conflict situations.

It becomes clear that *jus post bellum* cannot simply be modeled after *jus ad bellum* or *jus in bello*. It is a distinct concept, with its own functions, form, and content. It is still seeking its space in just war theory and international law. The most limited common denominator is that it serves as an analytical framework to guide discussion on fundamental challenges of international society. It opens new debates on the interplay between law and morality, the use of specific norms, standards, and practices of post-conflict conduct and a range of cross-cutting issues, such as the importance of inclusion, local ownership, context-specific approaches, and the critical need to address gender-sensitive issues and women's perspectives in the study and application of *jus post bellum*.

The volume's coverage of the topic is both broad and deep, but gaps and silences remain, as do opportunities and risks. Some of them are addressed separately in the Epilogue. The chapters below demonstrate the complexity of the issues raised by *jus post bellum* and different approaches toward fundamental elements of the concept. While there is some agreement on rationales and blind spots, voices differ as to the direction in which *jus post bellum* should develop. In the context of just war theory, significant focus has been placed on the idea of "justice after war." This focus on "justice" serves also as a natural starting point in the context of international law. But the contributions in this volume indicate that the tides may be shifting. With the growing impact of law in peacebuilding and greater reception of the concept in peace studies, the nexus to "sustainable peace" may gain greater weight—not necessarily in the form of the classical "liberal peace" idea, but in a novel, pluralistic way. *Jus post bellum* might serve as an instrument to overcome some of the existing normative and disciplinary biases in the international order. One of its strengths is that it creates the space to re-think entrenched dichotomies—for example, the interplay between security and human rights, law and politics, and peace and justice. What follows in this volume hopefully provides a useful "map" of the conceptual foundations for the onward journey.





PART 1

FOUNDATION AND CONCEPTIONS  
OF *JUS POST BELLUM*



# I

## FOUNDATION, CONCEPT, AND FUNCTION

### 1

## *Jus Post Bellum, Grotius, and Meionexia*

Larry May\*

In very recent times, the *jus post bellum* has begun to get attention.<sup>1</sup> Yet this branch of the Just War tradition was certainly countenanced and discussed in very early times as well. Today it is recognized that there are at least six *post bellum* principles: retribution, reconciliation, rebuilding, restitution, reparations, and proportionality, what we might call 5R&P. This part of the Just War tradition is not nearly as well settled as the other two parts. Indeed, there is not even consensus on what the conditions are, or even whether they are conditions of the same sort as those of the *jus ad bellum* and *jus in bello*.

In this chapter I will highlight several themes that are of theoretical and practical interest. First, I give a brief account of the six principles of *jus post bellum*, indicating how each was already addressed by such important sixteenth and seventeenth-century theorists as Hugo Grotius, Francisco Vitoria, and Francisco Suarez. Second, I provide a defense of seeing *meionexia* as a principle of justice well-suited for *jus post bellum* deliberations. Third, I attempt to answer the question: Is *jus post bellum* binding law? by going back to Grotius and Hobbes, especially to their discussion of the relation between the laws of nature and the laws of nations. And then in the fourth section, I conclude with a few thoughts about how *jus post bellum* and transitional justice relate to each other.

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<sup>1</sup> See Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012); Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012); Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press, forthcoming in 2014). Also see Carsten Stahn and Jann Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008); and Eric Patterson (ed.), *Ethics Beyond War's End* (Georgetown University Press 2012).

## I. Historical Roots of *Jus Post Bellum* Principles

After war is over, one of the most important and most difficult conditions to satisfy is that of retribution—bringing those to account who committed wrongs either by initiating an unjust war or by waging war unjustly. This is especially problematic because holding criminal trials and then punishing often-popular state leaders, for instance, sometimes makes another condition of *jus post bellum*, reconciliation, very difficult to satisfy. But it is hard to comprehend what *jus post bellum* justice would involve if it did not have some accounting for the wrongdoers during the war or armed conflict that has now ended. In the sixteenth century, Francisco Vitoria argued that wrongs committed during war should be punished “proportionate to fault,”<sup>2</sup> linking retribution with *jus post bellum* proportionality. And Vitoria argued that the guide to whether to seek retribution is whether it “be for the public good.”<sup>3</sup> We will return to this idea several times in this chapter.

Closure is hard to achieve if there is not a public reckoning for those who used the war as an occasion to commit wrongs, or who chose to conduct war in a wrongful way. This is because at the end of war there needs to be a just peace. The major theorists of the Just War tradition rarely talked about criminal trials, but certainly were focused on punishment of some kind for the wrongdoers after war ends. Grotius talked about some kind of tribunal in this respect, as when he says that “in some cases war is lawfully waged [...] in order that they [the criminals] may be brought to trial.”<sup>4</sup> But there would be another 300 years before the first war crimes tribunal would sit at Nuremberg.<sup>5</sup>

The second condition of the *jus post bellum* is reconciliation. After war or armed conflict is over, a key consideration of *post bellum* justice is that the parties come to a lasting peace where mutual respect for rights is the hallmark. Vitoria was concerned with the effects of punishing those who have done wrong during war, and argues that punishment must be mitigated by “moderation and Christian humility” so as best to achieve a secure and just peace.<sup>6</sup> I will return to this idea of humility in Section 4. Reconciliation was recognized by Grotius when he discussed the conditions for which clemency rather than punishment should be meted out,<sup>7</sup> or where he claimed that there are certain duties that must be performed even toward one’s enemies.<sup>8</sup> Today, reconciliation is again taking center stage in *jus post bellum* debates with the idea of a return to the rule of law as a major normative category related to reconciliation.<sup>9</sup>

<sup>2</sup> Francisco Vitoria, *De Indus et de Ivre Belli Reflectiones* (Reflections on Indians and on the Laws of War, first published 1557, John Pawley Bate tr., The Carnegie Institution 1917) s. 56, 185.

<sup>3</sup> Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 47, 182.

<sup>4</sup> Hugo Grotius, *De Jure Belli ac Pacis* (On the Law of War and Peace, first published 1625, Francis W. Kelsey tr., Clarendon Press 1925) bk I, ch. 3, s. 13, 69.

<sup>5</sup> See my discussion of the “Nuremberg Precedent” in Larry May, *Aggression and Crimes Against Peace* (Cambridge University Press 2008) ch. 7.

<sup>6</sup> Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 60, 187.

<sup>7</sup> Grotius, *De Jure Belli ac Pacis* bk III, ch. 11, (n. 4) s. III, 725.

<sup>8</sup> Grotius, *De Jure Belli ac Pacis* bk III, ch. 9, (n. 4) s. I, 722.

<sup>9</sup> See Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge University Press 2010).

The third condition of *jus post bellum* is rebuilding. Rebuilding is the condition that calls upon all those who participated in devastation during war to rebuild as a means to achieve a just peace. Grotius said that “all the soldiers that have participated in some common act, as the burning of a city, are responsible for the total damage.”<sup>10</sup> One of the most difficult issues in the *post bellum* debates over the centuries is whether both the just and unjust sides of a war have obligations to rebuild. Vitoria addressed this issue straightforwardly when he said that “injured states can obtain satisfaction” even if they are those who have done wrong because “fault is to be laid at the door of their princes” not with those people who acted in good faith in following the dictates of these princes.<sup>11</sup> While some in the Just War tradition called for the wrongful vanquished state to be severely treated, Vitoria and others were concerned that rebuilding was necessary for a just and lasting peace. This was also true of how the Allies responded to winning the Second World War, namely by funding the rebuilding of Axis cities in Germany and Japan, a topic to which we will return.

The fourth condition of *jus post bellum* is restitution. Vitoria addressed this condition when he urged that we distinguish between land and “immovables” in determining what the victor can legitimately demand.<sup>12</sup> Vitoria believed that restitution was due only in certain situations because he generally thought that the victors get to keep “movables” insofar as they are necessary for paying compensation for what the war has cost. In this regard Vitoria said that “he who fights a just cause is not bound to give back his booty.”<sup>13</sup> Grotius also argued strongly for this view in his book *De Jure Praedae*.<sup>14</sup>

When it comes to land that has been seized, though, most theorists believed that these lands should be returned as a matter of restitution after war ends, as long as it is not necessary “as a deterrent.”<sup>15</sup> This position on restitution is sometimes also held today, although it is becoming more common to think that restitution of land is normally owed at war’s end not as deterrent but as required restoration. There are exceptions, such as Israel’s refusal to give back the West Bank and Golan Heights after its so called Six Day War with Egypt and Syria. Israel claimed that these lands were needed to be able to deter future aggression. Here Israel seemingly followed Vitoria’s understanding of restitution in linking restitution to deterrence.

The fifth condition of the *jus post bellum* is reparations. Suarez said that “in order that reparation of the losses suffered should be made to the injured party” war may be declared.<sup>16</sup> But reparations are more typically discussed as due after a war is over. Indeed, Grotius said that “there are certain duties which must be performed toward those from whom you have received an injury.”<sup>17</sup> This remark is mainly addressed at

<sup>10</sup> Grotius, *De Jure Belli ac Pacis* bk III, ch. 10, (n. 4) s. IV, 719.

<sup>11</sup> Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 60, 187.

<sup>12</sup> Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 50, 184.

<sup>13</sup> Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 51, 184.

<sup>14</sup> See Hugo Grotius, *De Jure Praedae* (On the Law of Prize and Booty, first published 1605, Gwladys L. Williams tr., Clarendon Press 1950).

<sup>15</sup> Vitoria, *De Indus et de Ivre Belli Reflectiones* (n. 2) s. 52, 184.

<sup>16</sup> Francisco Suarez, “On War” (*Disputation XIII, De Triplici Virtute Theologica: Charitate*, first published c. 1610), in *Selections from Three Works* (Gladys L. Williams, Ammi Brown, and John Waldron, tr., Clarendon Press 1944) Disputation XIII, s. IV 4, 817.

<sup>17</sup> Grotius, *De Jure Belli ac Pacis* bk III, ch. 11, (n. 4) s. I, 722.

prohibiting cruelty<sup>18</sup> but it can easily also be seen as a way to view reparations, where even the just victor may have duties of reparation to the unjust vanquished. Reparations are often crucial for reestablishing trust among the parties after war's end as well as a simple matter of restitution.

The sixth *jus post bellum* condition is proportionality. One way to understand *post bellum* proportionality is as applying to each of the other five conditions. Whatever is required by the application of other normative principles of *jus post bellum* must not impose more harm on the population of a party to a war than the harm that is alleviated by the application of the other post-war principles. In this sense, *jus post bellum* principles are not necessary conditions so much as they are desiderata, to use Lon Fuller's term.

For Fuller, the components of the rule of law are desiderata.<sup>19</sup> Desiderata differ from necessary or sufficient conditions in that they need not be satisfied, at least not to their fullest extent, for a war to be justly ended. But each of the desiderata must at least be partially satisfied nonetheless. So, the proportionality principle calls for a determination of how much each of the other *jus post bellum* principles should be applied in light of the context.

*Jus post bellum* proportionality is perhaps closer to a meta-principle than the other two Just War proportionality principles, *ad bellum* and *in bello* proportionality. But this proportionality principle is still about weighing and context as was true for the other proportionality principles. Yet, *post bellum* proportionality focuses on the other *post bellum* conditions, unlike the way the *ad bellum* and *in bello* proportionality conditions are understood. One of the reasons for this is that at war's end military operations have ceased, and so the actions that proportionality will concern are some of the very components of the larger *jus post bellum*, such as reparations and retribution. We are asked to consider whether the operation of these other *post bellum* principles might not do more harm than good. A just peace is one where demands are not disproportionate.

Think again about restitution and reparations. These principles are often seen as a key to post-war justice and important dimensions in achieving reconciliation. But if the losing side of a war is already devastated and cannot easily repay the winning side what it would normally be thought to owe, then there is reason to think that demanding that full reparations be made is in some sense disproportionate. The question is in what sense is it disproportionate to demand reparations payments from those who are already devastated by the effects of a long war. And one answer is that demanding full reparations might pose a greater burden on the losing side than it will benefit the winning side in terms of long-term peace. Indeed, for this and related reasons Grotius proposed that *meionexia*, demanding less, could be seen as a principle of *post bellum* justice. For demanding less than what is one's due can be crucial for avoiding disproportionate settlements at the end of a war or armed conflict. *Jus post bellum* proportionality is the condition, or desiderata, which is aimed at aiding in the avoidance of overly severe terms of a peace settlement.

<sup>18</sup> For more on my Grotian account of cruelty and laws of war, see Larry May, *War Crimes and Just War* (Cambridge University Press 2007) chs 2 and 3.

<sup>19</sup> See Lon Fuller, *The Morality of Law* (Yale University Press 1964).

## II. *Meionexia* and *Post Bellum* Justice

In the early modern period, Grotius is the great defender of the principle of *meionexia* as the conceptual underpinning of *jus post bellum*. Grotius distinguishes an external and an internal “interpretation of the term ‘to be permissible.’”<sup>20</sup> External obligations are those imposed by explicit law; whereas internal obligations are “moral” obligations.<sup>21</sup> It seems to me that the internal obligations that Grotius here addressed, which he also calls considerations of honor or humanity, are similar to what Hobbes, just a few years later, would call judgments “*in fora interna*” or judgments according to conscience.<sup>22</sup> *Meionexia* is appropriately seen here by Grotius as part of the internal obligations of conscience. I return to this issue in Section 4.

And Grotius made this fairly explicit when he then addressed restitution and reparations. Even if one side fights a just war, it may not be entitled to the spoils of war, argued Grotius. Restitution as a matter of internal justice or obligation is something that may be owed even on the part of the just and victorious nation. And the reason for this is that justice can sometimes be a matter of not demanding what one has otherwise a (external) right to demand. Indeed, Grotius is one of the first to recognize that things that are permissible are of two kinds—a narrow permissibility in terms of what strict external right demands, and a wider notion that takes into account humanitarian considerations of the sort that *jus post bellum* involves. For Grotius, justice is not based in weakness but is grounded in what he had earlier described as “the common good.”<sup>23</sup> I return to this issue in the penultimate section of this chapter.

In Grotius’s view, justice is seen as a matter of moderation, where there are limits to what can be done “even in a lawful war.”<sup>24</sup> Grotius built on the Ancient Greek conceptions that saw justice as a form of moderation where justice was best understood in terms of moderation in the specific situation that one faced. And in this respect justice should not be seen as a strict notion that does not take account of the suffering that may result from demands that were permissible in one sense but not permissible in terms of values like compassion. Indeed, the idea that justice should encompass compassion is a central idea in what I regard to be the very best understanding of justice in a *jus post bellum* context.

Justice is normally understood as retributive, compensatory, or distributive. In retributive justice, the person who has done wrong is treated according to what is his or her due, in most cases this means some kind of penal sanction. In compensatory justice, one must pay back what one has wrongfully taken or damaged, again as what is due. In distributive justice, where things can be divided, equality is the rule, or there must be salient reasons for unequal division. But there is a fourth form of justice that is appropriate for situations where the good cannot be secured by adhering strictly to what is due, perhaps because securing what is due will set the stage for greater wrong

<sup>20</sup> Grotius, *De Jure Belli ac Pacis* bk III, ch. 10, (n. 4) s. III, 717.

<sup>21</sup> Grotius, *De Jure Belli ac Pacis* bk III, ch. 10, (n. 4) s. V, 720.

<sup>22</sup> See Thomas Hobbes, *Leviathan* (first published 1651) ch. 15.

<sup>23</sup> Grotius, *De Jure Belli ac Pacis* bk I, ch. 1, (n. 4) s. VIII, 36.

<sup>24</sup> Grotius, *De Jure Belli ac Pacis* bk III, ch. 11, (n. 4) s. I, 722.

or harm in the long-run. In my view, the form of justice appropriate for *jus post bellum* is *meionexia*, which incorporates aspects of the other three forms of justice, but is distinctly different from each of them.

In Aristotle's account, justice is a mean between the extremes of excess (demanding too much) and deficiency (demanding too little). Aristotle identifies the excess as *pleionexia*, but does not name the deficiency. I believe that the deficiency should have been named *meionexia*, as philosophers in the Ancient period who followed Aristotle recognized. But some of these philosophers, such as the Cynics, thought that *meionexia* was actually the best characterization of justice itself. I maintain that demanding too little is the wrong way to think of *meionexia*. Rather it is best seen as simply demanding less than one is due, or perhaps not demanding all that is one's due. So understood, *meionexia* can be seen as a form of justice. *Meionexia* calls for people to accept, or demand, less than what they are due if this is necessary for some greater good as well as for achieving justice understood in its wider sense.

*Meionexia* does not simply call for compromise or settling for less.<sup>25</sup> Instead, *meionexia* requires that in some cases people not demand what they are due as a way to gain a more secure and lasting peace. Compromise is problematic when it involves one or both parties having to sacrifice what is morally valuable to their integrity. On the assumption that all people strive for a just and lasting peace, there is no loss of integrity involved even when the parties decide to give up what is morally important to them. In the sense that all parties will equally get what they strongly desire, a just and lasting peace, there is a sense in which *meionexia* as a *jus post bellum* principle is closely related to justice understood in distributive terms.<sup>26</sup>

In post-apartheid South Africa, criminal trials and accompanying punishments were not pursued even though the victims had the right to demand them as a matter of strict retributive justice. But in not following strict justice, the Truth and Reconciliation Commission did not let the perpetrators of apartheid off the hook since there were still some penalties, as was also true in Rwanda with the *gacaca* proceedings.<sup>27</sup> The idea was to establish a return to the rule of law and mutual respect within a war-torn society by indicating that the victors would not demand all that they had a right to. Here justice as *meionexia* was consistent with the deontological underpinnings of retributive justice.

In addition, when the Allies decided to help rebuild the Axis countries after the Second World War, this was not a compensatory payment but rather an investment in reestablishing peaceful partners and fellow democratic states. By not demanding what the victors had a right to demand, victors show a respect for those individuals who are part of the vanquished side but who are often not complicit in the aggression of their political and military leaders. Showing respect for these vanquished people, but not necessarily for their leaders, can be crucial for a return to the rule of law. In such a situation, the people are motivated to demand of their leaders a change in how the people's rights are viewed by these leaders.

<sup>25</sup> See Robert Goodin, *On Settling* (Princeton University Press 2013).

<sup>26</sup> See Martin Benjamin, *Splitting the Difference* (University of Kansas Press 1990); also see Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton University Press 2010); and Amy Gutman and Dennis Thompson, *The Spirit of Compromise* (Princeton University Press 2012).

<sup>27</sup> See Larry May, *Genocide: A Normative Account* (Cambridge University Press 2010).



On my construal of the *jus post bellum*, providing compensation to deserving vanquished victims is hard to do unless those who are *not* responsible for the victims' harms are asked to contribute to the payment of the compensation. After war ends the vanquished government often cannot provide such compensation. In this sense reparations and restitution are accomplished as is sometimes true in auto accident cases in the US and elsewhere, as a kind of no fault plan. Those who are most able to pay are asked to pay compensation, even though they have no strict duty to do so.<sup>28</sup> The justice of *jus post bellum* is secured not through giving to people what is their due in the short run, but in securing what is good for societies that seek to return to a lasting peace. Again, we can see this in operation historically in the way the US and its allies paid for the rebuilding of Germany and Japan after the Second World War.

Another way to see that *meionexia* is not necessarily at odds with traditional understandings of justice is to see that justice has often been associated with equity. Equity (*epikeia*), as a part of justice as fairness, has been one of the hallmarks of justice since the time of the Greeks but even more so in the contemporary period especially in the writings of John Rawls and other liberal theorists. Even if one is due something it may be that demanding it is not fair in some cases, and hence that it would be unjust to demand all that one is due. This may be unfair in the sense that it may fail to see that the person who is properly your debtor simply has gotten into this position not by his or her fault. Or the person who is in your debt may simply not have the means to pay you on demand without undermining his ability to support his family. The aspect of justice that encompasses fairness seems to be affronted if a person demands all that is one's due in such situations.<sup>29</sup>

Equity is not the only dimension of fairness, since fairness also involves a concern for equality of treatment. And yet equality of treatment can be seen as better advanced sometimes when one does not, as opposed to when one does, demand all that is one's due. A situation where people start off with unequal shares of wealth will be exacerbated if a strict notion of justice (where each can demand all and only what one is due) is applied—thereby allowing the rich to get even richer at the expense of the poor getting poorer. Equal treatment is often one of the prerequisites for equal respect. Yet providing strictly equal treatment often exacerbates actual inequality. When there is major inequality in a society (of wealth or status) the way people think of their worth is also adversely affected. Indeed, such a situation could breed a society where people did not even have respect for one another as fellow human persons. And such disparity in respect normally intensifies conflict rather than providing a basis for the establishment of a lasting peace.

As I mentioned earlier, another component of justice is moderation, at least on the Aristotelian account. And an associated character-based virtue connected to moderation is humility, at least in the late-Medieval reworking of Aristotle. Vitoria spoke of the importance of "Christian humility" in the Just War tradition. While not a proper Greek virtue, the virtue of humility is closely linked with the kind of justice that is exemplified

<sup>28</sup> See Yaël Ronen, "Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted during Armed Conflict" (2009) 42 *Vanderbilt Journal of Transnational Law* 181–225 (who defends a standard of strict liability for compensating victims of armed conflicts).

<sup>29</sup> For more on equity, see Larry May, *Global Justice and Due Process* (Cambridge University Press 2011).

by *meionexia*. One does not demand all that is one's due out of a concern for the virtue of humility.

And humility also seems to be the appropriate attitude to have, given the epistemic problems associated with knowing what a person is due. It is the arrogant person who thinks he or she knows exactly what is his or her due, and demands it all. This is often arrogant because it does not recognize the epistemic difficulties of knowing the exact measure of what is one's due. Rather the person of virtue will recognize that humility is often called for when one is not certain of what is one's due, and that state of at least partial ignorance obtains so frequently that one should display humility rather than demand all that seemingly is one's due. Epistemic-based humility is a sign that one has the attitudes of a just person.

One might wonder whether *meionexia* might be better understood if it is not thought to be a form of justice. Perhaps we should associate *meionexia* with charity rather than justice. In this view, the concept of justice is best left to the strict considerations of public right. What one should do in terms of one's conscience seems to be a different matter than what one does as a matter of the kind of public justice associated with legality. Indeed, when *meionexia* is said to be the cornerstone of *jus post bellum*, it then becomes clear that we are not really talking of legal justice but of those considerations of private conscience that are best distinguished from public justice. To add a large component of what is normally seen as charity into a conception of justice seems merely to muddy the waters in understanding the nature of justice.

My response to this important criticism is to suggest that humility, if not charity, has played a role in the way justice is understood since the Middle Ages. In part, this is what seeing justice as a form of Aristotelian moderation is all about. For justice to be characterized as moderation, the demands of justice must not be seen as going beyond what is reasonable to demand of people, given the disparate situations people find themselves in. And seeing justice as connected to humility is also a way to make sure that justice is not associated with *pleionexia*, where one demands more than is one's due, either. Sometimes it seems as though the demands of justice are those that are the loudest—and in this way justice secures its place as the value of courtroom proceedings where prosecutor and defense counsel make conflicting and strident demands. But, in my view, justice is not best seen as adversarial in all settings. Yes, the victims need to be able to demand what is rightly theirs, but their demands must sometimes be seen as moderated by the circumstances.

So we have seen in this section that one who epitomizes moderation has a reason not to demand all that one is due at the moment since this may turn out not to be the best given long-term considerations. This brings us back to the ideas of *jus post bellum*. In order to secure the long-term goal of a just and lasting peace, it may be necessary for the current just and victorious party not to demand all that is his or her due in the short-term. And while it is true that the victorious party will thus lose what he or she has a strict right to gain in the short-term, there is often much more to gain by not demanding all that is one's due, and even in aiding those who may not deserve to be aided, so as to further long-term peace prospects. This is one of the central roles for *meionexia* in *jus post bellum* deliberations, as Grotius recognized.

### III. A Brief Note on the Question: Is *Jus Post Bellum* Binding Law?

If *meionexia* is not a matter of strict justice, but of humility and moderation, are people bound to follow this form of justice. Grotius distinguished between the law of nations and the law of nature,<sup>30</sup> as did other seventeenth-century philosophers such as Hobbes.<sup>31</sup> As I said earlier, Hobbes drew a distinction between what is binding in conscience, *in foro interno*, and what is binding in society, *in foro externo*. For Hobbes, natural law binds *in foro interno*, whereas civil law binds *in foro externo*. If one violates the laws of nature one commits a sin, not a crime. Only when the laws of nature have been given force and sanction by a sovereign does a violation result in a crime and a call for punishment.

Similarly, Grotius separates the bindingness of morality, of what he calls the laws of nature, from the bindingness of the law of nations. To say that something is only binding in one's conscience, at least in the seventeenth century when Grotius wrote, was not to imply that the bindingness was weak or inconsequential. What the law of nature dictates is "forbidden" according to Grotius.<sup>32</sup> The law of nature is grounded in "the common sense of mankind,"<sup>33</sup> where all or almost all nations would affirm them. And Grotius adds that the law of nature is "written in their hearts, their conscience."<sup>34</sup> In this sense, *jus post bellum* as grounded in *meionexia* can be binding even if it is not a matter of strict justice. Indeed, not all of justice is binding in the same way, since not all of what is just is written into anything like black letter law.

The phrases used by Grotius and Hobbes are very similar to the words used in the Martens Clause to The Hague Convention (II):

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>35</sup>

Here we have a regime of international law that is not strictly speaking *lex lata* but is also more than mere *lex ferenda*. It is my view that Grotius saw the laws of nature, including the principle of *meionexia*, as having this character—they are binding but not in quite the same way as black letter law because they are not promulgated and proven in the same way.

<sup>30</sup> See Larry May and Emily McGill (eds), *Grotius and Law* (Ashgate Publishing Co forthcoming in 2014) esp. the essays in the final section.

<sup>31</sup> See Larry May, *Limiting Leviathan: Hobbes on Law and International Affairs* (Oxford University Press 2013) esp. ch. 8.

<sup>32</sup> Grotius, *De Jure Belli Ac Pacis* bk I, ch. 1, (n. 4) s. X, 39.

<sup>33</sup> Grotius, *De Jure Belli Ac Pacis* bk I, ch. 1, (n. 4) s. XII, 42.

<sup>34</sup> Grotius, *De Jure Belli Ac Pacis* bk I, ch. 1, (n. 4) s. XVI, 47.

<sup>35</sup> Preamble, Hague Convention (II) Respecting the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 Sept. 1900) 32 Stat. 1803. There has been a healthy debate about how large a role the Martens Clause has played and should play in the domain of proportionality. See Michael Newton and Larry May, *Proportionality in International Law* (Oxford University Press forthcoming in 2014).

Notice that the best way to translate Grotius's book, *De Jure Belli Ac Pacis*, is "On the Law of War and Peace." For our purposes it is of course worth comment that Grotius believed there were laws not only of war but also of peace, *jus post bellum*. Of course, the Latin term "*jus*" is ambiguous in English and can be translated not only as "law" but also as "rights," where perhaps "rules" is even better in this context. For Grotius there were binding rules of peace just as there were binding rules of war. Insofar as Martens would have extended the laws of war to also include the immediate aftermath of war, his "laws of humanity and requirements of public conscience" would also concern *jus post bellum*.

Today the laws of war are fairly well settled, which is not true of the laws of peace. In this sense *jus post bellum* is perhaps best seen as *lex ferenda*. Notice the switch in the Latin terms from "*jus*" to "*lex*." Given that "*lex*" is most commonly translated as "law" and not ever as "rights" or "right" perhaps the contemporary *jus ad bellum* and *jus in bello* should be renamed as *lex ad bellum* or *lex in bello*. My point is only that the question of whether *jus post bellum* is merely *lex ferenda* and not *lex lata* is a more complex question than one might first imagine, especially from a Grotian perspective. Yet, etymology aside, it is true that there is not as much treaty law or clear-cut custom, that pertains to the *jus post bellum*, as compared to the realms of *jus ad bellum* and *jus in bello*.

#### IV. Transitional Justice and *Jus Post Bellum*

Transitional justice concerns the moral and legal considerations that pertain to situations where a new, normally more democratic, regime is being formed after mass atrocity or oppressive conditions have been stopped. *Jus post bellum* concerns the moral and legal considerations that pertain to situations where a war or armed conflict has come to an end. In both cases justice considerations pertain to situations where a just peace is being established or reestablished. Transitional justice and *jus post bellum* share in common many concepts. In both transitional justice and *jus post bellum*, reconciliation is crucial but so also are retribution and reparations. In the literatures that are emerging on transitional justice and *jus post bellum*, the victims of war and atrocity are front and center. But of course the victims are not the only ones that need to be satisfied for the securing of a just peace. The bystanders as well as the those who fought on the unjust side of a war will also have to be satisfied to a certain extent if the peace is to hold.

The issues that I have been addressing are ones that have been addressed for thousands of years, and yet these issues are also some of the most current and most timely. The idea of holding truth commissions is very recent indeed. Yet, the idea of granting amnesty, rather than taking revenge or seeking retribution, after war's end is at least as old as written history, with important amnesties occurring in Classical Greece and earlier. Indeed, in reading Homer and Hesiod one comes away with the belief that in Ancient Greece wars ended in only one of two ways, in amnesties or in mass slaughter of the losers by the victors. Luckily today there are intermediate positions at the end of war or mass atrocity.<sup>36</sup>

<sup>36</sup> On the issue of amnesty, see Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge University Press 2005) ch. 13; and Larry May, *Genocide: A Normative Account* (Cambridge University Press 2010) ch. 13.

Transitional justice differs from *jus post bellum* in that the focus of transitional justice is on the processes that lead to a democratic or at least a less repressive regime whereas *jus post bellum* is focused on the achieving of peace. So the goals are different in that peace of course can be achieved outside of democratic political processes. And democratic governments do not necessarily support the maintenance of peace. Indeed, the democratic government in the US seems to be constantly trying to find new places in the world to start wars.

Yet, there is 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 a peace that is less oppressive than what had existed before. And democratic governments are probably more likely to support peace than non-democratic governments (although there remains a debate about whether there is a relation between democracy and peace). Perhaps most importantly, the wars that are fought today are much more likely to be civil wars than interstate wars, and the atrocities from which transition is sought are much more likely to be accompanied by civil war than not.

Transitional justice is closely linked today with the Responsibility to Protect (R2P), and R2P shares much in common with the 5R&P of *jus post bellum*. The emphasis in the third prong of R2P is on rebuilding, especially of the rule of law, and this is also true of the rebuilding condition of *jus post bellum*. But there is a difference, perhaps a major one, in R2P's other prongs that involve recourse to military intervention to bring about a stop to atrocities or to force a regime change toward a more democratic order. Insofar as transitional justice is associated with this prong of R2P, there is a significant difference with *jus post bellum*, which seeks a just end to military operations. Nonetheless, transitional justice and *jus post bellum* look toward a long-term just peace.

As I said at the beginning of these remarks, we have two examples that can tell us quite a lot about how best to understand *jus post bellum* and transitional justice: Japan and Germany at the end of the Second World War. And we have significant recent examples of attempts to establish criminal trials and also to deal with victim reparations—namely, the International Criminal Court, which is in the background of most of the contemporary debates about both *jus post bellum* and transitional justice. In addition, there are the ongoing attempts to find a way to end the US and NATO's long war in Afghanistan—unfortunately this war, like the one in Iraq, was begun without exit strategies—but surely this is what *jus post bellum* principles would have called for. Peace and justice do not come easily, and there will continue to be many examples where serious discussion of justice after war or atrocity may aid policy-makers and citizens in understanding how a just peace can be secure.

## At War's End: Time to Turn to *Jus Post Bellum*?

Mark Evans

### I. Towards a Conceptual Toolkit for *Jus Post Bellum*

As is evident from the contents of this volume, *jus post bellum*—the account of what justice permits and/or requires in the ending and aftermath of war—can be treated either as a matter of what the law says or implies in this regard, or as a matter of what, independently of the law, morality holds with respect to the issue. These two different concepts of *jus post bellum*'s content can of course be related: many moral philosophers, for example, would argue (as I do) that they seek to identify the moral principles which animate the body of law that constitutes “legal” *jus post bellum*. Others, however, argue that the “moral” concept is redundant, sometimes because they are skeptical of the existence of separate moral principles and sometimes because they believe that the relevant moral judgments are either too indeterminate or too contestable (“who is to say what is just, if not the law?”), with no authoritative way of specifying their content. Some thus conclude that it is only the legal concept of *jus post bellum* that can be really meaningful and useful.

Implicitly, this chapter rejects this conclusion in wishing to bring the legal and moral theorists of *jus post bellum* into closer dialogue. But, to be fruitful, these exchanges would need to exhibit something that, with some justification, the “legalists” might also believe to be lacking in the moral theory: conceptual clarity. This simple but vital requirement can obviously be levied on both concepts of *jus post bellum*, but it is particularly pressing on the moral theory insofar as it is posited independently of concrete legal embodiment such as statute, international agreement, and so forth. Its more abstract character renders it more vulnerable to this defect. Perhaps this should come as no surprise: for all that we might try to trace back the origins of *jus post bellum* into distant reaches of the just war tradition, as a substantive field of moral inquiry in its own right, it is still maturing. Nevertheless, it is here contended that “moral” *jus post bellum* (and, unless otherwise stated, it is this conception which is hereafter intended by “*jus post bellum*”) has been, and is, prone to a certain conceptual inattention that needs correcting. Especially insofar as the theory is designed to be action-guiding, this could have significant practical consequences. In assembling the toolkit from which we construct *jus post bellum*, we thus need not only the right kind of tools but also assurance that they are sharp enough to do the job.

This chapter does not offer a full account of what should be in the toolkit: that is too large an undertaking here. All it can achieve is an opening-up of some lines of inquiry to be pursued in greater depth, but if the argument's guiding contention is correct, a significant shift in the way *jus post bellum* is conceptualized may be in order. Modest

though this chapter's remit may be, its focus is what is undoubtedly the main tool in the kit: the concept of justice itself. How it is to be understood: its nature or content, and its function or role in *jus post bellum* are all significant potential sources of unclarity. In particular, there may be reason to doubt what at first sight appears to be a ready point of agreement between "moral" and "legal" *jus post bellum*, namely, that it is indeed *justice* which should give us our *post bellum* orientation. Now, no quibble will be raised with respect to the legal conception's use of the term to define its content: it may be implicitly accepted that what is legal is therefore what is just, in a straightforward legal sense of what "justice" means. (I offer no view as to whether this is as clear-cut as it appears.) But whether, or to what extent, *jus post bellum* as a moral theory is a theory of (moral) justice is more complicated than its theorists have allowed. The *jus* in *jus post bellum* is typically and perhaps automatically taken to denote that following its precepts means "doing what justice requires." This chapter urges us to pause at this point: even if *jus post bellum* gives us an account of what is justified in war's ending and aftermath, is this necessarily and wholly an account of what justice permits or demands? Here, perhaps we should tweak the chapter's title: is it, indeed, justice to which we turn at war's end?

My inevitably selective entry-points into the "clarity" debate raise two general questions about justice in *jus post bellum*: (a) whether its nature, function, and role might be conceptualized too narrowly to the detriment of *jus post bellum*'s adequacy; and (b) whether its nature or content might be conceptualized too widely such that *jus post bellum* labels as "justice" some principles or precepts that are not appropriately thought of as matters of justice at all:

- (a) is addressed through consideration of Seth Lazar's argument that *jus post bellum* must be clearly distinguished from a morality of peacebuilding: the latter is forward-looking in the tasks it sets itself in a way that *jus post bellum*, when conceptualized as a theory of how a conflict should be properly concluded, is said not to be. Thus, according to Lazar, *jus post bellum* has at most a more limited role when the guns fall silent than its advocates have assumed. In response, the *flexibility* of "justice" will be demonstrated in contention that he is overly dismissive of the role that could be played by what can rightly be called an account of *post bellum* justice;
- (b) is addressed through consideration of Darrel Mollendorff's argument that what we need morally to determine when a war should be rightly brought to an end is a theory that needs to be distinguished from *jus post bellum*: *jus ex bello*. *Jus post bellum* has officially focused only on *how* a just war should be ended, and this supposed limitation becomes evident when the relevant moral calculations, which justified the initial resort to war, shift during its course such that morality may permit or require its ending without its initial moral objectives being achieved and, thus, perhaps without *jus post bellum*'s requirements being (fully) followed. Mollendorff has undoubtedly identified an important gap in just-war theorizing, but this kind of sub-optimal scenario starkly raises the question of whether, or to what extent, it is still justice that guides us in such circumstances.

The aforementioned constraints prevent a full account of what is meant by “justice” at each point of these two analyses but, to reiterate, the purpose is to initiate but not fully to conclude the debate: enough can be said to indicate the questions to be raised about *jus post bellum*'s conceptual make-up and the form that its theory may consequently take. And, with this “inconclusiveness” caveat in place, it is appropriate to preface these discussions with identification of some of the variables that may need to be “decontested”<sup>1</sup> whenever we wish to speak of justice.

## II. What Might We Mean by “Justice”?

It is entirely unremarkable, because it is hardly unique in this respect, to say that “justice” is a contested concept. To use Rawls's distinction, while we might agree upon the basic referent of “justice” as a general concept—what it is in general that justice is about—this “core” can be substantiated in various, perhaps rival, ways in the generation of separate *conceptions* of justice.<sup>2</sup> For example, those who argue that justice requires distributing resources according to need and those who argue that they should be distributed according to achievement (“merit” or “desert”) are debating the same general concept but clearly decontest it substantively as divergent conceptions. And note that they have to move beyond the general concept to state what they believe “justice” to mean and entail because the concept is too thin on its own to convey their meanings in full.

Some might argue that “justice” is actually “essentially” contested, in Steven Lukes's sense of the term: it is inherently liable to rival interpretations because of irreducibly controversial disputes over the specific values that constitute the general concept.<sup>3</sup> Thus there is no morally or philosophically authoritative way of positing any one of its conceptions as the “correct” or “best” one: no single conception coherently captures all that might be reasonably thought of as “justice.” If this thesis is valid, it seems plausible to assume that essential contestability is more likely when the initial general concept is complex in terms of the number of aspects that require conception-specific substantiation. To bring this point into our present topic, we might reflect on the concept of a “just peace.” *Jus post bellum* is standardly depicted as an account of what just victors can and should do in securing the goal of a just peace which is the ultimate aim—the basis of the just cause—of a just war. *Jus post bellum* theorists will all agree that they are debating the same basic concept when they consider how to understand a “just peace” but it is not difficult to appreciate how readily they may disagree once they begin to spell the specifics of what they understand by it, springing from questions of “what is justice?,” “what is peace?,” “what rights and responsibilities follow from the moral precepts of a just peace?” and so forth. Hence, one reason to think that the concept of a just peace is elusive in the sense of it being difficult authoritatively to explicate in full is that it could be *essentially* contested.<sup>4</sup>

<sup>1</sup> To “decontest” means to settle on one meaning of a contested term in a particular discourse: see Michael Freeden, *Ideologies and Political Theory* (Oxford University Press 1996) 76.

<sup>2</sup> John Rawls, *A Theory of Justice* (Oxford University Press 1972) 5.

<sup>3</sup> Steven Lukes, *Power: A Radical View* (Macmillan 1974) 9.

<sup>4</sup> This suggestion is explored in Mark Evans, “Just Peace: An Elusive Ideal” in Eric Patterson (ed.), *Ethics Beyond War's End* (Georgetown University Press 2012).



One does not have to accept the essential-contestability thesis to recognize that disputes over the meaning of “just peace” may be vexatious and difficult to resolve, and this point is all we need when stocking a suitable toolkit.<sup>5</sup> So the rest of this section is concerned not with the specific kinds of *value* that might populate different conceptions of justice and just peace (the kinds of value at issue, for example, over whether “justice” is about distributing according to need or earned merit) but with other kinds of variables which are manifest in debates about them and of which *jus post bellum* theorists need to be aware.

First, some treat justice as a specific principle or virtue, or some set of such, that provides one normative consideration among others against which its claims may have to be balanced. Typically, justice in this sense is very generally about “giving people their due” (and we can see how different conceptions can be generated over how we understand this injunction) and, when working out, for example, which principles should govern the organization of social affairs, the claims of “justice” thus understood might be weighed against others such as “freedom” and “democracy,” with further dispute arising over how that balance is best struck. In other words, there may be legitimate trade-offs between the claims of justice and the claims of other values in determining the best outcome. An attendant variable here is whether one is speaking of justice in a comparative sense—measuring what one is due relative to what is available to distribute with respect to trying to give everyone their due—or a non-comparative sense, measuring with reference to some standard which is independent of what is available to distribute among all relevant subjects.

Others treat “justice” as a “master concept,” some optimal combination of values which together constitute “justice” as the highest or primary quality or virtue of society. The Aristotelian doctrine of justice as the mean, or Larry May’s concept of *meionexia*, fall into this category.<sup>6</sup> Justice in this sense is not, in general, something to be traded-off in any optimal circumstances: it is what is achieved when the best combination of other values has been realized. It might be readily thought that, in its concept of “just peace,” it is this particular sense of justice that is being employed by *jus post bellum* theorists: “just peace” looks as if it is amenable to an all-encompassing sense of “justice.” But, quite apart from whether this is an altogether satisfactory way of treating “justice” (some reflection on which follows later), they rarely state clearly whether this is indeed how they understand it, thus leaving it mysterious what they mean by justice and hence unclear how one is meant to gauge whether it has been achieved in practice.

It is obviously necessary to specify the object of justice: what is it to which justice is to apply? Often, it is a state of (social) affairs: “society,” the legal system, the “international order,” for example. What state of affairs a “just peace” might refer to may be particularly vexatious: what is it that a theory of *jus post bellum* believes should be manifest in

<sup>5</sup> An alternative notion here is “effective” contestability, adopted by Michael Freeden to avoid meta-ethical claims about the essential nature of a concept abstractly conceived and instead to denote the effective ineliminability of its contestability in actual political discourse (the logical possibility but cultural unfeasibility of its authoritative decontestation). See Michael Freeden, “Essential Contestability and Effective Contestability” in (2004) 9(1) *Journal of Political Ideologies* 3.

<sup>6</sup> For discussion of this type of justice, see Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012) 6–10.

terms of justice and peace? Is the latter, for example, a “macro-level” concept such that a just peace is sufficiently secured if manifest in the major, society-wide institutions and relationships,<sup>7</sup> or must it also be manifest at the micro-level of a society, in small-scale communities and individual relationships, for example? We might at this point even move to a different general concept of justice which posits it as a state of character in addition or as opposed to “social affairs” in terms of the arrangements of institutions: a “just society” is thought by some to be a society populated by “just persons,” who manifest certain virtues which are said to be those of justice.

However the object is posited, *jus post bellum* needs to be sensitive to the distinction between a “just peace” and a “just society” in that, not least in order to specify the specific rights and responsibilities of just victors, the former is a more modest, less demanding goal than the more comprehensive and longer-term objective of the latter. A conception of a just peace will generally take inspiration from a conception of a just society in the sense that achievement of a just peace should, at the very least, lay the foundations for the building of a just society. But completing the latter task is something which conceptions of *jus post bellum* generally hold not to be an appropriate objective for their remit. Still, some sense of the objects of “just peace” and “just society” would appear to be vital to help us work out accounts of the objectives each ideal yields. And a further issue to decontest has now become clear: we also need an account of the subjects, or agents, of justice: on whose shoulders rest the rights and responsibilities of its pursuit?

The last paragraph prompts the question of how we might postulate when a just peace or a just society has been achieved—a further source of dispute. Some might say that “justice” denotes a definite, fixed end-state of affairs, identifiable by verifying the presence of the requisite desiderata at a specific time at which one could “freeze the moment” when justice is reached, so to speak. One need not assume that all the desiderata must be present in full to make this claim: that could well be too stringent. Nevertheless, this approach assumes that in principle one can identify a fixed “threshold” standard as we look for the decisive moment at which it is achieved. Others may find this overly rigid or static, arguing that social affairs are too complex and fluid to be normatively measurable in any sensible “checklist” way. They may argue instead for treating the concept of a just peace as denoting an on-going process, stretched over time, during which achievement of the individual relevant standards may wax or wane and thus have to be continuously pursued, maintained or repaired (presence of a commitment and ability to do so being more significant here, perhaps, than in the “checklist” approach). This approach to the concepts does not remove the need for a threshold standard altogether—we obviously require *some* idea of what the process needs to achieve in order to count as being just—but it may be more amenable to its objects’ nature and hence easier to apply. Once again, *jus post bellum*’s theorists can reasonably be asked to state where they stand on this particular conceptual divide.

We conclude this non-exhaustive survey with another distinction between two concepts of justice, but one over which *jus post bellum* theorists need not divide in the sense

<sup>7</sup> See, for example, Rawls’s notion of society’s basic structure—the institutions and relationships that profoundly shape liberties, opportunities and resource distribution in society—as being the appropriate site of justice: Rawls (n. 2) 7.

that they need not have to affirm *either one or the other*. Rather, they may recognize both of them are at work in their theories and that they may therefore need to indicate which one is being employed, and how, at various stages of the theory's assemblage and application.

The two concepts are:

- (a) a pristine concept: which posits what is just in, and about, the ideal world. To explain: when we think about what, ideally, the world should be like with respect to justice, we invoke a pristine concept in the sense that it is unsullied by the defects of the world in which we actually live;
- (b) a rectificatory concept: which applies to the “real” flawed non-ideal world. “Justice” in this sense is a particular specification of what should be done—what is just—in addressing problems which arise in such a world.

Now, before this distinction is further explicated (and it can be rendered in more complex and nuanced ways which we will not be able to map here), it must be acknowledged that not all theorists of justice will embrace it. Some, for example, think that “justice” is only applicable in non-ideal conditions, for example of moderate scarcity of resources where we have to work out who should get what when we do not have enough to give everyone everything they want: it is exclusively rectificatory. (This Humean disposition is manifest in those Marxian theories which think that “justice,” and the need for it, can be transcended once we reach the ideal world where there are no longer such distributive problems that require redress.<sup>8</sup>) But I contend that just war theory and *jus post bellum* crucially rely upon this distinction, with the problem being that these theories are not always as clear on this point as they need to be.

Recall the claim that embedded in the just cause of a just war is the commitment to secure a just peace. What this means and requires will vary radically from case to case but, as will be made clearer in the next section, it provides the moral basis from which *jus post bellum* springs. Next, let us return to the point made a few paragraphs back that a conception of just peace is inspired by a conception of a just society: the former takes its orientation from the latter even though its scope and objectives are narrower. But does anything orient the conception of a just society? The way to answer this question is, first, to see that whatever we think should and can be done is to some extent inspired by a “pristine” conception of what the world should ideally be like, even when our thinking is governed by a belief or recognition that we cannot (yet?) achieve that ideal in full. The pristine denotes our fundamental, most ideal normative commitments and inspires us to reflect and act upon how best we might move closer to their realization. So, while we may appreciate that we will not be able to achieve our pristine ideals, we still need to be clear about them: to keep them in view and under review as guides and inspirations for our non-ideal world thinking and practice.

But talking about a just society in its pristine sense does not preclude us from also having a concept of what a just society might be in terms of what we can realize in the non-ideal world—as long as it is recognized that there are simply different concepts, or

<sup>8</sup> For explication, see G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge University Press 1995) 138–43.

“types,” of justice here which are not properly reducible just to one. Justice as rectificatory—how we deal with non-ideal world issues—takes its cue from pristine justice but it is no less about justice for that. It is just a different basic concept of justice.

Overall, just war theory is straightforwardly rectificatory in the following sense. Ideally, we should be living in a world where there is no war: the moral need to do so (in response to a grave actual or threatened wrong which would never ideally arise) reveals the radical non-ideality of our circumstances. Thus, there is no pristine concept of justice for just war—but there is a rectificatory concept to ground the justice of a just war, specifying what (rectificatory) justice permits or requires in the just cause that is the military response to the great wrong which caused it. And insofar as the just cause in question is about “just peace” we have two ways of conceptualizing the latter: the first is as a pristine concept itself, which may not be fully achievable at war’s end or any foreseeable time thereafter but which still provides relevant moral orientation; the second as a rectificatory concept, consciously responding to problems that ideally we would wish not to have to deal with but still allowing us to talk of these responses in terms of acting justly. Further, note how the latter may readily subdivide in *jus post bellum* into a concept of rectificatory justice to cover what justice mandates in the immediacy of a war’s conclusion and, subsequently, a concept of *transitional* justice to cover processes in building towards a just peace.

The discomfort that many have felt over talking about “justice in war” might sometimes be explicable in terms of a failure to embrace this distinction, thinking only of justice in pristine terms. And it is because we sometimes *do* think of justice in ideal, pristine terms that we need this concept of it. But actually we often talk of justice in rectificatory terms too: justice is done when we justly punish criminals who should never have done what they have done but whose punishment, whilst not itself a matter of “doing good” in any ideal-world sense, is necessary to redress their wrongdoing in a way that tries to uphold, or at least proclaim, the values of the world in which we would wish to live. There is, then, obvious utility in this distinction for those who talk of justice in the resort, conduct, ending, and aftermath of war, that most shocking of non-ideal phenomena.

But we end this section with a warning about *jus post bellum* theorizing that is developed in sections IV and V in particular. Granted that justice can be legitimately conceptualized as rectificatory, are there any limits to what might count as the “doing of justice” in this category? Put somewhat differently, are there moral permissions and obligations of the kind that *jus post bellum* is designed to specify which may nevertheless be so non-ideal that they are not appropriately thought of as matters of justice? The kinds of question raised in this section are unavoidable when we confront this issue and, as I will suggest, rather more may be at stake than a theorist’s desire for clarity and rigour.

### III. *Jus Post Bellum* and the Pursuit of a Just Peace

In a wide-ranging critique of *jus post bellum*, Seth Lazar claims that it is too backward-looking to be adequate as a theory for what should be done in a just war’s aftermath because, in general, it is too dependent upon just war theory itself for its principles to

move beyond the war and its justification and to look forward instead to the task of peacebuilding:

*Jus post bellum* theorists are still too focused on warfighting—assessing our adherence to those standards, remedying the wars done, punishing us for our breaches. It is merely the ex post application of those warfighting principles. [...] Contemporary theorists of *jus post bellum* have too quickly applied the categories and standards of just war theory to the aftermath of war without reflecting adequately on what it is that we need principles at all—and that is an open question—it should be a subordinate component in a broader ethics of peacebuilding than theories of *jus post bellum* have been. Just war theory cannot be its only, or even its primary source.<sup>9</sup>

For reasons I shall shortly present, this may be a valid charge against much contemporary *jus post bellum* theory and can be regarded, in part, as a consequence of a failure to reflect upon some of the issues raised above. But this need not endorse the rather negative answer Lazar would give to this chapter's title question. And, to be fair, Lazar himself says that it is quite possible for just war theorists to develop an ethics of peacebuilding under the sobriquet of *jus post bellum*.<sup>10</sup> Indeed—and greater conceptual dexterity with a wider range of tools can help *jus post bellum* to transcend the limited form it takes in his critique.

Lazar's "backward-looking" charge is based on three claims about what he takes to be *jus post bellum*'s main stipulations:

- (i) that compensation should be a priority in the aftermath of war;
- (ii) priority should be given to the punishing of unjust political leaders and war criminals;
- (iii) that states which launch justified interventions become responsible for reconstruction in the states in which intervened on the basis of the so-called "Pottery Barn Principle"—"you break it, you own it."<sup>11</sup>

All three claims, he believes, arise from a conception of *post bellum* duties which is grounded in rectification of the wrongs that initially prompted the war, and in responsibilities arising from the destruction that just combatants have had to inflict during the conflict. In other words, the duties are based on what has taken place and not on any independent considerations of what should be done now that the war has concluded. In response to these claims, then, Lazar proposes that:

- (iA) reconstruction rather than compensation should be a priority, with resources going in the first instance not to the most aggrieved but to the most needy regardless of which side they were on;
- (iB) just punishment presupposes the presence of adequate and impartial judicial institutions, so it is the construction of those that must logically take priority over actual acts of punishment;

<sup>9</sup> Seth Lazar, "Skepticism About *Jus Post Bellum*" in Larry May and Andrew T. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* 220–1.

<sup>10</sup> Lazar, "Skepticism About *Jus Post Bellum*" (n. 9) 221.

<sup>11</sup> Lazar, "Skepticism About *Jus Post Bellum*" (n. 9) 204.

- (iC) the Pottery Barn principle may place too heavy a burden on just combatants who have already borne so much. They are entitled to expect multilateral assistance in reconstruction.<sup>12</sup>

Paradigmatic of the theory targeted by Lazar is Brian Orend's, whose tenets are:

- (a) *Proportionality and Publicity*. The peace settlement should be both measured and reasonable, as well as publicly proclaimed. In general, this rules out insistence on unconditional surrender.
- (b) *Rights Vindication*. The settlement should secure those basic rights whose violation triggered the justified war.
- (c) *Discrimination*. Distinction needs to be made between the leaders, the soldiers and the civilians in the defeated country one is negotiating with. Civilians are entitled to reasonable immunity from punitive post-war measures.
- (d) *Punishment # 1*. When the defeated country has been a blatant, rights-violating aggressor, proportionate punishment must be meted out.
- (e) *Punishment # 2*. Soldiers also commit war crimes. Justice after war requires that such soldiers, *from all sides of the conflict*, likewise be held accountable to investigation and possible trial.
- (f) *Compensation*. Financial restitution may be mandated, subject to both proportionality and discrimination.
- (g) *Rehabilitation*. The post-war environment provides a promising opportunity to reform decrepit institutions in an aggressor regime. Such reforms are permissible [...] but they must be proportional to the degree of depravity in the regime.<sup>13</sup>

This type of *jus post bellum* may be labeled "restricted" because of the relatively limited nature of its tenets in terms of the likely timeframe in which they are to apply (not much farther than the immediate aftermath of a war) as well as the scope (the "demandingness") of the responsibilities of just ex-combatants. (Indeed, given there is nothing explicit about reconstruction beyond the rights-restoration orientation of (g), it may be even more restricted than the version of *jus post bellum*, with its Pottery Barn principle, Lazar has in mind.)

Sometimes, the aftermath of war may afford no opportunities for any more than these restricted requirements to be observed: it may be as chaotic as its conduct so often is. But, as Lazar seems implicitly to acknowledge, there is no reason to think that *jus post bellum* is always and necessarily restricted in the above sense. To see this, we should reflect upon the "just peace" goal in the just cause of a just war by asking some of the questions prompted in the previous section. For example: what might the goal entail and to what might the tenets it prompts apply? How much is it reasonable to expect of the just combatants—the agents of justice—to bear and in what timeframe?

<sup>12</sup> Lazar, "Skepticism About *Jus Post Bellum*" (n. 9) 205–17.

<sup>13</sup> Brian Orend, *The Morality of War* (Broadview Press 2006) 180–1.

Thus we may conceptualize an “extended” version of *jus post bellum*, which adds broader objectives to the restricted variant, including the following requirements of just ex-combatants (and perhaps others: there is nothing to say that only the latter bear these *post bellum* responsibilities):

- (1) *to take full responsibility for their fair share of the material burdens of the war’s aftermath in constructing a just and stable peace*—which may include not only exacting fair reparations but also balancing these against contributions to the efforts to reconstruct the defeated state;
- (2) *to pursue those national and international political initiatives for war-prevention (and/or, sub-optimally, conflict containment) and post-war reconstruction*—based on a broader commitment to promote a just peace in general, and not just between and within the former enemies;
- (3) *to take a full and proactive part in the ethical and socio-cultural processes of forgiveness and reconciliation that are central to the construction of a just and stable peace*—a recognition that “social” as well as “material” repair is typically needed to establish or rebuild peaceful cultures.<sup>14</sup>

These principles are clearly rectificatory in that they seek to redress some of the wrongs of war but they are distinguished from the restricted tenets in being more overtly concerted towards a pristine view of a just peace as informing their objectives. Put slightly differently, they include the possibility of (elements of) transitional justice as part of *jus post bellum*’s objectives and, though the very designation of them as “transitional” indicates their rectificatory character, what it is to which they seek to transition is directly informed by a pristine conception of justice.

The possibility (some would say, given the current state of the world, likelihood) that such extended responsibilities will be extremely difficult to shoulder and/or satisfy at war’s end need not make them any less what justice nevertheless requires in this conception: what we would say, in this instance, is that justice cannot be fully done. And a key reason why this claim can be made also addresses Lazar’s concern that *jus post bellum*’s moral basis is supposedly retrospective. The basis of *post bellum* justice is better thought of as resting not simply in rectifying the wrongs of war but doing so in order to build a just peace. *This* is the forward-looking, constructive element-part of the war’s original justification whose duties carry through the conflict itself into its aftermath. In other words, peacebuilding as what justice requires is an element of the just cause, attendant on the righting of the initial wrong. For this reason, there may even be a case for adding something like the following requirement to *jus ad bellum*:

For there to be justice in the resort to war, one must plan to wage and conclude it in accordance, as best one can at the time, with the criteria of *jus in bello* and *jus post bellum*.

<sup>14</sup> For discussion of these tenets, see Mark Evans, “Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of ‘Just Occupation’” in (2008) 36(3) *Millennium* 533. A much fuller version of extended *jus post bellum* has recently been published by May, *After War Ends* (n. 5).

To be sure, due to limitations of reasoning and imagination with respect to the extreme vagaries of war, there will very likely be (and there almost certainly should be<sup>15</sup>) significant indeterminacy and provisionality in what objectives, and concomitant responsibilities/constraints, can be brought to bear at the *ad bellum* stage. But in thinking through the “just-peace” goal, there is a need to reckon seriously with what this may require of just combatants as necessary requirements in the justice of the cause.

Thus we turn to *jus post bellum* at war's beginning as well as its end and its focus may still be substantially forward-looking at that end-point even though the theory itself does not shoulder an entire morality of peacebuilding. To isolate one among possibly many reasons to insist on this point: if *jus post bellum* posits only just ex-combatants as its agents—and we should not take this for granted<sup>16</sup>—it should perhaps not be thought of as so demanding as to require *them* to complete (with or without others) the processes of peacebuilding: these requirements probably go well beyond what one could reasonably expect of those who waged the just war. And one reason to think why this may be so arises in particular if we view the “peace” that is aimed for in peacebuilding as a fluid on-going process rather than a definite end-state: it may be unreasonable, and perhaps undesirable, to expect just ex-combatants always to be part of that process in occupation scenarios, for example, given that they should, at some reasonable point, leave an occupied society to learn how to stand on its own two feet.

#### IV. Prematurely Ending a Just War Justly?

Darrel Mollendorff has proposed that just war theory needs to be completed with a theory of *jus ex bello*. He claims that this should be conceptualized as being distinct from *jus post bellum* because the latter “primarily concerns itself with the nature and policies of the post-war order and the constraints that these place on the prosecution of war [...] (*jus post bellum*) does not provide direct guidance on questions such as whether and how a war, once begun, should be ended.”<sup>17</sup> This is a fair comment insofar as *jus post bellum* theorizing does typically seem to assume that a just war should end once the objectives which require war have been achieved: in addressing justice “in

<sup>15</sup> This insistence is inserted in recognition of these limitations as requiring such indeterminacy not simply as a matter of regrettable necessity but as a virtue with respect to the vagaries of what will follow in terms of what should be done at war's end. It could be a profoundly costly error to try to conform to a whole set of detailed and rigidly preset *post-bellum*-inspired rules once war begins. But it would be equally erroneous, at least on moral grounds, to use the “vagaries” point to go to the opposite extreme and not plan to wage war with any such thought or constraint with respect to what the war is being waged for. To illustrate: the widely-accepted injustice of the 2003 Iraq invasion does not vitiate the relevance in this debate of the Bush Administration's recklessly optimistic disregard of the “Future of Iraq” project as an example of the kind of *pre bellum* responsibility that putative just combatants should shoulder with respect to *post bellum* planning.

<sup>16</sup> There is no good reason to think that principles of *post bellum* justice cannot be levied on unjust ex-combatants. Even if they have won their war, the demands of justice on them have no less force and their presumed deafness to them in no way diminishes their moral applicability. Extended conceptions of JPB in particular can also posit principles to be levied on agents who may not have even been direct participants in the conflict: the international community as embodied in the United Nations, for example, with the grounds of these principles obviously arising not from what was done by the combatants in the taking-up of arms (again, *contra* Lazar on JPB) but from some conception, rooted perhaps in a cosmopolitan ethic, of the responsibilities that the community may have to those among it who have gone to war.

<sup>17</sup> Darrel Mollendorff, “Jus ex Bello” (2008) 16 *Journal of Political Philosophy* 131.



the ending” of war, it focuses on how it should be ended, the answer to “when?” being implicitly regarded as self-evident. This attitude is almost certainly too cavalier: again, we can reflect upon the “war is chaos” claim to appreciate that there may be no clear-cut point at which one could say the military elements of a just war’s goals have been achieved. What is doubtful in this case is whether we need a separate theory of justice to answer the “when?” question, as opposed to some kind of theoretical instrument which merely helps us to discern the achievement of the relevant just objectives already posited by the processes of just-war thinking.

This point helps to explain why Mollendorff focuses on two rather different scenarios:

- (1) It could be morally required to end a war that initially satisfied [...] the principles of *jus ad bellum* even though a victory has not been obtained.
- (2) It could be right to continue a war that initially failed to satisfy any one (or more) of the [...] principles of *jus ad bellum*.<sup>18</sup>

It is undoubtedly vital to think about what morality requires in these cases and the gaps they highlight in theorizing the morality of war are striking. Our present concern is obviously with (1) and, although Mollendorff does not believe himself to be offering an exhaustive account of *jus ex bello*’s tenets, he suggests that the kind of theory we need will be structured in two parts:

- (a) a set of considerations/principles to determine whether a just war should be continued or terminated short of fulfilling its *ad bellum* objectives;
- (b) a set of considerations/principles to determine what should be done in pursuit of peace should the war be justifiably terminated.

For Mollendorff, (a) will feature at least four principles: (i) whether there remains a just cause—either the original cause or one which emerged after the war’s breakout; (ii) whether the war can continue to be waged with proportionate force; (iii) whether there is a continued likelihood of success; (iv) whether new diplomatic alternatives have emerged such that the “last resort” criterion no longer holds. Another principle which I believe suggests itself is whether the discrimination criterion, forbidding the direct targeting of civilians and requiring all reasonable means to avoid injuring/killing them, can still be respected, especially if no “supreme emergency” is present.<sup>19</sup> On the other hand, (b) is comprised of principles requiring actions in the ending of war to minimize casualties, damage to infrastructure and the institutions of law and order, and to mitigate other (especially foreseeable but unintended) injustices that might arise

<sup>18</sup> Mollendorff, “Jus ex Bello” (n. 17) 124.

<sup>19</sup> For Michael Walzer, a “supreme emergency exemption” applies when a combatant society with justice on its side, facing total extinction at the hands of unjust aggressors, has no reasonable choice except to wage war without respect to *jus in bello* to stave off the existential threat and are thus morally permitted to do so: Michael Walzer, *Just and Unjust Wars* (4th edn, Basic Books 1992) 34–50. One might think there is no need for *jus ex bello* in such circumstances but that could be mistaken. Prematurely laying down arms in a fight to the death may be disastrous for the combatants in question but, if they can continue to fight only in ways which are even more morally catastrophic (for example through the use of weapons of mass destruction), then morality may tragically require them to surrender. Whether it is specifically justice which requires them to do so is a variant of the question being opened up here, and which thus requires further investigation.

(ending a war that should be ended on other counts might leave in its wake, for example, hostile divisions in a society whose enmities could be afforded vicious expression once the troops have gone).

One might query whether (a) is as distinct from *jus ad bellum* as Mollendorff thinks: the tenets of the two are substantially the same, the difference lying only in when the questions they prompt are posed. But our focus is on (b): our question is whether, or to what degree, its requirements are still appropriately thought as those of justice as opposed to some other principle. Here, I sketch an argument to challenge its “justice” credentials and, in the chapter’s concluding section, I will suggest some of its implications with respect to how we might answer some of the questions from section II about how best to understand “justice.”

To mount this argument, I utilize a comment by Mark Allman and Tobias Winright on my account, developed elsewhere, of a justified early termination of a just occupation.<sup>20</sup> Not only does it have its own separate bearing on *jus post bellum* when talking about peaceful occupations, this case may itself be one of Mollendorff’s own scenarios if the occupation has not marked the war’s conclusion. (Hence my account and (b) share very similar concerns to minimize the harm that may be done given their failure to achieve their objectives.) Their claim is that my theory introduces “a slippery slope” into *post bellum* morality:

It essentially allows an easy out for occupiers who can cut and run, claiming, ‘If we stay any longer we will prevent the defeated from achieving self-sufficiency.’ This paternalistic argument was popular once the U.S. occupation of Iraq proved more arduous than anticipated. [...] Evans seems aware that he has stepped on the slippery slope. He sets a hedge around this argument by articulating six considerations necessary to excuse occupiers from their responsibilities.<sup>21</sup> While the nod to realism is appreciated, we contend that just war theory’s rationale for the use of deadly force is [...] a just and lasting peace. The moral force of *jus post bellum* is precisely that it holds those claiming to fight a just war responsible for the just cause(s) identified in the *ad bellum* phase. Any stepping back from this rigorous interpretation of the criteria makes for a less honest just war theory.<sup>22</sup>

The charge is that theories which permit shortfalls with respect to the requirements of justice in war may encourage some kind of dereliction of duty, an overly premature “cutting and running.” Now, we should note an important unclarity here: precisely what sort of criticism is being made of a theory by the claim that it opens up a “slippery slope” possibility? Does that claim necessarily constitute a valid criticism of that theory in itself? A slippery-slope argument says that “one should not do X because that might (in the weak version of the argument) or will (the strong version) lead to Y, and Y is impermissible/bad.” Beyond the putative tendency to prompt bad consequences, the argument points to no *intrinsic* fault with X. The question must be how *culpable* is X in

<sup>20</sup> Mark Allman and Tobias L. Winright, *After the Smoke Clears: The Just War Tradition and Post War Justice* (Orbis Books 2010) 72–4. My theory is presented in Mark Evans, “Moral Responsibilities and the Conflicting Demands of *Jus Post Bellum*” (2009) 23(2) *Ethics and International Affairs* 147.

<sup>21</sup> These considerations, which need not be listed here, are given in Evans, “Moral Responsibilities and the Conflicting Demands of *Jus Post Bellum*” (n. 19) 161–2.

<sup>22</sup> Allman and Winright, *After the Smoke Clears* (n. 19) 73–4.

the advent of Y such that its own impermissibility should result. Putting the question differently: what is meant by the claim that a “shortfall” theory “essentially allows” the “easy out” for occupiers? If by “allow” Allman and Winright mean “gives permission,” i.e. justify, then the theory clearly does not intend to do that. If they instead mean by “allow” that the proposal is insufficiently rigorous, or too incoherently stated to prevent illegitimate uses of its tenets, one still needs to know why this constitutes a reason not to accept it (as opposed, for example, to trying to rework it to address the deficiencies). For in this instance the slippery slope is slid down as a result of an *abuse* of the theory and, though there may be a prudential reason not to adopt it as a result, it is hardly obvious that something should never be done because of some consequence it does not justify (and indeed would itself condemn).<sup>23</sup>

The latter half of the passage, however, suggests a different account of the proposal’s alleged deficiency: precisely because it can permit a shortfall with respect to the just-and-lasting peace responsibilities which just war theory and *jus post bellum* urge on just combatants, it represents some sort of betrayal of those requirements and objectives of justice. But Allman and Winright overlook the significance of calling this a *justified* rather than *just* early-termination theory: it is an account of what should be done precisely when the tenets of *jus post bellum* cannot be fully satisfied. In other words, it applies when it is reasonable to think that justice cannot be secured, at least by the agents (the occupiers) in question. Hence they mislocate my proposal: it is not meant directly to be part of a theory of *justice* in war’s aftermath, even though it may be an important subsidiary element of *jus post bellum*.

Thus, the same may be said about *jus ex bello* in at least some instances of its application: we may be justified in ending a just war prematurely in the sense that its just cause has not been achieved—a just peace cannot foreseeably result—but why call a theory that permits such shortfalls from justice a theory of justice itself? To be sure, a shortfall theory still tries to make the best of a decidedly sub-optimal situation and is in that sense rectificatory. Some might then be tempted to say that justice is still being done if the premature end or exit is the best thing to do. All that has happened is that what can reasonably be done in pursuit of justice has shrunk from the original just cause—and isn’t that what is going on when we formulate a rectificatory theory from the guidance given by a pristine theory? More specifically, isn’t the rectificatory theory of justice (*jus post bellum*) from which *jus ex bello* is said to represent a shortfall itself crucially framed by considerations of what is possible in the non-ideal world? Is the difference merely one of degree which, as noted in section II’s discussion of the vagaries in determining when a “just peace” is achieved, is not amenable to any clear-cut line-drawing that would seem to be needed to make the justified/just distinction?

But, in reply, we should stress that this may still represent a shrinkage of “justice” to the point at which the whole theory becomes vulnerable to the devastating charge that

<sup>23</sup> In further pursuit of clarity in the terms of an argument’s conduct, and in support of the point being made here, we should consider the appropriate interpretation (which it is not clear they intend) of Allman and Winright’s claim that the theory is “excusing” occupiers from their responsibilities. If one is *excused* for not doing X, X is nevertheless what one should have done—but there are sufficient mitigating circumstances to render one less vulnerable to condemnation in having done otherwise (possibly even sufficiently so for partial exoneration).

“justice” has become merely whatever one wants it to mean, overlooking the failures to achieve what justice requires of its agents whether they are at fault for them or not. Put differently, this shrinkage deprives us of the ability to articulate an intuitively powerful (as I would claim it to be) sense that sometimes justice is impossible to achieve and we are forced to act according to other considerations. This applies even to the possibility-informed conception of rectificatory justice: it does not collapse its conception of justice from “possibility in a general, applicable-to-the-non-ideal-world sense” into “whatever is possible in any given situation.” Whenever we talk of justice, rectificatory or otherwise, we believe ourselves to be talking about something which is freighted with value and importance, which is consequently demanding—and sometimes too demanding, given what we are capable of doing at certain times. It is not so empty or flexible as to be something that we can always shape to fit the circumstances: it is not the raw material in the art of the possible, something than can be legitimately subject to some version of what Jon Elster calls “adaptive preference formation.”<sup>24</sup> Hence, one way of preventing (or at least identifying and criticizing) the moral backsliding that so concerns Allman and Winright is to avoid such cavalier recasting of moral concepts “conceptualize that conceptualizes away” any shortfalls from justice that are actually being allowed in as performances of justice through such recasting. We may be justified in not fulfilling our duties of justice, but we should not congratulate ourselves in thinking we *have* done what justice demands of us after all.

## V. What Does it Matter if We Call it “Justice”?

If this argument is correct, then we can see how it is not always or only a theory of justice that we need at war's end. I do not pretend that this argument is complete; indeed, very little *argument* has been given for the proposition that “shortfall” theories are not (wholly) theories of justice. It is appropriate, then, in this chapter's concluding comments, to reflect on how that argument might unfold and, in particular, how it might rely on a particular way of conceptualizing “justice.” For it may have significantly more purchase if we understand “justice” as a particular principle, of giving people their due in some sense, and not as a “master concept” which may lend itself rather more naturally to scenarios about which we say something like “this is the best that we can do, all things considered.” But “all things considered” may well indeed have involved a trade-off of values which, though quite conceivably done for the best of reasons, has involved sacrifices and compromises with respect even to some of the considerations we regard as important and valuable among which I categorized justice in the previous section. For example:

- (i) we may not be able to punish war criminals who deserve to be punished because the violent backlash that would result is something that it is more important to avoid;

<sup>24</sup> Jon Elster, *Sour Grapes* (Cambridge University Press 1983) ch. 3. In adaptive preference formation, A is preferred to B simply because A is available and B is not: the best that can be had is the best that is conceivable. “Justice” is not the only value whose preferred conception would seem to be far too casually determined if this is the process by which it was selected.

- (ii) we may not be able to exact the degree of reparations owed to just ex-combatants because that would financially cripple the defeated society, or because a display of magnanimous foregoing is to be preferred;
- (iii) we may not be able to track and rectify each and every grievance caused among a civilian population during a war because the administrative and judicial resources are simply not available. Some such rectification is pursued as the best that can be done, but justice is not comprehensively done: it is unjust that many deserving cases go unattended;
- (iv) a just ex-combatant state may desire to embrace the demands of forgiveness and reconciliation but a majority of their citizens are not yet ready to forgive and reconcile, and it is thus decided that the democratic principle should outweigh these demands.

Now, something like Larry May's conception of *meionexia* cited earlier may offer a way of thinking about at least some of these outcomes as examples of justice having been achieved.<sup>25</sup> The sense of something having been given up in each, though, is what gives (what I consider to be readily available) intuitive support to the idea of justice as a more specific principle that may need to be traded off. There is no disagreement between the two types of concept, though, that these are justified outcomes: the best or right thing to do.

At this point, some might impatiently consider all of this to be mere semantics, declaiming that whether something is called "justified" or "just" is trivial in the same way that a rose by any other name would smell as sweet. It is essentially irrelevant what we call a morally justified state of affairs: what matters is that it is indeed morally justified and the name we give it has no bearing on *that*. But, in response, it should be gathered by now that the usage of "justice" is not as innocent or nugatory as this position would have us think. Calling something a rose when it is not a rose might lead us to expect it to smell as sweet as a rose when in fact it does not: the name could nevertheless fool us into thinking it does, or lead our senses to adjust our appreciation of what counts as sweet-smelling (which would be an example of adaptive preference formation). And it is especially no trifling matter when we are talking about what to call "just" in war. It matters hugely that it is justice which is sought in the waging and conclusion of a just war, not least because of the weighty moral responsibilities it places on those who have taken up arms for its cause, and who are thus to be held to account with respect to it. That something is just is indeed a mark of its justification, but it is justification of a particularly robust type (a "high level" of justification) that war has to satisfy if it is to be justified at all.

Despite the fact that having justice on their side should not induce in just combatants a heightened, narcissistic sense of noble self-righteousness, to claim to have justice on one's side is undoubtedly intended to perform one or more of three types of speech-act.<sup>26</sup> It is a locutionary claim in describing justice as indeed what gives one a moral cause. It aims to have illocutionary effects in thereby eliciting from one's

<sup>25</sup> May, *After War Ends* (n. 5).

<sup>26</sup> As identified in J.L. Austin, *How to Do Things With Words* (Clarendon Press 1962).

audience their approval and support. And it may also be intended as a perlocutionary act, whereby a claim to be acting justly is itself the performance or establishment of moral justification. The moral and political importance of the latter two in particular should be obvious and one of the conditions for the success of these speech-acts is indeed the accepted conceptualization of justice as something specifically important and valuable. Why, after all, do war-making leaders invariably claim specifically to have justice on their side in attempted execution of these speech-acts? The fact that their opponents contest them on this score, sometimes rightly so and thus causing the speech-acts to fail, only confirms further the argument against the claim that it does not matter what we call justice.

What might justify a shortfall from justice if not simply a different concept of justice? If it is correct to avoid attaching the “justice” label to the “all-things-considered” trade-off of values that may do the relevant work, we might nevertheless not have an alternative name ready-to-hand (perhaps *this* is an instance of where the name matters not). Perhaps a utilitarian standard is what ultimately does the justificatory work in a shortfall theory but, still, with this type of concept, justice is not equated with maximal utility: the latter may, in this kind of situation, come at the expense of, or without otherwise being able to achieve, justice to the full. This conceptual postulate has some appeal for *ex* and *post bellum* morality as elements of, or companions to, just war theory, for a straightforward utilitarianism arguably lies behind its requirements as what is being appealed to when they cannot all be met (the supreme emergency exemption being one example). But the very fact that just war theory places many more constraints on war than the utility maxim is farther reason to think that justice, in the morality of war at least, is not to be conceptualized as an “all-things-considered” standard of which that maxim may be a variant.

Much more needs to be said on this matter: this, of course, is part of the remit of the *Jus Post Bellum* Project. In particular, we need to inspect further the concept of a “just peace” itself. For, insofar as it denotes a particular desired state of affairs or situation, it is very likely itself to be a compound of values, the product of trade-offs between justice and other considerations which are very relevant in selecting how institutions, behaviors, and relationships should be conceptualized and considered. This need not mean that “just peace” itself signifies a shortfall from justice in the way that *jus ex bello* or the justified early termination of occupation might. But still we have the question of what is “just” in just peace and hence *jus post bellum*, and what other concepts are needed for them: the toolkit is far from complete.

# *Jus Post Bellum* as a Partly Independent Legal Framework

Dieter Fleck\*

## I. Introduction

If the assumption holds true that the law of armed conflict in its wider sense is based on three pillars, the *jus ad bellum*, the *jus in bello*, and the *jus post bellum*, the latter is not as clearly defined as the former two. The importance of *jus post bellum* to achieving a lasting peace makes normative regulation worthwhile, yet it is difficult to identify specific legal rules on post-conflict peacebuilding. A host of very different branches of international law is to be considered here.<sup>1</sup> Due to ambiguities and contradictions between requirements of short-term stabilization and conciliation in longer perspective, the matter is far less regulated than, for example, the conduct of hostilities during armed conflict. While in many post-conflict environments there is a host of common problems, their origin and perspective may be different in each specific case. Many relevant legal rules—in particular when these are based on Security Council powers under Chapter VII—remain exceptional in nature and are hardly disposed to generalization. Responsible actors must avoid any premature precedents for other situations. The principles of *jus post bellum*—even when they are widely applied in the practice of states and international organizations—do not always represent binding legal obligations, as each situation has its own challenges and actors will be reluctant to accept best-practice principles as legal norms.

These considerations seem to be relevant for all main elements of post-conflict peacebuilding, which are coined by the United Nations as Disarmament, Demobilization, and Reintegration (DDR), Security Sector Reform (SSR), reestablishment of the rule of law, and democratization.<sup>2</sup> But they are still open to test. As an attempt to explore some

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<sup>1</sup> Vincent Chetail, “Introduction: Post-conflict Peacebuilding—Ambiguity and Identity” in Chetail (ed.), *Post-Conflict Peacebuilding. A Lexicon* (Oxford University Press 2009) 1–33, 18, rightly refers in this context to “international humanitarian law; international human rights law; international criminal law; international refugee law; international development law; international economic law; the law of international organizations; the law of international responsibility; the law relating to the peaceful settlement of disputes; treaty law which governs in particular ceasefire agreements; and the law relating to the succession of states in the case of territorial dismemberment due to conflict.”

<sup>2</sup> Cf. *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992* (17 June 1992) UN Doc. A/47/277–S/24111; *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* (25 January 1995) UN

core principles of the *jus post bellum* and delineate this branch of international law from other branches, this chapter will—starting from three select *post bellum* rules that deviate from the *jus in bello* on the one hand and peacetime international law on the other—identify special requirements of the *jus post bellum* (Section II), address open gaps in legal regulation (Section III), and discuss possible methods for closing these gaps (Section IV). The conclusions to be drawn may still be tentative, yet they will be developed in an effort to contribute to further consensus in this area which is challenging theorists and practitioners alike (Section V).

## II. Typical Rules of *Jus Post Bellum*

The principles that may best serve for the conduct of this study are related to (1) assistance in performing regime change, (2) robust law enforcement post-conflict, and (3) international territorial administration, as these are areas in which specific requirements and conditions for legal regulation appear to be most obvious.

### A. Assistance in creating a new constitutional order

Assistance by sending states and international organizations to performing regime change in a conflict-torn society may be essential for lasting peace, yet it is problematic. Pertinent legal principles and procedures clearly deviate from those which are applicable before the armed conflict has come to an end. For territorial occupation in international armed conflicts, the *jus in bello* sets relatively clear functional and temporary limits: an occupying power shall restore and ensure the public order of the occupied state and make exceptions only if “public order and safety”—a term phrased a little less rigid in the original French version: “l’ordre *et la vie publics*” (emphasis added)—so demand.<sup>3</sup> While this requires respecting the laws in force in the country, it does not

Doc. A/50/60-S/1995/1; *Development and International Economic Cooperation: An Agenda for Development*, Report of the Secretary-General (6 May 1994) UN Doc. A/48/935; Boutros Boutros-Ghali, *An Agenda for Democratization* (UN Department for Public Information New York 1996); see Thilo Marauhn and Sven Simon, “Peacebuilding,” paras 26–42, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law (MPEPIL)*, 10 vols (Oxford University Press 2012) <<http://www.mpepil.com>> (accessed 10 May 2013).

<sup>3</sup> Article 43 of the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV (adopted 18 October 1907, entered into force 26 January 1910) *American Journal of International Law* Supplement 90-117 (1908): *French original*: “L’autorité du pouvoir légal ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.” *English translation*: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

Article 64 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287: “(1) The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. (2) The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations



affect the authority of the occupying power to administer the territory.<sup>4</sup> Some experts argue for certain latitude in the application of the local legal order, especially when the occupation is prolonged,<sup>5</sup> but the guiding aim should be seen in administering the occupied territory for the benefit of the local population.<sup>6</sup> Under the *jus in bello*, any regime change is considered a domestic affair in which no third state may lawfully intervene. Thus the *jus in bello*, not different from general international law as confirmed in Article 2(7) of the UN Charter, does not permit any foreign state to introduce fundamental institutional changes in an occupied territory. It is not even on a provisional basis that such measures could be justified under the *jus in bello*, even if different considerations may apply under the *jus ad bellum* for the exercise of self-defence when “the threat posed by a regime that engages in an armed attack would not dissipate as long as that regime remains in power.”<sup>7</sup>

That situation is more complex, however, in post-conflict peacebuilding. After armed conflicts, institutional changes are a frequent phenomenon. The history of the last centuries shows that change in government and civil society is the rule rather than an exception when wars have come to an end. Fundamental political changes may even be a pre-condition for a lasting peace. In such cases the maintenance of the legislative *status quo* may be counterproductive for national conciliation, yet the local government will often be unable to effectively perform such change without active international assistance. Hence the limitations rooted in the law of occupation may no longer be adequate after the armed conflict has come to an end,<sup>8</sup> and while interference into domestic affairs remains prohibited under Article 2(7) of the UN Charter, cooperation between participating states is conditioned under dominating and often urgent requirements of post-conflict peacebuilding, forcefully demanding and supporting a political change.

The questions to be asked here must focus on the legal character of those requirements and also consider the limits of possible regulation. To respect and support national sovereignty, national consent must be sought for relevant external activities, but how could the local authorities be expected to effectively agree on the transformation of their present legal system? To what extent is civil society involved? Even if the main thrust is evolutionary reform of living conditions rather than a formal change of the national constitution, will the present regime be able to achieve this without accepting certain forms of a right of intervention (*droit de regard*) by, if not transferring

under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”

<sup>4</sup> Hans-Peter Gasser in Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008) section 545.

<sup>5</sup> Yoram Dinstein, “Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding” (Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Fall 2004 No. 1) <<http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf>> (accessed 26 July 2013).

<sup>6</sup> *Expert meeting, Occupation and other Forms of Administration of Foreign Territory*, Report prepared and edited by Tristan Ferraro (ICRC 2012) 14.

<sup>7</sup> Gregory H. Fox, “Regime Change” in *MPEPIL* (n. 2) paras 34, 54.

<sup>8</sup> See Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 53 *Vanderbilt Journal of International Law* 119, 130.

control powers (including a right of inspection or supervision) to international organizations or even foreign states? When such voluntary transfer of powers is to be substituted by Security Council decisions under Chapter VII, would a resolution on general principles suffice, or may a more detailed regulation of change processes and control mechanisms be required? There will be hardly any general answer to such questions. External initiatives and international control mechanisms may be essential, but they are to be balanced against and harmonized with decisions to be taken by local authorities. Attempts to provide too much guidance from outside may be counter-productive for the envisaged aim: to ensure peace and stability by strengthening state building processes and good governance.

A solution for these open issues may be expected from the Security Council in cooperation with the state concerned, as long as the latter is effectively represented by a responsible government. Unless this latter condition is fulfilled, the decision to be taken will be more difficult. In any event, it should be tailored to the specific situation rather than being kept in general terms. The Peacebuilding Commission, established in 2006 to assist the competent UN bodies—in particular the Security Council, the General Assembly, the Economic and Social Council and the Secretary General—in their efforts to improve the situation in conflict-torn countries,<sup>9</sup> has carefully avoided any external law-making activity and consistently preferred to strengthen the principle of cooperation instead.<sup>10</sup> Thus, not even general limits to state sovereignty have been established by the Peacebuilding Commission. But what has been identified as an essential requirement evolving with the end of hostilities and consequently supported in the Commission's practice is international cooperation for meeting the most essential challenge of post-conflict peacebuilding, i.e. jointly implementing the obligation to rebuild.<sup>11</sup>

The differences in legal regulation that exist *in bello* and *post bellum* in this respect are gradual rather than principal in nature. The principle of non-interference enshrined in Article 2(7) of the UN Charter is common to both situations, but with the end of hostilities there will be room for cooperative solutions. Methods and procedures for identifying and implementing available options should be developed. They may be manifold and often escape general regulation.

## B. Robust law enforcement operations post-conflict

Foreign military participation in law enforcement is another striking issue. As for any sovereign state, the maintenance of public order and safety in a war-torn society is a national responsibility to be fulfilled by the national police. Foreign participation in the implementation of these tasks must be subject to agreement between the states concerned. Such agreement may be facilitated and shared by competent international

<sup>9</sup> UNSC Res. 1645 (20 December 2005) UN Doc. S/RES/1645; UNGA Res. 60/180 (30 December 2005); see Freya Baetens and Katrin Kohoutek, "United Nations Peacebuilding Commission" in *MPEPIL* (n. 2).

<sup>10</sup> See <<http://www.un.org/en/peacebuilding/>> (accessed 10 May 2013). For further considerations see (nn 36–9) and accompanying text.

<sup>11</sup> See Fleck, "The Responsibility to Rebuild and its Potential for Law-Creation: Good Governance, Accountability and Judicial Control" (2012) 16 *Journal of International Peacekeeping* 84.

organizations. For peace operations led by the United Nations or by another international organization, such as the African Union (AU), the Economic Community of West African States (ECOWAS), the European Union (EU), or the North Atlantic Treaty Organization (NATO), that organization may become party to the agreement and arrange for necessary support by sending states providing military contingents, logistic services, and civilian assistance. In most cases these agreements will be based on a Security Council resolution in which the mandate of the mission and guiding principles for its performance may be defined.<sup>12</sup> But this cannot replace a good working relationship with the authorities of the host state for which purpose specific agreements will be necessary. It is this set of regulations that may authorize foreign peacekeepers to temporarily take over or at least participate in the exercise of state powers to help ensure security and safety under the rule of law. The application of national police law of the host state together with relevant international police law<sup>13</sup> and rules and regulations of the sending state need to be regulated.

The need for judicial control poses additional problems. In current peacebuilding operations, judicial control often seems to be left to the discretion of sending states. Because the host state is too weak to insist on a transparent exercise of such control and competent international organizations are still far from developing consistent policy and legal procedures for such purpose within their own realm, there is a lack of transparency and a potential lack of international regulation here, a situation that requires serious and meaningful efforts for developing principles and rules of the *jus post bellum*. Sending states must ensure discipline of their military and civilian personnel engaged in peace operations abroad. They should respect the law of the host state and develop a convincing detention policy in transparent cooperation with local authorities. For this, it will not be enough to secure that existing human rights obligations of the sending state are applied extraterritorially. Rather, it is necessary to respond to mission-specific requirements and develop best-practice rules in coordination with other sending states, the host state, and the international organization concerned. Such rules should be implemented in cooperation with the host state, to develop confidence-building within the local population and ensure respect for the rule of law.

It is important to recognize that a convincing solution cannot consist of replacing the authority of the territorial state for an unlimited time, but must include strengthening its capability for good governance, thus restoring national sovereignty as early and as fully as possible. This situation will at the same time challenge and limit the Security Council in performing its tasks for the maintenance of peace and security. Free to commit members of the United Nations even beyond their existing obligations under any other international agreement,<sup>14</sup> the Council is responsible to ensure the rule of law in

<sup>12</sup> See Gregory H. Fox, ch. 12, this volume.

<sup>13</sup> See, for example, *Code of Conduct for Law Enforcement Officials* (17 December 1979) UN Doc. A/RES/34/169, Annex; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (7 September 1990) UN Doc. A/CONF.144/28/Rev.1, 110, Annex. Both documents are reprinted with short commentaries in Bruce Oswald, Helen Durham, and Adrian Bates, *Documents on the Law of UN Peace Operations* (Oxford University Press 2010) 438–48.

<sup>14</sup> See Arts 25 and 103 of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

the performance of peace operations.<sup>15</sup> It has emphasized recently that “United Nations peacekeeping activities should be conducted in a manner so as to facilitate post-conflict peacebuilding, prevention of relapse of armed conflict and progress toward sustainable peace and development.”<sup>16</sup> The same applies to the cooperation between the United Nations and regional and subregional organizations in matters of peace and security.<sup>17</sup> This will require not only effective control of peacekeepers by their sending state and the responsible international organization, but also an impartial judicial control which is accessible for the victims, and ensures compliance with the principles of good government.

As usual in legal regulation, there are multiple aspects to be considered here, and often with the same priority. Not only respect by the host state for the immunity of peacekeepers but likewise effective judicial control by the sending state and the international organization concerned need to be ensured at the same time. It is essential for the effectiveness of post-conflict peacebuilding that the inviolability of peacekeepers is respected and they are protected against unlawful attacks. Practice shows that law enforcement activities may be jeopardized by armed groups victimizing civilians and deliberately attacking peacekeepers or taking them hostage. The 1994 UN Safety Convention<sup>18</sup> has criminalized such activities, yet it excluded its application to

United Nations operations which are authorized by the Security Council as an enforcement action under Chapter VII of the Charter, in which any of the personnel are engaged as combatants against organized armed forces, and to which the law of international armed conflict applies.<sup>19</sup>

The 1994 Convention is thus formally not applicable in armed conflicts to which peace forces would become party. It is a typical *post bellum* treaty. But regrettably, the Convention suffers severe shortcomings which clearly limit its practical relevance

<sup>15</sup> See Bardo Fassbender, “The Role for Human rights in the Decision-making Process of the Security Council” in Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford University Press 2011) 74–97.

<sup>16</sup> UNSC Res. 2086 (2013) UN Doc. S/RES/2108, para. 2.

<sup>17</sup> UNSC Res. 2033 (2012), UN Doc. S/RES/2033 para. 8.

<sup>18</sup> United Nations Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363, 34 ILM 482 (UN Safety Convention).

<sup>19</sup> United Nations Convention on the Safety of United Nations and Associated Personnel (n 18) Art. 2(2). As stated by Mahnouch H. Arsanjani in the United Nations Audiovisual Library of International Law, the purport of this exclusion clause is not entirely clear and is open to interpretations which may not have been anticipated at the time of the negotiation of the Convention <[http://untreaty.un.org/cod/avl/pdf/ha/csunap/csunap\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/csunap/csunap_e.pdf)> (accessed 10 May 2013); see also Arsanjani, “Defending the Blue Helmets: Protection of United Nations Personnel” in Luigi Condorelli, Anne-Marie La Rosa, and Silvie Scherrer (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law*, proceedings of the international symposium held on the occasion of the 50th anniversary of the United Nations, Geneva, 19, 20, and 21 October 1995 (Pedone 1996), 115–47, 132–45. Christopher Greenwood in Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008), para. 4 to section 208, convincingly explains that while the effect of this provision is that the threshold for the application of international humanitarian law is also the ceiling for the application of the Convention, it seems highly unlikely that those who drafted this Convention intended it to cease application as soon as there was any fighting, however low-level, between members of a UN force and members of other organized armed forces as this would reduce the scope of application of the Convention to almost nothing; see also Greenwood, “Protection of Peacekeepers: The Legal Regime” (1996) 7 *Duke Journal of Comparative & International Law*, 185–207, 197–202, 207.

for current peace operations: the international obligations created here are those of states, not of non-state actors, yet the responsibility of states to ensure compliance with its rules is not sufficiently addressed. In robust forms of peace operations, below the threshold of an armed conflict, the relevance of this instrument is unclear and disputable, as the legal definition of situations in which peacekeepers become involved in fighting, however low-level, may become a matter of dispute.<sup>20</sup> Peace operations conducted by states or regional organizations, even those authorized by the Security Council, are not covered by the scope of the Convention. It should be accepted that the principles of the Convention, to ensure safety and security of peacekeepers and prevent impunity, should apply in all peace operations, but this important aspect is not confirmed in the Convention.

The adoption of the Optional Protocol to the Convention<sup>21</sup> did not solve all resulting problems, as the scope of application, which was extended here to “humanitarian, political or development assistance in peacebuilding” and “emergency humanitarian assistance,” is still limited to operations conducted under United Nations authority and control.<sup>22</sup> Thus more robust forms of peace operations and peace operations conducted by regional organizations<sup>23</sup> continue to be excluded from the scope of the Convention. No convincing answer has been given by the international community to the question of how states should arrange for the legal protection of peacekeepers attacked in criminal action and how should peacekeepers be distinguished from combatants in an armed conflict. Robust peace operations should follow clear and transparent rules and ensure that the line between law enforcement and the conduct of hostilities will not be blurred. The Secretary General is tasked

to take all measures deemed necessary to strengthen United Nations field security arrangements and improve the safety and security of all military contingents, police officers, military observers and, especially, unarmed personnel<sup>24</sup>

and, indeed, all participating states should be committed to these goals and held responsible for acts of non-compliance with relevant obligations. Yet none of the host states to a peace operation has ratified the Convention so far,<sup>25</sup> let alone the Optional Protocol,<sup>26</sup> and attacks against peacekeepers with no sufficient action taken by such states are sadly part of reality.

Current UN practice was relatively successful in coping with this situation: Status of forces or mission agreements (SOFAs or SOMAs) concluded with the host state often

<sup>20</sup> See Ola Engdahl, *Protection of Personnel in Peace Operations: The Role of the “Safety Convention” Against the Background of General International Law* (Nijhoff 2007) 233–41, 292.

<sup>21</sup> Optional Protocol to the United Nations Convention on the Safety of United Nations and Associated Personnel of 15 December 1994, adopted by the General Assembly on 8 December 2005 (UNGA Res. A/60/42) (Optional Protocol).

<sup>22</sup> Article II(1) Optional Protocol (n. 21).

<sup>23</sup> See, for example, Abou Jeng, *Peacebuilding in the African Union. Law, Philosophy and Practice* (Cambridge University Press 2012).

<sup>24</sup> UNSC Res. 2086 (2013) UN Doc. S/RES/2086, para. 20.

<sup>25</sup> See list of States Parties to the Convention <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TR EATY&mtdsg\\_no=XVIII-8&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TR EATY&mtdsg_no=XVIII-8&chapter=18&lang=en)> (accessed 10 May 2013).

<sup>26</sup> See list of States Parties to the Optional Protocol <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-8-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8-a&chapter=18&lang=en)> (accessed 10 May 2013).

provide that relevant parts of the Safety Convention will be made applicable within the host state by including them in the SOFA in accordance with Security Council and General Assembly resolutions.<sup>27</sup> The Council has confirmed this practice ever since.<sup>28</sup> Yet a number of recent SOFAs<sup>29</sup> still make no reference to the Safety Convention, to assure the security and safety of peacekeepers. These SOFAs even confuse the picture by referring to “international conventions applicable to the conduct of military personnel,” and expressly mentioning the four 1949 Geneva Conventions and their Additional Protocols, and the 1954 Cultural Property Convention, *jus in bello* treaties that are not formally applicable in situations outside armed conflicts. When these SOFAs were concluded for Sudan and South Sudan, the Comprehensive Peace Agreement (CPA)<sup>30</sup> was supposed to have ended Africa’s longest-running civil war.<sup>31</sup> Post-conflict regulation was required for those peace operations and none of the sending states had an intention to intervene in an ongoing armed conflict. It may be true that reference in these SOFAs to international humanitarian law treaties was meant to serve a good purpose, as many experts are more familiar with the *jus in bello* than with principles and rules of *jus post bellum* which is applicable to post-conflict peacebuilding. The importance of the UN Safety Convention, which would have been the more appropriate document to provide legal guidance for participants of those missions and the host states concerned, was either misunderstood or neglected by the participants in these negotiations, and some may have wrongly thought that peacekeepers provided by states and regional organizations would not enjoy protection under the text of the Convention.

Thus the challenge for solving urgent practical problems in a treaty that applies particularly *post bellum* appears to be obvious, but it has not been met so far. Neither have contentious borderline issues between a negative peace and the outbreak of armed hostilities been properly addressed in the Convention, nor has the practical task of regularizing the maintenance of public order and safety under the rule of law between many different, and differently structured, military and civilian actors been fulfilled. New efforts will be necessary to ensure participation by states engaged in peace operations—host states and sending states alike—in the UN Safety Convention, improve

<sup>27</sup> Information kindly provided by Ms Katarina Grenfell, Office of the Legal Counsel, United Nations. See, for example, UNSC Res. 1502 (2003) UN Doc. S/RES/1502, operative para. 5(a) and Protocole modifiant l’Accord entre l’Organisation des Nations Unies et la République démocratique du Congo concernant le statut de la Mission de l’Organisation des Nations Unies en République démocratique du Congo—MONUSCO, Kinshasa, 6 juin 2006, 2106 UNTS 357; UNGA Res. 67/85 of 21 March 2013, operative paras 16 and 17.

<sup>28</sup> See, for example, UNSC Res. 1778 (2007) UN Doc. S/RES/1778, preambular para. 9, operative para. 4.

<sup>29</sup> See, for example, Agreement between the United Nations and the African Union and Sudan concerning the Status of the African Union/United Nations Hybrid Operation in Darfur—UNAMID, Khartoum, 9 February 2008, 2503 UNTS 217; Agreement between the United Nations and the Government of Sudan concerning the status of the United Nations Interim Security Force for Abyei—UNISFA—(with exchange of letters). New York, 1 October 2012, Registration No. 50146; The Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan (with supplemental arrangement) concerning the UN mission in South Sudan—UNMISS, Juba, 8 August 2011, Registration No. 48873, <<http://treaties.un.org/Home.aspx>> (accessed 10 May 2013).

<sup>30</sup> Comprehensive Peace Agreement between the Government of the Republic of the Sudan the Sudan People’s Liberation Movement/Sudan People’s Liberation Army, 31 December 2004, <<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>> (accessed 10 May 2013).

<sup>31</sup> For a legal assessment of the conflict in Sudan, see the Rule of Law in Armed Conflict (RULAC) website <[http://www.geneva-academy.ch/RULAC/state.php?id\\_state=205](http://www.geneva-academy.ch/RULAC/state.php?id_state=205)> (accessed 10 May 2013).

implementation efforts, and reach appropriate amendments to overcome existing shortcomings of this instrument.

Looking for treaty law that is specific for the conduct of peace operations, the particular SOFAs or SOMAs may provide more practical guidance than the Convention and its Optional Protocol. Together with the Model SOFA,<sup>32</sup> which is often used in practice *mutatis mutandis*, the pertinent SOFA or SOMA and applicable rules of customary international law provide the starting point for any search into the body of law forming the *jus post bellum* today.

It is important to accept that rule of law principles require judicial control of any act of law enforcement, so that individual victims may have confidence in a fair legal procedure and the host state would obtain a reliable assurance by the sending state or by the international organization involved that judicial control will be duly exercised on acts committed by peacekeepers.

While measures to ensure the inviolability of peacekeepers and protect them against unlawful attacks will require resolute action rather than changes of existing law, it would be helpful to secure reliable commitments toward this end by all states and international organizations concerned and jointly support appropriate legal regulation.

### C. International territorial administration of war-torn countries

The third issue to be considered here is international territorial administration. It may appear paradoxical that the political success of what is the strongest form of limiting a people's self-determination is dependent from active cooperation of and a sense of ownership by the people concerned. But this is the reality post-conflict, and an even encouraging one. The long-term purpose of international territorial administration and its ultimate success may depend on the degree to which cooperative solutions are envisaged from the beginning and carried through the process even when difficulties arise.<sup>33</sup>

Hence it may be concluded that while achievements, challenges, and lessons learned from each case of international territorial administration should remain in the centre of any activity toward developing a *jus post bellum*, the contents of possible rules will depend on the capacity available and action to be taken under ever different circumstances. It is procedural rules and attitudes rather than substantial rights and obligations that are to be envisaged here.

## III. Gaps in Legal Regulation

Very different normative approaches toward *jus post bellum* obligations are being followed in the practice of states and international organizations. A *first* and rather legalistic step to take may be to identify peremptory norms of general international law (*jus cogens*) that could imply an obligation, e.g. for Occupying Powers in an armed conflict

<sup>32</sup> Model Status-of-Forces Agreement for Peacekeeping Operations, UN Doc. A/45/594 (9 October 1990), reprinted with a short commentary in Oswald and others above (n. 13) 34–50.

<sup>33</sup> Carsten Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (Cambridge University Press 2008) 741–3.

“to abolish legislation and institutions which contravene international human rights standards.”<sup>34</sup> Similar obligations may often be compelling for states involved in peace operations, as they share a responsibility for securing peace in situations in which norms of the host state inhibit or even exclude an effective peace process. Yet it remains difficult to draw a convincing line between necessary initiatives and unlawful intervention, especially when policy assessments on what is to be achieved next may be controversial. A *second* approach could be seen in a binding Security Council decision based on Chapter VII of the Charter which might provide a formal solution, but should be considered as a last resort and will hardly be detailed enough to convincingly solve all contentious issues. Both approaches might be insufficient anyway for winning hearts and minds of actors on the ground whose participation remain essential for a lasting peace. Hence the *third* approach—cooperative action—seems to be the most successful, even if a combination with the former two will be relevant in practice.

Looking for specific norms of *jus post bellum*, it appears natural to draw from other normative regimes, but it will also be necessary to accept that any such regime “needs to be looked at separately, and that it may turn out impossible to always find a *lex specialis* that would block the application of other relevant bodies of law.”<sup>35</sup> Certain latitude for progressive practice remains necessary, the more so since post-conflict peacebuilding is transitional in nature and both criminal and civil justice require special mechanisms, apt to confront the past and support reconciliation.

The Peacebuilding Commission has gained first experience on cooperative action in its currently six country configurations on Burundi (together with the United Nations Office in Burundi—BNUP), Sierra Leone (together with the United Nations Integrated Peacebuilding Office in Sierra Leone—UNIPSIL), Guinea-Bissau (together with the United Nations Integrated Peacebuilding Office in Guinea-Bissau—UNIOGBIS), the *Central African Republic* (together with the United Nations Integrated Peacebuilding Office in the Central African Republic—BINUCA), Liberia (together with the United Nations Peacekeeping Mission in Liberia—UNMIL), and more recently Guinea. Developed by a small Peacebuilding Support Office and supported by the multi-donor Peacebuilding Fund, these activities may contribute to resource mobilization, national capacity development and interaction.<sup>36</sup> A Working Group on Lessons Learned has examined critical issues of peace building practice and developed perspectives and proposals for improvement which are worth being further explored and implemented.<sup>37</sup>

<sup>34</sup> Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers” (2005) 16(4) *European Journal of International Law* 661, 676.

<sup>35</sup> Andreas Paulus, Background Document annexed to the ICRC Report (n. 6) 131–2.

<sup>36</sup> Report of the Peacebuilding Commission on its fifth session, A/66/675–S/2012/70 (30 January 2012) <<http://reliefweb.int/sites/reliefweb.int/files/resources/N1221850.pdf>> (accessed 10 May 2013).

<sup>37</sup> See the discussions of the Peacebuilding Commission’s Working Group on Lessons Learned, including “Economic Revitalization and Youth Employment for Peacebuilding—with a focus on Youth Employment and Natural Resource Management” (8 July 2011); “Resource Mobilization for Peacebuilding Priorities and Improved Coordination Among Relevant Actors” (6 April 2011); “Economic Revitalization in Peacebuilding and the Development of Service Based Infrastructure” (22 November 2010); “Youth Employment in Peacebuilding” (14 July 2010); “The Role of the PBC in Marshalling Resources for Countries on its Agenda” (26 May 2010); “Taking Stock and Looking Forward” (9 December 2009); “Lessons Learned from National Dialogue in Post-Conflict Situations” (14 October 2009); “Lessons Learned from the Colombian DDR process and the ‘Contribution of Cartagena to Disarmament, Demobilization and Reintegration’” (2 October 2009); “Lessons Learned on Sustainable Reintegration in Post-Conflict Situations” (28 May



Strategies for early peacebuilding are being developed including a checklist to be followed in relevant operations<sup>38</sup> and guidance for the prioritization and sequencing of the multiple tasks peacekeepers may be facing.<sup>39</sup>

As many activities in post-conflict peacebuilding are voluntary in nature, specific *jus post bellum* rules have hardly evolved so far. What may be noted is best practice, pragmatically tailored to specific requirements, yet sometimes of a more general nature that could be taken as a useful example for future activities. While this is still far from law creation, it should not be ruled out at this stage that certain specific *jus post bellum* rules may be identified, even if many of them would be temporary in nature rather than lasting parts of a new legal order. Neither should discussions on possible needs of regulation in post-conflict peacebuilding be excluded. On a procedural level, further research should be devoted to the peacebuilding practice of the Security Council *versus* consent of participating states under the principle of sovereignty and the law of treaties. In all such activities the risks involved by creating novel antinomies rather than bridging gaps in the perception of actors should be taken into due consideration.

#### IV. A Tentative Look at the Nature of *Jus Post Bellum* Rules

The nature of *just post bellum* rules appears to be characterized by a specific openness to other legal disciplines. During post-conflict situations principles and rules of international humanitarian law continue to provide guiding standards for any use of force. The principles of necessity,<sup>40</sup> proportionality,<sup>41</sup> and humanity<sup>42</sup> are generally as relevant for

2009); "Promoting Collaboration and Improving Coordination between the PBC and Regional and sub-regional Organizations" (30 March 2009); "Comparative Experiences in Developing National Capacities after Conflict" (15 December 2008); "Learning from a Regional DDR Approach in the Great Lakes Region of Africa" (24 November 2008); "Comparative Lessons from the United Nations Rule of Law Assistance" (20 October 2008); "Key Insights, Principles, Good Practices and Emerging Lessons in Peacebuilding" (12 June 2008); "Environment, Conflict and Peacebuilding" (8 May 2008); "Comparative Lessons from Addressing Internal Displacement in Peacebuilding" (13 March 2008); "Justice in Times of Transition" (26 February 2008); "Gender and Peacebuilding: Enhancing Womens Participation" (29 January 2008); "Local Governance and Decentralization in Post-War Contexts" (13 December 2007); "Fiscal Capacities in Post-conflict Countries" (8 November 2007); "Strategic Frameworks" (19 September 2007); "Regional Approaches to Peacebuilding" (8 June 2007); "Afghanistan Compact" (17 April 2007); "Sierra Leone Elections" (20 February 2007); and a Report on "Emerging Lessons and Practices in Peacebuilding, 2007–2009" (May 2010) <[http://www.un.org/en/peacebuilding/doc\\_lessonslearned.shtml](http://www.un.org/en/peacebuilding/doc_lessonslearned.shtml)> (accessed 10 May 2013).

<sup>38</sup> UNGA Res. 65/290 (14 September 2011) UN Doc. A/RES/65/290, para. 16; see Report of the Peacebuilding Commission on its fifth session (n. 36) paras 20–2.

<sup>39</sup> See "The Contribution of United Nations Peacekeeping to Early Peacebuilding: A DPKO/DFS Strategy for Peacekeepers" (27 June 2011) <[http://www.operationspaix.net/DATA/DOCUMENT/6797~v~The\\_Contribution\\_of\\_United\\_Nations\\_Peacekeeping\\_to\\_Early\\_Peacebuilding\\_\\_\\_a\\_DPKO\\_DFS\\_Strategy\\_for\\_Peacekeepers.pdf](http://www.operationspaix.net/DATA/DOCUMENT/6797~v~The_Contribution_of_United_Nations_Peacekeeping_to_Early_Peacebuilding___a_DPKO_DFS_Strategy_for_Peacekeepers.pdf)> (accessed 10 May 2013).

<sup>40</sup> See Robert D. Sloane, "On the Use and Abuse of Necessity in the Law of State Responsibility" (July 2012) 106(3) *American Journal of International Law* 447.

<sup>41</sup> See Emily Crawford, "Proportionality" *MPEPIL* (n. 2); Aaron Fellmeth, "The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency" (2012) 45 *Israel Law Review* 125. As suggested by Larry May, ch. 1, section I, in this volume, "proportionality" may be characterized as a meta-principle, as strict standards for its application do not exist in general form, and what is to be balanced depends from the circumstances prevailing at the time. Yet such uncertainties are not special for the *jus post bellum*. They exist likewise for the proportionality principle in the *jus ad bellum* and the *jus in bello*.

<sup>42</sup> See Geoffrey Corn, "Humanity, Principle of," *MPEPIL* (n. 2); Kjetil Mujezinovic Larsen, Camilla Cooper, and Gro Nystuen (eds), *Searching for a "Principle of Humanity" in International Law* (Cambridge University Press 2012).

law enforcement operations post-conflict as for the conduct of hostilities during armed conflict, certain differences in their application notwithstanding.<sup>43</sup>

The specific role of international humanitarian law and its relationship with other relevant legal disciplines should be evaluated more specifically in this context. The rights and obligations of non-state actors; the legal foundations and control of those rights and obligations; and current practice to ensure compliance deserve further discussion.<sup>44</sup> Insofar as different legal paradigms apply in law enforcement, robust peacekeeping, and the conduct of hostilities, these should be approached in light of the practical requirement for all armed forces to conduct military operations according to largely uniform standards, however the conflict is characterized.<sup>45</sup> The application of uniform standards is a clear and understandable need for regular armed forces in the conduct of their operations. It also applies to armed opposition groups.

A helpful contribution from a *post bellum* perspective should be strictly case-oriented. It should evaluate different forms of regulation (treaty law and evolving customary norms, best practice, soft law, institutional frameworks), develop preferences to increase acceptability and effectiveness of *jus post bellum* rules, consider typical post-conflict requirements of cooperation, as addressed above (Section I), and promote accountability for the proper implementation of existing principles and rules.

## A. Forms of regulation

Different forms of regulation should be considered according to the goal to be pursued. That goal is notoriously complex. Experience shows that ideal-type strategic orientations, such as: (i) liberalization first; (ii) security first; (iii) institutionalization first; or (iv) civil society first<sup>46</sup> will hardly work in reality. In practice, each of these four different lines of interest must be considered simultaneously, as they are interrelated and may well deserve a similar high priority. As the late Secretary General Boutros Boutros-Ghali had explained in the Supplement to his Agenda for Peace,<sup>47</sup> the four concepts—preventive diplomacy, peacemaking, peacekeeping, and post-conflict peacebuilding—are interrelated. They have to come in at different stages of a conflict, but should be orchestrated into a coherent strategy.

A wide-ranging spectrum of different levels of regulation remains most essential. This will have consequences for the forms of pertinent rules. Treaty law and evolving customary norms, best practice, and even soft law may each present the most effective

<sup>43</sup> See Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) ch. 32 (Conclusions) 563.

<sup>44</sup> See Christian Tomuschat, “The Applicability of Human Rights Law to Insurgent Movements” in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, and Christian Raap (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag 2004) 573–91 drawing on a coherent practice of the General Assembly and the Security Council to make insurgent movements responsible for respecting human rights.

<sup>45</sup> See Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008) section 1216.

<sup>46</sup> Ulrich Schneckener, “International Statebuilding. Dilemmas, Strategies and Challenges for German Foreign Policy” (Stiftung Wissenschaft und Politik 2009) 16–20.

<sup>47</sup> Supplement to his Agenda for Peace (n. 2).

solution in a given situation, in order to strengthen cooperation, develop institutional frameworks, and ensure compliance in ever different circumstances.

## B. Participation

As the success of any peacebuilding process will depend from the participation of those concerned, appropriate strategies are to be applied to effectively approach all relevant actors. The use of military and police force, coercive diplomacy, intelligence measures, and material incentives may for longer periods remain part of “realist” approaches to change behavior of non-state actors, but it cannot replace political means of persuasion through mediation, negotiation, and reconciliation. While attempts to categorize such different approaches<sup>48</sup> may be useful for instruction purposes, their relevance for legal policy appears rather limited. What is required in practice is flexibility and a readiness for cooperation under ever changing circumstances. International organizations and NGOs may be more successful here in influencing public opinion than states and governments are. Contact channels which may be considered unacceptable by the latter may well turn into indispensable assets for civil society, thus strengthening participation in post-conflict statebuilding.

## C. Compliance control

The importance of the rule of law in all peacebuilding processes calls for strict adherence to rather than derogation from existing obligations. Where exemptions become necessary in a state of emergency, these should be tailored to existing needs and long-term goals. Any such exemption should be introduced under transparent procedures and be open for independent control, even if normal procedures of peacetime governance are not yet effective. While some caution will continue to be in place against straightforward attempts to identify specific legal rules that ought to be applied in post-conflict peacebuilding,<sup>49</sup> the process itself must be visible, and distinct activities toward ensuring compliance with its goals and principles remain a core task for any such endeavor. As universal values of peace, humanity, and accountability are likewise inherent in *jus ad bellum*, *jus in bello*, and *jus post bellum*, activities to ensure compliance with and control of legal obligations remain the core task of peacekeepers in all their operations, including post-conflict peacebuilding.

To perform this task effectively, a balance between formal and informal approaches will be required at all stages of this thorny road. This may include a great deal of improvisation. But creative flexibility in norm creation and strict control procedures to ensure practical steps toward accountability should not be considered as mutually excluding.

<sup>48</sup> See Claudia Hofmann and Ulrich Schneckener, “How to Engage Armed Groups? Reviewing Options and Strategies for Third Parties” (2011) 29 *S+F (Sicherheit und Frieden)* 254.

<sup>49</sup> Carsten Stahn, “‘*jus ad bellum*,’ ‘*jus in bello*’ ... ‘*jus post bellum*’?—Rethinking the Conception of the Law of Armed Force” (2006) 17(5) *European Journal of International Law* 921–43 at 942; Stahn, “The Future of *Jus Post Bellum*” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum. Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 231, 233.

At the same time, compliance with *jus post bellum* principles and rules should be seen in context with other legal disciplines. Upholding the rule of law as a general principle is not so much an issue of effectively policing every violation at any time, but it requires “that measures be taken to encourage compliance, deter non-compliance, and remedy injury caused by violations of legal norms.”<sup>50</sup> Hence the success of any peace operation is to be evaluated by considering a framework of interconnected processes.<sup>51</sup>

Keeping the *jus post bellum* visible in such a complex setting thus remains a task worth constant efforts. The functional and temporal limits of the *jus in bello* on the one hand and the limited effectiveness post-conflict of general peacetime rules on the other may justify considering the *jus post bellum* as a distinct legal branch in its own right. States and non-state actors are sharing responsibilities for cooperating in the development of its guiding principles and rules, and ensuring respect for them.

## V. Conclusions

So is the glass empty, waiting to be filled ad hoc by helpful actors who will be free to make decisions of their choice? Not quite. A few specific principles of *jus post bellum* may still be drawn from these considerations.

1. *Pragmatic limitation.* There is *first* the strong need for pragmatic limitation in peacebuilding processes. Pragmatic limitation as a legal principle is but weakly rooted in classic political philosophy, but it deserves more and more recognition under the experiences of the vast dimension and the high frequency of current armed conflicts. Aristotle had referred the attitude of taking too much (*pleionexia*) as a vice, not different from that of taking too little (*meionexia*). He had held that justice requires “taking only what is one’s due.”<sup>52</sup> Drawing from contemporary philosophical studies which followed the development of this idea from Aristotle to Xenophon and the Cynics up to the father of modern international law Hugo Grotius, we may realize today that a certain asymmetry between these two poles may well be justified for the sake of sustainable peace, “but not the one that has been traditionally accepted.”<sup>53</sup> For ages *meionexia* was the typical fate of the vanquished, and victor’s justice remains deeply rooted in historic memories up to our time. But failures of the Treaty of Versailles and the avoidance of such failures in post-conflict settlement after the Second World War may, indeed, convey a different message. In current post-conflict situations this might be understood as a matter of state practice and *opinio juris* rather than a mere moral postulate. Where this idea is accepted, it applies to peacebuilding after international and internal

<sup>50</sup> Dinah Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 9.

<sup>51</sup> Paul F. Diehl and Daniel Druckman, *Evaluating Peace Operations* (Lynne Rienner 2010); Diehl and Druckman, “Peace Operation Success: The Evaluation Framework” (2012) 16(3)–(4) *Journal of International Peacekeeping* 209.

<sup>52</sup> Aristotle, *Nicomachean Ethics*, 1129, tr. J. A. K. Thompson (Penguin 2004) 112.

<sup>53</sup> See Larry May, ch. 1, section II, in this volume. See also May, “Reparation, Restitution and Transitional Justice” in Larry May and Andrew T. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 32, 33–6; Larry May, *After War Ends. A Philosophical Perspective* (Cambridge University Press 2012).

conflicts likewise. A just and lasting peace may require that victors accept more obligations than the vanquished, irrespective of which party to the conflict had committed acts of aggression. The old question “what is one’s due” does not find an easy answer in a war-torn country. Yet it will be part of the success process to undertake answering it in a convincing manner.

2. *Conciliation.* While for factual reasons criminal justice will find its limits in post-conflict situations, with courts unable to fulfill their task in each single case and actors tasked to concentrate on reconstruction without any impediment, the need to re-establish the rule of law remains essential for any peacebuilding process to succeed. This requires balancing justice and conciliation, giving room for truth commissions where full reparation may be impossible, endeavoring to grant amnesties as required under Article 6(5) AP II,<sup>54</sup> again an example of existing treaty law *post bellum*, and offering the chance of changing even principled opinions rather than enforcing consequences for former action at all times.

3. *Participation.* A further principle may be seen in the widest possible participation of all actors of a peacebuilding process. As the success of sustainable peacebuilding depends from multiple support efforts, appropriate strategies are to be developed to include very different actors in fruitful cooperation. Armed forces and the police, governmental diplomacy and informal activities, economic incentives, and political pressure are realistic means of influencing states and non-state actors in support of peacebuilding. Yet they cannot be a substitute for a process of reconciliation through direct negotiations. What is required for sustainable peace is the will and ability to cooperate and include former adversaries in common objectives. International organizations and non-state actors may be more successful on this route than local governments and third states. Civil societies may develop and successfully use channels for cooperation that are not easily accessible to officials, and they may be able to mobilize forces that would hardly be available to states themselves.

4. *Temporary nature.* Not different from peace operations as such, certain *post bellum* rules are temporary in nature rather than lasting parts of a new legal order. Yet their duration may be open-ended. The degree and extent to which they succeed in informing the domestic law of the affected state may be decisive for the peace process to become effective and sustainable.

In that sense it may be accepted to treat *jus post bellum* as a special discipline, distinct from other branches of international law, yet also relevant for them, and using their rules in turn throughout the process of post-conflict peacebuilding. *Jus post bellum* principles and rules are, indeed, informing even the national law of the country, as they may be relevant for a lasting process of consolidation. States and international organizations, civil societies, and many non-state actors remain challenged to make such principles and rules work in practice.

<sup>54</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts—Protocol II—(adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

# *Jus Post Bellum*: An Interpretive Framework

James Gallen\*

## I. Introduction

At this nascent stage of its development, *jus post bellum* may most effectively operate as an interpretive framework that can identify and evaluate the moral legitimacy of diverse legal and political practices and actors in transitions. This distinctive claim broader than suggesting *jus post bellum* governs a strict temporal end-of-conflict period in international law alone. This chapter argues that *jus post bellum* should be concerned with transitions. Transitions can be described as the move from armed conflict to peace, or from dictatorship to democracy, and can be seen as a response to gross violations of human rights and as an attempt to re-constitute a sovereign political community. At the emergence of this present discussion regarding *jus post bellum*, it remains possible for scholars and practitioners to identify and assess a potential role for this term as a framework relevant to transitions from conflict to peace. International law has not yet fully articulated an explicit *jus post bellum* in the same manner that international law governs the use of force (*jus ad bellum*) or the conduct of armed conflict (*jus in bello*). This would appear to discourage the presentation of *jus post bellum* as a positive legal framework at this point in time.

One major preliminary challenge is to consider the nature of “post” in any concept of *jus post bellum*.<sup>1</sup> This issue determines whether *jus post bellum* is confined to periods at the end of armed conflict, and if so, for how long a period at the end of this conflict. Ruti Teitel has recently argued:

“[P]ost bellum” seems too limited or inappropriate today because of the unstable or undetermined boundaries between conflict and post-conflict situations. Transitional justice is arguably more capacious because it allows for purposes beyond those associated with a war’s beginning, such as transformation, namely purposes going beyond retributive or restorative justice.<sup>2</sup>

Transitional justice does present resources regarding the dynamic nature of “transition” that seem in contrast to a *post bellum* conception that may be linked closely to an armed conflict and demand swift, revolutionary change of legal orders.<sup>3</sup> For instance, transitional justice has contended with the issue of justice in the context of ongoing conflict,

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<sup>1</sup> Brian Orend, “Jus Post Bellum: The Perspective of a Just-War Theorist” (2007) 20 *Leiden Journal of International Law* 571; Kristen E. Boon, “Obligations of the New Occupier: The Contours of a Jus Post Bellum” (2008) 31 *Loyola International & Comparative Law Review* 101.

<sup>2</sup> Ruti Teitel, “Rethinking Jus Post Bellum in an Age of Global Transitional Justice” (2013) 24(1) *European Journal of International Law* 335, 339.

<sup>3</sup> Teitel, “Rethinking Jus Post Bellum in an Age of Global Transitional Justice” (n. 2) 340.

in the cases of Colombia and Afghanistan, but has adapted the concept of “transition” to be a dynamic and flexible process, rather than a set date in history.<sup>4</sup>

However, the advantage of *jus post bellum* may be to offer a dynamic concept of “*post bellum*” broader than that concerned with only transitional justice. The policies of international organizations regarding fragile states seek to operate before, during, and after periods of conflict, that may be conceived of as cyclical in fragile environments.<sup>5</sup> Such policies cover areas such as peacebuilding, statebuilding, security sector reform or development, all beyond the core of transitional justice. *Jus post bellum* could adopt this broad approach if it is employed as an overarching framework above existing areas of international law and policy relevant to the cessation of conflict and gross violations of human rights. This conception of *jus post bellum* is dynamic in nature regarding the period of “post,” which perhaps remains a problem for the binary nature of positive law. It has been noted that as it is unclear when night ends and day begins, the period of dawn is a gradual period that is difficult to ascertain.<sup>6</sup> So it is argued that transitions and *jus post bellum* have an overlapping relationship, with the conflict, post-conflict, and transition periods necessarily overlapping. The alternative seems to be set up transitional justice and *jus post bellum* in opposition, with a de-emphasis on additional fields such as peacebuilding, security sector reform or development, that are also relevant to the transitional or post-conflict period.<sup>7</sup> An overarching *jus post bellum* need not threaten any of these fields, but rather, as it is argued in this chapter, could emphasize their mutually supporting relationship and interdependent goals.

With this conception of a dynamic rather than static *jus post bellum*, this chapter considers the potential for *jus post bellum* to operate as an interpretive framework for international law through the various dimensions of complexity that arise in transitions. This interpretive framework operates through the principle and process of integrity as considered by Ronald Dworkin.<sup>8</sup> This chapter argues that the distinctive value of *jus post bellum* should be in recognizing that the various norms, regulations, and practices relevant to transitions are inter-dependent and mutually re-enforcing and as a result can be evaluated and interpreted in a unified fashion. This chapter first identifies three dimensions of complexity that warrant identification and evaluation for any proposed *jus post bellum* framework. Second, it identifies the need for a unified

<sup>4</sup> Lisa J. Laplante and Kimberly Theidon, “Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz” (2007) 28 *Michigan Journal of International Law* 49.

<sup>5</sup> Organisation for Economic Cooperation and Development (OECD), “Concepts and Dilemmas of State Building In Fragile Situations: From Fragility to Resilience” (2008) 9(3) *Journal on Development* 2008 17–21; European Commission, *Towards an EU response to situations of fragility—engaging in difficult environments for sustainable development, stability and peace*, Brussels, 25 October 2007 COM(2007) 643 final; World Bank, *Fragile States—Good Practice in Country Assistance Strategies Operations Policy and Country Services* (World Bank 2005).

<sup>6</sup> Brian Orend, “Jus Post Bellum: The Perspective of a Just-War Theorist” (n. 1) 574.

<sup>7</sup> It is questionable whether transitional justice can or should perform the role of an overarching framework of all forms of social transformation of transitional or post-conflict societies. Recent literature has seen the examination of the relationship between transitional justice and other fields, rather than the domination of one over the other. Roger Duthie and Pablo De Greiff (eds), *Transitional Justice and Development: Making Connections* (SSRC 2009).

<sup>8</sup> Ronald Dworkin, *Justice for Hedgehogs* (Belknap 2011); Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986); Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985); Jeremy Waldron, “The Circumstances of Integrity” (1997) 3 *Legal Theory* 1; Alex Schwartz, “Patriotism or Integrity? Constitutional Community in Divided Societies” (2011) *Oxford Journal of Legal Studies* 1.

framework based on the inter-dependence of areas relevant to transitions through their shared contribution to civic trust and the rule of law. Finally, it considers the application of Dworkin's integrity as a framework and identifies principles that would guide this framework across diverse areas and specific transitions and provide a basis for reform of international law and the policies of international organizations operating in transitions.

## II. The Role of *Jus Post Bellum*: Three Dimensions of Evaluation

International law has not fully articulated an explicit *jus post bellum*. Current areas of international law and policies of international organizations relevant to the *post bellum* period and periods of political transition seem to offer competing priorities and justifications for such transitions, for the affected state, society, and the international community. This complex competitive structure can be seen in the various areas of international law relevant to the *post bellum* period, in the range of legal actors involved, and in the manner in which the context of each transitional society is treated in international law and policy. Each of these components presents an area to be evaluated in the *post bellum* period and can be conceived of as dimensions of a single complex problem.

### A. Areas of international legal and policy regulation

First, a wide range of areas of international law and policy exist that are relevant to a *post bellum* period. The relationship between transitional justice, peacebuilding, security sector reform and economic development in international law warrants close examination. Statebuilding, the status of peace agreements, refugee and migration law, constitutionalism, elections, and democracy all could also be potentially considered relevant to transitions, as argued by Easterday and Boon in this volume.<sup>9</sup> Some of these areas, such as transitional justice, peace agreements, peacebuilding, and statebuilding are specifically designed to engage with the relatively narrow factual circumstances of transition.<sup>10</sup> Other areas such as refugee and migration law, constitutionalism, and the development of a country's economy and human development can be conceived of as universal in application, applying to consolidated democracies as well as to transitional societies. More broadly still, the application of international human rights in transitions represents a significant point of convergence among these diverse areas. Each of these areas also have specific value goals that they purport to contribute to, such as peace, justice, truth, reconciliation, security, or democracy. If *jus post bellum* is to make a distinctive contribution to international law, it must engage with this background network of prior goals, regulation, policies, and treaties, and their associated institutional

<sup>9</sup> See Jennifer Easterday, ch. 20, this volume; Kirsten Boon, ch. 13, this volume.

<sup>10</sup> United Nations Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies" UN Doc. S/2004/616, 3; United Nations Secretary General, "Report of the Secretary General on Peacebuilding in the Immediate Aftermath of Conflict" UN Doc. A/63/881-S/2009/304.



structures. If *jus post bellum* is ultimately to replace or modify some component of one or more of these existing areas, a distinctive justification is needed. In contrast, if *jus post bellum* adds no substantive, interpretive, or practical value to existing areas of law and regulation, the value of the concept and discourse must be called into question.

Moreover, if *jus post bellum* is to be considered an overarching framework for these areas of international law, scholars and practitioners should be mindful of the risk of fragmentation in the international legal regulation between these areas. The fragmentation of international law refers the proliferation of different legal regimes and institutions governing inter-state relations.<sup>11</sup> Value preferences in different fields may be envisaged as competing spheres of authority, which generate the need for strategic choice between these areas, such as mainstreaming human rights in development or the securitization of peacebuilding or development. If seeking to overarch these areas, *jus post bellum* cannot remain neutral among these competing choices, but make an assessment between them. Such an assessment would be highly complex, but broadly familiar to international lawyers. If *jus post bellum* is to be a specific framework, it must first appreciate the range of configurations of international legal obligations that potentially apply to a given transition as one dimension of complexity.

## B. Legal status of international actors

A second dimension of a proposed *jus post bellum* framework could consider the range of legal foundations for the engagement of international legal actors in transitions. It may be the case that such legal foundations make a legal or moral difference to their engagements. First, many past international engagements in transitional circumstances have been on the basis of the consent of the affected state, which has acknowledged its own inability to administer the full range of issues relevant to transitions. State consent is a legally sufficient basis for valid international obligations to accrue to that state and a concept that we find throughout the international system.<sup>12</sup> However, if it were possible for fragile states to give effective consent and express this through its political organs, then the certain forms of engagement from the international community, such as international territorial administration, would be unnecessary.<sup>13</sup> The capacity of a state in a *post bellum* scenario to give consent may thus vary from states with full legal capacity, political legitimacy, and ability and willingness to pursue public goods, to those that lack these attributes. It is therefore possible to evaluate the validity of legitimacy of the obligations and mechanisms consented to during transitions.

Second, international engagement in transitional circumstances can be authorized by United Nations Security Council resolution. The only requirements or limitations on Security Council action are that they must be *intra vires* and act in good

<sup>11</sup> Eyal Benvenisti, "The Conception of International Law as a Legal System" (2008) 50 *German Yearbook of International Law* 393.

<sup>12</sup> Matthew Lister, "The Legitimizing Role of Consent in International Law" (2011) 11(2) *Chicago Journal of International Law* 1.

<sup>13</sup> Simon Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (Oxford University Press 2004) 239.

faith, respecting *jus cogens* norms.<sup>14</sup> Security Council resolutions have been used to authorize international criminal tribunals, peace-keeping missions, election monitoring, civilian observation missions, or full international territorial administrations, such as in Kosovo and Timor-Leste. Significant literature examines the practice of such missions and has highlighted the lessons learned and ongoing challenges in international territorial administrations.<sup>15</sup> However, their costly and exceptional nature means that this area of regulation cannot be taken to apply to all transitions, though it may share challenges faced by other legal bases of international assistance to transitions. As a result it is an unlikely basis for a comprehensive legal *jus post bellum* framework but may provide distinctive areas that can be evaluated.

Third, the law of occupation governs the situation where one state occupies the territory of another after the cessation of armed conflict. In so doing, the original intention behind this area of law was to enable the occupying state to pursue two objectives.<sup>16</sup> The occupier was to administer territory in a conservative fashion, only enforcing legal changes where necessary to maintain peace and security. In addition, the occupier was to promote local capacity for autonomous self-government. The original regime was designed to be palliative, such that major issues of change or re-distribution of land or legal rights would take place in a peace agreement that would end the occupation and regularize the situation. This was the situation envisaged under the Hague Regulations of 1907, which remain the principal basis for the international law of occupation.<sup>17</sup> In addition, the Fourth Geneva Convention sought to provide minimum standards for civilians in circumstances of occupation. Nonetheless, these provisions fail to capture the existing reality of practice in this area and have failed to do so for some time. As far back as 1945, Allied occupations of Germany and Japan eschewed the conservationist approach to occupation and can be more accurately characterized as transformative occupations, outside the 1907 Regulations.<sup>18</sup> No provision appears to have been made in these frameworks for the introduction of further legislation designed to deal with a past legacy of gross violations of human rights. There is a tension between the existing obligation in occupation to return to the status quo ante and the broader ambition of human rights law across areas in transitions to use international law as a transformative force. Unless *jus post bellum* is conceived of to radically alter the priorities and application of areas such as transitional justice, peacebuilding or security sector reform, or somehow remain removed from their sphere of influence, the transformative ambition of human rights law will necessarily extend to *jus post bellum* as well.

<sup>14</sup> Larissa Van Den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual" (2007) 20 *Leiden Journal of International Law* 797.

<sup>15</sup> Kristen Boon, "Obligations of the New Occupier: The Contours of a Jus Post Bellum" (2008) 31 *Loyola of Los Angeles International and Comparative Law Review* 101, 118–19.

<sup>16</sup> Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press 2008) 18.

<sup>17</sup> Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV (adopted 18 October 1907, entered into force 26 January 1910) *American Journal of International Law Supplement* 90–117 (1908).

<sup>18</sup> Chesterman, *You the People* (n. 13) 25–37; Romulus Picotti, "Legal Problems of Occupied Nations After Occupation" (1966) 33 *Military Law Review* 25.

Finally, trusteeship was governed by Chapter XII of the Charter of the United Nations and was drafted with a view to overseeing and administering the process of decolonization from empires that occurred in the mid-twentieth century.<sup>19</sup> Given the political sensitivities that arose during this process and those that remain extant, use of any legal mechanism from the law of trusteeship does not seem viable. Indeed, use of the rhetoric or concepts from this area in transitional circumstances may engender accusations of neo-colonialist attitudes and agendas.<sup>20</sup>

Thus, the legal foundation for the actions of *post bellum* international actors is also complex. The application of the first dimension of complexity, substantive international rules, norms and principles must therefore cover a variety of factual and legal circumstances, from full occupation by a belligerent state, through a variety of Security Council authorizations, through to the legitimate consent of an affected population to the presence of donor states and INGOs on their territory. It may be useful to think of the strength of these principles as working along a spectrum from occupation and territorial administration at one end to minimal international monitoring and engagement at the other. A challenge for a *jus post bellum* framework is therefore to evaluate substantive international legal obligations and the nature of international legal actors involved as two dimensions of engagement in transition.

### C. Context of each transitional society

The final complex variable is the transitional society itself. Transitions cover diverse factual circumstances. From the end of the Second World War, to the end of apartheid in South Africa, the aftermath of genocide in Rwanda, the collapse of the Soviet Union, and the toppling of dictatorships in Latin America and recently in the Middle East and North Africa, transitions are radically diverse. The paradigm of a post-war or post-conflict period may remain a classical conception of two armed forces, with a military victory or agreement signalling the end of the conflict. Within internal armed conflicts, the potential for cycles of violence renders modern conflict complex and changing environments that inhibit discrete classification of periods of war and peace. Regardless of the “transitions” versus “*post bellum*” issue, even paradigmatic *post bellum* societies remain highly complex. It is difficult to speak meaningfully of such societies in a way that applies across this range of histories, contexts, languages, and cultures. The application of international law to diverse contexts is a general challenge inherent in the international legal system. Nonetheless, it appears that a common feature present across a number of fields relevant to transitions generates a distinctive challenge.

Transitions display a significant paradox. On the one hand, the areas identified seek to use law, and its expressive or transformative function to pursue activities and values that change the behaviors, attitudes, and perceptions of citizens of a transitional societies.<sup>21</sup> On the other hand, local ownership and context of each transitional society has featured

<sup>19</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Ch. XIII.

<sup>20</sup> BS Chimni, “International Institutions Today: An Imperial Global State in the Making” (2004) 15(1) *European Journal of International Law* 1.

<sup>21</sup> Robert Cooter, “Expressive Law and Economics” (1998) 27 *Journal Legal Studies* 585, 594–5; Cass Sunstein, “On the Expressive Function of Law” (1996) 114 *University of Pennsylvania Law Review* 2021.

as a significant priority of theory, international law and policy in several of these fields.<sup>22</sup> Respecting local context and ownership is seen as significantly enhancing the legitimacy and efficacy of international engagement in transitional societies. Just war theorists have also identified the need to respect local ownership and context in a *jus post bellum*.<sup>23</sup> Moreover, local ownership can reflect expressions of self-determination, a right to democratic governance, and the re-constitution of a sovereign political community.<sup>24</sup>

Identification of local owners across divided state and private institutions of a transitional society is complex. In particular, many actors may be resistant to reform in given areas, such as political leaders seeking to avoid individual criminal accountability, civil servants opposed to governance reform or statebuilding, or military and police against SSR. Such resistance to reform may be institutional as well as personal.<sup>25</sup> However, ownership is typically invoked to refer to entire populations.<sup>26</sup> Moreover, it is unclear how local ownership operates when “owners,” however identified, deeply disagree about public goods.<sup>27</sup> Such disagreement reflects the heart of political decision-making and priorities in a transitional society in the fashion Mark Malloch Brown suggested, “choosing, for instance, whether girls’ education should be a bigger budget priority than clean water.”<sup>28</sup> Finally, a concern for local ownership will reflect disagreement about the appropriate time and form of exit of international engagement. In the absence of a clearly defined goal and endpoint, international actors run the risk of accusations that their temporary and benevolent presence is disingenuous amid concerns of neo-colonialism.<sup>29</sup> Concerns for the temporary nature of international engagement can be contrasted with the long-term nature of the goals of fields relevant to transition.

Policies in each field express the desirability of local ownership, but have not generated specific and shared understandings of what that entails.<sup>30</sup> There are no clear guidelines on how to act and on how to operationalize the idea of ownership.<sup>31</sup> Local

<sup>22</sup> Simon Chesterman, “Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations” (2007) 1(1) *Journal of Intervention and State Building* 4; Eric Scheye and Gordon Peake, “Unknotting Local Ownership” in Ebnöther, Anja and Philipp Flürli (eds), *After Intervention: Public Security Management in Post-Conflict Societies: From Intervention to Sustainable Local Ownership* (Geneva Centre for the Democratic Control of Armed Forces and Austrian National Defense Academy 2005).

<sup>23</sup> Gary Bass, “Jus post bellum” (2004) 32(4) *Philosophy & Public Affairs* 384, at 392–3.

<sup>24</sup> Kristen Boon, “Legislative Reform in Post-Conflict Zones” (2005) 50(3) *McGill Law Journal/Revue De Droit de McGill* 37; Annika S. Hansen and Sharon Wiharta, “From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict” in Carsten Stahn and Jann Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 135.

<sup>25</sup> Scheye and Peake, “Unknotting Local Ownership” (n. 22).

<sup>26</sup> Chesterman, “Ownership in Theory and in Practice” (n. 22) 18–19.

<sup>27</sup> Scheye and Peake, “Unknotting Local Ownership” (n. 22) 241.

<sup>28</sup> Mark Malloch Brown, “Foreword” in C. Lopes and T. Theisohn (eds), *Ownership, Leadership and Transformation: Can We Do Better for Capacity Development?* (UNDP 2003) x.

<sup>29</sup> Chesterman, “Ownership in Theory and in Practice” (n. 22); Annika S. Hansen and Sharon Wiharta, “From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict” (n. 24) 135.

<sup>30</sup> OECD’s Development and Assistance Committee (DAC), “Development Partnerships in the New Global Context” (May 1995) <<http://www.oecd.org/dac/2755357.pdf>> (accessed 4 July 2013); OECD DAC, “Shaping the 21st Century” (1996) <<http://www.oecd.org/dac/2508761.pdf>> (accessed 4 July 2013); James Wolfensohn, “Proposal for a Comprehensive Development Framework” (1999) <<http://web.worldbank.org/archive/website01013/WEB/IMAGES/CDF.PDF>> (accessed 4 July 2013).

<sup>31</sup> Nina Wilén, “Capacity-building or Capacity-taking? Legitimizing Concepts in Peace and Development Operations” (2009) 16(3) *International Peacekeeping* 337, 344.

ownership and context could become more functional if there was some sort of common framework for its understanding in different disciplines that would facilitate particular guidelines from case to case.<sup>32</sup> A *jus post bellum* framework would therefore benefit from offering an adequate conception of the relationship between international and national actors. This conception should cover these areas and the variety of national circumstances experienced in transition and across fields and acknowledges the other two dimensions of complexity identified above.

### III. Why a Unified Framework? Interdependence in Transitions

These three dimensions of complexity, the areas of international law and regulation, the legal status of international actors, and the context of each transitional society, may suggest an inevitable and inherent fragmentation and incoherence in areas relevant to *jus post bellum*. It may be that these areas each seek to change the behaviors, attitudes, and perceptions of citizens of transitional societies but must do so independently of one another. A distinct case needs to be made that the practice of each area is in fact dependent on the other areas. To make this case, this chapter claims that certain conditions exist in all transitional societies, notwithstanding the three dimensions of complexity and variables identified above. This interpretation of transitional societies describes these conditions as the circumstances of transition, as where there are:

- intense demands and expectations for the achievement of public goods in political community; but also
- minimal bureaucratic capacity and legitimacy to achieve such goods, due to a breakdown of civic trust and the rule of law, relative to the prior commission of gross violations of human rights.

These circumstances are derived by analogy to the circumstances of politics and justice that describe conditions in consolidated democracies.<sup>33</sup> The demand for public goods is particularly acute in moments of transition due to the recent breakdown of the political community's ability or willingness to deliver such goods. Practitioners and scholars recognize the latter criterion as a necessary but insufficient condition for describing transitions.<sup>34</sup> Several areas relevant to *jus post bellum* are predicated on responding to gross violations of human rights and pursuing some value goal in response to them (e.g. truth, peace, security, and justice). A focus on gross violations of human rights itself therefore continues substantive diversity across these areas. However, there are

<sup>32</sup> Wilén, "Capacity-building or Capacity-taking?" (n. 31) 340.

<sup>33</sup> John Rawls, *A Theory of Justice* (Oxford University Press 1999) 109–12; Jeremy Waldron, *Law and Disagreement* (Oxford University Press 2001) 102.

<sup>34</sup> Paul Van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission" (1999) 52 *Journal of International Affairs* 647; William Schabas, "Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems" (1997) 8 *Criminal Law Forum* 523; William Schabas, "The Rwanda Case: Sometimes its Impossible" in M.C. Bassiouni (ed.), *Post-Conflict Justice* (Transnational 2002) 499. More generally see UNSC, "Report of the Secretary General on Peacebuilding in the Immediate Aftermath of Conflict", UN Doc. A/63/881 S/2009/304, 4; World Bank, *World Development Report 2011: Conflict, Security, and Development* (World Bank 2011) 99.

two distinct structural consequences to the commission of gross violations of human rights: the breakdown of civic trust and the rule of law.

The areas of transitional justice, peacebuilding, security sector reform and development are significantly diverse substantively, pursuing different goals (such as truth, peace, justice, security, economic growth, and good governance), using different institutions (including truth commissions; demobilization, disarmament, and reintegration (DDR) programs; and government/legislative reform) and often involve different actors and disciplines (such as law, peace studies, and economics). Nonetheless, these fields all seek to make a contribution to civic trust and the rule of law as part of their overall claim to change transitional societies. This shared claim provides a suitable entry point for an overarching framework such as *jus post bellum* proposed here.

Each goal of transitional justice aims to contribute to the restoration of civic trust.<sup>35</sup> By establishing the truth regarding past gross violations of human rights, truth commissions constitute processes of civic dialogue and deliberation, which in turn contributes to building civic trust.<sup>36</sup> In pursuing reconciliation, a transitional justice organization seeks to establish and maintain coexistence between the various groups and thus seeks to restore minimum conditions of civic trust.<sup>37</sup> The goal of recognition seeks to re-affirm victims as citizens, as persons of significance and value to the state.<sup>38</sup> This process of reparation through renewed state-citizen relations contributes to the restoration of civic trust.<sup>39</sup>

Peacebuilding processes also involve civic trust. Peacebuilding seeks to consolidate the legitimacy of the arrangements concluded at the cessation of gross violations of human rights and to transform social foundations of public legitimacy for the long term. Thus, the initial elite arrangement and distribution of power is then legitimized through peacebuilding processes. This process both depends on and seeks to constitute civic trust and the rule of law as conditions for future deliberation of particular issues in the re-establishment of a political and constitutional order. In security sector reform, the human security paradigm expressly acknowledges the need for civic trust in the achievement and maintenance of human security.<sup>40</sup> Paul Roe describes the value of trust for security, in “routinization” as a response to ontological insecurity: “Routinization ‘regularizes social life making it, and the self, knowable.’ With a basic trust in others, the individual can go about his/her day-to-day business with a reasonable expectation that many of the dangers in life can simply be put to one side.”<sup>41</sup> In the context of fragile states, the

<sup>35</sup> Pablo de Greiff, “Articulating the Links Between Transitional Justice and Development: Justice and Social Integration” in Roger Duthie and Pablo De Greiff (eds), *Transitional Justice and Development: Making Connections* (SSRC 2009) 58.

<sup>36</sup> Amy Gutmann and Dennis Thompson, “The Moral Foundations of Truth Commissions” in Robert Rotberg and Dennis Thompson (eds), *Truth v. Justice* (Princeton University Press 2000) 35–6.

<sup>37</sup> Louis Kriesberg, “Changing Forms of Coexistence” in Mohammed Abu-Nimer (ed.) *Reconciliation, Justice and Coexistence: Theory and Practice* (Lexington Books 2001) 47–64; Alex Boraine, “Transitional Justice: A Holistic Interpretation” (2006) 60(1) *Journal of International Affairs* 17, 22–3.

<sup>38</sup> De Greiff, “Articulating the Links between Transitional Justice and Development” (n. 35) 57.

<sup>39</sup> Pablo De Greiff, “Justice and Reparations” in Pablo De Greiff (ed.), *The Handbook of Reparations* 462; see also Anthony Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Polity Press 1993) 35–6.

<sup>40</sup> Commission on Human Security, *Human Security Now* (Commission on Human Security 2003) 63.

<sup>41</sup> Paul Roe, “The Value of Positive Security” (2008) 34 *Review of International Studies* 777, 783.

absence of civic trust also impacts on the cooperation and coordination necessary for economic activity: “Virtually every transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence.”<sup>42</sup> In the context of transitions, the absence of civic trust produces widespread dysfunction: “With actors lacking the means to make credible commitments to reform, societies are unable to break free from the threat of violence. A low-level equilibrium of dysfunctional institutions and recurrent violence is thereby created.”<sup>43</sup>

It may be that these areas mean different things by civic trust and the rule of law and seek to affect these values in different ways. However, the nature of both of these concepts, as social norms, makes it clear that contributions from the areas identified are inter-dependent and thus should be interpreted through a shared framework.

First, efforts to modify civic trust appear to treat trust as a social norm. We can describe civic trust as a shared, reciprocal normative commitment to certain patterns of behavior.<sup>44</sup> For a norm to exist, there must be a collective belief that the behavior dictated by the norm is widespread, as well as a shared belief that one is expected to engage in such behavior when appropriate and that transgressions might be punished.<sup>45</sup> Civic trust may be described as a constitutive social norm or convention. Such social conventions serve numerous functions by constituting means by which citizens interact. Social practices, on this understanding, are partly constituted by the conventional rules of the practice, which regulate the conduct within.<sup>46</sup> Andrei Marmor notes that reasons for following constitutive rules are compliance-dependent, and practice is required to constitute the rules.<sup>47</sup> Thus, constitutive conventions both constitute the practice and regulate conduct with it as a system of rules.<sup>48</sup> The contribution of each area of international law to civic trust thus represents efforts to change this conventional system of rules. As a consequence of these forms of conventionality, efforts to enhance or alter content of civic trust are necessarily systemic and interdependent. Thus, despite substantively diverse functions, each area relevant to transitions seeks to contribute to civic trust in shared circumstances and through shared methods: to evaluate the contribution of these diverse areas to civic trust we need a shared, convention-wide framework for interpretation and evaluation.

Each field relevant to *jus post bellum* also seeks to use legal institutions to generate civic trust through the rule of law. Transitional justice scholars have claimed that the enterprise contributes to both narrow formalist and to thicker substantive conceptions of the rule of law.<sup>49</sup> Peacebuilding is a process constitutive of the rule of law,

<sup>42</sup> Kenneth Arrow “Gifts and Exchanges” (1972) 1(4) *Philosophy and Public Affairs* 343, 357.

<sup>43</sup> World Bank, *World Development Report 2011* (World Bank 2011) 117.

<sup>44</sup> de Greiff, “Articulating the Links Between Transitional Justice and Development” (n. 35) 58.

<sup>45</sup> C. Bicchieri et al., “Trustworthiness is a Social Norm, But Trusting is Not” (2011) 10(2) *Politics, Philosophy & Economics* 173.

<sup>46</sup> Andrei Marmor, “How Law is Like Chess” (2006) 12 *Legal Theory* 347, 357.

<sup>47</sup> Marmor, “How Law is Like Chess” (n. 46) 360.

<sup>48</sup> John Searle, *Speech Acts* (Cambridge University Press 1969) 33, 35–7; Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1975) 111–13.

<sup>49</sup> Rama Mani “Exploring the Rule of Law in Theory and Practice” in Agnes Hurwitz (ed.), *Civil War and the Rule of Law* (Lynne Rienner Publishers 2008) 21–46. Mark Freeman, “Procedural Fairness and Truth Commissions”; David Crocker, “Truth Commissions, Transitional Justice, and Civil Society” in

seeking to hold all parties to peace accountable under a legal system, rather than allow a return to violence. Security sector reform also seeks to contribute to the rule of law. Conceptions of national security are necessarily constitutive of the rule of law, being formal in nature and seeking to maintain security through the use of formal rules, institutional structures, and procedures.<sup>50</sup> Similarly, a human security paradigm acknowledges the need to restore the rule of law as a necessary condition for ensuring broader human security.<sup>51</sup> Furthermore, the rule of law is claimed to as have significant explanatory power for foreign investment and economic growth.<sup>52</sup>

The rule of law acknowledges the risk of the abuse of power under law and the appropriateness of civic distrust caused by this risk. This acknowledgment of legitimate distrust, and the enabling capacities of the rule of law it offers citizens, represents a normative commitment from the legal system, rather than a merely empirical regularity. It is through the values, formalities, and processes of the rule of law that law can hope to foster civic trust. Enhancing the supply of civic trust in a society remains significantly dependent on state and, in particular, legal institutions:

Trusting institutions means knowing and recognising as valid the values and form of life incorporated in an institution and deriving from this recognition the assumption that this idea makes sufficient sense to a sufficient number of people to motivate their ongoing active support for the institution and the compliance with its rules.<sup>53</sup>

The rule of law thus provides an opportunity to assess the validity of distrust and to enable the trust of state officials, institutions, and citizens that withstand the scrutiny of its mechanisms of distrust. A political system in which distrust is easily articulated and listened to, and its presumed reasons easily and impartially assessed as valid or refuted, deserves to be trusted for the assurance this transparency provides to the citizens.<sup>54</sup> By virtue of using the rule of law and its suite of legal institutions and actors to respond to legitimate civic distrust, these areas relevant to *jus post bellum* seek to contribute to the restoration of civic trust and the rule of law in a systemic fashion, despite remaining substantively diverse at the level of immediate goals, institutions, and actors.

#### **IV. *Jus Post Bellum* as the Application of Integrity**

What is the role for *jus post bellum* in this contribution to civic trust and the rule of law as a framework? There remains no overarching mechanism for evaluating the conduct of transitions across the three dimensions of complexity identified above nor for

Robert Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 105–6; Colleen Murphy, “Political Reconciliation, the Rule of Law, and Genocide” (2007) 12(7) *The European Legacy* 853.

<sup>50</sup> OECD DAC, *OECD DAC Handbook on Security System Reform, Supporting Security and Justice* (OECD DAC, 2007) 112–24.

<sup>51</sup> Commission on Human Security, *Human Security Now* (n. 40) 68.

<sup>52</sup> Robert Barro, “Democracy and the Rule of Law” in Bruce Bueno de Mesquita and Hilton Root (eds), *Governing for Prosperity* (Yale University Press 2000) 209–31.

<sup>53</sup> Clause Offe, “How can we trust our fellow citizens?” in Mark Warren (ed.), *Democracy and Trust* (Cambridge University Press 1999) 70.

<sup>54</sup> Offe, “How can we trust our fellow citizens?” (n. 53) 76.



assessing their shared contribution to the inter-dependent conditions of civic trust and the rule of law. We identified above substantive diversity and fragmentation in relevant areas of international law and in the legal status of the actors involved, with risks of tension between their transformative goals and respect for local ownership. A purely substantive *jus post bellum* can acknowledge this diversity and associated tensions, but, without more, and without new state practice, cannot resolve them. An appropriate role for a *jus post bellum* may be thus to provide “not only substantive legal rules and principles governing transitions from conflict to peace, but also rules on their interplay and relationship in case of conflict.”<sup>55</sup>

Calls for a further Geneva Convention on *jus post bellum* issues may represent a suitable end point for the development of this area, but would require considerable political will, interest, and coordination among states, and significant re-orientation in the design and practices of international organizations. Despite some present interest in institutional coordination, it is suggested that this goal is not plausible in the short term. However, the absence of a conventional *jus post bellum* does not preclude the interpretation of existing international law and policy in an alternative *jus post bellum* framework. *Jus post bellum* can therefore be situated as part of the moral framework of just war theory.<sup>56</sup> It could be used to provide an interpretation of areas relevant to transition, actors who seek to pursue the goals in each areas, and the application to specific transitional societies. In so doing, it could use this interpretation to evaluate how these efforts contribute to shared necessary conditions of restoring civic trust and the rule of law in transitional societies.

This problem of complex interpretation and evaluation has been examined before as a matter of general jurisprudence and political philosophy. Ronald Dworkin described checkerboard statutes as those that are incoherent or arbitrary on matters of principle.<sup>57</sup> This seems to fit the substantive diversity and diversity among institutional actors quite well, pursuing a variety of goals through a host of institutions, with little legal consciousness of other such goals and institutions. Overcoming checkerboard statutes can be achieved through their interpretation with reference to the principle of integrity.<sup>58</sup> Integrity operates in non-ideal normative circumstances: ideally, coherence between values in each field expressed in law would be guaranteed because officials would always do what would be perfectly just and fair.<sup>59</sup> If there must be compromise because views are divided, then the compromise must be external, not internal; it must be compromise about a scheme of justice not a compromised scheme of justice.<sup>60</sup> Each transitional society will interpret its own practices, its own “*jus post bellum*” in re-constituting a sovereign political community. International actors assisting this transition will also seek to interpret that society and its international legal obligations and practices. In this act of interpretation, Dworkin conceives of the obligation to pursue integrity as the obligation to pursue “fidelity to a scheme of principle each citizen has

<sup>55</sup> Carsten Stahn, “Jus Post Bellum: Mapping the Disciplines” in Carsten Stahn and Jann Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 105.

<sup>56</sup> Larry May, *After War Ends: A Philosophical Account* (Cambridge University Press 2012).

<sup>57</sup> Dworkin, *Law's Empire* (n. 8) 178–86.

<sup>58</sup> Dworkin, *Law's Empire* (n. 8) 225; Dworkin, *Justice for Hedgehogs* (n. 8) 99–191.

<sup>59</sup> Dworkin, *Law's Empire* (n. 8) 176. <sup>60</sup> Dworkin, *Law's Empire* (n. 8) 179.

a responsibility to identify, ultimately for himself, as his community's scheme."<sup>61</sup> It is on the basis of a legal system founded on integrity that Dworkin argues that claims of political obligation are made legitimate for those made subject to them:

Law as integrity denies that statements of law are either the backward looking factual report of conventionalism or the forward-looking instrumental programs of legal pragmatism [...]. It insists that legal claims are interpretive judgments and therefore combine backward and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.<sup>62</sup>

To achieve this legitimation analytically, Dworkin distinguishes between “fit” and “justification.” The former is concerned with providing an interpretation that matches the existing practice and body of law. The latter seeks to identify a justification for this practice that shows it in its best light.<sup>63</sup> The task of *jus post bellum* as integrity is to therefore offer a description of the existing international law, policy, and theory as applied to given transitions and seek to justify this practice by reference to its value goals in a unified or coherent fashion. Fundamentally, therefore, integrity is concerned with interpreting through a coherent set of principles about citizens' rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community—including therefore the three dimensions of complexity identified above. According to Dworkin, “[l]aw as integrity requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.”<sup>64</sup> Integrity offers guidance to those who have the special responsibility to interpret legal norms on behalf of the polity in question.<sup>65</sup> In Dworkin's work, these are paradigmatically judges, but can extend to all law creating, applying, or enforcing officials.<sup>66</sup> This could extend to both officials in a transitional society and international actors providing assistance.

Integrity thus seeks to make seemingly substantively diverse areas of law coherent by reference to deeper principles and values inherent in the legal expression of a society's political community. By developing its coherence and thus its legitimacy, the process of interpretation by integrity seeks to give reason to citizens to share in trusting in the legal expression of political community and view a particular national conception of *jus post bellum* as legitimate. The process of integrity provides the mechanism for justifying the choices and preferences of a given society in the pursuit of the value goals of each field, for example why they choose a truth commission over trials, or peace-building over transitional justice, or governance reform over a DDR process. Integrity ensures that these fields are not seen as fragments, but rather as constitutive and interdependent components of a broader political project in transition, to re-constitute a coherent sovereign political community, predicated on civic trust and the rule of law.

<sup>61</sup> Dworkin, *Law's Empire* (n. 8) 190.

<sup>62</sup> Dworkin, *Law's Empire* (n. 8) 45–53, 225–7.

<sup>63</sup> Ronald Dworkin, “Hard Cases” (1975) 88 *Harvard Law Review* 1057; Dennis Patterson, “Dworkin on the Semantics of Legal and Political Concepts” (2006) 26(3) *Oxford Journal of Legal Studies* 545.

<sup>64</sup> Dworkin, *Law's Empire* (n. 8) 245.

<sup>65</sup> Alex Schwartz, “Patriotism or Integrity? Constitutional Community in Divided Societies” (2011) *Oxford Journal of Legal Studies* 1–24 at 17.

<sup>66</sup> Ronald Dworkin, *Law's Empire* (n. 8) 12.

The responsibility of integrity therefore requires the interpretation of the substantive components and practices of each of those fields with reference not only to the shared and interdependent goals of civic trust and the rule of law, but also with reference to the whole network of political structures and decisions of that transitional society.<sup>67</sup> This approach suggests that we can have the tools that would constitute a *jus post bellum* framework across the three dimensions of complexity identified above but also a framework that could go further and seek to justify as legitimate the nature of their application in a given transition.

## V. Principles of Integrity as *Jus Post Bellum*

An interpretive approach to *jus post bellum* that operates from integrity could manifest itself in tangible ways. A purely substantive framework does not speak to how an official of an international organization or transitional government is to act in transitions, facing the need to pursue public goods in the future. A purely formalistic approach does less to alter the behaviors, attitudes, and perceptions of such individuals than an approach that says that process matters: that the ends and the means are mutually reinforcing. Acknowledging that integrity is both a principle to be pursued and a process by which its other goals can be reached and reconciled contributes significantly to reinforcing behaviors, perceptions, and attitudes. Each field purports to contribute to the restoration of civic trust and the rule of law as contributions to the re-constitution of a sovereign political community. The following three principles seek to contribute to that overall goal in transitions.

An approach of *jus post bellum* that acknowledges organizing principles deeper than the substantive laws and policies reflects a commitment of the framework to the practice of integrity. This interpretive framework acknowledges the three dimensions of complexity, diverse areas of international law and regulation, the legal status of the actors involved, and the context of transitional societies identified above. By using the principles of accountability, stewardship, and proportionality, this framework compels states and international organizations to respond to and justify incoherence evaluated in their practices, between their stated normative commitments in those three dimensions of complexity and the absence of a coherent and consistent approach to those commitments. This process of justifying incoherence by reference to the norms of accountability, stewardship, and proportionality constitutes the practice and process of integrity as *jus post bellum*.

So conceived, manifesting *jus post bellum* as a series of interpretive principles is similar to Aurel Sari's approach regarding foreign armed forces in this volume.<sup>68</sup> The difference in the present approach is the acknowledgment that organizing principles can be used to cast a broader net than foreign armed forces, which, while crucial, are only part of the wide array of international actors, such as international organizations, donor states, and international non-governmental organizations (NGOs), that may be present

<sup>67</sup> Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24(1) *Oxford Journal of Legal Studies* 1–37.

<sup>68</sup> Aurel Sari, ch. 24, this volume.

in a given society experiencing a *post bellum* period. When we seek to offer a coherent account of how these broader principles apply as part of an overall framework that pursues integrity across diverse areas of law and regulation, diverse legal actors, and diverse transitional societies, new areas of concern and reform may be generated for a *jus post bellum* framework.

### A. Accountability

The principle of accountability is used to interpret diverse areas that share the desire to enhance civic trust and the rule of law. Though accountability is a malleable term with no legal definition and no settled theoretical meaning, its coherent pursuit can contribute to manifesting integrity in the development of civic trust and the rule of law. We can consider the issue of accountability as working at a domestic level, an international level, involving criminal responsibility, civil, state, and organizational responsibility—yet at present there is little systemic consideration of the relevant differences and discrepancies between these levels of accountability. Accountability is also seen as an important principle in existing *jus post bellum* proposals.<sup>69</sup>

Concern for accountability arises in each area relevant to transitions. Accountability for gross violations of human rights is of both intrinsic and instrumental importance for transitional justice, in both its potential to provide justice to victims and capacity to contribute to the restoration of the rule of law and the non-recurrence of rights violations.<sup>70</sup> An accountable security sector is acknowledged as a primary goal in SSR.<sup>71</sup> The accountability of individuals for the commission of international crimes is mirrored by State responsibility for such offences.<sup>72</sup> In turn, consideration of State responsibility for international crimes raises the issue of individual and institutional accountability of donor states and international organizations. In addition, we could also consider that accountability extends to anti-corruption in development and the monitoring of and compliance with peace agreements.

Accountability of donors and international organizations can be considered in three categories: (i) internal accountability; (ii) liability for unlawful acts; and (iii) legal responsibility for breach of international obligations.<sup>73</sup> These forms are limited by the state and institutional immunities, often provided for in Status of Forces/Mission Agreements or memoranda of association between donor states or international organizations and transitional states. Multilateral international organizations enjoy broad immunities.<sup>74</sup> While international staff operate with actual or

<sup>69</sup> Brian Orend, “The Perspective of a Just-War Theorist” (n. 1) 571.

<sup>70</sup> UN Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies” UN Doc. S/2004/61 4.

<sup>71</sup> OECD DAC, *OECD DAC Handbook on Security System Reform, Supporting Security and Justice* (n. 50).

<sup>72</sup> Andre Nollkaemper, “Concurrence between Individual Responsibility and State Responsibility in International Law” (2003) 52(3) *International and Comparative Law Quarterly* 615.

<sup>73</sup> International Law Association, “Accountability of International Organisations: Final Report of the Berlin Conference” (2004) 1 *International Organisations Law Review* 221, 226.

<sup>74</sup> Supplementary Protocol No. 2 to the Convention on the OECD (adopted 14 December 1960, entered into force 30 September 1961); Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15.

effective immunity from local laws, there is an ongoing contradiction between how internationals behave and how nationals are told that they must act.<sup>75</sup> The present, largely fragmented, approach to accountability in international law neglects the challenge to reconcile these two positions. An approach predicated on integrity requires this contradiction to be reconciled.

For instance, the primary area of concern for United Nations (UN) accountability has been sexual exploitation and abuse.<sup>76</sup> The UN has attempted to address the issue by adopting both preventive and investigative measures.<sup>77</sup> A UN General Assembly resolution calls for the establishment of a Sexual Exploitation and Abuse Victim Assistance Mechanism (SEA/VAM) in every country in which the UN operates, which seeks to provide victims with access to relevant services.<sup>78</sup> However, as a result of the lack of a direct formal relationship between the UN and military members of national contingents from troop contributing countries in UN missions, the UN does not have the authority to promulgate legally binding and enforceable rules addressed directly applicable to them without the approval and cooperation of their home countries. The primary avenue of redress remains a trial in the troop contributing country. A feeling of impunity can seep into the consciousness of the peacekeeping soldiers concerned to the serious detriment of the local population.<sup>79</sup>

Institutional accountability among international development organizations is exemplified by the World Bank Inspection Panel, designed to address the concerns of people who might be affected by Bank projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of such projects.<sup>80</sup> The International Law Commission's Draft Articles on the Responsibility of International Organisations propose new rules that could greatly expand liability of international organizations.<sup>81</sup> In particular, the proposals include responsibility for omissions, joint, parallel, and indirect liability for states in assisting international organizations, and an "aggravated responsibility" regime, which enables any state or international organization to demand cessation of a violation of a *jus cogens* norm or *erga omnes* obligation. A further area of limited accountability is the regulation of NGOs, which varies widely from state to state without any general framework. Initiatives such as codes of conducts and certification schemes are positive developments. However, without a compliance mechanism, the temptation for an NGO to

<sup>75</sup> Chesterman, "Ownership in Theory and in Practice" (n. 22) 20.

<sup>76</sup> Marco Odello, "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15(2) *Journal of Conflict & Security Law* (2010) 347.

<sup>77</sup> "Secretary General's Bulletin Status, Basic Rights and Duties of United Nations Staff Members" (1 November 2002) UN Doc. ST/SGB/2002/13; "Secretary General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse" (9 October 2003) UN Doc. ST/SGB/2003/13.

<sup>78</sup> United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, UNGA Res. 62/214 (7 March 2008) UN Doc. A/RES/62/214.

<sup>79</sup> Paul Rowe, "United Nations Peacekeepers and Human Rights Violations: The Role of Military Discipline" (2010) 51 *Harvard International Law Journal Online* 69, 79.

<sup>80</sup> The World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* (World Bank 2009).

<sup>81</sup> ILC, "Report of the International Law Commission on the Work of its Sixty-First Session, Draft Articles on Responsibility of International Organizations" UN Doc. A/64/10.

default on the commitments made under a self-regulation initiative is strong.<sup>82</sup> Finally, actions of private military companies in transitions also generate significant concerns of accountability in transitional societies.<sup>83</sup>

Accountability is thus fragmented across a wide range of general institutional structures and areas relevant to transitions, despite a commitment to the norm in several relevant areas. A consequence of this commitment is to suggest systematic avenues for individual and institutional accountability, to get the transitional society in the habit of seeing examples of accountability in action. This commitment is not coherently reflected in the present concern of international organizations for their own conduct. It is a case of “do as we say, and not as we do.”

A consolidated accountability mechanism for international actors and institutions engaged in transitional societies and fragile states could pursue coherent accountability and reflect an approach based on integrity, where non-coherent conduct requires principled justification. Such a mechanism would depend on high levels of transparency, cooperation, and publicity among international actors. Such a mechanism, agreed among donor states, international organizations, with potential involvement for international non-governmental organizations (INGOs) and private military actors, could identify priority areas of accountability. Areas of concern for individual conduct could include sexual offences, as highlighted by UN efforts, but could also include corruption offences, as international organizations seek to promote accountability for human rights and good governance. Institutional accountability could adopt the approach of the World Bank’s Inspection Panel to a shared forum for bilateral donors. International institutions could join this mechanism by mutual consent, and within the memoranda of understanding signed with the transitional state authorizing their actions in the state or, where relevant, the authorizing Security Council resolution. Such a mechanism could respond to concerns of remoteness of UN and Inspection Panel procedures by being based in the transitional country, offering an opportunity to combine state and international and local institutions. A consolidated approach, based on a consensually agreed framework, eschews the difficulties of diverse institutional frameworks and offers tangible coherence and greater access and participation for members of a transitional society. A coherent consolidated approach to accountability could contribute to greater trust of the involved international organizations and the sense that they are bound by the rule of law by demonstrating a consistent practice of accountability mechanisms for international actors. This sense of trust and rule of law could in turn enable the pursuit of civic trust and the rule of law by these international actors in a transitional society: “do both as we say, and as we do” as international actors lead by their example of how accountability builds trust and the rule of law.

<sup>82</sup> Jeannet Lingán et al., “Responding to Development Effectiveness in the Global South,” One World Trust/World Vision Briefing Paper No. 126 (June 2010) 1.

<sup>83</sup> Zoe Salzman, “Private Military Contractors and the Taint of a Mercenary Reputation” (2008) 40 *NYU Journal of International Law and Politics* 853.

## B. Stewardship

The principle of stewardship responds to the need for a neutral account of the legal content and status international assistance to *post bellum* states and the need for international actors to effectively respect and engage with local ownership and priorities. As discussed above, a mechanism is needed to evaluate how given societies, international organizations, and fields reflect the combination of transformation and respecting local ownership and context. International actors are engaged in transitions because of the diminished capacity and legitimacy of the state of a transitional society to provide public goods. Nevertheless, the engagement of such international actors seeks to respect the local ownership of that society, whose government has recently proven itself incapable of delivering said public goods. How can international engagement respond to the circumstances of transition and also respect local ownership?

These concerns operate across the range of fields relevant to transition. For *jus post bellum* to capture this range, it needs a coherent principle for international engagement that acknowledges that local ownership is fundamentally concerned with the actions and interests of local actors, and so places emphasis on their conduct. Past practice of international engagement includes territorial administrations, international financial institutions, donors, private military actors, and NGOs. These institutions reveal a wide and diverse engagement with aspects of a state's sovereignty, such as taxation, policing, natural resources, provision of aid, security, or the exploitation of natural resources. It is possible therefore to consider this range of activities across a spectrum. To reflect this diversity, any principle must therefore be content neutral. Moreover, the majority of international actors in transition will operate on diverse legal bases. A majority may operate the consent of the state or territorial authority involved. A further group of international actors may be authorized by Security Council resolution to administer core governance functions of a state or territorial unit. Any evaluation of this diversely founded international engagement must therefore also be origin neutral. To comprehensively evaluate the nature of international engagement in transitions, we need a conception that acknowledges the tension between transformative goals and local ownership, is neutral as to the origin and content of international activities, and reflects the reality that international actors operate with severely incomplete information regarding local political economy.

This chapter proposes stewardship as that concept. Stewardship is predicated on a conception of sovereignty that acknowledges that sovereignty is functional and designed for the equal benefit and protection of the individual citizens of that society.<sup>84</sup> In a sovereign political community, the state is a steward for the ultimate objects of value, individual citizens.<sup>85</sup> International activities in transitions may range from the exercise of full sovereign functions to advisory functions such as monitoring and advocacy. In exercising these functions, international actors profess to contribute to that

<sup>84</sup> Anne Peters, "Humanity as the A and  $\Omega$  of Sovereignty" (2009) 20(3) *European Journal of International Law* 513–44.

<sup>85</sup> Jeremy Waldron, "A Religious View of the Foundations of International Law" (26 April 2011) NYU School of Law, Public Law Research Paper No. 11-29, 47 <<http://ssrn.com/abstract=1823702>> (accessed 4 July 2013).

state's resumption of legitimate sovereign authority based on a stewardship conception of sovereignty. As a consequence, the focus of stewardship need not be on particular substantive outcomes and priorities. Rather, an appropriate focus of stewardship is on the processes by which the transitional societies re-constitute themselves with the assistance of international actors. A commitment to these processes by a transitional society, as expressed in state institutions, reflects the conditions under which the substantive decisions of that society warrant the respect and tolerance of the international community. Processes of international activities can be evaluated for publicity, transparency, use of vires, predictability, and clarity. These are virtues we associate with the rule of law. Processes can also be evaluated by reference to norms of inclusiveness, representativeness, and non-discrimination, cross-cutting norms of international human rights law. The combination of these features provides a basis for evaluating the initialization, operation, and conclusion of international processes.

International actors and transitional states share an overlapping desire to serve the citizens of a transitional society, but may do so in an environment of mutual distrust and lack of information about the motives and interests of the other.<sup>86</sup> Among international actors, a competitive posture may ensue, with limited tangible coordination, especially at a political level. Commitment mechanisms could be designed to overcome these postures and pursue the stated shared goals. One component of this is ensuring the independence of key executing state agencies, through independent third party monitoring, international execution of state functions, etc.<sup>87</sup>

Recent practice of multi-donor trust funds (MDTFs) shows some promise in this regard, but has also generated criticisms of slow procedures and governance and limited use in fragile states. Increasing international acknowledgment of the substantive interdependence of fields relevant to transition could see an increase in the use of such mechanisms to mitigate common risks to international actors engaged in transitions.<sup>88</sup> MDTFs could be used to share fiduciary responsibility for public goods between international and representative national actors in collegial decision-making bodies.<sup>89</sup> Such bodies could provide members with one vote for international and domestic actors, but shift towards greater domestic membership based on service and governance performance. The overall result would be frequent deliberation and negotiation between domestic and international representatives to achieve sufficiently large majorities in support of specific policies. Stefano Recchia gives the example of the Bosnian constitutional court composed of six national judges across the ethnic divide and three international judges.<sup>90</sup> Mechanisms such as these rely on process conditionality, limiting the distribution of international assistance to the willingness of a transitional government to demonstrate a commitment to inclusive and participatory processes and mitigating mutual

<sup>86</sup> World Bank, *World Development Report 2011* (n. 43) 248–50; Sally Morphet, “Current International Civil Administration: The Need for Political Legitimacy” (2002) 9(2) *International Peacekeeping* 140; Carlos Lopes and Thomas Theisohn, Ownership, Leadership and Transformation: *Can We Do Better for Capacity Development?* (UNDP 2003) 54–6.

<sup>87</sup> World Bank, *World Development Report 2011* (n. 43) 251.

<sup>88</sup> World Bank, *World Development Report 2011* (n. 43) 279.

<sup>89</sup> Stefano Recchia, “Just and Unjust Postwar Reconstruction: How Much External Interference Can Be Justified?” (2008) 23(2) *Ethics and International Affairs* 165–87, 181.

<sup>90</sup> Recchia, “Just and Unjust Postwar Reconstruction (n. 89) 182.



distrust between donor and state. The US Millennium Challenge Account embodies this process approach to conditionality. This approach requires the state to identify its own priorities for removing constraints to economic growth and poverty reduction, and to propose specific programs based on those priorities. In establishing such priorities, the Millennium Challenge Corporation (MCC) asks interested states during the compact proposal process to undertake public consultations and to make use of their local institutions, both to talk about national development strategies and to gather the varied local perspectives and information needed to design sustainable programs.<sup>91</sup>

Stewardship enables a differentiated evaluation of institutionally diverse actors. The proposals in this section illustrate the capacity of international actors to acknowledge their distinct role in public goods provision in transitions in building civic trust and the rule of law, and the need to respect local ownership. The role of stewardship as an organizing principle is to enable an evaluation of diverse actors regardless of their legal status in a transitional state and the content of their operations. In so doing, it seeks to respect local ownership, a stated priority of these diverse actors. This principle thus enables a coherent account of a range of international assistance in a given *post bellum* state and facilitates a shared relationship between all international actors and the state. This coherent account and shared relationship enables the population of a *post bellum* state to know where they stand with international actors and thus this relationship contributes to civic trust and the rule of law.

### C. Proportionality

The principle of proportionality responds to the need to resolve conflicts and competition between legal orders that co-exist and cooperate in *post bellum* states. The policy frameworks of international organizations struggle to provide a clear sense of priority among the various goals, such as truth, peace, security, that they seek to assist in individual transitions. This ambiguity leaves the policy frameworks with no metric to evaluate the legitimacy of particular priorities between these goals. Proportionality may provide one option for such a metric. There is little doubt that proportionality can be accepted as a general principle of international law and comparative constitutionalism.<sup>92</sup> Its relevance to *jus post bellum* arises as it derives from the “just war” doctrine. It is mentioned in passing in *jus post bellum* proposals.<sup>93</sup> Proportionality performs a balancing or reconciling function between an individual right and a competing right or compelling interest of the public or common good, seeking to balance the infringement of a right against the least restrictive competing alternative.

Proportionality arises in two areas of just war theory: the justified use of force in self-defence, and the nature of the conduct of hostilities. Proportionality has also been used as a criterion for assessing the legitimacy of non-military counter-measures.<sup>94</sup> Proportionality

<sup>91</sup> Alicia Philipps-Mandeville, *MCC's Approach to Country Ownership* (US Millennium Challenge Corporation 2009) 8.

<sup>92</sup> Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 *Columbia Journal of Transnational Law* 73.

<sup>93</sup> Orend, “Jus Post Bellum: The Perspective of a Just-War Theorist” (n. 1) 580.

<sup>94</sup> Thomas Franck, “On Proportionality of Countermeasures in International Law” (2008) 102 *American Journal of International Law* 715; W. Michael Reisman and Douglas L. Stevick, “The Applicability of

is also central to modern judicial assessment of the infringement of international human rights.<sup>95</sup> Proportionality also features in the jurisprudence of the WTO system and the European Court of Justice.<sup>96</sup> The challenge arises in considering the application of proportionality in international law and international affairs to the case of transitional circumstances. In her *jus post bellum* framework, Kirsten Boon suggests that proportionality would have a potential role to respond “to the need to create a measure and process regulating the extent and nature of legal interventionism by international actors.”<sup>97</sup> Recchia suggests two consequences of proportionality in *jus post bellum*:

First, higher degrees of paternalism will be justified over those societies that have been most adversely affected by violent conflict and where the state’s institutional apparatus has all but collapsed. Second, since any obstacles to political order and self-rule in the aftermath of violent conflict are inherently political, they can be gradually overcome with the help of various confidence-building measures and external assistance aimed at institutional reconstruction [...]. As a postwar society becomes progressively capable of managing its own affairs and protecting basic human rights, international interference should be accordingly reduced.<sup>98</sup>

We can consider the application of proportionality to each field. Kai Ambos considers the principle relevant to the determination of institutions and pursuit of value goals inherent in the practice and exercise of transitional justice, for instance the legitimacy of amnesties in a given transition.<sup>99</sup> This approach could be extended to an evaluation of the priority given to the various goals in transitional justice: justice, reparation, truth, and acknowledgment. By invoking transitional justice’s relationship with amnesty, a proportionality approach would also offer a platform for evaluating the goals and claims of transitional justice by comparison to the other fields of transition, such as peacebuilding. This approach would require a coherent articulation of the priorities and principles that international actors seek to bring to bear in supporting each field in transition through the international legal and policy frameworks. Finally, we can consider the application of proportionality to the overall nature of international institutional engagement in a given transition. Kirsten Boon identified that the extent of state collapse in transitions, and extent of human rights violations may suggest a deeper intervention, whereas a modern legal system, a functioning civil society, a history of a democratic, elected governance, and respect for human rights and universal

International Law Standards to United Nations Economic Sanctions Programmes” (1998) 9 *European Journal of International Law* 86; Thomas Franck “Proportionality in International Law” (2010) 4(2) *Law & Ethics of Human Rights* 231.

<sup>95</sup> Article 4(2) of the International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976).

<sup>96</sup> Decision by the Arbitrators, Brazil—Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 4.11 of the SCM Agreement, WT/DS46/ARB (adopted 28 August 2000); Marc-Andre Eissen, “The Principle of Proportionality in the Case-Law of the European Court of Human Rights” in Ronald St. John Macdonald, Franz Matscher, and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 125, 127.

<sup>97</sup> Boon, “Legislative Reform in Post-Conflict Zones” (n. 24) 41.

<sup>98</sup> Recchia, “Just War and Unjust Reconstruction” (n. 89) 172.

<sup>99</sup> Kai Ambos, “The Legal Framework of Transitional Justice” (International Conference “Building a Future on Peace and Justice,” Nuremberg, 25–27 June 2007) 34 <[http://www.peace-justice-conference.info/download/Ambos\\_NurembergStudy\\_070512.pdf](http://www.peace-justice-conference.info/download/Ambos_NurembergStudy_070512.pdf)> (accessed 4 July 2013).

norms suggest a lighter intervention.<sup>100</sup> The 2011 World Development Report identified five factors to be considered in tailoring international engagement to a given transition.<sup>101</sup>

Balancing priorities, values, and challenges in transitions is inherently and intensely political and competitive. Proportionality is a valuable means of assessment of transitions because it provides a common means of evaluating the choices made in balancing competing interests in a wide variety of contingent areas. A common means of evaluation does not resolve these balancing acts, but enables greater comparison between diverse areas and compels principled justification of the choices made. It provides little more than a structure for the assessment of public reasons. In that way, it contributes to the pursuit of a publicly reasoned foundation to transition, and to the pursuit of the use of integrity in decision-making and practices in transitions. By facilitating a comparison of balancing acts made across discrete fields and legal orders, a coherent account of proportionality can be offered that contributes to the restoration of civic trust and the rule of law.

## V. Conclusion

Complexity is necessary and sufficient as a description of post-conflict environments, but insufficient as a theoretical framework. The principle of integrity applied as a *jus post bellum* framework responds to the complexity of transitional societies by pursuing a coherent interpretation and evaluation of the actions of national and international actors. The risks of incoherence and misalignment between areas relevant to transitions are real and significant, not merely a matter of theoretical tidiness. Getting it wrong in transition can risk lives and cause a return to conflict. The development of a *jus post bellum* based on integrity and stated evaluative principles could enable coherent, explicit, and public evaluation of these issues significant in transitional societies and also ensure structural continuity in the contribution of diverse areas to the necessary conditions of civic trust and the rule of law. In so doing, this approach to *jus post bellum* does not seek to raise the already great expectations for international law, policies, and practice in transitions. Rather, it argues for a greater legal and policy consciousness of the need and potential for integrity in the interpretation of these areas. The development of a more coherent *jus post bellum*, based on the principles of accountability, proportionality, and stewardship, would not necessarily resolve the problems of transitions but rather could enable coherent, explicit, and public consideration of the array of issues significant in transitional circumstances for both individual states and societies. The pursuit of a coherent account of justice after conflict is thus not something we are likely to “complete” in a given transition, but remains a necessary and worthwhile endeavor.

<sup>100</sup> Boon, “Legislative Reform in Post-Conflict Zones” (n. 24) 39.

<sup>101</sup> World Bank, *World Development Report 2011* (n. 43) 248–9.

## II

# *JUS POST BELLUM* AND RELATED CONCEPTS

## 5

### Contrasting the Normative and Historical Foundations of Transitional Justice and *Jus Post Bellum* Outlining the Matrix of Definitions in Comparative Perspective

*Jens Iverson\**

#### I. Introduction

##### A. The surprise of the new

Ninety years ago, even amongst the invisible college of international law scholars, the phrases “Transitional Justice” and “*jus post bellum*”<sup>1</sup> would have been met with uncertainty. The terms were unknown. Perhaps more surprisingly, *jus post bellum*’s sister terms “*jus ad bellum*” and “*jus in bello*,” now enshrined as central and seemingly immovable pillars of the law of armed conflict, would also have prompted few knowing

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<sup>1</sup> A brief stylistic note—throughout this chapter, Transitional Justice will be capitalized, while *jus post bellum*, *jus ad bellum*, and *jus in bello* will not be capitalized but will be italicized. Italicization is traditional for foreign terms not in widespread use in an English-language article, and I do not believe these terms qualify as adopted into the English language. Transitional Justice is capitalized because I want to emphasize the proper noun specific concept of Transitional Justice, not simply justice that is in some way “transitional.” *Jus post bellum*, *jus ad bellum*, and *jus in bello* are already emphasized and are clearly terms of art, and as such do not need the emphasis or clarity provided by capitalization. The word “*jus*” rather than “*ius*” is used due to “*jus*” being more common, but researchers should be aware that a minority of references in the literature are to *ius post bellum*, *ius ad bellum*, and *ius in bello* rather than *jus post bellum*, *jus ad bellum*, and *jus in bello*.

nods of recognition, only blank stares.<sup>2</sup> Academic neoterisms—innovations in language such as a new word or term—can tell us something about the historical moment of their origin, and the tradition within which they emerge. The focus on *jus ad bellum* and *jus in bello* after the horrors of the First World War is hardly surprising. The concept of Transitional Justice emerged organically from the intense focus on transitions to democracy from the 1970s through the 1990s. The post-Cold War questions of transformative occupation, peacebuilding, and international territorial administration set the frame for *jus post bellum*.

It is impossible to tell whether Transitional Justice and *jus post bellum* will seize the collective imagination of those who concern themselves with international law in an enduring manner, or whether these concepts will quickly fade. The longevity of a term depends largely on how that term may be used in unknowable, future contexts. But it also may depend at least in part on the internal coherence of the body of concepts referenced by the term, and whether this coherence is maintained over time by its practitioners and advocates. Those invested in the success of a philosophy underlying a term have the most to gain from an effort to closely analyze the meanings of a term, and where necessary draw distinctions between related concepts.

## B. Chapter structure

This chapter will proceed as follows. In Part II, Hersch Lauterpacht's concept of the Grotian Tradition is described, and how that tradition relates to Transitional Justice and *jus post bellum* is explained. Part III briefly explores the definitions and qualities of each term, serving to introduce many of the contrasts explored in Parts IV through VIII. In Part IV, the role that law plays with each concept is examined. Part V analyzes the substantive focus of each concept, providing an initial contrast, introducing the tools of Transitional Justice, and plotting the content of *jus post bellum* along the axis of norms that are more substantive or more procedural in nature, and providing a concluding contrast. Part VI examines the possibilities of varied geographical scope of each concept. Part VII focuses on the historical foundations of each term. Part VIII takes a closer look at current usage. The chapter concludes in Part IX by providing analysis of what these contrasts mean for scholars, activists, and practitioners going forward.

## II. The Grotian Tradition

Both Transitional Justice and *jus post bellum* are products not only of the decades in which they emerged, but also part of what Sir Hersch Lauterpacht identified as “the Grotian tradition.”<sup>3</sup> Both the specific historical moments and the wider tradition are examined below.

<sup>2</sup> Robert Kolb, “Origin of the Twin Terms Jus Ad Bellum/Jus In Bello” (1997) 37 *International Review of the Red Cross* 553; Carsten Stahn, “Jus Post Bellum: Mapping the Discipline(s)” (2008) 23 *American University International Law Review* 311, 312. For a graphical depiction of the use of the terms since 1930, see <[http://books.google.com/ngrams/graph?content=jus+in+bello%2Cjus+ad+bellum%2Cius+in+bello%2Cius+ad+bellum&year\\_start=1930&year\\_end=2008&corpus=0&smoothing=0](http://books.google.com/ngrams/graph?content=jus+in+bello%2Cjus+ad+bellum%2Cius+in+bello%2Cius+ad+bellum&year_start=1930&year_end=2008&corpus=0&smoothing=0)> (accessed 25 July 2013).

<sup>3</sup> Hersch Lauterpacht, “The Grotian Tradition in International Law” (1946) 23 *British Year Book of International Law* 1.

In 1933, Hersch Lauterpacht famously described “The Function of Law in the International Community.” This work, which Martti Koskenniemi has described as the most important book in English in the twentieth century,<sup>4</sup> concerned itself, *inter alia*, with whether international law was a comprehensive system, capable of settling disputes brought to international judicial fora. Lauterpacht forcefully argued for a conception of international law as a complete system, with the function and duty of international legal practitioners to settle disputes. For Lauterpacht, there existed a prohibition of judicial *non liquet* (in essence, a ruling that there was no law to apply to determine a dispute), admitting no exception.<sup>5</sup> In the same way that a court, faced with a claim of property ownership, would have to make a determination as to that property claim regardless of the uncertainty surrounding the claim, the history of international judicial settlement provided “continuous proof”<sup>6</sup> of the capacity of international law to address “so-called gaps.”<sup>7</sup>

Lauterpacht’s argument is in contrast with, for example, Hans Morgenthau, from the perspective of international relations, with his contrast between political “tensions” not amenable to legal resolution and “disputes” that were amenable to legal resolution.<sup>8</sup> Lauterpacht’s perspective is also in contrast with the “Vienna School” of Hans Kelsen who essentially advocated a positivist model that limited the role of law in the international community.<sup>9</sup> Lauterpacht’s work was both a conception of what international law was and a project to define what law should do—to extend the process of dispute settlement through law. The issue of whether gaps exist in the fabric of international law, and what approach should be taken if apparent lacunae are highlighted, remains an enduring problem.

What was Lauterpacht’s goal in enshrining these goals as part of the Grotian tradition? The article *The Grotian Tradition in International Law* seeks to selectively praise Hugo Grotius,<sup>10</sup> not to bury him—it suggests that despite the flaws in argument and substance of *De jure belli ac pacis* (1625), Grotius’ enduring fame and influence is deserved because of the tradition he established. The tradition, as framed by Lauterpacht, appears to be a series of goals for international law. Unsurprisingly, these goals appear to be largely shared by Lauterpacht, although Lauterpacht may not have used the term “goals” but rather insisted that they were an accurate description of international law. Lauterpacht’s insistence on a complete system of international law, one that would broach no judicial *non liquet*, is strengthened by the idea that there is a tradition insisting on *The Subjection of the Totality of International Relations to the Rule of Law*<sup>11</sup>

<sup>4</sup> Martti Koskenniemi, “The Function of Law in the International Community: 75 Years After” (2008) 79 *British Year Book of International Law* 353.

<sup>5</sup> Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933) 134.

<sup>6</sup> Lauterpacht, *The Function of Law in the International Community* (n.5) 134.

<sup>7</sup> Lauterpacht, *The Function of Law in the International Community* (n.5) 134.

<sup>8</sup> Koskenniemi, “The Function of Law in the International Community: 75 Years After” (n. 4).

<sup>9</sup> See e.g. Joseph Kunz, “The ‘Vienna School’ and International Law” (1933–34) 11 *New York University Law Quarterly Review* 370.

<sup>10</sup> As Hugo de Groot is generally referred to by his Latin eponym, I will follow that practice in this chapter.

<sup>11</sup> Lauterpacht, “The Grotian Tradition in International Law” (n. 3) 19.

and *The Rejection of "Reason of State."*<sup>12</sup> Should there have been areas of International Relations to which no laws could apply, perhaps due to an assertion of *Raison d'État*, the system of international law would clearly be incomplete, and rulings based on a finding of *non liquet* would clearly be expected.

In a sense, both Transitional Justice and *jus post bellum* as intellectual projects represent attempts to fill apparent lacunae. Transitional Justice practitioners, as a general rule, are committed to the "fight against impunity." This impunity is seen as an unwanted gap. Transitional Justice seeks primarily to respond to the real-world gap in the universality of human rights as applied—a universality that is fundamental to the project of human rights. These rights are not derived from an individual's status *vis-à-vis* a state but solely due to being human, as a result of shared humanity. An apparent gap in the universality of international human rights protections caused by a change in regime (perhaps with amnesties for previous regime officials) or by the mere existence of unpunished systematic or widespread human rights abuses may cry out to be addressed by Transitional Justice practitioners. Additionally, uncovering and establishing the truth of past human rights abuses may be seen as filling a historical lacuna, which itself may serve as a form of reparation for victims. The idea that there should always be a purposeful (legal and otherwise) response to human rights abuses is very much in line with Lauterpacht's vision of the Grotian Tradition.

*Jus post bellum*, on its face, appears to be responding to the need to complete the temporal story of the law of armed conflict—with *jus ad bellum* governing the beginning of armed conflict, *jus in bello* governing the conflict itself, and *jus post bellum* governing its aftermath. While there is certainly power behind this simple depiction, a deeper understanding of the history of international law as it applies to law and peace reveals a more fundamental gap that *jus post bellum* can help to fill. Filling these lacunae is best understood with reference to what Lauterpacht called "The Grotian Tradition in International Law."<sup>13</sup> Lauterpacht identifies several features of the Grotian tradition that are potentially pertinent. He suggests that the Grotian tradition includes *The Subjection of the Totality of International Relations to the Rule of Law*;<sup>14</sup> *The Rejection of "Reason of State"*;<sup>15</sup> *The Distinction between Just and Unjust Wars*;<sup>16</sup> *The Fundamental Rights and Freedoms of the Individual*;<sup>17</sup> and *The Idea of Peace*.<sup>18</sup> By *The Idea of Peace*, Lauterpacht means Grotius's strong preference for peace, and the lack of praise for war as somehow beneficial or strengthening in character.<sup>19</sup> In particular, *The Subjection of the Totality of International Relations to the Rule of Law* and *The Rejection of "Reason of State"*; is relevant to the creation of *jus ad bellum*, *jus in bello*, and eventually *jus post bellum*. These themes certainly echo Lauterpacht's split from his teacher Hans Kelsen.<sup>20</sup>

<sup>12</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 30.

<sup>13</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 30.

<sup>14</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 19.

<sup>15</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 30.

<sup>16</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 35.

<sup>17</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 43.

<sup>18</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 46.

<sup>19</sup> Lauterpacht, "The Grotian Tradition in International Law" (n. 3) 46.

<sup>20</sup> See Martti Koskenniemi, "Lauterpacht: The Victorian Tradition in International Law" (1997) 8 *European Journal of International Law* 215, 217–18.

To use the term “*jus post bellum*” is itself to make an assertion, namely that a set of laws exists that applies to the transition to peace. Because the term is a recent arrival in contemporary legal discourse (see Part VII below), the claim may seem controversial. One might ask how a body of law could have been constructed without, until recently, a name. Further, one might ask whether those using the term are really advocating restraints upon the peacemakers and erecting barriers to peace.<sup>21</sup> After all, if this chapter claims that *jus post bellum* is a continuance and completion of the Grotian Tradition, and embedded in the Grotian Tradition is a strong preference for peace, then how can barriers to peace be appropriate?

With respect to the first concern about the implausibility of a heretofore “nameless” body of law, the history of the terms *jus ad bellum* and *jus in bello* stand as an answer. The concerns and laws of *jus post bellum*, like those of *jus ad bellum* and *jus in bello*, predate the terms themselves. For example, Brian Orend argues that the concept of *jus post bellum* should be credited to Immanuel Kant.<sup>22</sup> Regardless of its provenance, it is important to note the relative humility of the concept. The term “*jus post bellum*” does not seek to displace *jus ad bellum* or *jus in bello*, but rather to complement them. It does not seek to supplant the separate frameworks of humanitarian law, human rights law, or international criminal law,<sup>23</sup> and indeed to challenge the entire notion of public international law as traditionally understood,<sup>24</sup> but simply to integrate the law applicable to a particular phenomenon, the transition to a sustainable peace, into a more coherent whole.

With respect to the second concern regarding the possible drawbacks of clarifying and even extending the law applicable to the transition to a sustainable peace, one need only look to the atrocities that have historically followed military victory to understand the *prima facie* need for *jus post bellum*. No longer is it acceptable and commonplace to exterminate or enslave the defeated population. The prohibition on the annexation of territory is central not only in determining the legality of particular post-conflict settlement, but also in underpinning the entire order of stable and pacific interstate relations. An abhorrence of regulation and insistence on the “freedom” from law of those involved in the transition to a sustainable peace is effectively an application of the rationale of *Raison d’État* to the ending of conflict and the reestablishment of peace—to assert that a dispute regarding the legality of actions taken in the transition to a sustainable peace would be met with a judicial *non liquet*. This is not to say that there is a tight constraint in all circumstance or no role for discretion. There are many choices between equally legal options during the transition to sustainable peace. Regardless of one’s view as to the function of law in the international community, a vision of the reestablishment of peace as a law-free or law-poor zone is likely to result in an impoverished peace that does not tend to acceptably resolve the problems underlying the conflict or lay the foundation for a robust, positive peace.

<sup>21</sup> Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept” (2010) 43 *Vanderbilt Journal of Transnational Law* 119.

<sup>22</sup> Brian Orend, *War And International Justice: A Kantian Perspective* (Wilfrid Laurier University Press 2000) 57.

<sup>23</sup> See e.g. Ruti Teitel, *Humanity’s Law* (Oxford University Press 2011).

<sup>24</sup> Teitel, *Humanity’s Law* (n. 23).



### III. Basic Definitions

#### A. Transitional Justice

In *Transitional Justice Genealogy*,<sup>25</sup> Ruti Teitel begins with a definition, stating, “Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”<sup>26</sup> This definition, adopted very carefully in a self-reflective article by the individual often credited with coining the term, is a good place to start.

The substantive emphasis of Transitional Justice is on justice for human rights violations.<sup>27</sup> Temporally, the emphasis is on subjecting the acts that occurred during the predecessor regime to a toolbox of responses within the time period of the successor regime. The term contains an aspirational element—that a transition toward justice is possible in line with the political change in the wake of a change in regime. There is no assumption of armed conflict, nor is there a denial of the possibility of armed conflict. Armed conflict has only a potential, secondary importance in Transitional Justice—an importance derived not from the effects of armed conflict, nor the thing itself. These potential effects, human rights violations and regime change, may each occur with or without armed conflict. The goals of Transitional Justice are fundamentally tied to the aspiration of transition, both toward justice for past violations and toward a cementing of a new political order that will prevent the old order, with its attendant human rights violations, from returning.

#### B. *Jus post bellum*

There is, as yet, no authoritative definition for *jus post bellum*, although many have been proffered. For the purposes of this chapter, for reasons that are explained below,<sup>28</sup> the term *jus post bellum* is defined as the body of legal norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace.<sup>29</sup>

*Jus post bellum* must be understood in the context of its sister terms, *jus ad bellum* and *jus in bello*. None of these terms make sense without armed conflict. They are concerned with the use of armed force as a matter of primary, central importance.

<sup>25</sup> Ruti Teitel, “Transitional Justice Genealogy” (2003) 16 *Harvard Human Rights Journal* 69; see also Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 3.

<sup>26</sup> Ruti Teitel, “Transitional Justice Genealogy” (n. 25).

<sup>27</sup> Sections of this chapter draw partly from Jens Iverson, “Transitional Justice, Jus Post Bellum, and International Criminal Law: Differentiating the Usages, History, and Dynamics” (2013) 7 *International Journal of Transitional Justice* 413.

<sup>28</sup> See Part VI of this chapter.

<sup>29</sup> See e.g. Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (*The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, originally published 1887, tr. W. Hastie, The Lawbook Exchange 2002) (emphasis added) 214 (“The Right of Nations in relation to the State of War may be divided into: 1. The Right of *going to War*; 2. Right *during War*; and 3. Right *after War*, the object of which is to constrain the nations mutually *to pass from this state of war, and to found a common Constitution establishing Perpetual Peace.*”) The definition of a “just and sustainable peace” is itself an extremely interesting research topic, involving what many have termed “positive peace” vs. “negative peace,” and definitions of sustainable peace not in terms of the relations of two states but in terms of the international system as a whole.

Collectively, they seek to describe the constraints and rights regarding whether armed force may be used at all, the constraints and rights related to the use of armed force during armed conflict (how it may be used), and the constraints and rights related to the transition from armed conflict to a sustainable peace.

The substantive emphasis of *jus post bellum* is broader than human rights violations. It also clearly includes, inter alia, violations of the laws of armed conflict, the rights and privileges that spring from the laws of armed conflict, environmental law (including legal access to natural resources and regulating the toxic remnants of war), state responsibility outside of the realm of human rights, recognition of states and governments, laws and norms applicable to peace treaties and peace agreements, peace-keeping, occupation, and post-conflict peace building—laws that directly or through interpretation regulate and enable the transition to a just and sustainable peace.

#### IV. Legal Contrast

*Jus post bellum*, like *jus gentium* or *jus civile*, is best understood as *by definition* primarily a system or body of law. The term “*jus*,” used in this context, dates back to Roman law. A *jus* is “one particular system or body of particular law.”<sup>30</sup> While *jus post bellum* in practice always exists in a particular political context, the thing in itself is fundamentally legal in nature, not political. It is a primarily legal concept (of the existence of a body of law) with political implications. *Jus post bellum* can also legitimately be used to reference the aspects of just war theory that apply to the transition from armed conflict to peace that are philosophical in nature, as is the case with its sister terms *jus ad bellum* and *jus in bello*.

Transitional Justice weds a legal idea—human rights—to the political change that makes human rights enforcement possible and necessary. Transitional Justice is tied to the change in regime and a change in enforcement. For Transitional Justice to work, it is necessary to create a distinction between the old culture of impunity and the new norms of justice. Transitional Justice is political in the sense of bringing a full political awareness to the project of securing political-legal system that respects and enforces human rights norms. The International Center for Transitional Justice takes pains to emphasize that Transitional Justice “is not a ‘special’ kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression.”<sup>31</sup>

Contrasting *jus post bellum* and Transitional Justice with respect to how political or legal in nature each concept is may suggest—*contra* Lauterpacht—that some actions, from a political perspective, are impossible to call legal or illegal, but are instead out of the realm of law and into the realm of politics, in the manner espoused by Morgenthau and Kelsen. This suggestion is not the intent of the author. Identifying the political nature or political implications of a concept should not imply that any act cannot be

<sup>30</sup> *Black's Law Dictionary* (6th edn, West Group, 1991). The alternative definition of *jus* as “a right,” that is, “a power, privilege, faculty, or demand inherent in one person and incident upon another” is not applicable in this instance.

<sup>31</sup> International Center for Transitional Justice (ICTJ), “What is Transitional Justice?” <<http://ictj.org/about/transitional-justice>> (accessed 4 July 2013).

analyzed from a legal perspective. Transitional Justice practitioners are rooted in a specific legal regime—International Human Rights Law.

One concept that deserves mention in this context is the idea of “meta-conflict,”<sup>32</sup> or “the conflict about what the conflict is about.” Different narrative frames to understand an armed conflict will often be political in nature. This has implications for the politicization of *jus post bellum*. Because the true causes of the conflict are almost inevitably contested, the steps that need to be taken to resolve those causes and create a sustainable peace are also likely to be contested.

## V. Contrasting the Content of Transitional Justice and *Jus Post Bellum*

### A. General contrast

The basic definition of Transitional Justice provided in the Basic Definitions section above is not the only definition worth considering. Again, in *Transitional Justice Genealogy*,<sup>33</sup> Teitel states, “Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”<sup>34</sup> In contrast, the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) defines Transitional Justice as:

[...] 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. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>35</sup>

Similarly, the stocktaking report of the same name *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2011) describes Transitional Justice as follows:

Transitional justice initiatives promote accountability, reinforce respect for human rights and are critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance. Transitional justice initiatives may encompass both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals.<sup>36</sup>

Transitional Justice practitioners may know about and concern themselves with issues outside of human rights violations, such as violations of the laws of armed

<sup>32</sup> Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 15.

<sup>33</sup> Teitel, “Transitional Justice Genealogy” (n. 25) 3.

<sup>34</sup> Teitel, “Transitional Justice Genealogy” (n. 25) 69.

<sup>35</sup> UN Security Council, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General” (23 August 2004) UN Doc. S/2004/616, 4.

<sup>36</sup> UN Security Council, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General” (12 October 2011) UN Doc. S/2011/634, 6.

conflict, the rights and privileges that spring from the laws of armed conflict, state responsibility outside of the realm of human rights, recognition of states and governments, laws and norms applicable to peace treaties and peace agreements, occupation, and particularly post-conflict peace building. That said, these subjects are not the fundamental concern of Transitional Justice properly speaking. They are the fundamental concern of *jus post bellum*.

While *jus post bellum* is substantively broader than Transitional Justice in many respects, *jus post bellum* is also clearly inapplicable in certain scenarios where Transitional Justice is applicable. Following a peaceful, non-violent revolution or regime change, the principles of *jus post bellum* may apply by analogy, but not directly.

Similarly, one can imagine a change in regime in which no significant human rights violations were perpetrated by the previous regime, deposed by armed conflict. Armed conflicts happen without massive human rights violations. (The 1982 conflict in the Falkland/Malvinas Islands might provide such an example, the involvement of two 17-year-old armed service members notwithstanding.)<sup>37</sup> Additionally, armed conflicts occur without regime change. In these instances, Transitional Justice would tend not to apply, but *jus post bellum* would.

Just as *jus post bellum* is necessarily connected to an armed conflict, to the degree that *jus post bellum* has an aspirational character, it must relate in part to questions of war and peace. One would think that *jus post bellum* is tied to the contemporary aspirational character of *jus ad bellum* and *jus in bello*: to constrain the use of armed force. In addition to that negative goal of reducing the effects of unfettered armed force, practitioners of *jus post bellum* generally seek to build a “positive peace.”<sup>38</sup> This builds upon Lauterpacht’s idea that part of the Grotian Tradition is *The Idea of Peace*.<sup>39</sup> Again, by *The Idea of Peace*, Lauterpacht is invoking Grotius’s strong preference for peace, and the lack of praise for war as somehow beneficial or strengthening in character.<sup>40</sup> Sustainable peace is a central aspirational norm of *jus post bellum*, following a long but not uncontested tradition in international law.

This is not to say that human rights are not central to *jus post bellum*—they are. As ably demonstrated in such works as *Transitional Justice in the Twenty-first Century: Beyond Truth Versus Justice*<sup>41</sup> and *Selling Justice Short: Why Accountability Matters for Peace*<sup>42</sup> the supposed tension between different maximands such as peace and justice or truth and justice is frequently overblown. Discovering the truth about human rights violations and achieving justice for those violations is widely recognized as important in building a positive peace. But there will be responses to human rights violations that are not properly the concern of *jus post bellum*.

<sup>37</sup> Amnesty International, “United Kingdom: Summary of Concerns Raised with the Human Rights Committee” (1 November 2001) <<http://amnesty.org/en/library/asset/EUR45/024/2001/en/e81811b7-d8b3-11dd-ad8c-f3d4445c118e/eur450242001en.html>> (accessed 4 July 2013).

<sup>38</sup> See e.g. Johan Galtung, “Violence, Peace, and Peace Research” (1969) 6(3) *Journal of Peace Research* 167–91.

<sup>39</sup> Lauterpacht, “Grotian Tradition in International Law” (n. 3) 46.

<sup>40</sup> Lauterpacht, “Grotian Tradition in International Law” (n. 3) 46.

<sup>41</sup> Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-first Century: Beyond Truth Versus Justice* (Cambridge University Press 2006).

<sup>42</sup> Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (July 2009) <[http://www.hrw.org/sites/default/files/reports/ij0709webwcover\\_3.pdf](http://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf)> (accessed 4 July 2013).

## B. Substance of Transitional Justice

Transitional Justice practitioners are interested in the application of a collection of responses to human rights violations (sometimes referred to as a “toolbox” or “package” of mechanisms)<sup>43</sup> including criminal prosecutions, truth commissions, reparations programs, gender justice programs, security sector reform, memorialization,<sup>44</sup> vetting (also known as “lustration,” “screening,” “administrative justice,” and “purging”)<sup>45</sup> and education.<sup>46</sup> These responses will also likely be of interest to scholars and practitioners of *jus post bellum*, particularly during the period after the cessation of armed conflict. The emphasis, however, may be different. Those coming from the Transitional Justice perspective may share the natural primary concern of responding to human rights violations, while those coming from the tradition of emphasizing the importance of transitioning to a stable peace may highlight other areas, albeit often through responding to human rights violations. The content of what is called Transitional Justice has expanded as practitioners have looked for pragmatic problems to the difficult challenges inherent in the aftermath of human rights violations by a previous regime. The question of what qualifies as “Transitional Justice” is a pragmatic, and in some ways inherently political question, as it depends at least in part on what is considered useful in making a successful political transition.

It is not particularly useful to apply the term “Transitional Justice” to efforts that use the tools or approaches used in Transitional Justice but which bear no relationship to a distinct transition in political regime. If, at the present moment, there was a truth commission or memorialization effort for the deaths of more than 12,000 prisoners of war housed at the Confederate Andersonville Prisoner of War Camp during the US Civil War, it is hard to see how it is helpful to call these “Transitional Justice,” even in light of the political changes that occurred as a result of the armed conflict. A truth commission or memorial to victims does not necessarily imply a “transition” in the sense that is normally implicated by the term “Transitional Justice.” Applying the term to the post-conflict trial and execution of Henry Wirz, commander of the Andersonville Prison, as well as the 1908 monument to Wirz by the United Daughters of the Confederacy and continuing memorialization<sup>47</sup> would also constitute an unjustified enlargement of the term “Transitional Justice.” While both the trial and the monument may have had (conflicting) political implications or intents, the trial was hardly looking toward any sort of regime change in the US federal government, and the misplaced valorization of Wirz has more to do with denial of Confederate crimes than establishment of accountability for human rights violation of a previous regime. While some may feel that stretching

<sup>43</sup> See e.g. Naomi Roht-Arriaza, “Transitional Justice and Peace Agreements” (2005) *Working Paper, International Council on Human Rights Policy* 3, 5 <[http://www.ichrp.org/files/papers/63/128\\_-\\_Transitional\\_Justice\\_and\\_Peace\\_Agreements\\_Roht-Arriaza\\_Naomi\\_2005.pdf](http://www.ichrp.org/files/papers/63/128_-_Transitional_Justice_and_Peace_Agreements_Roht-Arriaza_Naomi_2005.pdf)> (accessed 4 July 2013).

<sup>44</sup> ICTJ, “What is Transitional Justice?” (n. 31).

<sup>45</sup> Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007).

<sup>46</sup> See e.g. Elizabeth A. Cole and Judy Barsalou, “Unite or Divide? The Challenges of Teaching History in Societies emerging from Violent Conflict” (United States Institute for Peace 2006) 2 (“History education should be understood as an integral but underutilized part of Transitional Justice and social reconstruction”).

<sup>47</sup> Glen W. LaForce, “The Trial of Major Henry Wirz—A National Disgrace” (1988) *1988 Army Law* 3.

the term is somehow innovative or exciting, overstretching the term tends to lead to the term lacking specific meaning and force. As Seneca the Younger noted: *Nusquam est qui ubique est* (roughly translated, “Nowhere is the one who is everywhere” or “to be everywhere is to be nowhere”).<sup>48</sup>

To take perhaps a more controversial example, it seems unhelpful to use the term “Transitional Justice” in application to the serial truth commissions in Uganda, including the Commission of Inquiry into the Disappearances of People in Uganda since 25 January 1971 established by Idi Amin Dada and the 1986 Commission of Inquiry into Violations of Human Rights.<sup>49</sup> While these Truth Commissions, along with various efforts at memorialization and even the International Crimes Division within the High Court of Uganda technically fit with the type of broad definition such as “a response to systematic or widespread violations of human rights”<sup>50</sup> they should not be considered to be Transitional Justice mechanisms, properly conceived. These are not the type of “conception of justice associated with periods of political change”<sup>51</sup> traditionally and properly associated with the term Transitional Justice. Discussing these institutions as “Transitional Justice” should at a minimum be done critically and cautiously, noting that they are not clearly part of a transition to a more democratic and accountable regime. They are, in each instance, a one-sided exercise of a regime not clearly moving toward ongoing accountability for their own human rights abuses. If the term “Transitional Justice” simply means an institutionalized allegation of abuse by the losing party in a conflict, even an allegation by a regime not in the process of transitioning to a superior approach toward human rights, it is unclear why “Transitional Justice” should retain its widespread support, or why the term would endure.

This is not to say that Transitional Justice efforts have to be without flaw or criticism to merit the title of “Transitional Justice.” As a phenomenon associated with political change, carried out by fallible humans, any instance of Transitional Justice will inevitably be flawed. Rather, calling an effort “Transitional Justice” should necessarily be an assertion that the substance of that effort contains the aspiration of transition to a new regime of accountability for human rights abuses.

Noémie Turgis in *What is Transitional Justice?* begins and ends with a warning regarding broadening the scope of transitional justice.<sup>52</sup> As she puts it:

The risk of broadening the meaning of the concept is to dilute it and turning it into something meaningless. [...] The core element of transitional justice is here: offering a “toolbox” filled with elements designed to deal with the violations of human rights from a predecessor regime to form the basis of an order to prevent their reoccurrence.<sup>53</sup>

This is well put, although some might object to the “toolbox” metaphor given that it may tend to reduce complex problems to simpler plumbing analogues. The content

<sup>48</sup> Seneca the Younger, *Epistula Ad Lucilium II*, Book 1, Letter 2, line 2.

<sup>49</sup> Joanna R. Quinn, “Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda” (Autumn/Winter 2009) 14(2) *International Journal of Peace Studies* 35–53.

<sup>50</sup> ICTJ, “What is Transitional Justice?” (n. 31).

<sup>51</sup> Teitel, “Transitional Justice Genealogy” (n. 25) 69.

<sup>52</sup> Noémie Turgis, “What is Transitional Justice?” (2010) 1 *International Journal of Law, Transitional Justice and Human Rights* 9, 14.

<sup>53</sup> Turgis, “What is Transitional Justice?” (n. 52) 14.

of Transitional Justice is rooted in a transformative response to a predecessor regime's human rights violations in order to prevent further violations.

### C. Plotting the content of *jus post bellum*: procedural and substantive law in the transition from armed conflict to peace

A full mapping of the content of *jus post bellum* is beyond the scope of this chapter, which focuses on the contrast between Transitional Justice and *jus post bellum*. What follows must, of necessity, resemble a sketched map more than an aerial photo. Nonetheless, a short and general guide should be useful.

One useful but under-appreciated tool when thinking about the content of *jus post bellum* is to highlight the procedural and substantive aspects of particular legal issues within *jus post bellum* as a system of law. This section will discuss the content of *jus post bellum* in three parts: legal norms that are more substantive in nature, legal norms that are more procedural in nature, and legal norms that are a mix of substantive and procedural norms. Plotting the different norms along this spectrum is not meant to be an absolute or precise exercise, but rather a helpful and somewhat systematic way to connect different issues and further the idea that these issues are related, and in fact constitute a coherent body of law.

#### *More substantive in nature*

Contemporary international law specifically outlaws many acts that may be (and historically have been) carried out during the transition from armed conflict to peace. Christine Bell provides a helpful table in *Peace Agreements and Human Rights*<sup>54</sup> with respect to “political strategies for dealing with minorities.” The table can usefully be generalized with application to the international law prescription for a variety of acts that are regulated by *jus post bellum*.

A party to the conflict may frame the conflict as caused by the existence or power of another group, and wish to act upon that second group in prohibited ways. For instance, a party to the conflict may adopt a strategy of eliminating the second group, through genocide, expulsion, or voluntary expatriation. The first two are specifically outlawed under international law,<sup>55</sup> the third is unclear but likely suspect if attached to the goal of elimination, as the “voluntary” nature will be in doubt in light of the potential crime of persecution. If the strategy of domination is adopted, the likely method of implementing of that strategy discrimination against a minority is specifically outlawed. This, of course, includes the prohibition of slavery.

A party to the conflict may also frame the cause of the conflict as caused by the relationship of another group to others, and choose to act upon that second group in ways that are regulated but not necessarily prohibited by international law. If the strategy of assimilation is adopted, the increased recognition of minority rights in international

<sup>54</sup> Bell, *Peace Agreements and Human Rights* (n. 32) 17.

<sup>55</sup> Bell, *Peace Agreements and Human Rights* (n. 32) 17; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff 1995).

law<sup>56</sup> may constrain any attempt to eliminate communal differences. Separate treatment may depend upon the particular provisions and the balance between individual rights and collective rights, including whether the treatment is more in the form of recognition and accommodation for vulnerable minorities or discrimination against minority groups.<sup>57</sup> Many conflicts are framed in terms of self-determination, whether it is a demand for internal autonomy or outright secession. The question of the legality of self-determination is inextricably tied to the rights of territorial integrity and the rights of minorities and individuals within the new framework.<sup>58</sup>

All of the substantive legal norms listed thus far are binding directly as part of non-derogable international human rights regimes that apply in times of peace, armed conflict, and periods that could be described as *status mixtus*,<sup>59</sup> but may have special and distinctive characteristics during the transition from armed conflict to peace. Most particularly, these norms bind those crafting peace agreements and those who enjoy transitional governmental authority. Bell suggests that international law applying to peace processes (including the crafting of peace agreements) should reflect the distinctive nature of these acts, including: a distinctive self-determination role bound to questions of state legitimacy and human rights protections; hybrid international/domestic legal status based on a distinctive mix of state and non-state categories; obligations that may need to be interpreted from both a treaty or contract law framework and a constitutional law framework; and distinctive types of third-party delegation.<sup>60</sup>

Certain areas of *jus ad bellum* and *jus in bello* are also heavily implicated in a body of law governing the transition from armed conflict to peace. The prohibition of annexation as the result of armed conflict is tied to the prohibition of acts of aggression, a clear *jus ad bellum* concern. Acts of aggression also raise the question of response in the transition to peace, including the question of reparations—an issue that implicates the law of state responsibility. United Nations Security Council resolutions under Chapter VII authority frequently provide specific binding law that applies to particular transitions from armed conflict to peace.<sup>61</sup>

All of the limits of the law of armed conflict applying to belligerent occupation under the law of armed conflict are traditionally classified as *jus in bello* (including

<sup>56</sup> Bell, *Peace Agreements and Human Rights* (n. 32) 17; see also Nātan Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff 2003).

<sup>57</sup> Bell, *Peace Agreements and Human Rights* (n. 32) 17.

<sup>58</sup> Bell, *Peace Agreements and Human Rights* (n. 32) 17.

<sup>59</sup> See Georg Schwarzenberger, “Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law” (1943) 37 *American Journal of International Law* 460, 470.

<sup>60</sup> Bell, *Peace Agreements and Human Rights* (n. 32) 407; see also Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

<sup>61</sup> The United Nations Charter does not limit its application to *jus post bellum* to providing for the authority of the Security Council to act under Chapter VI or Chapter VII to restore peace. Article 78 of the United Nations Charter states in full: “The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.” The trusteeship system, like the mandate system before it, was in part an effort to realize the principle of self-determination and to move away from colonialism and empire as a post-war norm. While the United Nations Trusteeship Council is moribund and widely considered obsolete, the history of colonization and decolonization must inform an analysis of the normative and historical foundations of *jus post bellum*.



Geneva Convention IV, Additional Protocol I, and Article 42 of the 1907 Hague Regulations<sup>62</sup>). The reality and legal restraints of “transformative occupation” requires a complementary understanding of *jus post bellum* to reconcile current practice (including the endorsement of some practitioners of transitional justice) and the Conservation Principle of *jus in bello* (prohibiting major changes in the institutions of the occupied territory). The tradition of *jus post bellum* covering occupation goes back to Immanuel Kant’s exception to the Conservation Principle when it comes to the constitution of warlike states.<sup>63</sup> Arguably, if a *legitimate* new government is established and widely recognized, belligerent occupation (where a foreign state exercises effective control over another state’s territory without the latter state’s consent) may become pacific occupation (occupation with the latter state’s consent) or international territorial administration,<sup>64</sup> such as the United Nations Transitional Authority in Cambodia.<sup>65</sup> This is, of course, a highly problematic, charged, and contested issue, but one that cannot be ignored. Merely placing a compliant puppet or satellite state should not remove the obligations of the occupier under *jus in bello*. The legitimacy of post-belligerent occupation is clearly tied to the validity of consent free from the threat of use of force as guaranteed by the Article 52 of the Vienna Convention on the Law of Treaties—*jus post bellum* law that is more procedural in nature, to which we shall turn shortly.

The international law applicable to state responsibility,<sup>66</sup> particularly with regards to new states created through conflict, is also an area of law that must be referenced by a body of law applicable to the transition from armed conflict to peace. State responsibilities also can provide the framework for considering the responsibility of international organizations and institutions.

The international law applicable to peacekeeping operations in the aftermath of armed conflict must also be considered in a comprehensive body of law applicable to the transition to peace. Similarly, status of armed forces on foreign territory agreements (SOFAs) are implicated by a *jus post bellum* regime.

Criminal law, both international and domestic, as well as laws regarding reparations (whether included as part of a criminal law regime or not) are also an important part of *jus post bellum*, if those laws have application to the transition from armed conflict to peace. The important criterion for their inclusion is not the venue (international or domestic) nor the source, but their applicability to the transition to peace.

Environmental law, particularly with respect to the rights and obligations relating to repairing and rebuilding the environmental damage from the conflict, but also

<sup>62</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910), 36 Stat. 2277, 1 Bevans 631, 205 Consol TS 277, Art. 42.

<sup>63</sup> See e.g. Kant, *Metaphysische Anfangsgründe der Rechtslehre* (n 29).

<sup>64</sup> See e.g. Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press 2008); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2010).

<sup>65</sup> See e.g. Steven R. Ratner, “The Cambodia Settlement Agreements” (1993) 87 *American Journal of International Law* 1.

<sup>66</sup> See International Law Association (ILA), “Draft Articles on Responsibility of States for Internationally Wrongful Acts” in ILA, “Report of the International Law Commission on the Work of its Fifty-third Session” (2001) UN GAOR 56th Session Supplement 10, 43; UN Doc. A/56/10.

resolving any resource disputes related to the conflict, may be implicated in the transition to a sustainable peace.

The Responsibility to Protect doctrine<sup>67</sup> includes the Responsibility to Prevent, Responsibility to Respond, and the Responsibility to Rebuild. Of the three norms within the Responsibility to Protection doctrine, the Responsibility to Respond has received the most attention and has the most bearing on questions related to *jus ad bellum* and *jus in bello*, as it seeks to replace the rhetoric of humanitarian intervention with guidelines of responses short of the use of armed force and constraints on the resort to armed force and how it is used. The Responsibility to Prevent and the Responsibility to Rebuild are more tightly tied to *jus post bellum*.

### *More procedural in nature*

Article 52 of the Vienna Convention on the Law of Treaties states in full: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”<sup>68</sup> This is a particular area of concern for *jus post bellum*. First a note on terminology: use of the term “peace treaty” indicates an agreement exclusively between states, unlike the term “peace agreement,” which is used for agreements not exclusively between states. Consider a generic, hypothetical peace treaty. Article 52 of the Vienna Convention on the Law of Treaties implies that the validity of that peace treaty, the foundation of a transition from interstate armed conflict to peace, depends on whether there has been an illegal threat or use of force to procure that treaty. In other words, the legal validity of the foundation of the transition to peace depends on what is typically considered a question of *jus ad bellum*, the legality of the use or threat of force. This connection between *jus ad bellum* and *jus post bellum* emerges not through an analysis of *substantive* rights and restrictions during the transition to peace, but through an analysis of the legitimate procedure for creating a peace treaty.

Recognition is also a critical question in *jus post bellum*. In order to apply *jus post bellum*, practitioners must be able to identify states and governments. This can be a contested issue, particularly for states in the case of secession (e.g. Bangladesh) and for governments in the case of contested legitimacy of a new regime (e.g. post-Democratic Kampuchea Cambodia). The law regarding recognition of states and recognition of governments is clearly implicated in the transition to peace.

The procedural law applicable to substantive criminal and civil law are also part of the transition to peace. This is not only with respect to the high profile, highly contested

<sup>67</sup> See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 39–45; see also United Nations Secretary General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change* (2004) 65–7; United Nations General Assembly, *2005 World Summit Outcome, UN Doc. A/60/L.1* (15 September 2005) paras 138–9; United Nations General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677 (12 January 2009) para. 48.

<sup>68</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 52.

issues such as amnesties for the perpetration of alleged crimes related to the armed conflict. It includes questions of jurisdiction, immunities, statutes of limitation, and other questions of admissibility.

### *Mixed substantive and procedural in nature*

Some subjects are very difficult to characterize as mostly substantive or procedural, or at least require further analysis to distinguish particular aspects that are more substantive or procedural. For example, the United Nations Security Council Resolution 1325<sup>69</sup> enunciates both procedural norms for the resolution of armed conflict<sup>70</sup> and norms for the substance of peace agreements.<sup>71</sup>

## **D. Summarizing the contrast in content**

Transitional Justice has evolved into a robust body of law and practice involving a wide variety of tools to respond to the challenges of responding to widespread or systematic human rights abuses in the context of a political transition to a new regime. *Jus post bellum* implicates a rich variety of legal traditions and regimes, applied to the particular situation of the transition from an armed conflict to a sustainable peace.

## **VI. Specific to Global Contrast**

### **A. The national and international dimensions of transitional justice**

One phenomenon that must be addressed with respect to the national and international dimensions of Transitional Justice is what has been called a “justice cascade.”<sup>72</sup> This term was coined to describe the dynamics behind the transnational effort to try Augusto Pinochet for alleged crimes under his regime, specifically “what changed between 1982 and 1999 that made Pinochet’s arrest in Britain possible,”<sup>73</sup> and refers more generally to how one legal proceeding, often abroad, can trigger domestic proceedings. It is clear that to understand how and why Transitional Justice works, one must keep in mind the sequence of Transitional Justice efforts, not only in terms of

<sup>69</sup> UNSC Res. 1325 (31 October 2000) UN Doc. S/RES/1325.

<sup>70</sup> “1. Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict[.]”

<sup>71</sup> “8. Calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women’s peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary[.]”

<sup>72</sup> See Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America” (2001) 2 *Chicago Journal of International Law* 1; see also Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W. W. Norton & Co. 2011).

<sup>73</sup> Lutz and Sikkink, “The Justice Cascade” (n. 72) 2.

domestic application of Transitional Justice tools, but in terms of steps taken internationally and in domestic fora.

While there are *international* tools of transitional justice, notably international fact-finding missions and particular investigations and criminal prosecutions in international fora, there could also be international criminal prosecutions that should not be considered transitional justice. Such prosecutions could take place in a time that had effectively no particular reference to the transition in regime, such as a prosecution for crimes that happened several regimes ago, as well as international criminal prosecutions that do not implicate human rights violations (for example a prosecution purely for the crime of aggression or a war crime that did not implicate a human rights violation) or a change in political regime (such as a failed coup or election-related violence).

To return to the “justice cascade” phenomenon, it is clear that while transitional justice has historically been largely focused on *domestic* responses to crimes of previous regimes, the picture of modern transitional justice is not complete without awareness of how the geographic scope of Transitional Justice may cross national borders. Tightly linked to the idea of a “justice cascade” in which judicial action in one (foreign) forum can result in judicial action in another forum is the idea of the “Pinochet Effect.”<sup>74</sup> The Pinochet Effect emphasizes the transnational change in tone across Latin America and the world due to the effective fight against impunity by leaders of previous regimes. This idea of the international climate or zeitgeist influencing transitional justice is helpful in order to understand the interplay between the domestic, regional, and international arenas.

## **B. Plotting the content of *jus post bellum*: specific to global**

The idea of *jus post bellum* as international law may lead one to believe that local context is largely irrelevant to the law; that it is a universal standard that applies to varied local and specific facts, but that the law itself does not change. In other words, while the assumption of Transitional Justice may be local actors working locally, the assumption with respect to *jus post bellum* may be that international norms, international fora, and the international perspective is all that fundamentally matters. This is not the case. In addition to the global or international level, it is also helpful to consider regional or mid-range level and local or specific levels of analysis.

On the regional or mid-range level, a few examples may be helpful. Substantively, in addition to UN peacekeeping efforts, there exist regional peacekeeping efforts that may be subject to specific regional guidelines and governance. To take an example of what may be a mid-level rather than a regional set of *jus post bellum* problems, the particular problems of resolving such atypical and contested armed conflicts such as the so-called “war on terror” (spanning multiple, non-contiguous countries) or the “war on drugs” (involving massive loss of life in northern Mexico, civil wars in Colombia and Afghanistan, etc.)—conflicts which often cross national borders or exist transnationally

<sup>74</sup> See Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2006).

in disparate networks with little reference to national borders. Of course, traditional conflicts also have important specific regional contexts, whether in the great lakes region of Africa or the central-south Asian context of Afghanistan and Pakistan. Procedurally, regional international organizations are also faced with the question of recognition of states and governments after conflicts. Multilateral negotiations to end armed conflict and build a sustainable peace are often regional (rather than global or bilateral) in scope. Regional positions regarding procedural issues such as immunity, for example the African Union positions on Sudanese President al Bashir, are obviously neither global nor local in scope. Mixed procedural and substantive regional or mid-level applications of *jus post bellum* include the jurisprudence of regional judicial bodies and multilateral treaties regarding disarmament, including procedures for verification. On the specific or local level, more substantive examples of *jus post bellum* in practice might include particular instances of reparation; post-conflict resolution of a particular *res* or just cause under just war theory; particular instances of state practice regarding state responsibility, occupation, and peacekeeping. Instances of local more procedural *jus post bellum* might include bilateral or purely domestic/intrastate agreements, specific amnesties, and specific state and government recognition. Mixed substantive and procedural local *jus post bellum* can be found in specific disarmament, demobilization, or reintegration efforts, including verification; and jurisprudence from domestic judicial bodies relating to *jus post bellum*. The astute reader will note that this analysis of geographic scope builds upon the dimension of “more substantive” or “more procedural” used in the analysis of the content of *jus post bellum* in Part IV. Together, these analyses allow a two-dimensional plotting of *jus post bellum*.

## VII. Historical Foundations

### A. Transitional Justice

The term is rooted in political transitions of Latin American and Eastern Europe in the late 1980s and early 1990s, with the term “transition” emphasizing the change from authoritarian rule to democracy.<sup>75</sup> Teitel links the withdrawal of support from the USSR to guerilla forces in the late 1970s to the eventual end of military rule in South America.<sup>76</sup> The transitions in Eastern Europe after 1989 were obviously tied to the collapse of the Soviet Union. Transitional Justice, as a concept, cannot be understood without reference to the domestic political transition. As a historical phenomenon, it cannot be understood without reference to international power politics and foreign relations. Teitel suggests that the phase of post-Cold War Transitional Justice has been replaced with a new phase associated with globalization and heightened political instability.<sup>77</sup> A full exposition of the history of Transitional Justice is outside the scope of

<sup>75</sup> ICTJ, “What is Transitional Justice?” (n. 31); see also Juan Linz, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996); Guillermo O’Donnell, Philippe C. Schmitter, and Laurence Whitehead, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* Vol. 4 (Johns Hopkins University Press 1986).

<sup>76</sup> Teitel, “Transitional Justice Genealogy” (n. 25) 71.

<sup>77</sup> Teitel, “Transitional Justice Genealogy” (n. 25) 71.

this chapter, but even a brief look at its history emphasizes the point emphasized by the International Center for Transitional Justice that Transitional Justice “is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse.”<sup>78</sup>

## B. *Jus post bellum*

Understanding the historical foundations of *jus post bellum* requires an analysis of the contemporary division between *jus ad bellum* and *jus in bello*, as well as looking at the treatment of the concept of law applying to the transition to peace as well. Robert Kolb tentatively credited Josef Kunz with coining the terms *jus ad bellum* and *jus in bello* in their contemporary sense in 1934.<sup>79</sup> Stahn has identified the emergence of the terms in the 1920s,<sup>80</sup> with Guiliano Enriques using the term *jus ad bellum* in 1928.<sup>81</sup>

The interwar period was hardly the first time concepts of *jus ad bellum* and *jus in bello* were in play. Indeed, the reason for the success of these terms was not only because of their usefulness in discussing the law as it was at the time, but to discuss the history of international law on these issues.

The traditional division in classical international law between the law of war and the law of peace was a sharp one. War, generally speaking, discontinued the application of what might be called the “ordinary” international law that occurred during periods of peace. Treaties, formed in peacetime between non-belligerents, were abrogated when states became belligerents. During the classical positivist era, even the naturalist constraints on the power to wage war were downplayed. The pre-First World War Hague Conventions of 1899 and 1907 and the post-First World War efforts such as the League of Nations and the Kellogg-Briand pact can be seen as part of an effort to lessen (and ultimately eradicate) the possibility of war ceasing the application of the international law of peace. Of particular interest is the Pacific Settlement of International Disputes (Hague I) of 18 October 1907.

The terms *jus ad bellum* and *jus in bello* arose in the context framed by the pre- and post-First World War efforts to address the question of the power to wage war, and indeed on Lauterpacht’s framing of the function of law in the international community as a comprehensive system. Those using the terms built on a rich tradition, and in many ways surpassed the classical naturalists in establishing rules to constrain armed conflict. Armed conflict, regardless of whether it was adorned with the trappings of formal declarations or recognitions of a state of war, was increasingly going to be considered less of a reason for a suspension of the “ordinary” functions of law in the international community, the functions that pertain during peace.

<sup>78</sup> ICTJ, “What is Transitional Justice?” (n. 31).

<sup>79</sup> Kolb, “Origin of the Twin Terms Jus Ad Bellum/Jus In Bello” (n. 2) 561.

<sup>80</sup> Stahn, “*Jus Post Bellum: Mapping the Discipline(s)*” (n. 2) 312.

<sup>81</sup> See Giuliano Enriques, “*Considerazioni sulla teoria della Guerra nel diritto Internazionale*” (Considerations on the Theory of War in International Law) (1928) 7 *Rivista Di Diritto Internazionale (Journal of International Law)* 172.

Robert Kolb, in the “Origin of the twin terms *jus ad bellum/jus in bello*,” leads one to an irony in the origins of the creation of a fundamental aspect of *jus in bello*—that it applies regardless of the justness of the cause of either side, generally applying to all belligerents. The strength of the idea of the *Reason of State* depreciated the question of the justness of a war during the nineteenth century.<sup>82</sup> Kolb suggests, following Peter Haggemacher,<sup>83</sup> that the idea of the *Reason of State* allowed a focus on the *de facto* and *de jure* conduct of hostilities, regardless of the justness of the resort to armed force. A critical function of the emergence of these two terms is the emphasis on the separate operation of these two terms—underlining the idea that one can (and should) objectively evaluate the rights and duties pertaining to the conduct of armed force separately from the legality of resorting to armed force, and *vice versa*.

In the context of the Grotian tradition as identified by Lauterpacht, there is an irony that the apparent failure of one aspect of the Grotian tradition enabled the success of another aspect of the Grotian tradition. Namely, the failure of the *Rejection of “Reason of State”*<sup>84</sup> with respect to the resort to armed force enabled *The Subjection of the Totality of International Relations to the Rule of Law*<sup>85</sup> with respect to what might be seen as one of the most difficult areas to apply the Rule of Law—the rights and duties *durante bello*, when international relations between the belligerents has been reduced to armed conflict. This, in a sense, is an important part of the story Kolb tells about the emergence of the terms *jus ad bellum* and *jus in bello*.

As Randall Lesaffer notes, interest in the history of international law has waxed and waned, with an increase during the First and Second World Wars followed by a subsequent decline.<sup>86</sup> This last peak in interest generally coincides with the coining of *jus ad bellum* and *jus in bello*, in addition to Lauterpacht’s framing of the Grotian Tradition. Lesaffer suggests that we are in the midst of a new surge of interest in international history, perhaps preparing the ground for adoption and development of a new term, *jus post bellum*.

## VIII. Current Usage

Transitional Justice has been a subject of increased interest over the last 15 years. *Jus post bellum* has also been a subject of increased interest in recent years, although not yet to the same degree as Transitional Justice. This can be illustrated in the following chart showing usage of each phrase in a large corpus of printed work.<sup>87</sup>

<sup>82</sup> Kolb, “Origin of the Twin Terms *Jus Ad Bellum/Jus In Bello*” (n. 2) 556.

<sup>83</sup> Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France 1983) 599.

<sup>84</sup> Lauterpacht, “The Grotian Tradition in International Law” (n. 3) 30.

<sup>85</sup> Lauterpacht, “The Grotian Tradition in International Law” (n. 3) 19.

<sup>86</sup> Randall Lesaffer, *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge University Press 2004) 2.

<sup>87</sup> Source: Google Books Ngram Viewer, dataset 20090715 <[http://books.google.com/ngrams/graph?content=jus+post+bellum%2Ctransitional+justice&year\\_start=1990&year\\_end=2008&corpus=0&smoothing=0](http://books.google.com/ngrams/graph?content=jus+post+bellum%2Ctransitional+justice&year_start=1990&year_end=2008&corpus=0&smoothing=0)> (accessed 24 January 2012). This represents the usage of the two exact terms “Transitional Justice” and “*jus post bellum*” over time within millions of printed books. For an additional representation including terms with varied capitalization, generally amplifying the same usage, see <[http://books.google.com/ngrams/graph?content=jus+post+bellum%2Ctransitional+justice%2C+Jus+Post+Bellum%2C+Transitional+Justice&year\\_start=1990&year\\_end=2008&corpus=0&smoothing=0](http://books.google.com/ngrams/graph?content=jus+post+bellum%2Ctransitional+justice%2C+Jus+Post+Bellum%2C+Transitional+Justice&year_start=1990&year_end=2008&corpus=0&smoothing=0)> (accessed 13 July 2013). For more on the use of bigram analysis of a large corpus of scanned materials,

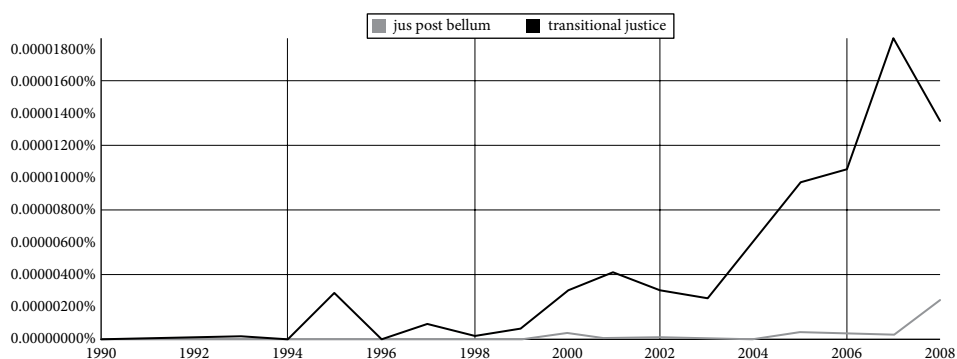


Fig 5.1 Usage of each phrase using in a corpus of all available materials published in English

Whether Transitional Justice and *jus post bellum* continue to grow and endure as useful concepts depends in part on whether these terms are defined with sufficient rigor. Because both terms deal with complex phenomena and benefit from scholarly interest from disparate fields and traditions, coming closer to a consensus on the definition of these terms is difficult. Since Transitional Justice and *jus post bellum* will often (but not always) apply simultaneously, it is all the more important to attempt this difficult task—to define both terms clearly and develop them in accordance with contemporary realities. It is important to recognize that multiple maximands will co-exist, rooted in the separate but related traditions, sometimes in tension, but hopefully almost always carried forward with good will.

## IX. Going Forward—Continuing the Grotian Tradition

Those interested in *jus post bellum* would be well served to pay attention to Transitional Justice for a variety of reasons. Transitional Justice will often be applied simultaneously with *jus post bellum*. The area of law at the heart of Transitional Justice, International Human Rights Law, is critical to understanding the law applicable to the ending of conflict and the building of peace—from the treatment of amnesties in peace agreements to the protection of human rights in constitutional documents. The success of Transitional Justice advocates in placing human rights and the fight against impunity at the center of global governance should be lauded and emulated. At the same time, those interested in *jus post bellum* may wish to take note of the danger in definitional creep, particularly using a relatively new term such as “Transitional Justice” and applying it without a change in regime, particularly in a one-sided manner by a human rights-abusing regime.

The observant reader may have noted that, in contrast with other scholars, the definition of Transitional Justice embraced by this chapter is *narrower* than the increasingly

see Jean-Baptiste Michel et al., “Quantitative Analysis of Culture Using Millions of Digitized Books” (16 December 2010) 331 *Science* 176 <<http://www.sciencemag.org/content/331/6014/176>> (accessed 13 July 2013).



broad definitions commonly used, while the definition of *jus post bellum* is broader. I do not see this as a contradiction, but rather a reflection of the separate problems each concept is designed to address.

Transitional Justice, as a specific conception of justice responding to the particular problems of political change and confronting the wrongdoings of repressive predecessor regimes, allows for establishing a new political compact that pledges an end to impunity for human rights abuses, including by new elites. Focusing on that specific problem and specific concept makes the term more useful than a general euphemism for anything alleging human rights abuses, regardless of political circumstance.

*Jus post bellum* recognizes the problem of systematically applying international law to the difficult area of transitioning from armed conflict to a sustainable peace. A narrow focus on one aspect of the transition to a sustainable peace misses the challenge implied by the term “*jus*,” that the effort of those involved must be to find the connections between various legal obligations and discover what is systematic about the law that applies to the process of achieving a sustainable peace.

My primary concern in this chapter been to clarify where the extensive literature and experience regarding Transitional Justice is more or less likely to be helpful to those interested in *jus post bellum*. Secondly, I hope that the concept of *jus post bellum* may help those interested in Transitional Justice to refocus their field.

There is, perhaps, an irony in suggesting that the Grotian Tradition as identified by Lauterpacht is “continuing” with the development of *jus post bellum* as a system of law pertaining to the transition from armed conflict to a sustainable peace. Lauterpacht did not portray international law as an inkspot that had spread to some areas but not others. Should disputes have arisen in his era as to the legality of acts taken during the transition to a sustainable peace, he surely would have felt those disputes could have arisen.

Yet embracing the concept that there should be no judicial *non liquet* in international law permits the idea that international law changes and develops, clarifies and matures. In a sense, uncovering the normative and historical foundations of *jus post bellum* is a project of construction as much as genealogy or archaeology. Application of international law in the transition to sustainable peace may be more or less part of a coherent and integrated system. The vision of Transitional Justice practitioners of their field as not a “special” field of law but a “holistic” practice of judicial and non-judicial approaches to a particular circumstance<sup>88</sup> surely provides some guidance and reassurance to those approaching the definitional questions of *jus post bellum*.

While I maintain that *jus post bellum* is best viewed primarily as a system of law, it is not yet as tightly internally integrated as its sister systems of law, *jus ad bellum*, and *jus in bello*. Conversely, *jus post bellum* is probably more tightly connected to diverse fields of law that operate during times of transition from armed conflict and during other circumstances. This is not a threat to the legitimacy of the concept of studying the international law that exists during the circumstance of transition to a sustainable peace, rather it is an opportunity and a challenge to discern the operations of law in this complex and varied environment.

<sup>88</sup> ICTJ, “What is Transitional Justice?” (n 31).

# 6

## R2P and *Jus Post Bellum* Towards a Polycentric Approach

Carsten Stahn\*

### I. Introduction

*Jus post bellum*<sup>1</sup> and responsibility to protect (R2P)<sup>2</sup> are emerging concepts that are at the heart of contemporary discourse of international responses to conflict. Both concepts have seen a rapid growth in scholarship over the past decade.<sup>3</sup> They are treated in various disciplines, international law, international relations, and the ethics of warfare. In contemporary doctrine and policy, both notions are presented as related concepts that coincide in relation to the treatment of post-conflict behavior.<sup>4</sup> This chapter challenges

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<sup>1</sup> See generally Larry May, *After War Ends* (Cambridge University Press 2012); Larry May and Andrew Forcehimes, *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012); Carsten Stahn and Jann Kleffner, *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008); Brian Orend, "Jus Post Bellum: The Perspective of a Just-War Theorist" (2007) 20 *Leiden Journal of International Law* 571; Michael Walzer, *Arguing About War* (Yale University Press 2004). For a discussion of Walzer, see also Antonia Chayes, "Chapter VII ½: Is *Jus Post Bellum* Possible?" (2013) 24 *European Journal of International Law* 291; Guglielmo Verdirame, "What to Make of *Jus Post Bellum*: A Response to Antonia Chayes" (2013) 24 *European Journal of International Law* 307; Ruti Teitel, "Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May" (2013) 24 *European Journal of International Law* 335.

<sup>2</sup> On R2P, see Alex J. Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, 2009); Alex J. Bellamy, "The Responsibility to Protect—Five Years On" (2010) 24 *Ethics & International Affairs* 143–69; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press 2008); Gareth Evans, "The Responsibility to Protect: An Idea Whose Time Has Come... and Gone?" (2008) 22 *International Relations* 283–98; James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press 2010); Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011); Ekkehard Strauss, "Bird in the Hand Is Worth Two in the Bush—On the Assumed Legal Nature of the Responsibility to Protect" (2009) 1 *Global Responsibility to Protect* 291; Luke Glanville, "The Antecedents of 'Sovereignty as Responsibility'" (2011) 17 *European Journal of International Relations* 233; David Chandler, "Unravelling the Paradox of the Responsibility to Protect" (2009) 20 *Irish Studies in International Affairs* 27–39; Edward C. Luck, "Building a Norm: The Responsibility to Protect Experience" in Robert I. Rotberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages* (Brookings Institution Press 2010) 108–27; Edward C. Luck, "Sovereignty, Choice, and the Responsibility to Protect" (2009) 1 *Global Responsibility to Protect* 10–21; Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 *American Journal of International Law* 99.

<sup>3</sup> An entire Journal, i.e. "Global Responsibility to Protect," has been devoted to R2P. See also W. Andy Knight and Frazer Egerton (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge 2012). The concept has received attention in UN practice. See UN Secretary General, "Report of the Secretary-General, Implementing the Responsibility to Protect" (2009) UN Doc. A/63/677. For a survey of the growth in scholarship on *jus post bellum*, see below Jens Iverson, Jennifer Easterday, and Carsten Stahn, *Conclusions*, this volume.

<sup>4</sup> See e.g. Inger Österdahl and Esther van Zadel, "What Will *Jus Post Bellum* Mean: Of New Wine and Old Bottles" (2009) 14 *Journal of Conflict and Security Law* 175, 190; Tomasz Lewandowski, "Law of Occupation, *Jus Post Bellum* and Responsibility to Protect: Separate or Complementary Tools for Restoring Human Rights Order After Mass Atrocities?" (2013) 1 *Social Transformations in Contemporary Society* 120.

this assumption. It claims that the concepts are complementary and contain partly reinforcing and partly contradicting principles. It argues that a polycentric vision is necessary in order to understand their mutual benefits, limitations, and criticisms.

R2P and *jus post bellum* share certain elements of convergence. They provide a fresh lens on the conception of international peace and security, based on ethical and legal duties, which is in line with the idea of human security.<sup>5</sup> They coincide in their postulate to constrain violence and secure conditions for sustainable peace.<sup>6</sup> Moreover, they have been subject to similar criticisms, i.e. entrenching existing biases and inequalities in the international legal order, encouraging intervention or deploying questionable means, or undesirable normative agendas (i.e. imposing liberal peace).<sup>7</sup>

But there are fundamental structural differences which are frequently side-lined in discourse. *Jus post bellum* is part of a tradition that is mainly concerned with the theorization and emancipation of the “post,” including the justification and limits of authority.<sup>8</sup> R2P is rooted in the tradition of problem-solving and conflict management.<sup>9</sup> In this context, the “post” is largely treated as a continuum, i.e. as an annex to prevention and reaction. It is framed as a positive duty, namely in the language of a “responsibility to rebuild.” This idea is the most neglected chapter of the R2P doctrine.<sup>10</sup> Its most nuanced treatment can be found in the Report of the International Commission on Intervention and State Sovereignty and Intervention (ICISS).<sup>11</sup>

The ICISS derived the “responsibility to rebuild” from the obligation to react. Paragraph 5.1 outlines the main idea as follows:

The responsibility to protect implies the responsibility not just to prevent and react, but to follow through and rebuild. This means that if military intervention

<sup>5</sup> See generally Barbara von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Hart Publishing 2007). On humanity and international law, see Ruti Teitel, *Humanity's Law* (Oxford University Press 2011) 27–31; Anne Peters, “Humanity as the A and Ω of Sovereignty” (2009) 20 *European Journal of International Law* 513–44. For a critical analysis, see S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Indiana State University Press 2006).

<sup>6</sup> The International Commission on Intervention and State Sovereignty went so far to argue that “coalitions or nations act irresponsibly if they intervene without the will to restore peace and stability, and to sustain a post-intervention operation as long as necessary to do so.” See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre 2001) para. 7.40.

<sup>7</sup> For *jus post bellum* critiques or concerns, see e.g. Hilary Charlesworth, “Law After War” (2007) 8 *Melbourne Journal of International Law* 233–47; Nehal Bhuta, “New Modes and Orders: The Difficulties of a *Jus Post Bellum* of Constitutional Transformation” (2010) 60 *University of Toronto Law Journal* 799. For R2P critiques, see David Chandler, “The Responsibility to Protect: Imposing the Liberal Peace” (2004) 11 *International Peacekeeping* 59–81; Alex Bellamy, “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq” (2005) *Ethics and International Affairs* 31.

<sup>8</sup> On its grounding in just war theory, see *inter alia* Brian Orend, *War and International Justice: A Kantian Perspective* (Wilfrid Laurier Press 2000) 57; Brian Orend, *The Morality of War* (Broadview Press 2006) 160–90; May, *After War Ends* (n. 1) 43–61; Alex Bellamy, “The Responsibilities of Victory: *Jus Post Bellum* and the Just War” (2008) 34 *Review of International Studies* 601. On *jus post bellum* and “judgment,” see Jeremy Waldron, “Post Bellum Aspects of the Laws of Armed Conflict” (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 31, 45–55.

<sup>9</sup> It emerged partly in reaction to the “problem” of “humanitarian intervention” and the findings of the Independent International Commission on Kosovo, *Kosovo Report* (Oxford University Press 2000).

<sup>10</sup> See generally, Alexandra Gheciu and Jennifer Welsh, “The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction” (2009) 23 *Ethics & International Affairs* 121–46; Albrecht Schnabel, “The Responsibility to Rebuild,” in Knight and Egerton, *The Routledge Handbook of the Responsibility to Protect* (n. 3) 50.

<sup>11</sup> See ICISS, *The Responsibility to Protect* (n. 6). Chapter 5 is entitled “Post-Intervention Obligations.”

action is taken—because of a breakdown or abdication of a state's own capacity and authority in discharging its “responsibility to protect”—there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development. Conditions of public safety and order have to be reconstituted by international agents acting in partnership with local authorities, with the goal of progressively transferring to them authority and responsibility to rebuild.

The ICISS relied on implied symmetry between intervention and rebuilding. It implied that “the intervening side has to be prepared to remain engaged in the post-intervention phase as long as necessary in order to achieve self-sustained stability.”<sup>12</sup>

This description contrasts with the more limited treatment in the Report of the High-Level Panel on Threats, Challenges and Change<sup>13</sup> and the cryptic language in paras 138 and 139 of the 2005 World Summit Outcome Document (Outcome Document).<sup>14</sup> These documents adopted a more restricted stance towards intervention<sup>15</sup> and embraced a new structure that is now based on different pillars: i.e. “the protection responsibilities of the state” (Pillar 1); “international assistance and capacity-building” for the state (Pillar 2); and “timely and decisive response” by the international community (Pillar 3).<sup>16</sup> The initial idea of “responsibility to rebuild” is reflected under Pillar 2. It is framed in moderated form in paragraph 138 of the Outcome Document, which has been endorsed by the UN General Assembly<sup>17</sup> and the Security Council.<sup>18</sup> Paragraph 138 asserts that “the international community, should, as appropriate, encourage and help states to exercise this [responsibility to protect] responsibility.”

Paragraph 139 contains a general declaration of intention by states:

to commit [themselves], as *necessary and appropriate*, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

This passage is one of the most ambiguous elements of the R2P doctrine, but also one of its most innovative parts. The idea of rebuilding is striking since it suggests a comprehensive and duty-based approach toward reconstruction after conflict. It introduces the idea of “just peace” in the equation of intervention. It consolidates the shift from a “negative” conception of peace at the end of war towards a

<sup>12</sup> ICISS, *The Responsibility to Protect* (n. 6) para. 7.40.

<sup>13</sup> See High-Level Panel on Threats, Challenges and Change, “A More Secure World: Our Shared Responsibility” (2004) UN Doc. A/59/565 para. 201.

<sup>14</sup> UNGA, “World Summit Outcome Document” (2005) UN Doc. A/RES/60/1 paras 138–9.

<sup>15</sup> See also David Chandler, “R2P or Not R2P? More Statebuilding, Less Responsibility” (2010) 2 *Global Responsibility to Protect* 161, 163.

<sup>16</sup> This three-pillar structure is developed in the Report of the Secretary General, “Implementing the Responsibility to Protect” (2009) UN Doc. A/63/677 paras 11–66.

<sup>17</sup> See above n. 14.

<sup>18</sup> See SC Res. 1674, 28 April 2006, para. 4 (“reaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”). For an analysis of the invocation of R2P in SC. Res. 1973 of 26 March 2011, see Carsten Stahn, “Libya, the ICC and Complementarity: A Test for ‘Shared Responsibility’” (2012) 10 *Journal of International Criminal Justice* 325.

“positive” notion of peace which has gained ground in UN practice after the end of the Cold War.<sup>19</sup>

## II. Context

*Jus post bellum* and R2P coincide in their assumption that peace needs to be constructed. This claim has long-standing roots in just war theory and international law. War has traditionally been considered as the natural condition in international relations, and peace as the exception.<sup>20</sup> The Latin term *pax* implies the idea of agreement through consent.<sup>21</sup> Today, this logic has been reversed in international law. Peace is assumed to be “state of normalcy” following the prohibition of the use of force by the UN Charter.<sup>22</sup> Peacemaking as process has gained new attention in past decades, both in normative and institutional terms.<sup>23</sup> This development is driven by a number of macro-factors.

The growing attention to peacemaking is partly a reaction to changing dynamics of conflict. In modern peace studies and in UN peacebuilding operations conflict is mostly treated as a human security issue which is approached on the basis of a distinction between (i) the “pre-conflict” phase, (ii) the actual “conflict” phase, and the (iii) “post-conflict phase.”<sup>24</sup> This conceptualization is open to challenge, in light of grey zones between these stages and transformations of violence through conflict.<sup>25</sup> But it has served a matrix for response structures under R2P, i.e. prevention, reaction, and post-conflict engagement.

The idea of a responsibility to rebuild is a direct response to evidence that 40 percent of post-conflict countries relapse into violence after five years.<sup>26</sup> It is guided by the ambition to secure that the “post” marks an improvement over conflict reality, and potentially the *status quo ante* before the conflict. It takes into account that peacebuilding and state-building<sup>27</sup> require a collective effort which extends beyond warring parties.<sup>28</sup>

It increasingly accepted that each post-conflict engagement requires a situation-specific response.<sup>29</sup> The choice of the right type of response, and the framing of peacebuilding strategy requires a balancing act between collective and particularist interests. It might

<sup>19</sup> On “positive” peace, see Report of the Secretary General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, “An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping” (1992) UN Doc. A/47/277-S/2411; John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (United States Institute of Peace Press 1997) 75. On “just peace,” see Pierre Allan and Alexis Keller (eds), *What is a Just Peace?* (Oxford University Press 2006).

<sup>20</sup> See Stephen Neff, *War and Law of Nations: A General History* (Cambridge University Press 2005) 30–8.

<sup>21</sup> See Simon Chesterman, Keynote Address “Statebuilding and International Law,” <[http://www.westminster.ac.uk/\\_\\_data/assets/pdf\\_file/0003/81588/Chesterman.pdf](http://www.westminster.ac.uk/__data/assets/pdf_file/0003/81588/Chesterman.pdf)> (accessed 26 July 2013) 5.

<sup>22</sup> See Art. 2(4) of the UN Charter.

<sup>23</sup> See Christine Bell, ch. 10 and Jennifer Easterday, ch. 20, this volume.

<sup>24</sup> For earlier treatments of grey zones between war and peace, see Georg Schwarzenberger, “Jus Pacis, Ac belli?” (1943) 37 *American Journal of International Law* 460, 470; Philip Jessup, “Should International Law Recognize an Intermediate Status Between War and Peace?” (1954) 48 *American Journal of International Law* 98.

<sup>25</sup> See e.g. Orend, “Jus Post Bellum: The Perspective of a Just-War Theorist” (n. 1) 573–4; Astri Suhrke, ch. 14, this volume.

<sup>26</sup> See Human Security Report 2005, *War in Peace in the 21st Century* (Oxford University Press 2005) 9.

<sup>27</sup> For a critique, see David Chandler, *Empire in Denial: The Politics of International State-building* (Pluto Press 2006).

<sup>28</sup> See May, *After War Ends* (n. 1) 145–51.

<sup>29</sup> See Report of the Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies” (2005) UN Doc. (S/2011/634), summary (“We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models”).

require construction, as well as deconstruction. This has repercussions for normative structures and legal form. Norms and principles must be flexible enough to accommodate divergent preferences, domestic specificities, and pluralist structures.

The report of the ICISS took this into account by framing issues relating to “responsibility to rebuild” predominantly in moral terms. It relied heavily on elements of “just war theory.” This background informed both language and content, i.e. the articulation of obligations.<sup>30</sup> The UN adopted a more technical approach when framing R2P which is typical of UN culture. It phrased normative principles for behavior as policy guidelines, rather than as clear-cut moral or legal obligations. The Summit Outcome contains statements of intent, which are informed by voluntary self-commitment and solidarity. Rebuilding and restoring are framed as subjective commitments (“genuine commitment”), but not as firm legal duties. There is neither a legal commitment to a specific result (obligation of result), nor an obligation to engage in assistance (obligation of means).

In light of this ambiguity, the precise normative status of “post-conflict” responsibilities under R2P remains contested.<sup>31</sup> It is questioned whether this dimension of R2P or the very concept itself qualify as a norm, i.e. as an embodiment of shared convictions and binding framework for action.<sup>32</sup> There is a spectrum of voices on legal status and normativity. The High Level Panel Report spoke of an “emerging norm.”<sup>33</sup> In UN documents, R2P is understood as a “concept,” “principle,” or “standard.”<sup>34</sup> In the 2009 debate in the General Assembly,<sup>35</sup> qualifications ranged from “political commitment” (Liechtenstein)<sup>36</sup> to “emerging normative framework” (Bangladesh)<sup>37</sup> and “legal principle” (Canada).<sup>38</sup> Scholars use different categorizations. Some have qualified R2P as the expression of a general “duty of care”<sup>39</sup> or “soft law.”<sup>40</sup> Others differentiate between its status as a norm with regard to the “protection responsibilities” of the host state, and its character as “an emerging legal norm with regard to other states and the United Nations.”<sup>41</sup>

<sup>30</sup> The ICISS Report relied on criteria in just war theory, such as (i) “right authority,” (ii) “just cause,” or (iii) “right intention.” See ICISS, *The Responsibility to Protect* (n. 6) ch. 6.

<sup>31</sup> For a study see, Mehrdad Payandeh, “With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking” (2010) 35 *Yale Journal of International Law* 469.

<sup>32</sup> See, *inter alia*, Gregory C. Shaffer and Mark A. Pollack, “Hard Versus Soft Law in International Security” (2011) 52 *Boston College Law Review* 1147, 1238, contrasting “a soft-law responsibility to protect norm” with a “hard-law state sovereignty and nonintervention norm”; Chayes, “Chapter VII ½: Is *Jus Post Bellum* Possible?” (n. 1) 295 arguing that “R2P may have somewhat altered consciousness, but not the law.”

<sup>33</sup> See Report (n. 13) paras 202–3.

<sup>34</sup> See in this sense Edward Luck, “The Responsibility to Protect: Growing Pains or Early Promise?” (2010) 24 *Ethics & International Affairs*.

<sup>35</sup> UNGA, UN Doc. A/63/PV.97-100 of 23, 24, and 28 July 2009.

<sup>36</sup> UNGA, UN Doc. A/63/PV.97, 22.

<sup>37</sup> UNGA, UN Doc. A/63/PV.100, 22.

<sup>38</sup> UNGA, UN Doc. A/63/PV.98, 26.

<sup>39</sup> See Louse Arbour, “The Responsibility to Protect as a Duty of Care in International Law and Practice” (2008) 34 *Review of International Studies* 445–58.

<sup>40</sup> Jennifer M. Welsh and Maria Banda, “International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?” (2010) 2 *Global Responsibility to Protect* 213, 230.

<sup>41</sup> See Anne Peters, “The Security Council’s Responsibility to Protect” (2011) 8 *International Organizations Law Review* 1, 12.

Taken as a whole, R2P is thus not a hard norm, but rather a transformative principle, i.e. a structural concept with the ability to transform international law.<sup>42</sup> It serves at least two important functions. It deepens the discourse on the interplay between rights to obligations, including positive obligations after armed conflict and mass atrocities; and it promotes a fresh look on the relationship between moral imperatives and legal norms and standards. In this sense, it shares some synergies with *jus post bellum*.<sup>43</sup>

### III. The Relationship Between R2P and *Jus Post Bellum*: Contemporary Notions and Narratives

In contemporary scholarship, little attention has been devoted to the question of how R2P and *jus post bellum* relate to each other. The current theorization is rather simplistic. The two concepts are either equated with each other, or understood as sub-systems.

Some authors view *jus post bellum* as the embodiment of reconstruction and rebuilding, i.e. as a corollary of the corresponding R2P pillar. This argument is reflected in different theorizations of *jus post bellum*. Sometimes *jus post bellum* is directly equated to an “obligation to rebuild,”<sup>44</sup> or a “responsibility for post-conflict reforms,”<sup>45</sup> i.e. language mirroring R2P. Others regard *jus post bellum* as part of a structural framework of reconstruction. It is branded as an umbrella for transformative occupation<sup>46</sup> as a framework for the obligations of occupiers in law-reform<sup>47</sup> or as a law of constitutional transformation.<sup>48</sup> Others again treat *jus post bellum* as a specific part of the broader R2P framework. For instance, Österdahl and van Zandel argue that R2P is “a broader concept than the framework of *jus post bellum*” since R2P includes more than the attainment of a just and durable peace.<sup>49</sup> R2P is thus regarded as the parent theme, and *jus post bellum* as a framework for its strengthening and implementation.

This conception is problematic. There are three principal problems with this type of argument. First, this equation disregards that there are significant normative differences between the two concepts. The peacebuilding component of R2P is primarily an institutional concept. It is a result of institutional lessons inside the UN system and geared toward it. This understanding is reflected in the Report of the Secretary General on “Implementing the Responsibility to Protect,”<sup>50</sup> where it is treated as Pillar 2 under the heading “International Assistance and Capacity-Building.” Ultimately, R2P is designed to foster institutional interaction and build partnership between states and the UN

<sup>42</sup> Peters, “The Security Council’s Responsibility to Protect” (n. 41).

<sup>43</sup> For an illustration of open *jus post bellum* questions, see Carsten Stahn, “The Future of *Jus Post Bellum*,” in Stahn and Kleffner, *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (n. 1) 231–7.

<sup>44</sup> See Chayes, “Chapter VII ½: Is *Jus Post Bellum* Possible?” (n. 1) 291, 304 (“moral obligation to rebuild”).

<sup>45</sup> Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 43 *Vanderbilt Journal of International Law* 119.

<sup>46</sup> See Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights” (2006) 100 *American Journal of International Law* 580, 619.

<sup>47</sup> Kristen Boon, “Obligations of the New Occupier: The Contours of *Jus Post Bellum*” (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 57.

<sup>48</sup> See Bhuta, “New Modes and Orders” (n. 7).

<sup>49</sup> See Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean” (n. 4) 191.

<sup>50</sup> See Report (n. 16) paras 28 *et seq.* of “Implementing the Responsibility to Protect.”

system. It is associated with four types of action: (i) encouragement and persuasion of states to meet their protection responsibilities (“under Pillar 1”), (ii) “helping them to exercise this responsibility,” (iii) “helping them to build their capacity to protect,” and (iv) assisting States “under stress *before* crises and conflicts breaks out.”<sup>51</sup>

*Jus post bellum* has a different starting point. It is a normative concept. It is concerned with evaluating and guiding choices, and providing judgment, namely vindicating right against wrong.<sup>52</sup> It is driven by an ethical and a normative ambition, namely to provide parameters for evaluation of action, and to establish a public context for debate. It has a dual foundation: It remains one of the most under-researched components of Just War theory,<sup>53</sup> and it is gaining ground as a legal concept.<sup>54</sup> Due to this dual nature, it has different normative layers.

Perhaps the most accepted understanding in Just War theory is that *jus post bellum* serves as a framework to evaluate action, based on set of normative criteria that facilitate choices and judgment. It identifies certain legitimacy standards for behavior,<sup>55</sup> i.e. standards that balance ethical, legal, and political considerations.<sup>56</sup> In the legal field, understandings vary. Some scholars argue that *jus post bellum* may be considered as a legal regime, i.e. as a body of rules and principles guiding assessment and choices.<sup>57</sup> Following such a logic, it may be said to comprise different categories of law (e.g. *ex lata, lex ferenda*<sup>58</sup>) and types of norms, i.e. rules of conflict and balancing principles for choice among conflicting imperatives or soft norms, in areas such as statebuilding, post-conflict reconstruction, transformative occupation, or transitional justice.<sup>59</sup> According to other voices, *jus post bellum* does not necessarily have to be construed as an independent system of law. It might be understood as an ordering framework, i.e. as a means to solve conflicts in the application of different legal orders (i.e. international v. domestic) or areas of law,<sup>60</sup> as a guiding concept for interpretation of rights and obligations,<sup>61</sup> or as a normative space for discourse.<sup>62</sup> These functions differ from the more “managerial” and institutional focus of R2P.

<sup>51</sup> See Report (n. 16) para 28.

<sup>52</sup> See Waldron, “Post Bellum Aspects of the Laws of Armed Conflict” (n. 8).

<sup>53</sup> See May, *After War Ends* (n. 1) 1.

<sup>54</sup> See e.g. Dieter Fleck, ch. 3, this volume.

<sup>55</sup> See Ian Clark, *Legitimacy in International Society* (Oxford University Press 2005) 220 arguing that “legitimacy denotes a combination of values, and represents some balance amongst them, when [...] individual normative standards might tend to pull in opposite directions.”

<sup>56</sup> See Bellamy, “The Responsibilities of Victory” (n. 8) 607–8.

<sup>57</sup> See Carsten Stahn, “‘*Jus In Bello*, ‘*Jus Ad Bellum*’—‘*Jus Post Bellum*’?: Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 921, 937–8; Jens Iverson, ch. 5, this volume.

<sup>58</sup> For a discussion, see Verdirame, “What to Make of *Jus Post Bellum*” (n. 1) 311–13.

<sup>59</sup> For an argument equating *Jus Post Bellum* with Transitional Justice, see Teitel, “Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice” (n. 1) 341.

<sup>60</sup> See e.g. Stahn, “The Future of *Jus Post Bellum*” (n. 43) 234.

<sup>61</sup> See James Gallen, ch. 4, this volume.

<sup>62</sup> See Christine Bell, “Post-conflict Accountability and the Reshaping of Human Rights and Humanitarian Law” in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights* (Oxford University Press 2011) 328, 369, arguing that *jus post bellum* can be understood as a “discursive project or a way of understanding the practical pressures which push for a distinctive normative revision.” See also Jennifer Easterday, ch. 20, this volume.



Secondly, R2P and *jus post bellum* have a different scope of application. The application of R2P is linked to idea of a shift of responsibility, based on failure of domestic jurisdiction. This trigger applies to all pillars. The Secretary General made this point specific in his 2009 Report (“Implementing the Responsibility to Protect”). The report notes:

[W]hen national political leadership is weak, divided or uncertain about how to proceed, lacks the capacity to protect its population effectively, or faces an armed opposition that is threatening or committing crimes and violations relating to the responsibility to protect, measures under pillar two could play a critical role in the international implementation of the responsibility to protect.<sup>63</sup>

This threshold illustrates some of the inherent dilemmas of the R2P doctrine.<sup>64</sup> It links international assistance and capacity-building expressly to domestic incapacity, i.e. unwillingness or inability. This conception carries a specific stigma, i.e. the idea of tutelage. This focus has exposed R2P to (neo-colonialist) critiques by some UN members<sup>65</sup> and the President of the UN General Assembly.<sup>66</sup> This trigger has further ambiguous side-effects from a policy point of view. It may provide a pretext for dispute (i.e. as to whether the threshold is met), rather than facilitating speedy delivery of aid and assistance.<sup>67</sup>

*Jus post bellum* operates on a different premise. Its application is triggered primarily by factual considerations, i.e. the ending of conflict.<sup>68</sup> It is less concerned with a shift of responsibility from the domestic realm to the “international responsibility.” It applies to international and domestic actors alike. It may thus be less vulnerable to ideological critiques (e.g. imperialism).

Finally, R2P and *jus post bellum* have different rationales. In some situations, they may even have contrary implications. R2P encourages action and collective engagement, including “international assistance and capacity building.” The ICISS Report even

<sup>63</sup> See Report (n. 16) para. 29.

<sup>64</sup> It is sometimes suggested to use thresholds developed in context of “human security” as indicators for R2P. See Vesselin Popovski, “Responsibility to Protect” in Malcolm McIntosh and Alan Hunter (eds), *New Perspectives on Human Security* (Greenleaf 2010) 204, 210, 216.

<sup>65</sup> Such criticism has been voiced by members of the non-Alignment Movement who argued that the framing of R2P favors powerful states, since they retain discretion whether and where to intervene and are unlikely cross the application threshold. See Carlo Focarelli, “The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine” (2008) 13 *Journal of Conflict and Security Law* 191, 202. See also Noam Chomsky, “Simple Truth, Hard Problems: Some Thoughts on Terror, Justice and Self-Defence” (2005) 80 *Philosophy* 5, 7.

<sup>66</sup> See Office of the President of the General Assembly, “Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity” (2009) <<http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf>> (accessed 26 July 2013). The document states:

Colonialism and interventionism used responsibility to protect arguments [...] The people have inalienable rights and are sovereign. The concept of sovereignty as responsibility either means this and therefore means nothing new or it means something without any foundation in international law, namely that a foreign agency can exercise this responsibility. It should not become a “jimmy in the door of national sovereignty.” The concept of responsibility to protect is a sovereign’s obligation and, if it is exercised by an external agency, sovereignty passes from the people of the target country to it. The people to be protected are transformed from bearers of rights to wards of this agency.

<sup>67</sup> See in relation to the situation in Sudan, Bellamy, “Responsibility to Protect or Trojan Horse?” (n. 7) 44, 47, 52.

<sup>68</sup> For a discussion, see Jann Kleffner, ch. 15 and Rogier Bartel, ch. 16, this volume.

implies a “responsibility” for international actors to “remain engaged [...] as long as necessary.”<sup>69</sup> *Jus post bellum* adopts a different logic. It takes into account other factors, such as the consequences of intervention and implications for the relationship between the “intervener” and domestic authorities. The two concepts might thus point to different necessities. This becomes evident in cases of unlawful intervention. In such cases, *jus post bellum* may warrant the withdrawal of international actors from the ground as the most effective remedy for the domestic polity.<sup>70</sup> This imperative conflicts with the incentive for continuing engagement or a more ambitious duty to reconstruct under R2P.

#### IV. Towards a Polycentric Vision

In light of these factors, it is necessary to re-consider the theorization and interplay between R2P and *jus post bellum*. Both concepts share certain points of convergence. But their communalities are area-specific. The concepts are thus complementary, rather than concentric.

*Jus post bellum* serves three general potential functions:

- (i) it has a certain preventive function, by requiring actors to look into the consequences of action before, rather than “in” and “after” intervention.
- (ii) it may serve as a constraint on violence in armed conflict; and
- (iii) it seeks to facilitate a succession to peace, rather than “exit” from conflict.

These three functions share synergies with individual elements of the different pillars of R2P. But they may diverge in method and result. It is thus more feasible to adopt a polycentric vision, based on a pillar-specific assessment. The distinct pillars will be examined step-by-step.

##### A. The “protection responsibilities” pillar

Contrary to current representations in doctrine, *jus post bellum* may actually have more synergies with Pillar 1 of R2P, i.e. its protective function, than with the “assistance and capacity-building” pillar. Both concepts coincide in their vision to constrain the use of force.

Initially, R2P was associated with fears of relaxing standards for intervention.<sup>71</sup> But this concern has been mitigated with the re-framing of the concept in Secretary General Annan’s “In Larger Freedom” Report<sup>72</sup> and the Millennium Summit, which have placed greater emphasis on the sovereign obligations of the territorial state<sup>73</sup> and re-directed the focus from unilateral intervention to collective security.<sup>74</sup> This is clearly

<sup>69</sup> See above n. 12.

<sup>70</sup> On occupation and exit, see also below Part IV.

<sup>71</sup> See Gareth Evans, “From Humanitarian Intervention to the Responsibility to Protect” (2006) 24 *Wisconsin International Law Journal* 703–22.

<sup>72</sup> See UNGA, “Report of the Secretary General: In Larger Freedom: Towards Development, Security and Human Rights for All” (2005) UN Doc. A/59/2005, para. 126.

<sup>73</sup> See also Report (n. 16) para. 13 (“The State, however, remains the bedrock of the responsibility to protect, the purpose of which is to build responsible sovereignty, not to undermine it”).

<sup>74</sup> The Outcome Document speaks of authorization by the Security Council and fails to mention action by regional organizations or unilateral intervention.

reflected in the wording of paragraphs 138 and 139 of the Outcome Document, which seek to strengthen the UN and focus measures involving the use of force on the “United Nations system.”<sup>75</sup> Additional attention has been devoted to prevention.<sup>76</sup> It is listed as an obligation of the territorial state in paragraph 138<sup>77</sup> and as a corresponding incentive for the international community and the UN.<sup>78</sup> Prevention of atrocities has become one of the main areas of preoccupation of R2P.<sup>79</sup>

*Jus post bellum* embraces this goal. Just war theorists have traditionally argued that *jus post bellum* is to some extent inherent in *jus ad bellum* and that it serves as a constraint on the use of force.<sup>80</sup> The requirement to conduct conflict in a way that is conducive to peace has formed part of just war theory since its inception. It has been linked to the right intent requirement under just war doctrine, i.e. the requirement to use armed force only for the sake of the just cause, since the early Christian tradition (*St. Augustine*).<sup>81</sup> It was taken up in the formulation of just war doctrine by Thomas Aquinas<sup>82</sup> and later renderings, e.g. Alberico Gentili’s claim that the waging of war should not jeopardize the return to peace.<sup>83</sup> Today, it is presented in different form in modern just war theory.<sup>84</sup> One of the most far-reaching claims is that any intervention should contain “a pre-commitment to *jus in bello* and *jus post bellum*.”<sup>85</sup> This implies that states would have to specify in public how they implement *jus post bellum* before going to war or intervening.<sup>86</sup>

The claim that every intervention should be subject to a public feasibility test under the right intention requirement *ex ante* is problematic since the ending of conflict typically involves a multiplicity of actors and measures that are not necessarily linked to

<sup>75</sup> See in particular para. 139 (“In this context, we are prepared to take collective action, in a timely and responsive manner, through the Security Council, in accordance with the Charter, including Chapter VII”). In the 2009 Report, the Secretary General reaffirmed that “under the ‘Uniting for peace’ procedure, the Assembly can address such issues when the Council fails to exercise its responsibility with regard to international peace and security because of the lack of unanimity among its five permanent members.” See Report (n. 16) para. 63.

<sup>76</sup> See generally Sheri P. Rosenberg, “Responsibility to Protect: A Framework for Prevention” (2009) 1 *Global Responsibility to Protect* 442.

<sup>77</sup> Paragraph 138 states: “This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”

<sup>78</sup> Paragraph 138 states: “The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.”

<sup>79</sup> See Report of the Secretary General, “Early Warning, Assessment and the Responsibility to Protect” (14 July 2010) UN Doc. A/64/864. It includes techniques, such as early warning, preventive diplomacy, and preventive deployment.

<sup>80</sup> See Mark Evans, “Balancing Peace, Justice and Sovereignty in *Jus Post Bellum*: The Case of ‘Just Occupation’” (2008) 36 *Journal of International Studies* 533, 534.

<sup>81</sup> See St. Augustine, *The City of God* (tr. H. Bettenson, Penguin 1972) 866.

<sup>82</sup> See Thomas Aquinas, *Summa Theologiae*, Pt. II-II, Qu. 40. Art. I (trs Fathers of the English Dominican Province, Burns, Oates, and Washburn 1936).

<sup>83</sup> See Randall Lesaffer, “Alberico Gentili’s *ius post bellum* and Early modern Peace Treaties” in Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press 2010) 221.

<sup>84</sup> For the argument that “the object in war is a better,” see Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* (Basic Books 1977) 122–3.

<sup>85</sup> See Brian Orend, *Michael Walzer on War and Justice* (University of Wales Press 2000) 137–9, 190; Analisa Koeman, “A Realistic and Effective Constraint on the Resort to Force? Pre-commitment to *Jus in Bello* and *Jus Post Bellum* as Part of the Criterion of Right Intention” (2007) 6 *Journal of Military Ethics* 198.

<sup>86</sup> See Koemann, “A Realistic and Effective Constraint on the Resort to Force?” (n. 85) 199.

the original title for intervention. Moreover, it fits more closely in the logic of just war theory than the legal realm, since international law is not concerned with motive assessment. But the general argument that *jus post bellum* may reinforce a *jus contra bellum* has some validity in international law. It gains relevance if the “commitment” idea is turned from a subjective criterion into a more objective consequentialist test. It might be asked whether the respective operation is capable, in terms of its forms and means, to contribute to peacemaking and to deal with the consequences entailed by the use of force. Such an idea is inherent in the principle of proportionality.<sup>87</sup> It may be argued that *jus post bellum* consequences should be taken into account in the initial assessment of *ad bellum* considerations, including the question whether the use of force causes harm that does not remove the threat. This argument has been put forward in the area of collective security in the context of the reform of the Security Council.<sup>88</sup> The UN High Level Panel suggested a corresponding restriction for intervention more generally, including enforcement action under Chapter VII. It recommended assessing in each case *ex ante* whether an intervention has the capacity to remove the threat in question.<sup>89</sup>

In some cases, *jus post bellum* may even provide an argument not to resort to the use of force in the first place. One might, for example, argue that the inability to secure peace and security in the post-conflict phase warrants abstention, if an intervention leads to devastation of a population, projected insurgency or other forms of non-controllable violence.<sup>90</sup> *Jus post bellum* may thus contribute to prevention, by serving as an incentive not to engage in conflict.

This reading remains contested since it might be perceived as a challenge to the general separation between *ad bellum* and *post bellum*.<sup>91</sup> It is therefore argued that *jus post bellum* should constitute a “test of legitimacy in its own right.”<sup>92</sup> According to this view, the “justice of peace” must be assessed independently of the causes of resort to force.<sup>93</sup> A state might thus be held accountable for violating *post bellum* responsibilities

<sup>87</sup> See generally Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004). For an illustration of “*jus ad bellum*” proportionality principles, see Enzo Cannizzaro, “Contextualizing Proportionality: *Jus Ad Bellum* and *Jus In Bello* in the Lebanese War” (2006) 88 *International Review of the Red Cross* 779, 781 *et seq.* On the interplay between *jus ad bellum* and *jus post bellum* proportionality, see May, *After War Ends* (n. 1) 171–80.

<sup>88</sup> Note that this pre-commitment idea has not been incorporated in the R2P framework. For critical analysis, see Österdahl and van Zandel, “What Will *Jus Post Bellum* Mean” (n. 4) 190–1.

<sup>89</sup> The High Level Panel argued that the Security Council should adopt guidelines to assess whether force should be used “as a matter of good conscience and good sense” (para. 205). It stated: “In considering whether to authorize or endorse the use of military force, the Security Council should always address—whatever other considerations it may take into account—at least the following five basic criteria of legitimacy: [...] (e) *Balance of consequences*. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction.” See “A more Secure World” (n. 13) para. 207. See also ICISS, *The Responsibility to Protect* (n. 6) 4.41–4.43 which required that the military intervention must have realistic prospects for success.

<sup>90</sup> See also May, *After War Ends* (n. 1) 168.

<sup>91</sup> See generally Keiichihiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart Publishing 2011). For a re-thinking, see Robert Sloane, “The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War” (2009) 24 *Yale Journal of International Law* 48.

<sup>92</sup> See Bellamy, “The Responsibilities of Victory” (n. 8) 622.

<sup>93</sup> See Bellamy, “The Responsibilities of Victory” (n. 8) 622.

(i.e. for withdrawal or violation of protection duties), irrespective of the original title of intervention. This interpretation shifts the focus formally from the *ex ante* perspective to the *ex post* perspective. But it ultimately has a similar impact on prevention. If post-conflict behavior is subject to accountability under *jus post bellum*, actors have an incentive not use force in a way which exposes them to *post bellum* liability, or which makes it difficult for them to assume proper responsibility for restoring peace.<sup>94</sup>

Both variations have thus one point in common: They reinforce the pacific dimension of the “protection responsibility” under Pillar 1.<sup>95</sup>

## B. The “timely and decisive response” pillar

Different considerations apply in the relationship between *jus post bellum* and the response pillar under the R2P doctrine. In this context, it is probably more accurate to state that *jus post bellum* complements R2P or goes beyond its imperatives.

R2P is focused on thresholds for action and response mechanisms. *Jus post bellum* has a broader substantive focus. It determines modalities and content. It serves to some extent as a catalyst for innovation. It provides, in particular, a means to re-think the law of armed conflict.<sup>96</sup> It may serve partly as an instrument to prevent an overreach of international humanitarian Law (IHL), and partly as a complement to it. It embodies two dimensions: a prohibitive component, i.e. a duty not to inhibit certain norms or objectives of peace through a response to mass atrocities, and certain affirmative duties, i.e. positive obligations.

### *Jus post bellum as constraint*

Existing international law contains a number of constraints under *jus ad bellum* and *jus in bello*. This raises the question: to what extent might *jus post bellum* provide added value? Scholarly opinion has identified a range of potential uses of *jus post bellum* in relation to responses to armed conflict.

#### *Re-assessing proportionality*

The most general proposal is that *jus post bellum* may refine proportionality assessments or introduce additional proportionality criteria into existing frameworks. Specific proportionality assessments are embedded in norms and prohibitions under IHL.<sup>97</sup> They

<sup>94</sup> See Bellamy, “The Responsibilities of Victory” (n. 8) 623.

<sup>95</sup> On “just war theory” and pacifism, see May, *After War Ends* (n. 1) 232–4.

<sup>96</sup> See Inger Österdahl, ch. 11, this volume.

<sup>97</sup> See e.g. the principle of proportionality in attack, codified in Art. 51(5)(b) and Art. 57 of Additional Protocol I to the Geneva Conventions, and the precautionary principles under Art. 57(1), (2) and Art. 58 of Additional Protocol I. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 25 UNTS 3. For their customary law status, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press 2005) 46–76. On environmental damage and proportionality, see Art. 8(2)(b)(iv) of the Statute of the International Criminal Court, which contains an explicit proportionality test, and Art. 55 and Art. 85(3)(b) of Additional Protocol I. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered

confine means of armed conflict (i.e. attack, targeting choices) to specific ends (e.g. military advantage). *Jus post bellum* might introduce a novel general end in relation to the conduct of hostilities, namely, the objective not to defeat the end of sustainable peace through the conduct of warfare.

This argument has been most forcefully advocated by Larry May.<sup>98</sup> According to traditional understandings, proportionality warrants that the scope of harm or destruction inflicted in the course of military objectives must “be proportionate to the importance of the objective.”<sup>99</sup> May proposes a new vision of proportionality. He draws attention to the close nexus between *jus in bello* and *jus post bellum*. He argues that parties should refrain from using tactics of victory and war that would cause unnecessary damage to the objective of lasting peace.<sup>100</sup> This test would require parties to refrain from using measures that cause irreparable damage to specific foundations of peacebuilding, such as rebuilding, retribution, or reconciliation. If, for instance, people have been treated wrongly or inhumanely during the war, so goes the argument, reconciliation will be more difficult to achieve.

May goes even a step further. He suggests that *jus post bellum* incorporates a proportionality test of its own, which complements *jus ad bellum* and in *jus in bello* proportionality. He argues that “post war efforts to achieve a just and lasting peace should not inflict more harm than good on the populations affected.”<sup>101</sup> This would require peace builders to consider the effects of conflict and measures necessary to reverse its most harmful consequences, such as “rebuilding of damaged property” or the restoration of trust that is necessary for the “rule of law.”<sup>102</sup>

May regards these principles as “moral principles” that are “meant to inform decisions about how international law is best to be established down the road.”<sup>103</sup> The application of the proportionality principles would reinforce a fundamental rethinking of the laws of war. *Jus post bellum* might become a parameter to reduce the length of conflict. It might impose an obligation of means on parties’ obligation to minimize casualties and to avoid an indefinite prolongation of armed conflict (e.g. Israeli-Palestinian). It may further entail a duty to withdraw, i.e. a “completion strategy” for occupation.<sup>104</sup>

into force 1 July 2002) UN Doc. A/CONF.183/9 as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999 in PCNICC/1999/INF/3 (Rome Statute).

<sup>98</sup> See Larry May, “Proportionality and the Fog of War” (2013) 24 *European Journal of International Law* 315.

<sup>99</sup> May, “Proportionality and the Fog of War” (n. 98) 234.

<sup>100</sup> May, “Proportionality and the Fog of War” (n. 98) 323.

<sup>101</sup> May, “Proportionality and the Fog of War” (n. 98) 324. He postulates two principles, a domestic one, geared towards parties to a conflict, and an international variation (“Whatever is required by the application of other *jus post bellum* principles must not impose more harm on the peoples of the world than is alleviated by the application of these principles”) at 325.

<sup>102</sup> May, “Proportionality and the Fog of War” (n.98) 324.

<sup>103</sup> May, “Proportionality and the Fog of War” (n.98) 318.

<sup>104</sup> Currently, the end of occupation is determined on a case-by-case basis and driven by functional considerations, i.e. effective control, consent or transfer of authority. See Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press 2012) 56. For a discussion of “exit” from occupation, see Gregory H. Fox, “Exit and Military Occupation” in Richard Caplan (ed.), *Exit Strategies and Statebuilding* (Oxford University Press 2012) 197–223. On the problems relating to the determination of the start and end of occupation, see Tristan Ferraro, “Determining the Beginning and End of an Occupation Under International Humanitarian Law” (2012) 94 *International Review of the Red Cross* 133.

*Re-assessing occupation*

*Jus post bellum* may further serve as a parameter to judge and assess occupation. State practice over the past decades has shown that the existing *jus in bello* is ill-suited to address challenges arising from dynamic processes of transformation.<sup>105</sup> The law of occupation, as provided under *jus in bello*, is generally directed at the maintenance of the *status quo*.<sup>106</sup> It provides a framework to maintain law and order and to protect the sovereignty of the ousted power. But it is “conservationist” in focus. It does not provide an elaborate governing framework to facilitate transitions beyond the *status quo ante*. This became evident, *inter alia*, in the reconstruction of Germany and Japan after 1945<sup>107</sup> and the exercise of public authority by the allied Powers in Iraq,<sup>108</sup> which departed from classical occupation models.

*Jus post bellum* may have three novel functions in relation to occupation. First, it may remedy certain deficits in the existing architecture. It might provide a legal framework to deal with post-conflict presences that do not fit easily into current conceptions of occupation, such as transitions to democratic rule.<sup>109</sup> This claim has been made specifically in relation to cases of “transformative occupation.”<sup>110</sup> *Jus post bellum* has two comparative advantages. It would remove certain types of post-conflict presences from the stigma of “occupation,” and it facilitates the exercise of civil administration and statebuilding in transitions from conflict to peace.

<sup>105</sup> See generally Roberts, “Transformative Military Occupation” (n. 46); Gregory Fox, *Humanitarian Occupation* (Cambridge University Press 2008); Steven R. Ratner, “Foreign Occupation and International Territorial Administration: The Challenges of Convergence” (2005) 16 *European Journal of International Law* 695.

<sup>106</sup> The need to respect the *status quo* is reflected in Art. 43 of the 1907 Hague Regulations. It states: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Article 64 of the Fourth Geneva Convention appears to provide some more flexibility to change existing domestic laws. It states: “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention [...] The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.” For a discussion, see Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 110–12; Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupiers” (2005) 16 *European Journal of International Law* 661, 670–71; Benvenisti, *The International Law of Occupation* (n. 104) 89–102.

<sup>107</sup> See Nisuke Ando, *Surrender, Occupation and Private Property in International Law* (Oxford University Press 1991); Robert Jennings, “Government in Commission” (1946) 23 *British Yearbook of International Law* 112; Benvenisti, *The International Law of Occupation* (n. 104) 159–66.

<sup>108</sup> See, *inter alia*, Roberts, “Transformative Military Occupation” (n. 46) 604–18; Gregory H. Fox, “The Occupation of Iraq” (2005) 32 *Georgetown Journal of International Law* 195; Andrea Carcano, “End of the Occupation in 2004? The Status of the Multinational Force in Iraq after the Transfer of Sovereignty to the Interim Iraqi Government” (2006) 11 *Journal of Conflict and Security Law* 41.

<sup>109</sup> Benvenisti argues that “the forced transition to democracy” in Iraq was arguably “the most radical departure from the conservationist principle.” See Benvenisti, *The International Law of Occupation* (n. 104) 269.

<sup>110</sup> See Roberts, “Transformative Military Occupation” (n. 46) 619 (“Underlying all consideration of transformative occupation is the fact that it is not a temporary wartime occupation, liable to be ended by the fortunes of war or a peace agreement. Rather, it typically arises *after* a war—whether civil or international—and/or after a foreign military intervention; and it is likely to end in a different way, as stable

Secondly, *jus post bellum* might in some instances serve as a benchmark and constraint for occupation, i.e. an instrument to guide reconstruction and legislative reform. The law of occupation is based on ideas of agency. It requires the occupant to act as an agent for the ousted government and basic humanitarian concerns of the inhabitants of the state.<sup>111</sup> It is neutral towards governing techniques, such as participatory rule or deliberative techniques.<sup>112</sup> *Jus post bellum* offers a different perspective which is increasingly important in processes of state transformation. It requires foreign rulers or transitional governments to exercise public authority through a “democratic” lens, i.e. principles of self-determination, consultative rule, and domestic empowerment (“local ownership”).<sup>113</sup> This perspective may serve as guidance in judging measures taken under occupation.<sup>114</sup>

The most controversial claim is that *jus post bellum* may provide a judgment over the title to occupation.<sup>115</sup> The current *jus in bello* does not contemplate a distinction between lawful and unlawful occupation. Following the principle of distinction between *jus ad bellum* and *jus in bello*, and the neutrality of the laws of war, the law of occupation is based on a factual test, i.e. the exercise of effective control over territory.<sup>116</sup> There is no distinct set of rules for lawful and unlawful occupations, nor a central decision-making body. This *status quo* is based on the idea that even unjust or unlawful occupants must abide by the constraints of the law of occupation.<sup>117</sup> This unified stance was adopted, *inter alia*, in the context of the Iraqi occupation under Security Council Resolution 1483, which did not pass any value judgment on legality.<sup>118</sup>

The neutrality towards unjust occupations, i.e. belligerent occupation without or against the consent of occupied people, is criticized from a moral point of view in the

government emerges in the territory itself. In such circumstances, the *jus in bello* is unlikely to be a perfect fit. It might even be tempting to invoke an emerging or future *jus post bellum* as a better basis for handling these situations”).

<sup>111</sup> See Benvenisti, *The International Law of Occupation* (n. 104) 76–86, 104–6.

<sup>112</sup> For a criticism of occupation practice in relation to Iraq, see Benvenisti, *The International Law of Occupation* (n. 104) 272 (“If the right of the local population for self-determination is taken seriously, it should mean that the reforms introduced by the occupant—as beneficial to the local population as they may be—must involve the population. As a matter of substance, the content of the new policies must be compatible with the people’s interests”).

<sup>113</sup> See generally Annika S. Hansen, “From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict” in Stahn and Kleffner, *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (n. 1) 135; Matthew Saul, “Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement” (2011) 16 *Journal of Conflict and Security Law* 165.

<sup>114</sup> See Jean L. Cohen, “The Role of International Law in Post-Conflict Constitution-Making: Towards a *Jus Post Bellum* for ‘Interim Occupations,’” (2006/2007) 51 *New York Law School Review* 498, 531; Kristen Boon, “Legislative Reform in Post-Conflict Zones: *Jus Post Bellum* and the Contemporary Occupant’s Law Making Powers” (2005) 50 *McGill Law Journal* 285; Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 200.

<sup>115</sup> For a discussion, see Jeff McMahan, “The Morality of Military Occupation” (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 101.

<sup>116</sup> Currently, this is assessed on “functional grounds,” i.e. exercise of effective control. In *DRC v. Uganda*, the ICJ required the exercise of actual authority. See ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, para. 173.

<sup>117</sup> See McMahan, “The Morality of Military Occupation” (n. 115) 122.

<sup>118</sup> SC Res. 1483 was silent on the legality of the use of force.



context of just war theory.<sup>119</sup> It is argued that “unlawful occupiers” owe the population a duty to leave and compensate the occupied people,<sup>120</sup> and that infringements of the modalities of occupation provide a moral title to resistance which should be recognized.

*Jus post bellum* may *de lege ferenda* help bring these moral considerations closer in line with the law, e.g. by placing occupation in relation to entitlements under the law of self-determination (i.e. right to resistance) and/or creating institutions for the surveillance of the exercise of occupation, in addition to the Security Council.

### Jus post bellum and positive duties

Similar considerations apply in relation to positive duties. Such obligations are occasionally recognized under IHL. One famous example is the duty to investigate and prosecute “grave breaches” under the Geneva Conventions.<sup>121</sup> Other duties relate to occupation. The Fourth Geneva Convention entails duties that go beyond negative obligations, i.e. obligations to provide certain services or protections (care and education of children, Article 51), medical and food supplies (Article 56), and relief schemes (Article 59). But they are geared toward the maintenance of public order. There is no general duty of continuing engagement or “reconstruction.” Such a duty is typically framed in terms of a moral obligation.<sup>122</sup>

#### Post-occupation obligations

*Jus post bellum* refines this vision. It might, *inter alia*, provide a framework to deal with positive duties arising out of occupation.<sup>123</sup> Technically, the obligation to ensure public order and safety exists until the end of occupation. But the withdrawal of the occupant might cause harm to the local population. The problem of post-occupation obligations has become relevant in several contexts, i.e. Israeli disengagement from South Lebanon or Gaza, and transformative occupations. Based on a ruling by the Israeli Supreme Court<sup>124</sup> and human rights duties of care in the context of transfer of territory,<sup>125</sup> it has been argued that undue consequences arising out of the exit from occupation should be mitigated, in particular in cases where the occupant withdraws “from an area that was held for many years and whose economy and society have become dependent on

<sup>119</sup> See McMahan, “The Morality of Military Occupation” (n. 115) 113–21, distinguishing three sets of regimes: “permissible action during a just occupation,” “permissible action during an unjust, and unjustified occupation,” and “permissible action during an unjust but justified occupation.”

<sup>120</sup> McMahan, “The Morality of Military Occupation” (n. 115) 116.

<sup>121</sup> See Art. 49 of the First Geneva Convention, Art. 50 of the Second Geneva Convention, Art. 129 of the Third Geneva Convention, and Art. 146 of the Fourth Geneva Convention. For a discussion, see e.g. Claus Kress, “Reflections on the Iudicare Limb of the Grave Breaches Regime” (2009) 7 *Journal of International Criminal Justice* 789–809; Knut Dörmann and Robin Geiß, “The Implementation of Grave Breaches into Domestic Legal Orders” (2009) 7 *Journal of International Criminal Justice* 703.

<sup>122</sup> See Chayes, “Chapter VII ½: Is *Jus Post Bellum* Possible?” (n. 1) 294–5; May, *After War Ends* (n. 1) 151–5.

<sup>123</sup> For a discussion see Yaël Ronen, ch. 22, this volume.

<sup>124</sup> Israeli Supreme Court, HCJ 9132/07, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister et al.*, 27 January 2008 <[http://elyon1.court.gov.il/files\\_eng/07/320/091/n25/07091320.n25.pdf](http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf)> (accessed 26 July 2013). For analysis, see Yuval Shany, “The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. The Prime Minister of Israel” (2009) *Israel Law Review* 101.

<sup>125</sup> That is, principles of state succession into human rights treaties.

the occupant.”<sup>126</sup> Assumed duties range from an “orderly transfer of control” over basic resources and infrastructure to measures building “the capacity of the indigenous community.”<sup>127</sup> In current scholarship, these positive duties of care are framed under the label of “post-occupation law.”<sup>128</sup> But given their context (“post”), unique nature, and grounding in different sources of law (i.e. human rights, occupation, and principles of solidarity), they may in fact fit better under the umbrella of *jus post bellum*, which balances such competing rationales.<sup>129</sup>

### *Environmental damage*

Damage to the environment is a second field where *jus post bellum* considerations might encourage fresh thinking.<sup>130</sup> A general obligation to limit damage to the environment in the post-conflict phase is inherent in proportionality considerations under *jus in bello*. The ICJ has made this clear in its Advisory Opinion on Nuclear Weapons. It held that

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.<sup>131</sup>

The Court went on to state that there is “a general obligation to protect the natural environment against widespread, long-term and severe environmental damage” and a prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage.<sup>132</sup> A similar statement is reflected in Rule 44 of the ICRC Customary Law Study.<sup>133</sup> This provides an incentive to use environmentally smart weapons.

*Jus post bellum* sheds an additional perspective on the treatment of environmental obligations. It provides greater attention to consequences arising out of the impact of damage. This point has been made by just war theorist Douglas Lackey, who has proposed adding “environmental restoration as a separate condition of *jus post bellum*.”<sup>134</sup> Lackey claims that “participants in war have an affirmative obligation to restore the environment damaged in their military operations.”<sup>135</sup> He argues in favor of a legal

<sup>126</sup> See Benvenisti, *The International Law of Occupation* (n. 104) 89. See also generally Benjamin Ruben, “Disengagement from the Gaza Strip and Post-Occupation Duties” (2010) 42 *Israel Law Review* 528.

<sup>127</sup> See Benvenisti, *The International Law of Occupation* (n. 104) 88.

<sup>128</sup> See Benvenisti, *The International Law of Occupation* (n. 104) 89 (“post-occupation obligations”).

<sup>129</sup> See Yaël Ronen, ch. 22, this volume.

<sup>130</sup> See Cymie Payne, ch. 25, this volume.

<sup>131</sup> See ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, para. 30.

<sup>132</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, para. 31.

<sup>133</sup> Rule 44 states: “Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.”

<sup>134</sup> See Douglas Lackey, “Postwar Environmental Damage: A Study in *Jus Post Bellum*” in Larry May and Zachary Hoskins, *International Criminal Law and Philosophy* (Cambridge University Press 2010) 141, 143.

<sup>135</sup> Lackey, “Postwar Environmental Damage” 141.

duty to clean up chemicals and “restore the environment to its pre-war condition.”<sup>136</sup> He justifies this separate treatment by the fact that damage to the environment is distinguishable from other forms of damage caused by war since it needs to be restored, irrespective of whether victims bring suit.<sup>137</sup> He suggests a strict liability approach (even in the absence of fault), since environmental damage consists of harm to nonhuman organisms.<sup>138</sup> Here again, *jus post bellum* may serve as a catalyst for development which beyond the confines of R2P.

### C. The “international assistance and capacity building” pillar

In the context of “international assistance and capacity building pillar,” the interplay between R2P and *jus post bellum* takes yet another form. R2P may be said to define a general behavioral norm, i.e. a communitarian duty to assist or become involved in post-conflict peacebuilding. *Jus post bellum* provides a framework for the application and review of such policies, based on normative standards (hard law, soft law, and practice) and their evaluation and “judgment.” In some cases, a pattern of conduct may be warranted or desirable under R2P, but sanctioned under *jus post bellum*. There are several examples where the respective concepts may differ.

#### Consent

The first area is consent. Consent is of secondary importance in the context of R2P. R2P opens a possibility for engagement of international actors in case of domestic failure, i.e. inadequate response to atrocities.<sup>139</sup> It allows external actors to intervene without consent, or on the basis of consent from an ineffective but internationally recognized government. Following the “sovereignty as responsibility” logic, the domestic jurisdiction is deemed to be obliged to accept international assistance and capacity-building. This conception renders the R2P vulnerable to the criticisms of external imposition.<sup>140</sup> In many cases, assistance is not altruistic, but guided by specific interests.

*Jus post bellum* provides a different lens. It sheds light on the problems of consent in post-conflict environments, and its manifestations.<sup>141</sup> Consent is often retained as a formal criteria for international engagement.<sup>142</sup> But it poses particular challenges in post-conflict settings. Consent to international involvement is frequently based on a fictional “social contract,” since traditional authority structures and forums for the expression of popular have been disrupted.<sup>143</sup> The current rules in international law

<sup>136</sup> Lackey, “Postwar Environmental Damage” 141.

<sup>137</sup> Lackey, “Postwar Environmental Damage” 147.

<sup>138</sup> Lackey, “Postwar Environmental Damage” 144.

<sup>139</sup> There is lack of criteria for application of this threshold. For a critique, see this ch., Part III.

<sup>140</sup> For such a critique, see Chandler, “The Responsibility to Protect” (n. 7) 165.

<sup>141</sup> See Stahn, “‘*Jus In Bello*,’ ‘*Jus Ad Bellum*’—‘*Jus Post Bellum*?’” (n. 57) 938–9.

<sup>142</sup> See e.g. Louise Doswald-Beck, “The Legal Validity of Military Intervention by Invitation of the Government” (1985) 56 *British Yearbook of International Law* 189; David Wippman, “Military Intervention, Regional Organization, and Host State Consent” (1996) 7 *Duke Journal of Comparative and International Law* 209.

<sup>143</sup> See Saul, “Local Ownership of Post-Conflict Reconstruction in International Law” (n. 113) 170.

are rudimentary. They look at formal<sup>144</sup> and functionalist considerations, i.e. effective government.<sup>145</sup> *Jus post bellum* provides a forum to substantiate criteria under what circumstances consent is “genuine, valid, and explicit,” in line with the principle of self-determination.<sup>146</sup> Moreover, it provides means to test to what extent it is possible to ground consent in non-traditional channels, i.e. local community structures.<sup>147</sup>

### *Division of responsibility*

A second field where R2P and *jus post bellum* differ is the framing of responsibility. R2P is focused on general ideas of solidarity and “shared responsibility.”<sup>148</sup> It provides authority for international engagement. Its reference to “International assistance and capacity-building” implies that international actors might under certain conditions exercise authority in a domestic setting, including governing and administrative functions (e.g. policing, criminal justice, constitutional assistance etc). But R2P does not spell out how this ought to be done. It provides at best that the long-term aim of international actors in a post-conflict situation is “to do themselves out of a job,” as the Commission of State Sovereignty and Intervention put it.<sup>149</sup> It does not contain any insights on balancing of conflicting obligations or “sequencing.”

*Jus post bellum* has a different focus. It may set guidelines and principles for power-sharing, consultation, and devolving responsibility back to the local community, which are essential for “local ownership” and sustainability on the long term.<sup>150</sup>

### *Accountability*

A third example of potential divergence between R2P and *jus post bellum* is the area accountability. R2P has a narrow accountability focus. The ICISS report linked protection under R2P to situations of human harm suffered “as a result of internal war, insurgency, repression, or state failure.”<sup>151</sup> The Outcome Document limited the concept to instances of “genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>152</sup> Its trigger is linked to core crimes. This focus frames the treatment of accountability in a specific direction, i.e. in terms of transitional justice strategies and responses to

<sup>144</sup> See e.g. Art. 34 of the Vienna Convention on the Law of Treaties.

<sup>145</sup> It is disputed to what extent consent by an “ineffective” government might be taken into account. See generally Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford University Press 1998), Christopher J. Le Mon, “Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested” (2003) 35 *NYU Journal of International Law and Politics* 741.

<sup>146</sup> For such a plea, see Saul, “Local Ownership of Post-Conflict Reconstruction in International Law” (n. 113) 187, 206.

<sup>147</sup> For consideration of civil society claims, see Béatrice Pouligny, “Local Ownership” in Vincent Chetail (ed.), *Post-conflict peacebuilding: A Lexicon* (Oxford University Press 2009) 174, 177.

<sup>148</sup> On “shared responsibility,” see André Nollkaemper and Dov Jacobs, “Shared Responsibility in International Law: A Conceptual Framework” (2013) 34 *Michigan Journal of International Law* 360.

<sup>149</sup> See ICISS, *Responsibility to Protect* (n. 6) 5.31.

<sup>150</sup> See Stahn, “‘Jus In Bello,’ ‘Jus Ad Bellum’—‘Jus Post Bellum’?” (n. 57) 941.

<sup>151</sup> See ICISS, *Responsibility to Protect* (n. 6) xi.

<sup>152</sup> See Summit Outcome (n. 14) para. 138.

atrocity crimes.<sup>153</sup> This tendency is reflected in subsequent follow-up reports by the Secretary General.<sup>154</sup>

*Jus post bellum* offers a wider focus. It provides a framework to address broader accountability dilemmas, such as problems connected with the “functional immunities” of international actors,<sup>155</sup> limits in the exercise of administering powers,<sup>156</sup> the scope of judicial review, and possibilities of individuals to challenge decisions of international authorities.<sup>157</sup> These issues do not necessarily coincide with interests in the pursuit of atrocity crimes.

## V. Conclusion

A systematic review of R2P and *jus post bellum* shows that they are separate paradigms. They share similarities, relating to goals and legal status. But they differ in nature and form.

R2P is grounded in the concept of solidarity.<sup>158</sup> It provides a reaction theme to violations. It contains a primary norm, i.e. the duty of the territorial state to prevent violations. This idea is grounded in pre-existing obligations.<sup>159</sup> But other components of the concept, such as the idea of a shift of responsibility and corresponding means of reaction, are grounded in conceptions that have traditionally formed part of secondary law, i.e. norms addressing consequences of violence. R2P offers an instrument to manage “shared responsibility.”

<sup>153</sup> For a critique, see Chandler, “The Responsibility to Protect” (n. 7) 185, arguing that R2P “understands mass atrocities outside of a concern with economic and social relations, focusing merely on the institutional structures which are held to shape the behavior of individuals.”

<sup>154</sup> See Report (n. 16) and Report (n. 79).

<sup>155</sup> The primary theoretical justification for the grant of immunity from host state jurisdiction in UN missions is “functional necessity.” For a critical analysis, see Róisín Burke, “Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity” (2011) 16 *Journal of Conflict and Security Law* 63.

<sup>156</sup> The more and the longer international actors exercise governing functions, the more will there be an attempt to hold them accountable to domestic constituencies through domestic institutions. See Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press 2008) 762–3.

<sup>157</sup> In its Decision no. AP 953/05 of 8 July 2006, the Constitutional Court of Bosnia and Herzegovina ordered domestic authorities to secure an effective remedy in respect of removals from office by the Office of the High Representative (OHR). The European Court of Human Rights (ECtHR) upheld the absolute immunity of the OHR, by way of an extension of the contested *Behrami* jurisprudence to international administration. It held that “the High Representative was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, ‘attributable’ to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organizations. Contrary to what the applicants suggested, a decision of the Constitutional Court of Bosnia and Herzegovina (or, indeed, any authorities of the host State) attempting to establish a review mechanism in respect of the acts of the High Representative cannot change the legal nature of those acts, unless the High Representative consents to such changes (as he did in respect of legislation imposed by him).” See ECtHR, *Beric and Others v. Bosnia and Herzegovina*, 16 October 2007, para. 28. This reasoning implies that decisions of the OHR cannot be challenged internationally or domestically.

<sup>158</sup> See Laurence Boisson de Chazournes, “Responsibility to Protect: Reflecting Sovereignty?” in Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2009) 93, 103, 109.

<sup>159</sup> See Peters, “The Security Council’s Responsibility to Protect” (n. 41) 8.

*Jus post bellum* has a different function. It is less focused on institutional coordination. It is more directly geared at substantiating substantive norms and principles. It provides a matrix for judgment of behavior and an instrument to solve disputes in law.

It is thus artificial and simplistic to equate *jus post bellum* and R2P. There is neither a hierarchical relationship between the two concepts, nor a clear symmetry. Both concepts have distinct centers of gravity. Their interrelationship depends on the respective pillar. They represent partly reinforcing and partly contradicting principles. This diversity is not a weakness, but is an asset. The main challenge for future practice is to accommodate this polycentricity by making them work successfully side-by-side as autonomous concepts.

# III

## JUS POST BELLUM AND ITS DISCONTENTS

### 7

#### The Concept of *Jus Post Bellum* in International Law A Normative Critique

*Eric De Brabandere\**

#### I. Introduction

The concept of *jus post bellum* is increasingly gaining support in contemporary legal scholarship, mainly based on the relatively optimistic perspective that *jus post bellum* can play an important role in managing post-conflict situation.<sup>1, 2</sup> *Jus post bellum* is described by some scholars as a new “discipline,”<sup>3</sup> or as “a new category of international law currently under construction.”<sup>4</sup>

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<sup>1</sup> This chapter draws partly from research previously conducted and published as Eric De Brabandere, “International Territorial Administrations and Post-Conflict Reforms: Reflections on the Need of a *Jus Post Bellum* as a Legal Framework” (2011) 44(1)–(2) *Revue belge de droit international* 69; Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 43 *Vanderbilt Journal of Transnational Law* 119.

<sup>2</sup> See the various contributions to this volume. See, however, for a critical assessment of *jus post bellum*: Antonia Chayes, “Chapter VII/2: Is *Jus Post Bellum* Possible?” (2013) 24 *European Journal of International Law* 291; Grégory Lewkowics, “*Jus post bellum*: Vieille antienne ou nouvelle branche du droit? Sur le mythe de l’origine vénérable du *jus post bellum*” (2011) 44(1)–(2) *Revue belge de droit international* 11; Olivier Corten, “Le *jus post bellum* remet-il en cause les règles traditionnelles du *jus contra bellum*?” (2011) 44(1)–(2) *Revue belge de droit international* 38; De Brabandere, “International Territorial Administrations and Post-Conflict Reforms” (n.1); De Brabandere, “The Responsibility for Post-Conflict Reforms” (n.1); Stephen C. Neff, “Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum. Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008).

<sup>3</sup> Carsten Stahn, “*Jus Post Bellum*: Mapping the Discipline(s)” (2007–08) 23 *American University International Law Review* 311.

<sup>4</sup> Inger Österdahl and Esther van Zadel, “What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles” (2009) 14 *Journal of Conflict and Security Law* 1.

Although the idea of a *jus post bellum* is relatively ancient, as will be explained in section II, it resurfaced through the work of a new generation of just war theorists such as Brian Orend,<sup>5</sup> and was subsequently taken up by international law scholars.<sup>6</sup> Since then, the concept has gained increasing support.<sup>7</sup>

Despite enthusiasm about the concept of *jus post bellum* and the role it plays or may play in international law, I remain skeptical about both the normative contents of *jus post bellum* and the usefulness and appropriateness of the concept generally. Coupled with this, one of the main problems of *jus post bellum* is its indeterminacy: there is to date no agreement nor any uniform view on what *jus post bellum* is or should be. It remains that however *jus post bellum* is framed, current attempts to conceptualize *jus post bellum* as a legal notion either adds nothing or little to the existing legal framework governing post-conflict reconstruction, or ties post-conflict reconstruction and the legal framework thereof to just war elements. I do see, however, some value in a recently emerged idea that consists of using *jus post bellum* as an interpretative framework governing the rules applicable to post-conflict reconstruction, a rather minimalist perspective on *jus post bellum*, but for that reason perhaps the most interesting *jus post bellum* theory.

In this chapter, I will argue that certain conceptions of *jus post bellum* pose a danger to some very foundational principles of international law, and that, in yet other conceptions of *jus post bellum*, the usefulness, from an international legal perspective, of the notion is relatively limited. The ideas underlying my argument are first that any attempt to link post-conflict obligations and responsibilities with either *jus ad bellum* or *jus in bello* rules, poses a certain risk of blurring the distinctiveness of both categories of rules, and thus reintroduce, through the backdoor, “just war” elements in contemporary international law. Secondly, currently, *jus post bellum* does not seem to add anything new to existing obligations, roles and responsibilities of actors in post-conflict settings. Indeed, the various mapping exercises, which consist of trying to establish the contents of *jus post bellum* clearly show not only the disagreement on the substance of *jus post bellum*, but in my view are symptomatic of the ambiguity and ineffectualness of the entire concept. In essence, my first argument tackles the extra-legal argument which often suggests that the responsibilities and authority in post-conflict reconstruction processes should be altered in order to more effectively manage the aftermath of a conflict. My second argument addresses the allegation that the evolution in peacekeeping and peace-building operations has resulted in a “legal void” since no adequate legal framework would exist to manage such operations.

My arguments here focus only on the position of the concept of *jus post bellum* in international law, although *jus post bellum* theories have emerged in ethics, political science, and international relations as well, in particular in respect of the first category of *jus post bellum* theories identified above. I will thus not center my arguments on these moral and other extra-legal aspects of *jus post bellum*. At the same time, I should add that it is precisely the involvement of moral and extra-legal normative propositions, in

<sup>5</sup> Brian Orend, “*Jus Post Bellum*” (2000) 31 *Journal of Social Philosophy* 117.

<sup>6</sup> Carsten Stahn, “‘*Jus ad bellum*,’ ‘*jus in bello*.’ .. *jus post bellum*?—Rethinking the Conception of the Law of Armed Conflict” (2007) 17 *European Journal of International Law* 921.

<sup>7</sup> See, recently, Inger Österdahl, “Just War, Just Peace and the ‘*Jus post bellum*’” (2012) 81 *Nordic Journal of International Law* 282.



particular by modern just war theorists, that have rendered the debate on the role and place of *jus post bellum* in international law more difficult to grasp and analyze.

I will start by briefly depicting the context in which this debate needs to be situated, namely the evolution in dealing with post-conflict situations, and the contemporary conceptions of *jus post bellum* (section II). I will then challenge these contemporary conceptions of *jus post bellum* (section III). First, I will argue that certain *jus post bellum* theories link *jus post bellum* to the legality or “justness” of the use of force, which in turn leads to an explicit or implicit reintroduction of just war theories in international law (section III.A). The subsequent section will tackle the usefulness of *jus post bellum* as an “objective” notion pertaining to the legal framework containing rules and principles applicable to post-conflict peacebuilding (section III.B). I will next turn to the idea of *jus post bellum* as an interpretative framework governing the rules applicable to post-conflict reconstruction (section III.B).

## II. Normative Propositions of Contemporary *Jus Post Bellum* Theories

It is not necessary here to repeat the evolutions which have led to the increased involvement of international actors in post-conflict reconstruction.<sup>8</sup> Suffice it to say that the increasing involvement of international actors in various forms of international missions set up to supervise reconstruction or peacebuilding processes has raised many questions in respect of the applicable legal framework and the rights and obligations of states which have participated in a possible military intervention preceding the reconstruction process.<sup>9</sup> These questions are partially the *rationale* behind the alleged need for a *jus post bellum*.

First, because of the importance of the post-phase of a conflict, certain *jus post bellum* theorists argue that there is a need to create or revisit the post-conflict responsibilities for states and international organizations, whether they have participated in a preceding military intervention or not.<sup>10</sup> Secondly, the focus on the activities in post-conflict scenarios has allegedly resulted in a “legal void” or “legal gap”<sup>11</sup> in the transition from war or conflict to peace, since the traditional conception of the law applicable in war in opposition to the law applicable in peacetime is considered to no longer stand.<sup>12</sup>

<sup>8</sup> See on this De Brabandere, “The Responsibility for Post-Conflict Reforms” (n.1).

<sup>9</sup> See e.g. Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations. The Search for a Legal Framework* (Martinus Nijhoff Publishers 1999); T. H. Irmscher, “The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation” (2001) 44 *German Yearbook of International Law* 353; A. F. Perez, “Legal Frameworks for Economic Transition in Iraq—Occupation under the Law of War vs. Global Governance under the Law of Peace” (2004–05) 18 *The Transnational Lawyer* 53.

<sup>10</sup> See e.g. Mark Evans, “Balancing Peace, Justice and Sovereignty in *Jus Post Bellum*: The Case of ‘Just Occupation’” (2008) 36 *Millennium—Journal of International Studies* 533, 541 (arguing that the “just side” of the actors should take “full responsibility for their fair share of the material burdens of the conflict’s aftermath in constructing a just and stable peace”).

<sup>11</sup> See e.g. Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 182. See also Dieter Fleck, ch. 3, this volume.

<sup>12</sup> See e.g. Carsten Stahn, “*Jus ad bellum*, ‘*jus in bello*’ ... ‘*jus post bellum*?’—Rethinking the Conception of the Law of Armed Conflict” (2007) 17 *European Journal of International Law* 921, 923–4.

Scholars have thus drawn attention to the need to move toward a distinct discipline on the law *after* conflict—*jus post bellum*—a systemic adaptation of the current division between the “law of war” and the “law of peace.” Although *jus post bellum* (re)surfaced first and principally in political philosophy<sup>13</sup> and ethics,<sup>14</sup> international legal scholars have taken up the case for a renewed attention to and recognition of *post bellum* as legal framework to manage post-conflict situations.<sup>15</sup>

As noted, in contemporary research, *jus post bellum* is used in several ways, both in legal and extra-legal contexts.<sup>16</sup> These different conceptions of *jus post bellum*, either in legal scholarship or other, are also the reason why it is difficult to grasp the exact contours of *jus post bellum*, let alone to use it as an (emerging) legal concept. However, on the whole, modern analyses of *jus post bellum* can be grouped into two different clusters, which largely coincide with the two implications of the evolution in peacebuilding and reconstruction activities.

The first category of *jus post bellum* theories focus on the legal holder of obligations in the post-conflict phase. Departing from well-established rules relating to the consent of states, the rights and obligations of foreign occupying powers, and the authority of the Security Council in respect of threats to international peace and security, the first type of *jus post bellum* theories focuses on the “inherent” link between post-conflict obligations and the use of force. They principally aim at a redistribution of the obligations of states and international organizations toward the state or territory in which the reconstruction process takes place.<sup>17</sup> States and international organizations which have actively participated in the *jus ad bellum* stage of a conflict could thus be endowed with special compulsory responsibilities in the post-conflict phase. In a sense, such arguments tie rules relating to *which* actor should be involved in post-conflict reconstruction with rules in respect of *what* is allowed in post-conflict reconstruction.<sup>18</sup> This conception of *jus post bellum* has essentially been witnessed in the work of just war theorists.

The second understanding of the notion sees *jus post bellum* as a legal framework to address post-conflict peacebuilding and is then a normative rather than a systemic notion, which encapsulates the laws or rules applicable in the transitory phase from conflict to peace. *Jus post bellum* is then considered as a “regulatory framework which contains substantive legal rules governing transitions from conflict to peace, as well as rules on the interplay of these substantive rules in case of conflict.”<sup>19</sup> That category of legal rules would then be the third of three distinct and relatively independent frameworks applicable to armed conflicts, together with *jus ad bellum* and *jus in bello*.<sup>20</sup> *Jus*

<sup>13</sup> See e.g. Michael Walzer, *Just and Unjust Wars* (Basic Books 1977) 122–3.

<sup>14</sup> See e.g. Brian Orend, “*Jus Post Bellum*” (2000) 31 *Journal of Social Philosophy* 117; Brian Orend, “*Jus Post Bellum: The Perspective of a Just-War Theorist*” (2007) 20 *Leiden Journal of International Law* 572.

<sup>15</sup> See e.g. Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum. Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008).

<sup>16</sup> See Stahn, “Mapping the Discipline(s)” (n. 3) 328; Mark Evans, ch. 2, this volume.

<sup>17</sup> See e.g. Louis V. Iasiello, “*Jus Post Bellum: The Moral Responsibilities of Victors in War*” (2004) 57 *Naval War College Review* 33.

<sup>18</sup> See e.g. Orend, “The Perspective of a Just-War Theorist” (n. 14).

<sup>19</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 178; see also Stahn, “Mapping the Discipline(s)” (n. 3) 332.

<sup>20</sup> See e.g. Kristen Boon, “Legislative Reform in Post-conflict Zones: *Jus Post Bellum* and the Contemporary Occupant’s Law-Making Powers” (2005) 50 *McGill Law Journal* 285; Stahn, “*Jus ad bellum*,

*post bellum* then needs to be seen as an objective set of rules, applicable irrespective of the legality or illegality of the use of force, similar to the separation of *jus ad bellum* and *jus in bello*.<sup>21</sup> Linked to this conception of *jus post bellum*, certain scholars have advocated the need of a *jus post bellum* as an interpretative framework, the value of which would then basically lie in the need to interpret uniformly the various norms, rules, and practices applicable in post-conflict reconstruction.<sup>22</sup> In other words, *jus post bellum* may be viewed as a normative set of *principles* rather than substantive rules which would give guidance in the application of the existing rules governing post-conflict reconstruction.<sup>23</sup> Such principles may for example include the principle of proportionality,<sup>24</sup> or the accountability of foreign actors.<sup>25</sup> All in all, here again, the question remains to what extent the proposed principles really are new principles applicable to post-conflict situations, and secondly, whether or not it is useful to group these principles under a “new” umbrella. Although I remain skeptical here again, this conception of *jus post bellum* theoretically is the most viable.

Before the recent (re)emergence of *jus post bellum*, legal scholars, “just war”-theorists and political philosophers such as Saint Augustine, Saint Isidore of Seville, Saint Thomas Aquinas, Francisco de Vitoria, Francisco Suarez, Alberico Gentili, Hugo Grotius and later on Immanuel Kant had included a “just” post-war arrangement in their conception of a “just war” as a necessary corollary of the just cause of the war.<sup>26</sup> The idea that current conceptions of *jus post bellum* have a foundation in the historical notion of *jus post bellum* is however excessive.<sup>27</sup> Grotius, for instance, in his discussion of “The Law of War and Peace” in which both *jus ad bellum* and *jus in bello* issues were addressed, added several legal rules pertaining to the period *after* war, such as how to treat enemy property.<sup>28</sup> The rules set out by Grotius however all result from the just cause of the war, which was, according to the author, the only valid source for the rules on the conduct of war and for the rules after the war.<sup>29</sup> It is therefore difficult to read in Grotius’s theories any specific or autonomous legal framework relating to the transition from “war” to “peace,” distinct from the just cause of the war.<sup>30</sup> In addition, the majority of the *jus post bellum* “rules,” which are discussed by Grotius, are in essence applications of the

*‘jus in bello’ ... ‘jus post bellum?’* (n. 12); Jean L. Cohen, “The Role of International Law in Post Conflict Constitution-Making: Toward a *Jus post Bellum* for ‘Interim Occupation’” (2007) 51 *New York Law School Law Review* 497.

<sup>21</sup> Boon, “Legislative Reform” (n. 20) 290–2.

<sup>22</sup> See James Gallen, ch. 4, this volume.

<sup>23</sup> See Christine Bell, ch. 10, this volume.

<sup>24</sup> See James Gallen, ch. 4, this volume; Dieter Fleck, ch. 3, this volume.

<sup>25</sup> See James Gallen ch. 4, this volume.

<sup>26</sup> See for an overview Wilhelm Georg Grewe, *The Epochs of International Law* (De Gruyter 2000), in particular Part I, ch. 7 (“Law Enforcement: The Idea and Reality of the ‘Just War’”) and Part II, ch. VII (“Law Enforcement: The Genesis of the Classical Law of War”); see also Marc Cogen, *The Comprehensive Guide to International Law* (Die Keure 2008), in particular ch. II “The History of International Law.”

<sup>27</sup> See generally for a critique of the alleged historical foundation of current *jus post bellum* theories: Lewkowics, “*Jus post bellum*” (n. 2).

<sup>28</sup> See e.g. ch. 13 “On Moderation in Making Captures in War” of Book III, Hugo Grotius, *De jure belli ac pacis libri tres* (A. C. Campbell tr. 2001) 328.

<sup>29</sup> Grotius, *De jure belli ac pacis libri tres* (n. 28) ch. 1, s. III, 7.

<sup>30</sup> See also Lewkowics, “*Jus post bellum*” (n. 2) 14–18.

general principles of international law, and do not therefore constitute any *jus post bellum lex specialis*.<sup>31</sup>

In the eighteenth century, Kant similarly argued that the rights of the victor were different according to whether the vanquished was either a “just,” or an “unjust” enemy. Kant was one of the first to establish a three-tiered framework for war:

The Right of Nations in relation to the State of War may be divided into: 1. The Right of *going to War*; 2. Right *during War*; and 3. Right *after War*, the object of which is to constrain the nations mutually to pass from this state of war, and to found a common Constitution establishing Perpetual Peace.<sup>32</sup>

The underlying reason for this theory was thus to further eternal peace, as a continuation of the right to resort to force, which was seen as lawful if aimed at establishing this eternal peace.<sup>33</sup> However, here again, the *contents* of the *Recht nach dem Kriege*, as explained by Kant,<sup>34</sup> does not differ substantially from the existing rules at that time, in particular those relating to the conclusion of treaties.<sup>35</sup>

### III. *Jus Post Bellum* in International Law: A Critical Appraisal

I will start by illustrating how the defended link between the “pre” and the “post” stages of a conflict leads to an unwarranted revival of a “just war”-type assessment of military interventions (section III.A). I will then challenge the (need for a) “new” distinct legal framework to address post-conflict reconstruction, or the transition from law to peace. I will point out that there is no normative gap in the law of transition from war to peace, since recent cases have shown that there already exists an adequate, flexible, and neutral legal framework to address such situations. I will also there address the idea that *jus post bellum* may operate as an “interpretative legal framework” (section III.B).

#### A. *Jus post bellum* and the responsibility for post-conflict reforms

The first type of *jus post bellum* theories essentially question the current rules relating to the responsibility, title, and authority in post-conflict reconstruction. In this conception of *jus post bellum* an “inherent” link is established between post-conflict obligations and the use of force.<sup>36</sup> States and international organizations which have actively participated in the *jus ad bellum* stage of a conflict would then have responsibilities in the post-conflict phase.

A transposition of rights and obligations to intervening states, and establishing a link between forcible intervention and post-conflict responsibilities, are problematic for two reasons. First, the authority to engage in post-conflict reforms is clearly delineated in international law, and the very reasons behind these rules are crucial for maintaining state sovereignty and the independence of peacebuilding and post-conflict

<sup>31</sup> Lewkowics, “*Jus post bellum*” (n. 2) 14–18.

<sup>32</sup> Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W. Hastie tr. 1887) 214.

<sup>33</sup> Kant, *The Philosophy of Law* (n. 33) 221 *et seq.*

<sup>34</sup> Kant, *The Philosophy of Law* (n. 33) 221–2, para. 58.

<sup>35</sup> Lewkowics, “*Jus post bellum*” (n. 2) 23.

<sup>36</sup> See e.g. Iasiello, “*Jus Post Bellum: The Moral Responsibilities of Victors in War*” (n. 17).

reconstruction. Peacebuilding and post-conflict reconstruction indeed are concepts that emerged independently from the legality of the use of armed force (section III.A.1). Connecting a military intervention with post-conflict results is difficult to accept since it amounts to reintroducing “just war” theories in contemporary international law (section III.A.2).

*1. Authority, title, legal responsibilities, and the independence of post-conflict reconstruction*

The question of which actor is responsible for the reconstruction of states or territories, and the norm from which such legal authority and title originates is a matter regulated by (general) international law and the UN Charter. State sovereignty, from which the state derives the exclusive right to exercise competences on its territory, must in any case be seen as the starting point of any debate on authority and title in post-conflict situations. In contemporary international law, the authority to engage in comprehensive post-conflict reforms is limited.

First, next to the consent of the host state, the only institution which can, since such power has been delegated to it, “impose” on a foreign state or territory a comprehensive peace-building or international administration mission with the aim of reconstruction, is the Security Council. This is legally speaking not really an “imposition” of a peace-building mission, since it is founded on the sovereignty of states, which can be described as the right to exercise, to the exclusion of any other state, the functions of a state.<sup>37</sup> As an *exercise* of the rights of a sovereign state, states can delegate certain competences to other actors, either by consenting ad hoc to the deployment of a mission, or by granting the power to the United Nations Security Council to establish such mission by being a party to the United Nations Charter.<sup>38</sup> The authority of international actors—foreign states and international organizations—to exercise intrusive functions only results from a *delegation of this competence* by the Security Council, which has been given the authority to do so by UN Member States.<sup>39</sup> It is more than doubtful that victory alone confers any entitlement or obligations in the post-conflict phase.<sup>40</sup>

Secondly, in the event of foreign occupation, the laws of armed conflict do not convey any comprehensive responsibilities to the occupier-administrator other than the mere “usufructuary”-type administration provided for by the laws of occupation. The application of the laws of occupation is based on a *factual* situation, namely the belligerent occupation of a territory by a foreign army. The rationale behind the regulation of such a factual situation is that resort to force and the subsequent (belligerent)

<sup>37</sup> Cf. “Island of Palmas Case” (*Netherlands v. U.S.*), Arbitral Award, 4 April 1928, (1928) 22 AJIL 875.

<sup>38</sup> See Matthias Ruffert, “The Administration of Kosovo and East-Timor by the International Community” (2001) 3 *International and Comparative Law Quarterly* 620–1; Nico Schrijver, “Commentary on the Lecture ‘The Complex Role of the Legal Adviser When International Organisations Administer Territory’ by R. Wilde” (2001) 95 *ASIL Proceedings* 259; Eric De Brabandere, *Post-conflict Administrations in International Law. International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff Publishers 2009) 15–34.

<sup>39</sup> See in general Danesh Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of Its Chapter VII Powers* (Oxford University Press 1999).

<sup>40</sup> See also Chayes, “Chapter VIII/2: Is *Jus Post Bellum* Possible?” (n. 2).

occupation of foreign territory cannot lead to the annexation of territory, neither to extensive reforms, nor to the exercise of transformative powers by the occupying forces. Both the Hague Regulations<sup>41</sup> and the Fourth Geneva Convention<sup>42</sup> adopt the principle that occupation of territory does not result in the transfer of sovereignty. The exercise by the occupied state of state competences is merely “suspended.”<sup>43</sup> The legal title to the administration of the “hostile” state is then, subject to several exceptions, limited to maintaining the state’s internal structures as they are. Obviously, the laws of occupation are an inadequate framework for peace-building exercises,<sup>44</sup> in particular in view of the limited administrative powers. The laws applicable to foreign occupation were clearly not designed for such activities, and are thus an insufficient and inadequate source of authority to address the reconstruction of states after conflict. However, the inadequacy of the laws of occupation to deal with comprehensive post-conflict reconstruction mission because of their rigid focus on maintaining a *status quo* is precisely the reason for their existence, namely to limit the occupier’s powers in a territory for which the occupier has no title. For these particular reasons, the laws of occupation, and especially the limited character of the occupiers’ authority, needs to be maintained.

*Jus post bellum* theories which transpose such a responsibility to other actors, such as the intervening state(s), fall short for several reasons. First, notwithstanding the possibility of having a moral obligation to engage in reconstruction after the armed conflict,<sup>45</sup> the *lex lata* does not permit any transposition of post-conflict responsibilities to an intervening state. The reasons for which states can resort to force are clearly established in international law, and are independent of the post-conflict phase. Secondly, and most importantly, *jus post bellum* theorists fail to explain convincingly *why* intervening actors should<sup>46</sup> bear a responsibility for the “post” phase, and what legal grounds exist for such responsibilities, in particular in view of the fact that in some circumstances, the use of force is justified for reasons such as self-defence. When a state has resorted to the use of force in self-defence, it would indeed be illogical to impose on that state certain obligations toward the state which has triggered the exercise of the right of self-defence.<sup>47</sup>

<sup>41</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (18 October 1907), (1907) 187 CTS 227 (hereafter referred to as “the Hague Regulations”). The rules concerning occupation are contained in Arts 42–56 of the Hague Regulations of 1907.

<sup>42</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287 (hereafter “Fourth Geneva Convention”), in particular Arts 27–34 and 47–78.

<sup>43</sup> Also Robert Kolb, *Ius in bello, le droit international des conflits armés* (Helbing & Lichtenhahn 2003) 191 and UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press 2004) no. 11.25.

<sup>44</sup> See also Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 182.

<sup>45</sup> See e.g. Outi Korhonen, “‘Post’ As Justification: International Law and Democracy-Building after Iraq” (2003) 4 *German Law Journal* 709; see also Brian Orend, “Justice after War” (2002) 16 *Ethics & International Affairs* 43.

<sup>46</sup> Several authors indeed argue that “just” occupiers not only have the right to engage in comprehensive post-war reforms, but that they have a (moral) obligation to do so. See e.g. Walzer, *Just and Unjust Wars* (n. 13) 122–3; Orend, “Jus Post Bellum” (n. 14) 122–3.

<sup>47</sup> See also Alex J. Bellamy, “The Responsibilities of Victory: Jus Post Bellum and the Just War” (2008) 34 *Review of International Studies* 619. The use of force in an exercise of the inherent right to self-defence can only be aimed at exercising that right. One could, however, consider that the state which acts in self-defence might go farther to take away the threat of the armed attack which had triggered the application of the right

Secondly, post-conflict reconstruction has emerged as a relatively independent institution over the past decades, and the “intervention” stage is very often irrelevant. Post-conflict peacebuilding indeed is a phenomenon which emerged *outside* the formal use of armed force, i.e. in situations other than after international armed conflict. This evolution fits into a focus on the creation of democratic and stable institutions, as a proactive and reactive instrument to maintain peace and security. It does not therefore necessarily follow an (international) armed conflict, nor does it imply the intervention of a third party. When comprehensive post-conflict missions are set up after the use of armed force, not authorized by the Security Council, and which has no clear legal justification, such as in Kosovo or Iraq, the authority to engage in post-conflict reconstruction is based on the consent of the host state, the laws of occupation and/or on the Security Council’s power in this respect. The drafters of relevant Security Council resolutions are very careful in avoiding every possible interpretation of these post-conflict mandates as *ex post facto* validation of the unauthorized resort to force.<sup>48</sup> The fact that such missions are set up notwithstanding the legality or illegality of the use of armed force, is a clear evidence of the “neutrality” of post-conflict peacebuilding toward the issue of the use of force. Moreover, actors operating in the post-conflict situation are not necessarily the same as those who resorted to the use of force.

It is furthermore interesting to note that the recent apparition of *jus post bellum* theories has coincided with the difficulty in legally justifying recent military interventions and subsequent occupations and reconstruction processes<sup>49</sup> above all when dealing with either “humanitarian” or “pro-democratic” interventions.<sup>50</sup> In such cases, the “positive” outcome of the reconstruction process is often used to legalize *ex post facto* a controversial use of force. Such theories thus amount to reintroducing notions of “just” war as a new but unwarranted exception to the prohibition of the use of force. Although I have implicitly shown the dangers of linking *jus post bellum* with *jus ad bellum* rules, it is necessary to briefly explain the connection between such *jus post bellum* theories and just war theories.

## 2. *Jus post bellum* and “just wars”

Under current international law, the laws relating to armed force are separated into the legality of the use of armed force (*jus ad bellum*), and the law applicable during an armed conflict (*jus in bello*), including the laws relating to the occupation of territory by a foreign presence. These two areas of international law are rightly unconnected,

to self-defence. Such a stretch of the right of self-defence can be acceptable under current international law, provided that it remains limited to the function of self-defence. An excessive extension of the right of self-defence is, however, dangerous in practice, since the causality between the armed attack and the cause underlying the launch of that armed attack is often difficult to establish, or at least subject to controversies.

<sup>48</sup> Corten, “Le *jus post bellum*” (n. 2) 61; see however Inger Österdahl, “Preach What You Practice. The Security Council and the Legalisation *ex post facto* of the Unilateral Use of Force” (2005) 74 *Nordic Journal of International Law* 231.

<sup>49</sup> Corten, “Le *jus post bellum*” (n. 2) 39 *et seq.*

<sup>50</sup> See on the claim that “transformative occupations” should be accepted in “exceptional circumstances,” such as genocide and ethnic cleansing, which besides warranting a military intervention would equally “justify” subsequent post-conflict transformations: Hamada Zahawi, “Redefining the Law of Occupation in the Wake of Operation Iraqi ‘Freedom’” (2007) 95 *California Law Review* 2295, 2335–37.

in the sense that the *violation* by a state of its obligations under one system does not by itself amount to a violation of the laws of the other. Similarly, the *application* of the *jus in bello* does not depend on the (il)legality of the military intervention.<sup>51</sup> Adding a “third” branch to this dualist regulation of the use of armed force is not as such problematic, were it not that such theories imply that the outcome or result of an armed conflict cannot be detached from the very reasons or legality of the resort to force.<sup>52</sup>

Orend notes for example that:

[T]he raw fact of victory does not of itself confer rights upon the victor, nor duties upon the vanquished. Might does not equal right. It is only when the victorious regime has fought a just war that we can meaningfully speak of rights and duties of victor and vanquished at the conclusion of armed conflict.<sup>53</sup>

This intrinsic<sup>54</sup> link with the justness of an armed conflict is the inherent flaw and one of the most fundamental problems of this conception of *jus post bellum*. In times where international law is moving from a *jus ad bellum* to a *jus contra bellum*,<sup>55</sup> it seems even more imprudent to assess the legality of an armed conflict in function of its effects, or to grant certain post-conflict responsibilities and rights to states in function of the “justness” of their cause. Moreover, in such case, *jus post bellum* is as a legal concept more susceptible to manipulation and to being used as a legitimation, through law, of State specific agendas, as is discussed by Roxana Vatanparast in chapter 8 of this volume.<sup>56</sup>

The only case in which a close link between *jus ad bellum* and *jus in bello* can be defended, without resorting to the justification of the use of force in function of the potential positive results of the intervention, is when the use of force has been authorized by the Security Council on humanitarian or related grounds. In that limited case, however, the post-conflict activity should not necessarily be directly linked to the use of force. As said earlier, practice has shown that the Security Council’s activity in this field is independent from any enquiry on the legality of the use of force.

## **B. *Jus post bellum* as “law after conflict”: is *jus post bellum* a useful new concept?**

The preceding debate on the authority and title in post-conflict reconstruction is difficult to completely detach from the contents of such responsibilities, namely the legal delimitation of the rights and obligations of actors involved in post-conflict. The recent re-focus on the obligations of foreign actors in such situations has equally led to a proposition to group such rules and norms under the umbrella of *jus post bellum*. This second more impartial category understands *jus post bellum* as a legal framework applicable in the transition from war to peace.<sup>57</sup> In essence, the idea is to group rules in

<sup>51</sup> See for a discussion Corten, “*Le jus post bellum*” (n. 2) 50–1.

<sup>52</sup> See in particular Orend, “The Perspective of a Just-War Theorist” (n. 14).

<sup>53</sup> Orend, “*Jus Post Bellum*” (n. 14) 122.

<sup>54</sup> See e.g. Stahn arguing that “*jus post bellum* is to some extent inherent in the conception of *jus ad bellum*” (Stahn, “Mapping the Discipline(s)” (n. 3) 328).

<sup>55</sup> See e.g. Corten, “*Le jus post bellum*” (n. 2).

<sup>56</sup> See Roxana Vatanparast, ch. 8, this volume.

<sup>57</sup> See for such an approach, Stahn, “‘*Jus ad bellum*,’ ‘*jus in bello*’ ... *jus post bellum*?” (n. 12); Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 177.



the areas of human rights law, criminal law, and humanitarian law under the umbrella of *jus post bellum*, in order to avoid an overly sectorial approach in post-conflict reconstruction.<sup>58</sup> This, it is argued, is necessary in order to “achieve a higher level of human rights protection, accountability and good governance in the post-conflict phase than it had in the period before the conflict.”<sup>59</sup>

The advantage of such an approach to *jus post bellum*, in contrast to the previous scheme, is that it is “decoupled from the historical understanding which associated fairness with the idea of justice in favour of the party which had fought a just and lawful war.”<sup>60</sup> It is moreover interesting to note that proponents of this understanding of *jus post bellum* occasionally distance themselves from other extra-legal conceptions of the notion, because of the problems associated to such conceptions identified above, at least from an international law perspective.<sup>61</sup> However, so far, as noted by one author, “there exist few concrete suggestions as far as the actual provisions of the prospective *jus post bellum* are concerned,”<sup>62</sup> which makes it of course difficult to fully grasp the contents of *jus post bellum*. I will thus not engage here in a detailed analysis of the contents of *jus post bellum*, but rather focus on the question whether such an understanding of *jus post bellum* really has some added value. I will however touch upon certain normative propositions to clarify that certain rules are already firmly embedded in international law.

The contents of that legal framework would include not only positive obligations including those applicable to peace settlement agreements, but would also encompass rules regulating the responsibilities and obligations of the actors involved in the post-conflict phase. To complement these rules, suggestions are often made to add “new” rules to post-conflict reconstruction (section III.B.1). All in all, an assessment of the contents of *jus post bellum* reveals that the “legal void” in the law regulating the “transition” from war to peace is overstated (section III.B.2). Finally, one of the possible avenues of the “*jus post bellum* project” might be that it functions as an interpretative legal framework, a less ambitious, but perhaps for that reason more feasible conception of *jus post bellum*.

### 1. The substantive “contents” of *jus post bellum*

On the necessity to create a new set of rules and principles, authors’ opinions differ to some extent, but they all concur on the fact that the differentiation between times of war and times of peace is not only factually impossible to make, but also legally faulty. Neither the “laws of peace” (*ius pacis*) nor the “laws of war” (*ius in bello*) would contain principles or a framework suitable for managing the transition or post-conflict phase,<sup>63</sup> in particular when it comes down to the conclusion and contents of peace settlement agreements.

<sup>58</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 179.

<sup>59</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 179.

<sup>60</sup> Stahn, “‘Jus ad bellum,’ ‘jus in bello’ ... jus post bellum?” (n. 12) 936.

<sup>61</sup> See Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 181.

<sup>62</sup> Inger Österdahl, “Just War, Just Peace and the ‘Jus post bellum’” (2012) 81 *Nordic Journal of International Law* 282.

<sup>63</sup> Stahn, “Mapping the Discipline(s)” (n. 3) 322–23.

On the fairness in peace settlements, often advocated as one of the fundamental principles in the law of transition from war to peace,<sup>64</sup> one can be rather brief, since elements of fairness are already included in various international legal norms. Generally, peace agreements are negotiated in function of the relevant rules of the Vienna Convention on the Law of Treaties which in large parts is reflective of customary international law.<sup>65</sup> There is no need to depart from existing rules in relation to the legal capacity of those persons which are entitled to negotiate or sign treaties on behalf of the population when dealing with a transition from war to peace. More specifically, Part V, Section 2 of the Vienna Convention contains principles on the invalidity of treaties, amongst which the coercion of a State by the threat or use of force (Article 52). Recent peace treaties are no longer a question of the victor imposing its conditions on the vanquished state. Rather, there is a clear evolution toward settling peace agreements in an objective manner, with due consideration of the equality of all parties and international peace and security.<sup>66</sup>

Another evidence of the balance of the rights of both parties is the prohibition of the acquisition of territory through the use of force, a principle which is equally firmly embedded in international law. There is no need to add this standard to the list of “principles” for a “just” termination of war.<sup>67</sup> The territorial integrity of the vanquished state cannot be altered by the victors. Arguably, the only entity capable of altering territorial rights is the Security Council when acting to maintain international peace and security.<sup>68</sup> Similarly, the question of reparations for the damages caused by the conflict is already dealt with in Article 3 of the Hague Regulations, which stipulates unambiguously that a “belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” The Draft Articles on the Responsibilities of States for Internationally Wrongful Acts equally contain sufficient provisions in this regard. One should also point to the existing norms which limit the effects of reparations. Although in the past such post-war reparations had comprised drastic effects on the lives of the population, Article 1, para. 2 of the International Covenant on Civil and Political Rights provide that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>69</sup> Such limits and principles in respect of peace settlements and agreements are already firmly established in international law. The law of transition from a state of war to a state of peace is thus in large parts covered by existing rules and principles.

<sup>64</sup> See e.g. Stahn, “‘Jus ad bellum,’ ‘jus in bello’ ... jus post bellum?” (n. 12) 938–41; see also, generally, Christine Bell, “Peace Settlements and International Law: From *Lex Pacificatoria* to *Jus Post Bellum*” in Christian Henderson and Nigel White (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar Publishing 2012).

<sup>65</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2007) 12–13.

<sup>66</sup> See generally, Christine Bell, *On the Law of Peace. Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 105 *et seq.* and Christine Bell, ch. 10, this volume. See also Stephen Neff, *War and the Law of Nations* (Cambridge University Press 2007).

<sup>67</sup> See, however, Stahn, “‘Jus ad bellum,’ ‘jus in bello’ ... jus post bellum?” (n. 12) 938–41.

<sup>68</sup> See for a discussion, Frederic L. Kirgis, “Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making” (2001) *American Journal of International Law* 579, 579 *et seq.*, and De Brabandere, *Post-conflict Administrations in International Law* (n. 38) 68–70.

<sup>69</sup> International Covenant on Civil and Political Rights (19 December 1966), 999 UNTS 17.

Of course, one might note that the *contents* of peace agreements need to be predetermined as a matter of law, in addition to the existing principles on reparations. Such additional settlements would cover issues such as transitional justice, i.e. how to deal with past crimes.<sup>70</sup> However, there is no “blueprint” for reconstruction processes. To continue with the example of transitional justice, the most obvious but not exclusive method is to rely on tribunals, which may be national, international, or “mixed” with differing levels of international involvement. The overall objective of transitional justice is of course accountability, but truth-finding, truth-telling, reparation and reconciliation may also be part of the process. The instruments therefore vary widely from case to case, according to the expectations in the territories. The accountability for past crimes, although vital in the reconstruction process, cannot be part of a compulsory and previously established framework. Such issues are best addressed at the national rather than international level, taking into account local culture and legal tradition.

Rules pertaining to the conduct of States or international organizations in the post-conflict reconstruction phase, i.e. rules relating to the way in which the authority and the mandate should be exercised are often considered as an indispensable part of *jus post bellum*.<sup>71</sup> *Jus post bellum* theorists are for instance almost unanimous on the inclusion of human rights law,<sup>72</sup> humanitarian law,<sup>73</sup> the law of occupation,<sup>74</sup> and rules on the accountability of international actors involved in post-conflict reconstruction.<sup>75</sup> However, human rights law,<sup>76</sup> and the laws of armed conflict, including the laws of occupation,<sup>77</sup> already provide adequate legal restraints to the conduct of foreign actors in such circumstances. Although the effective application of these rules might have been ineffective, the *existence and applicability* of these legal frameworks generally is beyond doubt.

<sup>70</sup> See e.g. Stahn, “‘Jus ad bellum,’ ‘jus in bello’ ... jus post bellum?” (n. 12) 940; see also Cedric Ryngaert and Lauren Gould, “International Criminal Justice and *Jus Post Bellum*: The Challenge of ICC Complementarity: A Case-Study of the Situation in Uganda” 44(1)–(2) (2011) *Revue belge de droit international* 91; Jens Iverson, ch. 5, this volume.

<sup>71</sup> See e.g. Boon, “Legislative Reform” (n. 20).

<sup>72</sup> See e.g. Ralph Wilde, “Are Human Rights Norms Part of the Jus Post Bellum, and Should They Be?” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum—Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 163; Kristen Boon, “Obligations of the New Occupier: The Contours of a Jus Post Bellum” (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 57–84 and Frederik Naert, “International Humanitarian Law and Human Rights Law in Peace—Operations as Parts of a Variable Jus Post Bellum” 44(1)–(2) (2011) *Revue belge de droit international* 26.

<sup>73</sup> See e.g. Hilary Charlesworth, “Law After War” (2007) 8 *Melbourne Journal of International Law* 233–247.

<sup>74</sup> See Charlesworth, “Law After War” (n. 73).

<sup>75</sup> See e.g. Boon, “Legislative Reform” (n. 20) 28.

<sup>76</sup> See for instance on the application of human rights law to international organizations in post-conflict situations: Robert Kolb et al., *Application du droit international humanitaire et des droits de l’homme aux organisations internationales: Forces de paix et administrations civiles transitoires* (Bruylant 2005); L. Cameron, “Human Rights Accountability of International Civil Administrations to the People Subject to Administration” (2007) 1 *Human Rights & International Legal Discourse* 267; Eric De Brabandere, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor” in Jan Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 331 *et seq.*

<sup>77</sup> See Michael J. Kelly et al., “Legal Aspects of Australia’s Involvement in the International Force for East Timor” (2001) 83 *International Review of the Red Cross* 101.

It has also been suggested that the existing rules discussed above should be complemented by new rules.<sup>78</sup> In any event, adding new substantive obligations faces the usual difficulties of law-making absent a political will to engage in a treatification of the new rules, or a practice that would coincide with the necessary *opinio juris*.<sup>79</sup> In other words, the question remains how such a “new regime” will transcend its *lex ferenda* character to become *lex lata*. Some authors have suggested including, for example, norms of national criminal law, national administrative law, national constitutional law, and national military law,<sup>80</sup> others have suggested adding “trusteeship” type obligations to the conduct of post-conflict reconstruction.<sup>81</sup> These and other suggestions are not really what could be termed “new rules” of international law, or national law for that matter. Rather, the proposed “new” rules are in fact *existing* rules of international or national law, which are imported into the concept of *jus post bellum*. Despite claims that *jus post bellum* is more than a grouping of existing international legal rules under a new framework,<sup>82</sup> propositions to include “new” norms are relatively indeterminate and unconvincing. To that extent, again, *jus post bellum*’s normative novelty is relatively limited, and the alleged “legal gap” in the law seems to be artificial and overstated.

## 2. The alleged “legal void” in post-conflict reconstruction

The alleged “legal void” seems rather to be, what Jean Salmon has described as a “*lacune de convenance*,”<sup>83</sup> namely an artificially created lacuna in order to justify the discard of certain rules and the suggestion of new rules. The problems encountered under post-conflict reconstruction missions in respect of human rights or humanitarian law for instance, are not a question of applicable law, but rather a question of accountability and effective implementation of international law, and the need to improve this. In other words, the identified “gaps” in the law are not the result of the absence of rules regulating post-conflict reconstruction, but rather the failure effectively to implement the existing rules. That is perhaps also why *jus post bellum* theorists mainly see the lack of implementation of existing rules as the main problem in post-conflict reconstruction and place an important focus on the effective implementation of *jus post bellum* rules.<sup>84</sup> The alleged “legal void” cannot however be “filled” by adding new rules to post-conflict reconstruction or by putting existing rules under the umbrella of *jus post bellum*.<sup>85</sup>

From this perspective, *jus post bellum* does not seem to add anything new to the legal framework of post-conflict reconstruction efforts. Existing rules may certainly be grouped under the concept of *jus post bellum*, and there is of course as such nothing wrong with this. However, because these rules are already clearly established in international law, the question is whether *jus post bellum* really can be more than a new umbrella term to

<sup>78</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 182.

<sup>79</sup> See also Christine Bell, ch. 10, this volume. <sup>80</sup> See also Christine Bell, ch. 10, this volume.

<sup>81</sup> As *inter alia* suggested by Boon, “Legislative Reform” (n. 20).

<sup>82</sup> See e.g. Boon, “Legislative Reform” (n. 20).

<sup>83</sup> Jean Salmon, “Quelques observations sur les lacunes en droit international public” in Chaïm Perelman (ed.), *Le problème des lacunes en droit* (Bruylant 1968) 326; see also Corten, “Le *jus post bellum*” (n. 2) 67.

<sup>84</sup> See e.g. Stahn, “Jus ad bellum, ‘jus in bello’ . . . jus post bellum?” (n. 12) 942; Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 184.

<sup>85</sup> Corten, “Le *jus post bellum*” (n. 2) 68.

group existing rights and obligations. While the concept is thus not really new to the extent that *jus post bellum* groups existing rules, it is rather the *labeling* of such obligations as *jus post bellum* which makes it a new concept in international law.

This is moreover implicit in certain conceptions of *jus post bellum*, where the usefulness of the concept is seen to be lying not exclusively in the creation of a new legal framework, but rather in bringing the existing rules and obligations to the forefront of legal discussion and political decision-making. As noted by Österdahl and van Zadel for example, labeling the law applicable to post-conflict situations might help

put the post-conflict phase in the centre of the attention of the international community as well as complete the available international law on armed conflict with a post-conflict category which may make the idea of a legal framework for the post-conflict phase more legitimate.<sup>86</sup>

While some authors have considered this useful and necessary,<sup>87</sup> and this might be true for policy considerations, I doubt that it has some added value from a purely legal perspective.

### 3. *Jus post bellum as an interpretative framework*

Linked to the previous discussion on the substantive “content” of *jus post bellum*, a related and more recent theory of *jus post bellum* sees the main relevance and importance of the concept in providing an interpretative framework for the conduct of post-conflict reconstruction.<sup>88</sup> In other words, *jus post bellum* is then viewed as a normative set of *principles* rather than substantive rules which would give guidance in the application of the existing rules governing post-conflict reconstruction.<sup>89</sup> This idea of *jus post bellum* is considered to be important because of the need to interpret uniformly the various norms, rules, and practices applicable in post-conflict reconstruction.<sup>90</sup> Under such an understanding of *jus post bellum*, the alleged “legal void” becomes irrelevant, since the objective is not to add new rules, but rather to use the existing legal system and where possible interpret these rules in function of the identified overarching principles. It then functions to “solve” the main problem of post-conflict reconstruction I have identified in the previous section: to improve the effective implementation of international law applicable in such situations. To be clear at the outset, I remain skeptical of the need to group these principles under a new notion, since they clearly are already of application in post-conflict situations. The question of the usefulness of *jus post bellum* thus again persists.

Roughly three principles are usually considered to part of this “interpretative legal framework”: the principle of proportionality,<sup>91</sup> the accountability of foreign actors,<sup>92</sup>

<sup>86</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 185.

<sup>87</sup> See for a discussion Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 4) 184–5.

<sup>88</sup> See James Gallen, ch. 4, this volume. Gallen, however, focuses more on the rather jurisprudential question of whether the principle of “integrity,” as used by Ronald Dworkin, may function as one of the main principles of *jus post bellum* as an interpretative framework. I will instead here try to identify possible existing principles of international law which may be part of *jus post bellum* as an interpretative framework.

<sup>89</sup> See Christine Bell, ch. 10, this volume. <sup>90</sup> See James Gallen, ch. 4, this volume.

<sup>91</sup> See James Gallen, ch. 4, and Dieter Fleck, ch. 3, this volume.

<sup>92</sup> See James Gallen, ch. 4, this volume.

and the principle that post-conflict reconstruction efforts should be for the benefit of the population (trusteeship<sup>93</sup> or fiduciary type of authority or stewardship<sup>94</sup>). Although I have referred to these principles above in the context of the substantive content of *jus post bellum* the difference in their use here is the fact that the objective is not necessarily to “create” new substantive rules applicable to post-conflict reconstruction or to define the substantive rules applicable to such situations, but rather to use these principles to interpret the existing legal norms applicable in post-conflict reconstruction. They would then function as overarching principles which may guide foreign actors involved in post-conflict reconstruction to interpret their mandate, either under the laws of occupation or under Security Council resolutions, and the general obligations they have under, for example, human rights law and the laws of armed conflict. It would also serve to interpret the law applicable generally in post-conflict territories, such as refugee law and human rights law.

The principle of proportionality is in fact already very much present in the *jus ad bellum* and the *jus in bello*, as it is in general international law.<sup>95</sup> It may, however, prove useful in defining the actions foreign actors may take in implementing their mandate. Proportionality also has the advantage of being an inherently flexible concept, capable of being adapted to the specific needs of the territory and the population.

The principle that post-conflict reconstruction efforts should be for the benefit of the population (trusteeship, judiciary authority, or stewardship) does not as such form a general principle of international law as proportionality, but the notion is inherent in the laws of occupation, and in case of action taken by the Security Council. The principle that international actors administer the territory on behalf and for the benefit of the population, and not for themselves is not a consequence of the direct application of the concept of trust or the fiduciary character of the authority to any post-conflict mission. When the laws of occupation apply, the notion of trust is included on the “usufructuary” nature of the occupier’s authority.<sup>96</sup> The existence of such an obligation outside the formal application of the laws relating to foreign occupation can be derived from the relevant Security Council Resolutions and the context in which these missions were set up. The objectives of such missions necessarily imply governance on behalf of and for the benefit of the population. I would therefore argue that the principle of a fiduciary or trusteeship type of authority does not as such independently apply to post-conflict reconstruction, but this principle may again serve to interpret mandates given to foreign actors, or delineate action to be taken by these actors.

The principle of accountability again is already very much present in general international law and in the areas of law which are of specific relevance in post-conflict settings. Emphasizing the need of accountability of foreign actors involved in post-conflict reconstruction is as mentioned of paramount importance, and in fact is

<sup>93</sup> See Boon, “Legislative Reform” (n. 20).

<sup>94</sup> See James Gallen, ch. 4, this volume.

<sup>95</sup> See Thomas M. Franck, “On Proportionality of Countermeasures in International Law” (2008) 102(4) *American Journal of International Law* 715; Enzo Cannizzaro, “The Role of Proportionality in the Law of International Countermeasures” 12 *European Journal of International Law* (2001) 890. Both authors discuss the role played by the principles of proportionality in general international law.

<sup>96</sup> A. Roberts “What is a Military Occupation?” (1984) 55 *British Yearbook of International Law* 291, 295.

perhaps the main reason behind the problems encountered under post-conflict reconstruction missions in respect of human rights or humanitarian law. As said, there is no applicable law gap, but rather a need to ensure accountability and effective implementation of international law. The principle of accountability may thus once more serve to guide foreign actors involved in post-conflict reconstruction, for instance, in terms of setting up adequate mechanisms to challenge acts taken by these actors.

Without doubt, these “principles” vary substantially in nature and legal force. Proportionality may without much hesitation be considered as a general principle of international law, as reflected in Article 38 of the ICJ Statute. Accountability on the other hand is very different: it is as such not a principle of international law. It rather constitutes an “objective” within a legal system. In other words, accountability is not a source of rights and obligations; it is only because it has been incorporated in certain specific rules, such as those on the responsibility of states and international organizations for internationally wrongful acts, that certain normative dimensions of “accountability” become binding. Finally, the last principle of “trusteeship” or “fiduciary authority” also is very different in nature. It clearly does not constitute a general principle of law, but is more an area-specific principle.<sup>97</sup> It applies to situations of occupation, and implicitly to Security Council mandated missions, but the relevance of the concept outside these situations is almost inexistent.

Reference is very often made in this context to the concept of “principles” elaborated by Ronald Dworkin.<sup>98</sup> Although it is not the purpose here to engage in the theoretical question on the concept of law as elaborated by Dworkin, essentially as “a general attack on positivism,”<sup>99</sup> a couple of remarks in this respect need to be made. First, Dworkin distinguishes between “principles” and “policies” which are respectively defined as “a standard that is to be observed [...] because it is a requirement of justice or fairness or some other dimension of morality” and as a “standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.”<sup>100</sup> Proportionality, trusteeship, and accountability each fit one of the two categories, but in light of their different nature, it is perhaps better to simply refer to them as “standards.” Secondly, from a positivist perspective, one should keep in mind that these three principles do not by definition constitute binding norms that should be applied by judges or arbitrators. General principles of law and general principles of international law indeed constitute sources of international obligations,<sup>101</sup> which clearly is not the case for concepts such as “accountability.” This again emphasizes the need to refer to them as overarching “standards,” rather than principles to avoid any ambiguity as to their legal force. Finally, in any event, these principles are not truly “new” principles or standards of international law, nor are they newly applicable to post-conflict situations. As said, proportionality, fiduciary authority, and accountability are either directly or indirectly already part of the applicable norms in post-conflict

<sup>97</sup> See on this concept, Marina Lostal-Becerril, “The Role of Specific Discipline Principles in International Law: A Parallel Analysis between Environmental and Cultural Heritage Law” (2013) 82(3) *Nordic Journal of International Law* 391–415.

<sup>98</sup> See James Gallen, ch. 4, this volume. <sup>99</sup> See James Gallen, ch. 4, this volume.

<sup>100</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 22.

<sup>101</sup> See Ian Brownlie, *Principles of Public International Law* (7th edn., Oxford University Press 2008) 16–19.

settings. The question thus remains whether, even in such a minimalist conception of *jus post bellum*, it really is useful to group *existing* principles in the new concept of *jus post bellum*.

#### IV. Conclusion

The importance of post-conflict settlements and the need to move beyond the mere maintenance of a *status quo* in case of potential threats to international stability, peace, and security cannot be doubted. Such a shift lies at the basis of the expanding activity of international organizations in post-conflict situations. However, the legal implications of such evolution need to be curtailed. The neutral approach toward the post-conflict reconstruction process, as distinct from the issues of both *jus ad bellum* and the *jus in bello* needs to be maintained. I have explained that *jus post bellum* theories linking post-conflict reconstruction to the legality of the intervention, or changing the rights and obligations of actors in post-conflict reconstruction according to the (il)legality of the intervention are not only unacceptable, they also run contrary to current international law and practice. Any attempt to transpose or impose legal obligations to intervening states implicitly or explicitly aims at evaluating the legality of a military intervention in function of the potential positive outcomes of the *post bellum* effects, thereby reintroducing “just war” ideas in international law.

If one takes the notion of *jus post bellum* as a “law after conflict,” or to fill an alleged “normative gap,” the added value of the notion seems rather limited. When *jus post bellum* is used in this sense, the question really is whether the whole legal framework of post-conflict reconstruction can or should be categorized as a distinct set of legal rules and whether the use of such new terminology has some added value from a legal perspective.<sup>102</sup> Moreover, in respect of the addition of new rules to the existing *jus post bellum* obligations, i.e. the existing rules regulating the post-conflict phase which would be grouped under a the *jus post bellum* framework, it seems that these “new” rules are existing rules of international or national law which are imported into the concept of *jus post bellum*.

The alleged “legal void” seems rather an artificially created lacuna. The identified “gaps” in the law are not the result of the absence of rules regulating post-conflict reconstruction, but rather the failure effectively to implement the existing rules. This is however inherent to the limits of any legal system.<sup>103</sup> It is thus doubtful that the alleged “legal void” can be “filled” by adding new rules to post-conflict reconstruction or by putting existing rules under the umbrella of *jus post bellum*.

I have nevertheless recognized that the *jus post bellum* theory that sees the main relevance and importance of the concept in providing an interpretative framework for the conduct of post-conflict reconstruction has some value, although I have expressed my skepticism on this theory as well. However, viewing *jus post bellum* as a normative

<sup>102</sup> See also Gelijs Molier, “Rebuilding After Armed Conflict: Towards a Legal Framework of the Responsibility to Rebuild or a Jus Post Bellum?” in Gelijs Molier and Eva C. Nieuwenhuys (eds), *Peace, Security and Development in an Era of Globalization. The Integrated Security Approach Viewed from a Multidisciplinary Perspective* (Republic of Letters Publishing/Martinus Nijhoff 2009) 317.

<sup>103</sup> Corten “Le *jus post bellum*” (n. 2) 68.



set of *principles*, such as proportionality, fiduciary authority, and accountability, rather than substantive rules, which would give guidance in the application of the existing rules governing post-conflict reconstruction constitutes a rather minimalist approach to *jus post bellum*, and is perhaps not what many proponents of such a theory had in mind when designing the concept and its contents, but it is possibly the only prospect for a viable and sound *jus post bellum*.

## Waging Peace

### Ambiguities, Contradictions, and Problems of a *Jus Post Bellum* Legal Framework

Roxana Vatanparast\*

#### I. Introduction

In the early 1990s, Myres McDougal and Siegfried Weissner noted that “[d]esigns for peace among nations have abounded throughout the course of history. The most successful plans harnessed the self-interest of ruling elites in the communities of the world.”<sup>1</sup> Might *jus post bellum*, an emerging body of international norms which aims to promote a sustainable peace in the post-conflict context, raise the same concern? This is one of a series of questions and challenges raised in this chapter on a contemporary *jus post bellum* legal framework.

This chapter will discuss the ambiguities, contradictions, and problems related to formalizing *jus post bellum* principles in a body of international law, and will outline some of the costs and limitations of a potential *jus post bellum* legal framework. One such limitation is that modern conflicts pose a serious challenge to extant international laws of war, and may also present significant challenges to *jus post bellum* as a body of law. For example, while *jus post bellum* is thought to apply in the post-conflict phase, the formal distinctions between war<sup>2</sup> and peace are increasingly blurring. This is further complicated by the fact that the legal status of conflict or peace can be, and often is, manipulated to avoid certain international legal obligations, or to obtain certain legal immunities and privileges that would not be available otherwise. Determining the temporal applicability of a *jus post bellum* legal framework is thus exceedingly difficult given the convoluted and ambiguous nature of warfare and its entanglement with politics.

*Jus post bellum* as a legal framework is also characterized by a series of contradictions and problems. One of those contradictions is that some of the general suggested principles of *jus post bellum* are not compatible with *jus post bellum*'s aspiration

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<sup>1</sup> Myres S. McDougal and Siegfried Wiessner, “Law and Peace in a Changing World” (1991–92) 22 *Cumberland Law Review* 681.

<sup>2</sup> For the sake of simplicity, I use the terms “war” and “conflict” interchangeably throughout this chapter to refer to a wide range of conflicts, including those often referred to as the “use of force,” the various forms of “armed conflict,” “humanitarian intervention,” “belligerent occupation,” and other types of conflict or warfare that might fall under more than one of these categories, or that might not necessarily fall under any of them.

of sustainable peace or even with one another. For example, as will be discussed, “economic reconstruction” is proposed by several scholars as one of the potential principles of a *jus post bellum* body of law. Contemporary post-conflict economic reconstruction efforts, however, have largely failed at promoting development or enduring peace, and in some cases, have set the stage for renewed conflict. This chapter warns that inclusion of a general “economic reconstruction” principle, without limitation or further specification, may result in a legitimization of problematic practices, and may have consequences that contradict the foundational aspirations of *jus post bellum* and certain humanitarian ideals, such as peace, human rights protection, and self-determination. Farther, if one takes the approach of critical theorists, any body of law created with the goal of attaining peace is characterized by a central tension, as often resorting to force may be regarded as necessary to maintain peace and uphold the legal order.

The chapter is structured as follows. Part II will briefly introduce the concept and suggested content of *jus post bellum* as a body of international law and discuss the basic contours of how *jus post bellum* is currently understood and conceptualized by some scholars. Part III will discuss some of the ambiguities surrounding the temporal applicability of a potential *jus post bellum* legal framework. Part IV will outline several potential contradictions and problems that may result if some of the proposed *jus post bellum* principles are incorporated into a body of international law. The chapter will conclude that although *jus post bellum* may be conceptually useful as a space for scholars and practitioners to discuss the unique challenges presented in the post-conflict transition phase, *jus post bellum* principles need not be formalized within a new body of international law.

## II. What Is *Jus Post Bellum*?

*Jus post bellum* has been a subject largely neglected in contemporary international law until recently. The recent upturn in scholarship on this topic suggests that *jus post bellum* is gaining traction among international lawyers, necessitating further analysis and development. While the turn of international legal scholars’ attention to a potential new legal framework that applies to the post-conflict phase is relatively recent, the concept is hardly new.<sup>3</sup> Until the recent focus on the legal dimensions of this framework, *jus post bellum* was considered a moral paradigm and the third part of just war theory, with rules governing going to war (*jus ad bellum*) and conduct during hostilities (*jus in bello* or international humanitarian law) being the first and second parts.<sup>4</sup>

<sup>3</sup> Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 43 *Vanderbilt Journal of Transnational Law* 119, 138 (referring to Saint Augustine, Saint Isidore of Seville, Saint Thomas Aquinas, Francisco de Vitoria, Francisco Suarez, Alberico Gentili, Hugo Grotius, and Immanuel Kant’s discussions on war termination and suggested theories and principles of a post-war framework).

<sup>4</sup> Carsten Stahn, “*Jus Post Bellum*: Mapping the Discipline(s)” (2007–08) 23 *American University International Law Review* 311, 313–14.

The revival in international law of the old concept of *jus post bellum* appears to be happening partly because of the recent fascination with governing peacemaking through law,<sup>5</sup> “the increase of interventions and the growing impact of international law on post-conflict peace,”<sup>6</sup> as well as the recognition among some scholars that a gap in the international legal framework governing the post-conflict phase exists, especially relative to the more developed frameworks of *jus ad bellum* and *jus in bello*.<sup>7</sup>

The nature and conceptualization of a contemporary *jus post bellum* is not something that is yet clear, or something on which there is yet a consensus on among legal scholars. Sustainable peace is considered a central aspiration of *jus post bellum*.<sup>8</sup> *Jus post bellum* has been defined as “the set of norms applicable at the end of an armed conflict—whether internal or international—with a view to establishing a sustainable peace.”<sup>9</sup> Some scholars advocate a holistic approach to the concept of *jus post bellum* “as a broad regulatory framework which contains substantive legal rules governing transitions from conflict to peace, as well as rules on the interplay of these substantive rules in case of conflict.”<sup>10</sup> For the purposes of this chapter, *jus post bellum* is defined as an emerging body of norms that are being proposed to govern the transition(s) from conflict to a sustainable peace.

International lawyers are particularly interested in whether the concept should be formalized in a body of international law as a way to deal with the challenges of state building and transformation in the post-conflict phase.<sup>11</sup> Given the importance of the post-conflict transition phase in establishing a foundation for durable peace, and the distinct legal issues that may arise in that context,<sup>12</sup> *jus post bellum* is thought to provide a legal framework that can address the underlying causes of conflict to prevent relapse into hostilities. Although there are already existing international laws that apply in the post-conflict phase, largely captured in the 1907 Hague Regulations and the Fourth Geneva Convention of 1949, these laws are thought to be fragmented, narrow in scope, and outdated.<sup>13</sup> It is thought that a legal *jus post bellum* framework can consolidate the current piecemeal approaches to the post-conflict phase in international human rights law, international criminal law, and international humanitarian law, fill in any gaps, and define the way these various laws ought to interplay with each other.<sup>14</sup> Moreover, some argue, the temporal scope of some of the existing laws, in terms

<sup>5</sup> Inger Österdahl and Esther van Zadel, “What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles” (2009) 14 *Journal of Conflict and Security Law* 175, 176.

<sup>6</sup> Carsten Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*’?—Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 921, 922.

<sup>7</sup> See e.g. Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 181–2; Stahn, “*Jus Post Bellum*: Mapping the Discipline(s)” (n. 4) 327–8.

<sup>8</sup> See Jens Iverson, ch. 5, this volume.

<sup>9</sup> Vincent Chetail, “Introduction: Post-Conflict Peacebuilding—Ambiguity and Identity” in V. Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press 2009) 18.

<sup>10</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 178.

<sup>11</sup> Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*’?” (n. 6) 321. For a suggestion that *jus post bellum* principles be codified in a treaty and their violations criminalized, see Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 184.

<sup>12</sup> Kristen E. Boon, “Obligations of the New Occupier: The Contours of a *Jus Post Bellum*” (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 57, 58.

<sup>13</sup> Brian Orend, “Terminating Wars and Establishing Global Governance” (1999) 12 *Canadian Journal of Law and Jurisprudence* 253, 254–5; Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 181–82.

<sup>14</sup> Stahn, “*Jus Post Bellum*: Mapping the Discipline(s)” (n. 4) 332.

of their application solely in times of war or in times of peace, is unsuitable for managing the period of transition that is not clearly in either a time of war or peace.<sup>15</sup>

Since *jus post bellum* is concerned not only with the end of the conflict, but also with the post-conflict transition to long-term stability, a broad-based approach to eliminating the root causes of conflict and creating lasting peace is suggested. The proposed principles for a legal *jus post bellum* framework are therefore much more involved and broader than the *jus ad bellum* and *jus in bello* legal frameworks, and encompass different areas of law, such as international humanitarian law, human rights law, and criminal law, as well as national criminal law, administrative law, constitutional law, and military law.<sup>16</sup> These principles include “restoration of order, restoration of sovereignty, economic reconstruction, seeking a durable peace, extracting post-conflict reparations, and punishment of rights violators.”<sup>17</sup> The proposed principles of *jus post bellum* have great power to influence the global order to the extent they inform and legitimate processes of reconstructing states and economies in the delicate post-conflict phase.

### III. Ambiguities Regarding the Temporal Applicability of *Jus Post Bellum*

#### A. The blurry line between war and peace

While the origins of *jus post bellum* lie in classical just war theory, proponents of this theory had a very different conception of conflict that does not translate to the challenges presented by modern warfare. Early public international lawyers such as Hugo Grotius and Alberico Gentili would have viewed war as a conflict between formally equal sovereigns. Modern wars do not fit neatly within this traditional notion of warfare, nor within the purview of traditional just war theory or even more contemporary international laws of war frameworks.

Traditionally, war and peace were thought of as not only distinct in temporal scope, but also had their own legal frameworks.<sup>18</sup> In 1943, Georg Schwarzenberger noted the limitations of the traditional system of international law “based on the distinction between the law of peace and the law of war.”<sup>19</sup> In 1954, Philip Jessup suggested “[t]he question may be posed whether it would not be useful to break away from the old dichotomous approach, acknowledging in law as in fact that there is a third status intermediate between peace and war.”<sup>20</sup> Since then, the classical view, with its sharp distinction between war and peace, has been increasingly disfavored due to the occurrence of conflicts that did not fit within this dichotomy.<sup>21</sup>

<sup>15</sup> De Brabandere, “The Responsibility for Post-Conflict Reforms” (n. 3) 142.

<sup>16</sup> See Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 182–3.

<sup>17</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 180–1.

<sup>18</sup> Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*?’” (n. 6) 923.

<sup>19</sup> Georg Schwarzenberger, “*Jus Pacis Ac Belli*?: Prolegomena to a Sociology of International Law” (1943) 37 *American Journal of International Law* 460.

<sup>20</sup> Philip C. Jessup, “Should International Law Recognize an Intermediate Status between Peace and War?” (1954) 48 *American Journal of International Law* 98, 100.

<sup>21</sup> Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*?’” (n. 6) 923.

*Jus post bellum* is thought to apply during the “post-conflict” phase, but it is unclear exactly when that would be. Scholars discussing *jus post bellum* acknowledge that the boundaries between war and peace have been blurred,<sup>22</sup> and recognize that the temporal scope of a modern *jus post bellum* framework is unclear given these blurry boundaries.<sup>23</sup> Understanding conflict and peace as a continuum rather than distinct phases has been suggested, as it more accurately reflects the realities of conflict.<sup>24</sup> However, certain discussions of *jus post bellum*, like more traditional discussions on conflict and peace, assume a linear, chronological trajectory from conflict to peace that oversimplifies the multidirectional and overdetermined trajectories of formal conflicts.<sup>25</sup> There is no standard definition of post-conflict for the purposes of *jus post bellum*, but some refer to it as the period of transition from conflict to peace.<sup>26</sup> Others define the post-conflict phase in more detail as “a situation of negative peace, i.e. the absence of hostilities/threats to the peace, and not a situation of positive peace which only comprises situations where peacebuilding efforts are in place.”<sup>27</sup> These definitions presuppose a simplicity that does not exist in reality.

David Kennedy says that if one takes the perspective of those in the military with experience in a variety of conflict settings, they would say the term “post-conflict” is a misnomer, and would stress “the continuities of the transition from war to peace [...]”<sup>28</sup> Since military activities, post-conflict law enforcement, humanitarian tasks, nation-building, and peacemaking all occur in a “gray area between war and peace,” and often overlap considerably, there is no clear dividing line between when a war ends and when post-conflict starts.<sup>29</sup> As Slavoj Žižek observes,

We no longer have an opposition between war and humanitarian aid: the same intervention can function at both levels simultaneously [...] Perhaps the ultimate image of the ‘local population’ as homo sacer<sup>30</sup> is that of the American war plane flying above Afghanistan: one can never be sure whether it will be dropping bombs or food parcels.<sup>31</sup>

<sup>22</sup> Stahn, “*Jus Post Bellum: Mapping the Discipline(s)*” (n. 4) 322.

<sup>23</sup> See e.g. Doug McCready, “Ending the War Right: *Jus Post Bellum* and the Just War Tradition” (2009) 8 *Journal of Military Ethics* 66, 75; Stahn, “*Jus Post Bellum: Mapping the Discipline(s)*” (n. 4) 322; Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 175–6; Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*?’” (n. 6) 923

<sup>24</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 204.

<sup>25</sup> See e.g. Brian Orend, *The Morality of War* (Broadview Press 2006) 160 (“Conceptually, war has three phases: beginning, middle and end. So if we want a complete just war theory—or comprehensive international law—we simply must discuss justice during the termination phase of the war”) (emphasis in original).

<sup>26</sup> See generally, Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*?’” (n. 6).

<sup>27</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 177.

<sup>28</sup> David Kennedy, *Of War and Law* (Princeton University Press 2006) 113.

<sup>29</sup> Kennedy, *Of War and Law* (n. 28) 113–14.

<sup>30</sup> This term was used in ancient Roman law to describe individuals who could be killed by anyone with impunity and whose deaths had no sacrificial value. The term has been used more frequently in contemporary political, legal, and sociological discourse since the publication of Giorgio Agamben’s book, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998), especially in relation to contemporary exercises of sovereign violence. Agamben took the model of the Nazi concentration camps to define homo sacer as someone who has had their moral, civil, and social identity stripped away such that the person is available to be disposed of in any way the sovereign sees fit, including killing the person without facing legal procedure, judgment, or sanction.

<sup>31</sup> Slavoj Žižek, “Are We in a War? Do We Have an Enemy?” *London Review of Books* 24 (23 May 2002) 3, <<http://www.lrb.co.uk/v24/n10/slavoj-zizek/are-we-in-a-war-do-we-have-an-enemy>> (accessed 19 May

Another difficulty is that often the end of combat does not necessarily coincide with the end of war and vice-versa. For example, the wars in Iraq and Afghanistan continued long after the actual combat operations had ended.<sup>32</sup> Whereas in the past the signing of a peace treaty or a victor's formal declaration of the end of a war was considered the discernable end point of the conflict, modern conflicts no longer follow this path. There are many contemporary instances of peace treaties being entered into only to be followed by a relapse into conflict. In fact, the period after a peace agreement has been signed can be the most violent period of a conflict, as was seen in South Africa, for example.<sup>33</sup> Additionally, in the case of civil wars and "ethnic conflicts," there may be a multiplicity of embedded conflicts which may "exhibit properties of several escalation and de-escalation stages simultaneously."<sup>34</sup> Given the coexistence of peace processes and violence, some argue that there is overlap as to the application of *jus post bellum* and *jus in bello* principles.<sup>35</sup> Adopting a less simplistic conflict transformation model in discussions on *jus post bellum*, rather than a traditional escalation and de-escalation model of conflict, may more accurately represent the multidirectional nature of most conflicts.<sup>36</sup>

Because of the unique complexities and challenges each conflict presents, and the unpredictable nature of conflict, some scholars advocate a case-by-case approach to determining when *jus post bellum* ought to apply, but insinuate that there are factual, objective, or procedural methods of determining this.<sup>37</sup> The notion that the temporal applicability of a *jus post bellum* framework should vary on a case-by-case basis is a salient one given the unique nature of each conflict. However, there are several challenges to the idea that procedural or objective means can be used to determine when the post-conflict period begins. These challenges include situations of overlapping hostilities and transitions to peace as well as situations involving disagreements as to whether a peace process even exists. Christine Bell argues that in the case of "ethnic conflicts," there are often "micro-conflicts" as to the existence of a peace process, who started it, who owns it, and what can be classified as a peace agreement,<sup>38</sup> illustrating the subjectivity

2013). Žižek highlights the total power of a militarily superior group to legitimate actions in the absence of some compelling law, institution, and/or moral imperative and how this relates to the blurring of the state of war, or "state of emergency," with a continuing state of normality to justify extreme measures such as torture and the limitation of civil and democratic rights.

<sup>32</sup> McCready, "Ending the War Right" (n. 23) 67.

<sup>33</sup> Veronique Dudouet, *Transitions from Violence to Peace: Revisiting Analysis and Intervention in Conflict Transformation* (Berghof Research Center for Constructive Conflict Management 2006) 12 <<http://www.berghof-conflictresearch.org/documents/publications/br15e.pdf>> (accessed 25 July 2013).

<sup>34</sup> Dudouet, *Transitions from Violence to Peace* (n. 33).

<sup>35</sup> McCready, "Ending the War Right" (n. 23) 67.

<sup>36</sup> See Dudouet, *Transitions from Violence to Peace* (n. 33) 20–2.

<sup>37</sup> See e.g. Österdahl and van Zadel, "What Will *Jus Post Bellum* Mean?" (n. 5) 179 ("an accurate description of the duration of a post-conflict period, from its beginning to its end, may need to be determined on a case-by-case basis. In order to help to determine this, whilst keeping in mind that the legal discipline needs something specific to signify the end of a post-conflict phase, one may think of introducing a specific result that can be achieved in each post-conflict phase, which signifies the end of the post-conflict phase. One may also think of introducing a more procedural way of thinking, whereby the existence of certain mechanisms in the country in which the rules of *jus post bellum* apply, signifies the end of the post-conflict phase"); Stahn, "*Jus Post Bellum*: Mapping the Discipline(s)" (n. 4) 334 ("The question of when a period can accurately be described as being "after" hostilities may need to be determined on a case-by-case basis. *Jus post bellum* might, for instance, apply after a factual end of hostilities or after a Security Council Resolution").

<sup>38</sup> Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 15–19.

of these determinations. Attitudes toward peace processes and peace agreements are shaped by perceptions on what the conflict is about<sup>39</sup> —something that is neither simple to determine, nor easily agreed upon by different parties to a conflict and members of the public. There can even be overlapping peace processes and initiatives taking place at the same time.<sup>40</sup> Thus, the answers to the questions of when a conflict ends, and when the transition to peace begins, will often vary depending on whom one asks. In light of this, and the multiplicity of actors that are involved in conflict transformations and who influence their outcomes, the application of “procedural” or “objective” standards to determine when a conflict ends for the purposes of *jus post bellum* seems overly simplistic.

Moreover, the challenges raised by conflicts that pause temporarily only to relapse into conflict seem to suggest that a legal *jus post bellum* might suit some conflicts better than others. One of the most prominent contemporary examples of this is the ongoing Israeli-Palestinian conflict. Although the Israeli-Palestinian conflict is considerably unique in many ways, as it derives from a particular historical, cultural, social, and geographical context, it illustrates the complexity of conflict in one of its diverse manifestations. One of the reasons this conflict is important to note in discussions of *jus post bellum* is because of its pattern of military strikes, cease-fires, peace treaties, occupation, and relapse into conflict over a prolonged period of time.<sup>41</sup> Even when there were certain objective indicators that the conflict might be over at certain points in time, such as the initiation of peace processes and peace accords being entered into, the protracted nature of the conflict, the failures of the peace processes, and the numerous relapses into conflict have shown that these objective indicators turned out to be misleading. For this reason, serious difficulties may arise if a legal *jus post bellum* framework is to set forth certain “objective” or factual criteria for the temporal scope of its applicability.

Ideological, metaphorical, and rhetorical wars also pose a serious challenge to the notion that objective criteria can help determine when a conflict is over or in a transitional phase. The “war on terror” is an example of a conflict that is malleable, confusing, and semantically, legally, and practically problematic.<sup>42</sup> The term has been used to describe a host of battles, occupations, and security and military operations being waged in different territories and against different groups and persons all at once. As the terrorist threat is seen as multifaceted and ever-changing,<sup>43</sup> will the “war on terror” ever end?<sup>44</sup> It is unclear how *jus post bellum* might address “permanent wars.”

While the blurry boundaries between war and peace are acknowledged by *jus post bellum* scholars, some scholars claim that this provides more reason to recognize a

<sup>39</sup> Bell, *Peace Agreements and Human Rights* 16.

<sup>40</sup> Bell, *Peace Agreements and Human Rights* 18.

<sup>41</sup> See also Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 176.

<sup>42</sup> See e.g. Frédéric Mégret, “War? Legal Semantics and the Move to Violence” (2002) 13 *European Journal of International Law* 361; Bruce Ackerman, “This is Not a War” (2004) 113 *Yale Law Journal* 1871.

<sup>43</sup> See Matthew C. Waxman, “The Structure of Terrorism Threats and the Laws of War” (2010) 20 *Duke Journal of Comparative and International Law* 429.

<sup>44</sup> See Glen Greenwald, “Washington gets explicit, its ‘war on terror’ is permanent” *The Guardian* (London, 17 May 2013) <<http://www.guardian.co.uk/commentisfree/2013/may/17/endless-war-on-terror-obama>> (accessed 18 May 2013). See also, Glen Greenwald, “The ‘war on terror’—by design—can never end,” *The Guardian* (London, 4 January 2013) <<http://www.guardian.co.uk/commentisfree/2013/jan/04/war-on-terror-endless-johnson>> (accessed 18 May 2013).



third category in between war and peace,<sup>45</sup> and in conjunction, that a *jus post bellum* legal framework should exist for this third category to help clarify some of the ambiguities. However, this third category might create more ambiguities than it resolves. In 1955, Myres McDougal, discussing scholars' recommendations at the time to recognize and elaborate on a third status between war and peace "as a mode of eliminating confusion in reference and irrationality in policy," argued,

[D]ecisions about "war" and "peace" are perhaps even more complex than the contemporary literature yet explicitly recognizes and that a mode of analysis much more comprehensive and flexible than either dichotomy or trichotomy may be required if clarity and rationality are to be promoted. It is doubted whether a trichotomy which makes simultaneous reference both to facts of the greatest variety and to the responses which many different decision-makers make to these varying facts for many different purposes can, any more than a dichotomy of similar reference, do much to dispel ambiguity and irrationality.<sup>46</sup>

Given the blurred boundary between conflict and peace, it is unclear when the *jus post bellum* phase ought to begin.<sup>47</sup> Attempting to refer to objective criteria for determining when a conflict ends is highly problematic for the purposes of determining the temporal applicability of *jus post bellum*, as often there are no objective criteria, or the objective and factual criteria can be misleading. As Schwarzenberger argued 70 years ago,

In a system of international law which admits the limited use of force to its law of peace, or in which there are more than two states of legal relationships [...] it is impossible to find an objective criterion which distinguishes the status of war both from the status of peace and from the status mixtus.<sup>48</sup>

As will be discussed in the next section, determining when a war ends has more to do with strategy and politics than law and fact.<sup>49</sup> One can see the limitations of a *jus post bellum* legal framework that depends on strategic political determinations, especially when those strategies are at odds with the goals of *jus post bellum*, or if the applicability of the framework can be avoided or manipulated to achieve political aims due to the "contingent and contested" legal status of war.<sup>50</sup> While *jus post bellum* is a concept that is currently being shaped and developed, further development of the concept does not necessarily mean that it can overcome or adequately address the politics entangled with conflict transformations and transitions.

<sup>45</sup> See e.g. Stahn, "'*Jus ad bellum*,' '*Jus in bello*' ... '*Jus post bellum*'?" (n. 6); Österdahl and van Zadel, "What Will *Jus Post Bellum* Mean?" (n. 5).

<sup>46</sup> Myres S. McDougal, "Peace and War: Factual Continuum With Multiple Legal Consequences" (1955) 49 *American Journal of International Law* 63.

<sup>47</sup> McCready, "Ending the War Right" (n. 23) 75.

<sup>48</sup> Schwarzenberger, "*Jus Pacis Ac Belli*?" (n. 19) 473.

<sup>49</sup> David Kennedy, "Lawfare and Warfare" in James Crawford and Martti Koskeniemi (eds), *Cambridge Companion to International Law* (Cambridge University Press 2012) 166.

<sup>50</sup> Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War" (2004) 43 *Columbia Journal of Transnational Law* 1, 14.

## B. Manipulation of the legal status of conflict

The issue of when a legal *jus post bellum* framework ought to apply is also complicated by the fact that the status and construction of war and peace are often exploited to meet strategic goals. Nathaniel Berman argues that “war is a legal construction that puts only a legally limited set of actors and actions outside the reach of ‘normal’ law.”<sup>51</sup> The legal concepts of war and non-war can be easily manipulated, and often are, to fit strategic interests.<sup>52</sup> Berman explains that despite efforts at setting forth objective criteria in international law as to what constitutes conflict and when *jus in bello* laws apply, whether there is a legally cognizable war necessarily depends on normative decisions “informed by strong statist and governmentalist biases.”<sup>53</sup> One reason for this is that during war, the “normal” laws of human rights and criminal law do not apply, as international law provides certain privileges and immunities during conflict that would not exist in a state of non-conflict. This has a wide range of legal implications, affecting rights and obligations in private law, as well as human rights law, criminal law, and the laws of war.<sup>54</sup>

The status of war, especially a metaphorical or rhetorical one like the “war on terror,” can also serve as a justification for the use of force and long-term occupation or presence in another country. For example, before the “war on terror,” it was the “war against communism” and the “war on drugs” that the United States used to justify its military presence in Colombia.<sup>55</sup> After 11 September, the justification turned into the US government trying to help the Colombian government in its unified war on narcotics and terrorism, even though there were no reported links of the opposition forces to the terrorists it was fighting in the “war on terror”—namely, Al-Qaeda and extremist Islamic groups.<sup>56</sup> The past decade has witnessed the use of the rhetoric of the “war on terror” to justify the use of force, regime change, and the establishment of new military bases around the world, to attribute the acts of non-state actors to particular states in order to justify the use of force against those states, to curtail domestic human rights protection, and to modify international law doctrine on forcible intervention.<sup>57</sup>

Utilizing the legal status of war or peace to meet strategic or political interests is hardly unique to modern warfare. For example, during the Second Sino-Japanese War, or the Manchurian crisis, despite the military clashes, and Japan’s invasion and occupation of the Chinese province of Manchuria, both China and Japan refused to recognize that a state of war existed to promote their political self-interests—Japan wanting to maintain its good standing as a founding member of the League of Nations and signatory to the Kellogg-Briand Pact, and China wanting to avoid disruption of its trade relations with the United States.<sup>58</sup> Since neither party acknowledged there was a war, the law of war could not apply to the conflict.<sup>59</sup>

<sup>51</sup> Berman, “Privileging Combat?” (n. 50) 1, 14.

<sup>52</sup> Berman, “Privileging Combat?” (n. 50) 8–9.

<sup>53</sup> Berman, “Privileging Combat?” (n. 50) 16–17.

<sup>54</sup> Berman, “Privileging Combat?” (n. 50) 9–10.

<sup>55</sup> Christine Gray, *International Law and the Use of Force* (Oxford University Press 2008) 229.

<sup>56</sup> Gray, *International Law and the Use of Force* (n. 55) 229.

<sup>57</sup> Gray, *International Law and the Use of Force* (n. 55) 227–53.

<sup>58</sup> Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict” in Nigel White and Christian Henderson (eds), *Research Handbook of International Conflict and Security Law* (Edward Elgar Publishing 2012) 4–5.

<sup>59</sup> Milanovic and Hadzi-Vidanovic, “A Taxonomy of Armed Conflict” (n. 58) 5.

In an analogous register, since *jus post bellum* is thought to apply in the “post-conflict” transition phase, the status of “post-conflict” and transitional periods after conflict may be highly contingent and subject to contestation and variation. Given the pliability of the statuses of war, post-conflict, and peace, *jus post bellum* as a legal framework faces the risk that it could be subject to the same limitations as other laws of war, if its applicability is determined by international actors acting in their self-interest. It is unclear how *jus post bellum* might address these problems, or whether it would even be capable of doing so.

## IV. Contradictions and Problems

### A. The legal “lacuna” in the post-conflict phase: is it really a problem?

One of the justifications presented for a contemporary *jus post bellum* framework is that such a framework might address the legal “gaps” in the post-conflict phase.<sup>60</sup> Scholars disagree as to the utility and enforceability of a legal *jus post bellum* framework and whether some of the legal gaps identified in the post-conflict phase are truly problematic. This section very briefly introduces a few different perspectives on these issues, but is by no means intended to be comprehensive.

Some scholars discussing *jus post bellum* argue that there is no need for a new legal framework, as existing rules are sufficient,<sup>61</sup> or even that *jus post bellum* theories are “detrimental to certain fundamental principles of international law and are not necessarily constructive in the current debate on post-conflict legal frameworks because they either amount to a challenge of the crucial neutral stance in the post-conflict phase or simply bring together already existing obligations under a new name.”<sup>62</sup> Others argue that it might be productive to maintain some concepts that might be addressed by *jus post bellum*, such as “transformative occupation,” outside legality to maintain the formal sovereign equality of states and reject “any one state’s legal entitlement to impose a single model of political order.”<sup>63</sup>

In Brian Orend’s view, on the other hand, “[w]ar termination is a legal problem inasmuch as there is next to no positive law regulating the war-ending process which is both substantive and explicit.”<sup>64</sup> He claims that the lack of positive law on war termination is a cause for concern because it allows the more powerful party to set the terms of peace and claim potentially unlimited entitlements, and there are no “settled expectations of state behaviour during this very fragile time.”<sup>65</sup> Orend’s view is that this places no limits on state behavior and leads to ad hoc solutions to outbreak of conflict that are inconsistent, creating uncertainty as to responsibilities and as to what extent an

<sup>60</sup> See e.g. Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5); Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*?’” (n. 6) 927–9.

<sup>61</sup> See Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 5) 177; De Brabandere, “The Responsibility for Post-Conflict Reforms” (n. 3) 134.

<sup>62</sup> De Brabandere, “The Responsibility for Post-Conflict Reforms” (n. 3) 121–2.

<sup>63</sup> See Nehal Bhuta, “The Antinomies of Transformative Occupation” (2005) 16 *European Journal of International Law* 721, 740.

<sup>64</sup> Orend, “Terminating Wars and Establishing Global Governance” (n. 13) 254.

<sup>65</sup> Orend, “Terminating Wars and Establishing Global Governance” (n. 13) 256.

external party should be involved in local violent outbreaks.<sup>66</sup> However, Orend fails to take into account the possibility that positive law in the war termination context might not necessarily solve the problems he is concerned with. Orend's argument fails to take into account that even when there is positive law outlining rights and obligations, there are still inconsistent outcomes, potentially limitless state behavior, and ad hoc arrangements that do not meet the standards of justice and prudence.

The argument regarding the legal lacuna creates a slippery slope because even if there were a legal *jus post bellum* framework, one would still be able to identify "gaps" and problems not addressed by law. It is highly impractical and even undesirable to have laws that cover every contingency and problem that might arise in the post-conflict context. Where would one draw the line between an acceptable degree of gaps and an unacceptable one? There is also the possibility that instead of simplifying the complicated nature of the post-conflict transition phase, *jus post bellum* might further complicate it by adding more laws, rules, and policies to an already regulated and fragmented terrain surrounding warfare. There is no certainty that *jus post bellum*, however well-defined and shaped, would bring about consistent results or outcomes compatible with humanitarian impulses.

In more general discussions of laws of war and security, some scholars take a more nuanced approach, by acknowledging the limits of law and the complexities of conflict, and by examining the costs, risks, and tradeoffs that accompany the entanglement of law and war. David Kennedy, for example, argues,

When things go well, law can provide a framework for talking across cultures about the justice and efficacy of wartime violence. More often, I am afraid, the modern partnership of war and law leaves all parties feeling their cause is just and no one feeling responsible for the deaths and suffering of war. Good legal arguments can make people lose their moral compass and sense of responsibility for the violence of war.<sup>67</sup>

The implication based on Kennedy's argument is that the tradeoff that comes with having rules or standards is that they can lead individuals and statesmen involved in conflict to believe that their cause is just, whatever that cause may be, as long as support for it can be found in the law, and it can be couched in legal terms and arguments. Having laws or standards in place tends to make people rely on them as the default and not sense personal responsibility for their actions and omissions, which is especially concerning when compliance with the rules has problematic or morally reprehensible consequences. Kennedy's argument may also apply to the post-conflict transformation context due to the overlapping conflict and peace processes that occur in the so-called "post-conflict" phase, which may include violent combat while peace initiatives are taking shape.

In relation to collective security, Martti Koskenniemi states that the Realist critiques of collective security suggest that "[w]hether peace exists is not dependent upon the presence or absence of rules about collective reaction, but upon the application of power by those states in a position to do so in the advancement of their interests."<sup>68</sup>

<sup>66</sup> Orend, "Terminating Wars and Establishing Global Governance" (n. 13) 257.

<sup>67</sup> David Kennedy, "Modern War and Modern Law" (2006-07) 36 *University of Baltimore Law Review* 173, 175-6.

<sup>68</sup> Martti Koskenniemi, "The Place of Law in Collective Security" (1995-96) 17 *Michigan Journal of International Law* 455, 463.

In the Realist view, a *jus post bellum* body of law may have little influence on the existence of peace, since its existence is not determined by rules, but rather it is within the power of states, and non-state parties, to determine based on their interests.

Ultimately, the utility of the concept of *jus post bellum* might depend on whom one asks and which particular principle of *jus post bellum* is being considered. Some military professionals might find more legal clarity in the post-conflict context useful but not necessarily advocate for the creation of a new *jus post bellum* legal framework.<sup>69</sup> States, coalitions of states, transitional councils, and/or non-state groups and multi-lateral organizations that are involved in the post-conflict transition process, may find that to the extent *jus post bellum* principles help them meet strategic goals, they are useful, and to the extent they do not, they may be disregarded. International lawyers, scholars, and policy-makers discussing the unique legal, policy, and theoretical issues presented in the post-conflict transition phase may find the concept useful as a common frame of reference or common language. On the other hand, some scholars may share Eric De Brabandere's view that *jus post bellum* may merely bring already existing discussions and principles under a new name<sup>70</sup> or may share Robert Cryer's view that the problems identified by scholars as reasons for the creation of a new legal *jus post bellum* do not actually necessitate the formulation of a new body of law.<sup>71</sup> National courts and international tribunals deciding on questions of violations of international law in the post-conflict transition phase may find it useful if *jus post bellum* is encapsulated in a formal body of law that provides a way to make judicial determinations in light of conflicting international law norms. Ordinary people may find that the implementation of some *jus post bellum* principles may lead to policies and actions that do more harm than good. Some examples pertaining to post-conflict reconstruction will be explored in the next sections.

Overall, *jus post bellum* seems a concept of mixed utility. Some aspects of *jus post bellum* may be more useful than others to different people at different times. Nevertheless, the disagreements and debates on *jus post bellum* are valuable in themselves because they shed light on some of the complexities of warfare and the evolving relationship between law, war, and peace. In this regard, *jus post bellum* could be valuable as a conceptual space for robust debate among scholars, practitioners, and policy-makers.

## **B. The link between economic reconstruction by international actors and renewed conflict**

There is much emphasis on the notion that economic reconstruction is an important part of peacemaking and the *jus post bellum* framework.<sup>72</sup> In the context of *jus post*

<sup>69</sup> Charles Garraway, "The Relevance of *Jus Post Bellum*: A Practitioner's Perspective" in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 162.

<sup>70</sup> See generally De Brabandere, "The Responsibility for Post-Conflict Reforms" (n. 3).

<sup>71</sup> Robert Cryer, "Law and the *Jus Post Bellum*: Counseling Caution" in Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 223–49.

<sup>72</sup> See e.g. Österdahl and van Zadel, "What Will *Jus Post Bellum* Mean?" (n. 5) 182–3; Alex J. Bellamy, "The Responsibilities of Victory: *Jus Post Bellum* and the Just War" (2008) 34 *Review of International*

*bellum*, it is thought that since peacemaking aims to remove the underlying causes of violence and conflict, it may require “positive transformations of the domestic order of a society,” including “the institutional and socio-economic conditions of polities under transition [ . . .].”<sup>73</sup>

However, contemporary post-conflict economic reconstruction efforts since the end of the Cold War have largely failed in promoting economic development or a sustainable peace.<sup>74</sup> Post-conflict economic reconstruction practices in places like Kosovo, Timor Leste, Afghanistan, Sierra Leone, Iraq, and other countries, have had a poor record due to inadequate policy frameworks and aid practices.<sup>75</sup> Often, these reconstruction efforts and the conditions they created, were destabilizing and exacerbated social tensions, setting the stage for renewed conflict. Roland Paris observes,

[I]nternational efforts to transform war-shattered states have, in a number of cases, inadvertently exacerbated societal tensions or reproduced conditions that historically fueled violence in these countries. The very strategy that peacebuilders have employed to consolidate peace—political and economic liberalization—seems, paradoxically, to have increased the likelihood of renewed violence in several of these states.<sup>76</sup>

Another problem of modern post-conflict economic reconstruction is that it is heavily dependent on the financial support of international financial institutions (IFIs), such as the World Bank, the International Monetary Fund, and regional development banks. The policy conditionalities and reforms that IFIs impose are in tension with the goal of sustainable peace, and may even be a contributing factor to renewed conflict. In fact, it is often overlooked that international institutions and actors, including the IFIs, can be just as much of a threat to peace and security as local institutions and actors, as was illustrated with the economic liberalization and restructuring projects that contributed to conditions resulting in inflamed ethnic hatreds, republican nationalism, and political destabilization in Yugoslavia.<sup>77</sup> The market reforms the IFIs promote can aggravate social conflicts, especially in ethnically divided societies.<sup>78</sup> In addition to contributing to renewed conflict, it has been noted that contemporary international reconstruction

*Studies* 601, 615 (“What might be labeled ‘new peacemaking’ goes beyond measures designed to help belligerents reach compromise and includes building political structures that respect human rights, permit self-determination, punish wrongdoers and promote social, economic and legal reconstruction”); Liliana Lyra Jubilut, “Toward a New *Jus Post Bellum*: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability” (2011) 20 *Minnesota Journal of International Law* 26, 57 (“a modern *jus post bellum* should encompass a broad notion of law and order, and help establish two ideas that are essential for social order: the rule of law and physical and economic security”); Boon, “Obligations of the New Occupier” (n. 12) 67 (“the establishment of a durable peace is widely perceived to include [...] economic reconstruction”).

<sup>73</sup> Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ . . . ‘*Jus post bellum*?’” (n. 6) 936.

<sup>74</sup> Chetail, “Introduction: Post-Conflict Peacebuilding” (n. 9) 7–8.

<sup>75</sup> Graciana Del Castillo, “Economic Reconstruction of War-Torn Countries: The Role of the International Financial Institutions” (2008) 38 *Seton Hall Law Review* 1265, 1267.

<sup>76</sup> Roland Paris, *At War’s End: Building Peace After Civil Conflicts* (Cambridge University Press 2004) 6.

<sup>77</sup> Anne Orford, “Locating the International: Military and Monetary Interventions After the Cold War” (1997) 38 *Harvard International Law Journal* 443, 455–9.

<sup>78</sup> Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Doubleday 2003).

efforts, which incorporate the neoliberal model of reconstruction with an emphasis on strong privatization and free markets, have done little to promote development in post-conflict territories, have had limited effects on poverty, and have even accelerated wealth inequalities.<sup>79</sup>

Contemporary post-conflict economic reconstruction efforts have largely been ineffective in stimulating economic development in post-conflict societies, and, in some cases, have inadvertently set the stage for future conflict. Scholars should be prudent in suggesting that economic reconstruction be part of a *jus post bellum* legal framework, without specifying who ought to be involved in the planning and implementation of such reconstruction or without specifying what kind of reconstruction is being contemplated. Without limitations, a broad “economic reconstruction” principle within a *jus post bellum* body of law may unintentionally mean a legitimation and continuation of past practices that have fueled violence and exacerbated tensions, which is precisely one of the problems *jus post bellum* aims to eradicate. On the other hand, even if a legal *jus post bellum* were to attempt to place legal limits on problematic reconstruction efforts that serve to primarily benefit the global elite and to provide contours for post-conflict reconstruction in the interests of ordinary people, there is no certainty that such a principle might influence or place significant limits on realpolitik or the broader structural problems and ideologies that may bring about these deleterious outcomes.

### C. Manipulation of *jus post bellum* to advance elite interests and the exclusion of local populations

One of the proposed goals of *jus post bellum* is to “regulate guidelines for peace-making in the interest of people and individuals affected by conflict.”<sup>80</sup> Yet in practice, *jus post bellum* may do more to serve the interests of global elites than the individuals affected by conflict, which raises issues relating to self-determination. Extensive international involvement in post-conflict economic reconstruction efforts have raised concerns of exclusion of local institutions and actors. Since the early 1990s, international agencies have played an increasingly prominent role in post-conflict reconstruction programs.<sup>81</sup> Often, international reconstruction efforts end up excluding and alienating local populations. Notably, this was observed in post-2003 Iraq by many commentators, raising questions as to whom the economic reconstruction programs there were benefiting.<sup>82</sup>

<sup>79</sup> See e.g. David Moore, “Levelling the Playing Fields and Embedding Illusions: ‘Post-Conflict’ Discourse & Neo-Liberal ‘Development’ in War-Torn Africa” (2000) 27 *Review of African Political Economy* 11, 13; Julien Barbara, “Rethinking Neo-liberal State Building: Building Post-conflict Development States” (2008) 18 *Development in Practice* 307–18; James Ahearne, “Neoliberal Economic Policies and Post-Conflict Peace-Building: A Help or Hindrance to Durable Peace?” (2009) 2 *University of Leeds POLIS Journal* 2–3; Michael Pugh, “Normative Values and Economic Deficits in Postconflict Transformation” (2007) 62 *International Journal* 478, 486; Alcira Kreimer et al., *The World Bank’s Experience with Post-Conflict Reconstruction* (World Bank Publications 1998) 34.

<sup>80</sup> Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*?’” (n. 6) 936.

<sup>81</sup> Astri Suhrke, “Reconstruction as Modernisation, The ‘Post-Conflict’ Project in Afghanistan” (2007) 28 *Third World Quarterly* 1291, 1294.

<sup>82</sup> See e.g. Wolfram Lacher, “Iraq: Exception to, or Epitome of Contemporary Post-Conflict Reconstruction?” (2007) 14 *International Peacekeeping* 237, 244; Asli Bâli, “Justice Under Occupation: Rule

Even if elections are held, or a representative government is already in place in a post-conflict state, the problem of extensive international involvement and the influence of the IFIs means that local populations will ultimately have a limited say in their country's post-conflict economic and political policies due to the long-term dependencies that result from international involvement. To the extent its principles would result in the advancement of the interests of IFIs and other international actors, and the subordination and exclusion of local populations' interests and participation in the reconstruction process, *jus post bellum* raises concerns of neocolonialism.<sup>83</sup> If it is used to legitimate these problematic practices, *jus post bellum* may become a continuation of politics by other means. Like war, it may become a tool for powerful states and international organizations to utilize to meet their strategic self-interests.

These criticisms mirror some of the criticisms in the humanitarian intervention literature. For example, in relation to post-conflict reconstruction in the aftermath of humanitarian intervention, Anne Orford argues that the post-conflict administration and reconstruction of Bosnia-Herzegovina and East Timor illustrate how "the project of post-conflict reconstruction mirrors the support of the international community for colonialism in earlier periods."<sup>84</sup> Orford argues that international administration and reconstruction projects following humanitarian intervention give limited meaning to the concept of self-determination and that, as a result,

[T]here appears to be little opportunity for those in whose name intervention is conducted to participate fully in determining the conditions that will shape their lives. The idea that the international community has a legitimate role as administrator of post-conflict territories and manager of the reconstruction process has gained increasing acceptance at the international level. These developments in international relations flow from a new faith in the international community as a benign, even civilising, administrator [. . .] Yet the role played by the international community in states subject to international administration would appear to be at odds with the realisation of the right of self-determination as one of the stated aims of humanitarian intervention.<sup>85</sup>

Similarly, *jus post bellum* might face a risk of being developed and implemented in such a way as to be at odds with the right of self-determination, and to be at odds with its stated aspiration of "regulat[ing] guidelines for peace-making in the interest of people and individuals affected by conflict."<sup>86</sup> If that is the case, *jus post bellum* might evolve into a new language or framework within which problematic practices continue and are legitimated.

of Law and the Ethics of Nation-Building in Iraq" (2005) 30 *Yale Journal of International Law* 431, 443; Naomi Klein, *Shock Doctrine* (Picador 2007); Barbara, "Rethinking Neo-liberal State Building" (n. 79) 311; D. Harvey, *The New Imperialism* (Oxford University Press 2005) 215.

<sup>83</sup> See e.g. Annika Hansen and Sharon Wiharta, "From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law After Conflict" in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 134; Cryer, "Law and the *Jus Post Bellum*" (n. 71) 244.

<sup>84</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 126.

<sup>85</sup> Orford, *Reading Humanitarian Intervention* (n. 84) 126–8.

<sup>86</sup> Stahn, "'*Jus ad bellum*,' '*Jus in bello*' ... '*Jus post bellum*'?" (n. 6) 936.



One possible antidote to the potential manipulation of *jus post bellum* is to ensure the inclusion of civil society and individuals affected by conflict. Emphasis ought to be placed on local populations, institutions, and governance, and not only on the interests of democratic majorities and local elites, but also those of minorities and the marginalized, in conflict transformation processes. Involving civil society is crucial to encouraging peace.<sup>87</sup>

A shared peace, or a peace in which international actors, as well as civil society and ordinary people have a stake in developing and sustaining, will outlast a peace that only a few members of the global elite have an interest in maintaining. While international lawyers may wish to address problems like exclusion by including policies of local ownership and participation in a new legal framework, law has its own limitations and costs. For example, there is an inherent contradiction in attempting to address the problem of exclusion in an international legal framework developed by scholars and policy-makers—by doing so, are we not also unintentionally marginalizing local post-conflict populations, depriving them of political engagement and the ability to determine their political futures? While these criticisms may not be unique to *jus post bellum*, the fragility of the post-conflict transition phase and the problematic history of contemporary post-conflict reconstruction practices make it all the more important to seriously consider the costs, risks, and biases that may inadvertently accompany the creation of a *jus post bellum* legal framework.

#### D. The contradicting agendas of a legal *jus post bellum*

The foundational principles of *jus post bellum* contain contradicting agendas. Economic reconstruction practices that focus on privatization and involve structural adjustment pursuant to recommendations by the IFIs contradict other aspects of *jus post bellum*'s normative principles, such as maintaining human rights norms and achieving sustainable peace. In light of the apparent contradictions between some of the principles of *jus post bellum*, there may be a need for prioritizing some of the principles based on each conflict's specific circumstances. For example, Jens Iverson notes that a conflict based primarily on human rights abuses may necessitate prioritizing human rights concerns in the aftermath of such a conflict, and a resource conflict may require addressing environmental law concerns in the post-conflict phase.<sup>88</sup> Carsten Stahn notes that *jus post bellum* may provide a means to manage conflicting international law norms in post-conflict contexts, such as human rights and humanitarian law.<sup>89</sup> Even if *jus post bellum* can provide a way to manage conflicting norms, there would have to be trade-offs in any given post-conflict situation. It is vital to consider who would decide what those tradeoffs would be, at what cost those decisions would be made, and what effects those decisions would have on ordinary people.

<sup>87</sup> Chetail, "Introduction: Post-Conflict Peacebuilding" (n. 9) 9–10.

<sup>88</sup> Jens Iverson, ch. 5, this volume.

<sup>89</sup> Stahn, "*Jus Post Bellum*: Mapping the Discipline(s)" (n. 4) 327.

### E. Waging peace—skepticism about a body of law with the aim of lasting peace

While the title of this subsection of the book parallels Sigmund Freud's "Civilization and Its Discontents," Freud's view on war may provide insight on a legal *jus post bellum*'s potential to achieve lasting peace, given the paradoxical use of war to achieve peace and the violence underlying law. In a 1932 letter to Albert Einstein, Freud wrote,

Paradoxical as it may sound, it must be admitted that war might be a far from inappropriate means of establishing the eagerly desired reign of "everlasting" peace, since it is in a position to create the large units within which a powerful central government makes further wars impossible. Nevertheless it fails in this purpose, for the results of conquest are as a rule short-lived: the newly created units fall apart once again, usually owing to a lack of cohesion between the portions that have been united by violence.<sup>90</sup>

Freud points to one of the central paradoxes of efforts to achieve sustainable peace that *jus post bellum* might inherit: the use of war to achieve peace. As Christine Bell notes, "[a]t its starkest, war is often described by those who wage it as a process designed to lead to peace."<sup>91</sup> Freud also adds, "[w]e shall be making a false calculation if we disregard the fact that law was originally brute violence and that even today it cannot do without the support of violence."<sup>92</sup> Freud's view on law's dependence on brute force and violence is similar to Jacques Derrida's discussion of law's entanglement with force and violence and the necessity of resorting to force to enforce the legal order. Derrida argues that law is founded on violence and depends upon force to maintain its integrity.<sup>93</sup> A body of law with the aim of lasting peace would therefore also require violence and conflict to enforce it. If law relies upon violent enforcement to maintain the legal order, then no body of law can claim a pacifist orientation.

Scholars advocating a new *jus post bellum* body of law should seriously consider the implications of these arguments. After all, let us not forget the violence of peacekeepers, and the numerous wars that are waged in the name of democracy, human rights, and ultimately, justified and legitimated by the aim of achieving lasting peace. The United Nations in numerous instances has ordained and sanctioned violence and warfare in the name of its ostensibly noble ambitions of maintaining international peace and security. More recently, and going one step further, the UN Security Council backed the creation of an "intervention brigade," mandating an offensive UN combat force for the first time in the Democratic Republic of Congo in accordance with its peacekeeping efforts.<sup>94</sup> Similarly, a legal *jus post bellum* may legitimate or require violence in the name of attaining and maintaining enduring peace. If that is the case, then a legal *jus post bellum* framework might make the aspiration of sustainable peace more, rather than less, elusive.

<sup>90</sup> Sigmund Freud, "Why War?" in *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XXII (1932–1936): New Introductory Lectures on Psycho-Analysis and Other Works* (1933) 195–216.

<sup>91</sup> Bell, *Peace Agreements and Human Rights* (n. 38) 16.

<sup>92</sup> Freud, "Why War?" (n. 90).

<sup>93</sup> See generally Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'" (1989–90) 11 *Cardozo Law Review* 920.

<sup>94</sup> UNSC Res. 2098 (28 March 2013) UN Doc. S/RES/2098.

## V. Conclusion

This chapter has argued that *jus post bellum* as a legal framework is characterized by a number of ambiguities, contradictions, and problems that weaken arguments in favor of formalizing *jus post bellum* principles within a body of international law. It has also argued that the creation of a new international legal framework to address the problems that arise in the post-conflict transition phase may not be necessary, and may in effect have unintended consequences that are contrary to both the foundational aspirations of *jus post bellum* and humanitarian ideals. These consequences include manipulation of the temporal scope and applicability of the legal framework, which may render it a continuation of politics by other means.

The recent focus on *jus post bellum* and proposals for a new international legal framework for the post-conflict phase also raises concerns that rather than “regulate guidelines for peace-making in the interest of people and individuals affected by conflict,”<sup>95</sup> *jus post bellum* may serve the self-interests of the international elite. As a professional project, *jus post bellum* serves the interests of well-intentioned international lawyers trying to come to grips with the grievous consequences of contemporary conflicts. The problem is that this professional project utilizes the same mechanisms, tools, and arguments of international law that have allowed for, if not facilitated, the occurrence of these conflicts in the first place. This leaves little hope for the possibility of a different, more peaceful future.

While *jus post bellum* may be advantageous for some international actors, the creation of a *jus post bellum* legal framework comes with risks, costs, and tradeoffs that international law scholars advancing its formalization in a body of law ought to take into account. There may be other ways to attain a sustainable peace that we may be overlooking when we commit our professional and intellectual resources to the creation of a new legal framework for the post-conflict phase. The creation of a new *jus post bellum* legal framework can divert our attention away from other areas that may have more of an impact on enduring peace, such as regulation of the global supply of arms and rules of state responsibility.<sup>96</sup>

This chapter raises these criticisms and poses these questions to discuss some of the issues that can arise when well-intentioned efforts might lead to unintended outcomes<sup>97</sup> and to invite further discussions on the topic. While the unique challenges presented in the post-conflict transition phase present a good case for further development of and engagement with the theoretical concept of *jus post bellum*, formalizing those principles into a body of law may be premature and may ultimately have consequences that not only contradict the aspirations of *jus post bellum*, but that are contrary to humanitarian ideals.

<sup>95</sup> Stahn, “‘*Jus ad bellum*,’ ‘*Jus in bello*’ ... ‘*Jus post bellum*?’” (n. 6) 936.

<sup>96</sup> David Kennedy, *Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004) 305.

<sup>97</sup> See generally Kennedy, *Dark Sides of Virtue* (n. 96).

Finally, while *jus post bellum*'s aim of lasting peace is a noble one, it is important to remain sensitive to the fact that nothing can undo the devastation of war or bring back lives that are lost in conflict. After all, we must remember that war is inherently destabilizing, and its destabilizing effects have long-term ramifications. As the pacifist and political activist A.J. Muste once wisely noted, "the problem after a war is with the victor. He thinks he has just proved that war and violence pay. Who will now teach him a lesson?"<sup>98</sup>

<sup>98</sup> Noam Chomsky, *Pirates and Emperors, Old and New: International Terrorism in the Real World* (South End Press 2002) 144 (quoting A. J. Muste).

# The Compatibility of Justice for Women with *Jus Post Bellum* Analysis

*Fionnuala Ní Aoláin and Dina Francesca Haynes\**

## I. Introduction

Over the past quarter-century, many countries have experienced deeply divisive and highly destructive conflicts, a number of which have then been subject to international intervention and ensuing post-conflict reconstruction initiatives. Most of these international ventures have an in-country presence from the pre-negotiation phase through to the post peace agreement phase, and often into a development phase, resulting in de facto expansions of international administration in the period after conflict's formal conclusion.<sup>1</sup>

While societies rarely have the opportunity to revisit and remake their basic social, political, and legal compacts, countries emerging from conflict provide multiple opportunities for transformation on many different levels, opportunities uncommon in stable and non-transitional societies. Such potentially transformative moments are so infrequent that their occurrence helps explain our preoccupation with societies that have been deeply and cyclically violent.<sup>2</sup> It also explains why some feminists view transitional opportunities as particularly important to groups that have been marginalized, underrepresented, and discriminated against, even while others are more reserved, wary of the vision of empire that submerges “international conflict feminism” into a broader imperialist project in sites of post-conflict nation building, and caution against over-optimism.<sup>3</sup> Among the many risks for women, there is the ever-present danger that the transformation from “conflicted” to “peaceful” risks being partial and exclusionary with the transition process itself operating to cloak women's ongoing repression and inequality. Because of the transformative potential in this moment—for women in particular and for gender relations more generally—and given the critical roles that international interveners can play in these transformations, it is crucial to understand,

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<sup>1</sup> Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008).

<sup>2</sup> “Conflict can provide women with opportunities to break out of stereotypes and stifling societal patterns [...] If women seize these opportunities, transformation is possible. The challenge is to protect the seeds of transformation sown during the upheaval and to use them to grow the transformation in the transitional period of reconstruction.” UN Women, “Progress of the World's Women (2011–2012): In Pursuit of Justice” (Report, UN Women 2011) 81 (quoting Anu Pillay).

<sup>3</sup> Vasuki Nesiah, “Feminism as Counter-Terrorism: The Seduction of Power” in Margaret L. Satterthwaite and Jayne C. Kirby (eds), *Gender, National Security and Counter-Terrorism: Human Rights Perspectives* (Routledge 2013) 133.

support and reframe post-conflict reconstruction processes for women. If *jus post bellum* constitutes, in part, an extension of the just war theory which looks to both “the justness of the war and the justness of the way that war was fought,”<sup>4</sup> a key question for feminist scholars is how and where do women fit in the antecedent and constituting doctrines? If for some, *jus post* requires a peace that is an improvement on the situation prior (to war), or creates some obligations for the parties to a conflict when a state is conquered or defeated, how might such obligations translate into practical effect for women? Our initial response is skepticism that another normative framework can substantively change the legal or political calculus for women, and fear that it may merely clutter the legal landscape, with the overall outcome of less rather than more legal enforcement for women. Our skepticism is also connected to unearthing the genealogy of the *jus ad* and *jus in* traditions, with their consistent lack of attention to gender as a relevant category of analysis or in disaggregating the modalities and costs of war to women.

This chapter will explore the utility of a *jus post bellum* conceptual framework in tackling gender issues in post-conflict transitions. Part I confronts the question of legitimacy—addressing the complexity of utilizing the post-conflict moment to advance the interests of women. Part II addresses the relationship between post-conflict reconstruction, gender justice, and a *jus post* framework of analysis. We specifically assess the practices of post-conflict reconstruction where some considerable gender mainstreaming efforts have been made by states and international institutions, speculating whether such form and substance can or should be grafted onto the *jus post* approach. Part III is concerned with teasing out what patriarchal baggage resides in the *jus post* placeholder, and identifying the gender blind spots of this emerging discourse. We address what “work” the concept is doing as identified by scholars and policy-makers, and whether the framework attends to the range and forms of issues that have been identified as “of concern to women” in the aftermath of armed conflict. Part IV imagines what *jus post* might add to this work. In conclusion, the chapter adopts a questioning stance on a juridical framework comprised of a deep reach into a law of war framework that remains deeply exclusionary for women and asks whether mindfulness of gender during war’s activation, regulation, and closure can mitigate those limitations or transcend them. We are not so naive as to suppose that any legal framework provides a silver bullet solution to regulating women’s lives during and after conflict, but we recognize the “need to examine the distributive and ideological implications of different legal architectures.”<sup>5</sup>

## II. Utilizing the Post-Conflict Temporal Period to Advance Women’s Interests and Positioning

At the outset, we must acknowledge a certain wariness in attempting to apply an under-defined concept *jus post bellum* to the issues with which we are concerned.<sup>6</sup> What “justice” means for and to women, and the extent to which the gendered nature of conflict, and the programs and policies undertaken in its aftermath, may necessitate

<sup>4</sup> Gary J. Bass, “Jus Post Bellum” (2004) 32 *Philosophy and Public Affairs* 384.

<sup>5</sup> Nesiiah, “Feminism as Counter-Terrorism” (n. 3) 140.

<sup>6</sup> We note that a number of feminist scholars working in other disciplines have sought to engage with the relationship between feminist and just war theorizing. See e.g. Laura Sjoberg, “Why Just War Needs

different solutions and outcomes for women than for the “gender neutral” citizen commonly employed as the post-conflict Everyman. As scholars have unequivocally affirmed, the idea of justice can be spelled out in many different ways, and such distinctions have important consequences in post-conflict societies.<sup>7</sup>

In post-conflict settings the justice in play can be alternatively retributive, restitutive, and compensatory, sometimes with all three combinations working in tandem. A gender perspective asks how, precisely, the distributive weight of justice in any of its forms is allocated. With a focus on transition, Bell and O’Rourke have aptly captured that there is much in particular to be gained from an emphasis on distributive justice for women—a facet frequently overlooked by feminist scholars and post-conflict theorists alike.<sup>8</sup> For that reason, our analysis pays particular attention to the presence or absence of distributive justice in any *jus post* conceptualization. In general, we start from the premise that close attention to gendered justice is critical to any evaluation of what *jus post bellum* brings for women.

## A. Legitimacy

We acknowledge that our own primary premise—that the post-conflict moment is generally an apt one for examining and potentially improving women’s status and daily lives—is not without critics or complexity.<sup>9</sup> First, the international presence within, and concomitant institutional validation of, the post-conflict arena may mean that the will to reform and transform serves to displace wide-ranging questions that would otherwise be asked about the morality of armed conflict itself.<sup>10</sup> There are a variety of feminist perspectives on the morality of war,<sup>11</sup> but it remains true that the “popular conception and actual practice alike align women with peace and pacifism.”<sup>12</sup> Feminist scholars have pithily noted in other post-war regulatory contexts that the trade-off on protection in conflict and inclusion in peace may well involve a deeper disengagement from the capacity to critique the engagement in armed conflict itself.<sup>13</sup> The post-conflict setting is one where the impulse to remedy the excesses of war by way of accountability,

Feminism Now More than Ever” (2008) 45 *International Politics* 1; Marian Eide, “The Stigma of Nation’ Feminist Just War, Privilege and Responsibility” (2008) 23 *Hypatia* 48.

<sup>7</sup> Jon Elster, “Justice, Truth, Power” in Rosemary Nagy, Jon Elster, and Melissa S. Williams, *Transitional Justice* (NYU Press 2012) 78.

<sup>8</sup> Christine Bell and Catherine O’Rourke, “Does Feminism Need a Theory of Transitional Justice?” (2007) 1 *International Journal of Transitional Justice* 23.

<sup>9</sup> See e.g. Karen Engle, “‘Calling in the Troops’: The Uneasy Relationship Among Women’s Rights, Human Rights and Humanitarian Intervention” (2007) 20 *Harvard Human Rights Journal* 189; Janet Halley, “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law” (2009) 30 *Michigan Journal of International Law* 1.

<sup>10</sup> Lucinda J. Peach, “An Alternative to Pacifism? Feminism and Just War Theory” (1994) 9 *Hypatia* 152, 153.

<sup>11</sup> See e.g. Jean Bethke Elshtain, *Women and War* (University of Chicago Press 1987); Sara Ruddick “Pacifying the Forces: Drafting Women in the Interests of Peace” (1983) 8 *Signs* 471.

<sup>12</sup> Peach, “An Alternative to Pacifism?” (n. 10) 153.

<sup>13</sup> Diane Otto, “The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade” (2009) 10 *Melbourne Journal of International Law* 11.

reform, reparation, and mediation should not obscure the dilemma of validating the forces, institutions, and individuals that have been causal to the creation of communal violence. Articulating this paradox for the advancement of women's interests in the post-conflict moment underscores a broader tension in the relationship between *jus ad* and *jus post bellum*.<sup>14</sup>

Second, there is certainly a range of complexities in post-conflict sites, but some of them portend more risk for women. For example, ending conflict often includes emerging mediated relationships between domestic elites; these can involve dominance, recalibration and perceived increases in or loss of status and political power for women and for minorities. In commenting on nascent efforts by the international community to engineer post-conflict processes aimed toward improving women's lives, we are mindful of the hazards that abound, when, for example, interveners insert themselves into the role of "savior" while essentializing some locals caught in conflict—particularly women—as "victims."<sup>15</sup>

A parallel, and third critique pinpoints the western imperialism implicit in the wide-ranging enterprise of post-conflict reconstruction.<sup>16</sup> It identifies the reproduction of colonial dialogues in cajoling the local population to move forward in defined ways, the emphasis on technocratic nation building, and the reproduction of social and political orders without reference to place, population, or local preferences.<sup>17</sup> Michael Ignatieff's celebration of nation building initiatives, for example, described as a "global hegemony whose grace notes are free markets, human rights and democracy,"<sup>18</sup> can also be understood as humanitarian empire building where the benefits and burdens are invariably distributed inequitably. We argue that those who control and shape these post-conflict processes are typically male and invariably elite local, state, non-state, and international institutional actors. In recent past practice, they have often systematically erased women as meaningful participants and agents from the post-conflict terrain.

Fourth, when international actors become aware of women's efforts to be included in conflict ending processes and acknowledge their obligations to assist with that inclusion,<sup>19</sup> there is evidence of a pattern that shunts women into soft roles as participants within civil

<sup>14</sup> Citing George W. Bush on the reconstruction of Germany and Japan after the Second World War, "After defeating enemies, we did not leave behind occupying armies, we left behind constitutions and parliaments." Bass, "Jus Post Bellum" (n. 4) 385.

<sup>15</sup> Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 *Harvard International Law Journal* 201. A riff on that note has framed the military intervention of western states as premised on "saving" local women from local misogynistic men, reproducing age old vocabularies of "saving brown women from brown men."

<sup>16</sup> David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press 1999).

<sup>17</sup> Dina Francesca Haynes, "The Deus ex Machina Descends: The Laws, Priorities and Players Central to the International Administration of Post-Conflict Bosnia and Herzegovina" in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction* (Ashgate 2008). For more on critiques of heavy-handed post-conflict interventions, see also Fionnuala Ní Aoláin, Dina Francesca Haynes, and Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford University Press 2011) (*On the Frontlines*) intro and ch. 4.

<sup>18</sup> Michael Ignatieff, "The American Empire: The Burden" *New York Time Magazine* (New York, 5 January 2003).

<sup>19</sup> Resolution 1325 mandates a set of inclusion requirements for states and other international actors. UN Security Council (UNSC) Res. 1325, Resolution on Women, Peace and Security (2000), UN Doc. S/RES/1325 (31 October 2000).



society movements rather than at the negotiation table itself.<sup>20</sup> While recent efforts to include women in post-conflict negotiation processes have succeeded in increasing the number of women present, there is still marginalization of these women, who have undertaken sometimes extraordinary efforts to become visible to the decision-makers in the transitional process.<sup>21</sup>

Like Vatanparast writing in this volume, we are concerned that *jus post bellum* framing allows for manipulation by elite actors and norm entrepreneurs, in tandem with embedding and legitimating neo-colonial projects through law. We assert, nonetheless, that it is critical to harness the potential to create opportunities and capture improvements for women that might otherwise never exist. In this effort, one might characterize our approach as deeply pragmatic. While all interventionist approaches have obvious drawbacks (lacking, for example, legitimacy and longevity unless there is local ownership and “buy in”),<sup>22</sup> not intervening at all, doing so too softly, or placing “women’s issues” too far down on the agenda of intervention and post-conflict priorities also bears significant risk. Inaction during transition can leave women at a loss for substantial rights protection at a time when the rights of individuals are most likely to be considered and formulated or reformulated.<sup>23</sup>

If a *jus post bellum* framework is one that optimizes and makes clearer the legal and political frames that apply in post-conflict settings, an important dimension of its utility to women would be the extent to which any such consolidation recognizes how conflict affects men and women differently, and prioritizes equality gains for women. Similarly, if the goal of a *jus post bellum* framework is coherency and completeness of the post-conflict reconstruction terrain, then an obvious set of questions arises as to the comparative benefits of coherency versus fragmentary legal systems. As one of the authors has asked elsewhere, “do the presumed benefits of a unitary, cohesive system of international law really accrue to women? When fragmentation occurs and legal regimes multiply do women benefit? If so, how?”<sup>24</sup> Feminists and those interested in gender in post-conflict would do well to pause and reflect on the state of the *jus post bellum* field,<sup>25</sup> and consider: How best to proceed? How can feminists avoid the constant difficulty of catching up while an emerging field expands? How could a feminist vision of *jus post bellum* be framed that is not only responsive to expansion and opportunity but could actually frame the basis of engagement on its own terms? How would a

<sup>20</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17) ch. 10; Dina Haynes, Fionnuala Ní Aoláin, and Naomi Cahn, “Women in the Post-Conflict Process: Reviewing the Impact of Recent UN Actions in Achieving Gender Centrality” (2012) 11 *Santa Clara Law Review* 101.

<sup>21</sup> See Johanna E. Bond, “Gender, Discourse, and Customary Law in Africa” (2010) 83 *Southern California Law Review* 509 (2010).

<sup>22</sup> See also Haynes, “The Deus ex Machina Descends” (n. 17) 13 (discussing “governance by fiat”).

<sup>23</sup> See e.g. Theodora-Ismene Gizelis, “A Country of Their Own: Women and Peacebuilding” (2011) 28 *Conflict Management and Peace Science* 522, 524 (“UN operations can do better to ensure successful long-term peace than purely domestic alternatives and international involvement without the UN”).

<sup>24</sup> Fionnuala Ní Aoláin, “International Law, Gender Regimes and Fragmentation: 1325 and Beyond” in Cecilia M. Bailliet (ed.), *Non State Actors, Soft Law and Protective Regimes* (Cambridge University Press 2012).

<sup>25</sup> On the “state of the field” in transitional justice discourses, see generally Christine Bell, “Transitional Justice, Interdisciplinarity, and the State of the ‘Field’ or ‘Non-Field’” (2009) 3 *International Journal of Transitional Justice* 5.

feminist vision incorporate non-hegemonic practices and be aware of the complexities and contradictions of its own dominant discourses?

## B. Post-conflict reconstruction: language and motif

If one aspect of the *jus ad bellum* motif is an extension of justness into the post-conflict phase,<sup>26</sup> the quality and outcomes of post-conflict re-construction then falls squarely into a *jus post bellum* framework. Post-conflict reconstruction can be said to describe the collection of programs created and administered by various international organizations and their local partners in the period immediately following the formal legal conclusion of armed conflict. There is frequently, but not inevitably, an overlap with the application of local and international transitional justice mechanisms and processes in play. In trying to understand how *jus post* differs or compares to post-conflict reconstruction, we can look to Larry May's concept of *jus post*, which focuses on the "rebuilding" of a state.<sup>27</sup> From a methodological point of view, we start with some linguistic parsing. The idea of "re" building presumes a putting back together of that which is broken or destroyed, as does "re" construction. It is difficult to argue with the urgent necessity to bring order and structure back to societies whose physical and social infrastructure has been destroyed by communal violence. Yet, the comforting implication of the terminology presumes a going to back to things as they were before, and this is where "post-conflict reconstruction" frequently falls short. First, the call to reconstruct the pre-conflict order can be a slippery slope for women,<sup>28</sup> risking a return to status quo ante. Presumptions of the status quo ante also are largely played out on realist terms as a politics of power, security, and order.<sup>29</sup> This approach has consistently ignored what Porter has termed a "politics of compassion," in which there is attentiveness to the needs of vulnerable persons who have experienced suffering, an active listening to the voices of the vulnerable and open, compassionate and appropriate responses to particular needs.<sup>30</sup>

And yet, much of post-conflict work is deaf to determining what women and other vulnerable persons who have suffered want in terms of the post-conflict justice devised and meted out for them by local and international elites. For example, in a study undertaken in the eastern Congo, more than 2,600 people (half of whom were women) stated that their highest individual priorities were peace, security, and livelihood concerns (money, education, food, and health).<sup>31</sup> Transitional justice, which has been historically

<sup>26</sup> Note, for example, the language of Former President Jimmy Carter in response to the war in Iraq emphasizing the relationship between the just war tradition and post-war responsibilities: "The peace it establishes must be a clear improvement over what exists." Jimmy Carter, "Just War—or Just a War?" *The New York Times* (New York, 9 March 2003) 13.

<sup>27</sup> Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) ch. 1 (defining the terrain as "governing practices after war ends").

<sup>28</sup> But see Ana Maria Munoz Boudet, Patti Petesch, and Carolyn Turk, "On Norms and Agency Conversations about Gender Equality with Women and Men in 20 Countries" (Report, World Bank 2012).

<sup>29</sup> Elizabeth Porter, "Can Politics Practice Compassion" (2006) 21 *Hypatia* 97.

<sup>30</sup> Porter, "Can Politics Practice Compassion" (n. 29) 97.

<sup>31</sup> Patrick Vinck and Phuong Pham, "Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC" (2008) 2 *International Journal of Transitional Justice* 398, 399.

premised on achieving accountability and underpinned by the notion of “punishing those responsible” was ranked as *the eighteenth* priority. The authors of the study concluded that “transitional justice must be integrated within a broader social, political, and economic transition to provide for basic needs and protection.”<sup>32</sup> A similar survey in Uganda, conducted shortly after a peace agreement was signed there, found that survey participants’ highest priorities were health (45 percent), peace, education, and livelihood issues (food and land), with seeking justice, at a mere three percent, as a much lower priority.<sup>33</sup> Indeed, when asked to consider what should be done for the victims of wartime violence, 51.8 percent of the respondents said that victims should be given financial compensation and 8.2 percent said victims should be given cattle and goats (for a total of 60 percent of financial or material compensation), with only 1.7 percent indicating that victims should be given “justice.”<sup>34</sup> When women in refugee camps in Darfur, who had previously experienced sexual violence, were asked what they needed to move forward, they replied “food security.”<sup>35</sup>

Empirically it seems that a substantial percentage of women deem (when asked), that justice in post-conflict contexts includes not just criminal and civil accountability (rights-based justice) but also assistance of the kind traditionally associated with development aid. This assistance, which falls somewhere between the mandates of those engaged in humanitarian aid and development, and which elsewhere we have described as “social services justice,”<sup>36</sup> is received more in the form of “healing” justice, because it focuses on providing critical social services to facilitate all aspects of post-conflict reconstruction.

As our work and that of other scholars has noted, conflicts sometimes produce surprising results for women. They are paradoxically contexts in which the social flux of violence provides access to public space, working opportunities, augmented political responsibilities, social activism, and greater gender equality.<sup>37</sup> The rub may come at the end of conflict, in the *jus post* phase when women see the gains that they have made through a time of social flux lost in the re-construction and re-building phase. Hence, we approach “re”-building with some gender-aware caution, and underscore our position that the re-distributive elements of any gender justice analysis demands nuanced recognition that conflicts can produce some gendered resource equalization, which may be lost by crude post-conflict liberal market driven “reforms.”<sup>38</sup>

<sup>32</sup> Vinck and Pham, “Ownership and Participation in Transitional Justice Mechanisms” (n. 31) 409.

<sup>33</sup> Phuong Pham et al., “When War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda” (Report, UC Berkeley Human Rights Center 2007) 3, 22.

<sup>34</sup> Pham et al., “When War Ends” (n. 33) 35.

<sup>35</sup> Physicians for Human Rights, “Nowhere to Turn: Failure to Protect, Support and Assure Justice for Darfuri Women” (Report, Physicians for Human Rights 2009) 2 <[https://s3.amazonaws.com/PHR\\_Reports/nowhere-to-turn.pdf](https://s3.amazonaws.com/PHR_Reports/nowhere-to-turn.pdf)> (accessed 22 July 2013).

<sup>36</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17) 11.

<sup>37</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17) chs 2, 5 and 10; see also Georgina Waylen, *Engendering Transitions: Women’s Mobilization, Institutions and Gender Outcomes* (Oxford University Press 2007) 6–9; Marsha Greenberg and Elaine Zuckerman, “The Gender Dimensions of Post-Conflict Reconstruction: Challenges in Development Aid” in Tony Addison and Tilman Bruck, *Making Peace Work: The Challenges of Social and Economic Reconstruction* 101 (Palgrave Macmillan 2009) 5.

<sup>38</sup> See e.g. Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17) ch. 10. It also underscores a broader analytical point by feminist scholar Danielle Poe that the failure of just war theory to account for the fullness of war’s costs has broader implications, not least that an ethic of difference ought to infuse our understanding

Second, as a construct for improving women's lives during and after the political, economic, and social transitions that often follow war, post-conflict reconstruction has some evident weak points. For example, it is distinctly "emergency" focused.<sup>39</sup> The people who work in the organizations and agencies post-conflict have often been present during the war and into the early days after formal cessation of hostilities. As a consequence, they are accustomed to operating in emergency mode, and so fail to adjust to longer-term strategizing and thinking even long after the emergency phases have passed.<sup>40</sup> As a result of this incessant focus on reacting, rather than planning, and then reacting only to the next urgent issue risking security, women's needs often figure in marginal and highly stereotyped ways. Most often this manifests as a sole focus on physical protection of women, and even then, as we have argued elsewhere, not often well done.<sup>41</sup> This sort of stylized approach fails to take account of "an ethics of sexual difference" in the post-war moment and its implications for the ordering of post-conflict settings.<sup>42</sup> Third, the outlines for most post-conflict programs are negotiated during peace talks where women have historically had scant representation.<sup>43</sup> Fourth, the programs defined during the peace accords, and refined by the international organizations carrying them out, typically focus heavily on civil and political rights, which may not align with women's priorities for post-conflict gains, and may result in skewed distributional effects, with perceptible gender effects.<sup>44</sup>

Ben-Porath, among others, has argued cogently that an ethics of care and dependence, if fused into the post-war arena, would fundamentally realign our understanding and re-prioritization of *jus post bellum*.<sup>45</sup> In this thinking, post-war deliberations should include relational considerations and the interconnectedness of responsibilities to address the consequences of armed conflict. Such theorization seeks to mitigate the perceived harms of humanitarian intervention, peacekeeping, and international administration, and to fundamentally realign how we conceive substantively and procedurally of post-war reconstruction.<sup>46</sup> But it remains unclear how, if at all, a *jus post bellum* analysis shifts some of the identified challenges and avoids the stated pitfalls. Moreover, we remain unconvinced that the post-conflict terrain requires a new conceptual placeholder of *jus post bellum* to do the work, rather than to address these issues of substance and process in their distinct and different legal and political fields.

of just war theory with implications for post-war settlements. See Danielle Poe, "Replacing Just War Theory with an Ethics of Sexual Difference" (2008) 23 *Hypatia* 33, 45–6.

<sup>39</sup> Diane Otto, "Remapping Crisis Through a Feminist Lens" in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart 2011) 75.

<sup>40</sup> Haynes, "Deus ex Machina" (n. 17).

<sup>41</sup> Haynes, Ní Aoláin, and Cahn, "Women in the Post-Conflict Process" (n. 20).

<sup>42</sup> Poe, "Replacing Just War Theory" (n. 38) 45–6.

<sup>43</sup> Christine Bell and Catherine O'Rourke, "The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements" (2010) 59 *International and Comparative Law Quarterly* 1.

<sup>44</sup> See Zinaida Miller, "Effects of Indivisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2 *International Journal of Transitional Justice* 266.

<sup>45</sup> Sigal Ben-Porath, "Care Ethics and Dependence—Rethinking Jus Post Bellum" (2008) 23 *Hypatia* 61.

<sup>46</sup> The analysis draws heavily on Joan Tronto's work arguing for instituting an ethics of care and reconstructing the political system to reflect an anti-elitist, participatory claim for ending dependency. See Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993).

### C. Gender centrality

Having introduced the notion that conflict affects both men and women, but sometimes differently, we want to affirm the importance of a gender lens focused on post-conflict processes, because the value of a gendered assessment remains contested. In the legal and political space of ending or transmuting conflict, women still struggle to assert the magnitude of issues that affect them directly. They remain subordinated by dominant discourses that minimize or ignore the value of placing the needs and views of women at the center of the conversation about ending violent communal behaviors, even though such placement is absolutely central to ending societal violence.<sup>47</sup> It needs constant restatement that women are the group most historically marginalized and excluded from the peacemaking and peacebuilding processes across all jurisdictions and conflicts.

There are well-acknowledged gender gaps in existing legal frameworks applicable to post-conflict settings, including the law of armed conflict, international criminal law, and international human rights law. In all these sites, significant but incomplete conceptual and practical work has been undertaken (and remains ongoing) to address deficits, incentivize compliance, and shore-up enforcement.<sup>48</sup> It is insufficient, but it is a start. Given the relative youth of such efforts, we underscore our skepticism that such a variety of legal and political responses can be fully embedded and resolved in emerging *jus post bellum* discourses, or that there has been a substantial commitment by the norm entrepreneurs in the field to frame them with an embedded sense of gender justice.

We assert, instead, that applying a gender lens to conflict and its aftermath, regardless of the doctrine employed, helps us recognize that understanding women's needs must become central to conflict resolution, peacekeeping, reconstruction, and reconciliation efforts. As we have argued elsewhere,<sup>49</sup> merely integrating gender practices into post-conflict process already underway is insufficient unless gender is incorporated into all aspects and levels of the newly developing or rehabilitating state. It is also insufficient to rely solely on formal legal norms alone, be they *jus post* driven or any other, to confront the gender inequalities, violence, and discrimination that women may have experienced during conflict, or for women to be given a place merely within civil society post-conflict institutions. Law alone cannot do the work.

Rather, a broadly framed set of imperatives is required which includes, but does not rely solely on, legal reform to address harm and exclusion. For example, where women have predominantly come into view in recent post-conflict legal arenas it has been as an instrumental means to hold war crimes perpetrators accountable for sexual violence.<sup>50</sup> While not undermining per se the credibility and value of such accountability mechanisms, it should be clear that this slice of woman-centered concern limits

<sup>47</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17) ch. 2.

<sup>48</sup> See e.g. Lara Stemple, "Human Rights, Sex, and Gender: Limits in Theory and Practice" (2011) 31 *Pace Law Review* 824; Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart 2005); Christine Chinkin, "Feminist Interventions into International Law" (1997) 19 *Adelaide Law Review* 13; Haynes et al., "Women in the Post-Conflict Process" (n. 20).

<sup>49</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17).

<sup>50</sup> Karen Engle, "Feminism and its (Dis)contents Criminalizing Wartime Rape in Bosnia and Herzegovina" (2005) 99 *American Journal of International Law* 778.

what we understand about the gendered dynamics of any conflict and its post-conflict processes and laws. Moreover, we cannot hope to dislodge practices of violence towards women (before, during, and after conflict) unless we are prepared to confront a broader array of socially embedded violence.

### III. What Work Does *Jus Post Bellum* Do in Post-Conflict Settings?

*Jus post bellum* can be regarded as a reasonably new conceptual placeholder containing the idea that there is an emerging and coherent body of legal norms applicable to the post-conflict arena.<sup>51</sup> In addressing the notion of an existing and consistent notion of “justice” in the post-conflict showground—we must first generally ascertain what norms we have now, how effective they are, and what augmentation, if any, is required.<sup>52</sup> In this vein, we pay particular attention to the danger that *jus post bellum* “is not a properly universal [concept] as its development has privileged the experiences of men over those of women.”<sup>53</sup> In this context, we draw on a substantial strain of feminist analysis directed at critique and reformulation of both *jus ad bellum* and *jus in bello* frameworks.<sup>54</sup> Second, we are acutely aware of a substantial literature that confirms the search for universal, abstract, and hierarchical standards as associated with and driven by masculine modes of reasoning, with distinct application to universalist and absolutist legal frameworks in international law.<sup>55</sup> There is an acute hazard, then, that *jus post bellum* also bestows privilege to a set of norms that capture what is important to men about justice in post-conflict settings, but may not equally address what is important to women. Finally, reflecting on the gendered dimensions of any *post bellum* framework, some obvious methodological questions arise.<sup>56</sup> They include questioning whether gender analysis emerges in response to an existing set of generally agreed norms, which means that the discourse presumes its own gender neutrality, but also, because it is established, that gender consciousness is to be integrated from the outside in.

<sup>51</sup> May, *After War Ends* (n. 27). Some early glimpses of a *jus post* analysis are found in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 1992) 123.

<sup>52</sup> There has been little if any analysis addressing what a feminist *jus in bello* might look like. The closest perhaps is the work of feminist international relations security scholars such as Laura Sjoberg’s language of “empathetic war-fighting” to describe the foregrounding of individual responsibility with the impact of war. Laura Sjoberg, “The Paradox of Double Effect: How Feminism Can Save the Immunity Principle” (2006) *Boston Consortium on Gender, Security and Human Rights Working Paper* 31.

<sup>53</sup> See Hilary Charlesworth and Christine Chinkin, “The Gender of *Jus Cogens*” (1993) 15 *Human Rights Quarterly* 63, 65.

<sup>54</sup> See, inter alia, Laura Sjoberg and Jessica Peet, “A(nother) Dark Side of the Protection Racket” (2011) 13 *International Feminist Journal of Politics* 163; Eide, “The Stigma of Nation” (n. 6).

<sup>55</sup> Eide, “The Stigma of Nation” (n. 6) 56, drawing on Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press 1982)

<sup>56</sup> Feminist scholars have frequently paused to reflect on the “gender” of international law doctrines and to wonder at the “structure of concept detailed by international law scholars.” This article follows that line of inquiry. See Charlesworth and Chinkin, “The Gender of *Jus Cogens*” (n. 53); in the context of the doctrine of self-determination, feminist scholars have noted how, for example, “the oppression of women has never been considered relevant to the validity of [a group’s] claim or to the form self-determination should take.” Christine Chinkin, “A Gendered perspective to the Use of Force in International Law” (1992) 12 *Australian Yearbook of International Law* 279 (1992); Charlesworth and Chinkin, “The Gender of *Jus Cogens*” (n. 53) 73.

It has been argued, for example, that “[o]ne important difference between *jus ad bellum* and *jus in bello* on the one hand, and *jus post bellum* on the other, is that the law is fairly settled as to the prior two categories.”<sup>57</sup> This position has some derivative consequences, and the presumption of settled law comes with some substantial gender baggage. First, women’s interests have fared notoriously badly in the regulation of violent conflicts between states. Armed confrontation between states has generally been carried out by male combatants (with exceptions, as we acknowledge). The applicable laws of war were also generally constructed from the vista of the soldier’s need for ordered rules within which to wage war on behalf of the state. Historically the focus lay in defining the fields of action for the soldier (including exclusions of acts and targets) rather than on recognizing harms with consequent liabilities caused by state actors during conflict. All this in turn meant that until relatively recently, the locales and personalities of injury towards women in situations of conflict were places where neither law nor recorded narrative entered.

Second, the lack of harm elaboration means any presumption that *jus ad bellum* and *jus in bello* adequately address the violence lawfully permitted in war starts from a gendered blind spot. Logically, if the legal terrain of *jus post bellum* follows from the frameworks of *jus ad bellum* and *jus in bello*, then one must, from a gendered perspective, account for the gendered limitations of the derivative frameworks. The degree of gender exclusion, blind spots, and omissions will invariably affect how one quantifies the value of the *jus post bellum* discourse to addressing the gendered dimensions of armed conflict and its aftermath.

Our primary concern is that *jus post bellum* discourse has emerged, as did its predecessor frameworks, without conscious attention being paid to gender as a constitutive dimension of post-conflict arenas, institutions, and activities. Hence, if it is to add anything to the post-conflict terrain for women, it must start by paying analytical attention to the degree (if any) of gender consciousness and gender sensitivity in articulation of relevant and cohering norms. Larry May asks who is the intended person addressed by *jus post bellum* principles?<sup>58</sup> His attention is directed to the “average citizen,” who has little say in how wars are mounted or in the morality of a state’s conduct. But there is no such thing as the “average citizen,” and he certainly does not represent women. We suggest that close attention to the sex and the intersectionalities that accompany the citizen subject make a profound difference to determining the views of this “average citizen,” for whom post-conflict laws and constitutions are written and institutions are built, both in respect of the conduct of war and its aftermath.

There is more to be said here, but the short form of what we would propose starts from the premise that the building blocks of *jus post* require a *jus ad* and a *jus in*—this is not per se controversial and is generally presumed by liberal approaches to *jus post*<sup>59</sup> discourse. However, if we interrogate the solidity of the building blocks constituting

<sup>57</sup> Kristen Boon, “*Jus Post Bellum* in the Age of Terrorism: Introductory Remarks” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 331.

<sup>58</sup> May, *After War Ends* (n. 27) 5

<sup>59</sup> Foremost among these is Walzer, *Just and Unjust Wars* (n. 51). While Walzer does not address *jus post bellum* directly, he clearly affirms that there is justice in the goals of war, from which follows the presumption that the post-conflict execution of these goals weigh in any judgment of the war’s overall justice.

these two frameworks from a gender perspective, namely the extent to which either body of norms takes account of gendered roles, relationships and structures and the consequent harms that may befall both women and men in situations of armed conflict on account of gender, then some foundational shakiness is evident. A number of choices follow. The first is to recognize the genealogical deficiencies and to construct *jus post bellum* as a transformative framework that fully integrates gender analysis and specificity into its norm creation and consolidation. We do not here attempt to advance such gender integration into *jus post bellum*, but instead acknowledge that attempts have been made by feminist political theorists to develop a gendered conceptualization of the doctrine to varied success.<sup>60</sup>

The direction of much of the existing theory work is to locate an alternative vision of *jus post* in a feminist ethic of care, compassion, and relational dependency. Leaving aside the significant challenges of essentialism in a feminist ethic of care approach, our goal here is not to translate the corpus of legally based post-conflict capacity building through the prism of relational autonomy and care,<sup>61</sup> though our views on social services justice, articulated elsewhere<sup>62</sup> and noted above, could be viewed as one instrumentalization of this approach.

The second choice is to work within the status quo, with its inherent limitations, but to utilize the tools that have emerged to integrate a gendered analysis (the United Nations Security Council Resolutions, international criminal law, gendered programming and development awareness),<sup>63</sup> and attempt to move forward, integrating those tools into the existing framework. As we have argued elsewhere,<sup>64</sup> the international community has not yet successfully addressed women and gender in its humanitarian interventions or its post war operations. Nevertheless, as we have also elsewhere articulated,<sup>65</sup> there is some momentum being created that indicates that gender is squarely on the agenda of these actors. We believe that putting some pressure on the reformist impulses currently underway, set forth in the next section, is preferable to beginning anew, unless the “new” framework promises to centralize gender into its essence, and fulfill that promise through implementation.

#### IV. Current International Legal Responses to the Gender Dimensions of Conflict and Post-Conflict Processes

In the past 30 years, the international institutional infrastructure (comprised largely of the UN and other international agencies and donors) has sought to respond to intra-state, and, more frequently, inter-state, conflict through interventions designed to secure peace and advance related goals, including regional security, economic stability, and the recognition of human rights for all individuals. The process of “securing” peace

<sup>60</sup> See, Sjøberg “Paradox of Double Effect” (n. 52); Eide, “The Stigma of Nation” (n. 6); Ben-Porath, “Care Ethics and Dependence” (n. 45).

<sup>61</sup> On relational feminist theory, see Robin West, *Caring for Justice* (NYU Press 1999).

<sup>62</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17) ch. 11.

<sup>63</sup> Haynes et al., “Women in the Post-Conflict Process” (n. 20).

<sup>64</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17) 17.

<sup>65</sup> Haynes et al., “Women in the Post-Conflict Process” (n. 20).



has no bright lines or demarcations, and so guaranteeing immediate peace often leads to a longer-term phase of stabilizing the country through post-conflict reconstruction processes and development. Decisions about what is included in, or left out of, *post bellum* processes are often made early during the peace negotiation phases.<sup>66</sup>

Historically, the actors involved in responding to violent conflict, securing peace, and reconstructing nations torn apart by conflict have failed to take into account the experiences and relevant contribution to peacemaking that women may have. Recent combined legal and political efforts on multiple fronts, including treaty recognition of gender-based violence,<sup>67</sup> robust jurisprudence from regional human rights treaties, and embedded policy initiatives through UN agencies (some newly created to address these issues),<sup>68</sup> have given rise to a larger discussion about the impact of conflict on women as a distinct group. Over the past half century, international actors, including and sometimes led by UN agencies specifically tasked with assessing the condition and status of women, began recognizing that women were excluded from many of the processes devised to end conflict and secure peace, and that their inclusion was desirable towards the UN objective of peace and security. In some sense therefore, without ignoring the pitfalls of international conflict feminism as a “player in global power politics,”<sup>69</sup> there are concrete and identifiable gains to be had for women. Including the presence of women in meaningful ways and securing their visibility in the transitional justice and post-conflict reconstruction frameworks that have emerged in recent decades creates a chance of concretely improving the post-conflict lives of women.

In particular, one relatively recent change is the UN Security Council’s passage of Resolution 1325, an initiative to “mainstream” women into post-conflict processes.<sup>70</sup> We can see various rationales for the adoption of Resolution 1325, including: (1) consolidation of the Security Council’s legitimacy (albeit via “soft” law) after the peacekeeping debacles in both Rwanda and Bosnia/Herzegovina;<sup>71</sup> (2) the patriarchal political capital to be gained by action with respect to women’s rights after the same two human rights crises revealed systematic rape and sexual violence of women; and (3) a response to the concerted campaign by international women’s NGOs (the governance feminism shift by the international feminist movement to gain UN Security Council access), insisting that the Security Council take a normative stand on women’s rights in the context of armed conflict.

Over a period of 10 years, the Security Council adopted six more resolutions on women, peace, and security, aiming to “mainstream” women into all aspects of

<sup>66</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17).

<sup>67</sup> Declaration on the Elimination of Violence against Women, UN General Assembly (UNGA) Res 48/104, UN Doc. A/RES/48/104 (20 December 1993).

<sup>68</sup> UN Women was formed in 2010 as a super-agency dedicated to issues impacting women. In its first report, the agency listed as indicators of progress for women’s suffrage, recognized by only two countries in 1911 and now “virtually universal” (signifying political rights) and the signing of the Convention on the Elimination of All Forms of Discrimination against Women by 186 countries (signifying attention to economic, social, and cultural rights); the report also noted, however, widespread economic and labor insecurity, bias in legal systems, gender-based violence, and insufficient health care as ongoing and pervasive gendered concerns. UN Women, “Progress of the World’s Women (2011–2012)” (n. 2) 8–9.

<sup>69</sup> Nesiiah, “Feminism as Counter-Terrorism” (n. 3) 125; See also Otto, “The Exile of Inclusion” (n. 13).

<sup>70</sup> UNSC Res. 1325 (n. 19). <sup>71</sup> See Otto, “The Exile of Inclusion” (n. 13).

peacemaking, peacebuilding, and peacekeeping operations.<sup>72</sup> On the plus side, the adoption of these Security Council Resolutions formally acknowledged and addressed, at least rhetorically, the need to incorporate women into processes intended to secure peace. Also, because the UN Security Council is recognized and understood as the key global actor in the security arena, an actor whose resolutions are both determinative and binding as legal, political, and normative pronouncements, it was a powerful signal that these dimensions of harm to women were to be taken seriously by states and international institutions.

While we hope that Resolution 1325 and its successor resolutions bear fruit, we are mindful that tackling a highly selected menu of “women’s issues,” (with a primary and excessive focus on sexual violence) allows states adopting the resolution to maintain a comfortable and familiar role—as patriarchal protectors of women.<sup>73</sup> Bearing in mind the multiple dimensions of justice at play in such contexts, it remains striking the distributive justice remains well off the menu of issues and solutions to the causes conducive to the production of extreme violence against women in conflict situations, even as international institutions profess greater engagement with the harms experienced by women in war.

Assuming that a particular set of issues perceived to most acutely affect women are at least formally on the international agenda now, we are as yet unclear what the *jus post bellum* framework can do for women.

## V. What *Jus Post Bellum* Might Add

The answer to whether the *jus post bellum* construct might add anything to the improvement of women’s lives in the aftermath of war depends both on (a) what women want (e.g. how one would measure and implement the justice demanded by women when asked), and (b) whether the conceptual and practical framework offered by *jus post bellum* offers new tools to address complex legal and political issues.

May suggests that there are six key principles of *jus post bellum*: reconciliation, retribution, rebuilding, restitution, reparations, and proportionality.<sup>74</sup> Other scholars have argued that *jus post bellum* constitutes an umbrella concept that reaches to the law of peace, the law of occupation, the responsibility to protect, emergency law, transitional justice, and peacebuilding.<sup>75</sup> Each of these legal realms has an enormous reach in its own right, and several facets of these legal fields remain under construction, or

<sup>72</sup> See UNSC Res. 2122, UN Doc. S/RES/2122 (18 October 2013) (recalling resolutions 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), and 2106 (2013)).

<sup>73</sup> See also Otto, “The Exile of Inclusion” (n. 13) (discussing additional factors for the adoption of SCR 1325 at this particular time). See also Sjoberg and Peet, “A(nother) Dark Side of the Protection Racket” (n. 54) 176 discussing how “belligerents justify wars as necessary to protect ‘their women and children’ both as innocent people themselves and as a symbol of the purity of the nation and the state.”

<sup>74</sup> May, *After War Ends* (n. 27).

<sup>75</sup> See e.g. Jennifer Easterday, “*Jus Post Bellum* in the Age of Terrorism: Remarks by Jennifer Easterday” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 335 (arguing that “One of [*jus post bellum*’s] central goals is the establishment and maintenance of sustainable peace. The *jus post bellum* framework offers a way of unifying and reconceptualizing overlaps in laws that apply in post-conflict situations. It provides relational cohesion to its underlying laws and norms, and a basis for assigning responsibility for post-conflict obligation”).

are challenged to remain relevant in the ever-changing terrain of armed conflict itself.<sup>76</sup> There remains dispute among scholars as to the “known” nature of *jus post bellum* and the certainty of what its application means and requires.<sup>77</sup>

We caution that women might be particularly wary of hanging any hopes on a norm “under construction,” not least because it remains unclear to what degree and extent the concerns and needs of women are addressed by a body of norms designed to “bring together” existing legal practices, irrespective of the identified limitations of existing doctrines. There has been little if any engagement by feminist legal scholars with the *jus post bellum* arena, yet as noted throughout this article and articulated by us elsewhere, the post-conflict arena is axiomatically relevant to women.<sup>78</sup> There are collective interests at play in the aftermath of conflict for women that cut across jurisdictions and contexts. Some of these interests might be addressed by the institution of laws or accountability mechanisms, but others require multiple tools and processes to be simultaneously in effect, for example: systemic or pre-conflict physical and sexual violence; psychosocial and physical concerns impacting refugees and displaced persons; humanitarian aid dependency; lack of access to social and economic goods on an equal basis; exclusion from political processes; and lower legal, social, and economic status.<sup>79</sup>

A separate set of issue arises as to the identities and motives of the entrepreneurs advancing a theory and practice of *jus post bellum*.<sup>80</sup> Does the gender of the norm entrepreneurs matter? If so, how should feminist analysis and knowledge practices be included as a new doctrine comes into play? Feminist scholars have revealed the masculinity of the international legal order, showing how it produces hierarchy, exclusivity and reproduces public/private dichotomies that rarely work to women’s advantage. Hilary Charlesworth deftly captured an almost entirely one-sided conversation between feminist international law scholars and the mainstream, in which feminist theorizing and insight “is an optional extra, a decorative frill on the edge of the discipline.”<sup>81</sup> There is evident pessimism about the mainstream indifference to feminist interventions, and deepening unease that feminist scholarship will remain confined to backwater status no matter the legal doctrine employed, if women are not centralized into the creation and implementation of the relevant doctrine.

<sup>76</sup> Boon, “*Jus Post Bellum* in the Age of Terrorism” (n. 57) (arguing that *jus post bellum* “contains many norms and objectives that are not settled law, but are instead under construction”). For example, occupation law is challenged by what Adam Roberts has termed “transformative occupations.” Adam Roberts, “Transformative Military Occupation: Applying the Law of War and Human Rights” (2006) 100 *American Journal of International Law* 580. The law of peace has experienced significant evolution since the end of the Cold War. Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

<sup>77</sup> Bass, “Jus Post Bellum” (n 4).

<sup>78</sup> Ní Aoláin, Haynes, and Cahn, *On the Frontlines* (n. 17).

<sup>79</sup> Fionnuala Ní Aoláin, “Advancing Feminist Positioning in the Field of Transitional Justice” (2012) 6 *International Journal of Transitional Justice* 205.

<sup>80</sup> See generally, Catherine Powell, “The Role of Transnational Norm Entrepreneurs in the U.S. ‘War on Terrorism’” (2004) 5 *Theoretical Inquiries* 47.

<sup>81</sup> Hilary Charlesworth, “Talking to Ourselves: Feminist Scholarship in International Law?” in Sari Kovo and Zoe Peterson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart Publishing 2011) 17.

As the train of *jus post bellum* thinking departs from the station, the same kinds of dynamics appear to be in play.<sup>82</sup> This is not to say that feminist scholars merely cry foul when a new theory makes an appearance without reference to women or to women's experiences. Rather, it is to say that critical engagement mandates that women are central in the production of norms, underscoring that the social construction of gendered norms is well understood and continues to reproduce itself in new norm creation. The unconscious presumption that the gender neutral Everyman employed when working out a new doctrine will meet the needs of both men and women no longer suffices.

When we insist that women be central to the creation of a new doctrine, we also wish to underscore the imperative of considering gender as one of many intersectionalities. *Jus post bellum* is a ripe field for intersectional analysis. Employing Larry May's "six normative principles of *jus post bellum*: rebuilding, restitution, reconciliation, restitution, and reparation as well as proportionality,"<sup>83</sup> for example, one can adduce a set of specific sites in which the dimensions of sex, age, sexual orientation, class, religion, ethnic identity and multiple other identities come together to shape individual and collective memory, articulation, and placement in the post-conflict site. Inevitably, identifying what women want and need in the post-conflict context is a delicate business. Any gender analysis must be particularly attuned to the intersectionality of women's experiences, not only conscious of their gender but also of their race, religion, family status, economic background, sexual orientation, and so forth. Despite this multiplicity of intersecting characteristics, women's complex and highly differentiated roles have too often, when thought of at all, been collapsed by the social and political dynamics of armed conflict. Accepting and accommodating a diverse range of roles for women in war and post-war facilitates a greater conceptual and practical understanding of the lived intersectionalities of most women's lives. An intersectional analysis integrated to any *jus post bellum* framework would both complicate and deepen the subjects of action in the post-conflict setting.

## VI. Conclusion

What is the right way to end a war? In a way that offers respite, and ideally improvement, in the lives of all of its citizens, not just some. For women, the transformation of a state from "conflicted" to "peaceful" risks being partial and exclusionary. The transition process itself may operate to cloak women's ongoing repression and inequality. Applying the gender lens is critical to ensuring the effectiveness of policies and practices involved in ending conflicts and ensuring that they do not recur. Without this attention, traditional gender dichotomies may be further entrenched and exacerbated during times of extreme violence and extended in the post-conflict phase.

We reflect on what a feminist vision of *jus post bellum* would look like. A feminist positioning would give prominence to a range of harms identified by those socially subjected to armed conflict and its aftermath. These would include retaining or

<sup>82</sup> Of course the inclusion of one paper in a collective devoted to identifying a feminist perspective may be seen to do some work in closing the gap.

<sup>83</sup> May, *After War Ends* (n. 27).

recapturing the agency of the subjects by including them in the process; advancing security from violence, discrimination, and oppression; promoting sexual health and reproductive freedom. It would also require a non-hierarchical vision of legal norms within the *jus post* analysis—one that does not automatically place political and civil rights at a hierarchical advantage. Drawing on the previous work of Charlesworth and Chinkin,<sup>84</sup> we reiterate that a feminist rethink could also undo the public/private division that has defined the identification and harnessing of and accountability for harms that occur in situations of armed conflict, but as yet we see no promise of a feminist rethink coming through adopting the *jus post bellum* framework.

Concentrating more rigorously on understanding how women experience harm and the manner in which law can facilitate and compound extremities of social and personal experience is a starting point for a female-centered understanding of conflict and the harms it causes to women. More concretely, we would look beyond harms to the body and think in broader terms. Only then can the full scope of harms experienced by women be adequately addressed by a post-conflict vision that is transformative.

Perhaps it matters less what we call this work, or the doctrine and theory under which it is done. What matters most is answering the questions—is the post-conflict moment one in which to attempt to improve women's status, power, and daily lives? Are the existing hard and soft laws and processes meeting those needs? We think all post-conflict moments are moments in which women's lives might be exponentially improved, because it is during this transitional moment—in which constitutions and laws are written and rewritten, in which economic projects are undertaken, in which labor markets are redefined, in which educational systems are built—that opportunities may open up for women.

<sup>84</sup> Charlesworth and Chinkin, "The Gender of Jus Cogens" (n. 53) 75.



PART 2

RECONCEPTUALIZING  
“BELLUM” AND “PAX”





## Of *Jus Post Bellum* and *Lex Pacificatoria*

What's in a Name?

*Christine Bell\**

### I. Introduction

Contemporary discussion of the term *jus post bellum* has emerged through two key disciplines. The first is that of philosophy, where philosophers, mainly North American, have been provoked by the questions raised by US-led military intervention in Iraq, and to a lesser extent Afghanistan, to consider how just war theory might apply post international intervention. Here the approach has been to try to locate an articulation of *jus post bellum* as an obligation of repair and reconstruction that would extend the just war tradition, as typified by the work of Walzer, Orend, and May.<sup>1</sup> The second discipline has been that of international law and engagement with *jus post bellum* as a legal project that attempts to define and articulate a better international legal regulation of post-conflict landscapes. A holistic approach to this second project has been pursued most notably by Carsten Stahn and the Leiden School, whose stated ambition is to move toward a *jus post bellum* legal regime that would stand as a third dimension to the current *jus ad bello* and *jus in bellum*, so as to regulate the management of post-conflict societies.<sup>2</sup> This legal fashioning of a *jus post bellum* is conceived as applying across a range of quite different post-conflict contexts: civil wars, other internal conflicts that do not meet the scale of civil war, and the internationalized constitution-making and restructuring processes that have succeeded international military interventions in Bosnia, Kosovo, Afghanistan, and Iraq.

This chapter largely leaves aside the first philosophical project to interrogate seriously the second. I aim to contribute to the discussion of whether a new *jus post bellum* regime operating across different types of conflict is possible and desirable, and if not, how we should best situate and respond to contemporary developments in international law relating to terminating intra-state conflict.

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<sup>1</sup> Michael Walzer, *Arguing About War* (Yale University Press 2006); Brian Orend, "Ius Post Bellum: A Just War Theory Perspective" in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (Springer Verlag 2008); Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012); this volume.

<sup>2</sup> Stahn and Kleffner, *Jus Post Bellum* (n. 1), and in particular Stahn's essay at 93–114. See also Antonia Chayes, "Chapter VII½: Is Jus Post Bellum Possible?" (2013) 24 *European Journal of International Law* 291; Guglielmo Verdirame, "What to Make of Jus Post Bellum: A Response to Antonia Chayes" (2013) 24 *European Journal of International Law* 307. Both Chayes and Verdirame engage with *jus post bellum* as a potential legal norm imposing an obligation to repair and reconstruct.

In Part II, I begin by exploring what I argue has been the main driver of the legal concept of *jus post bellum*: the relationship between law and practice in contemporary peace negotiations in deeply divided societies. I argue that a dynamic relationship between law and practice has generated novel interpretations and even mutations in the relevant international law so as to give some substance to arguments for a “third way” regime. I suggest that the current legal state of play is one of partial legalization and normative shifts that are uncertain and often lack formal binding legal status. Drawing on my earlier work, I term these shifts a new *lex pacificatoria*, in an analogy to *lex mercatoria*, to attempt to capture: first, the clear legal effect and import of these mutations; second, the ways in which they do not derive primarily from international lawmaking processes and jurisprudence, but a dialectical interaction of international law and the practice of peacemakers (international and domestic); and third, the legal status of new normative understandings as “developing” rather than developed law, whose normative pull stands somewhere between the realm of law and politics.<sup>3</sup>

In Part III, I consider whether it is firstly possible, and secondly desirable, to try to “complete” and develop this *lex pacificatoria* into a clearer set of legal standards and even a new regime such as a *jus post bellum*. I argue that while the discussion of *jus post bellum* provides a useful way to explore gaps in how international law deals with peace settlements and the implementation issues they raise, it is neither possible nor desirable to develop emerging legal innovations into a fully-fledged legal regime. In other words, I reject a project of developing and clarifying a holistic *jus post bellum* as a regulatory legal framework for transitions from conflict to peace. I suggest as an alternative a role for international law of articulating broad normative parameters that operate to hold open spaces of negotiation and contestation about the outcomes of transition and the meaning of core goals such as peace, democracy, legitimacy, and accountability.

In the final Part IV of the chapter, I attempt to situate the relationship of the conversation to alternative attempts to conceptualize the post-Westphalian legal order, showing how different conceptions of that order point to quite different assumptions for how one might situate and respond to *jus post bellum*.

## II. Pushing International Law’s Boundaries: Negotiating Peace Settlements

Contemporary philosophical discussions over a *jus post bellum* have been triggered by crises over international military intervention in Iraq in particular and an attempt to examine both the obligations and the justifications of interveners post-conflict.<sup>4</sup> However, contemporary legal approaches to *jus post bellum* have been generated in response to a wider context of peace negotiations and the moral, political, and legal issues that surround them, although in recent times they have come to focus more

<sup>3</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008). See also Christine Bell, “Peace Settlements and International Law: From *Lex Pacificatoria* to *Jus Post Bellum*” in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus Ad Bellum, Jus in Bello and Jus Post Bellum* (Edward Elgar 2013).

<sup>4</sup> Walzer, *Arguing About War* (n. 1).

narrowly on the philosophical questions relating to foreign intervention.<sup>5</sup> These peace negotiations have resulted in over 700 peace agreements arising in over 90 countries—a large-scale practice that has been remarkably successful in reducing the level of violence globally.<sup>6</sup> This practice interconnects with *jus post bellum* discussions focused on international military intervention where international post-conflict reconstruction involves brokering peace settlements (usually as constitutions) in the divided societies that remain. An approach to *jus post bellum* that focuses on peace settlement practices thus also addresses the dilemmas of these post-international intervention reconstruction processes, connecting with the subject matter of philosophical approaches.

I contend that the key driver for what appear to be the beginnings of a legal *jus post bellum* has been the interface of the practice of peacemaking with international law. The post-cold war peace settlement context has required international law to mutate in order to regulate the mediation and implementation of peace settlements. Both the pressure for a *jus post bellum* and what might be viewed as its developing content have emerged from a dialectical interaction of international law with peace processes. Three aspects of peace negotiations in divided societies experiencing protracted social conflict have been critical to producing this mutation.

The first is that contemporary peace negotiations have typically included all those waging war and result in peace agreements that contain fundamental compromises between competing conflict goals and competing conceptions of what would constitute a “just peace.” The second aspect is that while historically negotiation of conflicts arising primarily within states were understood to be essentially a domestic political matter, contemporary peace negotiations involved international actors and organizations and have been understood (increasingly over time) to be governed by international law, chiefly international human rights law, international humanitarian law, and, more recently still, international criminal law and the UN Charter itself. The third factor is that these negotiations have aimed to produce formal, legalized peace agreements, typically signed between the parties to the conflict and a range of international actors and organizations, that serve both as a form of contract or legalized road-map of the parties’ commitments to each other under the color of international law. The agreements typically “contract-in” aspects of international law—either explicitly or by using wording taken from such standards—to govern inter-party relationships and implementation tasks.

These three factors have led to a process of dialectical interaction between international law and peacemaking practice. This dialectic has revolved around three core difficulties of “fit” between international legal frameworks and post-conflict environments, which has been jurisgenerative of new understandings of how international law can be understood to apply. The first difficulty of fit is one of fitting “hybrid” solutions of peace agreements within the traditional boundaries between international and

<sup>5</sup> See Carsten Stahn, “‘Jus ad bellum,’ ‘jus in bello’ ... ‘jus post bellum’?—Rethinking the Conception of the Law of Armed Force,” (2007) 17 *European Journal of International Law* 991. For more recent work: Chayes, “Chapter VII½” (n. 2); Verdirame, “What to Make of Jus Post Bellum” (n. 2); Ruti Teitel, “Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May” (2013) 24 *European Journal of International Law* 335.

<sup>6</sup> Bell, *On the Law of Peace* (n. 3) appendix.

domestic law. Typically, solutions to protracted social conflict in deeply divided societies have required peace agreements to address both the internal configuration of the state's domestic constitutional order (internal self-determination) and its external articulations to sovereign statehood (external self-determination). Conceptually, hybrid negotiated settlements that address both the internal and external legitimacy of the state, are enforced by a hybrid tapestry of mechanisms in which international actors "guarantee" the peace agreement's implementation, working alongside domestic actors to build the new polity.<sup>7</sup>

The second difficulty of "fit" is the difficulty of war-peace hybridity: typically post-settlement contexts exhibit a "no-war, no-peace" landscape that requires international actors to work with the consent of the parties to the conflict, now re-cast as joint implementers of the new order, but also on occasion requires them to robustly enforce commitments in the face of local recalcitrance. This landscape poses difficulties for UN Charter authorization of international intervention because it defies the distinctions on which the Charter relies, such as: between war and peace, between international and domestic threats to peace, and between consent-based intervention and non-consent based use of force. War-peace hybridity also makes it difficult to establish whether international humanitarian law, international human rights law, or some type of merged regime governs the post-conflict period and the issues of authorization and accountability that arise.<sup>8</sup>

The third difficulty of fit is the difficulty of international law regulating a move from private corporate use of state power to normative restraint and legitimation as public power, which is being attempted at the domestic constitutional level. In peace processes, international law and international actors inevitably engage with how to achieve a shift whereby political-military elites engaged in private exercise of power for one section of society become public actors, using public power governed by law, in pursuit of the common good. Achieving such a shift involves difficult political judgments that increasingly play out under the cover of legal argument. A tension between private and public interests plays out across peace implementation debates, such as tensions between individual electoral rights and group rights relating to effective participation of groups.

### A. New emerging law

Each of these issues of "fit" have generated a mutation in understandings of how international law had to be reconceived so as to regulate this new landscape. These normative shifts point to the need for some sort of alternative approach to existing legal regimes, such as is suggested in *jus post bellum* literature. However, the mutations of international law also point to a possible emergent substantive content of any new *jus*. For

<sup>7</sup> See e.g. General Framework Agreement for Peace in Bosnia and Herzegovina (Paris, 17 December 1995) (hereinafter referred to as "Dayton Peace Agreement") which provided for a range of hybrid institutions including banks and judges.

<sup>8</sup> Christine Bell, "Post-conflict Accountability and the Reshaping of Human Rights and Humanitarian Law" in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011).

purposes of time and space, and because I have addressed the matter in detail elsewhere,<sup>9</sup> a short outline of this dynamic will be provided rather than its full explanation and defense.

In short, an emerging “law of the peacemakers” or as I have termed it, *lex pacificatoria*, can be argued to have developed in six key areas.

**1. A new law of self-determination.** The dialectic of law and peacemaking practice has significantly revised the application of self-determination law. Self-determination conflicts have been notoriously ill-served by a law that seems to promise states territorial integrity and non-state actors representative government—often understood by them as requiring secession.<sup>10</sup> Peace agreement negotiations have moved to reconcile self-determination law’s competing pillars of territorial integrity and representative government by incorporating aspects of internal self-determination and new domestic constitutional structures with aspects of external self-determination as a revision of the state’s conception of its external legitimacy.<sup>11</sup> Two key devices have been central to this move: first, the disaggregation and devolution of the power of the state and modalities of government into group right regimes; and second, the establishment of “fuzzy sovereignty”—hybrid solutions in which sovereignty is dislocated from the state as traditionally conceived, into novel forms of bi-nationalism, or internationalized regimes.

In substance, the new approach to self-determination prioritizes negotiations between states and non-state opponents as a way of resolving self-determination disputes and encourages substantive solutions that address the internal configuration of the state as a polity, so as to include the state’s opponents in structures of government. At the same time, peace agreement solutions include devices and language that make the sovereignty of the state less categorically linked to its traditional territorial configuration.

While these revisions have arisen as a matter of political negotiation, and arguably are primarily a political rather than a legal development, crucially they are underwritten by both hard and soft law standards that promote inclusion and group rights.<sup>12</sup> At a deeper level, these new practices can assert themselves to constitute a novel new application of the self-determination legal norm that serves to transcend and therefore reconcile the norm’s inherent tension between territorial integrity and representative government: the new law attempts to transcend demands for external self-determination as remedy

<sup>9</sup> Bell, “Peace Settlements and International Law” (n. 3).

<sup>10</sup> See e.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 1; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (24 October 1970); Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV) (14 December 1960); Charter of the United Nations (1945) Art. 2(4).

<sup>11</sup> Cf. Marc Weller, “Settling Self-determination Conflicts: Recent Developments” (2009) 20 *European Journal of International Law* 111; Jan Klabbers, “The Right to be Taken Seriously: Self-Determination in International Law” (2006) 28 *Human Rights Quarterly* 186.

<sup>12</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, UNGA Res. 47/135 (18 December 1992), UN Doc. A/47/49, annex (hereinafter referred to as “UN Declaration on Minorities”) Arts 2(3) and 5 (effective participation); Declaration on Rights of Indigenous Peoples, UNGA Res. 61/295 (13 September 2007), UN Doc. A/RES/61/295 (hereinafter referred to as “UN Declaration on Indigenous Peoples”); Council of Europe, Framework Convention on the Protection of National Minorities (1 February 1995, CETS no. 157) (hereinafter referred to as “Framework Convention”).

and internal self-determination as remedy by fashioning hybrid political solutions that combine both these elements.

**2. A new law of gender inclusion and inclusion more generally.** Processes of peace-making focused on politico-military elites who were for the most part men have also come under pressure from transnational feminist mobilization and increasing international unease around handing over what are essentially constitution-making processes to politico-military elites. The more peace processes and peace settlements have been understood to provide not just for ceasefires, but for broad constitutional road-maps which shape and constrain future democratic and constitutional development, the more they have come under pressure to open up participation. Most notably, legal standards have emerged which require the inclusion of women in peace negotiations and that post-conflict equality concerns are addressed. Chief of these is UNSC 1325 (and its successors) which, among other things:

*Calls on* all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia:

- (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction;
- (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements;
- (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.<sup>13</sup>

These developments can be viewed as the beginning of a process of international regulation of inclusion in peace and constitution-making processes—albeit one that lacks serious enforcement mechanisms. However, inclusion standards also aim to open up state-making processes beyond the corporatist deals between politico-military elites, to wider public legitimacy.

**3. A new law of return of refugees and displaced persons.** Traditionally, international refugee law did not focus on a right to return, either to the country of origin or own localities and even homes. Peace agreement practice, now backed up by emerging soft law standards, however, has tended to establish a “right to return” to one's own country, locality, and even home, or to be compensated.<sup>14</sup> This right is argued to apply with respect not just to those with formal refugee status but also to displaced and internally displaced persons. These standards together with peace agreement clauses provide for:

- a right to return to one's country and even locality;
- a right for return to be voluntary;

<sup>13</sup> UN Security Council (UNSC) Res. 1325, Resolution on Women, Peace and Security (2000), UN Doc. S/RES/1325 (31 October 2000). See also other subsequent resolutions (on UN Women website <<http://www.unwomen.org/about-us/about-un-women/>> (accessed 7 May 2013)).

<sup>14</sup> See e.g. UN Commission on Human Rights, Guiding Principles on Internal Displacement (11 February 1998) UN Doc. E/CN.4/1998/53/Add.2 (hereinafter referred to as “Guidelines on the Internally Displaced”); P. Sérgio Pinheiro, “Final Report of the Special Rapporteur, Principles on Housing and Property Restitution for Refugees and Displaced Persons, Annex: Principles on Housing and Property Restitution for

- a right not to be returned where conditions are not safe;
- a right to return to own homes or to be compensated where this is not possible;
- a right not to be discriminated against, having returned, and to political, legal, and physical security;
- a requirement on parties to the conflict to cooperate with the relevant agencies to ensure safe and voluntary return;
- a right to be included as a group in decisions about return, including in the peace negotiations themselves.<sup>15</sup>

They exist, however, largely as soft law, with arguments that traditional human rights also can be re-interpreted as requiring much of the same provision.<sup>16</sup>

**4. A new law of transitional justice.** While traditional approaches to accountability saw amnesty as a matter of the domestic law of the state, an evolving interaction of peacemaking practice with international human rights law, international humanitarian law, and more recently international criminal law, together with the production of soft law standards in particular relating to the rights of victims, has generated a “new law” of transitional justice that views serious international crimes in internal conflict (as well as international) as no longer capable of being amnestied.<sup>17</sup> This new law also views some type of settlement-inducing amnesty as permissible and even desirable.<sup>18</sup> It also acknowledges the rights of victims to reparation.<sup>19</sup> The new law, however, leaves largely undefined whether and what practices of amnesty are permissible in the “gray” middle area—and this gray area is also constantly shifting as the predominance of one or other poles asserts itself and is contested.<sup>20</sup>

**5. A new legal approach to understanding “consent” and international intervention post-settlement renewed conflict.** The contemporary post-conflict environment relies heavily on a diverse range of international actors to carry out a diverse range of peace

Refugees and Displaced Persons” (2005) UN Doc. E/CN.4/Sub.2/2005/17. See also Brookings Institution, *Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building* (Brookings Institute–University of Bern 2007); Gerard McHugh, *Integrating Internal Displacement in Peace Processes and Agreements* (Brookings Institute 2010).

<sup>15</sup> For peace agreement provision, see e.g. Dayton Peace Agreement (n. 7) annex 7, “Agreement on Refugees and Displaced Persons” Art. 1; Comprehensive Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) (21 November 2006); Arusha Peace and Reconciliation Agreement for Burundi (28 August 2000).

<sup>16</sup> See e.g. ICCPR (n. 10) Art. 12(3); Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res. 217 A(III) (UDHR) Art. 13.

<sup>17</sup> Bell, *On the Law of Peace* (n. 3) ch. 12.

<sup>18</sup> See e.g. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977) 1125 UNTS 609 Art. 6(5); Louis Joinet, “Report of the Special Rapporteur, The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” (1997) UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II Principle 25.

<sup>19</sup> See e.g. Joinet, “Report of the Special Rapporteur” (n. 18); see also, UN Commission on Human Rights (UNCHR) Res. 2005/35 (2005), “Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” UN Doc. E/CN.4/2005/L.10/Add.1; UNCHR Res. 2004/34 (2004), “The Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms” UN Doc. E/CN.4/2004/127.

<sup>20</sup> See e.g. the recent decision of the Inter-American Court of Human Rights in *Case of the Massacres of El Mozote and nearby places v. El Salvador (Merits, reparations and costs)* (25 October 2012) IACtHR Series

implementation functions. These functions can be categorized in terms of four broad tasks: policing demobilization and demilitarization; guaranteeing and implementing an internal constitutional settlement; mediating its development; and administering the transitional period in some form. The scale and nature of international intervention is varied, ranging from forms of low-level peacekeeping, to ad hoc international involvement in domestic institutions such as hybrid courts, to full-scale international administration.<sup>21</sup>

As regards UN intervention for the preservation of peace, the UN Charter provides for consent-based and non-consent based (forcible) intervention in Chapters VI and VII that is inapposite to the peace implementation context. In short, the Charter framework contemplates a clear sovereign independent state, capable of giving or withholding consent and clear distinctions between peace and conflict and between international and non-international threats to peace. Post-agreement ambiguity over “who” constitutes the state, and whether the war is over, means that such clarity seldom exists in periods of post-settlement transition.

While little clearly articulated “new law” has emerged, UN attempts to grapple with the lessons learned through different interventions have illustrated an on-going attempt to redefine what constitutes a threat to “international” peace, what constitutes “consent” in a post-settlement terrain government by a peace agreement/contract between the different parties to the conflict as to a re-configured government, and how to understand and redefine concepts of neutrality and impartiality in the peace implementation context.<sup>22</sup> Central to the attempt to “fit” the international legal framework for intervention to peace-implementation practice has been the attempt to navigate a middle ground between Chapters VI and VII that would view consent as desirable but retain some capacity to switch to force-based action in the event that a party to the settlement is recalcitrant.

However, the implementation tapestry of international involvement is very diverse. A wide range of international organizations beyond the UN intervene in a range of ways not requiring UN authorization, often “contracted in” and authorized by the peace agreement itself, but with their actions otherwise governed only by their own constitutions (provided of course that they do not contravene the Charter).<sup>23</sup>

A practical pressure to reconfigure understandings of the legal basis for legitimate international intervention derives from the need for international actors, focused on “implementing” democracy and the rule of law, to be able to articulate

C No. 252, paras 283–96; and in particular the concurring opinion of Judge Diego Garcia-Sayán, which suggests that thus far, the Inter-American Court has not had to address the context of an amnesty agreed as part of an attempt to have a legitimate peace versus justice compromise, and suggesting that some level of amnesty might be tolerated if crafted in a good faith attempt to provide for both justice and peace. Both opinions available online at the IACtHR website <[http://www.corteidh.or.cr/pais.cfm?id\\_Pais=17&CFID=2154010&CFTOKEN=38471785](http://www.corteidh.or.cr/pais.cfm?id_Pais=17&CFID=2154010&CFTOKEN=38471785)>.

<sup>21</sup> For a full picture of third party involvement, see Bell, *On the Law of Peace* (n. 3) 175–95.

<sup>22</sup> See e.g. Report of the Secretary General, “Supplement to An Agenda for Peace, Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary of the United Nations, Report of the Secretary-General” (1995) UN Doc. A/50/60-S/1995/1; UN, “Report of the Panel on United Nations Peace Operations” (2000) UN Doc A/55/305-S/2000/809.

<sup>23</sup> David Wippman, “Treaty-based Intervention: Who Can Say No?” (1995) 62 *University of Chicago Law Review* 607.



a legal basis for their own intervention—particularly when faced with recalcitrant parties.<sup>24</sup>

**6. A new approach to questions of accountability of the international actors engaged in peacekeeping and the implementation of peace agreements more generally.** Traditionally, the spheres of operation of international organizations and the sphere of the domestic state were understood to be distinct. The accountability of state actors was through the framework of the state's institutions and accountability of international actors through the framework of the international organization's institutions. In so far as international organizations committed wrongs within states, any accountability was contemplated to flow from the international organization to the state; however, when and how accountability applied remained controversial, depending on matters such as the relationship between the organization and its member states and what acts were attributable to the organization.<sup>25</sup>

Again, these assumptions are inapposite to post-conflict scenarios and tasks and have forced the attempt to look for new legal solutions. The tapestry of international involvement in peace settlement implementation tasks, as described above, gives rise to questions of third party accountability for violations of international law with respect to local populations. Two international exercises of power in particular give rise to such demands: the use of coercive force (including detention, torture, sexual violence, and lethal force) and the exercise of what are normally the powers of government.<sup>26</sup> The diversity of international intervention, both in terms of the large number of different international organizations that now intervene fairly routinely in peacemaking and building tasks, and in terms of the range of functions they undertake, have led to pressure to develop more appropriate legal standards—often on an ad hoc basis—to deal with the accountability issues that arise.<sup>27</sup> It is beyond the scope of this chapter to document these, save to note two broad trends. The first trend is that the longer international actors remain, the more there is pressure to hold them directly to account

<sup>24</sup> Eva Bertram, "Reinventing Governments: The Promise and Perils of United Nations Peace Building" (1995) 39 *Journal of Conflict Resolution* 387.

<sup>25</sup> Jan Klabbbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 271–93.

<sup>26</sup> For example, allegations of torture and execution against Belgian, Italian and Canadian UN troops in Somalia (1992–1995), Commission of Inquiry into the Deployment of Canadian Forces to Somalia, "Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry Into the Deployment of Canadian Forces to Somalia" (1997, Minister of Public Works and Government Services Canada); UN Secretary General, "Special Measures for Protection from Sexual Exploitation and Sexual Abuse" (2007) UN Doc. A/61/957, detailing sexual exploitation and related offences in the UN system in 2006, including sexual assault and sex with a minor.

<sup>27</sup> See e.g. Agreement between the United Nations Interim Administration in Kosovo (UNMIK) and the Council of Europe on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities (23 August 2004) <<http://www.unhcr.org/refworld/country,,MULTILATERALTREATY,SRB,,0.html>> (accessed 7 May 2013). For a full body of reports and Committee of Ministers resolutions pursuant to this agreement, see <<http://www.cpt.coe.int/en/states/srb.htm>> (accessed 7 May 2013); Agreement between the UNMIK and the Council of Europe on technical arrangements related to the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (23 August 2004) <<http://www.unhcr.org/refworld/country,,MULTILATERALTREATY,SRB,,0.html>> (accessed 7 May 2013). See further, UNMIK, Press Release, UNMIK/PR/1216 (Pristina, 23 August 2004) <<http://reliefweb.int/report/serbia/kosovo-unmik-and-council-europe-sign-two-agreements>> (accessed 7 May 2013). These agreements expressly note in their preambles that they do not make UNMIK a "party" to the treaty in question.

with international actors often conceding new mechanisms, in part because to fail to do so reduces their legitimacy and effectiveness with respect to the local actors they are trying to influence. The second trend is that it has proved fairly impossible, and seems likely to so remain, to design broad mechanisms of accountability capable of dealing with all the types of interveners and covering all their possible functions. International law—ad hoc or otherwise—just cannot keep up with the case-by-case innovation in peace-implementation practice.<sup>28</sup>

7. **Other potential “new law” areas?** Two other potential candidates for a new *jus post bellum* deserve a mention. The first is that of an over-arching obligation to reconstruct post-international intervention. Increasingly, lawyers are moving to interrogate whether law provides for the kind of moral obligation that theorists argue exists.<sup>29</sup> Such an obligation might provide an over-arching framework from which to develop law in the same manner as the prohibition on the use of force. Scholars largely agree that such an obligation does not exist, but note the existence of a relevant regulatory framework regarding re-construction acts.<sup>30</sup> In practice, the lack of an over-arching enabling obligation has not prevented re-construction and on-going intervention post-international conflict, which has taken place as a matter of course, with international actors sometimes viewing humanitarian law of occupation as the governing legal frame, and sometimes human rights law.<sup>31</sup> In practice, both have required amendment so as to facilitate a project of “transformative occupation.”<sup>32</sup>

The second area concerns rules governing the conduct of peace negotiations themselves. Existing laws of war contain fairly rudimentary regulation of the conduct of peace negotiations, with protection of the white flag and a prohibition on perfidy (or treachery), that attempt to preserve the possibility of negotiations by requiring good faith.<sup>33</sup> These rules have received little attention in the context of intra-state conflict where there is some evidence that the imperative to prosecute serious war criminals has displaced the idea that negotiations should be conducted in good faith and that their provisions should be honored. To give some examples: Charles Taylor was arrested on the back of a secret indictment on his way to peace negotiations relating to Liberia—albeit for offences committed in Sierra Leone; the Special Court for Sierra Leone had little qualms about rejecting arguments of abuse of process and over-turning an amnesty agreed in writing

<sup>28</sup> See e.g. Françoise Hampson, “Administration of Justice, Rules of Law and Democracy, Working paper on the Accountability of International Personnel Taking Part in Peace Support Operations” (2005) UN Doc. E/CN.4/Sub.2/2005/42, para. 79.

<sup>29</sup> See Chayes, “Chapter VII½” (n. 2); Verdirame, “What to Make of Jus Post Bellum” (n. 2).

<sup>30</sup> See Chayes, “Chapter VII½” (n. 2); Verdirame, “What to Make of Jus Post Bellum” (n. 2).

<sup>31</sup> See further, Steven R. Ratner, “Foreign Occupation and International Territorial Administration: The Challenges of Convergence” (2005) 16 *European Journal of International Law* 695, 702–3.

<sup>32</sup> See further, Adam Roberts, “Transformative Military Occupation: Applying the Law of War and Human Rights” (2006) 100 *American Journal of International Law* 580; *Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58; *Al-Jedda v. United Kingdom* App. no. 27021/08 (ECtHR, 8 July 2011) (for some of the controversies that have arisen as regards attempts to design a new governing legal frame through UNSC resolution).

<sup>33</sup> See e.g. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3 Art. 37; 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land (adopted 18 October 1907) 187 CTS 227.

in a peace agreement between local protagonists but also international actors;<sup>34</sup> and, more anecdotally, mediators in closed sessions appear unconcerned with equality of arms issues that see non-state actors (many admittedly with nasty pasts) sign blanket amnesties that, unknown to them, are unlikely to be honored. Where accountability of war criminals is at stake it seems that concerns about perfidy do not apply.

## B. Combined or separate registers? moral philosophy, politics, and law

It is worth pausing at this point to emphasize that this emerging “new law” is derived from examination of legal mutations provoked by peacemaking practice, rather than conceptual analysis of what an ideal *jus post bellum* should look like. Emergent new legal understandings have evolved from attempts to consider how seemingly relevant standards of international law might be understood to inform peace settlement compromises. Yet, the normativity of these settlements can be evaluated with reference to three quite different normative frames, each of which suggests a different direction and set of constraints with respect to developing the law. The first is a frame of justice, which views a normatively just peace as the priority, with reference to human rights, humanitarian law, and international criminal law as creating ideal demands from which departure must be strongly justified. The second frame is one of conflict resolution, which views the need to end the conflict as the dominant normative imperative, and views international law to be interpreted and applied so as to give effect to this over-riding normative imperative. The final frame is one that views the achievement of a particular political outcome, such as liberal democracy, as the dominant normative imperative, and could tolerate departures from international legal standards if it could be understood as necessary to that end goal. From this final frame the demands of both law and conflict resolution are viewed as instrumental to this larger aim of producing a normative political order.

These three normative frames can be viewed as propelled by three different peace-building imperatives: imperatives of justice as universal principles; imperatives of short-term conflict resolution; and long-term democracy-building imperatives. Each imperative can articulate itself within the language of the other: justice claims can be presented as conflict resolution imperatives (without justice peace has no content), or imperatives relating to liberal democracy (e.g. as a rule of law requirement), while conflict resolution imperatives can be re-framed in terms of justice concerns that aim to create an even playing field between parties. Each set of imperatives is tightly inter-linked with reference to the dilemmas of crafting and implementation of peace settlements. However, at different stages of negotiations different imperatives pull in different directions, leading to demands that each needs amended in the light of competing imperatives. The emergence of the new *lex pacificatoria* is in part produced as a result of this pressure. The area of transitional justice illustrates: classically, the tension between demands of accountability and demands of amnesty can be understood

<sup>34</sup> See combined cases *Prosecutor v. Morris Kallon, Brima Bazzy Kamara* (Judgment) SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (Special Court for Sierra Leone) (13 March 2004) para. 72.

as a tension between principle (accountability as set out in international humanitarian law and international human rights law) and pragmatism with relation to conflict resolution. However, the justice versus peace tension can also be argued to reflect a clash of principles and difficulties in deciding which should be prioritized: the principle of accountability for past acts or the principle of protecting the right to life in the future. The tension can also be understood as a clash of pragmatic imperatives, and the tension between conflict resolution as a negative attempt to stop the fighting in the short term and conflict resolution as a need for long-term liberal democratic structures and the rule of law as on-going mechanisms for stability in the long term. Ultimately, the idea that international law suggests a measure of accountability as tempered by a measure of amnesty enables attempts to find creative ways to move beyond genuine dilemmas over what best serves peace. The attempt to navigate between these different demands has produced a range of interpretations by human rights bodies and a range of soft law standards. While over time these standards have emphasized the need for accountability, even as they move toward the accountability pole to demand prosecution and punishment, pressure comes to bear from conflict resolution imperatives that reinforces the permissibility of some forms of amnesty.<sup>35</sup> And so, the law continues to suggest in broad terms a middle gray area in which some form of justice must be delivered but can be done so concomitantly with some level of amnesty.

### C. The uncertainty and instability of the new law

To summarize my proposition thus far: I have argued that the attempt to apply international law to transitions from conflict has produced reinterpretations of key international legal doctrines which operate to reshape what are understood to be the boundaries of international legal regimes and, indeed, international law itself. The attempt to use international law to regulate peace agreement settlements and their implementation has been argued to require new accounts of how international law applies and what it demands. These new accounts have re-worked the scope and concerns of core international legal regimes, such as refugee law, human rights law, and humanitarian law, so as to address the peculiar political dilemmas of transition. I have termed these new developments a new *lex pacificatoria* or “law of the peacemakers,” as an alternative to *jus post bellum*, for reasons I will elaborate on, but in part because the term marks that these apparent shifts in international legal doctrine stand somewhere between law and practice.

The developments are partial and unstable and it remains unclear whether the interpretations will be sustained, developed, or rolled back. The new *lex* does not operate as a clear new legal regime establishing a set of legal obligations but rather as a set of programmatic standards that provides guidance and, at times, goes further in creating a normative expectation as to how the dilemmas of peace settlements can be resolved concomitantly with the requirements of international law. These programmatic standards can be gleaned from an eclectic set of sources: novel interpretations of human rights and humanitarian law that respond to peace agreement dilemmas, new soft law programmatic standards, the convergent practices of peace-makers as contracted

<sup>35</sup> See *Case of the Massacres of El Mozote* (n. 20).

to legalized peace agreements, and ad hoc standard setting with relation to specific conflicts.

In none of the six areas discussed are the new legal developments fully established, consistently enforced, or stable: different areas are undermined by different difficulties. The new law of self-determination and transitional justice both indicate developments whereby a “mid-way” law has been developed between more extreme positions of what the law is or should be. With self-determination, the new law fashions a mid-way position between positions of “no legal right to external self-determination outside colonial self-determination” and “a new revised norm of self-determination that permits secession in cases of extreme human rights abuse.” With transitional justice the new law fashions a space between positions of “no amnesty for serious international crimes” and “amnesty should always remain a part of the negotiator’s tool kit.” In each of these areas, the compromise position operates as a holding device between different conflict resolution and legal imperatives in which the parties to the conflict can negotiate a compromise. In other areas of “new law,” new norms are clearly established but without clear standard-setting and enforcement: laws of return and gender inclusion remain new and exhortative although attempts to develop them further are ongoing. In yet other areas of new law—notably that of accountability of peacekeepers—any emergent re-interpretation or extension of existing norms and forms of accountability is both ad hoc and piece-meal. This piece-meal approach in part arises because of political difficulties of holding international actors accountable to local population. But it also derives from the impossibility of designing norms that would provide a coherent framework of accountability capable of general application across all intervention contexts, to all people, for all functions. The shape of international intervention is too innovative, diverse, complex, and fluid to be amenable to holistic regulation in generally applicable standards.

### III. From *Lex Pacificatoria* to *Jus Post Bellum*?

The question remains, therefore, as to whether this *lex pacificatoria* could be refined, stabilized, and built upon to create a coherent legal framework for peace settlements: in other words, could we develop a new coherent regime, as has been suggested in *jus post bellum* literature? The very partiality and instability of the *lex pacificatoria* means that it is indeed tempting to view it as a *lex ferenda*, or “developing law,” whose natural trajectory would seem to be toward a more established *lex lata* in the form of a fully worked out body of law capable of regulating transitions from conflict. We might, from this perspective, view the *lex pacificatoria* as *lex ferenda* and *jus post bellum* as its possible future as imagined new *lex lata*. I now turn to set out why I nonetheless view the project of development and clarification as both impossible and undesirable.

#### A. Naming as conceptualizing

Before considering whether and how the legal developments should be further codified, I wish to address the question of naming any imagined new *lex lata* a *jus post bellum*. From one point of view, we need not be too concerned at this stage with how to name

any possible new regime—the important matter is to decide whether there should be one and what it might comprise. However, naming legal developments also categorizes them and situates them within the international legal system with consequences for how we conceive of their relationship to existing branches of international law.

At a simple descriptive level the term *jus post bellum* appears inapposite to the practice of peacemaking. The legal gaps that need to be addressed by law do not manifest themselves post-conflict but during the process of settlement itself. It is relatively easy in inter-state conflicts to define the *post-bellum* period as that beginning with the formal conclusion of the international military conflict. However, if one examines contemporary inter-state conflict such as in Kosovo, Iraq, and Afghanistan, this period is less obviously *post-bellum* in terms of violent conflict within the state in which international actors inevitably become involved. The task remains one of resolving an intra-state conflict.

In more classic intra-state conflict, negotiations of an end to fighting often required agreement over the post-settlement political and legal institutions: the negotiation of a formal indefinite ceasefire requires the negotiation of some sort of constitutional road-map containing commitments relating to self-determination, inclusion, government, constitutional structure, and the return of displaced persons. Also included are issues such as whether amnesties are given or accountability mechanisms put in place and whether displaced people are to be returned or re-settled. An end to intra-state conflict will only be forthcoming if the parties are satisfied with what they are able to negotiate with respect to the post-conflict settlement. The regulation of transition, therefore, involves the regulation of peace settlement terms as well as the environment that follows. This environment is circumscribed by compromises agreed in the peace agreement text—shaped by balance of power between the parties—which continue to dominate arguments over how international law should apply.

Of course this objection to *jus post bellum* as a term could be dismissed as a semantic quibble: if some sort of even partial ceasefire is called to enable talks, then the period of negotiation could itself be understood to be part of the post-conflict period and the content of a peace agreement the subject of *jus post bellum* regulation. There is little point, it could be argued, in taking the descriptor *post bellum* too literally by tying it too tightly to a preceding ceasefire—we could understand a *jus post bellum* more flexibly as dealing with peace negotiations themselves.

Yet, a deeper objection to the term *jus post bellum* remains: the term *jus post bellum* locates the project as a part of the laws of war. The idea of a *jus post bellum* draws its name from the two-part division of the law of war into *jus ad bellum* and *jus in bello*. It suggests adding a third *jus post bellum* in a tri-partite division that would complete the two existing bodies of law by providing for the regulation of the post-conflict terrain. The name *jus post bellum* locates regulation of post-conflict environments as part of the law of war. In so doing, it begs the question of how this “interim” period between war and peace relates to the larger two-part division of international law into the laws of war and the laws of peace. If we return to Grotius, he divides international law into the laws of war and the laws of peace, with the law of peace largely everything that is not the law of war—the regulation of non-conflicted relations between states.<sup>36</sup> The period at the

<sup>36</sup> Hugo Grotius, *On the Law of War and Peace* (John W. Parker tr., Cambridge 1853).

end of a conflict until some specified point thereafter could be considered as the final stage of the conflict: albeit aberrational in terms of a strict application of the laws of war because it requires addressing how best to terminate and mop up the conflict. However, this period could also, of course, be considered the first stage of a law of peace: albeit aberrational from normal peaceful relations and doctrines because peace is contingent and partial. Interestingly, the etymology of the term “peace” as “pact” or “pax” speaks to a conception of peace as an aberration to a normal context of war, in which the pact constitutes an interregnum that is initially aberrational and temporary.<sup>37</sup>

The label *jus post bellum* is arguably spiritually wrong because it locates the project as one of regulating the post-conflict terrain with regard to the continued, if mediated, framework of the laws of war, rather than asking what it would mean to regulate the space between war and peace.

This problem is more than spiritual or semantic. The term *jus post bellum* in foregrounding the project as one of continued regulation of the vestigial dimensions of conflict, reinforces the conflict as the jurisgenerative frame, and presents the task in hand as one of repair. In contrast, if the legal project is viewed as a project of constructing a transition in the face of contestation between the parties, the dilemmas of transition become the jurisgenerative frame with a focus on the future rather than the past.<sup>38</sup> Crucially, understanding the space of attempted regulation as a space of transition does not just point to a quite different role of law, but also points to the fact that law and legal argument are themselves implicated in the contestation over the direction and end goals of transition. While the *jus post bellum* label suggests a project of international law-making aimed at codifying and extending existing laws of war so as to regulate post-conflict tasks, the idea of a law of transition points to a more controversial role for international law in defining the domestic polity and the legitimate ends of transition, when those ends are in part what the parties—domestic and international—require to negotiate between them. Arguments for particular applications of international law, in this context, often relate to parties’ preferred outcomes for transition, whether these are the status quo ante, a completely transformed state structure in which power is radically re-distributed between state to non-state actors, or the mechanisms of liberal democracy that international actors tend to view as centrally required.

## B. Is a *jus post bellum* possible?

Once we recognize that the outcomes of transition are at stake in debates over the application of international law, then we need to acknowledge that international law encounters connected legitimacy and efficacy problems in trying to move conflict resolution in the direction of particular outcomes. International law is not just the subject

<sup>37</sup> The etymology of the very word “peace” comes from the classical Latin *pacem* or *pax*, which meant “treaty of peace, tranquility, absence of war,” closely related to the Proto-European-Indo concept of *pak*—to fasten, in turn related to *pacisci* which meant “to covenant or agree.” See online etymology dictionary at <<http://www.etymonline.com/index.php?search=peace&searchmode=none>> (accessed 7 May 2013). This dictionary also states that the word came to replace the Old English *frid*, also *sibb*, which also meant “happiness;” cf. Charles Talbot Onions, *The Oxford Dictionary of English Etymology* (Clarendon Press 1966).

<sup>38</sup> Teitel, “Rethinking *Jus Post Bellum*” (n. 5).

of change, but also the object of contestation. As a result, a number of practical problems impinge on whether a more fully-fledged *jus post bellum* can be achieved, as will now be examined.

### *Difficulties of “legislating” in international law*

An initial problem of development lies into how to produce new international law. The clearest and most obvious form of an established *jus post bellum* would be as a new legal regime—perhaps as Orend suggests, a new fifth Geneva Convention.<sup>39</sup> It remains unclear, however, who would design and sign up to any new regime. Practices of international law-making are complex and typically protracted. Multi-lateral treaties involve complex and lengthy interstate negotiations that increasingly involve a host of other non-state actors.<sup>40</sup> There is no clear will or capacity to agree a new “fifth” Geneva Convention or suchlike, and much danger in opening up contested areas of the existing four Conventions and their Protocols—many of whose provisions are also argued to be anachronistic.

A second problem relates to whether it is possible to craft a new regime that would cover the breadth of the *lex pacificatoria* as an integrated whole. Where soft law guidance and binding jurisprudence currently exists it relates to one dimension of transition—refugees, transitional justice, gender, or third party accountability. It is difficult to imagine how the developing soft law of these disparate areas could be woven into a coherent, unified formal legal regime capable of regulating all aspects of transition and covering all possible permutations of international intervention.

Even if the will did exist it is unlikely that consensus could be reached on the content of any new regime. Attempts to codify, even in soft law standards, some of the “new law’s” current content—such as principles of transitional justice—have often foundered or produced very vague general principles.<sup>41</sup> This failure is not the result of a simple lack of commitment or will. There are real conceptual problems, for example, in producing clearer guidelines on exactly how accountability should be balanced with amnesty. Chief among these difficulties is that of containing the consequence of any new standard for how we understand the underlying legal regimes to apply in less controversial settings. For example, is an explicitly *transitional* justice to be articulated as an exception to norms demanding accountability or a differentiated application of them appropriate to the transitional state?<sup>42</sup> Even the latter conception requires criteria that would contain this differentiated application to the transitional setting.

<sup>39</sup> Orend, “Ius Post Bellum” (n. 1).

<sup>40</sup> Alan E. Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007).

<sup>41</sup> See UN Human Rights Council Res. 9/10 (2005) <[http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_9\\_10.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_10.pdf)> (accessed 7 May 2013), which started life as an attempt to articulate transitional justice principles, but in its end format resulted in these rather vague exhortations to the process of developing a UN position on transitional justice.

<sup>42</sup> The Office of the High Commissioner of Human Rights defines transitional justice as follows: “Transitional justice consists of both judicial and non-judicial mechanisms, including prosecution initiatives, reparations, truth-seeking, institutional reform, or a combination thereof. Whatever combination is chosen must be in conformity with international legal standards and obligations.” See Office of the High Commissioner of Human Rights website <[http://www2.ohchr.org/english/issues/rule\\_of\\_law/transjustice.htm](http://www2.ohchr.org/english/issues/rule_of_law/transjustice.htm)> (accessed 10



*New, rather than no, boundary dilemmas*

While the pressure for a new international legal regime arises in part to escape the boundary dilemmas of existing regimes, a new regime would merely present a new set of “boundary” dilemmas. The creation of a third-way regime understood as a third prong of the laws of war appears to remain tied to drawing artificial lines between types of conflict and peace settlement, when the call for new law responds to the perceived need to operate without these types of boundaries.

The first new boundary dilemma concerns what types and scales of conflict the new regime would apply to. The very scale of peace agreement practice illustrates the diverse conflict situations on which a *jus post bellum* might seek purchase: fully fledged international wars, Protocol II non-international armed conflict, conflict governed by Common Article 3 of the Geneva Conventions, and conflict that falls outside humanitarian law definitions altogether. The types of legal mutation we have examined have arisen in response to all these types of conflict. If the categories of humanitarian and human rights law are to be merged, this opens up a much broader range of conflicts to which the *jus post bellum* applies, than those engaging only humanitarian law. There are arguments that one should keep a broad approach. As Ní Aoláin and Gross argue, when one reaches lower scales of conflict, there can be little at stake besides the politics of how one labels the conflict legally, in deciding whether a permanent state of emergency or a common Article 3 conflict applies.<sup>43</sup> However, as conflict mutates post-settlement the boundaries between international armed conflict, internal armed conflict, and organized crime are becoming increasingly difficult to disentangle and regulate through different regimes. Trying to create a new bounded space between “conflict” and “peace” stands to be artificial and even to obscure the ways in which conflict mutates.

A second associated boundary dilemma relates to how to define a distinct transition in temporal terms. Peace settlements are often only partially implemented, with sporadic or sustained violence re-emerging. Post-settlement is not the same as “post-conflict,” although the literature often assumes that it is. Often, no consensus exists between any of the parties (including international third parties) as to whether a situation is “post-conflict,” or when a distinctive “transition” begins and ends. The fluctuating nature of post-conflict violence indicates a difficulty in deciding when any new *jus post bellum* might apply. Without a clear sense of such boundaries it is unclear when the differentiated standards of any *jus post bellum* would begin or end. This question of temporality is not easily resolved. Political science scholars dealing with questions of “democratization” and “transitology” have not found a ready consensus over fixed

June 2013). The UN Secretary General’s 2004 “Report on Transitional Justice and the Rule of Law” defines transitional justice as “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. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” UN Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” (2004) UN Doc. S/2004/616, para. 8. These attempts to define transitional justice in terms of mechanisms appear designed to avoid difficult questions of the extent to which transitional justice implies a revision of human rights norms.

<sup>43</sup> Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (Cambridge University Press 2006).

boundaries or criteria that would define clear stages in a process.<sup>44</sup> They have looked for these criteria as a matter of good comparative practice rather than a matter of defining when relevant legal standards apply—a purpose that arguably would require an even more impossibly precise delimitation of a beginning and end to transition. Lawyers engaging with the role of law in “transition” have tended to avoid the question of how to define it, largely failing to discuss or theorize what types of transition they are talking about.<sup>45</sup>

Courts, however, inevitably have to adjudicate boundary disputes. There is a nascent jurisprudence emerging from international human rights courts relating to when transition enables some sort of attenuation of human rights standards: what might be considered an embryonic jurisprudence defining—indirectly—when transition might be considered to be at an end. This jurisprudence illustrates some of the difficulties of any definitive legal policing of temporal boundaries. The European Court of Human Rights, for example, has found restrictions on the electoral participation of former communist party members in formerly communist states to be justified even 15 years into democracy, although they found that the longer the passage of time from authoritarianism, the greater the burden of justification on any restriction.<sup>46</sup> Yet in Bosnia and Herzegovina, the Court found consociationalism (or power-sharing) between groups to fall foul of election rights ten years after the conflict’s end because it could not be justified to be necessary to avoid an imminent threat to peace.<sup>47</sup> These decisions point to the difficulty of finding legal criteria that would operate across conflicts to define the *post bellum* period in which some human rights leeway is permitted. They also suggest that the transitional period may be defined differently for different rights, because proportionality tests may play out differently. In other words different *post bellum* periods may exist for different purposes. More fundamentally, however, the cases raise the question as to whether courts are the competent bodies to make a determination as to when transition ends, given that this decision is one that involves primarily political considerations relating to the local political climate—something that international courts have little capacity or legitimacy in judging.<sup>48</sup>

The language of *jus post bellum* appears to contemplate a re-drawing of boundaries rather than their elimination. The new boundaries will inevitably become the subject

<sup>44</sup> Transitionology literature defines transition in terms of a short period of time between the initiation of a point of change, and democratic elections, see Juan Linz, “Transitions to Democracy” (1990) 13 *The Washington Quarterly* 143, while consolidation of democratization literature attempts to define a broader transition as including the process of “consolidation of democracy,” a temporal period that is much more contested. See e.g. Samuel P. Huntington, *The Third Wave* (University of Oklahoma Press 1992) 266; Ben R. Schneider, “Democratic Consolidations: Some Broad Comparisons and Sweeping Arguments” (1995) 30 *Latin American Research Review* 215, 219; Carsten Q. Schneider, *The Consolidation of Democracy: Comparing Europe and Latin America* (Routledge 2008).

<sup>45</sup> Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’” (2009) 3 *International Journal of Transitional Justice* 5.

<sup>46</sup> Cf. *Ždanoka v. Latvia* App. no. 58278/00 (ECHR, 16 March 2006) with *Adamsons v. Latvia* App. no. 3669/03 (ECHR, 24 June 2008) and *Ta’ase v. Modlova* App. no. 7/08 (ECHR, 27 April 2010). See further Michael Hamilton, “Transition, Political Loyalties and the Order of the State” in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press 2011) 151–84.

<sup>47</sup> *Sejdić and Finci v. Bosnia & Herzegovina* App. nos 27996/06 and 34836/06 (ECHR, 22 December 2009).

<sup>48</sup> See further Bonello dissent in *Sejdić and Finci v. Bosnia* (n. 47); Christopher McCrudden and Brendan O’Leary, *Courts and Consociations* (Oxford University Press 2013).

of contestation that will form a part of the broader political picture of contestation over the nature and direction of transition. The language of law and legal boundaries may obscure the political nature of the decision that is being taken. To return to the case law just discussed, it can be argued that beneath an apparent emergent legal articulation of the temporal boundaries of *jus post bellum* exceptionality, the European Court of Human Rights (ECtHR) in both cases based its decision on unarticulated assumptions relating to whether such measurements could be justified as necessary to achieving a particular liberal democratic outcome. An underlying concept of promotion of liberal democracy can be understood (if not endorsed) to underlie both the decision to allow a restriction on electoral participation for former communist party members, and the decision to roll back group-rights measures in Bosnia Herzegovina. So, a longer more open-ended transitional period was tolerated in the former, where the impact on the individual's rights were understood by the court to be justified by a need to preserve and build liberal democratic values in the face of an ongoing (non-violent) communist threat; and a shorter period in the latter, where the Dayton Peace Agreement's consociational mechanisms were understood to constitute a form of "ethnic engineering" that stood in the way of a more "normal" longer-term liberal democratic development. The main point is that in both decisions, the court appeared to engage with questions of temporality, and the length of time passed from the violent or authoritarian past that justified the measure, but on closer examination can be understood to use discussions of temporality to bolster liberal democratic outcomes. Both cases raise the question again as to whether courts can competently and legitimately determine the relationship of the limitations of rights to asserted liberal democratic futures without capacity to engage in a contextual political examination of the existing political structures.<sup>49</sup>

Rather than pursuing a project of new boundaries, it may be better to consider when and how legal innovation is needed to resolve fundamental conflicts as to the state's foundations, inclusion in the polity, and its concept of political equality. Recently, the possible boundaries of any *jus post bellum* have been pushed even further, as a range of settled western liberal states have turned to the language of transition. Some of the language of transition and some of the dilemmas—such as those of transitional justice—present in moves from authoritarian regimes to democratic ones, or even in constitutional transitions in Western Democracies. Recently, settled liberal states have moved to the language and mechanisms of transitional justice to address the legacy of conflicts long past, such as those of Spain's dictatorship, Australia's treatment of aboriginal peoples, or even the unaddressed cases of the civil rights movement in the United States.<sup>50</sup> In all of these situations, the conflict may be long past, and armed conflict as such may never have existed at all. Arguably, the language of transition is invoked here to assist symbolic moves from one type of state self-understanding to another: an attempt to create a transition in the nature of the state. Innovative extra-legal remedies are

<sup>49</sup> McCrudden and O'Leary, *Courts and Consociations* (n. 48).

<sup>50</sup> For a discussion of these developments, see Anne Orford, "Commissioning the Truth" (2006) 15 *Columbia Journal of Gender and Law* 851; Stephanie Golob, "Volver: the Return of/to Transitional Justice Politics in Spain" (2008) 9 *Journal of Spanish Cultural Studies* 127; Christopher Lamont, "Justice and Transition in Mississippi: Opening the Books on the American South" (2010) 30 *Politics* 183.

required because of the passage of time, but also because symbolic as well as real issues of inclusion and state accountability require to be addressed.

Again, the language of *jus post bellum* in suggesting the need to fashion new legal responses to transitions from war to peace obscures the need for an approach to law capable of understanding its relationship to political transitions defined more broadly and vaguely as transitions from unjust and un-inclusive constitutional pasts to more just and inclusive futures: projects that exist as much as projects of collective political imagination as projects of technical legal and political reform. Strong arguments for innovative legal mechanisms to deal with past human rights abuses arise even in settled contexts, in situations where traditional legal responses—such as those of criminal law—fail to fit political demands for forms of accountability that address not just the conduct of individuals but how the state conceived of itself, how it defined the legitimacy of its constitutional origins, and justified the discriminatory political actions and laws that flowed from its exclusive, discriminatory, and ahistorical self-conception. In other words, peacemaking may continue to be required for a range of conflicts long past, and it may be that rather than either a *jus post bellum* or even a law of transition in a narrow sense, societies continue to require capacity to generate innovative legal responses to questions of political and legal institutional reform when justice demands are made that challenge the moral and legal integrity of the state. Rather than a *jus post bellum* this points to a *lex pacificatoria* that has relevance wherever projects of state transformation are asserted.

### C. Is a *jus post bellum* desirable?

These practical problems prompt the question of whether a new “third way” regime in the form of a clearly articulated *jus post bellum* is desirable. It can be argued that the partial nature of the *lex pacificatoria* leaves vital room for negotiations, and that the consent of the parties to a conflict to new political and legal arrangements is vital to ending the conflict. Rather than constituting *lex ferenda* that requires to be developed, I seek here to argue that the project of legal regulation of transition requires an approach to international law that is capable of moving beyond binary categories of lawful/unlawful, war/peace, or domestic/international and the notion of enforcing particular outcomes to negotiated transitions.

There are advantages to having international law as a partial guide that attempts to suggest normative requirements rather than prescribe. Guidelines for peace agreement content may be more appropriate to enabling negotiated solutions than developing international law so as to require particular substance. A broad sketching of the possible parameters of the relationship between accountability and amnesty, exhortations to include women, and “best practice” guidance on the return of refugees and displaced persons leave some room for the parties to negotiate solutions with some flexibility. Binding international legal standards making detailed provision on what is required would effectively operate to require a particular blueprint of any political deal, narrowing the parties’ room to maneuver: the more law specifies peace settlement terms, the less the parties are able to negotiate. Development of these standards into a fully-fledged new regime would run the risk of effectively establishing legal pre-requisites to negotiations. Ends to war that are ambiguous in justice terms are often preferable to protracted

intra-state conflict with little just-war basis and both sides often targeting civilians as a central tactic. While a more flexible approach to what peace settlements should provide for in human rights terms appears weaker than a clear normative injunction, and may indeed result in a rather less than satisfactory result on many issues, what is lost in substance may be gained in the commitment and ability to implement what little is agreed.

More positively, the partially formed state of the *lex pacificatoria* may assist and enable international mediators to support and move forward some normative boundaries to peace negotiations. At present, the “new law” of peacemakers operates as a holding device for disagreement over what law and conflict resolution requires and should require. For example, in the area of transitional justice, it holds together the idea that both accountability and amnesty are useful and permissible and some sense of where the line should be drawn between them. In the undefined middle space lie possibilities for negotiated settlement. Moving to some sort of clear definition of the permissible space for negotiation in between would expose the lack of international consensus on what that space is, reinvigorating the pull to either pole and perhaps excluding the middle ground. At present the middle ground exists as a form of “détente” between competing notions of how peace and justice should be reconciled—the detent held in place by agonistic discourse between different conceptions of what conflict resolution, morality and law require.

#### IV. Situating *Jus Post Bellum* within Wider Discussions of International Law’s Future Directions

While the label *jus post bellum* situates legal developments with reference to the laws of war, it also situates the discussion over the role of international law *post bellum* within broader debates over the nature of the international legal system. These debates involve competing views of how best to re-conceive international law beyond its traditional Westphalian conceptualization as a law between states. In suggesting a new regime, the *jus post bellum* rubs up against competing visions of what the post-Westphalia concept of international law is and should be. How one understands the relationship of *jus post bellum* to the changing nature of international law, affects one’s view of the legitimacy and usefulness of the *jus post bellum* project, but it also affects how one might approach any attempt to develop and clarify the law.

Several different conceptions of the post-Westphalian international legal system have been argued to be at play: international law as a law of regimes in which regime experts are empowered to make political decisions under cover of law; international law as now requiring liberal democratic outcomes perhaps supplemented by its capacity to now recognize the subjectivity of the person; international law as realist uni-polar hegemony; and international law reconceived in terms of projects of global administration.<sup>51</sup> Each of these competing visions can be understood to situate and understand a *jus post bellum* differently, with different conclusions as to its development. A short discussion illustrates.

<sup>51</sup> Cf. Neil Walker, “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders” (2008) 6 *International Journal of Constitutional Law* 373.

## A. International law as law of regimes

Arguments for a new international legal regime could be understood to contribute to the creation of international law as fragmented into regimes, this fragmentation replacing a concept of international law as the law of states.<sup>52</sup> If the project of international law is seen as having moved from the “international law” of states to the “international law of regimes,” then the creation of a new regime may perhaps be understood as inevitable but will be evaluated differently by those who think specialist regimes are a useful development of international law and those who are concerned about international law’s fragmentation. Beyond a general concern with fragmentation, harsher critiques of international law as the “law of regimes” have been made, namely that understanding international law as a law of regimes repositions international lawyers as regime experts, and the politics and majesty of international law become lost in a series of inter-regime battles approached as technocratic projects.<sup>53</sup> From this point of view, even the technocratic project of “fixing messes” by clarifying post-conflict soft law as a *jus post bellum* has a politics: the politics of obscuring what is at stake in regime disputes of experts through arguing over inter-regime boundaries.<sup>54</sup>

## B. Liberal international law

Alternatively, if the post-Westphalian project of international law is viewed as the international promotion, and even requirement, of liberal statehood, then one may view the current *lex pacificatoria*’s incomplete nature as a way-station toward achieving a clearer *jus post bellum*. But this conception of international law’s future will connect development of the *jus post bellum* to the promotion of liberal democracy as an outcome. The project of embracing and building a new *jus post bellum*, from this perspective, is very clearly tied up with ensuring that international law promotes the emergence of a liberal democratic state and so would develop the *jus* so as to ensure that such a state is delivered. Thus, some of the more fluid dimensions of the *lex pacificatoria* as a tool of navigation between the international and the domestic, times of conflict and times of peace, would be rejected in preference of a notion of *jus post bellum* exceptionality as a permitted temporary exceptionalism, bounded by its justification as in service to a liberal democratic outcome. For example, power-sharing and group rights might be tolerated short term, but only in so far as they can be justified as necessary to move towards a more classic form of liberal democracy which is suspicious of group accommodation.<sup>55</sup> Similarly, short-term amnesties might be tolerated with a pressure to move to full human rights accountability for all, as the threat of conflict subsides. Elements of both these approaches can be seen in existing human rights case law, as discussed.

<sup>52</sup> Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics” (2007) 70 *Modern Law Review* 1.

<sup>53</sup> Koskenniemi, “The Fate of Public International Law” (n. 52).

<sup>54</sup> Koskenniemi, “The Fate of Public International Law” (n. 52); David Kennedy, “The Mystery of Global Governance” in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009).

<sup>55</sup> Cf. Anne-Marie Slaughter, “Pursing the Limits of the Liberal Peace: Ethnic Conflict and the ‘Ideal Polity’” in David Wippman (ed.), *International Law and Ethnic Conflict* (Cornell University Press 1998).

Moreover, the liberal international lawyer may be predisposed to reasserting the state as the only appropriate power-holder, whose monopoly on the use of force must be bolstered by requiring the punishment of non-state actors and installing a standard set of legal and political institutions—again with some evidence of the International Criminal Court in paying this “claw-back” role.

However, if the development of liberal peacemaking is viewed skeptically, these attempts may be resisted in favor of acknowledging and working with prevailing domestic power-structures—even when profoundly illiberal, while understanding the contingent nature of both state and non-state legitimacy. In fact, those who take this view argue that such a project will inevitably result in any case: case studies question whether what emerges from liberal peacemaking practices is in fact “liberal peace” or a hybrid variant where top-down imposition of liberal institutions competes with bottom-up resistance operating to preserve indigenous power structures, which often subvert the liberal peacemaking project.<sup>56</sup> As a result, scholars such as Mac Ginty suggest that international interveners should remain more open-minded as to the legitimacy of local forms of political organization, become more creative in responding to these forms of legitimacy, and less assured and ready to roll out liberal international blueprints.<sup>57</sup> The role of law, from this perspective, should be one of a limited ambition aimed at constructive engagement with the dynamic of imposition and resistance, rather than an attempt to require, ever more militarily forcibly, a move towards Western liberal values and institutions in situations where all the political pre-requisites are missing.

### C. International law as uni-polar hegemony

There are also those who may be skeptical of a *jus post bellum* on realist grounds, namely that its strong association with the justifications for international intervention means that it cannot be separated from uni-polar attempts to pursue the interests of the United States and its allies, and that its development and application cannot resist being subverted to those ends. From this perspective, the move from existing regimes of human rights and humanitarian law to some sort of merged regime may be viewed suspiciously as enabling their selective application in pursuit of the ambitions of the international hegemon as the example of retaining administrative detention while rejecting the wider constraints of the law of occupation, or resisting human rights standards with respect to international actors seeking to transform the domestic landscape. The case of Iraq illustrates the potential conflicts that can result from attempts to legislate new *jus post bellum* regimes by UNSC Resolution and the conflicts that can result between those resolutions, the UN Charter and human rights standards promulgated by the UN

<sup>56</sup> Roger Mac Ginty, “Hybrid Peace: The Interaction between Top Down and Bottom Up Peace” (2010) 41 *Security Dialogue* 391.

<sup>57</sup> Mac Ginty, “Hybrid Peace” (n. 56) 391. See also Roger Mac Ginty, *International Peacebuilding and Local Resistance* (Palgrave Macmillan 2011); Volker Boege, Anne Brown, Kevin Clements, and Anna Nolan, “On Hybrid Political Orders and Emerging States: What is Failing—States in the Global South or Research and Politics in the West?” in Martina Fisher and Beatrix Schmelzle (eds), *Building Peace in the Absence of States: Challenging the Discourse on State Failure*, Berghof Handbook Dialogue Series, no. 8 (Berghof Research Centre 2009) and responses to it <[http://www.berghof-handbook.net/documents/publications/dialogue8\\_boegeetal\\_lead.pdf](http://www.berghof-handbook.net/documents/publications/dialogue8_boegeetal_lead.pdf)> (accessed 7 May 2013).

or other regional organizations. These are conflicts for which there is no clear body capable of providing authoritative resolution in a way that is persuasive across all the competing potential sites of authoritative interpretation.

#### D. Developing international law as project

A final approach to the relationship of *ius post bellum* with international law might involve reconceiving the *jus post bellum* as a discursive legal project, rather than an attempt to fashion a new regime. *Jus post bellum* might be a way of understanding how legal principles inform situations or come to assert themselves. An analogy can be made to the “Global Administrative Law” project, which considers whether and how free floating principles of administrative law might operate to govern “global administrative spaces” that exist beyond the reach of domestic law and yet are largely unregulated by international law as traditionally conceived.<sup>58</sup> The global administrative law project stands as project of exploration rather than concrete legal proposal—in some articulations at least. However, it also stands as a caution and alternative to larger “C” projects of trying to fashion a more holistic form of international constitutional law as a new international legal order. In contrast to international constitutional law proponents, the global administrative law project attempts to remain relatively open as to whether the developments it charts are capable of delivering the kind of legitimacy that international law looks for as it cuts free from its Westphalian sources of legitimacy rooted in the consent of states.<sup>59</sup> The global administrative law project can remain neutral as to whether it is possible to develop global administrative law, or whether it must remain a ‘project’ where instances of global administrative law can merely be observed and embraced as part of a dynamic of international legal pluralism. As a project of legal pluralism, global administrative law does not need to solve all problems of authority because it assumes that a new hierarchical ordering of international law that would replace the Westphalian model is just not possible, and that authority will always have to be negotiated between different sites of authority.<sup>60</sup>

It would be possible to similarly reconceive of the *jus post bellum* concept as a heuristic device for understanding the dilemmas of how law applies to transitions. This incarnation would bring it closer to the concept of *lex pacificatoria*. This approach opens up the possibility of saving *jus post bellum* from the impossibility of its regulatory ambition by re-inventing it as discussion of the possibility of regulation. To some extent, the philosophical exploration of *jus post bellum* in attempting abstract articulations of what should be already admits its own aspirational quality.

### V. Conclusion

The idea that *jus post bellum* might best be understood as a way of talking about the competing moral, legal, and political imperatives of peacebuilding brings the concept close to that of *lex pacificatoria*, which I return to defend. The term *lex pacificatoria*

<sup>58</sup> See e.g. Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, “The Emergence of Global Administrative Law” (2005) 68 *Law and Contemporary Problems* 15.

<sup>59</sup> See Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2012).

<sup>60</sup> Krisch, *Beyond Constitutionalism* (n. 59).



acknowledges that international law may usefully be shaped by conflict resolution innovations, even as it attempts to shape settlement terms, and that it is important to understand the two-way nature of the interface. In remaining open to viewing both those parties to the conflict and international actors as peace-makers capable of the generation of pluralist and competing legal standards, the term *lex pacificatoria* also points to the contingent nature of new ad hoc legal developments and the possibility both for them to be further developed into new normative understandings, but also the real possibility of retreat. In contrast to the more robust notion of *jus post bellum*, the conceptualization of the *lex pacificatoria* does not signal a fully-fledged regime as a possible, or desirable, end point of current developments but views the law as part of a broader domestic and international negotiation over the end point of transition and the democratic legitimacy of the polity that results. The term, in remaining open as to the future, rather than automatically equating resolution of the indeterminacy of current regulation of post-conflict dilemmas by international law with being “a good thing,” views the ambiguities of the law as deriving from agonistic processes of challenge and counter-challenge between different domestic actors, and between domestic actors and international actors. However, the term also is more than discursive as the emergent legal re-articulations of international law attempt to sketch out some broad parameters within which negotiated settlements should fall.

The term *lex pacificatoria*, in contrast to *jus post bellum* as a new legal regime, signals openness to the possibility that the useful purpose of international legal regulation of peace settlements is not to regulate negotiation outcomes, but rather to set out such broad normative parameters that support the idea that negotiated outcomes should be both capable of implementation and accord with some sense of justice, while leaving room for the contestation over what concepts such as “accountability,” “justice,” and even “peace” require.

It would be possible to use the term *jus post bellum* in this same way and this, in my view, would be its most useful invocation. The discussion of the possibility of *jus post bellum* is useful to better understanding the relationship of international law and international organizations who claim to uphold it to the resolution of intra-state conflict. However, in my view the term *lex pacificatoria* provides a better descriptive starting point because it better captures the dynamic relationship of international law to peace settlements and their implementation. Ultimately, however, it is not important to have a battle over Latin terms if we can recognize and counteract the ways in which the names we choose start to tell stories about the current state of play and the law’s future directions and ambitions.

In my view, what is important to recognize in our discussion of international law’s possibilities is that its most important role may be to hold open the middle space of political compromise and contestation over concepts such as legitimacy, democratic participation, and effective accountability rather than trying to proscribe transition in a new legal regime. This space, paradoxically, might best be held open by resisting projects of legal clarification and development, in favor of living with law’s partial application because we view uncertain legal formulations as able to articulate the importance of normative concepts such as accountability or even democratic participation, while also recognizing that in practice such concepts can only come into being by agreement

between people and groups of people who hold widely differing views as to what they entail. This vision of law's role requires letting go of the concept of legal regulation of peace agreement practice within binary categories of lawful and unlawful and embracing a more messy, uneasy, and uncertain world of negotiated justice that must harmonize a seemingly impossible dual commitment to a normative understanding of what justice requires and a commitment to on-going negotiation over what justice means.

# The Gentle Modernizer of the Law of Armed Conflict?

Inger Österdahl\*

## I. Introduction

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

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

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

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

<sup>2</sup> For a similar, humanitarian, perspective, see Daniel Thürer and Malcolm MacLaren, “‘Jus Post Bellum’ in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law” in Klaus Dicie

of *jus post bellum* is to achieve a just and stable peace based on democracy, human rights, and the rule of law.<sup>3</sup>

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

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

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

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

et al. (eds), *Weltinnenrecht—Liber amicorum Jost Delbrück* (Duncker & Humblot 2005); see also Theodor Meron, "The Humanization of Humanitarian Law" (2000) 94 *American Journal of International Law* 239; Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper, and Gro Nystuen (eds), *Searching for a "Principle of Humanity" in International Humanitarian Law* (Cambridge University Press 2013).

<sup>3</sup> For closely related thinking in the context of sovereignty as responsibility, and empirical support in the form of international practice in post-conflict statebuilding, see Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford University Press 2007). For similar presumptions, see also Ray Murphy (ed.), *Post-Conflict Rebuilding and International Law* (Ashgate 2012); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, Basic Books 2006) 121–2; Michael Walzer, *Arguing about War* (Yale Nota Bene 2005) 161, 164; and, more explicitly, Brian Orend, "Jus Post Bellum: A Just War Theory Perspective" in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 42–4; and, except for democracy (at least explicitly), Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) 17–19.

<sup>4</sup> But see Roxana Vatanparast, this volume, who argues that embedding these values into *jus post bellum* is problematic.

other ideology can compete with liberal democracy and that willfully organizing societies after war along other ideological lines would be wrong.

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

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

Subsequent to the introduction, the remainder of this chapter will be organized in the following way. First, the interaction between *jus post bellum* and *jus ad bellum* will be discussed with an emphasis on the effects that *jus post bellum* will have on *jus ad bellum*. The effects might work in different ways, but a common denominator is that eventually *jus post bellum* will contribute to diminishing the significance of *jus ad bellum* altogether. Secondly, the interaction between *jus post bellum* and *jus in bello* will be addressed, including the ensuing influence of *jus post bellum* on *jus in bello*. The two areas are closely related as concerns content—especially regarding the humanitarianism of *in bello* law—but the *post bellum* law will imply great conceptual and structural challenges to the *in bello* law too. Thirdly, the potentially emerging new organizing principles of the law of armed conflict will be addressed. *Jus post bellum* has the potential to transform the organizing principles considerably, as has been hinted above, and since we are in the beginning of a development, perhaps we should take advantage of the opportunity to form the principles in a way which furthers good values before the transforming principles possibly petrify for the benefit of the bad. Fourthly and finally,

the significance of *jus post bellum* for the notion of just war will be taken up; here also it will be asserted that the significance will be considerable. In fact, it is discussed whether the end is not more significant than the beginning for the notion of just war today and whether the means are not more significant than the end sought, or the cause; in the latter sense, the means might come to justify the end. Be that as it may, whether or not the end or the beginning is most important from the point of view of the eventual assessment of the lawfulness of the war, *jus in bello* in the middle governing the actual conduct of the war will stay equally and arguably gradually more important. In the discussion of just war, the way in which *jus post bellum* indirectly introduces this notion into the non-international war setting will be included.

## II. More or Less Difficult to Intervene?

The introduction of *jus post bellum* regulating the situation of relative peace reigning after the war might place additional burdens on a potential intervener or user of armed force. The obligation to implement *jus post bellum* after the military intervention or war is over means imposing new demanding tasks on the intervener. If it is demanded from the intervener to manage the post-conflict phase until a just and stable peace has been achieved respecting human rights, democracy, and the rule of law in the country where the hostilities took place, then this would imply a much greater burden on the war-maker than merely deciding whether there is reason to intervene in the first place and then having to respect *jus in bello* while conducting the armed struggle. The obligations of the initiator of the armed conflict are closely related to the notion of a just war and its possible expansion by the introduction of *jus post bellum*.<sup>5</sup> At this stage we can observe that the prospect of taking on the post-conflict rebuilding of the society intervened in the name of lasting human rights, democracy, and rule of law probably would have a discouraging effect on the party considering intervention.

Apart from pledging that it will fulfill its duties of post-conflict reconstruction, there is little a state could do at the very beginning to show whether it will fulfill its duties under *jus post bellum* or not. *Jus ad bellum* proper can be relatively easily separated from *jus post bellum* at this early stage of the conflict. The criteria listed by the International Commission on Intervention and State Sovereignty (ICISS), for instance, do work as independent criteria for military intervention irrespective of the later course of events in the *post bellum* phase.<sup>6</sup> These are meant as criteria for the authorization of intervention for humanitarian reasons by the UN Security Council under the “responsibility to protect,” but the criteria could also work as criteria for international intervention in general, i.e. for just war, provided that the *jus ad bellum* would allow international intervention, which it does not currently. Of course, self-defense constitutes an independent ground for the international use of force, which is recognized under the current *jus ad bellum*. The criteria for lawful self-defense do not include aspects relating to the period *post bellum*.<sup>7</sup>

<sup>5</sup> This is discussed in more detail below, see Part III.

<sup>6</sup> International Development Research Centre (IDRC), *The Responsibility to Protect—Report of the International Commission on Intervention and State Sovereignty* (Report, IDRC 2001) 32.

<sup>7</sup> In the future, however, it is possible that *jus post bellum* will affect even the exercise of the right to self-defense.

The last criterion on the ICISS list that spells out a reasonable prospect of success in order for an intervention to be legal or legitimate,<sup>8</sup> could lead to thoughts of the *post-bellum* phase where “success” would then mean the successful attainment of a just and durable peace based on human rights, democracy, and the rule of law. “Success” in the ICISS report, however, means the success of the military intervention as such, which must be taken to imply the removal of the most immediate threat to the civilian population or the termination of ongoing serious crimes and not the wider aspect of succeeding in the subsequent building of a good society for the hitherto persecuted people.<sup>9</sup>

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

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

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

<sup>8</sup> In the case of the UN Security Council.

<sup>9</sup> Note, however, the slightly different interpretation made by Carsten Stahn, “‘*Jus Ad Bellum*,’ ‘*Jus In Bello*’ ... ‘*Jus Post Bellum*’?—Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 921, 932 fn. 63.

<sup>10</sup> Depending on who is responsible for the implementation of *jus post bellum*. Intuitively, the winning side would seem the natural place to locate the responsibility to implement *jus post bellum*. The issue, however, is much more complex than that and *post bellum* obligations potentially apply to all parties to a conflict. The implementation of *jus post bellum* regrettably only receives cursory treatment in this chapter.

*ad bellum*.<sup>11</sup> However, except in a superficial sense, the claim that *jus post bellum* has made up part of *jus ad bellum* does not seem convincing, at least not if *jus post bellum* is regarded through today's lens with its rather broad aspirations to create a genuinely better society for the people effected by the armed conflict. If the aspiration is merely to impose the norms and values that the intervener considers are the better ones—without any reference to human rights, democracy, and the rule of law for instance—then the claim that *jus post bellum*, i.e. rules governing the aftermath of armed conflict, have always been present in *jus ad bellum* is more credible. In the very superficial sense of eventually attaining peace, *jus post bellum* also might have always been an element of *jus ad bellum*; it must be presumed that all interveners, conquerors etc. over the years have had as their ultimate goal to reach a state of peace.<sup>12</sup> The question is, however, what kind of peace and on what terms. *Jus post bellum* of today is not only about order, but also about justice or the content of the order.

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

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

It could be argued that instead of making the use of military force more difficult and therefore less attractive, the introduction of *jus post bellum* facilitates the initiation of the use of armed force. If the intention to create a just and stable peace after the war is counted as a valid reason for going to war, then the number of just causes for war have been expanded and it will consequently be easier to go to war.<sup>13</sup>

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

<sup>11</sup> See Walzer, *Just and Unjust Wars* (n. 3) 117, 121, 123.

<sup>12</sup> See Walzer, *Just and Unjust Wars* (n. 3) 117; Walzer, *Arguing about War* (n. 3) 92; Paul Ramsey, *The Just War: Force and Political Responsibility* (Rowman & Littlefield 2002) 152.

<sup>13</sup> Annalisa Koeman (discussing the work of Brian Orend), however, hopes that a pre-commitment to *jus post bellum* and *jus post bellum* will serve to constrain the use of force: see "A Realistic and Effective Constraint on the Resort to Force? Pre-commitment to *Jus in Bello* and *Jus Post Bellum* as Part of the Criterion of Right Intention" (2007) 6 *Journal of Military Ethics* 198, 213; Larry May finds support for his "contingent pacifism" in *jus post bellum*, May, *After War Ends* (n. 3) 232–4.



One way could be to demand from the intervening state that it places enough funds in a bank account to cover the costs involved in five to ten years of post-conflict peacebuilding in the country intervened in. The sum could be bigger or smaller depending on the military operation; a comprehensive military intervention will probably need comprehensive post-conflict peacebuilding whereas a more limited intervention for a more limited purpose will need a smaller post-conflict peacebuilding undertaking. If the real costs of fulfilling the demands of *jus post bellum* are taken into account, the facilitating aspect of the introduction of *jus post bellum* into the overall calculus of whether to go to war or not will probably diminish. Facing the real costs and taking seriously the tasks involved in following *jus post bellum* will probably discourage rather than encourage the potential intervener.

If it would be enough to claim to have just peace under *jus post bellum* in view as the goal of the initiation of the armed conflict, then *jus post bellum* could work as a facilitator of the use of armed force. Then *jus post bellum* would affect *jus ad bellum* in an expansive direction—*jus contra bellum* would again become a *jus ad bellum*—and the argument based on *jus post bellum* would fit in well with other arguments favoring humanitarian intervention. There has been a strong tendency in the post-Cold War debate on the use of force in favor of humanitarian intervention even lacking a UN Security Council authorization.<sup>14</sup> The responsibility to protect can also be invoked as an argument in favor of humanitarian intervention, although there is no support in the official UN documentation to use the responsibility to protect as a justification for military intervention without a Security Council authorization.<sup>15</sup>

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

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

<sup>14</sup> See e.g. Allen E. Buchanan, *Human Rights, Legitimacy & The Use of Force* (Oxford University Press 2010).

<sup>15</sup> See e.g. Aidan Hehir, *The Responsibility to Protect: Rhetoric, Reality, and the Future of Humanitarian Intervention* (Palgrave Macmillan 2012); James Pattison, *Humanitarian Intervention & The Responsibility to Protect—Who Should Intervene?* (Oxford University Press 2010); Liliana L. Jubilit, “Has the ‘Responsibility to Protect’ Been a Real Change in Humanitarian Intervention? An Analysis from the Crisis in Libya” (2012) 14 *International Community Law Review* 309; UN General Assembly (UNGA) Res. 60/1 (24 October 2005) UN Doc. A/RES/60/1 paras 138–9.

*jus post bellum* would have a greater potential to facilitate than to render more difficult the initiation of an armed intervention.

### III. Is *Jus Ad Bellum* Increasingly Obsolete?

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

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

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

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

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

<sup>16</sup> However, possibly with varying content depending on whether armed force was used in line with international law or not (see Carsten Stahn, "*Jus post bellum*: Mapping the Discipline(s)" in Stahn and Kleffner (n. 3) 111).

having been devastated by war. People will be better off and even the opposite party or parties in the war will be better off with a state (re)built under the aegis of *jus post bellum*.

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

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

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

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

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

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

<sup>17</sup> The latter subject has generated a lively debate in recent years: see, among others, Keiichiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart Publishing 2011); Jeff McMahan, *Killing in War* (Oxford University Press 2009); David Rodin and Henry Shue (eds), *Just and Unjust Warriors—The Moral and Legal Status of Soldiers* (Oxford University Press 2008); Adam Roberts, “The Equal Application of the Laws of War: A Principle Under Pressure” (2008) 90 *International Review of the Red Cross* 931; Serena Sharma, “Reconsidering the *Jus Ad Bellum/Jus In Bello* Distinction” in Stahn and Kleffner (eds), *Jus Post Bellum* (n. 3); Marco Sassòli, “*Jus ad Bellum* and *Ius in Bello*—The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?” in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff Publishers 2007).

the last set of obligations of the parties to the armed conflict, namely *jus post bellum*, the obligations pertaining to the middle, namely *jus in bello*, should be fulfilled.<sup>18</sup> The more *jus in bello* has been breached, the more demanding it will be on the parties to the conflict *post bellum* to (re)establish a just and lasting peace based on human rights, democracy, and the rule of law. From the point of view of content, the main focus of *in bello* law is the protection of the civilian population, just as with *jus post bellum*.

Arguably, even before the recent discussion began on an emerging *jus post bellum*, *jus in bello* has been increasingly emphasized more than *jus ad bellum* in the overall evaluation of a war effort.<sup>19</sup> At least states parties to armed conflict are increasingly anxious to show that *jus in bello* is respected—beginning with the precision strikes in the UN authorized war against Iraq in 1991—in order to gain legitimacy for the war effort. This legitimacy is important both with regards to the surrounding international community and with regards to both the people struck by the war as well as at home supporting and ultimately financing the military effort. The actual legitimacy as well as the perception of the legitimacy of the use of force primarily among the people struck by the armed conflict are important, presumably, to the (successful) implementation of *jus post bellum*. If people are sufficiently antagonized by the way the war is fought it may be impossible to realize a just and durable peace, and conversely, as has been argued above, if people perceive the fighting as legitimate it may be relatively easier to implement *jus post bellum*.<sup>20</sup> The legitimacy in its turn, it is argued here, hinges increasingly on whether *jus in bello* is respected (and decreasingly on the corresponding assessments under the *jus ad bellum*).

In Libya in 2011 it was important for the UN sanctioned coalition to follow and be seen to follow *jus in bello* carefully, even though the troops might not always have succeeded in doing this.<sup>21</sup> In this case as in the case of Iraq in 1991, *jus ad bellum* was likewise respected: in the case of Libya in the form of the existence of a preceding decision in the UN Security Council and in Iraq also in the form of a situation of (collective) self-defense. Thus, the respect for *jus ad bellum* was not an issue.<sup>22</sup> Still, showing respect for *jus in bello* was considered important both in the case of Iraq in 1991 and in the case of Libya in 2011 in order to gain additional legitimacy for the respective armed interventions.

It is in internal conflicts that the violations of the humanitarian law will leave the deepest scars, which will be most difficult to heal. This means that it is in internal conflicts that the scrupulous implementation of the *in bello* law would be most important from the point of view of the subsequent working of *jus post bellum*. Paradoxically, it

<sup>18</sup> See May, *After War Ends* (n. 3) 21.

<sup>19</sup> For historical precedent, see Jonathan A. Bush, “‘The Supreme Crime’ and Its Origins: The Lost Legislative History of the Crime of Aggressive War” (2002) 102 *Columbia Law Review* 2324, 2330–1; Paul Ramsey, *The Just War: Force and Political Responsibility* (Rowman & Littlefield 2002) 152.

<sup>20</sup> See May, *After War Ends* (n. 3) 21.

<sup>21</sup> See Human Rights Watch (HRW), *Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya* (HRW 2012) <<http://www.hrw.org/reports/2012/05/13/unacknowledged-deaths>> (accessed 1 July 2013).

<sup>22</sup> See, however, the critical Julian M. Lehmann, “All Necessary Means to Protect Civilians: What the Intervention in Libya Says about the Relationship Between the *Jus in Bello* and the *Jus ad Bellum*” (2012) 17 *Journal of Conflict & Security Law* 117.

is with respect to internal conflict that *jus in bello* is least developed, although through practice developing into customary law the body of *jus in bello* applicable in internal armed conflict is growing considerably.<sup>23</sup>

It is presumed in this chapter that for its application, *jus post bellum* is not dependent on the legality, or on the character of the preceding conflict. The people for whose benefit *jus post bellum* exists are equally struck by an international as well as internal armed conflict. *Jus post bellum* would thus apply after an internal conflict as well as after an international conflict.<sup>24</sup> If anything, the need to build a peace based on human rights, democracy, and the rule of law may be even greater in a country having gone through an internal conflict in comparison with a country having gone through an international conflict. The issue of whose responsibility it would be to implement *jus post bellum* is not addressed in this contribution, but a measure of international third party involvement in the effective implementation of *jus post bellum* would seem inevitable. This would apply in particular after an internal armed conflict.

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

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

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

<sup>23</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005); an updated version is available at <<http://www.icrc.org/customary-ihl/eng/docs/home>> (accessed 1 July 2013).

<sup>24</sup> This view is shared by Brian Orend, "Jus Post Bellum: A Just War Theory Perspective" (n. 3) 38.

adapted to the circumstances of each particular case. The contents and actual practice of *jus post bellum*, however, are left aside in this chapter.

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

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

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

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

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

In practice, *jus post bellum* would also seem likely to have to include an element of post-conflict (re)building of the institutions in society necessary to lay the foundation of a just and stable peace. Such institutional (re)building in its turn is likely in most instances to

require outside assistance in terms of expertise and economic resources. Even if understood in merely normative terms, the equal applicability of *jus post bellum* after internal and international conflict would contribute to reducing the importance of the distinctions between different kinds of conflict in *in bello* law.

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

## V. What is the Modernization so Far?

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

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

Moreover, from a temporal perspective, at the time *jus post bellum* is going to be applied, the legality of the conflict is irrelevant—not from a normative point of view but from a practical point of view. *Jus post bellum* must be applied whether the conflict was launched lawfully or unlawfully. Rather than pondering the issue of who might have been right at the beginning of the armed conflict, the core of *jus post bellum* is looking towards the future. From the normative point of view, the circumstances reigning at the time of the initiation of the use of armed force may play a role in the implementation of certain parts of *jus post bellum*, most evidently responsibility for the crime of aggression, but from the practical but also normative point of view of building a viable peace the exact interpretation of the legal situation when the war begun is of lesser relevance.<sup>25</sup> This reinforces the focus on the needs of the population who are the ultimate subjects of *jus post bellum*; it is their society that is going to be reconstructed in the name of a just and stable peace after the war.

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

<sup>25</sup> “[A]bstuse points of international law and treaty interpretation and the seeming ‘he said, she said’ of which side started the fight,” as Bush puts it; Bush, “‘The Supreme Crime’ and Its Origins” (n. 19) 2331; May argues more moderately that due to the “fog of war” the legality of the cause for war may be difficult to actually assess. May, *After War Ends* (n. 3) 231.

purpose are legitimate at all. It also concerns the *in bello* phase, where an emphasis on military necessity may cause so much material and immaterial damage that this may render the reconstruction under *jus post bellum* more difficult than it would otherwise be. Then there is the possible additional difficulty caused by violations of the *in bello* law during the armed conflict. Such violations would also increase the difficulties in the *jus post bellum* phase, it is presumed. Even without widespread and serious violations of international humanitarian law, however, a promotion of the military necessity at the expense of the interests of the civilian population, even though not illegal, would contribute to making the post-conflict peacebuilding phase more difficult.

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

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

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

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

If *jus post bellum* would not be premised on those values, the result might be different. It is difficult, however, to imagine a *jus post bellum* in today’s world not premised on democracy, human rights, and the rule of law as the values underpinning the post-conflict



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

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

The focus on the needs of the civilian population (a "civilianization" or a "humanization" of the law of armed conflict) in combination with a focus on the internal armed conflict (an "internalization") are the indirect modernizing effects of the introduction of *jus post bellum* on *jus ad bellum* and *jus in bello* foreseen in this contribution.<sup>26</sup> This constitutes an adaptation of the law even if indirect to the current realities; the modernization is also "gentle" in the sense of placing the emphasis on human needs and values rather than on military or state interests and values.

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

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

<sup>26</sup> "Civilianization" has also been used to denote an eroding distinction between the status of civilian and combatant in modern war for different reasons. This is not what civilianization is intended to mean here; see, e.g., Andreas Wenger and Simon J. A. Mason, "The Civilianization of Armed Conflict: Trends and Implications" (2008) 90 *International Review of the Red Cross* 835.

rather than on the rights of the state as such in relation to and in contradistinction to its population. With this end in view—and considering further that the implementation or not of *jus post bellum* might be decisive of whether the war or intervention will be considered just or not—it is likely that the prospect of the obligations contained in *jus post bellum* and the coming post-war effort will affect the way in which the armed conflict is carried out.

As pointed out, measures taken during the actual conflict might make the realization of *jus post bellum* more difficult. In particular, if the realization of a society based on *jus post bellum* with the kind of content presumed in this contribution makes up part of the very justification itself of the war effort or armed intervention, it is even more likely that the prospect of *jus post bellum* will affect the war effort in order for the latter not to be counter-productive with respect to the coming implementation of *jus post bellum*.<sup>27</sup>

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

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

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

<sup>27</sup> A similar thought is expressed in Robert B. Talisse, “Democratization and Just Cause” in Larry May and Andrew T. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 202.

<sup>28</sup> See also Ruti Teitel, *Humanity’s Law* (Oxford University Press 2011); Anne Peters, “Humanity as the A and Ω of Sovereignty” (2009) 20 *European Journal of International Law* 513; Kate Parlett, *The Individual in the International Legal System* (Cambridge University Press 2011); Barbara von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Hart 2007).

<sup>29</sup> There have been suggestions even for a fourth part of the law of war between *in bello* and *post bellum*: the law of war termination. See David Rodin, “Two Emerging Issues of *Jus post bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression” in Stahn and Kleffner (eds), *Jus Post Bellum* (n. 3).

humanitarian law” is already established as a legal term and has a distinct significance, the use of “international humanitarian law” to denote the entire spectrum of *jus ad bellum*, *jus in bello*, and *jus post bellum* could be confusing. Irrespective of labels, the view of armed conflict as a continuum probably corresponds better to the reality of armed conflict than the view of armed conflict as evidenced in the current law having a distinct beginning, middle, and end. In terms of chronology, furthermore, it is probably closer with reality to conceive of armed conflict as a continuum rather than conceiving of the different phases of armed conflict as coming in a distinct chronological order; the beginning, middle, and end of the conflict can at times exist simultaneously.<sup>30</sup>

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

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

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

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

<sup>31</sup> In reality, the difference between a state of peace and a state of war might not be evident. For reasons of workability as well as humanitarianism, the idea of having one set of laws governing armed conflict and another set of laws governing peace should perhaps be abandoned (for a similar but further-reaching thought, see Teitel, *Humanity’s Law* (n. 28) 40–2, 224). Then we would no longer discuss the “jus of force” with its reference to war-time law, but rather the “jus of conflict management” applicable as soon as conflict arises on a larger or lesser scale, within or between societies, irrespective of considerations of state of peace or state of war (see a similar thought expressed in the “unified use of force rule” conceived by Francisco Forrest Martin, “Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict” (2001) 64 *Saskatchewan Law Review* 347, 372–81). Under the “jus of conflict

If *jus post bellum* is implemented in line with the ambitious goals of creating human rights, democracy, and the rule of law, and in line with the responsibility to rebuild under the responsibility to protect, supported in addition by the UN peacebuilding commission, *jus post bellum* will also presumably prevent the occurrence of new armed conflicts, both international and internal, since democracies are presumed not to militarily attack other democracies and democracy generally is presumed to be a more stable form for organizing society than dictatorship.

## VII. Conclusion: New Just War?

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

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

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

<sup>32</sup> See also Stahn, “Rethinking the Conception of the Law of Armed Force” (n. 10) 931–3.

<sup>33</sup> For a discussion of this from a moral philosophical perspective, see Walzer, *Arguing about War* (n. 3) 162–8.

<sup>34</sup> Frédéric Mégret questions the “once and for all” evaluation of the legality of a state’s participation to a war and launches the thought that behavior in war could shed light retroactively on the cause, i.e. that crimes

The exclusion of *jus post bellum* from the just war equation would weaken the position of *jus post bellum*. It will be more difficult to press for *jus post bellum* to be implemented if its implementation is independent of the assessment of whether the war was just.

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

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

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

A strong *jus in bello* has the added benefit of potentially strengthening *jus ad bellum* in its current *contra bellum* form as well. The prospect of the scrupulous implementation of the international humanitarian law would arguably serve to discourage the resort to war in the first place.<sup>37</sup>

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

against *jus post bellum* could invalidate an otherwise good cause including but not limited to humanitarian intervention. Frédéric Mégret, "Jus In Bello and Jus Ad Bellum" (2006) 100 *American Society of International Law Proceedings* 109, 121–3. Even the right to defend oneself could be forfeited retroactively under serious enough circumstances, Mégret thinks, at 123.

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

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

<sup>37</sup> See mutatis mutandis *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226.

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

So far, in internal war situations there is no just war calculus since *jus ad bellum* is not applicable to internal war. *Jus post bellum* as part of the just war assessment would potentially introduce the perspective of just war into internal conflict and this would be of enormous importance of principle. In order for a war to be just, the war-maker would have to fulfill a number of requirements and suddenly the war effort of the state in internal war is no longer just by definition, whereas the efforts of others may indeed be justified, and other actors than the state might justly make war.<sup>38</sup> Irrespective of *jus post bellum* discussion, there are hints of such considerations in the Friendly Relations Declaration on wars of self-determination as well as in Additional Protocol I to the Geneva Conventions with respect to wars of self-determination.<sup>39</sup> It is hinted in these important legal instruments that wars of self-determination are actually just wars, although the context is internal armed conflict and not international armed conflict.<sup>40</sup>

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

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

<sup>38</sup> One of the few authors who have addressed the issue of the possible emergence of a *jus ad bellum* for civil war is Kirsti Samuels, “*Jus ad Bellum* and Civil Conflicts: A Case Study of the International Community’s Approach to Violence in the Conflict in Sierra Leone” (2003) 8 *Journal of Conflict & Security Law* 315. As Frédéric Mégret writes, the *jus ad bellum* as well as *jus post bellum* tells us that war is essentially the preserve of sovereigns, Mégret, “*Jus In Bello* and *Jus Ad Bellum*” (n. 34) 121–2. In the words of Mégret, the *jus ad bellum* and *jus post bellum* are speaking a common grammar of statehood and the primacy of the state in international relations, at 123. Significantly, Torkel Brekke argues that the lack of interest in *jus ad bellum* in the Hindu tradition—as well as all other non-European traditions—depends on the lack of two distinctions crucial to the European concept of war, namely the distinction between external and internal enemies (international v. non-international use of force) and the distinction precisely between public and private violence (sovereigns v. criminals). Torkel Brekke, “The Ethics of War and the Concept of War in India and Europe” (2005) 52 *Numen* 59.

<sup>39</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res. 25/2625 (24 October 1970) UN Doc. A/RES/25/2625; Definition of Aggression, UNGA Res. 29/3324 (14 December 1974) UN Doc. A/RES/29/3314 (Definition of Aggression) annex Art. 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (Additional Protocol I) Art. 1(4).

<sup>40</sup> In Additional Protocol I, the necessary context of “fighting against colonial domination and alien occupation and against racist regimes” is explicitly pointed out somewhat limiting the reach of self-determination as a justification for internal armed struggle. Additional Protocol I (n. 39). The Definition of Aggression states that “‘particularly’ [but apparently not exclusively] peoples under colonial and racist regimes or other forms of alien domination” have the right to struggle for self-determination. Definition of Aggression (n. 39).

short run, since *jus ad bellum* strictly speaking is not applicable to internal war and its potential applicability furthermore would be highly controversial. Under *jus ad bellum* and just war considerations generally, the internal conflict is a blank spot. The just war discussion relating to internal war is more likely to be carried out in terms of *jus in bello* and *jus post bellum*, i.e. an internal armed conflict must fulfill the requirements of *jus in bello* and *jus post bellum* in order to be considered a just war on condition that *jus post bellum* like *jus in bello* is considered applicable in the context of internal armed conflict. Also, the body of human rights indubitably applicable both during, after, and before the war and closely related in terms of substance both to *jus in bello* and *jus post bellum*, will become increasingly important for the evaluation of the justice of war.<sup>41</sup>

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

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

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

<sup>41</sup> On the potential of human rights in armed conflict, see the thought-provoking argument developed by Forrest Martin (n. 31); see also William Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" (2005) 16 *European Journal of International Law* 741; David. S. Koller, "The Moral Imperative: Toward a Human Rights-Based Law of War" (2005) 46 *Harvard International Law Journal* 231; Kjetil Mujezinovic Larsen, "A 'Principle of Humanity' or A 'Principle of Human-Rightism'?" in Kjetil Mujezinovic Larsen et al. (eds), *Searching for a "Principle of Humanity" in International Humanitarian Law* (n. 2).

<sup>42</sup> See Nick Fotion, who tries to formulate a theory of just war for non-international conflict. Nick Fotion, "Two Theories of Just War" (2006) 34 *Philosophia* 53. See also Ryoa Chung, "Limites et Pertinence de la Guerre Juste Face au Terrorisme et aux Nouvelles Guerres" (2009) 19 *International Review of Sociology—Revue Internationale de Sociologie* 489, who applies traditional just war theory to non-international wars.

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

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

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



# Navigating the Unilateral/Multilateral Divide

Gregory H. Fox\*

## I. Introduction

The idea of a *jus post bellum* is fraught with conceptual difficulties. The first is a problem of categories. *Jus post bellum* began its intellectual life as an aspect of just war theory, and Michael Walzer and others continue to employ the concept in discussions of political ethics.<sup>1</sup> Others suggest *jus post bellum* functions as an analytical category for policy-makers focused on the reconstruction of post-conflict states.<sup>2</sup> Still others view *jus post bellum* as interpretive tool that measures the reconstruction of state institutions against fundamental principles of justice and popular sovereignty.<sup>3</sup> Of course the very term *jus post bellum* suggests a species of law that imposes binding obligations on actors in post-conflict states. That international lawyers dominate the list of contributors to this volume suggest the legal perspective has gained a certain ascendance.

Yet viewing *jus post bellum* as law brings additional questions. How should the idea be integrated into the existing corpus of international law? Does it cover all post-conflict issues now regulated by international norms? If so, would it displace or subsume existing legal regimes? Or would it leave those regimes unaltered and function only interstitially? Further, should a *jus post bellum* regulate all actors working in post-conflict states, including international organizations and non-governmental organizations, or would it retain the existing regimes' state-centric focus? Finally, would recognition of a legally distinct *post bellum* period resolve or at least clarify the long-standing uncertainty about when armed conflict actually ends?<sup>4</sup>

However one answers these difficult questions, they illustrate the need to clarify the relationship between a new *jus post bellum* and the wide range of existing legal doctrines it would presumably supplement, enhance or even replace. These include the law of armed conflict, the rights of individuals against assertions of state power, state control over foreign territory, and the limits, if any, on the coercive authority of the United

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<sup>1</sup> Michael Walzer, *Just and Unjust Wars* (4th edn, Basic Books 2006) 109–26; see generally, Alex J. Bellamy, “The Responsibilities of Victory: *Jus Post Bellum* and the Just War” (2008) 34 *Review of International Studies* 601.

<sup>2</sup> Liliana Lyra Jubilit, “Towards a New *Jus Post Bellum*: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability” (2011) 20 *Minnesota Journal of International Law* 26, 30.

<sup>3</sup> See Carsten Stahn, “*Jus Post Bellum*: Mapping the Discipline(s)” (2007) 23 *American University International Law Review* 311, 345.

<sup>4</sup> See Derek Jinks, “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts” (Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 27–29 January 2003) <<http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>> (accessed 4 July 2013).

Nations Security Council. If a *jus post bellum* is essentially normative it must come to terms with certain essential attributes of the international legal system it seeks to join. This does not mean it must accept existing doctrine. Rather, to be taken seriously—i.e. viewed as essentially legitimate—the new normative proposals must demonstrate a connection to secondary norms in international law, a quality Thomas Franck usefully described as “adherence.”<sup>5</sup> Secondary rules—those “for determining what counts as a rule of the system”<sup>6</sup>—are the gatekeepers both of the process by which law is made in a decentralized system and of new norms’ legitimate claim on state compliance. These are eminently practical requirements. “A rule is more likely to obligate,” Franck observed, “if it is made within the framework of an organized normative hierarchy.”<sup>7</sup> Otherwise a new proposed primary rule will be viewed as a mere ad hoc arrangement between a limited number of willing parties, rather than the result of accepted rule-making.<sup>8</sup> It will not benefit from the deep historical pedigree and assumption of “right process” that accompany rules promulgated in harmony with prevailing secondary rules.

This chapter will focus on one particular secondary rule, or fundamental assumption, that will confront a *jus post bellum* understood as a legal concept. In summary it is the following. One central precept of the post-Second World War international legal order is the distinction between unilateral and multilateral actions. The former are increasingly disfavored as both unnecessary and undesirable. Multilateral alternatives have proliferated while unregulated resorts to self-help are seen as illegitimate efforts to circumvent norms and institutions. The unilateral/multilateral distinction reaches across a wide range of legal regimes, from peace and security, to state responsibility, to international trade, to the immunity of state officials in national courts. Contemporary international law makes sharp distinctions between the creation and implementation of norms depending on whether the relevant actors are states or international organizations. The United Nations Security Council arguably occupies the highest rung on this ladder of by virtue of its unique powers under Chapter VII of the Charter, as well as the trumping authority of Article 103. This elaborate set of secondary rules favoring multilateralism permeates assumptions about virtually every body of primary rules.

A *jus post bellum* must confront the unilateral/multilateral distinction, which cannot be ignored in the hope it will have no bearing on proposed solutions to shortcomings in existing primary rules for post-conflict states. Adherence of new post-conflict norms to the unilateral/multilateral distinction will play a critical role in their capacity to affect real change in international law. In particular, proponents of reform must address how the distinction will function for the three bodies of primary law most likely to be affected by a *jus post bellum*: *jus ad bellum*, the law of occupation (a sub-species of *jus in bello*), and the law of human rights.

This chapter will discuss the prevalence of the unilateral/multilateral distinction in these areas of law. Given the Security Council’s increasingly important role in rebuilding state institutions in the aftermath of conflict—the presumed domain of a *jus*

<sup>5</sup> Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) 184.

<sup>6</sup> John Lawrence Hargrove, “International Law as Law, Law as a System of Rule-Governed Conduct” (2011) 56 *Villanova Law Review* 509, 512.

<sup>7</sup> Franck, *The Power of Legitimacy Among Nations* (n. 5) 184.

<sup>8</sup> Franck, *The Power of Legitimacy Among Nations* (n. 5) 184.

*post bellum*—I will focus discussion on the particular form of multilateral action that results from an authorization by the Council under Chapter VII. Council-authorized actions in post-conflict states will be contrasted with similar actions undertaken by states acting without a Chapter VII mandate. This does not mean acts unaddressed by the Council are not authorized by international law generally or multilateral treaty regimes in particular. By describing an act as unilateral I am not suggesting that it is thereby unlawful. The point is rather that the range of lawful actions open to states in post-conflict settings without a Council mandate is much narrower than that available when the Council has acted under Chapter VII authorizing additional options. This contrast between broad and narrow options will be critical to understanding how an undifferentiated body of *jus post bellum*—one that treats all post-conflict actors as having the same range of legal options—might function.

The chapter starts with three propositions about that divide to set the stage for understanding the dilemma a *jus post bellum* will confront in adapting to this critical secondary rule. The dilemma arises from the choice facing a *jus post bellum* in the actors it seeks to regulate: if it purports to subject states *and* multilateral actors operating under a Chapter VII mandate to the same set of constraints, it will be unable to regulate the latter. This is because the Security Council operates outside (some might say above) the state-centric norms of these three regimes. But if it seeks only to regulate states, *jus post bellum* will fail to address the multilateral actors who increasingly dominate post-conflict reconstruction efforts. These two strategies for adapting a *jus post bellum* to the unilateral/multilateral divide, in other words, seem destined to fail. A possible alternative would be to prescribe different norms or different levels of compliance for different types of actors.

I will then discuss four recent cases of post-conflict reconstruction that serve to demonstrate the difficulties of regulating all international actors under a unified *jus post bellum*. These cases—East Timor, Afghanistan, Iraq, and Libya—present a spectrum of multilateral involvement, from complete to highly selective. A *jus post bellum* applied uniformly to all actors and all sectors in these cases would face tremendous problems of coherence and effectiveness.

## II. Proposition I: Existing Legal Regimes Applicable to the Post-Conflict Period are Almost Exclusively State-Centric

A multitude of actors now work in post-conflict states.<sup>9</sup> The World Bank observes that “more than any other kind of development effort, post-conflict situations have brought together an unusually wide-ranging group of economic, political, and military actors: bilateral and multilateral donors, NGOs, military/security forces, civil society, religious authorities.”<sup>10</sup> The actors are remarkably diverse: some are states, including their militaries and overseas development agencies; some are international organizations

<sup>9</sup> See generally, David Tolbert and Andrew Solomon, “United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies” (2006) 19 *Harvard Human Rights Journal* 29, 52.

<sup>10</sup> World Bank Operations Evaluation Department, “Aid Coordination and Post-Conflict Reconstruction: the West Bank and Gaza Experience” (Precis, World Bank 1999) 2. As examples, the Bank reports that as of 1999 “[i]n the case of the West Bank and Gaza, 50 bilateral and multilateral donors are active, while in Bosnia-Herzegovina, the number has soared to over 60 donors.”

(both regional and global), including their specialized agencies; some are non-government organizations and some are umbrella groups combining a variety of entities. Together they perform tasks designed to bring about reconciliation between formerly warring parties and reform dysfunctional national institutions.

Yet the legal regimes under which they operate are almost exclusively directed at states. To be sure, the state-centrism of these regimes is not as categorical as in previous eras. Much scholarship and self-examination by the actors themselves has led to efforts to expand their application in certain areas to new actors.<sup>11</sup> But in their original design these regimes directly regulate only states and assume in a variety of places that only states will be capable of complying with their dictates. Efforts to expand the regimes to multilateral actors fully, as opposed to ad hoc applications, have been limited. The following sections discuss the statist orientation of the three legal regimes most relevant to *jus post bellum*.

### A. *Jus Ad Bellum*

The first regime applicable to post-conflict states is *jus ad bellum*. In contemporary international law, *jus ad bellum* is grounded in Article 2(4) of the United Nations Charter.<sup>12</sup> That article prohibits the use of force except as used in self-defense or as authorized by the Security Council and has spawned a broad and detailed jurisprudence.<sup>13</sup> While invocation of a *jus "post" bellum* might imply that hostilities have ended and that regulation of the decision to use armed force has become unnecessary, the situation in post-conflict states is often substantially more complex. Most obviously, hostilities may appear to end and then restart, either at the instigation of the government or rebel forces. Third states may send their militaries into the territory. United Nations forces may come under attack or find they cannot fulfill their mandate without recourse to force. A party to an armed conflict with Security Council authorization may exceed the terms of the authorizing resolution. Or a party may insist it retains the right to use force in self-defense even though the Council has taken "measures necessary to maintain international peace and security," thereby terminating that right.<sup>14</sup> In each of these situations a question arises under *jus ad bellum* as to whether the use of force is justified by the circumstances.

Article 2(4) applies by its terms only to states. The same is true for Article 51 concerning the right to self-defense.<sup>15</sup> Controversially, in its Wall opinion, the ICJ held

<sup>11</sup> See generally, Robert McCourquodale, *International Law Beyond the State: Essays on Sovereignty, Non-State Actors and Human Rights* (CMP Publishing 2011), Andreas Bianchi (ed.), *Non-State Actors and International Law* (Ashgate 2009).

<sup>12</sup> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." United Nations, Charter of the United Nations (24 October 1945), 1 UNTS XVI (UN Charter) Art. 2(4).

<sup>13</sup> See generally, Yoram Dinstein, *War, Aggression and Self-Defense* (5th edn, Cambridge University Press 2012).

<sup>14</sup> UN Charter Art. 51.

<sup>15</sup> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise

that the right of self-defense does not arise when a non-state actor attacks a state.<sup>16</sup> While the Court may have qualified this holding in the Congo/Uganda case, it did not come close to ruling that an armed attack wholly unattributed to a state might trigger a right to self-defense.<sup>17</sup> But even if one believes the Court got the law wrong (a widely-held view among scholars<sup>18</sup>), the alternative view does not enlarge the class of right-holders beyond states. The critique of removing attacks by non-state actors as a trigger for the right does not purport also to grant the right to non-state actors. The critique of the Court's view is that *states* deserve a broader right of armed response.

International organizations are not addressed by *jus ad bellum*. The Security Council may authorize or deploy its own armed forces under Chapter VII of the Charter. Chapter VII actions are triggered by political decisions of the Security Council under criteria in Article 39 that allow a much broader scope of action than Article 2(4) permits states acting unilaterally.<sup>19</sup> Indeed, many commentators find no legal limits on the permissible scope of Council action under Chapter VII beyond the (rather hypothetical) violation of *jus cogens* norms.<sup>20</sup> Regional organizations, whose use is encouraged by Chapter VIII of the Charter, may engage in acts that would otherwise violate *jus ad bellum* only when granted leave to do so by the Council.<sup>21</sup> Absent such an authorization—which in recent years has occasionally come after hostilities commenced—“[t]he position of a regional group of States is not appreciably different than that of an individual State.”<sup>22</sup> That is, the regional group would be fully regulated by the *jus ad bellum* and could only use force in collective self-defense.

of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

<sup>16</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep. 136, para. 139 (Wall Opinion). For a thorough critique of the Court's reasoning, see Sean D. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: an *Ipse Dixit* from the ICJ?” (2005) 99 *American Journal of International Law* 62.

<sup>17</sup> The Court found that Uganda had offered “no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC” and were therefore “non-attributable to the DRC.” [2005] ICJ Rep. 2005, para. 146. For this and other reasons the Court concluded that “the legal and factual circumstances for the exercise of a right of self-defense by Uganda against the DRC were not present.” [2005] ICJ Rep. 2005, para. 147. This passage suggested that attribution of an attack to a state is essential. But immediately thereafter the Court added that as a result of its holding it had “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces.” [2005] ICJ Rep. 2005, para. 147. The Court may only have meant that it had no need to explore the threshold for attribution in circumstances where some state involvement is apparent. But the passage is not qualified in this manner and may signal the court's receptivity in the future to a claim challenging for attribution at all.

<sup>18</sup> See, for example, Murphy, “Self-Defense and the Israeli Wall Advisory Opinion” (n. 16).

<sup>19</sup> For example, in Libya the Council has authorized states to intervene in civil wars against the wishes of the incumbent government, an act not generally open to states acting unilaterally. See UNSC Res. 1973 (17 March 2011) UN Doc. S/RES/1973 (authorizing all member states “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya”); Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008) 80–1.

<sup>20</sup> See Vera Gowlland-Debbas, “The Functions of the United Nations Security Council in the International Legal System” in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford University Press 2001) 277; Gabriel Oosthuizen, “Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law” (1999) 12 *Leiden Journal of International Law* 549, 555; Rosalyn Higgins, “The Place of International Law in the Settlement of Disputes by the Security Council” (1970) 64 *American Journal of International Law* 1.

<sup>21</sup> UN Charter Art. 53.

<sup>22</sup> Dinstein, *War, Aggression and Self-Defense* (n. 13) 270.

## B. Occupation law<sup>23</sup>

The modern law of occupation is set out in the Fourth Geneva Convention of 1949 (GC IV),<sup>24</sup> which updates but does not supersede the Hague Regulations Respecting the Laws and Customs of War on Land of 1907 (Hague Regulations). Like all four Geneva Conventions, GC IV governs the conduct of the treaty's "High Contracting Parties."<sup>25</sup> To date, these have been limited to states. Neither the UN nor any other international organization has even attempted to ratify GC IV. The Conventions' drafters would have considered this state-centrism unremarkable, for the international organizations of 1949 were both limited in number and, even in the case of the United Nations, had not been parties to "declared war or ... any other armed conflicts," the threshold for applying the Convention.<sup>26</sup> Whether the United Nations *could* ratify the Geneva and Hague instruments turns less on its inherent capacity to do so<sup>27</sup> and more on its ability to carry out the treaties' obligations. Some obligations, such as those involving state territory or nationals, are clearly inapplicable to international organizations (IOs), meaning ratification in good faith would need to excise those obligations.<sup>28</sup> For an IO to do by asserting a variety of wide-ranging reservations would confront serious questions about compatibility with the Convention's object and purpose.

The lack of ratification has not ended matters. In 1999, the UN Secretary General issued a Bulletin declaring that UN forces would abide by a generalized set of humanitarian norms "when in situations of armed conflict they are actively engaged therein as combatants."<sup>29</sup> The Bulletin contains no guidelines specific to occupation, though the protection of civilians ("protected persons" under GC IV) is emphasized. The International Committee of the Red Cross takes the position that while application of occupation law to multilateral forces "may appear to be a kind of taboo for the international organizations involved as well as for some troops contributing States, occupation

<sup>23</sup> Much of the discussion in this section is taken from Gregory H. Fox, *Humanitarian Occupation* (Cambridge University Press 2008).

<sup>24</sup> Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV).

<sup>25</sup> GC IV Art. 2 provides that the Convention applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."

<sup>26</sup> GC IV Art. 2.

<sup>27</sup> The Vienna Convention on Law of Treaties Between States and International Organizations or Between International Organizations (adopted 21 March 1986) 25 ILM 543, provides in Art. 6 that "[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization." This contingent ability to contract stands in contrast with a *per se* rule for states: "[e]very State possesses capacity to conclude treaties." Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art. 6 (emphasis added).

<sup>28</sup> As Porrett and Vité observe, "some conventional rules are simply inapplicable, given the structure of international organizations. Thus, adhesion could only be partial and an adequate end result would require a reworking of all the instruments involved, including the formulation of reserves concerning certain changes." Gabriele Porretto and Sylvain Vité, "The Application of International Humanitarian Law and Human Rights Law to International Organisations" (2006) Research Paper Series 1/2006, University Centre for International Humanitarian Law, 27 <[http://www.geneva-academy.ch/docs/projets/CTR\\_application\\_du\\_DIH.pdf](http://www.geneva-academy.ch/docs/projets/CTR_application_du_DIH.pdf)> (accessed 4 July 2013). See also Ray Murphy, "United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?" (2003) 14 *Criminal Law Forum* 157 (UN ratification of Geneva Conventions "would entail binding the Organisation to detailed provisions that are aimed at states, and do not fit the role and function of an international organisation").

<sup>29</sup> UN Secretary General, "Observance by United Nations Forces of International Humanitarian Law" (1999) UN Doc. ST/SGB/1999/13, section 1.1.

law must not be discarded outright and the rights, obligations and protections derived from it must be applied *when the conditions for their applicability are met*.<sup>30</sup>

The ICRC's view and the practical impediments to IO adherence to all Convention obligations suggest a functional argument for applying occupation law to multinational actors. In this conception, the organization's *capacity* to carry out relevant obligations will be critical: if an IO in a particular post-conflict setting has the authority, resources, and infrastructure to follow occupation norms then it should do so.<sup>31</sup> Because, as Marco Sassoli notes, "some provisions of IHL cannot be applied to the UN since it lacks, eg, a territory, a penal system, or a population,"<sup>32</sup> the result would be less than full compliance with the complete set of occupation norms. But this problem of coverage aside, does support for the functional approach suggest an imminent end to occupation law's state centrism? I would suggest not.

First, the proposition that IO responsibility should turn on functional considerations exists entirely in the realm of *de lege ferenda*.<sup>33</sup> Secondly, and more importantly, a central provision of occupation law would severely limit the Security Council's ability to carry out the broad-based reforms that have become central to its missions to post-conflict states. Proponents of the functional view seem to have in mind human rights-type obligations protecting civilians in occupied territories. Occupation law certainly contains many such provisions. Extending them to Council-authorized missions would change very little in UN practice, since the mandate for virtually every recent multi-lateral mission to a post-conflict state has prioritized the protection of human rights.<sup>34</sup> But occupation law also *prohibits* broad legislative acts by occupiers in an effort to preserve existing laws and political institutions in the territory.<sup>35</sup> This "conservationist principle" seeks to draw a clear line between the temporary, trustee-like powers of an

<sup>30</sup> International Committee of the Red Cross, "Multinational Forces" (ICRC, 29 October 2010), <<http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/multinational-forces/overview-multinational-forces.htm>> (accessed 4 July 2013) (emphasis added).

<sup>31</sup> This proposition assumes one can readily distinguish multinational from national forces in a given operation. See Porrett and Vité, "The Application of International Humanitarian Law and Human Rights Law to International Organisations" (n. 28) 29 (noting that "a single operation can involve two simultaneous operational systems").

<sup>32</sup> Marco Sassoli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century" (Background Paper, International Humanitarian Law Research Initiative 2004) 17.

<sup>33</sup> The UN *might* ratify IHL treaties but it has shown no inclination to do so to date; the Secretary General *might* add occupation law to the list of IHL obligations the UN will voluntarily follow but has not done so in the 13 years since his bulletin; and the ICRC *urges reasons* for applying occupation law to multinational operations. I have made a somewhat similar argument in *Humanitarian Occupation*, urging that occupation law should apply to multinational forces if a function test is fulfilled. See Fox, *Humanitarian Occupation* (n. 23) 225–30. But that argument does not purport to describe existing law.

<sup>34</sup> Fox, *Humanitarian Occupation* (n. 23) 55–8. In authorizing the MINUSMA mission to Mali on 25 April 2013, for example, the Council mandated it to "monitor, help investigate and report to the Council on any abuses or violations of human rights or violations of international humanitarian law committed throughout Mali and to contribute to efforts to prevent such violations and abuses." UNSC Res. 2100 (25 April 2013) UN Doc. S/RES/2100. The Secretary General's promise to have forces under UN control observe IHL norms similarly focuses on protections of civilians and individuals *hors de combat*.

<sup>35</sup> The prohibition is grounded in Art. 43 of The Hague Regulations and Art. 64 of GC IV. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 Art. 43 (Hague Regulations); GC IV (n. 24) Art. 64.

occupier and the full authority of a *de jure* sovereign government.<sup>36</sup> Unlike the human rights obligations in occupation law, the conservationist principle<sup>37</sup> does not duplicate IO practice; indeed, it is the very antithesis of what multilateral post-conflict missions seek to accomplish. Their mandates contemplate wide-ranging changes to national laws and political cultures, often involving new democratic institutions and procedures.<sup>37</sup> In Kosovo the Council authorized an interim UN administration to oversee “the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants.”<sup>38</sup> In East Timor the Council endowed the UNTAET mission with “overall responsibility for the administration of East Timor” and empowered it “to exercise all legislative and executive authority, including the administration of justice.”<sup>39</sup> UNTAET’s reforms included a new procedure to select judges, a new judicial system, a central fiscal authority, a public service commission, a new currency, a border service, tax and customs regimes, a new treasury, procedures for public budgeting, and rules covering the representatives of foreign governments in East Timor.<sup>40</sup> Creating an inclusive democratic culture in post-conflict states, with the laws and institutions essential to its function, has become central to the UN’s view on how to prevent a recurrence of conflict.<sup>41</sup> “Applying” the restrictive conservationist principle to Security Council authorizations of this kind would amount to an effort to limit the Council’s choice of options for post-conflict states. As Part III will discuss below, such an attempt at preemption would run directly afoul of Article 103 of the Charter.<sup>42</sup> This

<sup>36</sup> See Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights” (2006) 100 *American Journal of International Law* 580.

<sup>37</sup> Eric De Brabandere, “UN Supervision of Post-Conflict Reconstruction and the Domestic Jurisdiction of States” (2009) 59 *Ars Aequi* 103, 106 (“[t]he UN Security Council, when authorizing the creation of comprehensive peacebuilding missions clearly and explicitly points to the democratization of state institutions as one of the long-term objectives”).

<sup>38</sup> UNSC Res. 1244 (10 June 1999) UN Doc. S/RES/1244, para. 10.

<sup>39</sup> UNSC Res. 1272 (25 October 1999) UN Doc. S/RES/1272, para. 1.

<sup>40</sup> Fox, *Humanitarian Occupation* (n. 23) 103.

<sup>41</sup> The Secretary General listed institution-building as one of the five core objectives of UN post-conflict peace-building missions. See Report of the Secretary General, “Peacebuilding in the Aftermath of Conflict” (2012) UN Doc. A/67/499-S/2012/746, 10–11. Beyond high profile national institutions such as parliaments and courts, the Secretary General has identified a remarkable range of governmental bodies potentially in need of reform:

Working with partners as early as possible to build or rebuild the functionality of country systems is critical to allowing for a successful transition from conflict and the drawdown of missions. These systems include the core administrative and financial management systems of the public administration, as well as social services, without which national Governments are unable to lead recovery efforts and respond to the needs of the population. They include policy formulation and public financial management, in particular planning, budgets and spending; leadership from the centre of Government, which is critical to driving change and ensuring coherence; civil service management, which entails ensuring that key administrative staff are in place, paid regularly and follow instructions and procedures; local governance, the level at which the State most frequently and directly interacts with its population; and the coordination of aid, which in many post-conflict contexts covers a major part of the budget. Improvement in other Government service systems, including health, education, agriculture and natural resources management, is also Improvement in other Government service systems, including health, education, agriculture and natural resources management, is also critical.

UN Doc. A/67/499-S/2012/746, 14.

<sup>42</sup> See Sylvain Vité, “L’applicabilité du droit international de l’occupation militaire aux activités des organisations internationales” (2004) 86 *International Review of the Red Cross* 9.



critical portion of occupation law, in other words, would remain state-centric even if efforts were made to expand its application to Chapter VII missions.

### C. Human rights law

Human rights principles famously helped break the state's near-monopoly on legal capacity to acquire rights under international law. But human rights law has not generally expanded *obligations* beyond the state, and in particular the obligations of IOs. Robert McCorquodale puts the matter directly:

The international human rights law system is a state-based system, a system in which the law operates in only one area: state action. It ignores actions by nonstate actors, such as the United Nations.... Nonstate actors are treated as if their actions could not violate human rights, or it is pretended that states can and do control all their activities.<sup>43</sup>

This despite the obvious reality that IOs such as the UN “can and do violate human rights.”<sup>44</sup>

As with occupation law, the human rights treaties most relevant to post-conflict situations permit only states to become parties.<sup>45</sup> Although the United Nations is party to a wide variety of other treaties, it has never ratified or acceded to a human rights instrument. The primary reason is the reluctance of state parties to enlarge their reach: despite increasing calls for the United Nations (and other IOs) to be held accountable for their delicts, the state parties serving as gate-keepers to these treaty regimes have not shown a willingness to admit IOs as parties.<sup>46</sup> Nor do the internal “rules” of the UN system (the relevant test posed by Article 6 of the Vienna Convention on IO treaties) provide for accession to human rights treaties. When confronted with a similar situation, the European Court of Justice held the European Community constitutionally incapable of ratifying the European Convention on Human Rights.<sup>47</sup>

<sup>43</sup> Robert McCorquodale, “Overlegalizing Silences: Human Rights And Nonstate Actors” (2002) 96 *American Society of International Law Proceedings* 384.

<sup>44</sup> McCorquodale, “Overlegalizing Silences” (n. 43) 384.

<sup>45</sup> Treaties such as the Covenant on Civil and Political Rights or the European Convention on Human Rights contain the broad-based protections of civil liberties that address most of the potential violations by an occupying power. Both are limited to states. One recent global instrument, the Convention on the Rights of Persons with Disabilities, provides that regional organizations may become parties “within the limits of their competence.” Convention on the Rights of Persons with Disabilities, UNGA Res. 61/106 (13 December 2006) UN Doc. A/RES/61/106, Art. 44(2). The Disability Rights Convention, while an important achievement, is not relevant to most of the potential abuses by an occupying regime.

<sup>46</sup> Nicole Quinivet, “Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties” (2010) 42 *George Washington International Law Review* 587, 592 (due to lack of provisions for IO accession “it is currently impossible for the United Nations, notwithstanding its capacity to enter into treaty relationships, to accede to human rights treaties”).

<sup>47</sup> Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759. Critically, the Court distinguished the question of the Community's competence to accede to the Convention from human rights obligations already internal to the Community legal order. While “[r]espect for human rights is... a condition of the lawfulness of Community acts,” accession to the Convention would “entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention

Some point out that when member states contribute troops to multinational operations, those forces remain bound by their national human rights treaty obligations, which are now understood to apply outside their national territories. But this fact does not make the treaty regimes any less state-centric; it simply extends the geographic and operational scope of treaty obligations that remain binding only on states. To the extent the wrongful acts of such troops are attributed to the UN and not the troop-contributing states, as has famously occurred,<sup>48</sup> rules of attribution would assign responsibility to an entity that is not a treaty party.

The observation that human rights regimes are state-centric is controversial. As many commentators note, the United Nations is the world's central proponent of human rights norms and to exempt it from scrutiny for its own acts seems the height of hypocrisy.<sup>49</sup> It certainly provides little comfort to the many who have decried the impunity of IOs for acts during post-conflict missions. Much has been written exploring how international law can ameliorate this lack of accountability.<sup>50</sup> But the ideas and proposals generated by that discussion do not significantly affect the claim made here that the human rights regime to be amended, replaced, or supplemented by a *jus post bellum* is essentially state-centric.

First, because major human rights treaties apply by their terms only to states, application to IOs would be a matter of customary law. But customary law is only a weak shadow of the treaty regimes that are the clear target of critiques underlying calls for a new *jus post bellum*. Divorced from statist treaties that are the major source of human rights norms, customary law lacks procedural obligations that would presumably play a critical role in post-conflict missions. For one, the treaties make possible the extra-territorial application of human rights norms to post-conflict missions. They also require state parties to reform their national laws to comply with substantive obligations and provide remedies for victims. They make clear to whom the human rights obligations are owed. Who would be the equivalent of other treaty parties if the UN were to be bound by customary norms? And they provide supervisory and enforcement mechanisms, albeit rather weak outside of Europe. The practical consequence of human rights obligations lacking any of these elements is, at best, uncertain. There is little authority for the idea that these essentially procedural aspects of human rights instruments have crossed into customary law.

into the Community legal order" para. 34. The ECJ held that treaty amendments would be necessary to grant the Community competence to enter into the European Convention and fulfill its obligations, paras 23–6. Those amendments were later enacted in Art. 6(2) of the Treaty on European Union and Protocol 14 to the European Convention. See Xavier Groussot, Tobias Lock, and Laurent Pech, "EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011" (Policy Paper, Foundation Robert Schuman 2011).

<sup>48</sup> See, *Behrami and Behrami v. France* App. No. 71412/01 and *Saramati v. France, Germany, and Norway* App. No. 78166/01, ECHR 2007 (joint admissibility decision).

<sup>49</sup> Frédéric Mégret and Florian Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities" (2003) 25 *Human Rights Quarterly* 314, 317 (arguing "the United Nations is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order, without any added juridical finesse").

<sup>50</sup> See the excellent discussion by Kjetil Mujezinovic Larsen, *Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press 2012).

Secondly, the much-discussed possibility that human rights violations in post-conflict settings may be attributed to international organizations, as opposed to their troop-contributing states, does not resolve the question of whether IOs have in fact committed “violations” of human rights norms. The International Law Commission’s attribution principles are secondary rules; human rights obligations are primary rules and must be shown to apply to IOs in their own right. For an IO to commit an internationally wrongful act, that act must *both* be attributable to that organization *and* constitute a breach of the organization’s primary obligations.<sup>51</sup> The two elements are co-equal but independent of each other.<sup>52</sup> Indeed, as Jose Alvarez has argued, crafting secondary rules of attribution when primary rules holding IOs responsible for human rights violations are uncertain at best may itself be a mistake.<sup>53</sup>

Thirdly, ad hoc arrangements in which IOs agree to abide by human rights norms or accept responsibility for particular human rights violations, as well as extrapolations from the UN’s central role in human rights, may, at some future point, create customary obligations for IOs. But scholars are divided on whether that day has yet arrived, and even the most cogent of these claims appears more prescriptive than descriptive.<sup>54</sup>

<sup>51</sup> International Law Commission, “Report of the International Law Commission: Sixty-first session (4 May–5 June and 6 July–7 August 2009), Draft Articles on the Responsibility of International Organizations” UN Doc. A/64/10 (2009) Art. 4 (“[t]here is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization”). Jean D’Aspremont argues that the elaboration of secondary rules of responsibility has created the false impression that primary rules for IO liability are well established. This is hardly the case. Jean D’Aspremont, “The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility” (2012) 9 *International Organizations Law Review* 15, 26 (“the rules on the attribution of responsibility prescribed by the ARIO generate an odd feeling of deceitfulness. Indeed, these rules convey the impression that, behind many of them, lurks a primary obligation of States and international organizations”).

<sup>52</sup> Tom Dannenbaum, “Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers” (2010) 51 *Harvard International Law Journal* 113, 130 (in assessing whether an international person such as the UN has committed an internationally wrongful act, the “first task . . . is to establish the relevant legal obligations that these persons may breach”); Larsen, *Human Rights Treaty Obligations of Peacekeepers* (n. 50) 85–164 (extensive but separate discussions of UN’s capacity to violate human rights norms and attribution of such violations to either the UN or troop-contributing states).

<sup>53</sup> Alvarez is worth quoting at length on this point:

If the ILC drafters are assuming that the UN, including its Security Council, needs to abide by “international human rights,” they do not indicate the basis for their assumption. Because the UN is bound by customary international law? Because the UN Charter or the UN’s practice achieves this result? Because the organization should be derivatively liable for members’ obligations? Note that each of these models suggests different implications—including with respect the specific human rights that are to be applied to the organization. Given the notorious disagreements among states with respect to the content of customary human rights, advocates of the human rights accountability of the UN rely on the human rights covenants or other human rights treaties but it is quite a leap to suggest that the UN, a third party to such treaties, can possibly be bound by agreements that not all of its members have ratified and that, even when they have, are subject to diverse (and sometimes quite extensive) reservations.

José Alvarez, “International Organizations: Accountability or Responsibility?” (Address to the Canadian Council of International Law, 35th Annual Conference on Responsibility of Individuals, States, and Organizations, 27 October 2006) <<http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf>> (accessed 5 July 2013).

<sup>54</sup> Compare McCorquodale, “Overlegalizing Silences” (n. 43) 388 (“[i]t is possible to imagine an international human rights legal system where nonstate actors have direct obligations for violations of human

In part this is because of another manifestation of human rights' state-centrism: the literal lack of any forum in which an IO can be brought to account for human rights violations. The United Nations is immune before national courts and international tribunals, with very limited exceptions, have no jurisdiction to hear claims against IOs.<sup>55</sup> Absent courts, tribunals, or other standing review bodies with jurisdiction to hear claims against IOs, no meaningful jurisprudence can arise to explore whether human rights apply to IOs at all and, if so, under what circumstances. But the reason also has to do with the enormous variation in regional and global human rights regimes. The highly developed European system is able to produce opinions attributing responsibility to the UN though not discussing its primary-rule liability. But no other human rights system, whether regional or global, has addressed the issue.

### III. Proposition II: The Security Council Can Alter These State-Centric Rules in Important Ways

Even assuming one or more of these three bodies of law would apply to both sets of actors in a post-conflict state—states and IOs—portions of the rules may be preempted by the Security Council under Chapter VII of the Charter. Security Council preemption of state treaty obligations is a consequence of Article 103 of the Charter, which prioritizes commitments under the Charter over those imposed by other treaties.<sup>56</sup> Even though Council resolutions are obviously a consequence of the Charter rather than the Charter itself, and might not be seen as having preemptive force under Article 103, the necessary relation between the Council's Chapter VII powers and the resolutions by which it exercises those powers is sufficient to grant them preemptive status.<sup>57</sup> Indeed, the Council itself regularly affirms that obligations in Chapter VII resolutions prevail “notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement.”<sup>58</sup>

rights. This requires a move towards a dynamic and victim-oriented approach where international human rights law becomes an effective limitation on oppressive power, no matter what its source”) with Dannenbaum, “Translating the Standard of Effective Control into a System of Effective Accountability” (n. 52) 134–9 (advancing four arguments for applying customary human rights norms to the UN).

<sup>55</sup> See UN Charter, Art. 105 (“[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes”); Dannenbaum, “Translating the Standard of Effective Control into a System of Effective Accountability” (n. 52) 125 (“[t]he lack of an international judicial forum in which to bring suit against the United Nations reflects the fact that existing international dispute resolution mechanisms were designed to deal with states, not international organizations”).

<sup>56</sup> Article 103 provides, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

<sup>57</sup> UN, *UN Repertory of Practice of United Nations Organs* (Vol. VI Supp. No. 8, UN) Art. 103, 3 (“[i]n as much as the Charter imposes an obligation on Member States to accept and carry out decisions of the Security Council under the Charter, it also includes obligations which arise as a result of those decisions. As such, the obligation of Member States to accept and carry out decisions of the Security Council under Chapter VII prevails over their obligations under other international agreements in the event that they conflict”).

<sup>58</sup> See e.g. UNSC Res. 757 (30 May 1992) UN Doc. S/RES/757 (former Yugoslavia); UNSC Res. 917 (6 May 1994) UN Doc. S/RES/917 (Haiti); UNSC Res. 1127 (28 August 1997) UN Doc. S/RES/1127 (Angola); UNSC Res. 1267 (15 October 1999) UN Doc. S/RES/1267 (Afghanistan).

The Council's legislative power *vis-à-vis* conflicting treaty obligations is now unexceptional.<sup>59</sup> The most important implication for the present discussion arises for the conservationist principle. Absent Council action, unilateral state occupiers are prohibited from altering the law in force in a territory they control, though the degree to which the principle constrains new law-making is highly controversial.<sup>60</sup> But assuming some limits exist on an occupier's legislative authority, the Council may transgress those limits by authorizing occupiers to enact wide-ranging reforms that go to the very heart of the state's constitutional order.<sup>61</sup> Many argue, for example, that in Resolution 1483 the Council substantially broadened the United States' legislative authority in Iraq.<sup>62</sup> The Council now has a substantial track-record in designing missions to repair societies whose political institutions have failed to prevent destructive conflict and polarization.<sup>63</sup> Almost all have involved legal and political reforms that arguably transgress the conservationist principle. A substantial internal infrastructure and in-house expertise now exists within the UN to study and refine its peace-building capacity.<sup>64</sup> To deny this preemptive authority to the Council via Article 103 would substantially limit its flexibility in prescribing appropriate measures to prevent the recurrence of conflict in fragile post-conflict societies.<sup>65</sup>

Nonetheless, questions do remain about the scope of the Council's power. May the Council authorize any sorts of reforms in post-conflict states, creating an *ad hoc jus post bellum* that deviates not only from the conservationist principle but other, more fundamental principles of international law, such as the protection of human rights? The first thing to be said about this difficult question is that it is almost entirely

<sup>59</sup> See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (Provisional Measures, Order of 14 April 1992) ICJ Rep. 1992, para. 39 ("in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement"); Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus, *The Charter of the United Nations: A Commentary* (3d edn, Oxford University Press 2013) 2110.

<sup>60</sup> See Gregory H. Fox, "Transformative Occupation and the Unilateralist Impulse" (2012) 94 *International Review of the Red Cross* 237.

<sup>61</sup> Sassoli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century" (n. 32) 16 ("the UN Security Council may mandate or authorize an occupying power to take certain steps to create conditions in which the population of the occupied territory can freely determine its future, live under the rule of law and enjoy the respect of human rights... such resolutions authorizing legislative changes in an occupied territory prevail over the restrictions of Article 43 of the Hague Regulations and Article 64 of Convention IV").

<sup>62</sup> See UNSC Res. 1483 (22 May 2003) UN Doc. S/RES/1483; Marten Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation" (2004) 86 *International Review of the Red Cross* 745. I have disagreed strongly with this view. See Gregory H. Fox, "The Occupation of Iraq" (2005) 36 *Georgetown Journal International Law* 196, 257–62.

<sup>63</sup> See generally, Michael Doyle and Nicholas Sambannis, *Making War and Building Peace: United Nations Peace Operations* (Princeton University Press 2006); Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press 2008).

<sup>64</sup> See Wolfgang Seibel, "The Normative Underpinnings of the UN Peacebuilding Commission" in James Mayall and Ricardo Soares De Oliveira (eds), *The New Protectorates: International Tutelage and The Making of Liberal States* (Columbia University Press 2011).

<sup>65</sup> As Frowein and Krisch note in a related context, limiting the Council's preemptive authority under Art. 103 would mean that the Charter "would not reach its goal of allowing the SC to take the action it deems the most appropriate to deal with threats to the peace." J. Frowein and N. Krisch, "Article 42" in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002).

hypothetical.<sup>66</sup> Those who might be in a position to oppose Chapter VII post-conflict resolutions—UN member states—have raised few objections to the now-substantial number of missions.<sup>67</sup> The missions themselves have consistently taken respect for human rights and creation of democratic institutions as core objectives.<sup>68</sup> While many have fallen short and even experienced abuses by their own members, there is no example of a post-conflict mission whose initial mandate arguably contravened human rights or other international legal principles designed to protect the inhabitants of a post-conflict state.<sup>69</sup>

If limits must be identified, they likely reside not in substantive restrictions on Security Council authority but in the process by which mission mandates are approved. This is a complex set of issues that cannot be done justice here.<sup>70</sup> Suffice it to say, the two most commonly identified substantive limits on Council authority—the purposes and principles of the Charter and *jus cogens*—have serious conceptual difficulties. The former are general and hortatory, providing scant basis for drawing clear doctrinal lines beyond a few frequently-offered examples (i.e. the Council cannot pass a resolution encouraging genocide) that are largely irrelevant to actual Council practice. The latter relies on a necessary inferiority of Council resolutions to *jus cogens* norms that is quite difficult to defend. The Council acts for the entire membership of the United Nations when it invokes Chapter VII.<sup>71</sup> Yet to violate a *jus cogens* norm such a resolution would need to contravene a norm “accepted and recognized by the international community of States as a whole a norm as a whole as a norm from which no derogation is permitted.”<sup>72</sup> The two norms share a self-described universality. As I have written elsewhere, “[i]f the support accorded both is roughly equivalent the proposition becomes a non-sequitur, for the international community cannot unequivocally condemn an action it has just endorsed through the Council.”<sup>73</sup>

<sup>66</sup> See Simma et al., *The Charter of the United Nations* (n. 59) 2119 (“conflicts between primary rules of the Charter and *jus cogens* are difficult to imagine, and conflicts of secondary law under the Charter will usually be resolved by interpretation”).

<sup>67</sup> Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 43 *Vanderbilt Journal Transnational Law* 119, 128 (“recent comprehensive peace-building mandates have not encountered objections by United Nations member states”).

<sup>68</sup> Fox, *Humanitarian Occupation* (n. 23) 52–8.

<sup>69</sup> There seems little likelihood, therefore, that a situation would arise from a post-conflict mission similar to that in the *Kadi* case, where the European Court of Justice measured obligations resulting from a Chapter VII resolution against regional human rights norms. Joined Cases C-402 and 415/05P, *Kadi and Al Barakaat International Foundation v. Council and Commission* (2008) ECR I-6351. Since the ECJ explicitly denied that it was reviewing the Council resolution as such, it did not set out criteria for limits on Council powers. Even if one were to read (or over-read) *Kadi* as holding that Chapter VII resolutions cannot supersede regional human rights norms, such a holding would not find the Council to have acted *ultra vires* but rather in contradiction to another international norm. Such a holding merely begins a complex analysis of how such conflicts are to be resolved, a question that has generated much discussion but little clear resolution. See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003).

<sup>70</sup> See the discussion in Fox, *Humanitarian Occupation* (n. 23) chs 6 and 8.

<sup>71</sup> See UN Charter, Art. 24(1) (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”).

<sup>72</sup> VCLT, Art. 53.

<sup>73</sup> Fox, *Humanitarian Occupation* (n. 23) 213.

In sum, the Security Council may authorize member states or its own forces to transgress the conservationist principle, thereby creating an ad hoc *jus post bellum* that bears no necessary relation to the statist precepts of occupation law.

#### IV. Proposition III: The International Community has Effectively Multilateralized the Post-Conflict Period<sup>74</sup>

If the web of treaty rules particularly important to post-conflict states—*jus ad bellum*, occupation law and human rights—was designed to regulate states acting unilaterally, the modern era has taken a decidedly different approach. Starting in the early 1990s, the Security Council began engaging with all aspects of armed conflict.<sup>75</sup> In part this fulfilled a critical aspect of the Charter's original design: to make conflict resolution a multilateral rather than unilateral concern, thereby leveraging the superior resources of the international community to resolve local disputes.<sup>76</sup> But the Council's activism in the post-Cold War period also went well beyond the original Charter design by engaging fully with the aftermath of internal armed conflicts. This was a transition born of necessity, as most armed conflicts in this period have been internal and the Council would have rapidly become a marginal presence if it had not addressed civil wars.

The goal of multilateralizing all aspects of warfare has largely succeeded. According to two major datasets of armed conflict, there were ten inter-state armed conflicts between 1990 and 2010.<sup>77</sup> All but two of these were addressed in one form or another by the UN Security Council, which took actions ranging from authorizing intervention to supporting regional peace processes.<sup>78</sup> The Council's involvement has not been episodic but holistic, as it regularly addresses all aspects of armed conflict from inception to termination. It mediates disputes that appear likely to escalate into armed conflict; authorizes responses to cross-border incursions; condemns violations of humanitarian law in the course of armed conflicts, including referring matters to the International Criminal Court; assists in negotiating ceasefires and eventual peace agreements; and, as has been noted, dispatches reconstruction missions to post-conflict states.<sup>79</sup> To take

<sup>74</sup> Some discussion in this section parallels that in Fox, "Transformative Occupation" (n. 60) 262–5.

<sup>75</sup> See generally, Vaughn Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (eds), *The United Nations Security Council and War* (Oxford University Press 2008).

<sup>76</sup> See Thomas M. Franck and Faiza Patel, "UN Police Action in Lieu of War: 'The Old Order Changeth'" (1991) 85 *American Journal of International Law* 63.

<sup>77</sup> The Correlates of War Project (<<http://www.correlatesofwar.org>> (accessed 5 July 2013)) and the Uppsala Conflict Data Program/Peace Research Institute Oslo (<[www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/](http://www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/)> (accessed 5 July 2013)). The major armed conflicts were the Gulf War (1991), the Bosnian War of Independence (1992), the Azeri-Armenian War (1993–94), the Eritrea-Ethiopia War (1998), the Kosovo Conflict (1999), the US invasion of Afghanistan (2001), the US invasion of Iraq (2003), and the Eritrea-Djibouti conflict (2008). India and Pakistan had several conflicts during this period and they are treated differently by the two datasets.

<sup>78</sup> The Council did not take any action on the Kashmir conflict between India and Pakistan, which flared into armed conflict ten times during this period, or on the Ecuador-Peru Cenepa Valley War of 1995. The Cenepa conflict was resolved by a regional treaty group, the Protocol of Rio de Janeiro, and guaranteed by a monitoring mission dispatched by the Protocol member states. See Glenn R. Weidner, "Operation Safe Border: The Ecuador-Peru Crisis" (1996) *Joint Forces Quarterly* 52.

<sup>79</sup> See generally, Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press 2006).

one brief snapshot of UN activities, the Secretary General reported in September 2012 that “[s]ince September 2011, the Organization has engaged in more than 20 peace processes, supported democratic transitions in various Arab countries, assisted in preparing and conducting elections in more than 50 Member States, and worked to build peace after conflict through 16 peacekeeping operations, 18 political field missions and United Nations country teams.”<sup>80</sup> This multifaceted approach embodies an important learning curve. The UN (via Council action) has moved well beyond simple post hoc responses to aggression to deploying sophisticated strategies of prevention, mediation, reconciliation, reconstruction, and exit from conflict zones.<sup>81</sup>

This move to multilateralism has been particularly evident at the post-conflict stage. The UN has become the indispensable actor in such transitional operations.<sup>82</sup> Its involvement has ranged from full international governance to advising transitional regimes. To ensure the organization continues to learn from both its successes and failures, the Security Council created the Peacebuilding Commission in 2005 with a mandate to “bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery” as well as to “focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict.”<sup>83</sup> Reviewing the UN post-conflict record in 2006, Doyle and Sambanis concluded that the organization is most successful when it is involved in all aspects of a transition from conflict to stable peacetime governance.<sup>84</sup> A *greater* role for the United Nations thus *enhances* the effectiveness of post-conflict reconstruction.

## V. Which Direction for a *Jus Post Bellum*?

The norms applicable to post conflict states are thus highly bifurcated. On the one hand, the existing treaty regimes are state centric in their design and also largely in their application. On the other hand, the Security Council has multilateralized the post-conflict period for almost all armed conflicts over the past decade (to a greater or lesser extent to be sure). If we can assume the Council will not retreat from these reconstruction initiatives in the near future, the consequence is that existing post-conflict norms barely regulate the most important actor in the field. Architects of a nascent *jus*

<sup>80</sup> UN Secretary General, “Report of the Secretary-General on the Work of the Organization” (2012) UN Doc. A/67/1, 7.

<sup>81</sup> Touko Piiparinen, *The Transformation of UN Conflict Management* (Routledge 2009); Richard Caplan (ed.), *Exit Strategies and Peacebuilding* (Oxford University Press 2012).

<sup>82</sup> Thorsten Benner, Stephan Mergenthaler, and Philipp Rotmann, *The New World of UN Peace Operations* (Oxford University Press 2011); Doyle and Sambanis, *Making War and Building Peace* (n. 63). Call and Cousens wrote in 2007, “[o]f the wars ended since 1988, the UN has exercised some peacebuilding role in half, including in Cambodia, Southern Africa, Central America, the Balkans, West Africa, Afghanistan, and Iraq. Of the nineteen UN peace operations currently in the field, at least ten could be considered to be engaged in or contributing to peacebuilding, along with a few dedicated UN ‘Peacebuilding Support Offices.’” Charles T. Call and Elizabeth M. Cousens, *Ending Wars and Building Peace* (International Peace Academy 2007) 1.

<sup>83</sup> UNSC Res. 1645 (20 December 2005) UN Doc. S/RES/1645.

<sup>84</sup> Doyle and Sambanis, *Making War and Building Peace* (n. 63) 349–50 (“[t]he defining characteristic of all the successful operations is that they each achieved a comprehensive peace agreement—one involving the UN in the entire peace process, from the signing of the first cease-fire to the restoration of the last structures of government”).



*post bellum* thus face a dilemma. The new regime can mirror the state-centrism of existing law, in which case it will be of questionable relevance to the IOs and IO-sanctioned operations dominating today's post-conflict missions. Ad hoc IO adherence could certainly continue, as could ethical or political arguments urging their adherence. But this route would effectively abandon a uniform *jus post bellum* applicable to all post-conflict actors.

Alternatively, the new regime can expand its application to include multilateral actors. But in that case it must provide a convincing justification for subordinating Council authorizations under Chapter VII to a set of treaty-based or customary rules. Article 103 makes that an impossible task.

## VI. An Alternative Path?

This lack of fit makes either of these alternatives quite unappealing. Either state centric norms attempt to regulate IOs not subject to their terms or they exclude IOs and fail to account for the most important players in contemporary post-conflict environments. A third alternative would seek to modify the norms themselves. It would draw on the different capacities of states and international organizations not as a basis for denying the application of *jus post bellum* but crafting differential obligations. This approach would effectively disaggregate *jus post bellum* norms from unified treaty regimes into (at least) two sets of component parts: those that IOs are capable of following and those they are not. Identifying additional sets of obligations may be necessary since, as will be discussed below, the "capacity" of an IO in any given case may vary greatly depending on the nature of the mission and the mandate it has assumed.

A differentiated set of obligations for IOs would avoid help avoid the uncomfortable outcome of exempting the United Nations from a *jus post bellum*. Given that many derive *jus post bellum* principles from the ethical tradition of just war theory, limiting its application to unilateral actors hardly seems tenable on ethical grounds. A moral imperative to apply minimum standards of human rights and political accountability to post-conflict states could hardly exempt multilateral actors. Indeed, as is often argued, the UN is the world's primary exponent of human rights and the rule of law and can hardly be held to lower standards of conduct than national actors. The widely-discussed Brahimi Report on United Nations Peace Operations, for example, took as one of its foundational premises the "essential importance of the United Nations system adhering to and promoting international human rights instruments and standards and international humanitarian law in all aspects of its peace and security activities."<sup>85</sup> A differentiated set of rules for different post-conflict actors would be difficult to reconcile with these imperatives.

The primary model for distinguishing state from IO obligations would be the principle of Common but Differentiated Obligations (CDO) in international

<sup>85</sup> UNGA, "Report of the United Nations Panel on Peace Operations" (2000) UN Doc. A/55/305-S/2000/809, I.

environmental law.<sup>86</sup> Most international norms are uniform both in the standards they apply and the timing and nature of compliance they demand.<sup>87</sup> But beginning with the 1972 Stockholm Declaration, environmental regimes began to differentiate between developed and developing countries, holding the latter either to no immediate obligations or to lower standards or to obligations phased in over time.<sup>88</sup> The principle was reaffirmed in the 1992 Rio Declaration and is now enshrined in a variety of environmental instruments, most notably the United Nations Framework Agreement on Climate Change, and also in trade law and the law of the sea.<sup>89</sup>

The primary rationale for CDO in environmental law is corrective justice, grounded in developed countries' historical responsibility for much of the environmental degradation that has made global treaty regimes necessary.<sup>90</sup> If developing countries contributed little, if anything, to the depletion of the ozone layer or emission of greenhouse gases, why should they assume the costs of remediation? This claim has little application to *jus post bellum*; the history of the actors involved has little bearing on how they should conduct themselves in post-conflict states. A secondary rationale, based on the capabilities of different actors, better fits actors distinguished by the breadth of their international legal personalities.<sup>91</sup> The goal in both cases is utilitarian: the good involved (environment/welfare of inhabitants of post-conflict states) will be furthered if the disadvantaged actor (poor state/IO) participated in the regime.<sup>92</sup> In order to gain their participation, however, concessions must be made to their diminished capacities relative to the stronger actors.

Few attempts have been made to understand how CDO would operate if applied to humanitarian law and even fewer when obligations are differentiated not between

<sup>86</sup> See Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 234–6; Christopher Stone, “Common But Differentiated Responsibilities in International Law” (2004) 98 *American Journal of International Law* 276.

<sup>87</sup> Gabriella Blum, “On a Differential Law of War” (2011) 52 *Harvard International Law Journal* 163, 168–73. An exception is economic and social rights, which are to be implemented progressively and depending on available resources. See International Covenant on Economic, Social and Cultural Rights (adopted 16 January 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 2(1) (state parties must take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”).

<sup>88</sup> United Nations Conference on the Human Environment, Stockholm Declaration (16 June 1972) UN Doc. A/CONF.48/14, principle 12, reprinted in 11 ILM 1416, 1419 (1972) (supporting “taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose”); Blum, “On a Differential Law of War” (n. 87) 177, 178 (law of the sea and trade law examples).

<sup>89</sup> Rio Declaration on Environment and Development (12 August 1992) UN Doc. A/CONF.151/26/Review.1 (Vol. 1), principle 6 (“the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority”); Michael Weisslitz, “Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context” (2002) 13 *Colorado Journal International Environmental Law and Policy* 473, 478–86 (citing numerous treaties incorporating CDO).

<sup>90</sup> Blum, “On a Differential Law of War” (n. 87) 182–4.

<sup>91</sup> Stone, “Common But Differentiated Responsibilities in International Law” (n. 88) 292.

<sup>92</sup> Stone, “Common But Differentiated Responsibilities in International Law” (n. 88) 292 (CDO in environmental regimes is “asking no more than a ratable or even lighter contribution by the Rich in welfare measured by utility”); Michael N. Schmitt, “Bellum Americanum: The US View of Twenty-First Century

more and less powerful states, or even states and non-state actors in civil wars (ie, rebel movements), but states and international organizations.<sup>93</sup> While a full analysis is beyond the scope of this chapter, one can imagine CDO for *jus post bellum* operating as follows. Missions authorized by the Security Council under Chapter VII—increasingly the norm—exist wholly outside the *jus ad bellum* and could not be subject to its limitations.<sup>94</sup> No concession to the UN's different legal capacity could make the *jus ad bellum* applicable to Council-authorized missions. Any normative realignment would involve only the portion of *jus post bellum* derivative of occupation law and human rights law. In those areas, IOs are primarily deficient in their ability to carry out affirmative obligations: in occupation law obligations to ensure the subsistence of the local population and in human rights law obligations to provide institutions that oversee the implementation of rights, investigation of violations, and provide remedies to victims. Generalizations in these areas are difficult, since Council-authorized missions have varied widely in the breadth of tasks assigned and institutional capabilities to affect change in their territories. There is a world of difference, for example, between territorial administrations in which the UN mission effectively becomes the government of a state or a portion thereof and missions tasked only with advising local actors on reform efforts. A single standard for IOs would miss this broad variation. Any codification of IO obligations would therefore need to be quite flexible, perhaps saying no more than that an organization assumes responsibility under *jus post bellum* commensurate with its mandate to act in a particular circumstance.<sup>95</sup> In addition, the conservationist principle that limits an occupier's legislative authority is wholly inapplicable to UN missions tasked precisely to bring out political and legal reform. Each of these areas could be carved out of the *jus post bellum* obligations of IOs; unlike environmental regimes, where CDOs differently calibrate compliance with the same set of obligations, CDO here would differentiate between the obligations that are owed.

By most accounts the CDO principle has not entered customary international law, even in the environmental realm where it permeates global treaty regimes.<sup>96</sup> This means if CDOs are to be included in *jus post bellum* they must become part of new IOs or revisions to existing instruments—the same path followed by environmental CDOs. This is no small task. The United Nations has been a major player in post-conflict states since the end of the Cold War and debate surrounding its adherence to humanitarian and human rights law had been ongoing for decades before.<sup>97</sup> Yet no humanitarian law instruments have been created or amended to account for its different legal capacity.

War and its Possible Implications for the Law of Armed Conflict" (1998) 19 *Michigan Journal of International Law* 1051, 1088 ("[t]oday, the law of armed conflict is designed primarily to minimize suffering and prevent unnecessary destruction. This being so, belligerents are held to the standards to which they are capable of reasonably rising. The sole exceptions are absolute prohibitions, such as the direct targeting of civilians or the use of poison").

<sup>93</sup> Blum, "On a Differential Law of War" (n. 87) is one of the few examples. <sup>94</sup> See Part II(A) above.

<sup>95</sup> This standard would be consistent with IO responsibility more generally. See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) (1949) ICJ Rep. 174.

<sup>96</sup> Stone, "On a Differential Law of War" (n. 88) 299.

<sup>97</sup> Two accounts from the early 1960s are still cited frequently today. See Derek W. Bowett, *United Nations Forces* (Stevens and Sons 1964); Finn Seyfersted, "United Nations Forces: Some Legal Problems" (1961) 37 *British Yearbook of International Law* 362.

## VII. Consequences of a Unified *Jus Post Bellum*

A detailed exploration of a *jus post bellum* with CDOs or limited to regulating states' paths is beyond the scope of this chapter. Instead, discussion will be limited to the broadest conception of a *jus post bellum* that subjects all post-conflict scenarios—purely unilateral, partially regulated by Security Council mandate, or fully regulated by a Council mandate—to a unified body of rules. Much recent writing appears to assume that a *jus post bellum* would apply uniformly to all post-conflict actors.<sup>98</sup> One can well understand the reasons for this universalist conception, since the reality of contemporary post-conflict states is that an enormous variety of entities works on reconstruction initiatives.<sup>99</sup> Even leaving aside NGOs, which are often integral to reform in certain sectors, the mix of unilateral and multilateral actors varies greatly from case to case. For international territorial administrations the Security Council has subsumed all actors under a Chapter VII mandate that grants plenary power to its own administrators. In other cases, actors with a Chapter VII mandate work side-by-side with national actors. And in still others certain aspects of reform or maintenance of security are covered by a Council mandate but others are not.

How would a uniform *jus post bellum* function in such circumstances? An examination of four post-conflict episodes provides useful illustrations. Each case presents a different variation on the possible plurality of unilateral or multilateral actors.

### A. East Timor 1999

After the United Nations supervised an independence referendum in East Timor in August 1999, militias supported by the Indonesian government ran rampant, causing widespread death and destruction.<sup>100</sup> After a vanguard Australian force entered East Timor, the Security Council effectively internationalized the territory in Resolution 1272 in order to repair the damage and pave the way for the independence supported by

<sup>98</sup> See e.g. Liliانا Lyra Jubilit, "Towards a New *Jus Post Bellum*: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability" (2011) 20 *Minnesota Journal International Law* 26, 58 (proposing that the UN Peacebuilding Commission begin to elaborate principles of a *jus post bellum* in a broad manner, which "would mean that the UN itself would be acting under principles of rule of law, and would be able to 'lead by example'"); Inger Österdahl and Esther van Zadel, "What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles" (2009) 14 *Journal Conflict and Security Law* 175, 179 ("[w]hat is crucial is that the rules of *jus post bellum* are to apply to the territory of the state(s) where the parties to the conflict operated, as well as to all parties involved in the post-conflict phase"); Major Richard P. Dimeglio, "The Evolution of the Just War Tradition: Defining *Jus Post Bellum*" (2005) 186 *Military Law Review* 119, 146 (suggesting *jus post bellum* "criteria for a general application within the just war framework").

<sup>99</sup> See generally, Sabine Kurtenbach, "Post-War and Post-Conflict Challenges for Development Cooperation" (Policy Brief, Institut für Entwicklung und Frieden 2009); Cedric de Coning, "The Coherence Dilemma in Peacebuilding and Post-Conflict Reconstruction Systems" (2008) 8 *African Journal Conflict Resolution* 85, 94–5 ("[a] peacebuilding or post-conflict reconstruction system consists of a large number of independent agents that collectively carry out a broad range of activities across the dimensions of the system. These agents are independent in that they are each legally constituted in their own right, have their own organisational goals and objectives, have their own access to resources, and are in control of those resources, i.e. they have the power to make decisions about the allocation of those resources").

<sup>100</sup> Much of the discussion in this section is taken from Fox, *Humanitarian Occupation* (n. 23) 98–106.

Timorese voters.<sup>101</sup> The territory was to be governed by the UN Transitional Authority in East Timor (UNTAET).

UNTAET's mandate comprised all tasks regularly involved in nation-building: creation of a regulatory infrastructure, rule of law initiatives, building democratic institutions, and training local personnel.<sup>102</sup> The mission was "endowed with overall responsibility for the administration of East Timor and...empowered to exercise all legislative and executive authority, including the administration of justice."<sup>103</sup> The Transitional Administrator had the power to "appoint any person to perform functions in the civil administration in East Timor, including the judiciary, or remove such person."<sup>104</sup> The Administrator announced that in fulfilling its mandate UNTAET would be constrained by seven widely subscribed human rights instruments. Indonesian law would continue to apply to the extent it was consistent with these instruments, the Security Council mandate, and directives issued by UNTAET. Early on, the Administrator rescinded a series of Indonesian security regulations deemed to be inconsistent with human rights standards.<sup>105</sup>

UNTAET's organizational structure came to resemble a government, divided into eight ministerial-like portfolios of authority.<sup>106</sup> It set to work filling the void left by Indonesia's departure and the rampaging militias, issuing regulations, establishing numerous governmental entities and functions, and staffing these new institutions. UNTAET's reforms included a new procedure to select judges, a judicial system, a central fiscal authority, a public service commission, a currency (the US dollar), a border service, tax and customs regimes, a treasury, procedures for public budgeting, and rules covering the representatives of foreign governments in East Timor.<sup>107</sup>

UNTAET's governing authority in East Timor was plenary. It set policy, oversaw implementation, and designed the new institutions and norms deemed necessary to affect a transition to independent statehood. Reconstruction in the territory was fully multilateralized, to the point where a credible argument can be made that during UNTAET's reign East Timor became the first example of "UN statehood."<sup>108</sup>

In order to have any meaningful impact in East Timor, a uniform *jus post bellum* would have needed to assert regulatory authority over the Council's Chapter VII mandate and UNTAET's legislative authority that followed. Regulation of individual states participating in UNTAET would have had no impact on the Mission itself.

<sup>101</sup> UNSC Res. 1272 (25 October 1999) UN Doc. S/RES/1272.

<sup>102</sup> UN Secretary General, "Report of the Secretary-General on the United Nations Transitional Administration in East Timor" (2000) UN Doc. S/2000/738, paras 18–50. See generally, Mark Rothert, "UN Intervention in East Timor" (2000) 39 *Columbia Journal of Transnational Law* 257.

<sup>103</sup> UNSC Res. 1272 (25 October 1999) UN Doc. S/RES/1272, para. 1.

<sup>104</sup> UNTEAT, On the Authority of the Transitional Administrator in East Timor (1999) UNTAET/REG/1991/1 (UNTAET Reg. 1) s. 1.2. All UNTAET regulations are available at <<http://www.un.org/peace/etimor/UntaetN.htm>> (accessed 5 July 2013).

<sup>105</sup> (1999) UNTAET/REG/1991/1 (UNTAET Reg. 1) s. 3.2.

<sup>106</sup> See UNTAET, "Background" (UN Department of Public Information, May 2002) <<http://www.un.org/peace/etimor/untaetB.htm>> (accessed 5 July 2013).

<sup>107</sup> See UNTAET/REG/1999/3 (judicial service commission); UNTAET/REG/2000/1 (central fiscal authority); UNTAET/REG/2000/3 (public service commission); UNTAET/REG/2000/7 (currency); UNTAET/REG/2000/9 (border service); UNTAET/REG/2000/12 (tax and customs regimes); UNTAET/REG/2000/20 (treasury); UNTAET/REG/2000/31 (offices of foreign governments).

<sup>108</sup> Jarat Chopra, "Building State Failure in East Timor" (2002) 33 *Development and Change* 979, 981.

## B. Afghanistan 2001

Following the US intervention in Afghanistan on 7 October 2001 and the ouster of the Taliban regime, control over various sectors of Afghan society changed steadily.<sup>109</sup> US and Afghan resistance forces took the capital Kabul on 12 November. On 14 November, the Security Council expressed support for Afghans creating an interim government but did not invoke Chapter VII or authorize a UN presence in the country.<sup>110</sup> An interim administration was created at an international conference in Bonn on 5 December.<sup>111</sup> The Council endorsed the agreement the next day but again refrained from invoking Chapter VII.<sup>112</sup> The Bonn Agreement called on the United Nations to establish an international security force in Afghanistan and on 20 December the Security Council did so in Resolution 1386.<sup>113</sup> Invoking Chapter VII for the first time, it created an International Security Assistance Force (ISAF) “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas.”<sup>114</sup> The Council “called on” ISAF to “to work in close consultation with the Afghan Interim Authority” but also authorized member states contributing forces to ISAF to “take all necessary measures to fulfill its mandate.”<sup>115</sup> In October 2003, with the security situation in Afghanistan deteriorating, the Council extended ISAF’s mandate to cover areas outside Kabul.<sup>116</sup> The Council subsequently approved a multi-staged expansion of ISAF’s territorial authority until it covered the entire country in 2007.<sup>117</sup> Up until that point, security in the areas not under ISAF’s jurisdiction had been the province of the US-led coalition.

The Council’s involvement in the Afghan civilian administration similarly varied over time. The Bonn Agreement established an Interim Authority, headed by Hamid Karzai, to govern Afghanistan until an Emergency Loya Jurga could be convened within six months.<sup>118</sup> That body would govern “until such time as a fully representative government can be elected” which was to occur within two years.<sup>119</sup> The Bonn Agreement called for a significant UN role in the transition, and the Council fulfilled that request on 28 March 2002 by creating the United Nations Assistance Mission to Afghanistan (UNAMA).<sup>120</sup> But the Council did not invoke Chapter VII and UNAMA’s mandate did not include coercive authority to impose reforms; instead, the mission functioned to coordinate the many UN activities called for under the Bonn Agreement and to respond to assistance needs identified by the interim Afghan government and the international donor community.<sup>121</sup> Indeed, much development assistance for

<sup>109</sup> Some of the following description of post-conflict Afghanistan relies on the very useful summary in Grant T. Harris, “The Era of Multilateral Occupation” (2006) 24 *Berkeley Journal International Law* 1, 48–56.

<sup>110</sup> UNSC Res. 1378 (14 November 2001) UN Doc. S/RES/1378.

<sup>111</sup> “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions” (5 December 2001) UN Doc. S/2001/1154 (Bonn Agreement).

<sup>112</sup> UNSC Res. 1383 (6 December 2001) UN Doc. S/RES/1383.

<sup>113</sup> UNSC Res. 1386 (25 December 2001) UN Doc. S/RES/1386.

<sup>114</sup> UNSC Res. 1386 (25 December 2001) UN Doc. S/RES/1386 para. 4.

<sup>115</sup> UNSC Res. 1386 (25 December 2001) UN Doc. S/RES/1386 para. 5.

<sup>116</sup> UNSC Res 1510 (13 October 2003) UN Doc. S/RES/1510.

<sup>117</sup> UNSC Res 1776 (19 September 2007) UN Doc. S/RES/1776.

<sup>118</sup> Bonn Agreement (n. 111) s. 1.

<sup>119</sup> Bonn Agreement (n. 111) s. 1(4).

<sup>120</sup> UNSC Res. 1401 (28 March 2002) UN Doc. S/RES/1401.

<sup>121</sup> Report of the Secretary General, “The Situation in Afghanistan and its Implications for International Peace and Security” (2002) UN Doc. A/56/875–S/2002/278, 15–16.

Afghanistan, including responsibility for entire sectors, remained under the control of individual donor states. One source shows 17 states as development partners in the country.<sup>122</sup> Whether development assistance was bilateral, regional, or global in origin varied widely by the sector involved.<sup>123</sup>

Post-war Afghanistan thus presents a complex and overlapping set of external actors. The security sector was multilateralized but in geographical increments, with only portions of the country being subject to ISAF's Chapter VII mandate from 2002 to 2006. Authority over civilian affairs never passed to the UN but remained with the Afghan government working in cooperation with various UN agencies and other multilateral and bilateral donors. A uniform *jus post bellum* would have needed to take account these sectoral, geographical, and temporal variations among the international actors operating in the country.

### C. Iraq 2003

The 2003 occupation of Iraq presents the most complex interaction between unilateral and multilateral actors in a recent post-conflict state.<sup>124</sup> The United States initiated hostilities against Iraq in March 2003 and gained control of Baghdad in early April. On 8 May the newly-constituted occupation authority, the Coalition Provisional Authority (CPA), issued a proclamation announcing its plenary authority to govern Iraq.<sup>125</sup> At the same time, the United States, having defied an evident majority on the Security Council opposed to the intervention, returned to the Council to obtain a mandate giving it broad discretion for reform.<sup>126</sup> The outcome of that effort was critical in determining the identity and legal status of the actors in occupied Iraq. If the Council approved broad reforms via Chapter VII, the CPA would have operated under the aegis of that authorization, subject not to the more limiting principles of occupation law but only the four corners of the Council resolution. But if the Council did not authorize reform, and perhaps even affirmed the applicability of occupation law, the CPA would have operated within the confining limits of the conservationist principle. The nature of the actors, in other words, determined the law applicable to their actions.

<sup>122</sup> Agha Kahn Development Network, "International Development Partners in Afghanistan" <[www.akdn.org/afghanistan\\_partners.asp](http://www.akdn.org/afghanistan_partners.asp)> (accessed 5 July 2013).

<sup>123</sup> As Grant Harris recounts, "the US, Saudi Arabia, Japan, and the European Union (EU) established an Afghan Reconstruction Steering Group that also included the World Bank and Asian Development Bank. The US, France, and Britain began an extended program to create and train a national army, and Germany (with US assistance) initiated a similar program to establish a police force." Harris, "The Era of Multilateral Occupation" (n. 109) 52.

<sup>124</sup> Some of the discussion in this section parallels that in Fox, "The Occupation of Iraq" (n. 62).

<sup>125</sup> The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.

Coalition Provisional Authority Regulation No. 1 (16 May 2003) CPA/REG/16May2003/01 <[http://www.iraqcoalition.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority\\_.pdf](http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf)> (accessed 5 July 2013).

<sup>126</sup> Zwanenburg, "Existentialism in Iraq" (n. 62) 746–7.

The polarized and awkward politics of the immediate post-war period led to Resolution 1483, a study in political compromise and legal ambiguity.<sup>127</sup> On the one hand, the resolution affirmed that the US and UK were occupying powers subject to all the strictures of occupation law, in particular the Hague Regulations and the Fourth Geneva Convention.<sup>128</sup> It also called for a quick return to local governing authority, a request the Council reiterated in subsequent resolutions.<sup>129</sup> Neither assertion seems compatible with a multilateralization of the occupation with a broad reform mandate.<sup>130</sup>

On the other hand, Resolution 1483 called on the CPA, “consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.” Some have read this and other passages as effectively abrogating the conservationist principle by granting the CPA broad legislative authority.<sup>131</sup> Others oppose this view, arguing that such ambiguous language should not be read to support a radical departure from a core tenant of occupation law, and that when the Council has authorized domestic reforms in the past it has done so in clear and unmistakable terms.<sup>132</sup> Perhaps Marten Zwanenburg is correct that claims the Council authorized a transformative occupation in Resolution 1483 “are neither clearly corroborated nor clearly dismissed by an analysis of the resolution and the circumstances surrounding its adoption.”<sup>133</sup>

The existence (or not) of a reform mandate was not the only Council action contributing to a heterogeneity of actors in post-war Iraq. A series of actions across several resolutions resulted in a crazy-quilt of unilateral and multilateral mandates and entities:

- Resolution 1483 seemed to describe other states working with the US and UK as not qualifying as occupying powers.<sup>134</sup> If this is a correct reading, it implies

<sup>127</sup> UNSC Res. 1483 (22 May 2003). See Thomas D. Grant, “The Security Council and Iraq: An Incremental Practice” (2003) 97 *American Journal of International Law* 823, 824 (“The resolution bore the hallmarks of compromise throughout. Its salient overarching feature a blend of specificity and purposive vagueness, Resolution 1483 at once defined a mandate for action by the coalition, the United Nations, and other participants in Iraq—and left space for the mandate to evolve. It amounts in this respect as much to an invitation to further dialogue as to a detailed blueprint”).

<sup>128</sup> UNSC Res. 1483 (22 May 2003) para. 5 (calling on “all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”); see also UNSC Res. 1511 (16 October 2003) UN Doc. S/RES/1511, para. 1 (affirming CPA’s “specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483”).

<sup>129</sup> UNSC Res. 1483 (22 May 2003) UN Doc. S/RES/1483, preamble (“expressing resolve that the day when Iraqis govern themselves must come quickly”); UNSC Res. 1511 (16 October 2003) UN Doc. S/RES/1511, para. 6 (calling upon the CPA “to return governing responsibilities and authorities to the people of Iraq as soon as practicable”).

<sup>130</sup> See Fox, “The Occupation of Iraq” (n. 62) 258–62.

<sup>131</sup> See e.g. Nehal Bhuta, “The Antinomies of Transformative Occupation” (2005) 16 *European Journal of International Law* 721, 735–6.

<sup>132</sup> See Fox, “The Occupation of Iraq” (n. 62) 259–62.

<sup>133</sup> Zwanenburg, “Existentialism in Iraq” (n. 62) 767.

<sup>134</sup> Preambular paras 13 and 14 of the resolution provided:

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of



there may have been at least three bodies of law applicable to actors in Iraq: the Council's authorization for CPA-led reform, the law of occupation applicable to the US and UK (which 1483 and other resolutions specifically affirmed), and other regimes (perhaps human rights law, as the European Court of Human Rights later affirmed) applicable states cooperating with the CPA.

- In Resolution 1483 the Council urged the creation of an interim Iraqi administration during the occupation. On 13 July 2003 the CPA did so, announcing the creation of the Iraqi Governing Council (IGC). The IGC appeared to have the status of a partner: “the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council.”<sup>135</sup> Two months later, in Resolution 1511, the Council declared that the IGC “embodies the sovereignty of the State of Iraq during the transitional period.”<sup>136</sup> The Council's determination of the IGC's status was an act of legal fiat, since none of the other criteria typically employed by international law to determine the legitimacy of a governing regime seemed to apply. Indeed, the most venerable test for regime legitimacy—effective control—would have come to the opposite conclusion, since the IGC had virtually no independent authority of its own.<sup>137</sup> A central purpose of the conservationist principle is to preserve the prerogatives of the occupied state's *de jure* government. Presumably Resolution 1511 elevated the IGC to that status. But can a body that owes its status solely to the Chapter VII authority of the Security Council be subject to regulation (and protection) by occupation law? The IGC seemed to occupy an intermediate level between a national and international actor.
- In Resolution 1483 the Security Council requested the Secretary General to appoint a Special Representative (SRSG) to coordinate the work in Iraq of UN bodies, other international agencies and the CPA in a variety of areas.<sup>138</sup> The SRSG had no direct governing responsibilities; those remained with the CPA.<sup>139</sup> But as a representative of the United Nations, the SRSG was clearly not subordinate to the

the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “Authority”),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority

UNSC Res. 1483 (22 May 2003) UN Doc. S/RES/1483.

<sup>135</sup> Governing Council of Iraq, Coalition Provisional Authority Regulation No. 6 (13 July 2003) CPA/REG/13 July 2003/06, para. 2(1) <[http://www.iraqcoalition.org/regulations/20030713\\_CPAREG\\_6\\_Governing\\_Council\\_of\\_Iraq\\_pdf](http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_pdf)> (accessed 5 July 2013).

<sup>136</sup> UNSC Res. 1511 (16 October 2003) UN Doc. S/RES/1511, para. 4.

<sup>137</sup> Fox, “The Occupation of Iraq” (n. 62) 247–54.

<sup>138</sup> The Special Representative's “independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq” in nine separate areas. UNSC Res. 1483 (22 May 2003) UN Doc. S/RES/1483, para. 8.

<sup>139</sup> The SRSG “made clear the independence of his role and that the Coalition Provisional Authority, not the United Nations, was responsible for administering Iraq, for providing for the welfare of the people, and for restoring conditions of security and stability.” UN Secretary General, “Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483” (2003) UN Doc. S/2003/715, 22.

occupying powers or assimilated into their governing structure. He remained a multilateral actor, despite his limited influence on CPA policy.

- In August 2003 Security Council created the United Nations Assistance Mission for Iraq (UNAMI), to be headed by the SRSG.<sup>140</sup> Its role was to advise and assist Iraqi bodies on electoral reform and other areas. Like the SRSG, UNAMI was a multilateral actor but without a mandate to supervise the acts of either the CPA or local Iraqi institutions. Presumably for this reason the Council did not invoke Chapter VII when creating the mission.
- In Resolution 1511 the Security Council created a “multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>141</sup> While the Council urged member states to contribute to the force, the United States and Britain supplied over 90 percent of the foreign troops in Iraq.<sup>142</sup> The Council did not assert operational control over the force and did not grant it a Chapter VII mandate. US military commanders reported directly to the US Secretary of Defense and through him to the President of the United States.<sup>143</sup>
- The existence *vel non* of an occupation is normally a question of fact, focusing on a state’s control over foreign territory.<sup>144</sup> Such factual determinations trigger the application of the entire corpus of occupation law. But in Resolution 1546 the Security Council declared that “by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.”<sup>145</sup> As with the status of the IGC, the end of the Iraqi occupation involved the Council using its Chapter VII powers to interpret and apply law normally operating independently of Council action.

To recap, whether or not the Security Council authorized the CPA to engage in broad reforms in Iraq is an unresolved and perhaps unresolvable question. As a result, it remains unclear whether the CPA operated under occupation law or the terms of Resolution 1483. The Council removed the questions of whether the United States and United Kingdom were occupying powers and the question of when the occupation ended from the purview of occupation law by providing its own answers under Chapter VII. Further, it created three entities—the SRSG, UNAMI, and the multinational force—which were clearly not organs of the occupying states but which also had none of the independent coercive authority that Chapter VII might have provided. Finally, the CPA created the IGC and the Security Council declared it to be the repository of Iraqi sovereignty during a transitional period. The IGC thus appeared to be an Iraqi body, neither

<sup>140</sup> UNSC Res. 1500 (14 August 2003) UN Doc. S/RES/1500.

<sup>141</sup> UNSC Res. 1511 (16 October 2003) UN Doc. S/RES/1511, para. 13.

<sup>142</sup> In July 2004, 133,000 foreign soldiers were stationed in Iraq. US and UK troops constituted most of these, with 112,000 being American. BBC News, “Coalition Troops in Iraq” (20 July 2004) <news.bbc.co.uk/2/hi/middle\_east/3873359.stm> (accessed 5 July 2013).

<sup>143</sup> Elaine Halchin, “The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities” (CRS Report to Congress, Library of Congress 2004) 11 <fpc.state.gov/documents/organization/32338.pdf> (accessed 5 July 2013).

<sup>144</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2009) 42.

<sup>145</sup> UNSC Res. 1546 (8 June 2004) UN Doc. S/RES/1546, para. 2.

an appendage of the CPA nor an organ of the Security Council, but with virtually no independent authority to change Iraqi law.

#### D. Libya 2011

In early 2011 a growing uprising in Libya led to harsh reprisals by government forces that were widely condemned by states and IOs.<sup>146</sup> When Libyan President Muammar Gaddafi did not cease actions against rebels and their supporters, the Security Council passed Resolution 1970 on 26 February 2011, demanding an end to human rights violations and imposing various sanctions against regime leaders.<sup>147</sup>

The situation worsened in early March when Libyan government forces advanced on Benghazi, a rebel stronghold. President Gaddafi threatened brutal retaliation against rebels in the city. On 17 March the Council passed Resolution 1973, with five states abstaining including permanent members Russia and China. Invoking Chapter VII, the resolution imposed a no-fly zone on Libya and, critically, authorized “Member States that have notified the Secretary-General... to take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi.”<sup>148</sup> The Council specifically precluded a significant foreign troop presence in Libya by “excluding a foreign occupation force of any form on any part of Libyan territory.”<sup>149</sup> Almost immediately thereafter a coalition of western states, eventually succeeded by NATO, began a wide-ranging air campaign against Libyan government forces and installations. Bolstered by this close air support, the Libyan rebels gained territory throughout the summer and, shortly after President Gaddafi was captured and killed, the rebels declared victory on 23 October 2011.<sup>150</sup>

Even before the rebels’ victory their leaders requested UN assistance for a post-conflict transition.<sup>151</sup> On 16 September the Council responded by creating the United Nations Support Mission in Libya (UNSMIL).<sup>152</sup> The Council invoked Chapter VII but its mandate for UNSMIL emphasized local ownership rather than UN-led reform and embodied the same light-footprint approach it had applied to Afghanistan.<sup>153</sup> UNSMIL was authorized “to assist and support Libyan national efforts” to achieve a variety of goals, such as restoring security, promoting rule of law, undertake elections,

<sup>146</sup> Portions of this section parallel the discussion in Gregory H. Fox, “Regime Change” in Rüdiger Wolfrum (ed.), *Encyclopedia of Public International Law* (Max Planck Institute for Comparative Public Law and Public International Law 2013).

<sup>147</sup> UNSC Res. 1970 (26 February 2011) UN Doc. S/RES/1970.

<sup>148</sup> UNSC Res. 1973 (17 March 2011) UN Doc. S/RES/1973, para 4.

<sup>149</sup> UNSC Res. 1973 (17 March 2011) UN Doc. S/RES/1973, para 4.

<sup>150</sup> UN Secretary General, “Report of the Secretary-General on the United Nations Support Mission in Libya” (22 November 2011) UN Doc. S/2011/727 (November 2011 Report on Libya) para. 3.

<sup>151</sup> UN Secretary General, “Letter dated 7 September 2011 from the Secretary-General to the President of the Security Council” (7 September 2011) UN Doc. S/2011/542.

<sup>152</sup> UNSC Res. 2009 (16 September 2011) UN Doc. S/RES/2009.

<sup>153</sup> The preamble to Resolution 2009 emphasized that “national ownership and national responsibility are key to establishing sustainable peace and the primary responsibility of national authorities in identifying their priorities and strategies for post-conflict peace-building,” UNSC Res. 2009 (16 September 2011) UN Doc. S/RES/2009.

and protect human rights.<sup>154</sup> Leaders of the Libyan transition acted in accordance with this view of the UN as a supportive partner.<sup>155</sup>

Even though UNSMIL was charged with coordinating all UN reconstruction efforts in Libya, it did not occupy the field of external actors. Indeed, one of its responsibilities was to “coordinate support that may be requested from other multilateral and bilateral actors as appropriate,”<sup>156</sup> which it has done.<sup>157</sup> In his most recent report the Secretary General urged greater bilateral assistance to secure the Libyan transition.<sup>158</sup> As of this writing, the United States<sup>159</sup> and the United Kingdom<sup>160</sup> have made significant development commitments in a variety of sectors, while Jordan and Turkey are coordinating police training.<sup>161</sup> On 13 February 2013 a group of donor nations and international organizations outlined a joint plan for support in the security, justice, and rule of law sectors.<sup>162</sup>

Post-conflict Libya has a UN mission operating under Chapter VII but without a security or peacekeeping component. Its mandate is focused on political, legal, and economic reforms but it shares those functions with a number of bilateral actors whose presence alongside UNSMIL the Security Council has encouraged. But the Council has emphasized the importance of Libyans taking the lead in developing new institutions and policy preferences. Presumably for this reason none of the Council-authorized actions carry preemptive authority under Chapter VII.

## VIII. Conclusions

Much is to be gained by viewing *jus post bellum* as law rather than as a moral prescription or policy proposal. But to gain the benefits of normativity, the new regime, a set of primary rules must demonstrate adherence to more fundamental secondary rules. This chapter has argued that adherence to the secondary rule distinguishing unilateral from

<sup>154</sup> UNSC Res. 2009 (16 September 2011) UN Doc. S/RES/2009, para. 12.

<sup>155</sup> See UN Secretary General, November 2011 Report on Libya (n. 150) 3 (“While Libyan officials have made it clear that they see the United Nations as a key partner at this critical time in Libya’s post-conflict transition, they have also stressed the importance of full Libyan ownership of planning processes related to the rebuilding of Libya”).

<sup>156</sup> UNSC Res. 2009 (16 September 2011) UN Doc. S/RES/2009, para. 12(f).

<sup>157</sup> UN Secretary General, “Report of the Secretary-General on the United Nations Support Mission in Libya” (1 March 2012) UN Doc. S/2012/129, para. 88.

<sup>158</sup> UN Secretary General, “Report of the Secretary-General on the United Nations Support Mission in Libya” (30 August 2012) UN Doc. S/2012/675, para. 75 (“the ability to adequately respond to Libya’s priorities will require the active engagement of the Libyan authorities to consolidate and clarify their requests for assistance and a renewed commitment by the international community to coordinate bilateral interventions”).

<sup>159</sup> See Embassy of the United States, Tripoli, Libya, “US Partnerships in Libya” <libya.usembassy.gov/partnerships.html> (accessed 5 July 2013).

<sup>160</sup> See Rt Hon. William Hague, “Reaffirming the UK’s Commitment to Libya” (16 February 2012) <<http://www.gov.uk/government/news/reaffirming-the-uks-commitment-to-libya?view=News&id=731073982>> (accessed 5 July 2013).

<sup>161</sup> Frederic Wherey, “The Roots of Benghazi” (*The National Interest*, 30 November 2012) <<http://www.nationalinterest.org/commentary/the-roots-benghazi-7790>> (accessed 5 July 2013).

<sup>162</sup> French Ministry of Foreign Affairs, “International Ministerial Conference on Support to Libya in the Areas of Security, Justice and Rule of Law—Communiqué” (12 February 2013) <<http://www.diplomatie.gouv.fr/en/country-files/libya/events-7697/2013/article/international-ministerial>> (accessed 5 July 2013).

multilateral acts will be critical. The distinction permeates all three sets of primary rules applicable to post-conflict states—*ius ad bellum*, occupation law, and human rights law. It is difficult to imagine how a *ius post bellum* might realistically and coherently demonstrate that adherence.

The problem arises from the extraordinary diversity of actors in post-conflict states. Some post-conflict environments are binary, with actors operating either wholly unilaterally or wholly pursuant to a Chapter VII mandate. In others, a UN mission authorized under Chapter VII operates alongside unilateral national actors. But other post-conflict states present a kind of twilight zone. In one variation, some actors receive Chapter VII mandates but have no authority to supervene local actors or bilateral donors. In a second, some have Chapter VII authorizations that are limited topically or geographically. In a third, local actors are created by international actors. The cases of East Timor, Afghanistan, Iraq, and Libya provide examples of each of these configurations. The only binary case of the four was East Timor, where the Security Council granted UNTAET plenary power to legislate for the territory and govern during the transition. The other three cases present the extreme heterogeneity of both unilateral and multilateral actors with uncertain and perhaps even overlapping competencies.

The question in each case is whether an actor is subject to regulation by applicable state-centric legal regimes or whether those regimes have been superseded by the Council under Article 103 of the Charter. The answers in the binary cases are easy, though not promising for the efficacy of a uniform *ius post bellum*. The purely unilateral cases would be fully susceptible to a *ius post bellum* that followed the state-centrism of the existing regimes. The purely multilateral cases might be subject to state-centric norms that did not conflict with a Chapter VII prescription but those norms would yield wherever they conflicted with stated Council goals.

Such pure cases, however, are increasingly rare. The internationalization of post-conflict reconstruction has made the UN a constant presence in the aftermath of wars. Fewer and fewer occupations are conducted wholly without Security Council involvement. None of the four cases reviewed here is purely unilateral, even Iraq which is often seen as a solely American initiative. On the other hand, the full internationalization of a post-conflict territory last occurred in East Timor in 1999. The enormous political and logistical burdens inherent in such missions suggest that these too will become few and far between. That leaves the twilight zones.

In those cases, the possibility of a uniform *ius post bellum* adhering to the unilateral/multilateral distinction seems remote. Because the nature of each actor dictates the applicable law the result will be a patchwork of obligations following no necessary hierarchy. Either the law will retain its uniformity and yield to an inconsistent Chapter VII mandate, thereby leaving the multilateral actors unregulated or, recognizing the futility of this effort, regress to the state-centrism of existing norms. The Iraq occupation provides an example. If one believes the Security Council granted the CPA a Chapter VII reform mandate, its actions would not have been subject to the limits of the conservationist principle (despite the Council's repeated exhortations that occupation law be obeyed). The Council deemed other states working with the United States and United Kingdom not to be occupying powers, thereby removing them from the ambit of one set of norms for unilateral actors (occupation law) but not altering their

susceptibility to another (human rights law). The Iraqi Governing Council, though a creation of the CPA, was deemed to embody the sovereignty of Iraq by the Security Council. Its status may have been the result of a unilateral or multilateral act. UNAMI and the SRSG were multilateral actors with no coercive authority in their mandates, suggesting they could not transcend the limits of occupation law. But neither were they national actors and were likely not susceptible to occupation law in the first place. Finally, the multinational force created by Resolution 1511 had an “all necessary means” mandate, suggesting its authority flowed from the Council. But operationally the force had no ties to the United Nations; force commanders reported to London and Washington. The legal status of the force being ambiguous the applicable law was ambiguous at well.

One intellectually promising alternative is to abandon the idea of uniform obligations under state-centric law and hold international organizations only to those norms that, in any given case, they are capable of respecting. This approach would borrow the idea of Common but Differentiated Obligations from international environmental law. Because the principle has not entered customary international law, its prospects depend upon the unlikely emergence of new humanitarian law instruments or substantial revision of existing ones.

Perhaps *jus post bellum*'s ascent into law is premature. If the roles of individual states and the Security Council in post-conflict states can be harmonized then perhaps a more uniform body of norms can emerge that does require tailoring to the unique characteristics of each. At that point the division between the two might recede in importance. But for now it remains fundamental and *jus post bellum* cannot avoid reckoning with its implications.

# The Application of *Jus Post Bellum* in Non-International Armed Conflicts

Kristen E. Boon\*

## I. Introduction

*Jus post bellum*'s deep moral and legal associations with the humanitarian tradition have meant that predominant approaches to the concept have tended to focus on *international* wars and *international* actors at the expense of any deep exploration of what role *jus post bellum* might play in non-international or internal situations.<sup>1</sup> Now that non-international armed conflicts (NIACs) outnumber international armed conflicts (IACs) by a significant margin, some predict the line between IACs and NIACs will be erased altogether.<sup>2</sup> In light of this dissipating distinction, or even despite it, the central question posed in this contribution is: What role does and should *jus post bellum* play in cases of non-international conflicts?

From an empirical perspective, it is clear that *jus post bellum* practices are a regular feature of transitions from internal conflicts.<sup>3</sup> Peace agreements, transitional constitutions, and commitments made by non-state actors during ceasefires contain examples of core processes that are relevant to the *post bellum* of intrastate wars.<sup>4</sup> These sources create valuable indicators of *jus post bellum* norms that are credible, enforceable, and

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<sup>1</sup> Cf. Carsten Stahn, "Mapping the Discipline (s): Jus Post Bellum" (2007) 23 *American University International Law Review* 311 (who notes that *jus post bellum* rules should apply to national and international actors). See also Eric De Brabudere, "The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept" (2012) 43 *Vanderbilt Journal of International Law* 119 (discussing the role of international transitional administrations).

<sup>2</sup> As the International Committee of the Red Cross notes: "NIACs [remain] the predominant form of conflict. This has been generated primarily by state weakness that has left room for local militias and armed groups to operate, leading to environments where looting and trafficking, extortion and kidnapping have become profitable economic strategies sustained by violence and national, regional and international interests, with all the consequent suffering on civilians." International Committee of the Red Cross (ICRC), "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 31st International Conference of the Red Cross and Red Crescent" (ICRC 2011) 5–6. See also Jakob Kellenberger, "Grotius Lecture" 2012 American Society of International Law Annual Meeting (*Intercross*, 3 April 2012) <<http://intercrossblog.icrc.org/blog/kellenberger-grotius-lecture-asil-case-reason-vision-and-humanity>> (accessed 18 May 2013), who predicts that the distinction between IACs and NIACs will break down.

<sup>3</sup> Internal armed conflicts may also be non-international, however the reverse is not true: not all non-international armed conflicts are internal because they may have a cross-border element. For the purposes of this analysis, the terms non-international and intrastate are used interchangeably, while the use of the term internal follows the Conventions and Protocols.

<sup>4</sup> For an extensive analysis of these practices, see Jennifer Easterday, ch. 20 and Christine Bell, ch. 10, this volume.

complementary to the interstate orientation of *jus post bellum*. Nonetheless, at times there is a tension between the bottom-up process of creating *post bellum* peace agreements which might later be codified in constitutions, and the top-down norms found in international humanitarian, criminal, and human rights instruments. I argue that a “bounded discretion” approach should inform how to address these tensions, and that it will result in a more rudimentary set of norms applicable to the *jus post bellum* of non-international conflicts. When the top-down norms are strong, there should be great deference to local decision-making. However, if the norms found in international instruments do not address certain issues or themselves defer to local authorities, local decision-making processes should trump umbrella principles.

## II. International vs. Non-International Armed Conflicts: What is the Difference?

The scope of application of *jus post bellum* in intrastate situations generally might be situated with regards to two concepts: the definitions of “non-international” and “armed conflict.” While these international humanitarian law (IHL) categories are not technically determinative of how *jus post bellum* could be triggered for an intrastate conflict<sup>5</sup> because *jus post bellum* is broader than IHL, they are nonetheless, helpful indicators of the humanitarian principles applicable in internal conflicts. This, in turn, can inform the potential scope and content of *jus post bellum* in non-international conflicts.

With regards to the distinction between international and non-international, Common Article II to the Geneva Conventions states that the Conventions are applicable to: “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”<sup>6</sup> An IAC, consequently, involves the armed forces of different states. As the ICRC writes: “an international armed conflict occurs when one or more states have recourse to armed force against another state, regardless of the reasons or the intensity of this confrontation.”<sup>7</sup>

A NIAC, in contrast, will have at least one non-state armed group as an opposing side, or even two such groups alone.<sup>8</sup> The ICRC gives as recent examples of NIACs the

<sup>5</sup> For example, in most situations, human rights law would apply whether or not an “armed conflict” were deemed to exist, and many accounts of the contents of a *jus post bellum* draw heavily on human rights principles. For a comprehensive analysis of the triggers for the application of human rights law, and the relationship between human rights and international humanitarian law, see Oona Hathaway et al., “The Relationship Between Humanitarian Law and Human Rights Law” (2012) 96 *Minnesota Law Review* 1883.

<sup>6</sup> See e.g. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, Art. 2, which states, “In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

<sup>7</sup> ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” (2008) ICRC Opinion Paper, 1.

<sup>8</sup> The Manual on the Law of Non-International Armed Conflict makes this clear: “[NIACs] do not include conflicts in which two or more states are engaged against each other. Nor do they encompass conflicts extending to the territory of two or more states.” Michael N. Schmitt, Charles H.B. Garraway, and Yoram Dinstein, “The Manual on the Law of Non-International Armed Conflict with Commentary” (2006)



2012 conflict in northern Mali and fighting in Syria between armed groups and Syrian government forces.<sup>9</sup> The scope of application of international humanitarian law is narrower in a NIAC than an IAC. At a minimum, parties must apply Common Article III of the Geneva Conventions, which sets forth rules that include humane treatment of all persons taking no active part in the hostilities, and a prohibition on outrages upon personal dignity.<sup>10</sup> But many would now agree that because a majority of the provisions of *jus in bello* are considered to be customary international law,<sup>11</sup> they are applicable to both internal and international conflicts.<sup>12</sup>

A second definition of importance is “armed conflict.” The ICRC has elaborated on Article 2, stating in its commentaries that “any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict [...].”<sup>13</sup> The mutual acknowledgment of the conflict, its duration, and the number of casualties or destruction are irrelevant.<sup>14</sup> This term was included in the Geneva Conventions to protect humanitarian interests by preventing states from contending that their hostile acts were police enforcement or legitimate acts of self-defense, as opposed to war.<sup>15</sup>

In the intrastate context, however, armed conflict has a more nuanced definition in order to distinguish it from less serious forms of violence like protests or rebellions. There are consequently two accepted criteria for identifying “armed conflict” in a NIAC: “(1) a protracted conflict, and (2) the organization of the parties to the conflict, which helps to distinguish an armed conflict ‘from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international

*International Institute of Humanitarian Law* 2. See also Sonja Boelaert-Suominen, who noted that “[t]he definition of armed conflict suggested by the Appeals Chamber covers not only the classic examples of (a) an armed conflict between two or more states and (b) a civil war between a state on the one hand, and a non-state entity on the other. It clearly encompasses a third situation, (c) an armed conflict in which no government party is involved, because two or more non-state entities are fighting each other,” quoted in Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2012) 119.

<sup>9</sup> ICRC, “Internal conflicts or other situations of violence—what is the difference for victims?” (International Committee of the Red Cross, 10 December 2012) <<http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>> (accessed 18 May 2013).

<sup>10</sup> For a comprehensive analysis of the scope of Art. III, see Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (n. 8) 25.

<sup>11</sup> See generally, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules and Volume II, Practice* (Cambridge University Press 2005).

<sup>12</sup> See Emily Crawford, “Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflict” (2011) Sydney Law School Legal Studies Research Paper No. 11/28, 31–2 (“Indeed, of the 161 customary rules of international humanitarian law as determined by the ICRC study, 17 rules are solely applicable in international armed conflicts, and only 6 rules are solely applicable in non-international armed conflicts. To put this in a somewhat rudimentary statistical context, of the 161 customary rules of IHL, 138 rules—or 85% of rules—are uniformly applicable in all armed conflicts, regardless of origin or characterization”).

<sup>13</sup> Jean S. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field* (ICRC 1952) 20–1.

<sup>14</sup> Pictet, *Commentary on the Geneva Convention* (n. 13) 20–1. See also “Qualification of armed conflicts” (Rule of Law in Armed Conflicts Project, 13 June 2012) <[http://www.geneva-academy.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.geneva-academy.ch/RULAC/qualification_of_armed_conflict.php)> (accessed 18 May 2013), stating “Thus, it is generally agreed that a single incident involving the armed forces of two states may be sufficient to be considered an international armed conflict.”

<sup>15</sup> Natasha Balendra, “Defining Armed Conflict” (2008) 29 *Cardozo Law Review* 2470 (citing Pictet, *Commentary on the Geneva Convention* (n. 13)).

humanitarian law.’<sup>16</sup> As a result, in a NIAC, hostilities must reach a minimum level of intensity<sup>17</sup> and the forces must be under a certain command structure and have the capacity to sustain military operations.<sup>18</sup> There are limits to the applicability of this test to be sure, particularly with regards to their relevance to terrorism or violence committed by drug cartels,<sup>19</sup> but they give us a starting point for understanding the legal geography of the intrastate *post bellum*.

### III. Minimizing the Distinction between International and Non-International Armed Conflict and Implications for *Jus Post Bellum*

The distinction between IACs and NIACs is historically rooted in state sovereignty: the dichotomy limits situations in which others can interfere in a state’s internal affairs. Indeed, when the Geneva Conventions were concluded, only states were considered to be subjects of international law, and non-state actors like rebel groups or international organizations has no role to play in the development of applicable rules.<sup>20</sup> Nonetheless, in the last 50 years, this distinction has come under fire. As I will show below, this minimization has consequences for the scope of application of *jus post bellum* as well.

The border between intra and interstate conflict was first called into question with the creation of the additional protocols to the Geneva Conventions, which create greater protections for civilians in internal situations. Protocol I to the Geneva Conventions provides, inter alia, a set of rules concerning the obligation to discriminate between military and civilian targets and defines *international* conflicts as including internal matters, such as “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right

<sup>16</sup> *Prosecutor v. Boškoski & Tarčulovski* (Judgment) ICTY-04-82 (10 July 2008) para. 175 (citing *Prosecutor v. Tadić*, (Judgment) ICTY-94-1 (7 May 1997) para. 561). See also International Law Association, “Final Report on the Meaning of Armed Conflict in International Law” (Report, International Law Association 2010).

<sup>17</sup> Although most commentators note the analysis is heavily dependent on the facts, the test has evolved to apply in reference to the entire period of hostilities, with courts focusing on the seriousness of the armed clashes, the mobilization of troops, the kind of weaponry used, the destruction of property, and the existence of casualties. See Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (n. 8) 129 discussing the *Milosević* and *Limaj* judgments.

<sup>18</sup> When the ICTY evaluated the Kosovo Liberation Army (KLA), it considered whether the KLA was an organized military force on the basis of its official joint command structure, headquarters, designated zones of operation, and its ability to procure, transport, and distribute arms. *Prosecutor v. Slobodan Milosević* (Trial Chamber Decision) ICTY-02-54 (16 June 2004) para. 23. Similarly, the *Limaj* Trial Chamber focused on the role of the General Staff as governing body of the KLA, and the KLA’s ability to recruit, train, and equip new members. See *Prosecutor v. Limaj et al.* (Judgment) ICTY-03-66 (30 November 2005) para. 90. See generally, ICRC, “How is the Term ‘Armed Conflict’ Defined?” (n. 7) 3.

<sup>19</sup> See e.g. Monika Hakimi, “A Functional Approach to Targeting and Detention” (2012) 110 *Michigan Law Review* 1374 (arguing that the armed conflict test fails to resolve whether a conflict exists in these contexts). See also Laurie R. Blank and Geoffrey S. Corn, “Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition” (2013) 46 *Vanderbilt Journal of Transnational Law* (forthcoming) (criticizing the increasingly legalistic approach to the elements test, and noting how some situations are not being designated as armed conflicts, despite the totality of the facts and circumstances).

<sup>20</sup> See generally, Alfred P. Rubin, “The Status of Rebels under the Geneva Conventions of 1949” (1972) 12 *International and Comparative Law Quarterly* 472.

of self-determination.”<sup>21</sup> Protocol II develops and expands upon Common Article III, and applies specifically to internal conflicts like civil wars.<sup>22</sup> These protocols represented watershed moments: for one of the first times, states agreed that internal matters should become the subject of international agreements.<sup>23</sup> Moreover, the Protocols have high ratification rates, with 172 states party to Protocol I and 166 states party to Protocol II.<sup>24</sup> The ICRC’s Study on the Geneva Conventions takes the position that of the 161 provisions of the Geneva Conventions that are now customary international law, 141 apply to internal situations,<sup>25</sup> and in so doing, extends the application of core IHL provisions beyond their historical context.<sup>26</sup>

A second way in which the distinction between the international and internal has been minimized involves international criminal law. Beginning with the creation of the international criminal tribunals for Yugoslavia and Rwanda, the Security Council contemplated that individuals could be charged for war crimes under international law in certain cases, even if the conflict was non-international.<sup>27</sup> The Rome Statute furthered this trend, making actionable crimes against humanity committed in internal situations pursuant to Article 7 of the Court’s Statute, and War Crimes, pursuant to Articles 8(c) and (e).<sup>28</sup> International criminal tribunals have now interpreted and reinterpreted humanitarian law provisions, “putting flesh on the bare bones of conventional provisions.”<sup>29</sup> As a result, the jurisprudence of international courts and tribunals has blurred the relevance of the internal/international divide, extending, in notable instances, protections to individuals caught in internal wars, and applying obligations to non-state actors that are parties to conflicts.

A third, yet fundamental way in which the treatment of international and intra-state conflicts has converged is the application of human rights obligations to internal conflicts. Unlike IHL, which is triggered by the existence of an armed conflict, human rights law is applicable within the territories of states that have ratified relevant

<sup>21</sup> Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

<sup>22</sup> Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

<sup>23</sup> Igor P. Blishchenko, “Adoption of the 1977 Additional Protocols” (1977) 320 *International Review of the Red Cross* 509.

<sup>24</sup> A list of state signatories is available at <<http://www.icrc.org/ihl.nsf/INTRO/470>> and <<http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument>> (accessed 26 June 2013).

<sup>25</sup> Jean-Marie Henckaerts, “Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict” (2005) 87 *International Review of the Red Cross* 175.

<sup>26</sup> See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n. 11).

<sup>27</sup> Beth Van Schaack and Ronald C. Slye, *International Criminal Law and Its Enforcement: Cases and Materials* (2nd edn, Foundation Press 2012) 215–16. (In both circumstances, the tribunals envisioned violations of Common Article 3 and Protocol II as war crimes).

<sup>28</sup> Although both provisions are subject to the following proviso: “they [apply] to armed conflicts not of an international character and thus [do] not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” See generally Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (n. 8) 159–85, on the concept of non-international armed conflict under the Rome Statute.

<sup>29</sup> Sandesh Sivakumaran, “Re-envisioning the International Law of Internal Armed Conflict” (2011) 22 *European Journal of International Law* 219.

treaties.<sup>30</sup> There is also a growing consensus that human rights obligations apply abroad wherever a state exercises “effective control” over territory or individuals outside its borders.<sup>31</sup> The ICJ addressed extraterritorial application of human rights and the relationship generally between IHL and human rights in the *Wall* decision, where it confirmed that human rights apply even in times of armed conflict.<sup>32</sup> This finding has been reinforced by state practice and by the jurisprudence of other international tribunals, which have generally followed the directive to apply human rights and IHL in tandem.<sup>33</sup> Although there are instances in which the substantive obligations between these two bodies conflict, for example human rights law protects the right to life whereas IHL authorizes the use of force against human targets, in most instances human rights and IHL can coexist.<sup>34</sup> As a result, there has been a “humanization” of international humanitarian law on the one hand, and an extension of human rights obligations to extraterritorial situations on the other, creating a much broader range of protections than was once thought possible.<sup>35</sup>

Finally, the nature of warfare itself has changed, meaning that it is exceedingly difficult to neatly categorize wars as either internal or international.<sup>36</sup> Battlefields are no longer traditional, internal conflicts often have international elements, and non-state actors are playing a much more significant role.<sup>37</sup> International organizations such as the United Nations and the World Bank, which are often active in post-conflict situations, must abide by customary international law and other treaties to which they are a party.<sup>38</sup> Similarly, rebels, belligerents, insurgents, and even national liberation movements are today considered to be holders of rights and obligations in internal conflict situations.<sup>39</sup>

<sup>30</sup> See e.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (“[I]n accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”). See also, Hathaway et al., “The Relationship Between Humanitarian Law and Human Rights Law” (n. 5) on the position of the United States with regards to the effective control standard in the human rights context.

<sup>31</sup> Hathaway et al., “The Relationship Between Humanitarian Law and Human Rights Law” (n. 5) 1893.

<sup>32</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep. 136 [106].

<sup>33</sup> Sivakumaran, “Re-envisaging the International Law of Internal Armed Conflict” (n. 29) 234.

<sup>34</sup> The exceptions would be if a state derogates from human rights obligations due to a state of emergency as per Art. 4 of the ICCPR, or if there is a conflict between IHL and human rights law. In the latter case, sometimes human rights law will be displaced as *lex specialis*. See Michael Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Operation” (2005) 99 *American Journal of International Law* 119.

<sup>35</sup> Theodor Meron, “The Humanization of Humanitarian Law” (2000) 94 *American Journal of International Law* 239.

<sup>36</sup> See generally, James Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict” (Report, ICRC 2003) <[www.icrc.org/eng/assets/files/other/irrc\\_850\\_stewart.pdf](http://www.icrc.org/eng/assets/files/other/irrc_850_stewart.pdf)> (accessed 24 June 2013).

<sup>37</sup> Hersch Lauterpacht and Elihu Lauterpacht (eds), *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press 1970) 136.

<sup>38</sup> Although the UN is not bound by IHL, it is well known that it has committed to implement it in practice. See Secretary General’s Bulletin, “Observance by United Nations Forces of International Humanitarian Law” (1999) UN Doc. ST/SGB/1999/13.

<sup>39</sup> Andrew Clapham, “Human Rights Obligations of Non- state Actors in Conflict Situations” (2006) 88 *International Review Of the Red Cross* 863 (who also notes that some such groups seek out this status as it gives them a certain degree of recognition on the international plane).

The minimization of the distinction between NIACs and IACs under IHL and human rights law might be used as support for the creation of a unified set of *jus post bellum* principles that would apply regardless of the nature of the conflict.<sup>40</sup> For example, some take the position that because the protection of human beings are at stake, *jus post bellum* should be seen as containing a universal principle: namely the pursuit of stable peace.<sup>41</sup> In my view, such an expansive scope may be problematic where it applies to institution building and reconstruction. I make the case for a set of *jus post bellum* principles applicable to NIACs which would coincide with those applicable in IACs in areas governed by international humanitarian law, criminal law, and human rights, but which would differ with regards to rebuilding, reconstruction, and constitutional design. I argue that a narrower set of principles in these latter domains will improve the effectiveness and legitimacy of *jus post bellum* in the long run, and is justified by the principle of “bounded discretion.”

#### IV. Limitations to *Jus Post Bellum* in Situations of NIAC

The end to intra-state conflicts often involves the writing of new constitutions and the creation of new institutions of government.<sup>42</sup> Indeed, in order to ensure a stable peace, it is often suggested that fundamental changes will be required where existing institutions, either by design, incapacity, or neglect, created instability in the first place. Some accounts of *jus post bellum* consequently advocate regime change, rule of law reform, or institution building driven in small or large ways, by interested states, the international community, and/or the UN and its platforms such as the Peacebuilding Commission.<sup>43</sup> This has led to observation that peacebuilding operates as an “outside-in” process driven by international actors and embodying international norms.<sup>44</sup>

There are, however, frequently tensions between the international norms and the domestic realities that lie at the heart of conflict and instability. Many societies cannot “absorb” massive democratic transitions in the early post-war period,<sup>45</sup> and international actors are often overly ambitious in regards to what can be achieved during peacekeeping missions.<sup>46</sup> References to international obligations are thus frequently

<sup>40</sup> Cf. Inger Österdahl, ch. 11, this volume.

<sup>41</sup> Crawford, “Unequal Before the Law” (n. 12) 41.

<sup>42</sup> Bell, for example, describes the traditional approach to intra-state conflict as follows: “In more classic intra-state conflict, negotiations of an end to fighting often required agreement over the post-settlement political and legal institutions: the negotiation of a formal indefinite ceasefire requires the negotiation of some sort of constitutional road-map containing commitments relating to self-determination, inclusion, government, constitutional structure, return of displaced persons.” Christine Bell, ch. 10, this volume.

<sup>43</sup> See e.g. the chapters in this volume by Larry May, ch. 1, who discusses rebuilding generally, and Dieter Fleck, ch. 3, who addresses reform of the security sector. Bell, however, notes that there is little support for an overarching obligation to rebuild, but that in practice, re-construction and intervention post international conflict, take place as a matter of course. Bell, ch. 10, this volume.

<sup>44</sup> Timothy Donais, “Haiti and the Dilemmas of Local Ownership” (2008) 64 *International Journal* 753.

<sup>45</sup> International Peace Institute, “Peacekeeping Operations and the Durability of Peace: What Works and What Does Not?” (Note, International Peace Institute 2013) 3, quoting Nicholas Sambanis (who also notes that externally-promoted democratization may sometimes generate violence and backtracking in war-to-peace transitions).

<sup>46</sup> International Peace Institute, “Peacekeeping Operations and the Durability of Peace” (n. 45) 8 (noting that the UN and international actors have taken on tasks that they are unlikely to fulfill in peacekeeping contexts).

paired with refrains for local ownership.<sup>47</sup> An alternative vision has thus developed which views the process of peacebuilding as contestation—meaning that the sustainable peace is derived from contestation by a wide range of actors, both international and local alike, who together “define, refine, and shape” an understanding of what peacebuilding entails, and the processes by which it is enacted.<sup>48</sup>

This contestation justifies an approach of “bounded discretion.”<sup>49</sup> By this I mean that principles of *jus post bellum* should be used to encourage the participation of local stakeholders, and shore up legitimate outcomes by providing support to the development of transitional instruments and structures, but not the substance of the reconstruction. There is, therefore, a distinction to be drawn between substance and process: it may not be appropriate to invoke and apply the same set of substantive norms following international and non-international conflicts where reconstruction and rebuilding are at issue.<sup>50</sup> Nonetheless, *jus post bellum* will be essential in supporting the process of reconstruction.

There are two principles that support the concept of “bounded discretion”: subsidiarity and margin of appreciation. Subsidiarity is based on a concept of multi-level governance, in that it advocates that the most appropriate level of governance should be chosen for exercising a particular power. It has been described as a “structural principle in international human rights law,”<sup>51</sup> and justified on economic grounds as an approach that “enables economic agents to discover the regulation best suited to their needs in both formal and substantial terms.”<sup>52</sup> But its most important characteristic is that it expresses a preference for governance at the most local level in order to achieve a government’s stated purposes.<sup>53</sup> In this way, it advances the values of accountability, self-determination, and diversity, which are central to the enterprise of *jus post bellum*.<sup>54</sup>

<sup>47</sup> An example in this regard is the Report of the Secretary General on peacebuilding in the immediate aftermath of conflict of 11 June 2009 (UN Doc. A/63/881), which notes both that “building peace is primarily the responsibility of national actors” and “only national actors can address their society’s needs and goals in a sustainable way,” while stating “the international community can play a critical role” and “the support of the United Nations intergovernmental bodies, individual Member states, and other international stakeholders has proven to be crucial in the immediate aftermath of conflict when counterproductive behavior by even one actor can be very damaging [...]”

<sup>48</sup> Donais, “Haiti and the Dilemmas of Local Ownership” (n. 44) 758. See also Bell, ch. 10, this volume, who argues that international law should “hold open spaces of negotiation and *contestation* about the outcomes of transition” (emphasis added).

<sup>49</sup> Cf. Easterday, ch. 20, this volume, who suggests that constitutional peace agreements have different actors, but many of the same goals, namely to “create new institutions, governance structures and try to foster new social mores based on constitutionalism, created with the aim to foster sustainable peace.”

<sup>50</sup> Although an exception to this rule would arise where *jus cogens* norms, such as the prohibition against genocide, are violated as these might trigger collective action.

<sup>51</sup> Paolo G. Carozza, “Subsidiarity as a Structural Principles of International Human Rights Law” (2003) 33 *American Journal of International Law* 40.

<sup>52</sup> Aurelian Portuese, “The Principle of Subsidiarity as a Principle of Economic Efficiency” (2010) 17 *Columbia Journal of European Law* 238.

<sup>53</sup> George A. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Union and United States” (1994) 94 *Columbia Law Review* 331.

<sup>54</sup> Bermann, “Taking Subsidiarity Seriously” (n. 53) 343 (arguing that subsidiarity advances the values of self-determination and accountability, political liberty, flexibility, preservation of identities, diversity, and respect for internal divisions of component states). Compare with Kristen Boon, “Obligations of the New Occupier: The Contours of a Jus Post Bellum” (2008) 31 *Loyola of Los Angeles International and Comparative Law Review* 101.

Margin of appreciation, in contrast, refers to a jurisprudential doctrine that is based on the premise that “each society is entitled to a certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions.”<sup>55</sup> It operates as a constraint on international courts, directing them not to review national decisions *de novo*, in deference to the discretion and independent evaluation already exercised by national authorities.<sup>56</sup> More to the point, it also applies directly to international norms themselves, where those norms are unsettled or provide limited conduct-guidance.<sup>57</sup> As such, it emphasizes process over substance in areas of legal uncertainty, in order to preserve the prerogative of states in areas of their reserve domain.

Both the margin of appreciation and doctrine of subsidiarity reflect a general position of deference (or “room for manoeuvre”<sup>58</sup>) to local communities because they are often positioned to reach a result that will be credible and enforceable within that context. Nonetheless, these doctrines do not detract from the “universal” nature of the norms, nor do they permit states to contract around inviolable protections enshrined in the Geneva Conventions, human rights conventions or instruments of international criminal law. As such, they recognize that certain norms are non-negotiable. Where international criminal law, human rights law, or criminal law inform the content of *jus post bellum*, the rules should be the same regardless of the nature of the conflict. This will be particularly relevant where local decision-makers attempt to subvert international norms that safeguard minority rights.<sup>59</sup>

In the many areas where these three bodies of law say little about reconstruction, rebuilding and institutional design, however, or where those instruments themselves defer to local authorities, process should trump substance. Here, the theorization of *jus post bellum* will benefit from a pluralistic approach. As Nehal Bhuta argues:

the international order permits the coexistence of a considerable plurality of forms of political legitimization—although the conduct of governments within polities is subject to certain universal norms such as human rights law and international criminal law. [...] Successful constitution-making—when it coincides with state-making—requires the coordination of socially and political powerful groups who have the capacity to legitimate the relationship of supremacy and subordination which is essential to an effective state order. On this understanding, there is little place for internationally-prescribed rules which encode specific forms of legitimacy (such as liberal democratic forms). [...] [O]ne of the virtues of international law in these situations is its (relative) agnosticism towards different modes of legitimization.<sup>60</sup>

<sup>55</sup> Eyal Benvenisti, “Margin of Appreciation, Consensus and Universal Standards” (1998) 31 *New York University Journal of International Law and Politics* 843.

<sup>56</sup> Yuval Shany, “Towards a General Margin of Appreciation Doctrine in International Law?” 16 *European Journal of International Law* 911.

<sup>57</sup> Shany, “Towards a General Margin of Appreciation Doctrine in International Law?” (n. 55) 911.

<sup>58</sup> Steven Greer, “The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation” (2010) 3 *UCL Human Rights Review* 1.

<sup>59</sup> Benvenisti, “Margin of Appreciation, Consensus and Universal Standards” (n. 55).

<sup>60</sup> Nehal Bhuta, “New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation” (2010) 60 *University of Toronto Law School* 805.

## V. Conclusion

The principles and processes applicable to internal peace processes are inherently context-specific and complex. They often represent micro-bargains on cultural questions, including the creation of new institutions, the ethnic balance within these constitutions, and the role for civil society in peace negotiations and in future structures of governance.<sup>61</sup> Drawing on the practice of peace agreements and post-conflict institution making, I have argued that “bounded discretion” would limit the potential set of substantive principles that might apply in the *jus post bellum* applicable to NIACs.

The distinction I have drawn between non-international and international conflicts and specifically the contention that *jus post bellum* should be more limited in NIACs might be challenged on the ground that state sovereignty is not so important that certain principles would not apply unless international borders are involved. This case is particularly strong if one views *jus post bellum* principles as primarily moral, rather than as legally binding at this stage of their development.<sup>62</sup> The strength of the case for an umbrella set of *jus post bellum* principles applicable to IACs and NIACs alike depends on how the crux of the enterprise is viewed. To the extent they draw from IHL and human rights law, the analysis above demonstrates that the distinctions would be minimal. When *jus post bellum* tranches on rebuilding, however, more is at stake: specifically, the freedom of states to choose their own constitutional order and to react to specific situations on the ground.

The great difference in post-conflict contexts, including social differentiation, economic development, the type of conflict, and the nature of the actors involved means that it might be preferable for actors involved in reconstruction to have a certain degree of freedom of approach.<sup>63</sup> Indeed, in situations where reform is inherently political or involves striking consensus amongst a wide degree of actors, some discretion will be useful in tailoring governance to the context in question. Specifically, in the context of NIACs, *jus post bellum* offers an opportunity to develop norms that anticipate the role of non-state armed groups in post-conflict contexts. By working from the ground up, we can build on established practices while striving for better compliance. A circumscribed set of principles will be more effective than a broad array of commitments.<sup>64</sup>

<sup>61</sup> Christine Bell, “Post-Conflict Accountability and the Reshaping of Human Rights and Humanitarian Law” in Orna Ben-Naftali (ed.), *International Humanitarian Law and Human Rights Law* (Oxford University Press 2011) 229–30; see also Easterday, ch. 20, this volume (arguing that peace agreements can serve as a useful framework for *jus post bellum*, because they can go further than the law and address issues that are critical for a holistic approach to the transition to peace).

<sup>62</sup> Larry May, *After War Ends* (Cambridge University Press 2012) 5.

<sup>63</sup> See Matthew Saul, ch. 23, this volume, discussing elections in Sierra Leone.

<sup>64</sup> Sivakumaran, “Re-envisaging the International Law of Internal Armed Conflict” (n. 29) 122 (“although more holistic commitments are perhaps of greater appeal to the international community, commitments to abide by particular rules may have a greater influence in practice”).



# Post-War States: Differentiating Patterns of Peace

*Astri Suhrke\**

## I. Introduction

The very first principle of the Organization for Economic Cooperation and Development (OECD) Paris Declaration in 2007 on international aid to fragile states (hereinafter “OECD Declaration”) proclaims that the local context must be the starting point.<sup>1</sup> Yet there have been few efforts to systematize what kinds of contexts donors confront when they seek to stabilize or develop countries emerging from civil war or other kinds of post-conflict situations. In some cases, the state is weak and violence remains widespread. In other cases, the state is strong and able to impose a new order, although vindictive against those associated with the defeated belligerent party. International involvement will also differ. As aid actors establish themselves, they become a part of the “local” context, sometimes taking a fairly direct role in rebuilding the political, legal, and economic structure of the post-war state. At other times the international footprint is light. As the OECD Declaration recognizes, such differences must be taken into account in the design of appropriate policies for economic reconstruction, state-building, and peacebuilding.

This chapter examines some principal differences in post-war situations that affect efforts to rebuild a state and society after armed conflict, and suggests some implications for the development of law.

The term “war” rather than “armed conflict” will be used, although the choice here has little substantive significance. As both the qualitative and the quantitative social science literature recognize, the boundary lines between war and peace are fluid.<sup>2</sup> Nevertheless, “war” is usually defined by a certain level of violence (1,000 battle-related deaths per year is a common threshold in quantitative analysis), in addition to an evident measure of organization and collective purpose on the part of the belligerents.<sup>3</sup> In legal analysis, the term “armed conflict” is defined by similar criteria of intensity, organization, and purpose.<sup>4</sup> Post-war violence as used in this chapter consequently denotes violence

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<sup>1</sup> Organization for Economic Co-operation and Development (OECD), “Principles for Good International Engagement in Fragile States and Situations” (April 2007). The OECD Declaration has ten principles.

<sup>2</sup> Nicholas Sambanis, “What Is Civil War? Conceptual and Empirical Complexities of an Operational Definition” (2004) 48 *Journal of Conflict Resolution* 814; David Keen, “War and Peace: What’s the Difference?” (2000) 7 *International Peacekeeping* 1.

<sup>3</sup> Nils Petter Gleditsch et al., “Armed Conflict 1946–2001: A New Dataset” (2002) 39 *Journal of Peace Research* 615.

<sup>4</sup> ILA, “Use of Force, Final Report on the Meaning of Armed Conflict in International Law, Presented to the Hague Conference 2010” (International Law Association 2010) <<http://www.ila-hq.org/download.cfm/>

below the threshold of war in terms of intensity, purpose, and organization. The last item applies in this case only to non-state actors. The use of physical violence or threats of such by state agents clearly emanates from an organized entity (the state), and is a not uncommon form of post-war violence. It does not qualify as “war” unless the other party fights back with a measure of organizational coherence and collective purpose.

The term “post-war state” suggests the period is defined by what preceded it in time—the war—but says nothing about how long the period will last. Markers that denote a transition from an unusual to a normal state of affairs are often used in the case of Germany and Japan after the Second World War. The end of allied occupation, membership in international organizations and rapid economic growth during the early 1950s are commonly taken as signs that the post-war period ended. Since contemporary war-torn countries are rarely occupied, economic progress and political stability are often used as markers.<sup>5</sup> Quantitative studies often use a cut-off point of one five-year period, as in the now-classical study by Archer and Gartner.<sup>6</sup>

## II. The International Peacebuilding Regime

The international peacebuilding regime that emerged after the end of the Cold War had by the turn of the century produced a relatively standardized package of international assistance for post-conflict peacebuilding and, with it, an associated body of policy norms and “best practices.” The accumulated body of knowledge, including codification in the form of policy guidelines, declarations, and program recommendations, was the product of the major institutions that formed the peacebuilding regime—the United Nations (UN), the international financial institutions (IFIs), the major Western powers and their allies, a host of transnational aid and humanitarian organizations, and outside scholars whose policy-related work serviced these agencies or the aid recipients.

Internationally assisted peacebuilding was thus by the early 2000s regulated and guided in many ways. The activity was divided according to commonly accepted sector areas. The main ones were: (i) security sector reform (demobilization and reintegration of soldiers, reform of the police, legal reform and strengthening of the formal justice sector, increasingly also informal legal mechanisms); (ii) “good governance” (elections, public sector reform, including better local government, anti-corruption measures); (iii) human rights (rights-based development programs, transitional justice initiatives); (iv) economic reconstruction (reducing the role of the state in the economy, rebuilding infrastructure); and (v) social services (rebuilding and strengthening health and education). On the country level, elaborate and often multiple mechanisms of coordination among donors tried to streamline assistance and align aid programs with consensus-based objectives. In recent years, several guidelines and recommendations in this area

[docid/2176DC63-D268-4133-8989A664754F9F87](https://doi.org/10.1017/docid/2176DC63-D268-4133-8989A664754F9F87)> (accessed 11 July 2013). The authors note the similarity to criteria used in the Uppsala data set, a standard data set used by political scientists, including Gleditsch et al., “Armed Conflict 1946–2001” (n. 3) fn. 2.

<sup>5</sup> Mats Berdal, *Building Peace after War* (International Institute of Strategic Studies 2009) 20–4.

<sup>6</sup> Dane Archer and Rosemary Gartner, “Violent Acts and Violent Times” (1976) 41 *American Sociological Review* 937.

have been inspired by the OECD's Declaration of 2007 that sets out principles for donor assistance in conflict-affected states.<sup>7</sup>

The OECD principles are framed in quite general language (e.g. "focus on state-building"), but are accompanied by texts that provide more detailed guidelines for aid policy. The composite text is a principal tool for coordinating and monitoring donor activity. The OECD Declaration has generated a continuous organizational discourse on aid in fragile states as well as subsequent additions and reinterpretations. The most recent are the guidelines developed by OECD members in cooperation with governments that receive aid for state or peacebuilding purposes, the so-called New Deal adopted at OECD's high-level meeting in Busan (South Korea) in 2011 (hereinafter "the 2011 Declaration").<sup>8</sup> The 2011 Declaration emphasizes that local ownership is the only way out of state fragility, and that national governments consequently must have a role in formulating the criteria for developing and evaluating aid programs for purposes of state-and peacebuilding. The criteria adopted at the Busan meeting were progress toward legitimate politics, greater national revenue collection, and provision of security, justice, and social services. The UN Secretariat had earlier underscored the importance of local ownership as a critical norm for post-conflict reconstruction in the Secretary General's 2009 report on peacebuilding.<sup>9</sup> Summarizing the consensus in the international aid community at the time, the report concluded that peacebuilding would not succeed unless the process was supported, or "owned," by the local parties concerned.

The underlying concept of state-society relations that underpinned the norms and practices of this peacebuilding regime was an idealized version of the Western state and a free market economy. Its key components were liberal democratic institutions, a lean but effective state, and a large private sector as the engine of growth. The prominence of these values was hardly surprising given the hegemony of Western political paradigms after the collapse of the Soviet Union and, with it, the ideology of state socialism. The post-Cold War dominant norms were written into the sudden rush of peace agreements in the 1990s that terminated wars that belonged to the Cold War era, as well as agreements that terminated the new wars that erupted afterwards.<sup>10</sup> Most

<sup>7</sup> The ten OECD principles are: 1. Take context as the starting point; 2. Do no harm; 3. Focus on state-building as the central objective; 4. Prioritize prevention [of renewed conflict]; 5. Recognize the links between political, security and development objectives; 6. Promote non-discrimination as a basis for inclusive and stable societies; 7. Align with local priorities in different ways in different contexts; 8. Agree on practical coordination mechanisms between international actors; 9. Act fast [...] but stay engaged long enough to give success a chance; 10. Avoid pockets of exclusion [fragile states that receive little aid/attention]. OECD, "Principles for Good International Engagement in Fragile States and Situations" (n. 1).

<sup>8</sup> OECD, "A New Deal for Engagement in Fragile States" (International Dialogue on Peacebuilding and Statebuilding 2011) <<http://www.newdeal4peace.org/>> (accessed 17 June 2013).

<sup>9</sup> UN Secretary General, "Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict" (11 June 2009) UN Doc. A/63/881-S/2009/304.

<sup>10</sup> A detailed study of 27 agreements in the period 1990–2006 prepared for the World Bank and UNDP found that a significant majority (70 percent) had at least one provision related to public administration and governance. Similarly, 81 percent had provisions relating to economic reconstruction and management. Provisions covering macro-economic policies, financial, business, investment, and labor regulatory frameworks and regional wealth allocations were more common in the agreements concluded towards the end of the period. Almost all agreements (85 percent) had at least one justice-related provision, and slightly over half (59 percent) had at least one justice-related provision other than general reference to human rights. Astri Suhrke, Torunn Wimpelmann, and Marcia Dawes, "Peace Processes and Statebuilding: Economic and

of these agreements were mediated by the UN, the major powers and the IFIs were in many cases closely involved as well. Heavy IFI involvement in post-war reconstruction reinforced the market orientation of the reforms. As a result, post-war assistance for reconstruction and peacebuilding typically entailed reforms promoting economic and political liberalism that collectively came to be known as “the liberal peace.” The term reflected the underlying assumption that political democracy was associated with peace and the market economy with prosperity. From Mozambique to Bosnia and Afghanistan, competitive political structures such as elections were introduced, the state was slimmed down, and the post-war economy was structured to encourage market forces and fiscal stability.

### III. Implications for Norms and Practice

From the perspective of the development of law, the emergence of a powerful international peacebuilding regime as outlined above raises several questions. First, there is a distinct possibility that the development of law will privilege the interests of the most powerful relevant actors. What are now mainly norms for post-war reconstruction would likely be further entrenched. As Roxana Vatanparast points out in Chapter 8 of this book, this might lead to legitimization of neo-colonial projects through law. Her point is echoed in the critical body of literature on peacebuilding.<sup>11</sup>

The critical literature on “the liberal peace” also raises issues of substance. As Roland Paris laid out in an early comprehensive analysis, the problem is that both the market and liberal democracy are based on competitive institutions and norms. When introduced into post-war societies that typically are divided by the legacy of past strife, lacking strong institutions, and often plagued by continuing violence, the result is likely to be renewed conflict.<sup>12</sup> Subsequent experience has partly confirmed this thesis. Elections in fragile states, particularly if held soon after a peace agreement, are likely to generate violence designed to influence the outcome (as in Afghanistan in 2005), harden existing divisions among hostile factions (as in Bosnia and Herzegovina in 1996), or encourage massive fraud (Afghanistan in 2009). On the other hand, elections are also an opportunity to “manage political competition through non-violent rule-bound procedures and institutions.”<sup>13</sup> Elections can be a decisive element in moving conflicts from the military to the political arena and for that reason are often included in peace agreements that terminate civil wars. For instance, two quite different peace agreements, concluded in different historical contexts—the General Peace Agreement in Mozambique (1992)

Institutional Provisions of Peace Agreements” (Report, Chr. Michelsen Institute 2007) <<http://www.cmi.no/publications/publication/?2689>> (accessed 17 June 2013).

<sup>11</sup> David Chandler, *International Statebuilding. The Rise of Post-Liberal Governance* (Routledge 2010); Mark R. Duffield, *Development, Security and Unending War: Governing the World of Peoples* (Polity 2007), Roger Mac Ginty and Oliver Richmond, “Myth or Reality: Opposing Views on the Liberal Peace and Post-War Reconstruction” in Roger Mac Ginty and Oliver Richmond (eds), *The Liberal Peace and Post-War Reconstruction* (Routledge 2009); Shahrbanou Tadsjibakhsh (ed.), *Rethinking the Liberal Peace* (Routledge 2011).

<sup>12</sup> Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge University Press 2004).

<sup>13</sup> Timothy D. Sisk, “Elections in Fragile States. Between Voice and Violence” (2008) (International Studies Association Annual Meeting, San Francisco, March 2008) <[http://www.humansecuritygateway.com/documents/ISA\\_electionsinfragilestates.pdf](http://www.humansecuritygateway.com/documents/ISA_electionsinfragilestates.pdf)> (accessed 17 June 2013) 1.

and the Comprehensive Peace Agreement in Nepal (2006)—both had detailed provisions for post-war elections. In both cases, the opportunity to participate in free and fair elections was a major incentive for the rebels to lay down arms and sign the agreement. Whether elections will generate conflict or political negotiations thus depend heavily on context. A rule-bound commitment to post-war elections could well prove counter-productive, as the OECD 2007 Declaration recognizes in its opening emphasis to take context as the starting point for assistance.

Similar considerations apply to transitional justice. The UN Secretary General has in recent years repeatedly affirmed that the UN cannot support peace agreements that promise amnesties for actions considered crimes under the Rome Statute of the International Criminal Court (genocide, crimes against humanity, and war crimes) as well as gross violations of human rights.<sup>14</sup> In other words, there is a presumption that accountability mechanisms for past crimes and human rights violations of this kind should at least be possible. About half of the peace agreements concluded between 1990 and 2006 did have one or more provisions for transitional justice.<sup>15</sup> There are many good reasons why transitional justice in the form of prosecution or truth commissions should be pursued, as the UN maintains, but there are also considerations that counsel caution. While it is expected and often claimed that accountability mechanisms will strengthen rule of law and thereby peace and democracy, the statistical evidence does not support this view.<sup>16</sup> The case-study literature has documented difficult trade-offs and significant costs in terms of social and political conflict.<sup>17</sup> A legal obligation to institute transitional justice mechanisms, e.g. by mandating provisions to this effect in peace agreements approved by the UN Security Council, would deny the importance of context.

When it comes to economic liberalization—a cornerstone of “the liberal peace”—there is less ambiguity. In countries where the pre-war state controlled a large part of the economy, early liberalization in the form of privatization as a rule leads to corruption, organized crime, inequality, conflict, and human rights violations. The negative consequences of rapid privatization driven by donors and the IFIs have been documented in post-war situations as diverse as Cambodia, Mozambique, Angola, and Bosnia.<sup>18</sup> The reforms enabled well-positioned individuals and factions to capture the process and its dividends, with clearly negative social effects.

<sup>14</sup> See e.g. UN Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General to the Security Council” UN Doc. S/2011/634 (12 October 2011). See also an earlier version of the same title, UN Doc. S/2004/616 (23 August 2004) para. 10.

<sup>15</sup> Fourteen of the 27 agreements cited in Suhrke et al., “Peace Processes and Statebuilding” (n. 10).

<sup>16</sup> Elin Skaar, “Does Transitional Justice Promote Reconciliation?” (2012) 1 *Transitional Justice Review* 54; Oskar Thoms, James Ron, and Roland Paris, “The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners” (2008) The Center for International Policy Working Paper <[http://aix1.uottawa.ca/~rparis/CIPS\\_Transitional\\_Justice\\_April2008.pdf](http://aix1.uottawa.ca/~rparis/CIPS_Transitional_Justice_April2008.pdf)> (accessed 17 June 2013).

<sup>17</sup> Elin Skaar and Astri Suhrke (eds), “Special Issue: Drivers of Justice” (2013) 31 *Nordic Journal of Human Rights* 117.

<sup>18</sup> Christopher Cramer, “Trajectories of Accumulation through War and Peace” in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting Contradictions of Postwar Operations* (Routledge, 2009); Michael Pugh, “Transformation in the Political Economy of Bosnia since Dayton” (2005) 11 *International Peacekeeping* 448.

In sum, the complex workings and uncertain consequences of reforms typically promoted as part of “the liberal peace” are a warning against their uniform imposition in post-war situations. Lending such reforms the status of legal principles appropriate to post-war situations increases the likelihood that they will indeed be imposed.

A related concern is the widespread assumption in the international peacebuilding community that there is one predominant type of post-war state. The OECD Declaration, while starting out by emphasizing context (“Take context as the starting point”), quickly proceeds to a general principle that contradicts the importance of context (“Focus on state-building as the central objective”). The importance of statebuilding in the OECD discourse and the peacebuilding literature, and the very term “fragile state,” suggest there is one kind of post-war state. This state is endowed with certain generic features that predispose the state (as an agent) and society towards disorder and violence. In this understanding, the weak state permits or colludes with criminal elements generated by the war-time economy, cannot deal with ex-combatants that need to be demobilized, demilitarized and reintegrated, is unwilling or unable to establish institutions of justice and political accountability, fails to run an effective public administration, and fails to provide basic social services. This may be the model type of post-war state, but there are others as well, as we shall see below. A norm that takes statebuilding as its central objective, based on the assumption that the post-war state is fragile or weak, risks the adverse consequences that come with wrong diagnosis.

A wrong diagnosis obscures the problem. In some post-war situations, the source of social disorder and violence is not a weak state, but a strong state that seeks to inflict its vision of the post-war society on the population as a whole, and with particular vengeance on people associated with the defeated enemy. State sanctions in this case may take the form of subtle violence (intimidation and fear), as well as physical coercion. The post-war state in Rwanda after the genocide in 1994 is a case in point. In this case, the appropriate peacebuilding strategy would have focused on taming rather than building the state.

Even in situations when the state is weak, the task of (re)building the post-war state may be so long-term and difficult that other strategies are more realistic. Recognizing these constraints, recent scholarship on peacebuilding has focused on ways to create political order and provide services with minimal state involvement. A measure of “governance without the state” can in some cases be achieved by relying on traditional institutions (e.g. of justice), public-private partnerships, community policing, civil society, and so on.<sup>19</sup> This approach can offer faster and better solutions in some areas than the general rule to “focus on statebuilding as the central objective,” as the OECD principle claims.

Certain post-war situations, moreover, have more of a functioning state than what meets the eye, particularly if the viewer is conditioned to expect a weak or imploded state apparatus. In East Timor, for instance, the UN agencies that moved in after the violent end to Indonesian rule in 1999 assumed that after a long period of colonial

<sup>19</sup> Anne L. Clunan and Harold A. Trinkunas (eds), *Ungoverned Spaces. Alternatives to State Authority in an Era of Softened Sovereignty* (Stanford University Press 2010); Thomas Risse (ed.), *Governance without a State?* (Columbia University Press 2011).

rulers, who had departed, East Timor was a political, legal, and administrative *terra nullius*. They consequently assumed direct rule through a de facto trusteeship (the UN Transitional Administration of East Timor, UNTAET), much to the chagrin of the long-established and relatively well-organized Timorese independence movement. The neglect created tensions that only later were addressed by including the Timorese in the governing structure.<sup>20</sup> Similarly, in Afghanistan after 2001, the Western powers acted as if there was no extant Afghan law relevant to the new order, and proceeded to import US and Italian law with little regard for the well-known problems of legal transplants, as well as the fact that the country had a comprehensive Civil Code and Penal code assembled in the late 1970s by a modernizing president.<sup>21</sup> The transplant was part of a larger agenda of statebuilding, married to the impulse of Westernized reforms. The effects were mostly negative, as the new laws were ignored or became magnets of criticism among the Afghans.

#### IV. Post-War States

To gain a better understanding of the diversity of post-war situations, the following analysis constructs four main types based on the nature and role of the state and its consequences for post-war violence. The typology is based on historical cases, two older ones that belong to previous historical eras (the Spanish and the US civil wars), and the others from contemporary, post-Cold War period.<sup>22</sup>

##### A. Victor's peace

Spain under General Franco is the prototype of what can be called a victor's peace. This state emerged from what appeared to all parties as a totalizing civil war over the nature and structure of society. During the war itself (1936–39), the Nationalist forces under General Franco had systematically repressed or eliminated the Republican forces and their supporters as they advanced. After the Republican forces were decisively defeated, the Franco regime launched systematic purges—significantly called *limpieza* (cleansing)—to rid society of threats to the new order and its foundational principles. The new order embodied a vision of Spanish society, and Franco's state was the main instrument of creation. This post-war state, then, was strong, purposeful, and effective, using violence, threats, or sanctions to attain its objectives. With the rest of Europe on the eve of what became the Second World War, Franco could operate without international constraint and with considerable support from the Axis powers. This “victor's peace” meant a repressive, violent peace in the same sense that a “victor's justice” means the denial of justice.

<sup>20</sup> James Fox and Dionisio Babo-Soares (eds), *Out of the Ashes: Destruction and Reconstruction of East Timor* (Australian National University Press 2003).

<sup>21</sup> Michael E. Hartmann and Agnieszka Klonowiecka-Milart, “Lost in Translation: Legal Transplants without Consensus-Based Adaptation” in Whit Mason (ed.), *The Rule of Law in Afghanistan* (Cambridge University Press 2011).

<sup>22</sup> For a further discussion, see Astri Suhrke, “The Peace in Between” in Astri Suhrke and Mats Berdal (eds), *The Peace in Between: Post-War Violence and Peacebuilding* (Routledge 2012) 1–38.

The violence orchestrated by Franco's state, with the support of the army, the clergy, and the landed propertied class, was directed against particular civilian segments such as trade unions, "reds," and professionals.<sup>23</sup> The terminology and practice of violence reflected a view of social conflict as absolute. The *we/they* distinction was laced with normative connotations of good and evil, permitting no compromise. Violence was most intense in the first post-war decade, when it took the form of systematic purges, mass imprisonment, and executions, but continued until Franco's death in 1974. Post-war violence can be said to have outlasted the post-war period, as defined by conventional markers. The regime also used indirect violence by regulating access to basic necessities (ration cards, employment, medical care, and food in detention centers) so as to weaken "the enemy" and reward regime supporters.

There are few contemporary cases of a victor's peace, mainly because of greater international attention to post-war peacebuilding as well as early mediation that encourages compromise and peace agreements rather than total defeat and total victory. Nevertheless, Rwanda after the genocide in 1994 comes close.<sup>24</sup> Post-genocide Rwanda has all the parameters of the Spanish case. The Rwandan case also has two unique features that set it apart from other contemporary post-war environments. First is the enormity of the genocide itself and the logic of total social conflict that it expressed. The victim-turned-victor (the Rwandan Patriotic Front) subsequently resorted to targeted violence, followed by more subtle means of control to instill fear and silence among the ethnic "other." The second distinguishing feature is the relative passivity in the international community towards the violence committed by the new Rwandan government. International human rights organizations reported violence within Rwanda and the UN issued investigative reports on the killings in neighboring DRC, but governments were long silent. As in post-war Spain, Rwandan sovereignty was in effect unconstrained. International passivity reflected reluctance to sanction a government that represented genocide victims, as well as the paralyzing memory of UN failure to prevent the massacres despite having been present on the ground with a peacekeeping force when the killings started.<sup>25</sup>

## B. Loser's peace

The loser's peace is the mirror image of the victor's peace. While the latter signifies a violent consolidation of the post-war order, the former denotes violence unleashed to sabotage the new order. In this case, the party that lost the war retains the power to obstruct and sabotage and, if successful, can block the implementation of the post-war order in territory under its control. This happened in the ex-Confederate states of the United States during the post-civil war period known as Reconstruction (1865–77).

<sup>23</sup> Michael Richards, "Violence and the Post-Conflict State in Historical Perspective: Spain, 1936–48" in Suhrke and Berdal (eds), *The Peace in Between* (n. 22)

<sup>24</sup> Jean-Paul Chrétien and Richard Banégas (eds), *The Recurring Great Lakes Crisis: Identity, Violence and Power* (Columbia University Press 2011). Trine Eide, "Violence, Denial and Fear in Post-Genocide Rwanda" in Suhrke and Berdal (eds), *The Peace in Between* (n. 22).

<sup>25</sup> Howard Adelman and Astri Suhrke (eds), *The Path of a Genocide* (Transaction Publishers 1999).



As in the victor's peace, the purpose of the violence—in this case unleashed by “the losers” in the civil war—was primarily political (to influence the post-war political order), but there were other important dimensions as well.<sup>26</sup> Violent constraints on the mobility of blacks served to keep the cost of labor down, and violence along racial lines reinforced identity boundaries that were particularly important for poor whites. As in Franco's Spain, violence was targeted against particular social segments and political groups, often couched in the language of “cleansing.”

While the state is the major agent of violence in the victor's peace, the loser by necessity relies more on vigilante-type violence—or asymmetrical warfare in contemporary terminology. In the post-*bellum* Southern states, vigilante and paramilitary violence was backed, or initiated, by local elites and local political and law enforcement authorities as the “redeemers” increasingly won political office.

In the absence of international restraints, the only external limitation on violence came from the federal authorities. Yet federal troops stationed in the South during the period under consideration were far too few to prevent violence in a far-flung territory. Moreover, vigilante groups were careful not to provide a pretext for more direct intervention by attacking the troops or other symbols of Federal power directly. The other federal agency with a specific justice-related mandate in the South was the Federal Freedman's Bureau, originally established by President Abraham Lincoln to help refugees from the civil war and freed slaves. The Bureau maintained a record of human rights abuses, murders, and lynching, but could not prevent massive and sustained human rights abuse against blacks and their white sympathizers. Arguably, the minimal presence and *de facto* permissiveness of the federal state was a significant enabling condition of the violence characteristic of the loser's peace. A hundred years later, it will be recalled, the deployment of federal troops to the South dramatically demonstrated the federal government's commitment to enforce civil rights and helped change the situation.

A full-blown case of the loser's peace is difficult to find in contemporary post-war environments, but some elements are recognizable. The pattern of violence in post-war Guatemala suggests powerful forces seeking to obstruct the sweeping reforms envisaged in the 1996 peace agreement.<sup>27</sup> Yet it was a distinctly contemporary form of loser's peace in that it was based on an internationally mediated compromise to end the war and the post-war period showed the imprint of international constraints.

The Guatemalan war ended with no clear winners and losers. The armed forces, however, were set to lose in institutional and ideological terms. The peace agreement called for drastic cuts in the numbers and budgets for the military. Paramilitary forces would be disbanded and military intelligence services closed down. Politically, the peace accords endorsed principles of social justice, indigenous rights, human rights, and democratic participation—principles that the military had fought against during the long war as threats to the integrity of the state and the very fabric of the nation.

<sup>26</sup> Michael Beaton, “Reconstruction and Violence in the Post-Bellum American South 1865–77” in Suhrke and Bernal (eds), *The Peace in Between* (n. 22).

<sup>27</sup> John-Andrew McNeish and Oscar Lopez Rivera, “The Multiple Forms of Violence in Post-War Guatemala” in Suhrke and Bernal (eds), *The Peace in Between* (n. 22).

As a result, elements in the military used threats, political manipulation, and violence to obstruct the implementation of the peace agreement. Most famously, ex-military formed the core of the “hidden powers”—an amorphous structure of networks with links deep into organized crime as well as the state administration, the economic elite, and the political establishment. Operating through groups with names such as *The Syndicate*, the “hidden powers” resembled a conventional mafia that used violence to maximize profits and worked with organized crime in a wide range of illegal operations.<sup>28</sup>

The “hidden powers” became a synonym for an invisible hand that appeared to facilitate the staggering level and variety of violence in post-war Guatemala. The “hidden powers” also had vested interests in a dysfunctional police and court system. The police investigated only a fraction of the approximately 5,000 murders annually in the immediate post-war years. Fewer arrests were made and the judiciary was impotent. With general impunity for crimes of all kinds, violence seemed to have developed into a social norm.

The fact that the key structures behind this violence were hidden, operating outside the formal political process and not seeking to “redeem” the past by challenging the principles of the peace agreement, sets post-war Guatemala apart from the Loser’s Peace modeled on the US Civil War. What mainly compelled the “hidden powers” to stay hidden was international pressure. After the end of the Cold War, Guatemala’s military had gradually lost favor with its powerful North American patron. Its appalling human rights record was internationally condemned. The peace agreement principles for a new and better post-war order were endorsed by the United Nations, which also established a large human rights verification mission on the ground two years before the final peace agreement was signed and maintained the mission for a decade.

### C. Divided peace

Afghanistan arguably was in a post-war phase for a period from late 2001, when the US-led intervention removed the Taliban regime, until early 2005 when mounting clashes between the US-led forces and a revived insurgency produced a *de facto* state of renewed war in much of the country. In the intervening years, there was violence, but it was low-level and scattered, and thus below a reasonable assessment of war according to criteria of intensity, organization, and purpose as discussed above.

What caused this divided and low-level violent condition? The post-war period opened without an agreement among the nominal victors on the substantive provisions for the new order or an authoritative distribution of power, only a schedule for a competitive process to settle these matters.<sup>29</sup> Military power was fragmented with numerous armed groups and factions on the winning side. The result was a ferocious conflict among the victors over access to economic rents, political power, and—the grand prize—control of the state. On the local level, new strongmen supported by Kabul and

<sup>28</sup> Susan C. Peacock and Adriana Beltrán, “Hidden Powers in Post-Conflict Guatemala: Illegal Armed Groups and the Forces Behind Them” (Report, Washington Office on Latin America 2003).

<sup>29</sup> This section draws on chs 1–3 of Astri Suhrke, *When More Is Less. The International Project in Afghanistan* (Hurst & Co and Columbia University Press 2011).

the international forces moved in to displace, harass, and kill factions that had been aligned with the Taliban, adding another level of violence and laying the foundation for a revived insurgency.

The power struggle within the winning coalition was fought in many arenas, sometimes with overt violence and almost always against the backdrop of threats of violence. The central government and the local strongmen struggled for control over revenue, territory, and formal state power. Sometimes local rivals fought pitched battles (in the North); at other times US military force was used in support of the government to settle scores (in Herat). Military strongmen organized or facilitated violent riots to demonstrate their power *vis-à-vis* competing factions (in Kabul and the provinces). By the time of the parliamentary elections in 2005, some types of “armed politics” had become less visible due to co-optation, the UN disarmament program, diversification of rent-seeking opportunities, and political alignments.<sup>30</sup> Meanwhile, the Taliban were recovering and regrouping to fight the new government and the international forces. Despite the targeted nature of the violence, the mounting warfare caused significant death and damage among civilians.

The intense, post-war struggle for power among the anti-Taliban factions made it difficult to recreate a central state that had been practically demolished over the past almost 25 years of revolutionary strife, foreign invasion, civil war, and deliberate neglect. While the major Western states and the UN were committed in principle to establishing an effective and representative Afghan state, the parallel “war on terror” fought by US-led forces on Afghan soil had profoundly distorting effects. The international community represented in Afghanistan was divided over whether to prioritize fighting the war or consolidating the peace, and consequently in their willingness to pressure Afghan parties to disarm and reform. More directly, the US and some of its allies armed and paid Afghan commanders to participate in the war, thereby strengthening armed factions and their reliance on violence to maintain themselves. The UN disarmament program, as a result, was slow and incomplete.

The post-war Afghan government, then, was a loose coalition of armed, or partially disarmed, competing factions and internationally supported technocrats. Collectively they lacked both capacity and incentives to create an effective and accountable state that could have constrained violence. Removing a local strongman who abused his power, for instance, or prosecuting an official involved in land-grabbing at gunpoint, was very difficult; a person with the capacity to inflict serious harm on others usually also had political protection higher up, often because he was useful in the war. Except for the poor and the powerless, impunity prevailed.

A small international “security assistance” force (ISAF) was deployed to the capital, Kabul, where it helped deter open fighting and at least one planned military coup. However, the mission lacked the political support even to start addressing the security and order problems that plagued the immediate post-war period, including violence associated with the factional struggles for power and the drug economy, illegal confiscation of land, harassment and forced displacement of ethnic minorities, and the

<sup>30</sup> Antonio Giustozzi, “Armed Politics in Afghanistan” in Suhrke and Berdal (eds), *The Peace in Between* (n. 22).

everyday human rights violations committed by local strongmen and government officials against the population.

In sum, the key factors that structured the divided peace of the immediate post-Taliban order were defined by the contradictions of the transition. The political bargain reached in Bonn was inconclusive and did not reflect the balance of power on the ground, the parties to the bargain retained a capacity for armed action, the central state was weak yet strongly contested, and the international intervention that had brought about the post-war state was inextricably linked to continued warfare in ways that sharpened political conflict and encouraged impunity for everyday violence. Even discounting the legacy of nearly 25 years of violent strife and displacement, these conditions formed an environment ripe for multifaceted and multidirectional violence. The potential for violence was not only embedded in the unresolved struggle among the victors. Local points of tension, such as disputes over land that in more benign environments could have been defused or restrained by relevant authorities, were joined to the broader conflict of the transition and allowed to run a violent course.

#### **D. Pacified peace**

Liberia, by contrast, demonstrates a relatively peaceful post-war situation. Two important factors helped to define this post-war trajectory. First, peace negotiations involved all the relevant Liberian parties and in important respects reflected the military balance on the ground. Second, the UN and the major regional organization, the Economic Community of West African States (ECOWAS), established an international presence in the country that was massive relative to Liberia's small size and population and had one overarching focus—the need to end the violence, implement the peace agreement, and establish at least a minimally effective and accountable state.<sup>31</sup>

When the final Comprehensive Peace Agreement was signed in 2003, the Liberian civil war had lasted for more than a decade, interspersed with short periods of relative calm, several abortive cease-fires and inconclusive negotiations. The protagonists were largely mobilized on ethnic/tribal grounds, with a changing list of rebel groups fighting the government forces. The decisive break in the war came when the United States and neighboring Guinea shifted their support from the government forces of Charles Taylor to rebel groups, enabling the main rebel group to gain control of about 80 percent of the country in 2002. Pressured by international forces, Taylor sued for peace in an agreement that led to his exile (and later arraignment before the Special Court for Sierra Leone), but included other members of the government as well as the principal rebel groups in a transitional administration. The transitional administration established by the peace agreement was extraordinarily inclusive, with the factional distribution of 21 government departments, 22 public corporations, and 22 autonomous agencies specified in the agreement. The transitional bargain held until the 2005 elections, when several former rebel commanders and faction leaders transited into the political arena through election or appointment by the new president, Ellen Johnson Sirleaf, an internationally supported technocrat.

<sup>31</sup> Torunn Wimpelmann Chaudhary, "The Political Economies of Violence in Post-War Liberia" in Suhrke and Berdal (eds), *The Peace in Between* (n. 22).

The political transition was supported by a huge international presence. The UN had authorized advance deployment of 3,500 ECOWAS troops to constrain the parties shortly before the peace agreement was signed. It was followed by a UN peacekeeping force of 15,000 troops, around 1,100 police (including armed police) and 250 military observers. For a country with a population just over three million and the size of Portugal, it meant a dense presence of soldiers with a broad mandate to maintain order and security, including providing security at government installations, ensuring freedom of movement, supporting the safe return of refugees and IDPs, and “protect[ing] civilians under imminent threat of physical violence” in areas around UN troops (Res. 1509/2003). The United Nations Mission in Liberia (UNMIL) also supervised the disarmament and demobilization of rebel forces. The program started immediately and, despite some snags, had by early 2005 completed the process for around 100,000 soldiers—just in time for the elections. Meanwhile, the army was restructured under the auspices of the United States.

The political bargain and UN-supervised disarmament of the rebels provided a reasonably stable framework for the post-war environment that limited politically oriented and other forms of collective violence. This was so even in the absence of an effective and accountable Liberian state, which was much more difficult to establish.<sup>32</sup> Institutions of justice and order, in particular the police, remained weak, creating concern about crime, gangs, and vigilante justice, such as lynching.

Liberia, then, was demilitarized and to that extent “pacified” by international forces in a way that Afghanistan obviously was not. This does not mean that a “Liberian solution” in terms of a heavier international presence from the outset would have reduced post-war violence in Afghanistan. The international presence helped constrain post-war violence in Liberia for several reasons: the internationals had one common objective—making and consolidating peace in Liberia, which was part of a larger regional conflict complex; the local parties were amenable to negotiations; and Liberia was a small country where a favorable ratio of peacekeepers to population and territory was within the financial reach of the UN. None of these conditions existed in Afghanistan.

## E. The international context

How do we explain these different trajectories of war-to-peace transitions and consequent violence? As the above cases show, key factors are (i) the political bargain and balance of power on the ground at the time of the peace settlement; (ii) the political-normative framework for the new post-war order; and (iii) the presence or absence of institutions for managing violence, including, importantly, international forces and agencies. The importance of the international context is evident in all cases, and is of particular relevance in a discussion of the development of *jus post bellum* law.

<sup>32</sup> A joint WB/UNDP mission to Liberia in 2009 uttered a sign of despair. Despite the huge international investment and a national leader recognized for her integrity, cooperation and will to reform, the mission found that the results were deeply disappointing. The country was at peace, but the state remained fragile. “It is even possible that the unspoken overall goal of the aid community, i.e. reconstituting Liberia as a functioning Weberian state, is not attainable.” World Bank and UNDP, *Report of the Technical Mission to Liberia on State Building in Fragile and Post-Conflict Contexts* (Washington, D.C.: World Bank, 2009) 17.

The importance of the international context is brought out by the sharp difference between the older cases (post-civil war Spain and the United States), and the contemporary cases unfolding within the framework of an active and at times intrusive international peacebuilding regime. Thus, international pressures constrained a certain kind of violence in post-war Guatemala (but certainly not all kinds), and extinguished or deterred most post-war violence in Liberia. Yet, as the Afghan case shows, international presence can also complicate and generate local violence.

In general, international peace operations have built-in contradictions between the objectives of autonomous local development and aid agency interests in short-term control. Large, international peace operations tend to undermine the development of effective and legitimate state power and institutions of justice that can defuse tension, address sources of conflict, and restrain violence. On the other hand, a pervasive international presence in post-war environments has increased the awareness and monitoring of violence and thereby exposed those responsible to potential counter-intervention. The rapid expansion of the human rights regimes during the past two decades in particular has greatly increased the capacity to monitor violations, advocate political, legal or educational intervention, and support local human rights organizations. Since the Rwandan genocide—where the UN system failed spectacularly—human rights field missions under the High Commissioner for Human Rights are routinely included in all UN peace operations.

The presence of armed international peacekeepers can be an effective constraint on some kinds of local violence, as statistical studies indicate.<sup>33</sup> Yet much depends upon the type and strength of the presence. Some peacekeepers may resemble US federal troops in the post-*bellum* Southern states some 150 years ago—few in number, thinly stretched, and without a clear authorization to stop mob violence, riots or violence against civilians carried out by men armed with guns and political connections. In the Democratic Republic of the Congo, a UN peacekeeping force of almost 20,000 was unable to prevent widespread attacks on civilians and systematic violence associated with the illegal exploitation of natural resources in the country's large eastern provinces.

On the other hand, some peacekeepers take on unconventional tasks to reduce post-war violence. The UN Stabilization Mission in Haiti (MINUSTAH) cleaned out armed gangs in Port-au-Prince, with savory effects that lasted for at least a couple of years until the massive earthquake of 2010. In Liberia, UNMIL troops defused tension and probably prevented violence when ex-combatants occupied rubber plantations. In the DRC, UN troops helped local police stop street fights during the 2006 elections that left more than a dozen dead in Kinshasa. In East Timor, it is often noted that violent street riots and fighting between factions of the police and army occurred after the UN peacekeepers had left and stopped when an international stabilization force was reintroduced.

<sup>33</sup> Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton University Press, 2006).

## V. Conclusions

The growth of the international peacebuilding regime is a manifestation of the growing collective will during the past two decades to mediate an end to civil wars and stabilize the post-war situation with UN or regional peace operations. This stands in sharp contrast to the Cold War period, when the large powers conducted wars of proxy in much of the developing world, as well the international context of the two classic civil wars discussed here in the mid-twentieth and mid-nineteenth centuries.

The potentially constraining effect of international involvement on local wars and its aftermath is the foundational principle of the international peacebuilding regime and growing efforts to streamline, sharpen, but also broaden such interventions. In principle, that is also a justification for the development of a corpus of international law tailored to post-war situations. The discussion in this chapter, however, strikes a strong note of caution.

In a very general sense, the demands and needs of post-war situations are similar. Security, justice, political accountability, employment, and economic reconstructions are all needed. But because the post-war environments differ considerably, the strategies for dealing with these demands and needs must reflect local context. There is no such thing as “a post-war situation.” As this chapter has shown, “peace” can have many meanings. War-to-peace transitions may produce a highly fragmented society and a weak state (as in “divided peace”); a fragmented society but political bargains and international presence to rebuild the state and maintain the peace (“pacified peace”), a divided society where the ostensible loser remains capable of inflicting continuous violence on the ostensible winners, but through the use of informal structures (“loser’s peace”), or the winner may seize control of the state and use it effectively to create a new social order that entails a regime of violence or fear against particular population groups that were on the losing side of the war (“victor’s peace”).

Peacebuilding strategies would in some cases require restraining the state rather than building the state, restricting political participation (in order to prevent “armed politics”) rather than opening institutions in the name of democracy and political accountability, limiting economic liberalization to avoid a new layer of graft, delaying demobilization or dismantling of paramilitary police forces to avoid a security vacuum, and so on. In the international aid community, the need for peacebuilding strategies to be context specific is increasingly accepted. The development of *jus post bellum*, it would seem, must make similar concessions to local context.

Strategies to (re)establish order, stability, and justice in war-torn societies must also recognize that the problems are not only internal in nature. As the critical literature on peacebuilding has pointed out, problems of poverty, inequality, violence, organized crime, and armed politics are in a deeper sense typically connected to the international economic and political order, and the ways in which a post-war country is integrated into that order. Increasing globalization and openness across state boundaries have also facilitated illicit movement of goods and services that serve agents of violence, trafficking (of humans), and smuggling (of drugs and weapons). Production and trade of drug and “blood diamonds,” for instance, may undercut peacebuilding strategies

designed to enhance the revenues of the state and establish a post-war monopoly of legitimate force. Curbing such efforts by legal and coercive means, however, must take into account the essentially international nature of the venture and the importance of the demand side. In this respect, as well, the development of *jus post bellum* needs to be informed by the complexities of contemporary post-war situations.



PART 3  
DILEMMAS OF THE “POST”



## DILEMMAS OF CLASSIFICATION

## 15

Towards a Functional Conceptualization of the  
Temporal Scope of *Jus Post Bellum*

Jann K. Kleffner\*

**I. Introduction**

One of the central questions that is being raised by the emerging body of international law referred to as *jus post bellum* is the temporal scope of its applicability. The very choice of the term “*jus post bellum*” confirms this centrality, as it suggests that it is aimed at regulating the phase after an armed conflict has come to an end. This in turn invites us to reflect on the temporal scope of *jus post bellum* and the available choices and their consequences as regards the beginning and end of the applicability of *jus post bellum*. It lies in the nature of *jus post bellum* as a “concept under construction” that no hard-and-fast rules exist in this regard. In other words, the choices pertaining to the temporal scope of *jus post bellum* and their consequences are not so much a matter of different interpretations of applicable legal rules or principles. Rather, they are in essence policy choices.

The present chapter offers some reflections on these available choices and their consequences, first regarding the beginning of the applicability (Part II), and secondly, on the end of applicability (Part III). Against the background of these reflections, the chapter will then conclude by developing an argument in support of a functional conceptualization of the temporal scope of *jus post bellum* (Part IV).

**II. The Beginning of Applicability**

How shall we identify the moment of time at which *jus post bellum* starts to apply? That question and controversies about possible answers to it are nothing new in the realm of international law pertaining to armed conflicts and other situations of crisis, or for that

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matter, any area of international law that specifically regulates individual “situations” that possess a temporal dimension.

We are confronted with the corresponding question when determining the temporal scope of *jus in bello*. The question there is whether and when the applicability of the law is triggered by virtue of the existence of an armed conflict or when a situation of belligerent occupation has begun and whether and when the law has ceased to apply. In other words, the question is whether, when, and for how long the situation is one of resort to armed force between states, of protracted armed violence between governmental authorities and organized armed groups, or between such groups<sup>1</sup> or a situation in which territory of one state is placed under the authority of (the armed forces of) another state without the consent of the former state.<sup>2</sup>

Likewise, in *jus ad bellum*, the question of when and for how long the right to self-defense becomes available is central. While the language of Article 51 of the UN Charter requires that “an armed attack occurs,” the precise temporal contours of the right to self-defense remain a matter of dispute, with disagreement surrounding questions such as whether the right requires that an armed attack has been launched, whether the results of the armed attack have to have materialized, or whether it also allows for an act in self-defense against an imminent armed attack. On the flip side of the temporal coin, divergent answers to the question of when the right to act in self-defense ceases (provided that the Security Council has not acted) are provided. Some argue that the right to act in self-defense ceases when the armed attack has been repelled, and others allow for the right to self-defense until the source of the threat for an armed attack has been removed, for instance. Further controversy surrounds the meaning of the law’s requirement that a use of force in self-defense be immediate.<sup>3</sup>

Similar questions about the temporal scope arise in the context of states of emergency, most pertinently in the realm of human rights law where a “public emergency which threatens the life of the nation”<sup>4</sup> allows for certain derogations to the extent that they are “strictly required by the exigencies of the situation,” consistent “with [states’] other obligations under international law” and do “not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”<sup>5</sup> Here, temporal

<sup>1</sup> *Prosecutor v. Tadić* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A, Appeals Chamber (2 October 1995) para. 70.

<sup>2</sup> Hague Regulations Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227, Art. 42; Common Art. 2(2) of the four 1949 Geneva Conventions.

<sup>3</sup> For two recent comprehensive studies of these and other related questions, see amongst many others, Kinga Tibori Szabo, *Anticipatory Action in Self-Defence: Essence and Limits Under International Law* (TMC Asser Press 2011); and Tom Ruys, “Armed Attack” and Art 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge University Press 2010).

<sup>4</sup> International Covenant on Civil and Political Rights (ICCPR) (adopted on 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 4. Similar provisions are contained in Art. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5; and Art. 27 of the 1978 American Convention on Human Rights (ACHR) (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

<sup>5</sup> ICCPR Art. 4(1); limitations to the possibility of derogating from their human rights obligations, which are to a large extent identical to the ones provided for under Art. 4(1) ICCPR are spelled out in Art. 15(1) of the ECHR and Art. 27(1) of the ACHR. On states of emergency more generally, see Human

issues arise in the context of determining whether, when, and for how long a situation of crisis amounts to such a public emergency which threatens the life of the nation and whether, when, and for how long the exigencies of such a state of emergency strictly require a given derogation.

It is not necessary for the purpose of the present analysis to delve into the aforementioned controversies surrounding the temporal scope of *jus in bello*, *jus ad bellum*, and states of emergency. However, the questions that arise from those areas of international law that are pertinent for the present purpose of conceptualizing the temporal scope of *jus post bellum* are twofold: first, what can *jus post bellum* learn from those other areas? And secondly, what should be the relationship between the temporal scope of those other areas of international law, on the one hand, and of *jus post bellum*, on the other?

When addressing the latter question, the most immediately obvious choice that presents itself in conceptualizing the beginning of *jus post bellum*'s applicability would be to determine it by reference to the law of armed conflict and let *jus post bellum* begin to apply when the law of armed conflict ceases to apply. Such an approach would suggest a neat temporal continuum between *jus in bello* and *jus post bellum*, fully in line with the legal fiction that armed conflicts—whether international or non-international in character—and belligerent occupations have a clearly identifiable start and end date. That legal fiction, in turn, is a remnant of the times when declarations of war, or ultimatums with conditional declarations of war, and peace treaties were dominant institutes in the international regulatory framework of (international) armed conflicts.<sup>6</sup> The law of armed conflict has retained the idea of an identifiable start and end date of armed conflicts, thus confirming its nature as a body of law that regulates a subject matter that is perceived to be inherently temporal, constituting a state of exception from periods of normalcy.

The following two examples illustrate how the ICJ and the ICTY have confronted the challenges inherent in the exercise of determining the applicability *ratione temporis* of *jus in bello*.<sup>7</sup>

In *Armed Activities (DRC v. Uganda)*, the ICJ was confronted with the question of whether, and if so, from what moment in time, Uganda was the Occupying Power in Ituri in Eastern DRC. The Court went through a meticulous reconstruction of the timeline of the Ugandan military presence in Eastern Congo.<sup>8</sup> It then turned to the question of belligerent occupation. Central in its determination in that respect was the fact that:

[...] General Kazini, commander of the Ugandan forces in the DRC, created the new “province of Kibali-Ituri” in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as “provisional Governor”

Rights Committee, “General Comment 29, States of Emergency (Article 4)” (2001) UN Doc. CCPR/C/21/Rev.1/Add.11.

<sup>6</sup> For an historical account, see Stephen Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2005) 103–11, 115–19.

<sup>7</sup> For more on how the ICTY has interpreted the temporality of *jus in bello*, see Bartels, ch. 16, this volume.

<sup>8</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) (2005) ICJ Rep. 2005, paras 72–91.

and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district).<sup>9</sup>

The Court concluded from these facts that “Uganda was the occupying Power in Ituri at the relevant time.”<sup>10</sup> This conclusion displays a conspicuous degree of temporal vagueness if considered against the background of the minutious recount of the Ugandan military presence on the territory of the DRC.

In *Prosecutor v. Limaj, Bala, and Musliu*, the ICTY had to determine the existence of a (non-international) armed conflict in Kosovo. The trial chamber provided a very detailed examination of individual events in the context of determining whether the requisite level of intensity was met.<sup>11</sup> The tribunal then concluded that “an internal armed conflict existed in Kosovo before the end of May 1998. This continued until long after 26 July 1998 [ie the date of the execution of ten detainees for which two of the accused, Limaj and Bala, had been indicted].”<sup>12</sup> This finding displays considerably more temporal precision than the ICJ finding above. In large part, this is due to the nature of the ICTY as a *criminal* tribunal, which, as a rule, has to satisfy higher evidentiary standards in its determination of the innocence or guilt of an accused than the ICJ has when determining the responsibility of a state in contentious proceedings before it.

Be that as it may, the two aforementioned examples illustrate how a body of law that is based on the legal fiction of a clearly identifiable start and end date can be applied in practice. The question that then arises in the present context is whether the adoption of a similar legal fiction in conceptualizing the temporal scope of *jus post bellum* is the preferable choice.

To answer that question in the affirmative would mean that the end of an armed conflict or situation of belligerent occupation has to be determined in a given situation. That moment would in turn constitute the trigger for the applicability of *jus post bellum*. One possibility to identify that moment in time is to examine the matter through a formal lens and inquire whether a peace agreement has been concluded and entered into force. Another possibility is to determine the end of an armed conflict through a factual lens and consider the absence of a resort to armed force between states, the termination of a situation of belligerent occupation, or the absence of protracted armed violence between organized armed groups and governmental authorities or between such groups as determinative. The two different possibilities would have evident consequences for the temporal dimension of the temporal scope of *jus post bellum*. In the first case, *jus post bellum* would not be applicable until a peace agreement is concluded. In the second case, its applicability would coincide with the moment in time when the resort to armed force between states has come to an end, the intensity of violence or degree of organization of an armed group falls beneath the threshold of a non-international armed conflict, or territory is no longer occupied.

<sup>9</sup> *Armed Activities on the Territory of the Congo* (n. 8) para. 175.

<sup>10</sup> *Armed Activities on the Territory of the Congo* (n. 8) para. 178, emphasis added.

<sup>11</sup> *Prosecutor v. Limaj, Bala and Musliu* (Judgment) ICTY-03-66-T (30 November 2005) paras 135–70.

<sup>12</sup> *Prosecutor v. Limaj, Bala and Musliu* (n. 11) para 173.

Generally, the law of armed conflict is today more in tune with the second, fact-driven approach. Indeed, this fact-driven approach has had a profound impact on the nature, role, and legal effect of peace agreements, so much so that it is today broadly accepted that peace agreements are no prerequisite to the end of an armed conflict. Rather, the termination of an armed conflict can come about by less formalized modes, including the implied mutual consent that can be inferred from the mere termination of hostilities.<sup>13</sup>

The law of armed conflict epitomizes that the termination of armed conflicts is fact-driven by indicating its end of applicability with notions such as “the general close of military operations;”<sup>14</sup> “one year after the general close of military operations” or the “termination of the occupation;”<sup>15</sup> or, in case of non-international armed conflicts, very simply as the “end of the armed conflict;”<sup>16</sup> rather than the conclusion of a formal instrument such as a peace treaty. The view expressed in the *Tadić* “Interlocutory Appeals Decision” of the ICTY as regards non-international armed conflict, that the law applies “until [...] a peaceful settlement is achieved,”<sup>17</sup> thus only holds true as a matter of law to the extent that the “peaceful settlement” is also an accurate description of the factual situation on the ground.

And yet, it is one thing to suggest that the end of the applicability of the law of armed conflict—and with it, in the current hypothesis, the beginning of the applicability of *jus post bellum*—is a fact-driven exercise. It is quite another to actually operationalize that abstract idea and apply it to the facts in a given situation. At times, there may be clear “end dates” of an armed conflict, indicated, for instance by the complete defeat of one of the parties following the decisive battle or by the formal moment of the entry into force of, and subsequent compliance with, a peace agreement. However, such clear instances are exceptions to the rule that armed conflicts frequently terminate under far murkier conditions. Under these conditions, the answer to the question of whether military operations have come to a general close, an occupation has been “terminated,” or an armed conflict has come to an end is not determined easily. It is unclear, for instance, what degree of stability is required before one can reasonably conclude from an absence of military operations or fighting, or from the (local) withdrawal of troops of an occupying power, that the law of armed conflict ceases to apply.<sup>18</sup> Indeed, in quite a few contemporary crisis situations one can discern several moments at which the degree of intensity of the armed violence is below or above the threshold of an armed conflict.

<sup>13</sup> Jann K. Kleffner, “Peace Treaties” in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) 9–10.

<sup>14</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GCIV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Art. 6(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 3(b).

<sup>15</sup> AP I, Art. 3(b).

<sup>16</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 2(2).

<sup>17</sup> *Prosecutor v. Tadić* (n. 1) para. 70.

<sup>18</sup> For further analysis of these and other relevant considerations in the context of belligerent occupation, see Tristan Ferraro, “Determining the Beginning and End of an Occupation under International Humanitarian Law” (2012) 94 *International Review of the Red Cross* 133. For the context of non-international armed conflicts, see Bartels, ch. 16, this volume.

If one were to pursue the route of a neat temporal continuum from the law of armed conflict to *jus post bellum* to its logical conclusion, the consequence would be that the applicable legal framework switches back and forth between the two. It would mean, for instance, that *jus post bellum* would again be replaced by the law of armed conflict if fighting resumed after a period of relative calm that had suggested that the crisis situation in question had reached the post-conflict phase.

While the foregoing suggests that the determination of the end of the applicability of the law of armed conflict will regularly be a difficult exercise, this difficulty alone would not justify an outright dismissal of the approach to conceptualize the temporal scope of *jus post bellum* by reference to the temporal scope of applicability of the law of armed conflict. However, there are more fundamental considerations that would seem to militate against such a conceptualization.

The law of armed conflict may overlap in part with the factual situation that *jus post bellum* is intended to regulate, namely the transitional phase from armed conflict to peace. This can be illustrated by the following hypothetical situation of belligerent occupation. Let us assume that the occupied territory has a long history of ethnical or religious divides, and of marginalization of certain ethnic or religious groups, of political oppression, and a general absence of human rights for the population that are cemented by discriminatory laws and a judiciary that lacks independence and impartiality. A mere withdrawal of the Occupying Power would entail the clear risk of the situation escalating into a non-international armed conflict during which different ethnic or religious groups start fighting. The situation in Iraq in 2003 after the invasion phase of the US-led coalition can serve as a real-life example that underlines the relevance of such a hypothetical scenario. An obvious set of measures that would have to be taken in such a situation in order to make the occurrence of a non-international armed conflict less likely is to introduce human rights standards into the occupied territory. It is submitted that such an introduction of human rights into war-torn societies forms part of *jus post bellum*. It should immediately be recalled that such an approach involves a plethora of intricate legal, moral, and policy issues that are involved in such a project of “benevolent reform” during times of occupation. Such a reform project raises the question of whether and to what extent it is compatible with the “hands-off” approach that dominates the law of belligerent occupation.<sup>19</sup> It requires a determination of the extent of extraterritorial application of human rights.<sup>20</sup> It begs questions such as how to ensure local ownership of the reform process, other questions relating to its legitimacy, and to the political choices that are being made in order to ensure its viability. While an analysis of these questions is beyond the purview of the present endeavor to address the temporal scope of *jus post bellum*, they epitomize the simultaneous application of the law of armed conflict (*in casu* the law of belligerent occupation) and *jus post bellum*.

<sup>19</sup> See generally on this problem, Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights” (2006) 100 *American Journal of International Law* 580; Gregory H. Fox, “Transformative Occupation and the Unilateralist Impulse” (2012) 94 *International Review of the Red Cross* 237.

<sup>20</sup> See Ralph Wilde, “Are Human Rights Part of Jus Post Bellum and Should They Be?” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 163.



Another hypothetical situation in which the law of armed conflict may overlap in part with the factual situation that *jus post bellum* is intended to regulate is an ongoing non-international armed conflict in which several organized armed groups are pitted against the central government and, at least in part or occasionally, also against one another. Let us assume that some units (from a dissident faction of one of the organized armed groups, for instance) and individual defectors from one of these groups are willing to lay down their arms. The situation would call for their being demobilized, disarmed, and reintegrated into civilian life—again, measures that, it is submitted, are an integral part of *jus post bellum*. Yet, the non-international armed conflict continues and with it the applicability of *jus in bello*. This scenario would hence also call for an application of *jus post bellum* despite the fact that the law of armed conflict has not (yet) ceased to apply.

In sum, a certain amount of skepticism seems to be justified *vis-à-vis* the suggestion that *jus post bellum* starts to apply when the law of armed conflict ceases to apply.

Let us then turn to the question of the end of applicability of *jus post bellum*.

### III. The End of Applicability

The conceptualization of *jus post bellum* as a body of international law that regulates the transition from armed conflict to “peace” invites us to think about that desired “end-state” called “peace,” not the least because—presumably—the establishment of peace would mean that *jus post bellum* ceases to apply.

My hypothesis here is that *jus post bellum* provides the legal framework for a transitional process that aims at establishing a durable, stable situation in which a relapse into armed conflict is significantly less likely. Put differently, *jus post bellum* aims at avoiding that “After the War” becomes “Before the War.” As such, it will have to incorporate retrospective and prospective dimensions. It will be a legal framework that oscillates between addressing the root causes of a given armed conflict and a projection into the future as a legal framework of conflict prevention.

I further hypothesize that a situation of “peace” as the desired “end-state” cannot merely be characterized by an absence of intense organized armed violence, i.e. armed conflict. Instead, it is submitted that more ambitious, positive elements are instilled into the notion of “peace.” Indeed, if one were to equate “peace” with the absence of an armed conflict, there would essentially be no intermediate “post conflict phase” preceding “peace” which *jus post bellum* is designed to regulate. There would only be room for “*jus post bellum*” during armed conflicts, thereby in fact becoming part of *jus in bello* and applied simultaneously with the law of armed conflict as we currently know it. However, to discern the positive elements of a situation that deserves to be referred to as “peace” is no easy undertaking, and it would go well beyond the current contribution to engage in a detailed analysis.<sup>21</sup> For our present purpose, I will generically define

<sup>21</sup> See generally on the notion of positive peace, Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (Sage Publications 1996). As an example for individual indicators of peace, see The Global Peace Index produced by the Institute for Economics and Peace, which considers 23 different indicators such as the number of external and internal wars fought, political stability, the level of respect for human rights, and the level of violent crime <[http://www.visionofhumanity.org/pdf/gpi/2013\\_Global\\_Peace\\_Index\\_Report.pdf](http://www.visionofhumanity.org/pdf/gpi/2013_Global_Peace_Index_Report.pdf)> (accessed 10 July 2013).

“peace” as a situation of non-violence (both direct and indirect/structural), respect for human rights, and the rule of law. Thus understood, a situation of “peace” is one characterized by the absence of personalized acts of violence, such as those occurring during an armed conflict, physical and mental abuse, and gun violence, as much as by the absence of structural mechanisms of exploitation, marginalization, and discrimination in the social, political, and economic fabric of a society. Peace is further characterized by the enjoyment of human rights by all individuals and by the rule of law, denoting the accountability:

of all persons, institutions and entities, public and private, including the state itself, [...] to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>22</sup>

With such a generic notion of peace in mind, the question arises where to draw the dividing line between *jus post bellum* and the law of peace, and, more fundamentally, whether there should be such a dividing line. It would seem that such a dividing line would not be impossible if one were to develop and apply criteria that would allow for a gradation of “peace.” Accordingly, one could think of a set of indicative parameters similar to those applied by inter-governmental and non-governmental organizations in order to draw up indexes in areas such as human development,<sup>23</sup> democracy,<sup>24</sup> and human security.<sup>25</sup> In fact, the existence of a “Global Peace Index”<sup>26</sup> exemplifies the progress that has been made in developing criteria to determine whether a state has reached a certain level of non-violence (both direct and indirect), respect for human rights, and the rule of law. The real challenge would then be to identify where on the scale between the two extremes of outright armed conflict and a comprehensive peace one would have to locate the end of the post-conflict phase for purposes of the temporal scope of *jus post bellum*.

However, I am not entirely convinced that such an approach would be very helpful. For one, different elements of *jus post bellum* have different time frames. Surely, some of the elements of *jus post bellum* may have a due-date that is relatively easy to determine. An example would be reparation measures, which seek to relieve the suffering of and afford justice to victims of violations of international law that occurred during an armed conflict. When all claims for reparations have been processed (maybe even by a specific body that has a clear time-line) this part of *jus post bellum* will come to an end. Similarly, as an integral part of transitional justice, the prosecution of individual

<sup>22</sup> UN Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General” (2004) UN Doc. S/2004/616, para. 6.

<sup>23</sup> See e.g. the Human Development Index of the United Nations Development Programme <<http://hdr.undp.org/en/statistics/hdi/>> (accessed 10 July 2013).

<sup>24</sup> See e.g. the Democracy Index, produced by the Economist Intelligence Unit <[http://www.eiu.com/public/topical\\_report.aspx?campaignid=DemocracyIndex12](http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex12)> (accessed 10 July 2013).

<sup>25</sup> See e.g. the Human Security Index <<http://www.humansecurityindex.org/>> (accessed 10 July 2013).

<sup>26</sup> See The Global Peace Index produced by the Institute for Economics and Peace (n. 21).

perpetrators of international crimes committed during the armed conflict will eventually come to an end—if not because *all* perpetrators have been brought to justice (which will often be practically impossible) then because also perpetrators of international crimes eventually die. Another example will be demobilization, disarmament, and reintegration (“DDR”) programs, which by their nature are designed to have a limited life span in as much as they will come to an end when former fighters have been demobilized, disarmed, and reintegrated. However, even these elements of *jus post bellum* for which it is possible to discern an end-date do not necessarily come to an end simultaneously. The rule will be that they are all subject to their individual time frames.

More fundamentally, however, *jus post bellum* does not exhaust itself in elements for which it is possible to discern an end-date. It is also the purpose of *jus post bellum* to introduce much more lasting, long-term processes and structures in order to prevent a relapse into armed conflict. Mechanisms for the protection of human rights introduced as part of *jus post bellum*, for instance, are intended to become a permanent and constant feature of a given post-conflict society. They may become gradually internalized into the social fabric of that society, they may evolve, be adapted to changing circumstances, become perhaps more ambitious, and so forth. Yet, it will be *jus post bellum* that is the vehicle of these legal norms. It then appears doubtful that the quest for a clear dividing line between *jus post bellum* in its entirety and the law of peace is a fruitful exercise.

#### IV. Towards a Functional Conceptualization of the Temporal Scope of *Jus Post Bellum*

The foregoing analysis suggests that the temporal scope of the applicability of *jus post bellum* needs to be approached with a degree of flexibility. The quest for a clear start and end date of the entire body of *jus post bellum* is ill-fitted to its function as a law that accompanies and regulates transitional processes from armed conflict to peace. Instead, that function suggests that its applicability *ratione temporis* is equally transitional. It is submitted that a more viable way of conceptualizing the temporal scope of *jus post bellum* is to take seriously the content of this emerging body of law. *Jus post bellum* as an international legal framework provides several instruments and mechanisms, all of which address specific challenges that typically occur in processes that accompany the transition from armed conflict to peace. Admittedly, which of those instruments and mechanisms falls outside or inside the toolbox called *jus post bellum* is not settled and is a matter of future legal evolution. I have hypothesized in the present contribution that areas such as transitional justice, DDR programs, human rights, and rule of law reforms should feature as constituent components of *jus post bellum*, although these areas do not necessarily exhaust its content.<sup>27</sup> Others may approach the matter of the constituent elements of *jus post bellum* with more or with less ambition. Yet, the fact that the exact content of *jus post bellum* is still evolving does not distort the basic argument that its different constituent components have their individual temporal scopes and should

<sup>27</sup> See e.g. Cymie Payne, ch. 25, this volume, who discusses environmental norms as part of *jus post bellum*.

apply as soon and for as long as the transitional process at hand calls for and allows for their implementation. For instance, if DDR processes can be initiated or if perpetrators of international crimes can be brought to justice while the armed conflict is ongoing, they should. In fact, by approaching the temporal scope of *jus post bellum* flexibly in this way, *jus post bellum* can in itself in part become an instrument for the transformation of an ongoing armed conflict and contribute to the quest to end it, rather than its applicability being conditioned by the end of that conflict. Similarly, once a situation of relative calm and stability has evolved after an armed conflict has come to an end, rule of law reforms—for instance the internationalization of the justice sector in order to ensure the independent and impartial administration of justice that was introduced as part of *jus post bellum*—may very well have to continue, and so they should until such internationalization can be phased out because justice can be administered locally in a way that is satisfactory from a human rights perspective.

In sum, it is argued that the temporal scope of *jus post bellum* should be conceptualized with functionality as the leitmotiv. In such a conceptualization, it would be the facts on the ground that determine whether and to what extent *jus post bellum* starts or ceases to apply, and which of its constituent elements. The applicability *ratione temporis* would hence not be an abrupt “all or nothing” exercise, but a fluid and flexible gradual phasing in and out, driven by the central equation whether the function of the different constituent elements of *jus post bellum* befits the situation.

Surely, such a functional conceptualization of the temporal scope of *jus post bellum* will in itself raise a myriad of complex questions of fact and of law. It will require constant monitoring of a given armed conflict and its aftermath to see which parts of *jus post bellum* should be phased in and out. It will also require an appreciation and refinement of the relationships between the (constituent elements of) *jus post bellum*, on the one hand, and *jus in bello* and the law of peace, on the other hand; relationships that in the current argument are characterized not by mutual exclusivity but by at least partial simultaneous application. However, the alternative to a functional conceptualization of the temporal scope of *jus post bellum* with its ensuing fluidity would be to perpetuate the logic of a temporal compartmentalization that has dominated the binary division of public international law into an international law of armed conflict and an international law of peace. Such a temporal compartmentalization is ill-suited for a body of international law that by its function and nature transcends the divide between armed conflict and peace as it accompanies the transitional process from the former to the latter.

## From *Jus In Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?

Rogier Bartels\*

### I. Introduction

*Jus post bellum* literarily means “law after war.” Logically then, it appears that for *jus post bellum* to apply, there must first have existed a situation of war and that this war has ended. It is therefore important to determine when wars end. In international law, the term “war”<sup>1</sup> has been replaced by “armed conflict;”<sup>2</sup> this term will thus be used in this chapter. According to this literal understanding, *jus post bellum* would only come into play after classical inter-state wars. However, the modern concept of *jus post bellum* must apply after all (modern) forms of armed conflict, that is, after international armed conflicts and after non-international armed conflicts.<sup>3</sup>

In addition, when *jus post bellum* is taken to refer to the entire process of transition from a situation of war to a situation of peace,<sup>4</sup> it is also important to know when armed conflicts end because of the *lex specialis* principle. Whilst some rules of *jus post bellum*, the law of peace, or those related to transitional justice may be applicable already during an armed conflict—just as certain provision of *jus in bello* apply in peace time<sup>5</sup> or

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<sup>1</sup> Whilst the humanitarian conventions and treaties prior to 1949 did not specify as such, it was clear that they were applicable during war. They were intended for use in wartime and the meaning of war was evident and did not need to be defined (see Jean S. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross 1952) 28).

<sup>2</sup> The applicability of the laws of war was subject to formal declarations, e.g. declarations of war and belligerency. Situations in dire need of application of these rules were not regulated by treaty law unless formally recognized by such declarations as being within the scope of the laws of war, thus as an (international) war. This system was replaced by the inclusion of the notion of “armed conflict” in the 1949 Geneva Conventions, which addressed the actual situation on the ground. International humanitarian law therefore became applicable on the basis of material aspects of conflict instead of formalities. See Rogier Bartels, “Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts” (2009) 91 *International Review of the Red Cross* 35.

<sup>3</sup> Carsten Stahn, “Jus Post Bellum: Mapping the Discipline(s)” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 105–6.

<sup>4</sup> See Jens Iverson, ch. 5, this volume, s. III B.

<sup>5</sup> See e.g. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 31, Arts 47, 53 (Geneva Convention I); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 85 (Geneva Convention II), Arts 44, 45, 48.

continue to apply for a certain period after the end of the armed conflict<sup>6</sup>—*jus in bello* has to be considered as the *lex specialis* during times of armed conflict, and thus takes precedence over the realm of rules that (mainly) pertain to *post bellum* situations.<sup>7</sup>

The application of *jus in bello*, or international humanitarian law (IHL), is dependent on the existence of an armed conflict.<sup>8</sup> However, one of the glaring gaps in IHL concerns its very foundation, namely the question of the definition of “armed conflict.” IHL does not provide a clear definition to this question for either type of armed conflict, international or non-international.<sup>9</sup> According to Erik Castrén, who was present at the Diplomatic Conference in 1949, a definition was purposely left out for non-international armed conflicts,<sup>10</sup> which has been considered as a “blessing in disguise.”<sup>11</sup> Indeed, a single definition may not encompass all varieties of contemporary armed conflict. On the other hand, a definition appears necessary in order to also ensure an effective extension of humanitarian guarantees in new, contemporary types of armed conflict.<sup>12</sup> Without a clear definition, it is problematic to determine when conflicts start and indeed, when they end.

Ever since IHL became applicable to conflicts that are “not of an international character,” that is with the inclusion of Common Article 3 in the Geneva Conventions of 1949, there has been much debate on what is to be considered a non-international armed conflict (NIAC), and when the threshold of violence has surpassed a situation of mere internal disturbances or riots.<sup>13</sup> The existence of an armed conflict allows states

<sup>6</sup> For example, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609 (Additional Protocol II), Art. 5.

<sup>7</sup> On the overlap of various legal regimes prior to, during, and after armed conflicts, see Carsten Stahn, “‘*Jus ad bellum*,’ ‘*jus in bello*’ ... ‘*jus post bellum*’?—Rethinking the Conception of the Law of Armed Force” (2007) 17 *European Journal of International Law* 921. The current contribution does not deal with the question whether *jus post bellum* can be considered to be a branch of (international) law as such, or whether it is made up of components of various branches of international law (on this question, see “Part 1. Foundation and Conceptions of *Jus Post Bellum*” of the present volume). However, even if *jus post bellum* merely consists of components of, for example, international human rights law, the law specifically created for situations of armed conflict, IHL, is to be considered the *lex specialis* during such situations of conflict.

<sup>8</sup> Whilst initially, the scope of application of the Geneva Conventions of 1949 and subsequent Additional Protocols of 1977 related only to the application of these treaties, it has become accepted that this scope now governs the application of the whole body of IHL, both of the rest of the treaty rules and customary rules—save of course restrictions based on ratification of concerning treaties. See, inter alia, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) Art. 1, which provides that the Certain Conventional Weapons Convention and its Protocols “apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions;” and Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956), Arts 18–19, which deal with the scope of application of the said convention and use language identical to that of Common Articles 2 and 3 of the Geneva Conventions of 1949.

<sup>9</sup> See Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n. 1) 32 and 49.

<sup>10</sup> Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia 1966) 85; see also Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n. 1) 49.

<sup>11</sup> Jelena Pejic, “Status of Conflict” in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 85.

<sup>12</sup> See Andreas Paulus and Mindia Vashakmadze, “Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization” (2009) 91 *International Review of the Red Cross* 97.

<sup>13</sup> An independent institute tasked to determine whether the threshold for the application of IHL has been met in particular situations has been called for (see Sandesh Sivakumaran, “How to Improve Upon

to take more forceful action, such as the use of lethal force against “fighters” and/or against those directly participating in hostilities.<sup>14</sup> On the other hand, courts and tribunals must assess whether in the situations before them an armed conflict existed, either for jurisdictional matters or to identify the applicable body of law.<sup>15</sup> It is therefore of no surprise that there has been an extensive legal and academic debate and voluminous case law on what qualifies as an armed conflict, and on when the so-called lower threshold for NIAC has been crossed. The debate has almost solely focused on the *start* of these armed conflicts, however. In fact, very little has been written on the temporal application of IHL, or indeed, on the *end* of these armed conflicts.<sup>16</sup> When a committee of the International Law Association (ILA) addressed the definition of NIAC in the 2010 *Final Report on the Meaning of Armed Conflict in International Law*, it did not make any findings on the matter, but it found the end of the temporal scope of application to be a “complicated issue [...] in need of thorough research.”<sup>17</sup> This chapter is not the thorough research envisaged in this report, but will make a proposal on how to approach the issue of determining the end of NIACs.

To that end, the following two questions will be dealt with: when do armed conflicts end? And when does the application of *jus in bello* cease? This will be done specifically

the Faulty Regime of Internal Armed Conflicts” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 527). The International Committee of the Red Cross (ICRC) has declined to do so in the past (see ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Official: Report on the Work of the Conference (ICRC August 1971) paras 195, 212–18). To date, such an institute does not exist and is a long way from ever being founded. If ever there would be such an institute, this would naturally be the body most suited to also determine whether a NIAC has ended.

<sup>14</sup> See, inter alia, Yuval Shany, “Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror” in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011) 22–4.

<sup>15</sup> See e.g. the cases at the International Criminal Tribunal for the former Yugoslavia (ICTY) dealing with the question whether war crimes could have been committed in Kosovo and Macedonia, i.e. whether there was a non-international armed conflict at the time of the alleged crimes (e.g. *Prosecutor v. Fatmir Limaj et al.* (Judgment) ICTY-03-66-T (30 November 2005) (*Limaj* Trial Judgment); *Prosecutor v. Ramush Haradinaj et al.* (Judgment) ICTY-04-84-T (3 April 2008); and *Prosecutor v. Ljube Boškoshi and Johan Tarčulovski* (Judgment) ICTY-04-82-T (10 July 2008) (*Boškoshi* Trial Judgment)). The first case at the International Criminal Court (ICC) addressed the classification of the armed conflict in the Ituri District in eastern Democratic Republic of Congo (*Prosecutor v. Thomas Lubanga Dyilo*) (Judgment Pursuant to Art. 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (*Lubanga* Trial Judgment). The Inter-American Commission on Human Rights addressed whether a one-day attack on military barracks in Argentina qualified as a non-international armed conflict in the *La Tablada* case. *Juan Carlos Abella v. Argentina*, Inter-American Commission of Human Rights Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (18 November 1997).

<sup>16</sup> The academic literature in English specifically on this topic consists of only a working paper by Derek Jinks, “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts” (HPCR Background Paper 2003). When addressing the “meaning” of non-international armed conflict, Christine Gray touches upon the issue for two paragraphs, but does not provide a conclusive answer (Christine Gray, “The Meaning of Armed Conflict: Non-International Armed Conflict” in Mary Ellen O’Connell (ed.), *What is War? An Investigation in the Wake of 9/11* (Martinus Nijhoff Publishers 2012) 88). Even monographs on the law of non-international armed conflicts address the issue of temporal application only very briefly, in passing, or not at all (see respectively, for example, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 252–4; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) 142–6; and Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002).

<sup>17</sup> International Law Association (ILA) Committee on Use of Force, *Final Report on the Meaning of Armed Conflict in International Law* (ILA 2010) 30.

with a focus on NIACs. Considered first is whether the treaty law provides any guidance as to the end of the application of IHL with respect to NIACs, and whether it is possible to apply the framework for international armed conflicts (IACs) to NIACs. Examined next is whether the threshold criteria for the start of a NIAC can be applied to determine the end of such conflicts. The consequences and challenges of such an approach will then be discussed, followed by some concluding remarks.

## II. Is There Guidance to be Found in (Case) Law?

Common Article 3 applies to “case[s] of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” but does not refer to any end of the said application; nor, indeed, does it give any guidance as to when these armed conflicts not of an international character may end.<sup>18</sup> Similarly, Additional Protocol II refers to “the end of the conflict,”<sup>19</sup> but does not clarify when this may be. And whilst it refers to “the end of hostilities” in relation to the granting of amnesty for the participation in the armed conflict, this only reflects that “when hostilities have ceased, passions die down and there is a possibility of amnesty.”<sup>20</sup> The ICRC Commentary to Additional Protocol II mentions that the Protocol’s text does not contain any indication as regards the end of its applicability.<sup>21</sup> “Logically this means that the rules relating to armed confrontation are no longer applicable after the end of hostilities,” whilst the fundamental guarantees granted to persons deprived of their liberty “remain valid at all times and without any restriction in time, until the deprivation or restriction of the liberty of those concerned has come to an end.”<sup>22</sup> However, it is uncertain whether this is a reference to the cessation of active hostilities, usually achieved by a ceasefire agreement, or whether it relates to the general close of hostilities, which would not occur until a peace agreement is reached.<sup>23</sup>

In its seminal decision on jurisdiction in *Tadić*, the Appeals Chamber of the ICTY held that:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation

<sup>18</sup> The clarification given by the *Tadić* Appeals Chamber that “[t]he fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities [...] indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations” refers more to the geographical scope than the temporal scope. See *Prosecutor v. Dusko Tadić* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (2 October 1995) (*Tadić* Jurisdiction Decision) para. 69.

<sup>19</sup> Additional Protocol II, Arts 2(2) 25.

<sup>20</sup> Yves Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 1401.

<sup>21</sup> The Commentary notes that “[a]n amendment which was not adopted proposed that the application of the Protocol should cease ‘upon the general cessation of military operations.’” Sandoz et al. (eds), *Commentary on the Additional Protocols* (n. 20) 1360.

<sup>22</sup> Sandoz et al. (eds), *Commentary on the Additional Protocols* (n. 20) 1360.

<sup>23</sup> Sivakumaran, *The Law of Non-International Armed Conflict* (n. 16) 252.



of hostilities [...], in the case of internal conflicts, [until] a peaceful settlement is achieved.<sup>24</sup>

As mentioned above, the literature does not really tackle the issue of the temporal scope of NIACs. This reference to a peaceful settlement being reached is thus the only “substantive” authoritative statement on the issue. Even so, it is not very specific, of course. Furthermore, it is submitted here that “a peaceful settlement” is too strict a standard for a NIAC to be considered as ended, and that this standard is not supported by IHL.

As opposed to NIACs, for IACs, there is some guidance as to their end. A distinction has to be drawn between declared wars, which are in themselves IACs (“war in the technical sense”),<sup>25</sup> and the factual concept of international armed conflict. Declared wars can only be ended by a peace treaty or another “clear indication on the part of the belligerents that they regard the state of war as ended,”<sup>26</sup> such as an armistice agreement.<sup>27</sup> Greenwood observes with regard to IACs that “[i]t is not clear whether a formal instrument is needed to terminate an armed conflict which does not amount to war in the formal sense.”<sup>28</sup> As “armed conflict” is not a technical, legal concept, but is instead recognition of the fact that hostilities are taking place, the cessation of active hostilities should therefore be enough to terminate the situation of armed conflict.<sup>29</sup> The Geneva Conventions of 1949 give a specific end of their application,<sup>30</sup> which is summed up in Article 3 of the 1977 Additional Protocol I to these conventions:

Without prejudice to the provisions which are applicable at all times [...] the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation, or re-establishment.

<sup>24</sup> *Tadić* Jurisdiction Decision, para. 70. The paragraph continues: “Until that moment, international humanitarian law continues to apply in [...], in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”

<sup>25</sup> A war can exist in the technical sense when a declaration of war is made without being followed by active hostilities. Such was the case in the Second World War when a number of Latin American states declared war on Germany (see, for example, Julius Stone, *Legal Controls of International Conflict* (Rinehart 1954) 306). IHL applies to this kind of situation, including where hostilities do not take place. See Yoram Dinstein, “The Initiation, Suspension, and Termination of War” in Michael Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday* (Naval War College 2000) 131–3; and Christopher Greenwood, “Scope of Application of Humanitarian Law” in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008) 47. For a contrary view, see the ILA *Meaning of Armed Conflict Report* that contends that nowadays declarations of war do not start armed conflicts or the application of IHL (ILA, *Meaning of Armed Conflict Report* (n. 17) 28–32).

<sup>26</sup> Greenwood, “Scope of Application of Humanitarian Law” (n. 25) 62.

<sup>27</sup> Dinstein, “The Initiation, Suspension, and Termination of War” (n. 25) 134–50.

<sup>28</sup> Greenwood, “Scope of Application of Humanitarian Law” (n. 25) 62.

<sup>29</sup> Greenwood, “Scope of Application of Humanitarian Law” (n. 25) 62.

<sup>30</sup> Geneva Convention I, Art. 5; Geneva Convention III, Art. 5; Geneva Convention IV, Art. 6.

However, besides the fact that the application of IHL does not end at the same time for all parts of the law,<sup>31</sup> the vague terminology used, namely “general close of military operations,” makes it difficult to define the end of the application of the bulk of IHL for IACs.<sup>32</sup> Indeed, this concept, which codifies customary international law, identifies the end of the application of IHL as the moment that a general and definitive armistice is concluded; or in the absence of such an agreement, when implied mutual consent about the suspension of hostilities is reached, when there is general capitulation by a belligerent, or when the enemy is completely defeated (*debellatio*) takes place.<sup>33</sup> Ultimately, the main criterion is effectiveness: “[a]n effective and final cessation of hostilities, whether set out in writing or merely de facto,” brings about the end of the applicability of IHL.<sup>34</sup>

The final cessation of hostilities is also hard to define, however. With regard to the Iraq conflict, for example, American president Bush announced that the major combat operations had ended, but in reality, the armed conflict (and the application of IHL) was far from over.<sup>35</sup> Additionally, the application of IHL ends in a situation of occupation, when the occupation ends, which did not happen in Iraq until June 2004, some 13 months after the said declaration made by Bush.<sup>36</sup>

The question then arises whether it would be possible to apply this IAC framework *mutatis mutandis* to determine the end of a NIAC. Unfortunately, the matter is not that straightforward. First of all, the test whether there is an international armed conflict depends on the factual situation, and not on political statements.<sup>37</sup> Consider the conflict between the Sinhalese government of Sri Lanka and the Tamil Tigers (LTTE):<sup>38</sup> a peace agreement<sup>39</sup> was signed between the warring parties in 2002, but the fighting did

<sup>31</sup> See Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* (2nd edn, Ashgate 1998) 63.

<sup>32</sup> Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* Vol. I (2nd edn, ICRC 2006) 116.

<sup>33</sup> See Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 102; see further Dinstein, “The Initiation, Suspension, and Termination of War” (n. 25) 134–50; and McCoubrey, *International Humanitarian Law* (n. 31) 64.

<sup>34</sup> Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts* (n. 33) 102; see for a similar view, McCoubrey, *International Humanitarian Law* (n. 31) 66, who holds that “the primary criterion [for the termination of the application of IHL] will be the end of hostilities, but in many other cases the criterion will simply be the end of the situation calling for humanitarian protection to which a treaty o[r] provision refers.”

<sup>35</sup> Bush held his “Mission Accomplished Speech” on 1 May 2002. On the continuation of the application of IHL, see Knut Dörmann and Laurent Colassis, “International Humanitarian Law in the Iraq Conflict” (2004) 47 *German Yearbook of International Law* 293.

<sup>36</sup> Although Art. 6(3) of Geneva Convention IV limits the application of the convention to “one year after the general close of military operations,” Additional Protocol I extended the application of IHL to the entire occupation: based on its Art. (b), the application of both the Geneva Conventions of 1949 and the Protocol, in case of occupied territories, ceases only with “the termination of the occupation.” The latter is in line with the scope of application of the Hague Regulations and given that almost all substantive rules of occupation law are now considered to be part of customary IHL, the limitation of Art. 6(3) of Geneva Convention IV is said to be largely obsolete (Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts* (n. 33) 103–4). See also Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli, “A Response to the Review of the Palestine Question in International Law by Robbie Sabel” (2010) 43 *Israel Law Review* 252–5.

<sup>37</sup> Only in case of a declaration of war is a political statement (and the subsequent actions required under the concerning national law for such a declaration to take effect) obviously relevant.

<sup>38</sup> Even though the organizational level of the LTTE and their control over a substantial part of the Sri Lankan territory was such that the requirements of Additional Protocol II clearly were met, this was a Common Article 3 conflict only, as Sri Lanka has never ratified Additional Protocol II.

<sup>39</sup> Since a NIAC involves at least one non-state actor, naturally, a peace *treaty* is not an option.

not cease.<sup>40</sup> It was not until the full-scale military defeat in May 2009 of the LTTE by the government forces that the armed conflict actually ended. Such a non-international version of *debellatio* is rare, however. For example, in Sierra Leone, two agreements were signed before the Revolutionary United Front was finally defeated and dissolved.<sup>41</sup> It happens that NIACs just taper until they have withered away until no warring parties exist anymore. Often, however, like with the Shining Path in Peru, armed groups continue to exist, but on a smaller scale, thereby forming less of a threat. It is also possible that only one armed group, or only part of an armed group, becomes a party to the agreement, as was the case with the *Interahamwe* in Rwanda or the *Forces Nationales de Libération* in Burundi.<sup>42</sup>

Secondly, the need for an “effective and final cessation of hostilities” for IACs comports with fact that an IAC starts with the first hostile act (involving two states), which initiates the protection given by IHL, namely when the first (protected) person is affected by an attack.<sup>43</sup> However, the threshold for the existence of a NIAC is significantly higher and not all violence reaches this threshold. Similarly, at the end of a NIAC, a certain amount of violence should be considered to be below the armed conflict level.

### III. Using the Lower Threshold Criteria

Given the lack of information on the end of NIACs, guidance will now be sought about what the relevant sources have said about the start of NIACs. If a NIAC only starts when organized groups are engaged in fighting of a certain intensity, then logically, the armed conflict ends when these two criteria are no longer present.<sup>44</sup>

<sup>40</sup> See, inter alia, the 28 November 2006, 14 June 2007, and 20 February 2008 reports on Sri Lanka by the International Crisis Group <<http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka.aspx>> (accessed 7 July 2013).

<sup>41</sup> The Lomé Cease Fire Agreement was followed by the Lomé Peace Agreement, but neither ended the conflict. For a chronology on the Sierra Leone conflict, see the following report: Africa Confidential, “Chronology of Sierra Leone: How Diamonds Fuelled the Conflict” (Africa Confidential 1998) <[http://www.africa-confidential.com/special-report/id/4/Chronology\\_of\\_Sierra\\_Leone](http://www.africa-confidential.com/special-report/id/4/Chronology_of_Sierra_Leone)> (accessed 8 July 2013).

<sup>42</sup> See Jennifer Hazen, “War Transitions and Armed Groups” in Mats Berdal and Achim Wennmann (eds), *Ending Wars, Consolidating Peace: Economic Perspectives* (Routledge 2010) 157.

<sup>43</sup> See, inter alia, Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n. 1) 32; Sassòli and Bouvier, *How Does Law Protect in War?* (n. 32) 116; Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts* (n. 33) 101; ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” (Opinion Paper, ICRC 2008) 5; Hans-Peter Gasser, “International Humanitarian Law: An Introduction” in Hans Haug et al. (eds), *Humanity for All: the International Red Cross and Red Crescent Movement* (Henri Dunant Institute 1993) 24; Éric David, *Principes de droit des conflits armés* (Bruylant 2008) 122. In recent years and as a result of the Global War on Terror, some authors have argued that a certain lower threshold of violence also exists for IAC and that mere incidents, or an isolated confrontation, do not qualify as an IAC (see e.g. Mary Ellen O’Connell, “Defining Armed Conflict” (2008) 13 *Journal of Conflict & Security Law* 393).

<sup>44</sup> For a similar conclusion, see ILA, *Meaning of Armed Conflict Report* (n. 17) 30. In his think-piece on the temporal application of IHL, Derek Jinks asks the question: “does the applicability of international humanitarian law terminate once the intensity of the fighting passes back below the critical threshold? Or, does it apply until the ‘general close of hostilities’ or the ‘cessation of active hostilities?’” Jinks, “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts” (n. 16) 7–8. An accused before the ICTY proposed that an intensity and organization threshold should apply to the case against him, but the Trial Chamber held that the relevant situation qualified as an international armed conflict, and thus did not consider the proposed determination. See the submission by the Markač Defense in *Prosecutor v. Ante Gotovina et al.* (Defendant Miladin Markač’s Final Trial Brief), ICTY-06-90-T (16 July 2010 (redacted version filed on 23 May 2011)) paras 31–2, 37, 51; and the Trial Chamber’s rejection of these

The threshold for so-called “Additional Protocol II conflicts” is higher than that for what can be referred to as “Common Article 3 conflicts.” Whilst it is generally accepted that the non-application of IHL “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”<sup>45</sup> applies for both Common Article 3 and for Additional Protocol II, the requirements that at least one of the parties is the state and that the armed group that is engaged in fighting with the government must control part of the territory of this state are specific to Additional Protocol II. Besides the obvious requirement that the concerning state is a party to Additional Protocol II, it is not necessary, for the purposes of this chapter, to look into the end of “Additional Protocol II conflicts” specifically, as all Additional Protocol II conflicts are also governed by Common Article 3. Furthermore, whereas the toppling of the government in an “Additional Protocol II conflict” arguably does not lead to the end of the application of Additional Protocol II, the loss of territorial control by the armed group would.<sup>46</sup> If, in such a situation, the criteria of organization and intensity are still met, a NIAC still exists in the form of a Common Article 3 conflict.

The ICRC Commentary to the Geneva Conventions lists “convenient criteria” to guide the application of Common Article 3 in practice.<sup>47</sup> However, these have the potential to mislead the application in practice of Common Article 3, given that the criteria were only a compilation of the suggestions made by the delegates at the Diplomatic Conference, which were all rejected.<sup>48</sup> Similarly, the ICTY in *Limaj* rejected the convenient criteria as being too stringent with regard to the organizational requirement, when it considered whether or not the Kosovo Liberation Army fulfilled the said requirement.<sup>49</sup>

submissions in *Prosecutor v. Ante Gotovina et al.* (Judgment) ICTY-06-90-T (15 April 2011) (*Gotovina* Trial Judgment) para. 1694.

<sup>45</sup> See George Abi-Saab, “Non-International Armed Conflicts” in Richard R. Baxter and Claude Pilloud (eds), *International Dimensions of Humanitarian Law* (Martinus Nijhoff 1988) 229; ICRC (n. 43) 5.

<sup>46</sup> Compare Sandoz et al. (eds), *Commentary on the Additional Protocols* (n 20) 1352.

<sup>47</sup> The “convenient criteria” listed are:

1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or  
(b) That it has claimed for itself the rights of a belligerent; or  
(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or  
(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4. (a) That the insurgents have an organization purporting to have the characteristics of a State.  
(b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory.  
(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.  
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n. 1) 49–50.

<sup>48</sup> Sivakumaran, *The Law of Non-International Armed Conflict* (n. 13) 526.

<sup>49</sup> *Limaj* Trial Judgment, para 89.

## A. From *Tadić* to *Boškoski*

It was this same Tribunal that came up with what today is seen as the definition for “armed conflict.” The definition given by the ICTY’s Appeals Chamber in *Tadić* has been widely accepted as reflecting custom,<sup>50</sup> or at least has become custom by now, due to its general acceptance.<sup>51</sup> When applying the part of the definition relating to NIACs, the *Tadić* Trial Chamber and the *Akayesu* Trial Chamber at the ICTR both interpreted the definition as consisting of the following two criteria in order to distinguish a situation of armed conflict from “banditry, unorganized and short-lived insurrections, or terrorist activities”: the intensity of the conflict and the organization of the parties to the armed conflict.<sup>52</sup> This approach has been followed subsequently by other chambers at both the ICTY and at the ICTR. The Tribunals in these later judgments concluded that “protracted” refers more to the “intensity” of the violence than to its duration.<sup>53</sup> This approach is in line with the Inter-American Commission on Human Rights’ view in the *La Tablada* case, when it considered that a 30-hour battle constituted a Common Article 3 conflict.<sup>54</sup>

In *Limaj*, the ICTY found that the convenient criteria mentioned in the ICRC Commentary to the Geneva Conventions were not intended by the drafters to be explicit requirements, and therefore proceeded to assess the existence of a NIAC by reference to objective indicative factors of intensity of the fighting and the organization of the armed group(s), depending on the factors of each case.<sup>55</sup>

In *Haradinaj*, the Trial Chamber conducted an elaborate review of the Tribunal’s case law on this matter and listed all the indicative factors that the various chambers had used thus far.<sup>56</sup> In *Boškoski*, the Trial Chamber refined it further by giving a similarly detailed overview, but this time also looked beyond what was earlier stated by the ad hoc tribunals and included case law of other institutions, as well as a review of the relevant literature.<sup>57</sup> This approach by the *Boškoski* Trial Chamber was confirmed by the Appeals Chamber.<sup>58</sup> Although the Appeals Chamber was not called upon to discuss the matter, the bench raised the issue of the lower threshold during the appeals hearing,

<sup>50</sup> See Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict” in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus Ad Bellum, Jus In Bello and Jus Post Bellum* (Edward Elgar Publishing 2013).

<sup>51</sup> Compare with Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (n. 16) 137.

<sup>52</sup> *Prosecutor v. Dusko Tadić* (Judgment) ICTY-94-1-T (7 May 1997) para. 562; *Prosecutor v. Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para. 620.

<sup>53</sup> See e.g. *Prosecutor v. Zejnil Delalić et al.* (Judgment) ICTY-96-21-T (16 November 1998) (*Delalić* Trial Judgment) para. 184; *Prosecutor v. Dario Kordić and Mario Cerkez* (Judgment) ICTY-95-14/2-A (17 December 2004) para. 341; *Limaj* Trial Judgment, para. 84, *Prosecutor v. Ramush Haradinaj et al.* (Judgment) ICTY-04-84-T (3 April 2008) (*Haradinaj* First Trial Judgment) para. 38; *Prosecutor v. Alfred Musema* (Judgment) ICTR-96-13-T (27 January 2000) paras 248–51.

<sup>54</sup> *Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).

<sup>55</sup> *Limaj* Trial Judgment, para. 86; *Boškoski* Trial Judgment, para. 176.

<sup>56</sup> *Haradinaj* First Trial Judgment, paras 39–60.

<sup>57</sup> *Boškoski* Trial Judgment, paras 175–206.

<sup>58</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (Judgment) ICTY-04-82-A (19 May 2010) paras 19–24.

showing a clear interest in getting an Appeals Chamber ruling on this matter that, until that moment, had only been dealt with at the trial level.<sup>59</sup>

So in *Boškoski*, the ICTY gave a detailed overview of what constitutes the lower threshold of NIACs, and reviewed how the relevant elements of Common Article 3 recognized in *Tadić* (“organization of the armed group” and “intensity”), are to be understood. In doing so, it identified the “factors” to be taken into account when assessing these elements, and identified a number of “indicators” thereof. These factors, as identified by the ICTY, have since been adopted by the ICC Trial Chamber in *Lubanga*, in the first ICC judgment.<sup>60</sup> The next sections will further discuss the organizational and intensity criteria and set out the factors and indicators for these criteria as they were identified by the *Boškoski* Trial Chamber.

## B. Organization

The organizational requirement relates only to armed groups. If one side to the conflict is the government, it can be assumed that the government is sufficiently organized to fulfill the threshold. Whilst there are armed groups that are better organized than the government of certain states, the “organizational criterion” should nonetheless focus only on the organization of the armed groups opposing the government or each other.

For the organizational criterion in *Boškoski*, the following five factors with various indicators were identified:

- (1) The existence of a command structure;  
Indicators: e.g. the existence of headquarters; a general staff or high command; internal regulations; the issuing of political statements or communiqués; spokespersons; identifiable ranks and positions.
- (2) The existence of military (operational) capacity;  
Indicators: e.g. the ability to define a unified military strategy; to use military tactics; to carry out (large-scale or coordinated) military operations; the control of certain territory, and territorial division into zones of responsibility;
- (3) The existence of logistical capacity;  
Indicators: e.g. the existence of supply chains (to gain access to weapons and other military equipment); ability for troop movement; ability to recruit and train personnel;
- (4) The existence of an internal disciplinary system and the ability to implement IHL;  
Indicators: e.g. the existence of disciplinary rules or mechanisms within the group; training;
- (5) The ability of the group to speak with one voice;  
Indicators: the capacity to act on behalf of its members in political negotiations; the capacity to conclude cease fire agreements.<sup>61</sup>

<sup>59</sup> See *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (Appeals Hearing Transcript) ICTY-04-82-A (29 October 2009) 40, 63–4, and 94; *Boškoski* Appeals Judgment, para. 19.

<sup>60</sup> *Lubanga* Trial Judgment, paras 537–8. <sup>61</sup> *Boškoski* Trial Judgment, paras 194–203.

### C. Intensity

The factors for the “intensity criterion” refers both to the way that organs of the state, such as the police and military, use force against armed groups, and to the way that armed groups use force against the government (forces) or each other. Whereas both (or all) parties to a NIAC need to be sufficiently organized, the intensity requirement could be fulfilled by the force used by one side only. As with all types of armed conflicts, both international and non-international, it is possible that one side is unable or unwilling to respond to the attacks carried out against it by another party. IHL would nevertheless apply to such situations.

The factors of the use of such force can be grouped in six categories that all have qualitative and quantitative indicators:

- (1) The use of armed forces;  
Indicators: e.g. quantity of troops involved; the increase in the number and type (army, air force, navy) of government forces, and need for mobilization;
- (2) The attacks;  
Indicators: e.g. the seriousness of attacks and whether there has been an increase in armed clashes; the spread of clashes over territory and over a period of time; damage and casualties suffered by the fighting parties;
- (3) The type of actions;  
Indicators: e.g. the extent to which towns are besieged or supply routes are blocked; the closure of roads;
- (4) The type of weapons, ammunition, and other military equipment used by the parties;  
Indicators: e.g. use of heavy weapons, such as tanks and other heavy vehicles;
- (5) Effects on the civilian population;  
Indicators: e.g. number of casualties; number of civilians forced to flee from the combat zones; extent of destruction;
- (6) Involvement of the United Nations (UN) Security Council and other external actors;  
Indicators: e.g. whether resolutions have been passed on the situation; and whether there were other external actors.<sup>62</sup>

### D. Use of the factors outside the context of the former Yugoslavia

The case law identifying the factors described hitherto, all concerned (breakaway) states in the former Yugoslavia. One can wonder then whether the indicators can also be put into a broader perspective, or whether they are only relevant for the identification of NIACs in the Balkans.

<sup>62</sup> *Boškoski* Trial Judgment, paras 177–8.

The ICTY cases where the existence of a NIAC was an issue dealt mainly with the fighting in Kosovo and Macedonia. The *Boškoski* Trial Chamber did, however, assess arguments relied on by other courts in relation to, for example, Peru, Somalia, and Chechnya.<sup>63</sup> Nevertheless, some of the indicators were relevant to the fighting in the former Yugoslavia, such as the type of weaponry, but would not necessarily work for some of the conflicts in central Africa, for example, where only limited heavy weaponry is used, due to a lack thereof, or due to the nature of the terrain. The fact that no use would be made of tanks or the air force cannot then serve as an indicator in such circumstances. Also, the involvement of the UN Security Council, or lack thereof, naturally cannot be considered an indicator when one of the parties to the conflict is a permanent Council member.<sup>64</sup>

Be that as it may, since the indicators are not determinative, but merely serve indeed to indicate, they can also be applied to many other situations.<sup>65</sup> Using the factors and indicators as put forward by the ICTY, it is clear that the current situation in Syria qualifies as a NIAC—although at that time Kofi Annan, for example, still continued to express his fear that the situation might “descend *into* a civil war.”<sup>66</sup> Importantly also, as mentioned above, the *Lubanga* Trial Chamber recently relied on the *Boškoski* indicators when determining that a NIAC had taken place in Ituri (Democratic Republic of the Congo) during the period of the charges.<sup>67</sup>

<sup>63</sup> *Boškoski* Trial Judgment, paras 181, 196, and 180.

<sup>64</sup> The involvement of the UN Security Council should in any case be considered by taking into account the political nature of the Council and the fact that for political or economic reasons the Council might ignore a situation in certain countries, whilst for the same reasons it might be overly interested (and thus involved) in the situation in other countries. Council statements on the possible end of a conflict might similarly result from this.

<sup>65</sup> See e.g. Paul Ducheine, who applies the indicators to the conflict in Afghanistan to determine whether there existed a NIAC between the Netherlands (as part of ISAF) and the Taliban. Paul Ducheine, “ISAF en oorlogsrecht: ‘Door het juiste te doen, vreest zij niemand’” (2009) 6 *Militair Rechtelijk Tijdschrift* 286–300. Benjamin Zawacki and Katie Johnston do the same for Thailand and Libya, respectively (Benjamin Zawacki, “Politically Inconvenient, Legally Correct: A Non-international Armed Conflict in Southern Thailand” (2013) 18 *Journal of Conflict & Security Law* 151; and Katie A. Johnston, “Transformations of Conflict Status in Libya” (2012) 17 *Journal of Conflict & Security Law* 89–93).

<sup>66</sup> See “Kofi Annan: Syria could descend into civil war,” (*The Guardian*, 9 May 2012) <<http://www.guardian.co.uk/world/video/2012/may/09/kofi-annan-syria-civil-war-video>> (accessed 8 July 2013), emphasis added; and “UN envoy Kofi Annan warns of civil war in Syria” (*CBC News*, 8 May 2012) <<http://www.cbc.ca/news/world/story/2012/05/08/syria-kofi-annan-civil-war.html>>.

<sup>67</sup> *Lubanga* Trial Judgment, paras 537–8. The Judgment refers only to a number of the factors. For organization, it considered these factors as “potentially relevant”:

[T]he force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement [537].

For intensity, the Trial Chamber considered that it should take into account:

the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed [538].



#### IV. Relevance of the Factors and Indicators for Determining the End of a NIAC

The discussion now turns to the relevance of these indicators for identifying the end of a NIAC. As mentioned above, it appears that when the criteria of “intensity” and “organization” no longer exist, the armed conflict comes to an end. Using the factors and indicators identified earlier can thus be a useful method to assess the end of the conflict. However, a number of the indicators cannot easily be applied “in reverse,” such as the indicator of UN Security Council attention to the situation. Examining the damage caused might also be more difficult, as it is hard to assess whether there is less damage if few buildings are left standing or if few potential targets remain.<sup>68</sup> The lack of such damage may well be due to these circumstances rather than as a result of the end of the conflict. As said above, an indicator only serves to “indicate” the existence of a NIAC, and has to be seen in relation to other indicators: if few military objects remain and a prolonged period occurs during which no targets are attacked, this may well be a sign that the conflict has ended.

Furthermore, other indicators need to be adapted. For the indicator of refugee flows from combat zones, for example, one could, rather than consider the number of civilians fleeing an area, look instead at the number of civilians returning home, i.e. considering their place of residence safe enough to return to. Again, that is not to say that a conflict could never be considered as ended if refugees and or internally displaced persons (IDPs) do not return to their homes as this may be caused by other factors,<sup>69</sup> such as a changed ethnic composition of the area concerned,<sup>70</sup> lack of corporation by the government, and/or measures implemented by the victorious party.<sup>71</sup> Likewise, instead of looking at the weapons used, an indicator could be the effectiveness of a disarmament program: the type and amount of weapons handed in *vis-à-vis* the number of initial fighters or the approximate type and number of weapons initially used.<sup>72</sup> Similarly, when reservists have been called under arms, their returning home could be used as an indicator that the armed conflict has come to an end.

<sup>68</sup> A drop in the number of strikes carried out, or in the case of an air campaign, the number of sorties flown, could be the result of a decreasing number of military objects that can be legitimately targeted, rather than the result of a diminishing intensity.

<sup>69</sup> On such problem with respect to return of refugees and IDPs after the 2003 Iraq war, see David Romano, “Whose House is this Anyway? IDP and Refugee Return in Post-Saddam Iraq” (2005) 18 *Journal of Refugee Studies* 430–53.

<sup>70</sup> The Balkan conflict serves as an example here. Policies of ethnic cleansing as part of which houses of members of a particular ethnicity were deliberately destroyed and persons were forcibly displaced or deported resulted in permanent changes in the ethnic composition of many villages and areas in the former Yugoslavia.

<sup>71</sup> Croatia, for example, was specifically warned that it was to allow for the return of the Serbian population of the areas that were (re)taken during Operation Storm and Flash. See UNSC Res. 1009 (10 August 1995) UN Doc. S/RES/1009. See also Karen Hulme, “Armed Conflict and the Displaced” (2005) 17 *International Journal of Refugee Law* 100. See also, in relation to the Sri Lankan government’s problematic policies preventing Tamil IDPs to return home, International Crisis Group, “Sri Lanka: Post-War Progress Report” (International Crisis Group 2011).

<sup>72</sup> On disarmament as part of peace building, see e.g. Sami Faltas, Glenn McDonald, and Camilla Waszink, “Removing Small Arms from Society: A Review of Weapons Collection and Destruction Programmes” (Small Arms Survey 2001).

Whereas the focus appears to be mostly on the intensity requirement when peace agreements are viewed to be the end of NIACs, as advocated by the ICTY in *Tadić*, the present author considers that between the two criteria, organization and intensity, the former should be the most relevant for the assessment. The decline in organization of one or more of the parties to the conflict can result in a security vacuum when the controlling regime, the state, or the rebel force, gives way and the resulting (state) apparatus is not (yet) able to provide for effective security.<sup>73</sup> Especially then, *jus post bellum* would have an important role to play. It is also the organizational structure of an armed group that is mainly targeted by the opposing party. Whilst targeting the leadership was relatively uncommon in IACs,<sup>74</sup> it has long been the main goal in NIACs, and appears also the most effective way to bring about the end of the conflict, as was evidenced by the killing of LTTE leader Prabhakaran in 2009, the effects of the air strikes by the Colombian government on the commanders of the Revolutionary Armed Forces of Colombia (FARC), and the (drone) attacks by United States on Al-Qaeda leadership. Furthermore, intensity or “protractedness” is hard to pinpoint on a specific moment, because a time element—despite claims to the contrary—is still inherent in it. Moreover, small breakaway fractions of an armed group could continue to carry out attacks, or sectarian violence could continue—or perhaps more likely follow as a result of—the disappearance of the organizational structure of one or more of the fighting parties. Examples include the sectarian violence in Iraq following the US/British occupation<sup>75</sup> and the situation in Libya in the period after the defeat of the Gaddafi regime and the formation of the new government by the rebels.

The author’s submission that NIACs end when the level of violence and organization drops below a certain lower threshold has consequences for the application of IHL and consequently for the protection afforded by IHL. In *Gotovina*, the ICTY held—albeit with regard to IAC—that:

Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.<sup>76</sup>

This is a very rational finding and when considering the proposed lower threshold with regard to the end of a NIAC, it makes sense that this end-threshold would probably have to be set at a lower level than the threshold that would bring about the start of the conflict. In reality, however, having a threshold for the end of NIACs should not create a gap in protection, nor create the uncertainty envisaged by the *Gotovina* Trial Chamber. Applying the lower threshold to the end of a NIAC actually allows for

<sup>73</sup> On such security problems, see Hazen, “War Transitions and Armed Groups” (n. 42) 157.

<sup>74</sup> From the US strikes on Libya in 1986 (Operation El Dorado Canyon), which included bombing Muammar Gaddafi’s residence, onwards, this policy appears to have changed. Attacks on Slobodan Milosević’s residence in 1999 (as part of Operation Allied Force), and on Saddam Hussein’s palace in 2003, are further examples that the previous policy not to target the leadership of the enemy state has now changed. See, inter alia, Catherine Lotrointe, “Targeting Regime Leaders During Armed Hostilities: An Effective Way to Achieve Regime Change?” in Howard M. Hensel (ed.), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate 2007) 21–38.

<sup>75</sup> It should be noted that sectarian violence had already erupted during the occupation.

<sup>76</sup> *Gotovina* Trial Judgment, para. 1694.

a smoother transition between the law governing the use of force during armed conflict (conduct of hostilities paradigm) and the law governing force outside situations of armed conflict (law enforcement paradigm). In the discussions leading up to the ICRC's Interpretive Guidance on Direct Participation in Hostilities,<sup>77</sup> it was already considered that a human rights form of proportionality should govern the "taking out of the game" of members of armed groups who find themselves away from the combat zone. The guidance submits that, in certain situations, the party controlling the concerning territory should aim to "capture rather than kill" members of the opposing party. The example given is that of a military commander of an organized armed group, such as the FARC in Colombia, who visits relatives inside government-controlled territory, for example, to attend a sibling's birthday party in Bogota. According to the ICRC, and some of the experts, in such a situation, the Colombian government forces should first attempt to arrest the FARC commander, rather than to consider him a target<sup>78</sup> as this would allow for incidental damage to civilians or to civilian objects.<sup>79</sup> As such, it proposes to apply a law enforcement paradigm to such situations.<sup>80</sup>

In light of the matter addressed in the chapter, it makes sense to slowly move toward a law enforcement approach in the end stages of a NIAC. When the intensity of the fighting has decreased, and/or organizational structure of concerning groups has broken down, to such an extent that it would be near or at the lower threshold, it appears that there will not be any "direct participating in hostilities" in the traditional sense. The persons belonging to a (partly or fully broken down) group, are likely to find themselves in a situation as described above, namely where the opposing party controls the territory that they find themselves in. The said opposing party should then apply the human rights or law enforcement approach when taking action against these persons. If it is unclear whether or not a situation of armed conflict continues to exist, the attacking party should err on the safe side and apply the least amount of force necessary. This would also make sense from a moral and practical point of view: if the conflict is ending, why would one want to continue killing the opponents, rather than starting to think about processes that would bring a lasting peace after the conflict? In addition, when the conflict is ending, it will be easier to bring the persons to justice that have committed crimes, because the regular rule of law can start to apply again after the conflict.<sup>81</sup> Such taking into account of post-conflict considerations would be an example of the—arguable—application of certain *jus post bellum* principles during armed conflicts; especially, during the end stages of armed conflicts.

<sup>77</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (ICRC 2009).

<sup>78</sup> The commander does not cease to be a target as such.

<sup>79</sup> Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (n. 77) 81.

<sup>80</sup> The proposal made in Chapter IX of the Interpretive Guidance is in line with the ruling of the Israeli High Court of Justice, which determined that "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed" (Israel High Court of Justice, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, HC J 769/02, Judgment of 13 December 2006, para. 40. However, Chapter IX of the Interpretive Guidance has received fierce criticism (see e.g. Jann K. Kleffner, "Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of *Jus in Bello* Proportionality as We Know It?" (2012) 45 *Israel Law Review* 35; and W. Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect" (2010) 42 *New York University Journal of International Law and Politics* 769.

<sup>81</sup> Notwithstanding the problems associated with setting up rule of law in post-conflict societies.

The breakdown of an organizational structure of an armed group (which will, amongst other things, be indicated by the inability to carry out military operations) should result in the cessation of the “continuous combat function” of members of that group, thereby limiting the right to target the concerning persons. For those advocating for the so-called “membership approach,”<sup>82</sup> such an approach should not be problematic either. An even further breakdown of the organizational structure should result in the concerning persons ceasing to be “members” at all. After all, there needs to be a group or organization in order for someone to be a member of it.

## V. Challenges in Applying the Threshold Criteria

The fight of the United States against Al-Qaeda highlights one of the problems in applying the threshold criteria to determine the end of NIACs. If this is a NIAC,<sup>83</sup> when would this NIAC end and how can this end be determined?<sup>84</sup> It would be challenging to apply the threshold criteria to this situation. Generally, for asymmetric constellations that elude both temporal and spatial boundaries—in order words, challenge the traditional concept of the “battlefield”—it would be rather difficult to delineate or determine with any degree of precision the end of the conflict.<sup>85</sup> The US government itself has held that it “is fighting a war against terrorists of global reach [that] [...] will be fought on many fronts against a particularly elusive enemy over an extended period of time.”<sup>86</sup>

According to the ICTY’s case law, IHL applies “to situations of protracted armed violence where hostilities are not necessarily to be characterized as continuous.”<sup>87</sup> The

<sup>82</sup> Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance” (2010) 42 *New York University Journal of International Law and Politics* 690–3.

<sup>83</sup> It is open to debate whether this situation can be considered to be a conflict at all (see e.g. Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press 2010) 96); or whether it should be qualified as an IAC rather than a NIAC (see e.g. Rogier Bartels, “Transnational Armed Conflict: Does it Exist?” in Stéphane Kolanowski (ed.), *Proceedings of the Bruges Colloquium “Scope of Application of International Humanitarian Law”* (College of Europe/ICRC 2013); and Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts” in Elizabeth Wilmhurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 70–8). The US Supreme Court took the view that this situation constitutes a NIAC when it ruled that Common Article 3 was applicable to the fight against Al-Qaeda. US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) 66–9. Whereas this does not (have to) mean that the conflict is necessarily non-international in character and could merely reflect that Common Article 3 as a minimum applies to all armed conflicts (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) ICJ Rep. 1986, para. 187), the US government has taken the view that it is a NIAC (see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011) 377–80).

<sup>84</sup> Naturally, the initial “declaration” by Bush on terrorism, resulting in the “Global War on Terror,” did not bring about a classical state of war, and did not result in the automatic application of IHL pursuant to Common Article 2 of the Geneva Conventions. It therefore does not need to be concluded by a peace treaty. Whilst the term “Global War on Terror” might not be used anymore by the Obama administration, the new version (“Overseas Contingency Operations”) still involves the use of armed force against (suspected) Al-Qaeda operatives in various countries (other than Afghanistan). If there is indeed such a thing as the conflict between the United States and Al-Qaeda, this conflict has not ended by using a different name.

<sup>85</sup> Robin Geiss, “Asymmetric Conflict Structures” (2006) 88 *International Review of the Red Cross* 769.

<sup>86</sup> The White House, *U.S. National Security Strategy: Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends* (US Department of State 2001) <<http://2001-2009.state.gov/r/pa/ei/wh/15423.htm>>.

<sup>87</sup> Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (n. 16) 142.

Tribunal's view of the term "protracted" in relation to NIACs "implies that hostilities need not require, unlike Additional Protocol II, the use of 'sustained and concerted' military operations" and that "interruptions in fighting do not suspend" the application of IHL, nor does there "have to be actual combat activities in a particular location for the norms of [IHL] to be applicable."<sup>88</sup> However, the relevant case law relates to very different situations and not to fighting done in multiple states and even continents.

The indicators for the intensity criterion are thus difficult to apply. Questions come up, such as: Where should the indicators be applied? To certain states or rather to particular geographical areas? And, could the lack of fulfillment of indicators in one state point to possible end of the conflict, whilst at the same time in another state the indicators might be fulfilled?

It is not just the fight with Al-Qaeda that poses challenges, however. With a few exceptions, most contemporary NIACs cannot be assessed in isolation. Conflicts such as the one in 2006 between either Israel or Lebanon, the fighting between the Turkish armed forces and the Kurdish Working Party (PKK) in southern Turkey, or the fighting in northern Iraq are not easily qualified as being international or non-international. As such, these situations are subject to debate about the applicable legal framework. Also worth mentioning is the situation in the Great Lake Region, where the Lord's Resistance Army, for example, moves between the territories of multiple states. Similarly difficult is the situation in the Kivus or in Ituri in the Democratic Republic of Congo, where a multitude of groups (which are to various degrees backed by states), in shifting alliances, is engaged in periods of at times intense, but often sporadic and unorganized, fighting. For these types of conflicts, it might be useful to develop a *jus post bellum* approach that distinguishes between geographical areas: those where hostilities are no longer taking place and those where the hostilities are still ongoing.

In these situations, it may be hard to identify the parties and thus to whom the indicators are to be applied. Moreover, when multiple parties are involved, or when several conflicts of both international and non-international nature take place alongside each other, a NIAC may well end, whilst an IAC continues; or the other way around.<sup>89</sup> Even

<sup>88</sup> Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (n. 16) 142; *Delalić* Trial Judgment, para. 185.

<sup>89</sup> The non-international armed conflict between Serbia and the Kosovo Liberation Army (KLA), for example, was already ongoing when the NATO bombing on Serbia in the spring of 1999 started an international armed conflict between the participating NATO member states and Serbia. These two armed conflicts existed alongside each other until both ended around the same time in June 1999 when president Milošević accepted the terms of a peace agreement as a result of which NATO ceased its air strikes. One of these terms was, of course, the ending of all Serbian military operations against the KLA in Kosovo. When the actual fighting in Kosovo ceased, the NIAC ended. It was therefore the fulfilling of the terms of the peace agreement, which led to end of the violence and thus the required intensity, rather than the peace agreement itself that ended the NIAC (for an overview of the timelines and legal qualification of these two conflicts, see the findings of the Trial Chamber in *Prosecutor v. Đorđević* (Judgment) ICTY-05-89/1-T (23 February 2011) paras 1531–80). Similarly, the NATO strikes against the Gaddafi regime started an IAC between the participating NATO member states and Libya whilst the NIAC between Gaddafi's government forces and the National Transitional Council (NTC) was already ongoing. In this situation, the NIAC continued after the IAC ended. In addition, when fighting between the government forces and the NTC ceased following the death of Gaddafi, fighting between various armed groups and/or forces of the newly formed government continued. See e.g. Peter Fragiskatos, "Disarming Libya's Militias" (*BBC*, 28 September 2012) <<http://www.bbc.co.uk/news/world-africa-19744593>> (accessed 8 July 2013).

though a part of IHL ceases to apply,<sup>90</sup> IHL itself continues to govern the behavior of at least some of the actors in the concerning area. If the application of *jus in bello* has not ended, can *jus post bellum* then already “kick-in?”

Furthermore, IACs can evolve into NIACs. This happened with the conflict in Afghanistan after the Bonn Agreement in 2002, which installed the *Loya Jirga*. There, the multinational forces (ISAF), after the toppling of the Taliban government as part of a US-led intervention on the side of the Northern Alliance, assisted the new Afghan government in fighting the Taliban (and associated armed groups). Another example is the 2004 shift from occupation, inter alia, by the United States of (parts of) Iraq to a situation of assistance to the new Iraqi government in securing Iraq. Similarly, NIACs can evolve into IACs as a result of third state involvement: besides the proxy wars of the Cold War era, the Bosnian conflict that motivated the ICTY’s “effective control test” for internationalization of a NIAC being a case in point.<sup>91</sup> Applying the distinction between *jus in bello* and *jus post bellum* too rigidly would therefore not be desirable. Therefore, it may be useful adopt a two-prong approach for *jus post bellum*: one legal framework for after IAC, and another one to follow NIAC.

## VI. Concluding Remarks

This chapter discussed the hypothesis that non-international armed conflicts do not necessarily end only by virtue of a peace settlement being reached, but rather do so by way of falling below the threshold of organization and intensity. To assess when non-international armed conflicts end, one could resort to using the factors and indicators for determining the lower threshold for the start of such conflicts, as identified by the ICTY in its voluminous case law. However, these factors and indicators are to be applied on a case-by-case basis as not all of them are adaptable to the specific circumstances in which some conflicts take place.

Indeed, contemporary non-international armed conflicts can be of such a nature that it can be difficult to apply the factors and indicators. These situations also show that it is neither possible, nor desirable, to identify a specific point in time when international humanitarian law ceases to apply, and when *jus post bellum* “takes over;” for both can apply, in part, after the cessation of active hostilities.

Some rules of *jus in bello* apply in times of peace and some rules continue to apply after the armed conflict that initially brought the rules into force has ended. Examples of such rules are those protecting prisoners of war or persons detained in relation to the conflict. Since it is difficult to define a clear-cut moment for *jus post bellum* to take effect, the *jus in bello* and *jus post bellum* frameworks should exist alongside one another in the end-stages of armed conflicts; and after the conflicts have in fact ended. At the very minimum, certain parts of the frameworks should overlap and certain rules should co-exist at these times so as to ensure protection for those affected by the armed conflict, or what results from it.

<sup>90</sup> Namely, either the rules of IHL applicable to NIAC or the rules of IHL applicable to IAC.

<sup>91</sup> *Prosecutor v. Dusko Tadić* (Judgment) ICTY-94-1-A (15 July 1999) paras 145 and 156.

# II

## INSTITUTIONAL DILEMMAS AND STRATEGIES

17

### Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the “Post”

*Martin Wählisch\**

#### I. Introduction

The concept of time is still a mystery. Philosophers, physicists, theologians, and legal scholars have been trying to capture the nature of timeframes, the impact of temporal limitations, and the reasons for a beginning and end, yet a comprehensive understanding about the measurement of time remains intangible. Gottfried Wilhelm Leibniz, a German mathematician and philosopher, as well as one of the seventeenth century’s advocates of rationalism, argued that “[t]ime is the general order of changes.”<sup>1</sup> The American author and clergyman Henry Van Dyke concluded: “Time is too slow for those who wait, [and] too swift for those who fear.”<sup>2</sup> Both make it clear that time is a key parameter in rating continuity and transformations; however, its assessment often comes with difficulties.

In the context of international law, the definition of the aftermath of conflict has been a hazy case. Though international law developed meticulous conditions for an armed confrontation between states (*jus ad bellum*), as well as detailed regulations for

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<sup>1</sup> On the metaphysical definition of time in the context of mathematics, see Gottfried Wilhelm Leibniz, *Hauptschriften zur Grundlegung der Philosophie* (Felix Meiner Verlag 1996) 36, who argues that “Die Zeit ist die Ordnung des nicht zugleich Existierenden. Sie ist somit die allgemeine Ordnung der Veränderungen, in der nämlich nicht auf die bestimmte Art der Veränderungen gesehen wird.”

<sup>2</sup> Henry Van Dyke, *The Poems of Henry Van Dyke* (Charles Scribner’s Sons 1911) 341.

warfare (*jus in bello*), specifications for the time after conflict (*jus post bellum*) have stayed rather unregulated.<sup>3</sup> Whereas declarations of war or ceasefire agreements can mark the launch or closure of an armed conflict, transitional periods for peacebuilding are fluid, and thus harder to grasp.<sup>4</sup>

The challenge for *jus post bellum* is that timeframes can be defined through static deadlines based on fixed dates (e.g. “The transition has to be completed by the end of 2014”) or circumstances (e.g. “The national dialogue is concluded with the conduction of parliamentary elections after the adoption of a new constitution”). Correspondingly, the allocation of time varies according to the particular post-conflict challenge at hand (e.g. military integration, legal reforms, transitional justice).<sup>5</sup> Moreover, it is questionable which authority decides about the time scale.

This chapter focuses on temporal questions of *jus post bellum*. Adding to the overall reflection about the application of the laws of war and the emerging concept of justice after war, the chapter scrutinizes indicators set by international human rights institutions for characterizing post-conflict phases. Whereas previous studies comprehensively evaluated the relation of the *trias* between human rights, *jus post bellum*, and the end of conflict in general, this analysis highlights legal conditions for emergency derogations, justified discrimination, and transitional power-sharing as crucial reference points for the calculation of the onset and expiration of *jus post bellum*.<sup>6</sup>

This chapter elaborates how the practice of international human rights bodies take a multitude of factors into consideration for the decision whether or not a state is still in a process of transition. Among others, a decisive factor can be whether free and fair elections are conducted while a state works towards enhancing the fulfillment of its human rights obligations. The reintegration of militia, security sector reforms, the re-establishment of diplomatic relations, and progressive economic developments are other political factors that can indicate an approaching end of *jus post bellum*.<sup>7</sup> Overall, the assessment of the “post” needs to be context specific and varies according to the concrete case at hand.

Outlining conceptual challenges in the context of human rights for defining the phase after armed conflict, the first part of this chapter investigates the temporal quali-ifiability of *jus post bellum*. The second part probes three case studies from different institutional perspectives: the decision *Sejdić and Finci v. Bosnia and Herzegovina* of the European Court of Human Rights (ECtHR), which concentrates on the proportionality of time frames for state transitions; the debate about Lebanon’s confessional power-sharing system, which caused concerns in UN human rights monitoring bodies about the permissible length of post-Civil War transitions; and the case of Libya, which provides a recent example for the stages of developments after an international military intervention.

<sup>3</sup> Jann K. Kleffner, “Introduction” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 1.

<sup>4</sup> See Figure 17.1.

<sup>5</sup> See Figure 17.2.

<sup>6</sup> Previously, see Ralph Wilde, “Are Human Rights Norms Part of *Jus Post Bellum*, and Should they Be?” in Stahn and Kleffner, *Jus Post Bellum* (n. 3) 163. See also Stephen C. Neff, “Conflict Termination and Peace-making in the Law of Nations: A Historical Perspective” in Stahn and Kleffner, *Jus Post Bellum* (n. 3) 77.

<sup>7</sup> See Figure 17.4.



## II. Conceptual Challenges

The relationship between law and time is an ambivalent one. Whereas law is habitually appraised for providing constant variables prompting predictability and consistency, legal temporal rules also maintain a core of indecisiveness in order to guarantee flexible interpretations serving particular circumstances.<sup>8</sup> For example, on one hand, private law, criminal, or administrative law contain precise and static instructions for the length of time periods quantified in years, weeks, or days.<sup>9</sup> On the other hand, time limitations can also be framed conditionally, which is accompanied with potential dispute over whether distinct requirements are fulfilled or not.<sup>10</sup> Both approaches explain why the qualifiability of the necessary time for transformation processes after conflict is not necessarily uniform.

### A. Continuum and temporal qualifiability of *jus post bellum*

To begin with, the exact moment of application of *jus ad bellum* and *jus in bello* is already often problematic, predicting a similar quandary for *jus post bellum*.<sup>11</sup> International humanitarian law is limited in its temporal purpose to the existence of an “armed conflict,” which conditions have been outlined through state practice, but regularly pose new questions of clarification.<sup>12</sup> Neither the UN Charter nor the Geneva Conventions prescribe how long an armed conflict can last. Rationally, the UN Charter upholds human rights and peace, and demands immediate compliance.<sup>13</sup> However, armed struggles can remain present for decades or even longer, as the “Hundred Years’ War” that assembled a cascade of separate conflicts waging from 1337 to 1453.<sup>14</sup> Continuing

<sup>8</sup> Benjamin Nathan Cardozo, “The Methods of History, Tradition and Sociology,” in Clarence Morris (ed.), *The Great Legal Philosophers: Selected Readings in Jurisprudence* (University of Pennsylvania 1970) 519.

<sup>9</sup> In German private law see e.g. German Civil Code 2002 (BGB) para. 187 (Beginning of a period of time); para. 188 (End of a period of time); para. 190 (Extension of period); para. 191 (Calculation of periods of time). In German criminal law see e.g. German Criminal Code 1998 (StGB) para. 77b (Time limit). In German administrative law see e.g. German Administrative Procedure Act 1976 (VwVfG) dev. 2 (Time limits, deadlines, restoration). For time quantities, see BGB para. 39 (“[T]he maximum [...] period is two years [...]”); BGB para. 50 (“[A]t the end of the second day [...]”); BGB para. 108 (“[B]efore the expiry of two weeks [...]”).

<sup>10</sup> See e.g. BGB para. 29 (“[F]or the period until the defect is corrected [...]”); BGB para. 101 (“[D]uring the period of entitlement [...]”); BGB para. 124 (“[F]rom the time when the duress stops.”); BGB para. 187 (“[P]eriod commences on the occurrence of an event [...]”).

<sup>11</sup> See e.g. Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 212.

<sup>12</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3, Art. 3 para. (a), Art. 1 para. 4 (“Beginning and end of application”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 1 para. 1 (“Material field of application”). About the contemporary challenges for *jus ad bellum* and *jus in bello*, see Katharine C. Hinkle, “Countermeasures in the Cyber Context: One More Thing To Worry About” (2011) 37 *Yale Journal of International Law Online* 11.

<sup>13</sup> United Nations (UN) “Charter of the United Nations” (24 October 1945) 1 UNTS XVI (UN Charter) Art. 1 para. 1.

<sup>14</sup> For insight about the Hundred Years’ War and the limits of international law, see Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press 2005) 69.

for over half a century, the armed insurrection in Myanmar is said to be the longest civil war in history.<sup>15</sup> Guatemala experienced 36 years of civil war spanning from 1960–96.<sup>16</sup>

Eventually, the timespan after conflict to renew, consolidate, or transform state structures and build sustainable peace requires even much more patience in comparison to the fraction of time causing devastating hostilities. As the UN Secretary General noted in his *Report on Peacebuilding in the Immediate Aftermath of Conflict* in 2009:

Time and again, we have failed to catalyse a response that delivers immediate, tangible results on the ground. Often, it has taken many months before essential government functions resume or basic services are available. In some cases, it has taken several years before the international community has aligned its efforts behind a common strategic vision.<sup>17</sup>

The end of conflict “tends to create high expectations for the delivery of concrete political, social and economic dividends,” whereas the political will, commitment and consensus among the main national protagonists is often not ripe enough to carry long-term peace beyond the immediate end of violence.<sup>18</sup> These moments are on the edge of the *jus in bello* and *jus post bellum*. They reveal a continuum of practical and legal dynamics that set the “post” into a relative state.

## B. Agenda for peace and the UN report on peacebuilding in the immediate aftermath of conflict as possible reference points for *jus post bellum*

The steps in the phase following armed conflict are manifold, ranging from the demobilization and reintegration of militia, transitional power-sharing, constitutional reforms, and infrastructure reconstruction. It is difficult to judge what component still exclusively belongs to *jus post bellum* or is already evidence for the state of normalcy.<sup>19</sup> Does *jus post bellum* end with the first round of post-conflict elections or a legislative amendment granting additional rights to those who fought for them? Is the peak of post-conflict reconstruction reached when the main parts of a country’s infrastructure are rehabilitated or when a vetting process is completed? The aspired outcome of conflicts are also frequently the causes of armed strife intertwining and connecting *jus ad bellum*, *jus in bello*, and *jus post bellum*, which complicates cutting emerging events along the way into pieces of time.<sup>20</sup>

<sup>15</sup> See “The World’s Longest Ongoing War,” *Al Jazeera*, 10 August 2011 <<http://www.aljazeera.com/programmes/101east/2011/08/201181073919760492.html>> (accessed 20 June 2013).

<sup>16</sup> Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2008) 363.

<sup>17</sup> UN Secretary General, “Report on Peacebuilding in the Immediate Aftermath of Conflict” (2009) UN Doc. A/63/881–S/2009/304 (Report on Peace) para. 4.

<sup>18</sup> “Report on Peacebuilding in the Immediate Aftermath of Conflict” (n. 17) para. 4.

<sup>19</sup> See Figure 17.2. For the spectrum of aspects concerning *jus post bellum*, see Carsten Stahn, “*Jus Post Bellum*: Mapping the Discipline(s)” in Stahn and Kleffner, *Jus Post Bellum* (n. 3) 93. For a practical conceptual overview about occupation, the use of force, detention, and criminal justice in the context of *Jus Post Bellum*, see Charles Garraway, “The Relevance of *Jus Post Bellum*: A Practitioner’s Perspective” in Stahn and Kleffner, *Jus Post Bellum* (n. 3) 153.

<sup>20</sup> About the ultimate purpose of peacemaking to remove the causes of violence, see also Carsten Stahn, “*Jus ad bellum*, ‘*jus in bello*’ . . . ‘*Jus Post Bellum*’?: Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 936.

Nonetheless, the definition of a qualitative time quantum for *jus post bellum* in the post-conflict context is not impossible. The *UN Agenda for Peace* (1992), for instance, differentiates between peacekeeping, as the “work to preserve peace,” and peacebuilding, which includes “rebuilding the institutions and infrastructures of nations torn by civil war and strife” as well as “building bonds of peaceful mutual benefit among nations formerly at war.”<sup>21</sup> Within the system of the Agenda for Peace, peacebuilding is the “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”<sup>22</sup> The report suggests that peacebuilding can include the disarmament of “the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation.”<sup>23</sup> In addition, “projects that bring States together to develop agriculture, improve transportation or utilize resources such as water or electricity that they need to share, or joint programmes through which barriers between nations are brought down by means of freer travel, cultural exchanges and mutually beneficial youth and educational projects” are envisaged as a part of peacebuilding.<sup>24</sup> Although the Agenda for Peace does not explicitly address time aspects and a *jus post bellum*, its system of differentiating between preventive diplomacy, peacemaking, peacekeeping, and post-conflict peacebuilding establishes an analytical frame which exemplifies that there is leeway for temporality and post-conflict phases.<sup>25</sup>

In the *Report on Peacebuilding in the Immediate Aftermath of Conflict*, the UN Secretary General subsequently clarified that the “immediate post-conflict period” offers a window of opportunity to provide “basic security, deliver peace dividends, shore up and build confidence in the political process, and strengthen core national capacity to lead peacebuilding efforts.”<sup>26</sup> During that time “[s]tability in one part of a country may coexist alongside continued violence in other parts; [...] [h]umanitarian crises and continued violations of human rights may continue to unfold beyond the formal cessation of hostilities.”<sup>27</sup> Whereas peacebuilding is “primarily the responsibility of national actors,” in “early post-conflict situations” of “insecurity and political uncertainty” the international community plays “a critical role.”<sup>28</sup> The definition of “immediate” and “early” post-conflict periods shows that international practice operates within distinct temporal frames for the time after armed conflict and international interventions.

<sup>21</sup> UN Secretary General, “An Agenda for Peace” (1992) UN Doc. A/47/277-S/24111 (Agenda for Peace) para. 15.

<sup>22</sup> “An Agenda for Peace” (n. 21) para. 21.

<sup>23</sup> “An Agenda for Peace” (n. 21) para. 55. For an overview about indicative post-conflict tasks see also UN DPKO, “United Nations Peacekeeping Operations: Principles and Guidelines” (2008) (Capstone Doctrine) 23.

<sup>24</sup> “An Agenda for Peace” (n. 21) para. 56. <sup>25</sup> See Figure 17.1.

<sup>26</sup> Report on Peace (n. 17) para. 3.

<sup>27</sup> Report on Peace (n. 17) para 8.

<sup>28</sup> Report on Peace (n. 17) paras 4, 8.

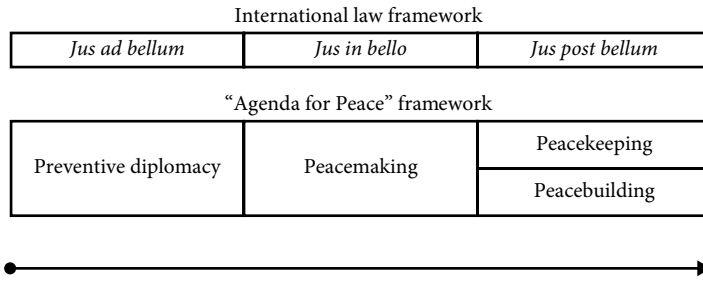


Fig. 17.1 Comparing Conceptual Time Frameworks (I)

A reference point for the temporary application of *jus post bellum* can be transitional power-sharing agreements and elections.<sup>29</sup> As the UN *Report on Peacebuilding in the Immediate Aftermath of Conflict* highlights, “[m]any post-conflict countries are governed by transitional political arrangements until the first post-conflict elections are held.”<sup>30</sup>

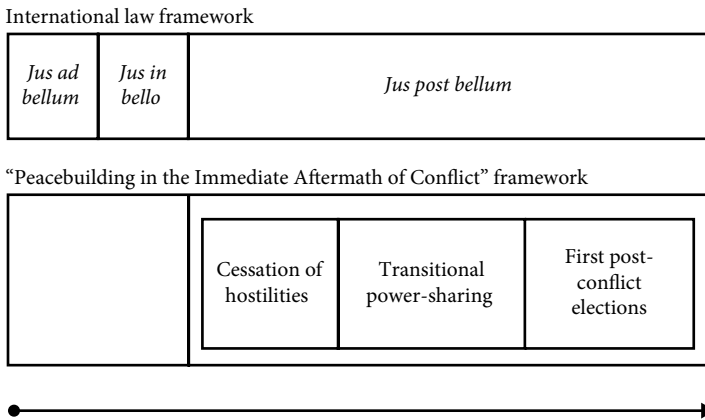


Fig. 17.2 Comparing Conceptual Time Frameworks (II)

### C. Emergency derogations as temporal indicators for *jus post bellum*

From the pre- and post-conflict human rights perspective, another potential indicator to consider for the temporal application of *jus post bellum* can be emergency derogations.<sup>31</sup> As the UN Secretary General *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* stressed:

<sup>29</sup> See Figure 17.2. For an exploratory analysis about constraints on post-conflict power-sharing, see David Wippman, “Practical and Legal Constraints on Internal Powersharing” in David Wippman (ed.), *International Law and Ethnic Conflict* (Cornell University Press 1998) 211. See also Anne-Marie Slaughter, “Pushing the Limits of Liberal Peace: Ethnic Conflict and the ‘Ideal Polity’” in Wippman (ed.), *International Law and Ethnic Conflict* 128.

<sup>30</sup> Report on Peace (n. 17) para. 11: “National authorities are often appointed rather than elected, put in place through a brokered agreement between parties to the conflict who may not be fully representative or recognized by the population.”

<sup>31</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR) Art. 4 para. 1; European Convention for the Protection of Human

In post-conflict settings, legislative frameworks often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards. Emergency laws and executive decrees are often the order of the day.<sup>32</sup>

In this regard, human rights play a critical role as an indicator for *jus post bellum*, given that their respect is essential for the completion of peacebuilding.<sup>33</sup> Following this rationale, approximate compliance with human rights signals one of the closing stages of *jus post bellum* merging into the state of normalcy.<sup>34</sup>

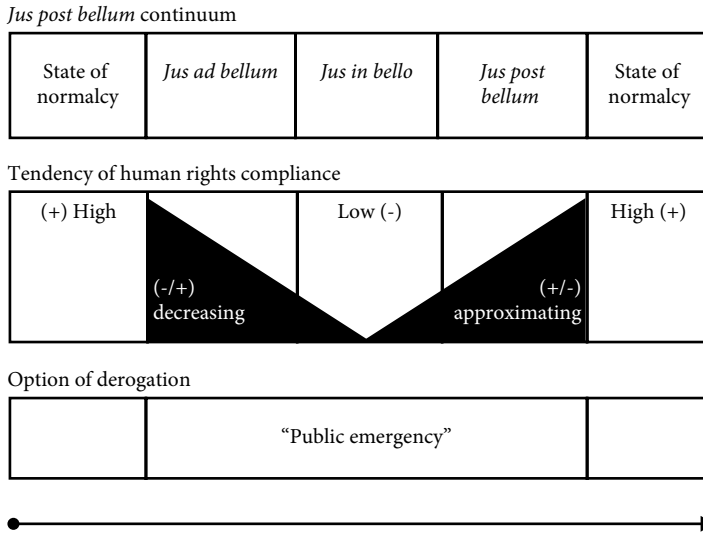


Fig. 17.3 Comparing Conceptual Time Frameworks (III)

Although state practice has been incoherent in the application of emergency derogations, existing rules of international law can serve as guidance for temporal

Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 (ACHR); League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004), reprinted in 12 *International Human Rights Reports* 893 (2005) (ArCHR).

<sup>32</sup> UN Secretary General, "Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" (2004) UN Doc. S/2004/616 para. 27.

<sup>33</sup> "Report of the Secretary-General on the Rule of Law" (n. 32) para. 22; see Figure 17.3.

<sup>34</sup> Report on Peace (n. 17) para. 18: "The post-conflict government needs to build core State capacities that will help to restore its legitimacy and effectiveness, including the capacity to provide basic services and essential public safety, to strengthen the rule of law, and to protect and promote human rights. [...] These priority areas span across development, peace and security and human rights, reflecting the interlinked and mutually reinforcing nature of these areas, as repeatedly emphasized by Member States, including in the 2005 World Summit Outcome." See also Michelle Parlevliet, "Rethinking Conflict Transformation from a Human Rights Perspective" in Véronique Dudouet and Beatrix Schmelzle (eds), *Human Rights and Conflict Transformation: The Challenges of Just Peace* (Berghof Handbook for Conflict Transformation, Dialogue Series Issue No. 9) 15.

problems.<sup>35</sup> As derogations are essentially transitory mechanisms serving the re-establishment of peace, their conditions give hints about the beginning and end of transitory time phases.<sup>36</sup> Varying in their facets, most human rights derogation clauses require a “public emergency” intended to cover only immediate periods of threats to a nation. The UN Human Rights Committee has never comprehensively addressed how long post-conflict situations can be covered as emergency periods. However, international practice gives a wide margin of appreciation for assessing the existence of a public emergency.<sup>37</sup>

Legally, time limits for derogations are qualitatively regulated: the International Covenant on Civil and Political Rights (ICCPR); European Convention on Human Rights (ECHR); American Convention on Human Rights (“ACHR”); and Arab Charter on Human Rights (ArCHR) demand that derogations are “strictly required by the exigencies of the situation.”<sup>38</sup> As the General Comment 29 of the UN Human Rights Committee states, measures derogating from the provisions of the Covenant “must be of an exceptional and temporary nature.”<sup>39</sup> The Paris Minimum Standards explain that the declaration of a state of emergency shall never exceed the “period strictly required to restore normal conditions.”<sup>40</sup> In the understanding of the Paris Minimum Standards “a measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitation clauses of the Covenant would be adequate to deal with the threat to the life of the nation.”<sup>41</sup>

The comment in the Paris Minimum Standards exemplifies that the line between emergencies and normalcy has to be sharp; however, in practice its contours can only be captured loosely. One of the challenges is that states might *de jure* impose emergency laws, while the conditions are *de facto* absent.<sup>42</sup> National security doctrines have been

<sup>35</sup> For a reflection about the application of derogations in the post-conflict context, see Gro Nystuen, *Achieving Peace or Protecting Human Rights?: Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff 2005) 184; Hurst Hannum, “Peace versus Justice: Creating Rights as well as Order Out of Chaos” (2006) 13 *International Peacekeeping* 588; Jeremy I. Levitt, “Illegal Peace?: An Inquiry into the Legality of Power-sharing with Warlords and Rebels in Africa” (2006) 27 *Michigan Journal of International Law* 548.

<sup>36</sup> About the transitory role of derogation, see Antônio Augusto Cançado Trindade, “Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)” (1987) 202 *Recueil des Cours* 104.

<sup>37</sup> For details about the state margin of appreciation concerning emergency derogations, see Peter Rowe, “The Application of the European Convention on Human Rights during an International Armed Conflict” in Richard Burchill, Nigel D. White, and Justin Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge University Press 2005) 186.

<sup>38</sup> ICCPR Art. 4 para. 1; ECHR Art. 15 para. 1; ACHR Art. 27 para. 1; ArCHR Art. 4 para. 1.

<sup>39</sup> UN Human Rights Committee (HRC), “CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency” (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11 (General Comment 29) paras 2, 4.

<sup>40</sup> The Paris Minimum Standards of Human Rights Norms in a State of Emergency, reprinted in (1985) 79 *American Journal of International Law* 1072 (Paris Minimum Standards) para. (A) 3(a).

<sup>41</sup> UN Economic and Social Council, “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights” (28 September 1984) UN Doc. E/CN.4/1985/4, Annex (Siracusa Principles) para. 53.

<sup>42</sup> As the UN Special Rapporteur on Human Rights and States in Emergency noted: “[I]n many cases states of emergency merely became the legal means of ‘legalizing’ the worst abuses and the most pernicious forms of arbitrariness.” UN Economic and Social Council, “The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency” (23 June 1997) UN Doc. E/CN.4/Sub.2/1997/19, para. 3.

often exploited to justify the seizure or maintenance of power and use of repressive measures.<sup>43</sup> Thus, derogations involve a high degree of flawed inaccuracy whilst being employed as an instrument for measuring *jus post bellum*.

An illustrating example of the fluctuating and asynchronous application of emergency derogations is the Northern Ireland conflict. After having passed emergency legislation for Northern Ireland by the UK Parliament in 1973, the British Government officially derogated from essential human rights of the ICCPR in 1976. The United Kingdom terminated its derogation in 1984, but notified a re-enactment of emergency measures in 1988.<sup>44</sup> In April 1998, the Belfast Agreement was signed, which came into force a year later in December 1999. As a cornerstone of the Northern Ireland peace process, the Belfast Agreement contained the obligation to remove the special emergency powers in Northern Ireland.<sup>45</sup> Finally, the British Government ended its derogation in February 2001.<sup>46</sup> Yet, special measures continued, for instance, under the Justice and Security (Northern Ireland) Act 2007.<sup>47</sup> The Explanatory Notes to the act elaborate that “[t]he purpose of the Act is to deliver a number of measures which are necessary to deliver a commitment to security normalisation in Northern Ireland.”<sup>48</sup> The note underlined: “Although Northern Ireland is in a process of security normalisation, some arrangements are necessary to ensure that jurors in Northern Ireland are protected from intimidation.”<sup>49</sup> In the last CCPR periodic report in 2008, the UN Human Rights Committee remained “concerned that, despite improvements in the security situation in Northern Ireland, some elements of criminal procedure continue to differ between Northern Ireland and the remainder of the State party’s territory.”<sup>50</sup> In 2012, 14 years after the Belfast Agreement, the violence that devastated Northern Ireland for decades certainly decreased but cannot be absolutely stalled.<sup>51</sup> In the end, this example shows that continuing emergency restrictions are reciprocally an obstacle and indicator for change. While the closing stages of emergencies might seem to be achieved, conflict can re-approach. Hence, declaring an end of *jus post bellum* too early could be problematic.

<sup>43</sup> “The Administration of Justice and the Human Rights of Detainees” (n. 42) paras 3–4.

<sup>44</sup> As analyzed by other legal scholars, Britain withdrew its derogation in 1984 only in order to rationalize the criminalization of terrorist violence emphasizing its belief that there was no incompatibility between its emergency and anti-terrorist powers. See Laura K. Donohue, “Temporary Permanence: The Constitutional Entrenchment of Emergency Legislation” (1999) 1 *Stanford Journal of Legal Studies* 60; see also Colm Campbell, “Wars on Terror and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict” (2005) 54 *International and Comparative Law Quarterly* 337.

<sup>45</sup> For an overview, see Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2011) 122.

<sup>46</sup> For a critical analysis with regard to renewed derogations after the 9/11 attacks, see John Reynolds, “Emergency, Governmentality, and the Arab Spring” *Jadaliyya*, 10 April 2011 <<http://www.jadaliyya.com/pages/index/2357/emergency-governmentality-and-the-arab-spring>> (accessed 24 June 2013).

<sup>47</sup> Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Springer 2010) 236.

<sup>48</sup> Justice and Security (Northern Ireland) Act 2007, Explanatory Notes, para. 3.

<sup>49</sup> Justice and Security (Northern Ireland) Act 2007, Explanatory Notes, para 3.

<sup>50</sup> HRC, “Concluding Observations on United Kingdom” UN Doc. CCPR/C/GBR/CO/6 (30 July 2008) para. 18.

<sup>51</sup> “Bomb Found by Dublin-Belfast Road” *Reuters*, 6 April 2012 <<http://uk.reuters.com/article/2012/04/06/uk-irish-bomb-idUKBRE8350HR20120406>> (accessed 24 June 2013).

### III. Case Studies

As case studies bringing together experience from the Balkans as well as the Middle East and Northern Africa, Bosnia-Herzegovina, Lebanon, and Libya give an insight into how temporal aspects of post-conflict transformation and human rights attributes are closely interlinked.<sup>52</sup> In the decision *Sejdić and Finci v. Bosnia and Herzegovina*, the ECtHR addressed issues of temporality concerning ethnic power-sharing in the country. In the case of Lebanon, the UN human rights monitoring bodies dealt with the duration of the continuing state transition after the Lebanese Civil War. The Lebanese confessional power-sharing system has been seen as the cause for persistently keeping the country in limbo between consolidated statehood and a new civil war, but also as a survival mechanism of the confessional groups.<sup>53</sup> In Libya, human rights violations have been a core cause for the recent international intervention posing uncertain consequences and the question whether the country is standing at the end of an armed conflict or actually descending towards long-term internal violent struggle. All three cases exemplify that the rebuilding of the rule of law and compliance with human rights after conflict comes with difficulties, especially when a limited timeframe is allocated.<sup>54</sup>

#### A. Bosnia-Herzegovina

As one of the most turbulent cases of a multilateral intervention and longstanding post-conflict administration after the Second World War, Bosnia and Herzegovina is still striving to shed its war-torn past. Recently, in April 2012, a United Nations donor conference in Sarajevo sought to raise €500 million to build homes for some 74,000 people who are still displaced after the 1990's armed conflict.<sup>55</sup> Bosnia-Herzegovina is preparing to enter the EU and NATO, while trying to cope with ethnic nationalism, governmental effectiveness, and a looming economic collapse and territorial break up.<sup>56</sup>

Officially, the General Framework Agreement for Peace in Bosnia and Herzegovina—initialed in Dayton on 21 November and formally signed in Paris on 14 December 1995—put an end to the three-and-a-half year-long armed conflict in the country.<sup>57</sup> After 36 unsuccessful ceasefires, a brokered truce had come into effect on 12 October 1995.<sup>58</sup>

<sup>52</sup> For an overview and a set of indicators for the end of *jus post bellum*, see Figure 17.4.

<sup>53</sup> For an insightful introduction, see Theodor Hanf, “The Sceptical Nation: Opinions and Attitudes Twelve Years after the End of the War” in Theodor Hanf and Nawaf Salam (eds), *Lebanon in Limbo: Postwar Society and State in an Uncertain Regional Environment* (Nomos 2003) 197.

<sup>54</sup> On *jus post bellum* and the Rule of Law, see Annika Hansen and Sharon Wiharta, “From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict” in Stahn and Kleffner, *Jus Post Bellum* (n. 3) 131.

<sup>55</sup> “Bosnian Donor Conference Seeks 500 Million Euros” *Radio Free Europe/Radio Liberty*, 24 April 2012 <[http://www.rferl.org/content/bosnian\\_donor\\_conference\\_seeks\\_500\\_million\\_euros/24558222.html](http://www.rferl.org/content/bosnian_donor_conference_seeks_500_million_euros/24558222.html)> (accessed 24 June 2013).

<sup>56</sup> “Bosnian Minister Appreciates Turkey’s Support to His Country’s NATO Membership” *Turkish Weekly*, 26 April 2012. For an insightful assessment, see Steven Woehrel, *Bosnia: Current Issues and U.S. Policy*, CRS Report, 29 February 2012.

<sup>57</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (Paris, 17 December 1995).

<sup>58</sup> UN Secretary General, “Report of the Secretary-General Pursuant to Security Council Resolutions 981 (1995), 982 (1995) and 983 (1995)” (23 November 1995) UN Doc. S/1995/987, para. 18.



Dayton established a complex constitutional power-sharing structure that safeguards the interests of the main ethnic waging groups, Serbs, Bosniaks, and Croats, by creating a three-headed Presidency and an exclusive second chamber of the bicameral Parliamentary Assembly. In August 2006, a Bosnian Roma citizen, Dervo Sejdić, and a Bosnian Jewish citizen, Jakob Finci, turned to the ECtHR arguing that the ethnic power-sharing system of Bosnia-Herzegovina violates the principle of non-discrimination.<sup>59</sup> The Court ruled in favor of the applicants, holding that alternative mechanisms could replace the existing ethnic restrictions in the constitution.<sup>60</sup> Bosnia-Herzegovina also never derogated from its obligations under the Convention, which may have shifted the outcome of the legal evaluation.<sup>61</sup>

Relevant for a temporal interpretation of *jus post bellum* are the remarks of the judges on the justification of discrimination endorsing the “restoration of peace.”<sup>62</sup> The Court detailed that the ethnic constitutional provisions were “necessary to ensure peace” while a very fragile ceasefire was in effect on the ground and “a brutal conflict marked by genocide and ‘ethnic cleansing’” had to be ended.<sup>63</sup> Yet, the factual situation changed over a decade after the signing of the peace agreement, argued the judges. The Court stated that it observed “significant positive developments in Bosnia and Herzegovina since the Dayton Peace Agreement,” although “progress might not always have been consistent and challenges remain.”<sup>64</sup> The government of Bosnia-Herzegovina responded that the existing ethnic power-sharing formula is still needed, as a transition of the country had yet not been accomplished, given the on-going trials at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the continuing “presence of international organizations” in the country such as the High Representative as well as stationed NATO troops.<sup>65</sup> However, listing a number of indicators, the ECtHR emphasized that Bosnia-Herzegovina is about to complete its transition:

- In 2005 the former parties to the conflict surrendered their control over the armed forces and transformed them into a small, professional force;
- [I]n 2006 Bosnia and Herzegovina joined NATO’s Partnership for Peace;
- [I]n 2008 it signed and ratified a Stabilization and Association Agreement with the European Union;
- [I]n March 2009 it successfully amended the State Constitution for the first time; and
- [I]t has recently been elected a member of the United Nations Security Council for a two-year term beginning on 1 January 2010.
- Furthermore, whereas the maintenance of an international administration as an enforcement measure under Chapter VII of the United Nations Charter implies

<sup>59</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, App. Nos 27996/06 and 34836/06 (ECtHR, 22 December 2009) para. 3.

<sup>60</sup> *Sejdić and Finci* (n. 59) paras 46–8.

<sup>61</sup> For a critical appraisal of the matter of derogation and the Dayton Peace Agreement, see Nystuen, *Achieving Peace or Protecting Human Rights?* (n. 35) 184.

<sup>62</sup> *Sejdić and Finci* (n. 59) para. 45.

<sup>63</sup> *Sejdić and Finci* (n. 59) para. 45.

<sup>64</sup> *Sejdić and Finci* (n. 59) para. 45.

<sup>65</sup> Additional Written Observations and Comments of Bosnia and Herzegovina on the Claims for Just Satisfaction, App. Nos 27996/06 and 34836/06 (ECtHR, 26 December 2008) para. 43.

that the situation in the region still constitutes a “threat to international peace and security,” it appears that preparations for the closure of that administration are under way.<sup>66</sup>

Whether the Court has been convincing in the structure of its arguments has been persuasively opposed by some of the judges.<sup>67</sup> Judge Mijović emphasized that the political situation was still fragile, enumerating, in line with the pleading of the government, that:

- Many war-crimes suspects are still free, although there is a process of transferring war-crimes cases from the ICTY to domestic courts[;]
- Judicial and prosecutorial authorities are still supervised and instructed by international judges and prosecutors[;]
- All these facts were sufficient reasons for the United Nations, the European Union and the Peace Implementation Council to extend (in November 2009) the mandate of the High Representative[;]
- There are other signs that the international community sees no significant progress in Bosnia and Herzegovina (for example, international military forces are still resent, as is the EUPM)[;]
- On official websites, many States warn their citizens not to travel to Bosnia and Herzegovina on safety grounds[;]
- The 2006 elections showed that most voters still preferred nationalist rule because they felt safe being led by “their own people[;]” [and]
- Children in schools are separated, and cities that had a mixed population before the war are still divided.<sup>68</sup>

The judgment of the ECtHR was delivered in December 2009, and since then, the political parties of Bosnia-Herzegovina have been trying to reach a compromise about constitutional and electoral changes in order to comply with European human rights standards.<sup>69</sup> In November 2011, the UN Security Council Resolution extended the mandate of the military mission EUFOR ALTHEA in Bosnia-Herzegovina until November 2012.<sup>70</sup> The next parliamentary elections are scheduled for 2014. Whether the country at that moment will have overcome the need for international post-conflict care cannot be foreseen yet. The case study of Bosnia-Herzegovina demonstrates that the interpretation of determinates of time for *jus post bellum* are disputed, making the crafting of generic rules for the “post” strenuous but not unfeasible.

<sup>66</sup> *Sejdić and Finci* (n. 59) para. 47 (bullet points inserted by the author).

<sup>67</sup> *Sejdić and Finci* (n. 59) para. 47. Partly Concurring and Partly Dissenting Opinion of Judge Mijović, joined by Judge Hajiyevev, and Dissenting Opinion of Judge Bonello.

<sup>68</sup> *Sejdić and Finci* (n. 59), Dissenting Opinion of Judge Mijović, s. V (bullet points inserted by the author).

<sup>69</sup> For recent development, see Anes Alic, “BiH on Verge of Missing Another Constitutional Reform” *Southeast European Times*, 10 March 2012 <[http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2012/03/10/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2012/03/10/feature-01)> (accessed 24 June 2013).

<sup>70</sup> UNSC Res. 2019 (16 November 2011) UN Doc. S/Res/2019, para. 10.

## B. Lebanon

Lebanon's post-Civil War developments are perplexing. The 2011 Conflict Barometer of the Heidelberg Institute for International Conflict Research attested to Lebanon's confessional conflict, which is dated in the study with the beginning of the Civil War in 1975, an increase from a "manifest conflict" to a "crisis."<sup>71</sup> In comparison, Bosnia-Herzegovina remains on the lowest level a "latent conflict."<sup>72</sup> The 2011 Global Peace Index of the Institute for Economics and Peace, one of the world's leading measures of global peacefulness, ranks Lebanon as one of the few countries in the red zone of lowest peace potential, somewhere in the middle between the on-going armed conflict in Afghanistan and the continuing Civil War in Myanmar.<sup>73</sup> Among others, the poor compliance with human rights has been a criteria for the ranking.<sup>74</sup> The result suggests that Lebanon is placed at the median between war and peace.

Historically, the Taif Accords of 1989 marked the beginning of the ending of armed conflict.<sup>75</sup> As the UN Secretary General noted in his report, the Taif Accord provided a framework for a return to normalcy and political stability through national reconciliation and a negotiated settlement of the crisis, including political reform.<sup>76</sup> In October 1990, the cessation of the fighting by the Lebanese army and the systematic extension of the Government's control over most of the country marked another milestone.<sup>77</sup> In December 1990, the Lebanese Government informed the UN Secretary General of its success in enforcing its authority and requested UN assistance for the rehabilitation and reconstruction of the country.<sup>78</sup> Most of the militia were dissolved in March 1991, and reunified in a national army until July 1991, while the military non-integration of Hezbollah remains an issue between the political parties today.<sup>79</sup>

Although the Taif Accords outlined a roadmap to modify elements of the consensus based confessional system, the implementation of the agreement still has been protracted.<sup>80</sup> On several occasions, Lebanon's confessional power-sharing system has been a matter of debate in the UN Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Elimination of Discrimination against Women (CEDAW). In 2004, CERD noted that Lebanon continued "to be confronted with numerous challenges resulting from almost two decades of war."<sup>81</sup> As factors the

<sup>71</sup> *Conflict Barometer 2011* (Heidelberg Institute for International Conflict Research 2011) 93.

<sup>72</sup> *Conflict Barometer 2011* (n. 71) 14.

<sup>73</sup> *Global Peace Index 2011: Methodology, Results & Findings* (Institute for Economics and Peace 2011).

<sup>74</sup> *Global Peace Index 2011* (n. 73) 72.

<sup>75</sup> The Taif Accords were signed in Saudi Arabia on 22 October 1989 and ratified shortly after on 4 November of the same year. For a critical analysis of the Taif Accords, see Augustus Richard Norton, "Lebanon After Taif: Is the Civil War Over?" (1991) 45 *Middle East Journal* 455.

<sup>76</sup> UN, "Special Economic and Disaster Relief Assistance: Special Programmes of Economic Assistance, Assistance for the Reconstruction and Development of Lebanon" (21 November 1991) UN Doc. A/46/557/Add.2, para. 33.

<sup>77</sup> UN Doc. A/46/557/Add.2 (n. 76) paras 4, 34.

<sup>78</sup> UN Doc. A/46/557/Add.2 (n. 76) para. 4.

<sup>79</sup> UN Doc. A/46/557/Add.2 (n. 76) para. 34.

<sup>80</sup> "Suleiman: Elections Must Take Place Regardless of Electoral Law" *Naharnet*, 28 April 2012 <<http://www.naharnet.com/stories/en/38423>> (accessed 24 June 2013).

<sup>81</sup> UN Committee on the Elimination of Racial Discrimination, "Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, Lebanon" (28 April 2004) UN Doc. CERD/C/64/CO/3, para. 4.

Committee mentioned: “foreign intervention and partial occupation, which have resulted in widespread destruction.”<sup>82</sup> Despite positive aspects with regard to human rights developments in the country, the Committee particularly expressed concerns about Lebanon’s post-conflict nature, recommending a “gradual elimination of the system of political confessionalism in the spirit of the Taif agreement.”<sup>83</sup> The Committee observed an “overall resistance and lack of progress in this regard [...] [w]hile recognizing the need to balance any steps with the maintenance of peace.”<sup>84</sup>

In the 2010–11 periodic proceedings, the Lebanese Government stressed that it is continuing “the recovery of stability” while facing difficulties to fulfill its human rights obligations.<sup>85</sup> The country had been “at a critical stage” as after the Civil War it had faced several external interventions that destabilized the country.<sup>86</sup> Interestingly, different from the 2004 reports, neither the 2011 submission by the Lebanese Government nor the subsequent periodic review of the UN Human Rights Committee frames the situation in Lebanon expressively anymore as “post-conflict.”<sup>87</sup> This could be interpreted as a sign of normalization.

### C. Libya

As a recent example, Libya is another complex case at the intersection of human rights, international intervention, and post-war aftermath. Whether the country is in the phase of *jus post bellum* or in a transition toward another internal armed conflict is still unclear. This highlights the difficulties of identifying precise time segments facing a possible overlapping or oscillating between *jus in bello* and *jus post bellum*.

The beginning of armed hostilities in Libya is already hard to set. From the perspective of the Libyan opposition, the revolution started with the nationwide series of demonstrations during the so-called “Day of Rage” on 17 February 2011, which resulted in a violent clash between Libyan security forces and armed protesters.<sup>88</sup> Weeks of intense street-to-street combat operations followed.<sup>89</sup> In March 2011, acting under Chapter VII, the Security Council authorized UN member states to “take all necessary measures [...] to protect civilians and civilian populated areas,” and, among other measures, established a no-fly zone.<sup>90</sup> Military forces from France, the United Kingdom, and the United States began with air strikes.<sup>91</sup>

<sup>82</sup> UN Doc. CERD/C/64/CO/3 (n. 81) para. 4.

<sup>83</sup> UN Doc. CERD/C/64/CO/3 (n. 81) para. 10.

<sup>84</sup> UN Doc. CERD/C/64/CO/3 (n. 81) para. 10.

<sup>85</sup> UN Human Rights Council, “Report of the Working Group on the Universal Periodic Review, Lebanon” (12 January 2011) UN Doc. A/HRC/RES/16/18, para. 9.

<sup>86</sup> UN Doc. A/HRC/RES/16/18 (n. 85) para. 11.

<sup>87</sup> UN Doc. A/HRC/RES/16/18 (n. 85) para. 11. See also UN Human Rights Council, “National report submitted in accordance with paragraph 15(a) of the annex to HRC resolution 5/1, Lebanese Republic” (23 August 2010) UN Doc. A/HRC/WG.6/9/LBN/1.

<sup>88</sup> UN Secretary General, “Report of the Secretary-General on the United Nations Support Mission in Libya” (1 March 2012) UN Doc. S/2012/129, para. 2.

<sup>89</sup> UN Secretary General, “Report of the Secretary-General on the United Nations Support Mission in Libya” (22 November 2011) UN Doc. S/2011/727, para. 3.

<sup>90</sup> UNSC Res. 1973 (17 March 2011) UN Doc. S/Res/1973, paras 4, 6.

<sup>91</sup> UN Human Rights Council, “Report of the International Commission of Inquiry on Libya” (8 March 2012) UN Doc. A/HRC/19/68, para. H1.

Two months later, in August 2011, the National Transitional Council (“NTC”) released its “Constitutional Declaration” stipulating the establishment of an interim Government within 30 days, the adoption of electoral legislation within a 90-day period, and scheduling elections for a national congress within 240 days.<sup>92</sup> As the UN Secretary General noted in his report, the declaration of liberation by the National Transitional Council of Libya “signaled the end of armed hostilities in the country.”<sup>93</sup> The country, assessed the Secretary General, had been set on “the path to national reconciliation and the building of a modern nation-state, based on the principles embraced by the revolution: democracy, human rights, the rule of law, accountability, respect for minority rights, the empowerment of women and the promotion of civil society.”<sup>94</sup> In October 2011, a number of brigades from Misrata handed over 500 light arms to the Ministry of the Interior in a ceremony.<sup>95</sup> Shortly afterwards, the Security Council terminated the no-fly zone and its authorization of UN member states to enforce the protection of civilians.<sup>96</sup> Finally, on 31 October 2011, NATO officially ended its military operation.<sup>97</sup>

However, after the end of 2011, Libya struggled to gain full stability and to secure peace among the country’s ethnic groups.<sup>98</sup> In March 2012, Libya’s interim government announced a ceasefire that aimed to end deadly tribal clashes in a southern desert oasis, costing more than 150 lives.<sup>99</sup> In April 2012, Libya asked the Iraqi government for assistance in destroying its chemical weapons stockpiles.<sup>100</sup> In the same month, the International Committee of the Red Cross (ICRC) announced it will continue to respond to the “emergency” by providing urgent humanitarian aid.<sup>101</sup> All these have been signs for the tendency that the state of normalcy was still far off.

In April 2012, the UN Human Rights Council remarked that Libya is on the way toward a “swift and peaceful political transition and the full realization of human rights.”<sup>102</sup> Yet, the Council also recognized “ongoing human rights challenges” in the country.<sup>103</sup> The Council welcomed the recent establishment of a national institution for human rights, namely, the Council of Human Rights and Fundamental Freedoms in Libya.<sup>104</sup> The transitional Government of Libya was “strongly encourage[d]” to “investigate human rights violations and to bring those responsible before Libyan

<sup>92</sup> UN Doc. S/2011/727 (n. 89) para. 5.

<sup>93</sup> UN Doc. S/2011/727 (n. 89) para. 3.

<sup>94</sup> UN Doc. S/2011/727 (n. 89) para. 4.

<sup>95</sup> UN Doc. S/2011/727 (n. 89) para. 10.

<sup>96</sup> UNSC Res. 2016 (27 October 2011) UN Doc. S/Res/2016, paras 5–6: “[T]erminated from 23.59 Libyan local time on 31 October 2011.”

<sup>97</sup> North Atlantic Treaty Organization, “NATO and Libya: Operational Media Update” NATO, 25 October 2011 <[http://www.nato.int/cps/en/natolive/news\\_71994.htm](http://www.nato.int/cps/en/natolive/news_71994.htm)> (accessed 24 June 2013).

<sup>98</sup> Rami al-Shaheibi, “Libya’s Leader Admits Instability” *Associated Press*, 26 March 2012.

<sup>99</sup> Imed Lamloum, “Libya PM announces truce to end deadly Sabha clashes” *AFP*, 30 March 2012 <<http://www.google.com/hostednews/afp/article/ALeqM5hfaQvSxp74eB2vjTcELC-hX3x01A?docId=CNG.5ba00d350acdc99f903fb64f33d3cb13.7e1>> (accessed 24 June 2013). See also UN Doc. S/2012/129 (n. 95) para. 12.

<sup>100</sup> “Iraq Helps Libya Destroy Chemical Weapons” *News24*, 12 April 2012 <<http://www.news24.com/Africa/News/Iraq-helps-Libya-destroy-chemical-weapons-20120412>> (accessed 24 June 2013).

<sup>101</sup> “Libya: ICRC Continues to Respond to Emergencies” ICRC Press, 12 April 2012 <<http://www.icrc.org/eng/resources/documents/update/2012/libya-update-2012-04-12.htm>> (accessed 24 June 2013).

<sup>102</sup> UN Human Rights Council, “Summary of the Discussions Held During the Panel ‘The Way Forward in the Realization of the Right to Development: Between Policy and Practice’” (19 April 2012) UN Doc. A/HRC/RES/19/39, para. 2.

<sup>103</sup> UN Doc. A/HRC/RES/19/39 (n. 102) para. 4.

<sup>104</sup> UN Doc. A/HRC/RES/19/39 (n. 102) para. 1(d).

Justice.”<sup>105</sup> Elections and constitutional change have been seen as crucial for the transition process.<sup>106</sup>

One year later in April 2013, the UN Human Rights Council attests that progress has been made in Libya. The Council acknowledged “the efforts made” in “building the basis for democracy, the rule of law and human rights.”<sup>107</sup> The election of the members of the General National Congress was welcomed as “an essential step.”<sup>108</sup> The launch of a process for drawing up a national action plan on enhancing the protection of human rights was also praised.<sup>109</sup> Also positively noted was the ratification of several human rights conventions, the reactivation of the constitutional jurisdiction of the Supreme Court, and the issuance of new rules and regulations to guarantee freedom of speech, peaceful protest and assembly, as well as the formation of political parties.<sup>110</sup> As remaining steps for the completion of transition, the Human Rights Council urged strengthening the protection of religious and ethnic minorities as well as “expedit[ing] the return of all persons displaced by the conflict.”<sup>111</sup>

#### IV. Conclusion: Acknowledging the Sum of Endpoints

Time is often more a social construct rather than a natural condition, suggest sociologists.<sup>112</sup> And indeed, anthropological evidence exposes that time perceptions depend, in part, on traditions, social values, past experience, and present aspirations.<sup>113</sup> Eventually, this subjective notion of time needs to be also acknowledged in the search for the temporal concept of *jus post bellum*.

Despite those variances, international law tries to create a universal framework of procedures to delimit a collective time horizon. As this chapter has shown, particularly the enforcement of human rights after conflict is a chronometer for the progress and will of states for change in post-conflict phases.<sup>114</sup> In the end, *jus post bellum* is a concept for flagging and labeling those critical moments of transition. Ultimately, human rights improvements can be only one of many indicators.<sup>115</sup>

As Tai-Heng Cheng compellingly advocates in his recent analysis about *When International Law Works*, international law is highly contingent to the respective

<sup>105</sup> UN Doc. A/HRC/RES/19/39 (n. 102) para. 6.

<sup>106</sup> UN Doc. A/HRC/RES/19/39 (n. 102) para. 1(e).

<sup>107</sup> UN Human Rights Council, “Report of the International Commission of Inquiry on Libya” (8 March 2012) UN Doc. A/HRC/19/68.

<sup>108</sup> UN Doc. A/HRC/19/68 (n. 107) para. 3(c).

<sup>109</sup> UN Doc. A/HRC/19/68 (n. 107) para. 3(e).

<sup>110</sup> UN Doc. A/HRC/19/68 (n. 107) paras 3(i)-(k).

<sup>111</sup> UN Doc. A/HRC/19/68 (n. 107) paras 10–11.

<sup>112</sup> For an introduction to the debate, see Michael A. Katovich, “Durkheim’s Macrofoundations of Time: An Assessment and Critique” (1987) 28 *The Sociological Quarterly* 367. For a critical comparison, see Ian Hacking, *The Social Construction of What?* (Harvard University Press 1999) 212.

<sup>113</sup> For a comprehensive overview, see Douwe Tiemersma and Henk Oosterling (eds), *Time and Temporality in Intercultural Perspective* (Editions Rodopi B.V. 1996).

<sup>114</sup> See Figure 17.3. As the Secretary General report on the rule of law and transitional justice underlined: “Restoring the capacity and legitimacy of national institutions is a long-term undertaking. However, urgent action to restore human security, human rights and the rule of law cannot be deferred.” UN Doc. S/2004/616 (n. 36) para. 12.

<sup>115</sup> See Stahn, “Mapping the Discipline(s)” (n. 19). See also Figure 17.4.

Bosnia and Herzegovina	Lebanon	Libya
<ul style="list-style-type: none"> <li>• Transformation of armed forces</li> <li>• Extension of security partnerships (e.g. NATO)</li> <li>• Enhancement of regional diplomatic relations (e.g. EU Stabilization and Association Agreement)</li> <li>• Constitutional amendments</li> <li>• Active participation in the UN (e.g. non-permanent member of Security Council)</li> <li>• Preparations for the closure of international oversight (e.g. phasing out of UN peacekeeping mission)</li> </ul>	<ul style="list-style-type: none"> <li>• Rehabilitation and reconstruction of the country</li> <li>• Integration of militia into state army</li> <li>• Gradual elimination of system of political confessionalism, reform of the political system</li> <li>• Compliance with CERD and CEDAW</li> </ul>	<ul style="list-style-type: none"> <li>• Completed elections</li> <li>• Establishment of national institutions for the protection of human rights</li> <li>• Launched process for drawing up a national action plan on enhancing the protection of human rights</li> <li>• Reactivation of the constitutional jurisdiction of the Supreme Court</li> <li>• New rules and regulations to guarantee freedom of speech, peaceful protest and assembly, as well as the formation of political parties</li> <li>• Strengthened religious and ethnic minority rights</li> <li>• Return of displaced people</li> <li>• Investigation of human rights violation (Transitional Justice)</li> </ul>

Fig. 17.4 Summary of Indicators for the Approaching End of Post-Conflict State Transition and *Jus Post Bellum*

standpoint of the decision-maker in an international problem.<sup>116</sup> The ECtHR decision *Sejdić and Finci* has shown that regional integration processes of a state (e.g. EU association of Bosnia and Herzegovina) and completed military integrations can be evidence for an ending transition process. The proceedings of the UN Committee on the Elimination of Racial Discrimination about Lebanon stated that a gradual elimination of discriminatory power-sharing can be another indicator. As the case of Libya exhibits, governmental interim systems, compensation programs, and constitutional change mark the completion of post-conflict phases. Overall, all three case studies revealed that international courts, human rights commissions, and other international bodies are consistent in their objective to motivate an instant compliance with international law despite post-conflict hardships, yet the matter of temporality and state transition remains context and case specific.<sup>117</sup>

In its General Comment 29, the UN Human Rights Committee postulated that it reviews the conduct of a state party through a “careful analysis” based on an “objective

<sup>116</sup> Tai-Heng Cheng, *When International Law Works: Realistic Idealism After 9/11 and the Global Recession* (Oxford University Press 2012) 8.

<sup>117</sup> For a set of indicators for the beginning and end of *jus post bellum*, see Figure 17.5.

<i>Jus in bello</i>	<i>Jus post bellum</i>	State of normalcy
Beginning and end of armed conflict	Transitional period	
Indicators: <ul style="list-style-type: none"> <li>• Signing of ceasefire</li> <li>• Signing of comprehensive peace agreement</li> <li>• End of hostilities</li> </ul>	Indicators: <ul style="list-style-type: none"> <li><b>HUMAN RIGHTS</b> <ul style="list-style-type: none"> <li>• E.g. enhancement of human rights protections, end of derogations</li> </ul> </li> <li><b>MILITARY</b> <ul style="list-style-type: none"> <li>• E.g. Security Sector Reform (SSR) and Disarmament, Demobilization and Reintegration (DDR)</li> </ul> </li> <li><b>HUMANITARIAN</b> <ul style="list-style-type: none"> <li>• E.g. reduction of humanitarian aid by international community</li> </ul> </li> <li><b>POLITICAL</b> <ul style="list-style-type: none"> <li>• E.g. end of interim power-sharing arrangement, conduction of elections</li> </ul> </li> <li><b>LEGAL</b> <ul style="list-style-type: none"> <li>• E.g. constitutional reforms, legislative change</li> </ul> </li> <li><b>ECONOMIC</b> <ul style="list-style-type: none"> <li>• E.g. revitalization of labor market</li> </ul> </li> <li><b>DIPLOMATIC</b> <ul style="list-style-type: none"> <li>• E.g. establishment of international diplomatic relations and regional cooperation (UN, EU, NATO)</li> </ul> </li> <li><b>SOCIAL</b> <ul style="list-style-type: none"> <li>• E.g. completed Transitional Justice and truth seeking process</li> </ul> </li> </ul>	

Fig. 17.5 Indicators for the Beginning and End of *Jus Post Bellum*

assessment” of the “actual situation.”<sup>118</sup> The Siracusa Principles emphasize that “the competent national authorities shall have a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.”<sup>119</sup> The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.<sup>120</sup> The Paris Minimum Standards detail that the executive authority is competent to declare a state of emergency, but such official declaration shall always be subject to confirmation by the legislature.<sup>121</sup> However,

<sup>118</sup> General Comment 29 (n. 39) para. 6. Also, the Siracusa Principles note that any assessment as to the necessity of a limitation shall be made on “objective considerations” and in an “objective manner.” Siracusa Principles (n 41) paras 10, 54.

<sup>119</sup> However, the Siracusa Principles also note that in determining whether derogation measures are strictly required by the exigencies of the situation, “the judgement of the national authorities cannot be accepted as conclusive.” Siracusa Principles (n 41) paras 52, 57.

<sup>120</sup> Siracusa Principles (n. 41) paras 12, 64.

<sup>121</sup> Paris Minimum Standards (n. 40) para (A) 2.



recalling the sense of the words of Henry Van Dyke, the timeframe for *jus post bellum* may appear too swift for those who are trying to hold on to the past, and too slow for those who seek prompt reforms.<sup>122</sup> Potentially, merely constant human rights monitoring and dialogue might settle an equilibrium marking the crossover from conflict to peace.<sup>123</sup>

The UN Secretary General defined the challenges that post-conflict countries and the international community face in the “immediate aftermath of conflict” as “the first two years” after the main conflict in a country has ended.<sup>124</sup> The Fourth Geneva Convention on the protection of civilians states that occupations shall cease “one year” after the general close of military operations.<sup>125</sup> Peacekeeping missions and post-conflict administrations by the UN or regional organizations can last for decades.<sup>126</sup>

However, declaring a static timeframe for *jus post bellum* would be inappropriate. Certainly, the end of an armed conflict does not necessarily mean the arrival of peace.<sup>127</sup> As for the legal regimes of preventing or managing armed conflict, capturing time conditions for *jus post bellum* in “objective” legal rules is a conceptual contest between positivism and realism. Ultimately, the sum of a critical amount of post-conflict reform steps will indicate the outset of a state of normalcy.<sup>128</sup> Time limits for *jus post bellum* are not automatically effective; nonetheless, they can counterbalance stagnancy when conflict parties are deadlocked by challenging their stalemate. A solution to the dilemma will need pragmatic process principles as constant reminders for progress, maintaining flexibility and conflict sensitivity, all while guaranteeing accountability and aiding the aim to overcome the root causes of conflict to assure sustainable peace.

<sup>122</sup> See Van Dyke, *The Poems of Henry Van Dyke* (n. 2).

<sup>123</sup> The Siracusa Principles, for instance, note that “the ordinary courts should maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.” Siracusa Principles (n. 41) para 60.

<sup>124</sup> UN Doc. A/63/881-S/2009/304 (n. 17) para. 2.

<sup>125</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Art. 6.

<sup>126</sup> The United Nations Interim Administration Mission in Kosovo (UNMIK), for instance, began in 1999; the ongoing United Nations Interim Force in Lebanon (UNIFIL) started its operation initially in 1978; the enduring United Nations Truce Supervision Organization (UNTSO), which monitors various ceasefires, was set up in 1948. For practical insights on the exit and transition of peacekeeping mission, see Capstone Doctrine (n. 23) 85. For comprehensive critical analysis about legal framework alternatives for dealing with collapsed state emergencies, see also Michael J. Kelly, *Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Kluwer Law International 1999) 91. For a detailed analysis of post-conflict administrations, see Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press 2008) 654.

<sup>127</sup> UN Doc. A/63/881-S/2009/304 (n. 17) para. 8.

<sup>128</sup> For an overview, see Figure 17.5.

*Jus Post Bellum* and the Politics of Exit

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## I. Introduction

The question of “exit” of peacekeeping operations, of transformative occupations, and of international transitional administrations has increasingly occupied scholars and practitioners alike.<sup>1</sup> Just as the military deployments and the assumption of governmental authority by external actors have raised difficult legal, political, and ethical questions, so have the processes of handing over authority and withdrawing an external security presence. Concerns have included, but have not been limited to, the legal and political mechanisms facilitating exit, the sustainability of transformative goals in the absence of an international presence, the nature of follow-on arrangements, the local actors and institutions to whom authority is transitioned, and managing the risk of renewed violence.

“Exit” is about more than just the withdrawal of an external military and administrative presence, but is better understood as the *transition of authority from international to legitimate local institutions*<sup>2</sup>—an understanding of exit that is also reflected in one of the most prominent policy documents on the issue, the United Nations (UN) Secretary General’s report *No Exit without a Strategy*.<sup>3</sup> Such an understanding of exit has two implications. First, it inextricably links the withdrawal of international actors and the handover of authority to their efforts to transform local institutions, as exit ultimately requires the existence of reasonably legitimate institutions to which power can be transferred. Secondly, exit is best understood as a process, not a single event, such as mission closure or the holding of elections. The iconic status of elections, which have long been seen as legitimizing the new political settlement and as a convenient and highly symbolic exit point for international actors, has declined given the relapse of a range of states back into conflict (e.g. Angola) or into authoritarian rule (e.g. Cambodia) shortly thereafter.<sup>4</sup> Since the mid-1990s, most peace operations have remained involved in governance and reconstruction activities in the aftermath of elections (sometimes for many years—in Bosnia and Herzegovina, both an external civilian and military

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<sup>1</sup> See e.g. Richard Caplan (ed.), *Exit Strategies and State Building* (Oxford University Press 2012); Gideon Rose, “The Exit Strategy Delusion” (1998) 77 *Foreign Affairs* 56; Frederic Pearson, Marie Olson Lounsbury, and Loretta Costa, “The Search for Exit Strategies from Neo-Colonial Interventions” (2005) 25 *Journal of Conflict Studies* 45; Dominik Zaum, “The Norms and Politics of Exit: Ending Postconflict Transitional Administrations” (2009) 23 *Ethics and International Affairs* 189.

<sup>2</sup> Zaum, “Politics of Exit” (n. 1) 192–3.

<sup>3</sup> Kofi Annan, “No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations” (2001) UN Doc. S/2001/394.

<sup>4</sup> Charles T. Call and Susan E. Cook, “On Democratization and Peacebuilding” (2003) 9 *Global Governance* 233, 237.

presence continues to date, 17 years after the first post-war elections); or have been succeeded by follow-on mechanisms with a declining degree of international involvement, as authority was gradually handed over to local institutions.<sup>5</sup>

*Jus post bellum* and its core moral concerns pertain to such an understanding of exit for three reasons in particular. First, exit processes are relevant to the exercise of political authority in conflict-affected societies, both by the interveners and by the local institutions established (or empowered) as a result of a peace settlement and/or an external intervention. Key questions about exit, for example about the actors and institutions to whom authority is to be handed to, and under what conditions, are thus affected by the moral and legal rules that govern the exercise of political authority, which are central *jus post bellum* concerns. Secondly, questions about exit (both in terms of processes and timing) are closely linked to the wider state- and peacebuilding objectives of interveners, and with that also their concomitant responsibilities, another central concern of much *jus post bellum* scholarship.<sup>6</sup> Finally, the focus of “exit” on the exercise of authority, and the agents exercising authority, makes it relevant to questions of local ownership and self-determination, which are important normative frameworks that inform *jus post bellum* discussions.<sup>7</sup>

International exit from state- and peacebuilding operations can be approached from three distinct perspectives. The first is operational, and is focused on the most appropriate process and timing of exit to secure the security and development gains that have arisen from an operation. This operational perspective has been a central aspect of the peacebuilding literature, examining for example the impact of the duration of international engagement on the risk of conflict recurrence,<sup>8</sup> or discussing the problems of exit mechanisms like elections, and their propensity to re-ignite conflict or entrench wartime parties.<sup>9</sup> However, it has little bearing on *jus post bellum* discussions.

The second perspective is explicitly normative, and asks how, and to what extent, existing normative frameworks, including *jus post bellum*, can help with the development of an ethical framework to guide decision-makers in exit and transition processes, and help to resolve questions about the timing of exit and the scope of transition, and about the appropriate character of institutions to whom authority is handed. Ralph Wilde, for example, outlines two normative frameworks providing guidance with regard to exit: trusteeship (associated with contemporary liberal statebuilding efforts) and self-determination.<sup>10</sup> While under the trusteeship framework an international

<sup>5</sup> Richard Caplan, “After Exit: Successor Missions and Peace Consolidation” (2006) 8 *Civil Wars* 253, 254.

<sup>6</sup> See e.g. Gary Bass, “Ius Post Bellum” (2004) 32 *Philosophy and Public Affairs* 384; Carsten Stahn, “‘Jus ad Bellum,’ ‘Jus in Bello’ ... ‘Jus Post Bellum’? Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 921; Jeremy Waldron, “Post Bellum Aspects of the Laws of Armed Conflict” (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 31.

<sup>7</sup> See e.g. Jennifer Easterday (ch. 20) and Christine Bell (ch. 10), this volume.

<sup>8</sup> See e.g. Nicholas Sambanis, “Short- and Long-Term Effects of United Nations Peace Operations” (2008) 22 *World Bank Economic Review* 9, 29–30.

<sup>9</sup> Benjamin Reilly, “Post-Conflict Elections: Constraints and Dangers” in Edward Newman and Albrecht Schnabel (eds), *Recovering from Civil Conflict: Reconciliation, Peace and Development* (Routledge 2002) 118–39; Roland Paris, *At War’s End: Building Peace after Civil Conflict* (Cambridge University Press 2004); Caplan, “After Exit” (n. 5).

<sup>10</sup> Ralph Wilde, “Competing Normative Visions of Exit” in Richard Caplan (ed.), *Exit Strategies and Statebuilding* (Oxford University Press 2012) 261–75.

presence should come to an end when the local capacity to govern has reached a certain threshold, the self-determination framework emphasizes the right to self-government irrespective of local capacities, arguing that any non-consensual international involvement is illegitimate and that immediate exit is ethically mandatory. As Noah Feldman's work demonstrates, most efforts to develop an ethic of exit are likely to be located between these two poles, drawing on elements of the trusteeship framework (for example, establishing benchmarks for democratically legitimized government) as well as the self-determination framework (for example, emphasizing the importance of local consent for the presence of an international presence).<sup>11</sup>

The third perspective is also interested in normative frameworks guiding exit, but approaches it from an empirical angle. It assesses the extent to which established *jus post bellum* and related norms are already reflected in the exit practices of external actors from peace operations. A range of scholars has examined the impact of mostly liberal norms on international state- and peacebuilding practices. However, the way in which such norms or *jus post bellum* norms might also shape the exit from statebuilding operations has so far remained largely unexplored.

This chapter examines whether key exit mechanisms and instruments, transition policies, and the negotiations between external and local actors over the transition of political authority are shaped by *jus post bellum* concerns. As other chapters in this book cogently argue, *jus post bellum* has a complex relationship with other legal and moral approaches to think about “post”-war situations and the rights and responsibilities of different actors—local and external, combatants and civilians—in such environments.<sup>12</sup> This chapter focuses in its analysis on one aspect of *jus post bellum*, namely the responsibilities of external actors exercising political authority in the aftermath of conflict. It suggests that while exit practices are not explicitly guided by *jus post bellum* norms—there is no explicit invocation of a body of rules identified as *jus post bellum* by states and international organizations in the context of exit from peace operations—related normative frameworks, especially about local ownership and about the character of political institutions and relationships, have shaped the timing of exit, key exit mechanisms such as benchmarks, and transition planning mechanisms like the UN's Integrated Mission Planning Process (IMPP), integrated peacebuilding frameworks, and compact mechanisms.

The remainder of the chapter is divided into four parts. The first examines the evolution of debates about exit from peace operations, and of exit practices, focusing in particular on UN peace operations. The second part looks more closely at specific exit mechanisms, in particular the use of exit benchmarks and planning instruments like the UN's IMPP to assess the impact *jus post bellum* and related norms on exit. Part three examines the impact that such norms have had on decisions on the timing of exit. The final part concludes the chapter with a reflection of the impact of *jus post bellum* norms on exit, and on the implications of this for peace operations.

<sup>11</sup> Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton University Press 2004).

<sup>12</sup> See e.g. Larry May, ch. 1, Gregory Fox, ch. 12, Jennifer Easterday, ch. 20, Aurel Sari, ch. 24, and Cymie Payne, ch. 25, this volume.

## II. The Evolution of Exit Debates and Practices

The challenges associated with the exit of a mission (both in terms of withdrawal, and in terms of transition to a follow-on authority) have increasingly occupied the UN, key member states, and regional organizations. This has been driven not only by public pressures in troop-contributing countries to bring the troops home, but also by concerns that poorly timed and executed transitions (in particular premature exit) could jeopardize the wider statebuilding and peace consolidation efforts pursued by the interveners. The perception that interventions had left the structures and actors that fuelled conflict in the first place still in power (as in Bosnia and Herzegovina in late 1996), that countries soon lapsed into authoritarianism following the departure of a peace operation (as in Cambodia in 1994), and the return to violence and conflict of some countries after a mission's departure (e.g. in Angola, Timor Leste, or Haiti) further fuelled debates about the timing and nature of a mission's exit.<sup>13</sup>

The UN has arguably been the focal point of exit debates, starting with the 2001 Report of the Secretary General, *No Exit Without a Strategy* (and the debate in the UN Security Council on the issue),<sup>14</sup> which focused both on the conditions for exit, and on follow-on arrangements. One of the key consequences of this was an effort—through high-level panels and working groups—to develop planning tools for peace operations that would help to integrate the wider UN system, and take account not only of different dimensions of peace consolidation (e.g. security, political, and economic), but also give greater attention to transition issues and supporting greater continuity in key peace consolidation tasks. This process culminated in the IMPP, which has been implemented since 2008.

In addition to new planning instruments, there has been a significant shift in the exit practices of UN-led peace operations over the last ten to 15 years. Three developments stand out.

First, there has been a move away since the mid-1990s, from relatively short-term mandates normally culminating in elections, to longer-term missions and more gradual transitions. Of the 29 UN peace operations with a statebuilding mandate established between 1989 and 2011, only nine ended several months after the holding of elections, which were normally part of a peace agreement.<sup>15</sup> While elections no longer play such a central role as an exit mechanism for peace operations,<sup>16</sup> they have increasingly served

<sup>13</sup> More generally, the concern about conflict recidivism has been fuelled by research by Paul Collier and others highlighting the greater risk of war recurrence in conflict-affected countries. For a critical discussion of this debate, see Astri Suhrke and Ingrid Samset, "What's in a Figure: Estimating Recurrence of Civil War" (2007) 14 *International Peacekeeping* 195.

<sup>14</sup> Annan, "No Exit Without Strategy" (n. 3).

<sup>15</sup> These missions include the UN Transition Assistance Group (UNTAG) in Namibia, UN Observer Mission in El Salvador (ONUSAL), UN Transitional Authority in Cambodia (UNTAC), UN Operation in Mozambique (ONUMOZ), UN Mission in Haiti (UNMIH), UN Angola Verification Mission III (UNAVEM III), UN Mission in the Central African Republic (MINURCA), UN Transitional Authority in East Timor (UNTAET), and UN Operation in Burundi (ONUB). It is worth noting, though, that both UNMIH and UNTAET were immediately followed by smaller peace operations. For a table of UN peace operations with statebuilding mandates, see Mats Berdal and Dominik Zaum (eds), *Political Economy of Statebuilding: Power after Peace* (Routledge 2012) 133–7.

<sup>16</sup> Call and Cook, "On Democratization and Peacebuilding" (n. 4) 237; Terrence Lyons, *Demilitarizing Politics: Elections on the Uncertain Road to Peace* (Lynne Rienner 2005).

as an instrument to select local partners on whom international actors needed to rely to implement their peace- and statebuilding objectives. As peace operations generally lack the capacity and legitimacy to impose their designs on local actors unilaterally, exercising their mandates requires a degree of cooperation from local political elites.<sup>17</sup> Elections provide a mechanism to identify local partners who are likely to be able to command sufficient legitimacy among the local population and are therefore more likely to be able (though not necessarily willing) to implement the reforms associated with peacebuilding.

Secondly, there has been a greater use of successor missions to continue peace consolidation efforts in a different, and normally less intrusive (and expensive) configuration. Haiti, for example, had a total of four consecutive missions between 1993 and 2000,<sup>18</sup> and the UN re-deployed with a large stabilization mission, the UN Stabilization Mission in Haiti (MINUSTAH) in 2004, following the breakdown of order and the departure of President Aristide into exile. East Timor had three consecutive missions between 1999 and August 2006 with increasingly limited mandates,<sup>19</sup> only to scale up to a new full peace operation, UN Integrated Mission in Timor-Leste (UNMIT), following a political crisis and renewed violence in August 2006. Both Bosnia and Herzegovina and Kosovo have also seen successor missions to external military and civilian/policing actors respectively. Since the early 2000s, a well-established transition path has emerged, where countries go from a (normally UN-led) peace operation to a special political mission (SPM), and then to an integrated peacebuilding office or a UN country team, who continue with the developmental aspects of peace consolidation.

Thirdly, a broad agreement has emerged among states and multilateral organizations on the key elements of political order in conflict-affected countries that contribute to containing violence and enable the exit of peace operations. These include in particular legitimate and inclusive political settlements, reasonably responsive political and administrative institutions, the protection of human rights (including protection of minorities), and security sector reform.<sup>20</sup> However, even if the understanding of the political and institutional factors that contribute to peace has improved, we still know very little about how, and through what interventions and instruments, these factors can be strengthened.<sup>21</sup>

<sup>17</sup> See Michael Barnett and Christoph Zürcher, "The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood" in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge 2009) 23–52.

<sup>18</sup> The UN Mission to Haiti (UNMIH, 1993–96), the UN Support Mission in Haiti (UNSMIH, 1996–97), the UN Transition Mission in Haiti (UNTMH, July–November 1997), and the UN Civilian Police Mission in Haiti (MIPONU, 1997–2000).

<sup>19</sup> UNTAET (1999–2002), UN Mission of Support in East Timor (UNMISSET) (2002–05), and UN Office in East Timor (UNOTIL) (2005–06).

<sup>20</sup> A good reflection of this includes the G7+ peace- and statebuilding goals, and the World Bank's World Development Report on Conflict Security and Development. See G7+, "A New Deal for Engagement in Fragile States" (G7+ 2011); World Bank, "World Development Report 2011: Conflict, Security, and Development" (Report, World Bank 2010). See also Charles Call, *Why Peace Fails: The Causes and Prevention of Civil War Recurrence* (Georgetown University Press 2012).

<sup>21</sup> Bruce Jones and Molly Elgin-Cossart, "Development in the Shadow of Violence" (Centre for International Cooperation 2011).

### III. *Jus Post Bellum* and Exit Mechanisms

One way in which norms, including *jus post bellum* norms, have influenced exit practices of peace operations is through the influence they have had on exit mechanisms. Two of the key instruments for exit—the use of governance and security benchmarks, and the greater use of integrated planning processes—clearly reflect important substantive concerns of *jus post bellum*.

*Jus post bellum* norms are reflected in the state- and peacebuilding goals of peace operations and thereby shape the specific benchmarks for exit, the fulfillment of which triggers the handover of authority to local institutions. As growing literature on socialization in international relations argues, norms can provide blueprints for appropriate institutions and conduct.<sup>22</sup> While such blueprints can be fairly informal, simply reflecting the institutions of the international interveners themselves, they can also be explicit, outlining in the mandates of statebuilding operations the kind of institutions that should be built. With regard to exit, such blueprints are the basis for the benchmarks for the transition of authority from international to local institutions.

Benchmarks tend to entail legislative and institutional reforms or sustained changes in conduct (for example, in the treatment of minorities) that might indicate the acceptance of the normative framework, or indicate that a situation is stable enough for external actors to draw down. Especially in gradual, phased exit processes, where exit is linked to the fulfillment of various phases of the statebuilding mission's mandate, benchmarks have become an important exit mechanism. The UN used explicit benchmarks for exit for the first time in Sierra Leone, to manage the transition from the UN Assistance Mission in Sierra Leone (UNAMSIL), a major peacekeeping operation, to the UN Integrated Office in Sierra Leone (UNIOSIL), between 2002 and 2005. Central to the process were five security-related benchmarks regarding demobilization and training and deployment of the local security forces, especially the police.<sup>23</sup> The benchmarks “worked” in the sense that they slowed down the drawdown of the 17,500 UNAMSIL peacekeepers and delayed the exit of the mission by a year amidst concerns about the readiness of the police to assume responsibility for security in parts of the country.<sup>24</sup>

Benchmarks have been widely used by peace operations during the last decade by both UN operations, for example in Kosovo with the “Standards before Status” policy, and in non-UN operations like NATO's International Security Assistance Force (ISAF) mission in Afghanistan, which developed a “conditions-based transition” process to

<sup>22</sup> Jeffrey T. Chekel, “International Institutions and Socialization in Europe: Introduction and Framework” (2005) 59 *International Organization* 801, 804. On the role of peacebuilding operations as “transmission belts” that convey international norms to post-conflict countries, see Roland Paris, “International Peacebuilding and the ‘Mission Civilisatrice’” (2002) 28 *Review of International Studies* 637, 653–4.

<sup>23</sup> The benchmarks included (1) the rebuilding of the security forces; (2) the full integration of former combatants; (3) the consolidation of state authority; (4) the restoration of government control over mining areas; and addressing cross-border instability. See UN Secretary General, “Fifteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone” (2002) UN Doc. S/2002/987 paras 14–25.

<sup>24</sup> UN Secretary General, “Eighteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone” (2003) UN Doc. S/2003/663, paras 37–40. See also Sarjoh Bah, “Sierra Leone” in Richard Caplan (ed.), *Exit and Peace Consolidation* (Oxford University Press 2012) 110–11.

local security forces, with security responsibility handed over province by province. Superficially, benchmarks appear to de-politicize exit decisions, as they link it to clearly observable and measurable outcomes.<sup>25</sup> In reality, however, both the identification of benchmarks for peace consolidation, and their measurement, are rarely straightforward and often deeply political. Identifying benchmarks requires a shared understanding of the causes of conflict, which are both multiple and complex,<sup>26</sup> and which are often transformed by conflict itself.<sup>27</sup> Interveners might disagree on the importance of different causes of a conflict, and hence the most relevant benchmarks. The benchmarks chosen might reflect as much the wider political and security priorities of interveners as they do those of the local population and government. Furthermore, peace consolidation benchmarks are not always easily measurable, especially when measuring outcomes (e.g. security) rather than outputs (e.g. police officers trained). Assessing the fulfillment of benchmarks can therefore be a highly subjective and political process, reflecting the interests of the reviewers. Leaving the determination of whether benchmarks have been met to a peace operation raises the possibility that they are manipulated to ensure the “right” outcome, a criticism leveled for example against the Office of the High Representative in Bosnia and Herzegovina, which has been accused of “moving the goalposts” to justify its continued exercise of its authority;<sup>28</sup> and against ISAF in Afghanistan, where the security and stability in some of the provinces handed to the Afghan security forces has been questioned by experts.

The challenge posed by benchmarks is therefore both a technical one, concerned with identifying relevant and measurable benchmarks, and a political one, concerned with the authority to determine progress against them and to pronounce on their fulfillment. However, benchmarks also pose a moral challenge, as they root exit strategies firmly in what Ralph Wilde has called the “trusteeship paradigm” of transition, which emphasizes the continuation of the exercise of political authority by peace operations until a society is perceived to be ready, and its institutions strong enough, to run their own affairs.<sup>29</sup> Linking exit to the achievements of benchmarks which are, especially in more ambitious statebuilding operations, rooted in broadly liberal norms about the character of political institutions, challenges well-established norms of self-determination and self-governance,<sup>30</sup> and often pronounced principles

<sup>25</sup> See e.g. UN, *Monitoring Peace Consolidation: United Nations Practitioners’ Guide to Benchmarking* (United Nations, 2010).

<sup>26</sup> World Bank (n. 20).

<sup>27</sup> Susan Woodward, “Do the Root Causes of Civil War Matter? On Using Knowledge to Improve Peacebuilding Interventions” (2007) 1 *Journal of Intervention and Statebuilding* 143.

<sup>28</sup> Gerald Knaus and Felix Martin, “Travails of the European Raj” (2003) 14 *Journal of Democracy* 58, 60–74.

<sup>29</sup> Wilde, “Competing Normative Visions” (n. 10) 264–7.

<sup>30</sup> See e.g. David Chandler, *Empire in Denial: The Politics of Statebuilding* (Pluto 2007); Jarat Chopra, “The UN’s Kingdom in East Timor” (2000) 42 *Survival* (2000) 27; Beate Jahn, “The Tragedy of Liberal Diplomacy: Democratization, Intervention, and Statebuilding (Part I)” (2007) 1 *Journal of Intervention and Statebuilding* 87; and Beate Jahn, “The Tragedy of Liberal Diplomacy: Democratization, Intervention, and Statebuilding (Part II)” (2007) 1 *Journal of Intervention and Statebuilding* 211. For a defense of liberal peacebuilding against these criticisms, see Roland Paris, “Saving Liberal Peacebuilding” (2010) 36 *Review of International Studies* 337.



of local or national ownership<sup>31</sup> —a moral tension that is also inherent in many *jus post bellum* debates.<sup>32</sup>

In addition to exit benchmarks, *jus post bellum* norms are also reflected in some of the key planning instruments used by peace operations for their exit, such as the IMPP, so-called compact mechanisms between local governments and external peace- and state-building actors (e.g. the Afghanistan compact), or the Integrated Strategic Frameworks for peacebuilding used by the UN Peacebuilding Commission.<sup>33</sup> One central element of these planning instruments is their emphasis on local ownership, involving local governments and civil society in the identification of peace- and statebuilding objectives, and jointly identifying policies and practices to achieve them. Another is mutual accountability, with local and international actors committing themselves to particular policy and institutional changes and continued financial and political support for these reforms, respectively.

The reality of these processes is, however, more complicated. As Sarah von Billerbeck has shown in the case of the DRC, while rhetorical commitments to local ownership are very strong in UN missions, in practice it is operationalized discursively, rather than substantively, for fear that it might compromise peacebuilding goals.<sup>34</sup> Similarly, Severine Autessere has highlighted how narratives of the causes of a conflict among peacebuilders, and the resulting policy choices, are often divorced from local dynamics and understandings of these dynamics.<sup>35</sup>

Similarly, the notion of “mutual accountability” is problematic in its operationalization. While donors can hold—and have held—recipient governments to account for their policies and practices and withhold financial support, recipient governments—and even less so the populations of conflict-affected countries—seldom have the wherewithal to hold external actors to account. While recipient governments can try to shame donors into actually disbursing the assistance they pledged, they have no legal recourse to enforce disbursement. Given the immunity that peacekeepers and civilians working for international organizations engaged in peacebuilding enjoy, they cannot be held accountable for individual malfeasances either, even in some of the most egregious cases, as over sexual exploitation of women and children by peacekeepers in the DRC,<sup>36</sup> or the alleged responsibility of UN peacekeepers for the outbreak of Cholera in Haiti.<sup>37</sup> Mutuality in these planning processes and frameworks is therefore distinctly limited.

Arguably, these developments in exit practices largely reflect concerns about reducing the risk of conflict recidivism, rather than specific normative concerns about a just

<sup>31</sup> For UN commitments to local ownership, see e.g. UN, *United Nations Peacekeeping Operations: Principles and Guidelines* (UN Department of Peacekeeping Operations 2008). For a critical discussion of the operationalization of ownership by the UN, see Sarah von Billerbeck, “Whose Peace? Local Ownership and UN Peacebuilding” (D.Phil. thesis, University of Oxford 2013).

<sup>32</sup> See e.g. Stahn, “‘Jus ad Bellum,’ ‘Jus in Bello’ . . . ‘Jus Post Bellum?’” (n. 6).

<sup>33</sup> See e.g. Richard Ponzio, “After Exit: The UN Peacebuilding Architecture” in Richard Caplan (ed.), *Exit Strategies and Peacebuilding* (Oxford University Press 2012), 293–310.

<sup>34</sup> Von Billerbeck, “Whose Peace?” (n. 31).

<sup>35</sup> Severine Autessere, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge University Press 2010).

<sup>36</sup> Owen Bocott, “Report reveals shame of UN peacekeepers,” *Guardian* (London, 25 March 2005).

<sup>37</sup> UN, “Haiti Cholera Victims’ Compensation Claims ‘Not Receivable’ under Immunities and Privileges Convention, United Nations Tells Their Representatives” (2013) UN Doc. SG/SM/14828.

post-conflict political order. However, they also respond, even if largely at a discursive level, to concerns about self-determination, and about the responsibilities of interveners in war-torn societies.

#### IV. The Timing of Exit

The third area where *jus post bellum* can impact on exit is with regard to its timing. Across peace operations, the decision to exit has been triggered by a wide range of factors, often in combination with others. Thus, exit processes can be triggered by the withdrawal or reconfiguration of host consent (as in Burundi<sup>38</sup> or the missions in Ethiopia and Eritrea), or by sudden shocks, such as renewed violence (as in Rwanda in 1994 or Kosovo in 2004). They can be the result of pressure from donors or troop contributors (e.g. Nigeria in Sierra Leone in 1999), or pressure from regional powers (e.g. India over Nepal in 2009). They can be the consequence of mandate fulfillment (e.g. Sierra Leone in 2001/02); or pressures by Security Council members to reduce or end a peacekeeping presence, because of concerns of cost, overstretch, or sovereignty (e.g. Russia and China over Haiti in the late 1990s). Normally, the decision to exit arises from the interaction of different factors, and *jus post bellum* concerns can play into these dynamic interactions in two ways.

First, they can create “zones of permissibility,” encompassing a range of actions that are compatible with *jus post bellum* norms,<sup>39</sup> as well as “taboos” that make particular practices all but inconceivable.<sup>40</sup> A taboo of particular importance to the issue of exit is the prohibition of colonial rule, epitomized in the 1960 UN General Assembly’s *Declaration on the Granting of Independence to Colonial Countries and Peoples*.<sup>41</sup> In the decades after the end of the Second World War, the practice of colonial governance was increasingly challenged and delegitimized internationally by the norm of self-determination, and this emerging taboo significantly contributed to the dissolution of the European overseas empires.<sup>42</sup> Reflecting this taboo, peace operations, especially those involving statebuilding and international administration, have generally sought to distance their efforts from any appearance of colonialism.<sup>43</sup> As Michael Ignatieff has suggested, “All modern imperial rule is temporary, justified as the exercise of force and coercion necessary to restore peoples to their sovereignty.”<sup>44</sup> Peace operations have therefore emphasized their strictly temporary nature.

<sup>38</sup> See Peter Uvin and Leanne Bayer, “The Political Economy of Statebuilding in Burundi” in Berdal and Zaum, *Political Economy of Statebuilding* (n. 15) 271–3.

<sup>39</sup> Friedrich Kratochwil, “How do Norms Matter?” in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000) 43–51.

<sup>40</sup> Richard Price, “A Genealogy of the Chemical Weapons Taboo” (1995) 49 *International Organization* 73.

<sup>41</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV) (14 December 1960).

<sup>42</sup> Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press 1990) 82–5; Hendrik Spruyt, “The End of Empire and the Extension of the Westphalian System,” in James A. Caporaso (ed.), *Continuity and Change in the Westphalian Order* (Blackwell 2000) 65–92.

<sup>43</sup> Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008) 395–428.

<sup>44</sup> Michael Ignatieff, *Empire Lite: Nation-Building in Bosnia, Kosovo, and Afghanistan* (Vintage 2003) 113–14.

The norm of self-determination and the taboo of permanent direct control associated with colonialism therefore make timely exit central to the legitimacy of post-conflict statebuilding efforts. Ultimately, some form of self-government needs to be re-established.

This also explains the effectiveness of the second way in which *jus post bellum* norms affect the timing of exit: through the strategic use of norms by local actors to argue for exit. Actors appeal to norms strategically in political arguments, interpreting and reinterpreting the content and meaning of norms to justify their political objectives.<sup>45</sup> In the case of peace operations, elements of the liberal normative framework have been invoked by international actors to justify their continued presence and statebuilding activities. In particular, they have highlighted the absence or weakness of democratic institutions, the weakness of administrative institutions, persistent human rights problems, or the continued lack of domestic security.

However, norms are public goods, and their use is both non-rivalrous and non-exclusive. Each side in a political argument can strategically appropriate and use them to promote its political goals, independent of their actual support for the norm. Local elites can strategically employ and re-interpret them to argue against an international presence and push for more local participation in the statebuilding process, and for the mission's exit. In particular, local elites have used the norm of democracy to this end, interpreting it not so much in terms of accountable and representative institutions, but focusing instead on the notion of self-rule inherent in the concept. Local elites have frequently invoked the language of "ownership," emphasized the lack of democracy that is fundamental to the practice of international administrations, and demanded more self-government and greater local control over public institutions and the statebuilding process. These claims have been effective given the international normative commitment to democracy: they appeal to well-codified and well-understood international normative frameworks, and create what one could call a "transition push"—significantly shaping the nature and timing of the exit process.

In Iraq, for example, the Coalition Provisional Authority (CPA) originally wanted to select the members of the Transitional National Assembly, which was tasked to draft the new Iraqi constitution and to choose the new Iraqi government through a complex system of regional caucuses that some argue would have given the United States a greater degree of control over the outcome of the process. Iraqi leaders, most prominently Ayatollah Sistani, stated publicly that an Iraqi government had to be democratically elected to be legitimate, making it impossible for the CPA to stick to the process of caucuses and, in the end, forcing it to accept the election of the assembly.<sup>46</sup> By appealing to the very same democracy norm used by the US occupation forces to legitimize their actions, this forced the CPA to approve elections. The language of democracy, and self-rule, was also successfully employed in Kosovo and East Timor to accelerate the handover of political authority. Contestations over different norms between local

<sup>45</sup> Ian Hurd, "The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003" (2005) 95 *International Organization* 495; Frank Schimmelfennig, "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union" (2001) 55 *International Organization* 47.

<sup>46</sup> Feldman, *What We Owe Iraq* (n. 11) 115–16.

elites and international peacebuilders, which might superficially appear to be arguments about principles—between self-determination and local ownership on the one hand, and about liberal norms of justice and good governance on the other—in reality often seem to veil particularist interests and political competition.

The democratic legitimation of post-conflict governments also appears to make it more difficult for peacebuilding actors to push for reforms that such governments are reluctant to advance. This highlights one of the challenges that the political economy of exit can create for peace consolidation, through its effects on the political and economic dynamics in conflict-affected societies. The way *jus post bellum* norms have affected exit practices can contribute to the empowering of post-war elites, who often display strong continuity with war-time and pre-war elites, and which are further entrenched by both peace- and statebuilding practices, and by exit processes.<sup>47</sup> As the institutional transformations in post-war countries are frequently more formal than substantive,<sup>48</sup> the actual mechanisms of rule and power often remains largely unchanged. The case of Iraq is illustrative: the way in which prime minister Nuri al-Maliki has centralized and personalized power, in particular in the aftermath of the US exit from the country, bears more than just a passing resemblance to some the mechanisms used by the Saddam Hussein regime.<sup>49</sup>

## V. Conclusion

What, then, does this discussion suggest about the place of *jus post bellum* in the politics and practice of exit from peace operations? First, *jus post bellum* norms clearly matter for exit, and have affected key exit practices and decisions on timing exit. However, one should not overstate the impact of *jus post bellum*: its norms clearly do not provide a general framework against which decisions to exit can be assessed, or which has guided the evolution of contemporary exit practices. Much of the development in thinking about exit has been at a technical level, and is concerned with issues such as how to ensure continuity between successive missions, or how to prevent the occurrence of sudden gaps in funding and personnel. There has been much less engagement in official debates with the bigger moral and political questions that exit processes raise, and that are at the heart of *jus post bellum* concerns relating to exit. Arguably, this official focus on technical aspects of exit reflects a lack of agreement on the substantive normative issues that exit raises, for example on what the appropriate transformative objectives of peace operations are, and how competing normative commitments should be reconciled. This merely underlines the pluralist character and the thin normative consensus of contemporary international society.

Secondly, the discussion suggests that the influence of *jus post bellum* norms might have had unexpected—and unintended—consequences for the substantive outcomes of the peace- and statebuilding efforts of peace operations. As outlined earlier, the

<sup>47</sup> See Berdal and Zaum, *Political Economy of Statebuilding* (n. 15).

<sup>48</sup> Matt Andrews, *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions* (Cambridge University Press 2013).

<sup>49</sup> See Toby Dodge, *Iraq: From War to a New Authoritarianism* (IISS 2013).

emphasis on ownership and self-rule, which are core features of the *jus post bellum* framework, have helped to embed peacebuilding policies by external actors that have contributed to the entrenchment of wartime elites and their informal networks of influence and power in the post-conflict order.

Finally, the often technocratic language around exit, with its focus on benchmarks and frameworks, might suggest that such processes have been transformed into rule-governed, technical exercises. However, this merely veils the deeply political nature of decisions to exit, and the importance of perceptions of domestic support for interventions, and considerations of cost and capacity. It is the interaction of these hard considerations of self-interest with the normative ambitions advanced by *jus post bellum* that help us to understand the particular exit dynamics in different peace operations.

# Facilitating Post-Conflict Reconstruction: Is the UN Peacebuilding Commission Successfully Filling an Institutional Gap or Marking a Missed Opportunity?

*Freya Baetens\**

## I. Introduction

The UN Peacebuilding Commission (PBC or Commission) was created as an intergovernmental advisory body in the framework of the 2005 World Summit.<sup>1</sup> The PBC aims to fill an institutional gap as the United Nations (UN) was lacking an organ specifically dealing with states facing post-conflict reconstruction. While the UN Security Council (UNSC) mostly concerns itself with present conflict situations in member states, the Economic and Social Council (ECOSOC) mainly assists stable countries. The purpose of the PBC is to establish an institutional mechanism addressing the special needs of states emerging from conflict towards recovery, reintegration, and reconstruction. The ultimate goal is to support these states in laying the foundation for sustainable development but UN member states remain divided on the appropriate interpretation of the Commission's role and competences. The first review of the functioning of the PBC took place in 2010.

This chapter first sets out the legal and institutional framework within which the PBC operates, concentrating on the countries currently on its agenda and discussing the Commission's initial reception in the international community.<sup>2</sup> Subsequently, this

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<sup>1</sup> UNGA Res. 60/01 (2005) World Summit Outcome, paras 97–8. For an extensive overview of the PBC's place within the UN peacebuilding architecture, see Rob Jenkins, *Peacebuilding: From Concept to Commission* (Routledge 2013).

<sup>2</sup> Parts of this section were formerly published as Freya Baetens and Katrin Kohoutek, "The Peacebuilding Commission" in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010). These sections have been brought up-to-date to June 2013.

chapter examines the critical conclusions of the 2010 review report, starting with the lack of benchmarks to measure failure or success, and focusing on six key issues concerning peacebuilding in general: (1) the complexity of peacebuilding; (2) the imperative of national ownership; (3) the illusion of sequencing; (4) the urgency of resource mobilization; (5) the importance of contributions from women; and (6) the need for connection with (and understanding of) the field. This is followed by perspectives from the field concerning the Commission's accomplishments and the lessons that can be learned. Next, this chapter analyzes the review of the PBC's performance at the Headquarters, including practical recommendations to the Organizational Committee and the Country-Specific Configurations, and an assessment of the mutual accountability concept in this context. Before discussing the key relationships of the PBC with other international and regional actors, this chapter addresses the multi-tiered engagement and the graduation criteria applicable to PBC-assisted countries. This analysis is limited to the functioning of the Commission and does not elaborate separately on the role of the Peacebuilding Support Office and the Peacebuilding Fund.

Underlying this chapter is the question of what contributions international organizations and their specialist bodies in general, and the UN and the PBC in particular, can make to develop guidelines for conflict termination and peace stabilization. This analysis is set against the background of the rights and responsibilities of international organizations under *jus post bellum*. The discussions surrounding the PBC's functioning are symptomatic of the impasse concerning UN reform. This chapter examines how this Commission could help ensure that the peacekeeping operations are not conducted in vain as countries relapse into conflict and chaos when UN forces and/or external observers leave. The PBC, albeit not as "strongly equipped" as some might have wished, has important tools at its disposal and the regional support required to help achieve sustainable peace. The question is to which extent these tools and support currently remain under-utilized.

## II. Legal and Operative Framework of the Peacebuilding Commission

In 2004, the UN General Assembly (UNGA) High-Level Panel on Threats, Challenges, and Change advised to establish the PBC.<sup>3</sup> This proposal was subsequently amended by the UN Secretary General's 2005 report "In Larger Freedom: Towards Development, Security and Human Rights for All."<sup>4</sup> During its 66th plenary meeting, the UNGA officially established the PBC in accordance with Articles 7, 22, and 29 of the UN Charter,<sup>5</sup> as confirmed by the UNSC.<sup>6</sup> The PBC formally entered into existence in June 2006 and is subject to review every five years to ensure that its arrangements remain appropriate

<sup>3</sup> UNGA, "A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change" in UN Secretary General, "Note by the Secretary-General" (2004) UN Doc. A/59/565, para. 85.

<sup>4</sup> UN Secretary General, "In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary General" (2005) UN Doc. A/59/2005, paras 31–3.

<sup>5</sup> UNGA Res. 60/180 (2005) UN Doc. A/RES/60/180.

<sup>6</sup> UNSC Res. 1645 (2005) UN Doc. SC/RES/1645.

to fulfill its functions. The sections below outline the PBC's legal and institutional structure (main purposes, composition, and agenda) before delving into its field operations (Organizational Committee and country-specific meetings) and initial reception by the international community.

## **A. Legal and institutional structure**

### *Main purposes*

The objective of the PBC is to marshal international resources and propose integrated strategies for post-conflict recovery, focusing on reconstruction, institution-building, and sustainable development.<sup>7</sup> For this purpose, the PBC can draw from the UN's broad capacities and experience in areas such as conflict prevention, mediation, peacekeeping, human rights, rule of law, humanitarian assistance, reconstruction, and long-term development. Additionally, the PBC specifically helps to ensure predictable financing for early recovery activities and sustained financial investment. The aim is to extend the attention span of the international community to include post-conflict recovery, and to develop best practices on issues that require extensive collaboration between political, military, humanitarian, and development actors.

### *Composition*

The PBC operates through its standing Organizational Committee and through country-specific meetings.<sup>8</sup> By creating five groups of members, the composition of the Organizational Committee was designed to alleviate fears that the permanent UNSC members might attempt to exercise control over the new Commission or, at the very least, excessively influence decision-making processes and thereby diminishing the PBC's acceptance among other states. The first group includes seven UNSC members, including all permanent members, while geographical origin has to be taken into account for the selection of the two "rotating" UNSC members. The second group consists of seven ECOSOC members, elected from regional groups. The third group encompasses the five top providers of assessed contributions to UN budgets and of voluntary contributions to UN funds, programs, and agencies. The fourth group contains the five top providers of military personnel and civilian police to UN missions. The fifth group is formed by seven states, elected according to UNGA rules and procedures, in order to ensure that all regional groups and countries that have experienced post-conflict recovery are represented in the overall composition of the Organizational Committee.

In all matters the PBC acts on the basis of consensus of its members who serve renewable terms of two years. Further procedural rules provide that representatives of the UN Secretary General as well as representatives from the World Bank Group, the International Monetary Fund (IMF), and other institutional donors are invited to participate in PBC meetings.<sup>9</sup> Where possible, the Commission works in cooperation with national or transitional authorities in the country under consideration to

<sup>7</sup> UNGA Res. 60/180 (2005) para. 2.

<sup>8</sup> UNGA Res. 60/180 (2005) para. 4.

<sup>9</sup> UNGA Res. 60/180 (2005) para. 9.



ensure national ownership of the peacebuilding process, as well as in close consultation with (sub-)regional organizations. With regard to particular operations in the field, the PBC operates through country-specific meetings, which include, in addition to the Organizational Committee members, representatives from the country under consideration; countries in the region engaged in the post-conflict process and other countries that are involved in relief efforts and/or political dialogue. Other participants include representatives of (sub-)regional organizations; major financial, troop, and civilian police contributors; relevant UN representatives; and regional and international financial institutions.<sup>10</sup>

### *Agenda*

While aiming at maintaining a balance in addressing situations in countries in different regions, the Organizational Committee determines the PBC agenda based on requests for advice submitted by the UNSC, the UN Secretary General, the ECOSOC, the UNGA, and the member states. With regard to the latter three, exceptional circumstances have to be shown, namely that the member state concerned is on the verge of (re-)lapsing into conflict while the situation is not on the UNSC agenda. In order for the ECOSOC or the UNGA to request PBC advice, the consent of the member state concerned needs to be obtained.<sup>11</sup> One of the main purposes of the Commission is to advise the UNSC in matters relating to international peace and security, particularly when there is a UN-mandated peacekeeping mission on the ground or under way. The critical phase immediately after countries emerge from conflict tends to be burdened with learning processes during which the new authorities may experience difficulties in coordinating the conduct of various actors with varying interests. The PBC is currently developing best practices to facilitate integrated strategies for peacebuilding missions, particularly with regard to the countries on its agenda. This is also of particular relevance to the ECOSOC as the principal body for coordination, policy review, dialogue, and recommendations on economic and social development.<sup>12</sup>

The PBC recommendations are publicly available so all relevant bodies and actors can take them into account when deciding upon action in accordance with their respective mandates. The Commission also submits an annual report to the UNGA and the UNSC.<sup>13</sup> The UNGA requested the UN Secretary General to establish a small Peacebuilding Support Office staffed by qualified experts to assist the PBC, as well as a standing Peacebuilding Fund for post-conflict peacebuilding. The fund is financed by voluntary contributions to ensure the immediate release of resources needed to launch peacebuilding activities and the availability of appropriate financing for recovery. This funding is not allocated directly to potential individual beneficiaries, but is distributed via national steering committees that elect individual projects.

<sup>10</sup> UNGA Res. 60/180 (2005) para. 7.

<sup>12</sup> UNGA Res. 60/180 (2005) para. 17.

<sup>11</sup> UNGA Res. 60/180 (2005) para. 12.

<sup>13</sup> UNGA Res. 60/180 (2005) para. 15.

## B. Operations in the field

### *Work of the organizational committee*

Upon request of the UNSC President, the Organizational Committee established its first two country-specific meetings in 2006 to deal with the situations in Sierra Leone and Burundi. Furthermore, it adopted the provisional rules of procedure to guide the PBC's work,<sup>14</sup> and solved the problem of involving institutional donors<sup>15</sup> and civil society.<sup>16</sup> Standing invitations were issued to the respective institutional donors, namely the IMF, the World Bank, the European Union, and the Organization of the Islamic Conference, to attend all PBC meetings except those which the chairperson in consultation with the member states deems to be limited to member states only. Simultaneously, the Organizational Committee established a "Working Group on Lessons Learned" to harness knowledge about peacebuilding strategies in order to enrich the deliberations of the different PBC configurations, taking into account expertise from national actors, civil organizations, and academic institutions.

In its subsequent sessions, the Organizational Committee dealt with general questions pertaining to the PBC's work and strengthening the working relationships with institutions within and outside the UN. For example, it discussed how the PBC could influence the selection of countries on its agenda with the referring organs (UNSC, UNGA, and ECOSOC). Through internal debates, e.g. regarding modifying approaches to the purpose and scope of the integrated peacebuilding strategies, the Organizational Committee aims to improve the implementation of its mandate. The same objective is served by meetings with other institutions on issues such as the role of the private sector in peacebuilding, with representatives of the United Nations Development Program (UNDP), the International Financial Corporation of the World Bank, and UN Foundations on International Partnerships. In addition to Sierra Leone and Burundi, since 2006 the Organizational Committee has also established country-specific meetings for Guinea-Bissau, the Central African Republic, Liberia, and Guinea.

### *Country-specific meetings*

#### **1. Burundi configuration**

After more than a decade of (ethnic) civil war, several ceasefires and a power-sharing agreement between the Hutu and Tutsi forces paved the way for a new constitution in Burundi followed by democratic elections in 2005. The last ceasefire agreement was concluded in 2006 between the government and a rebel group that had continued hostilities until that date. Before the PBC started to deal with Burundi, the government had already adopted several agreements and strategies to create conditions for sustainable development. Based on the idea of national ownership of the peacebuilding process,

<sup>14</sup> UN PBC, "Provisional rules of procedure of the Peacebuilding Commission" (2006) UN Doc. PBC/1/OC/3.

<sup>15</sup> UNSC Res. 1645 and UNGA Res. 60/180 (2005) para. 9.

<sup>16</sup> UNSC Res. 1645 and UNGA Res. 60/180 (2005) para. 21.

the country-specific meeting focuses on the priority areas identified by the Burundian government in consultation with national stakeholders.

The most important challenges are to strengthen good governance and the rule of law, to reform the security sector, and to ensure that the community recovers from the former conflict. Based on these priorities and supported by the country-specific meeting, the Burundian government has developed the Strategic Framework for Peacebuilding in Burundi to implement the existing national and international strategies and agreements. It identifies challenges and risks for the peacebuilding process and lists the mutual commitments of the Burundian government and the PBC. The monitoring and tracking mechanism of the Strategic Framework also provides a Partners Coordination Group to prepare the review of internal strategy papers as well as the Strategic Framework itself, whereby progress is measured against benchmarks and indicators as established in a report matrix.

After some setbacks at the national level (e.g. renewed confrontations between parties to ceasefire agreements), the disarmament, demobilization, and reintegration process started in March 2009, supported by the African Union Special Task Force and funded by the Peacebuilding Fund as well as individual PBC members. When reviewing the implementation of the Strategic Framework, the PBC welcomed the progress made by Burundi, particularly with regard to the 2010 elections as well as the functioning of the elected institutions; the actions taken to strengthen accountability and address corruption; the creation of the Ombudsperson office, the Independent National Human Rights Commission and the Burundi Revenue Authority; the national consultations on the establishment of transitional justice mechanisms; and the steps toward the disarmament of the civilian population.<sup>17</sup> Both the PBC and the government of Burundi listed their specific commitments concerning political and institutional peacebuilding (e.g. consolidation of democracy, good governance, human rights, and rule of law) as well as social and economic peacebuilding (e.g. poverty reduction, socio-economics, and regional reintegration of vulnerable groups).<sup>18</sup>

## 2. Sierra Leone configuration

A civil war disrupted Sierra Leone from 1991 until 2002, followed by elections in May 2002. The new government established several instruments, such as the Peace Consolidation Strategy and the Poverty Reduction Strategy, to restore peace and stability.<sup>19</sup> Four areas were identified as critical to the peacebuilding process: counteracting youth unemployment and disempowerment; promoting justice and security sector reform; consolidating democracy; and supporting good governance and capacity building. In addition, the development of the energy sector and sub-regional

<sup>17</sup> UN PBC, "Outcome of the fifth review of the implementation of the Strategic Framework for Peacebuilding in Burundi" (2011) UN Doc. PBC/5/BDI/2, para. 6.

<sup>18</sup> UN PBC, "Report on the Peacebuilding Commission on its Sixth Session" (2013) UN Doc. A/67/715-S/2013/63, paras 4, 12, 27, and 49. The latest focus of the PBC with regard to the Burundi configuration has been on the elaboration of the poverty reduction strategy, for which US\$2.5 billion was pledged for the period 2013–16.

<sup>19</sup> See more generally, Thelma Ekiyor, "Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective" in Chandra Lekha Sriram and Suren Pillay (eds), *Peace versus Justice?: The Dilemma of Transitional Justice in Africa* (University of KwaZulu-Natal Press 2010) 153.

dimensions of peacebuilding were recognized as challenges in the Sierra Leone Peacebuilding Cooperation Framework. This framework was adopted after the presidential and parliamentary elections in 2007, based on existing strategies and the principles of national ownership, mutual accountability, and sustained engagement. Apart from an analysis of priorities, challenges and risks to the peacebuilding process, it contains commitments by the government of Sierra Leone and the PBC. Moreover, it provides a review mechanism based on the benchmarks provided by national programs.

The framework is a flexible document on mid-term engagement, which can be modified jointly by the national government and the PBC, and its implementation is subject to biannual review. The peacebuilding process in Sierra Leone has made certain progress, e.g. in a joint communiqué all parties agreed on terminating political violence and strengthening key democratic institutions and national policies. In 2009, the PBC endorsed the Agenda for Change developed by the national government as the core strategy to guide all national and international peacebuilding efforts. Furthermore, the Commission established a lighter form of engagement in the outcome document to monitor the progress of the peacebuilding process through a six-monthly review.<sup>20</sup>

In 2012, the Chair of the Sierra Leone configuration took stock of peacebuilding progress by focusing on the elections, regional challenges to peacebuilding, and transition.<sup>21</sup> First, although the technical and financial preparations for the elections were on track, there was a clear need for more open dialogue between the political parties and the national electoral institutions. Secondly, although Sierra Leone has taken steps toward fighting transnational organized crime, it is hampered by the slower pace of progress elsewhere in the sub-region. Therefore, the Chair called for “[s]tronger and more outcome-oriented engagement with regional organizations such as ECOWAS, as well as increased support for regional programs such as the West Africa Coast Initiative.”<sup>22</sup> Thirdly, Sierra Leone is currently going through a transition, shifting from end-stage peacebuilding to longer-term development, while at the same time the UNSC prepares to draw down the UN Integrated Peacebuilding Office in Sierra Leone (UNIPSIL) following the free, fair, and peaceful elections of November 2012.<sup>23</sup> The PBC is currently considering how its own engagement should evolve as part of this transitional process, while mobilizing funding for the 2013 poverty reduction strategy.<sup>24</sup>

### **3. Guinea-Bissau configuration**

Since its independence from Portugal in 1974, Guinea-Bissau has been shaped by conflicts within the political elite as well as between the political and military command, leading to several overthrows and even a short civil war. Following the 2005 elections, national as well as international programs for peace, stability, and economic recovery were developed. The country-specific meeting tackled the challenges

<sup>20</sup> UN PBC, “Outcome of the Peacebuilding Commission High-Level Special Session on Sierra Leone” (2009) UN Doc. PBC/3/SLE/6.

<sup>21</sup> Ambassador Guillermo E. Rishchynski, “Statement dated 22 March 2012 by the Chair of the Peacebuilding Commission’s configuration in Sierra Leone” (2012) 2.

<sup>22</sup> Rishchynski, “Statement dated 22 March 2012 (n. 21) 2.

<sup>23</sup> UN Doc. A/67/715-S/2013/63, paras 24–5 and 49.

<sup>24</sup> UN Doc. A/67/715-S/2013/63, paras 9, 15, and 30.

of Guinea-Bissau in a double-tracked way. First, by declaring the country eligible for immediate funding of the Peacebuilding Fund, the PBC supported projects to deliver short-term results. Secondly, a Strategic Framework for Peacebuilding in Guinea-Bissau was established by the national government with contributions from all actors involved in the long-term peacebuilding process.<sup>25</sup> Both the interim priority plan and the Strategic Framework are based on the priority areas enumerated by the national government: reform of public administration, consolidation of rule of law and security sector reforms, promotion of professional technical training and youth employment, and support for vulnerable groups.

Like the Sierra Leone Peacebuilding Cooperation Framework, this Strategic Framework is a flexible document that can be modified jointly by the national government and the PBC. It identifies risks and challenges in the process of achieving short-term and mid- to long-term priority objectives within the peacebuilding process—as matched by the commitments of the PBC and the national government. The review process outlined in the framework is partially based on review mechanisms of national programs. Additionally, the PBC uses its own benchmarks to review the peacebuilding process. At first the work of the country-specific meeting on Guinea-Bissau concentrated on securing the funding for the 2008 elections. The Strategic Framework for Peacebuilding in Guinea-Bissau was adopted on 1 October 2008 but the assassinations of the president and a candidate in the subsequent presidential election campaign marked severe setbacks on the way to peace.

In 2012, another *coup d'état* took place, resulting in the forcible overthrow of the legitimate government of Guinea-Bissau and the arbitrary detentions of the interim President, the Prime Minister and other senior officials. Strongly condemning these acts, the Chair of the country-specific meeting emphasized that their timing was particularly unfortunate as Guinea-Bissau was in the process of implementing reforms leading to “economic recovery and the revival of trust in the country by national stakeholders and foreign partners,”<sup>26</sup> evidenced by security sector reform and progress in the fight against drug trafficking. As a result of the unconstitutional change of government, the World Bank, the IMF, the Peacebuilding Fund and several other bilateral and multilateral partners have indefinitely suspended their activities in the country, while it is currently being discussed whether Guinea-Bissau should even remain on the PBC agenda.<sup>27</sup>

#### 4. Central African Republic configuration

The Central African Republic has experienced several forcible changes of government since the end of the monarchy in 1979. In 2005 the government began to tackle the problems of instability, lack of basic services, etc., by a series of national programs. Due to rebel activities, it lost control over northern parts of the country in 2006 but

<sup>25</sup> UN PBC, “Strategic Framework for Peacebuilding in Guinea-Bissau 31 July 2008” (2008) UN Doc. PBC/3/GNB/3.

<sup>26</sup> Ambassador Maria Luiza Ribeiro Viotti, “Statement of the Chair of the Guinea-Bissau Configuration of the PBC to the Security Council” (19 April 2012) 4.

<sup>27</sup> UN Doc. A/67/715-S/2013/63, paras 13 and 25; Ambassador Maria Luiza Ribeiro Viotti, “Statement of the Chair of the Guinea-Bissau Configuration of the PBC to the Security Council” (5 February 2013).

by May 2008 most of the rebel groups had concluded ceasefire agreements or declared ceasefire. The Central African Republic was put on the PBC agenda in June 2008, at the request of the UNSC. As priority areas, the government of the Central African Republic named the reform of the security sector, good governance, and rule of law, and socio-economic advancement through implementation of development hubs. The Strategic Framework for Peacebuilding in the Central African Republic frames these priorities within the context of the country's socio-economic environment, sums up challenges, and names precise activities to improve the situation.<sup>28</sup> As the whole framework takes into account the already existing programs, the biannual review of the framework is based on the national review of progress in those programs, too. Furthermore, a follow-up and coordination committee has been established which monitors the implementation of the Strategic Framework.

After the adoption of the Strategic Framework, the country-specific meeting focused on resource mobilization to implement the framework, to coordinate the work of different actors, and to maintain international attention. The Central African Republic also received immediate funding. The first biannual review of the Strategic Framework took place at the beginning of 2010,<sup>29</sup> while additional time was given to complete the second review due to a number of important developments, such as the presidential and legislative elections in 2011, supported by US\$7.5 million in international funding.

As the country developed its new poverty reduction strategy paper, the PBC increased its support of the national authorities, for example relating to the management of natural resources.<sup>30</sup> It critically remarked that:

Although the joint support of the Peacebuilding Fund and UNDP has created a capacity to implement the disarmament, demobilization and reintegration process since January 2010, this has not materialized. Developments on the ground have been exceedingly slow, in large part due to the politicization of the Disarmament, Demobilization and Reintegration Steering Committee in the run-up to the elections in January 2011.<sup>31</sup>

Positive news is that UNICEF implemented a disarmament, demobilization, and reintegration program for children, resulting in the release of 525 child soldiers from the ranks of the *Armée populaire pour la restauration de la démocratie*. The PBC also welcomed the creation of a National Human Rights Commission and the establishment of the Ombudsperson office, and closely monitors the security sector reform.<sup>32</sup> The main point of concern is the lack of a timely and coordinated approach to disarmament, demobilization, and reintegration by the government and its international partners.<sup>33</sup>

<sup>28</sup> UN PBC, "Strategic Framework for Peacebuilding in the Central African Republic 2009–2011" (2009) UN Doc. PBC/3/CAF/7.

<sup>29</sup> UN PBC, "Conclusions and Recommendations of the First Biannual Review of the Strategic Framework for Peacebuilding in the Central African Republic" (2010) UN Doc. PBC/4/CAF/5.

<sup>30</sup> UN PBC, "Conclusions and Recommendations of the Second Biannual Review of the Strategic Framework for Peacebuilding in the Central African Republic" (2011) UN Doc. PBC/5/CAF/3, paras 18–19.

<sup>31</sup> UN Doc. PBC/5/CAF/3, paras 23–4.

<sup>32</sup> UN Doc. PBC/5/CAF/3, paras 27–8.

<sup>33</sup> UN Doc. A/67/715-S/2013/63, paras 14, 19, 26, and 37.

## 5. Liberia configuration

The PBC Organizational Committee placed Liberia on its agenda in 2010, upon request of the Liberian government and the UNSC, which sought the Commission's advice on the requirements to accelerate progress in meeting key benchmarks set out by the UN Mission in Liberia (UNMIL). The peacebuilding priorities identified in the statement of mutual commitment were the rule of law, security sector reform, and national reconciliation.<sup>34</sup> Substantial efforts have been invested in these sectors, whereby UNMIL played an instrumental role in maintaining security. PBC support facilitated a smooth transfer from UNMIL to the Liberian government in security management, as well as tackled critical root causes and drivers of conflict. Regional dimensions and gender considerations were also incorporated into the peacebuilding activities.

In the first review report, the Chair established that the justice system was making laudable progress and the Land and Law Reform Commissions were gradually realizing their mandates, but nonetheless, the reputation of the legal profession was poor, "due in large part to ineffectual or non-existent oversight and accountability mechanisms for justice actors, which permits rampant corruption."<sup>35</sup> Thanks to a budget increase for justice and security institutions, an effective and accountable security presence is steadily being built but there remained "a disparity between progress made in the areas of rule of law and security sector reform and that achieved in national reconciliation efforts."<sup>36</sup> Luckily, Liberia can benefit from the sub-regional security regime that is being constructed under the aegis of the Economic Community of West African states.<sup>37</sup> Continued attention is paid to national reconciliation efforts and resource mobilization as well as the transitional process to prepare for the closing down of UNMIL.<sup>38</sup>

## 6. Guinea configuration

From 2008 to 2010, Guinea benefited from Peacebuilding Fund support amounting to US\$12.5 million, invested in the areas of security sector reform, human rights, promotion of political dialogue, and mediation support.<sup>39</sup> The Organizational Committee decided in 2011 to place Guinea officially on its agenda, after receiving a request from the Guinean government following the inauguration of the country's first democratically elected President. In the post-election period, the government saw itself "faced with the challenge of responding to Guineans' expectations for a revitalized economy, employment opportunities and quality basic services, including water and electricity," while public finances were in a worrying state.<sup>40</sup> Despite Guinea's economic potential, socio-economic conditions steadily deteriorated so that in 2009 the country registered its worst economic performance of the decade.

<sup>34</sup> UN PBC, "Statement of Mutual Commitments on Peacebuilding in Liberia" (2010) UN Doc. PBC/4/LBR/2, para. 6.

<sup>35</sup> UN PBC, "Review of Progress in the Implementation of the Statement of Mutual Commitments on Peacebuilding in Liberia First Progress Report" (2012) UN Doc. PBC/6/LBR/1, paras 2–4.

<sup>36</sup> UN Doc. PBC/6/LBR/1, paras 5 and 7–8. <sup>37</sup> UN Doc. PBC/6/LBR/1, para. 9.

<sup>38</sup> UN Doc. A/67/715-S/2013/63, paras 4, 9, 16, 23, 30, 44–6, and 49.

<sup>39</sup> UN PBC, "Statement of Mutual Commitments on Peacebuilding in Guinea between the Government of Guinea and the Peacebuilding Commission" (2011) UN Doc. PBC/5/GUI/2, para. 10.

<sup>40</sup> UN Doc. PBC/5/GUI/2, para. 8.

As a result, the country needed “rapid reform and an injection of funds in order to begin delivering on key services, without which Guineans, who expect to reap the dividends of democracy, are likely to become disillusioned.”<sup>41</sup> The peacebuilding priorities agreed upon in the statement of mutual commitments negotiated between the PBC and the government, in a consultation process with other key stakeholders, including the UN, civil society and the private sector, bilateral and multilateral partners and regional organizations, include “(a) the promotion of national reconciliation and unity, (b) security and defense sector reform, and (c) youth and women’s employment policy.”<sup>42</sup> The focus is currently on the establishment of an aid information and management system, capacity development in the area of resources management, and the set-up of a national reconciliation process to mobilize requisite expertise and financial resources.<sup>43</sup>

### C. Initial reception

Reactions to the establishment and activities of the PBC have not been uniformly positive. The Commission obtained positive feedback for its peacebuilding efforts in Burundi and Sierra Leone,<sup>44</sup> which in turn created interest from prospective candidate countries emerging from conflict, such as East-Timor.<sup>45</sup> The number of voluntary requests received from states such as Guinea-Bissau and the Central African Republic, asking to be put on the PBC agenda, show the perceived value of engaging with the Commission. Simultaneously, the PBC struggled with various start-up problems, such as the lack of a common definition of “peacebuilding” and the overlap with conflict prevention activities.<sup>46</sup>

Some viewed the PBC as a missed opportunity: while the creation of such a Commission “would seem to be a major accomplishment, it is in fact a disappointing ending to a long process that at certain times carried considerable promise.”<sup>47</sup> Two important deficiencies can be identified. First, the Commission has a contemplative and advisory function without a strong coordinating capacity whereas a proactive and preventive mandate would be preferable to enable effective interventions. Secondly, the lead in developing new policies and strategies for post-conflict reconstruction is to be taken by the UN Development Group, and not the PBC. These deficiencies may contribute to an already fragmented approach towards countries emerging from conflict. The most negative conclusion would be that the new Commission is merely “an optical illusion, suggesting reforms while in fact representing a hindrance to post-conflict reconstruction and

<sup>41</sup> UN Doc. PBC/5/GUI/2, para. 8.      <sup>42</sup> UN Doc. PBC/5/GUI/2, paras 5 and 9.

<sup>43</sup> UN Doc. A/67/715-S/2013/63, paras 11, 20, 23, 28, 44, and 45.

<sup>44</sup> UNGA, “Statement by Mr. Ntakirutimana” (2007) UN Doc. A/C.3/62/SR.27 24; UNGA, “Address by Mr. Ernest Bai Koroma, President of the Republic of Sierra Leone” (2009) UN Doc. A/64/PV.9 24.

<sup>45</sup> José Ramos-Horta, “Address by Mr. José Ramos-Horta, President of the Democratic Republic of Timor-Leste” (2007) UN Doc. A/62/PV.8.

<sup>46</sup> Rosalie Azar, “The United Nations Peacebuilding Commission: An Initial Assessment” in Guillaume Devin (ed.), *Making Peace: The Contribution of International Institutions* (Palgrave Macmillan 2011) 99–101; see also Bartjan Wegter, “Emerging from the Crib: the Difficult First Steps of the Newly Born UN Peacebuilding Commission” (2007) 4 *International Organizations Law Review* 343.

<sup>47</sup> Dirk Salomons “On the Far Side of Conflict: The UN Peacebuilding Commission as Optical Illusion” in Peter G. Danchin and Horst Fischer (eds), *United Nations Reform and the New Collective Security* (Cambridge University Press 2010) 195.



development.”<sup>48</sup> The PBC could have served as a unifying coordinator of peacebuilding activities but is not fulfilling such role at present.

Not all commentators share such a bleak view of the prospects of the Commission. Eloho Otobo, for example, emphasized that the work of the Commission “during the first years provides reason for hope and offers an encouraging start.”<sup>49</sup> Analysts are warned not to be impatient for “quick results” as the “new peacebuilding architecture is in its infancy” and first has to address critical “organizational, procedural and methodological issues.”<sup>50</sup> Berdal, on the other hand, viewed the latter issues as having “everything to do with politics and little [...] with any genuine attempt to translate the vague and easily agreed upon statements of intent contained in the constitutive resolutions into workable arrangements.”<sup>51</sup> The current rules regarding the size, composition, focus, and institutional status of the Organizational Committee do not suffice to achieve the overall aim of bringing “more coherence and impact to the international community’s approach to peacebuilding.”<sup>52</sup>

Solutions to these problems include appointing a High Commissioner for Peacebuilding; a mandatory contribution of 1 percent of member states’ defense budgets towards support of the Peacebuilding Fund; the revision of the Commission’s terms of reference; and the transfer of operational responsibilities from the UN Department of Peacekeeping Operations to the Peacebuilding Support Office.<sup>53</sup> Less drastic suggestions relate to enhancing the impact which the Commission in its current form may have, first by focusing on “thinking in strategic terms,” meaning “harmonizing disparate activities and directing them towards some common objective” by developing integrated peacebuilding strategies.<sup>54</sup> Secondly, in the light of the UN’s lack of flexible funding mechanisms for peacebuilding activities, the PBC should “improve the responsiveness of missions to developments on the ground and enable so-called ‘catalytic’ funding.”<sup>55</sup>

### III. Reviewing the 2010 Review Report

The first review report of 21 July 2010 echoed the rather negative reception in the literature in equally or even more critical terms. This section analyses the PBC’s functioning in the light of this review report. The following angles are discussed: key issues in peacebuilding; perspectives from the field; performance at headquarters; and key relationships with the UN and other partners. But first, a preliminary problem is examined: the absence of benchmarks to measure failure or success of the PBC’s actions.

<sup>48</sup> Danchin and Fischer (eds), *United Nations Reform and the New Collective Security* (n. 47) 211.

<sup>49</sup> Ejeviome Eloho Otobo, “The New Peacebuilding Architecture: An Institutional Innovation of the United Nations” in Danchin and Fischer (eds), *United Nations Reform and the New Collective Security* (n. 47) 233.

<sup>50</sup> Danchin and Fischer (eds), *United Nations Reform and the New Collective Security* (n. 47) 231.

<sup>51</sup> Mats R. Berdal “The UN Peacebuilding Commission: The Rise and Fall of a Good Idea” in Michael C. Pugh, Neil Cooper, and Mandy Turner (eds), *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding* (Houndmills 2008) 357.

<sup>52</sup> Pugh, Cooper, and Turner (eds), *Whose Peace?* (n. 51) 357.

<sup>53</sup> Salomons, “On the Far Side of Conflict” (n. 47) 202–11.

<sup>54</sup> Berdal, “The UN Peacebuilding Commission” (n. 51) 369.

<sup>55</sup> Berdal, “The UN Peacebuilding Commission” (n. 51) 370.

### A. Absence of benchmarks to measure failure or success

A major problem haunting the PBC, as well as a great many other international and national initiatives, is that it was set up with high yet vague expectations. No benchmark criteria or any time schedule providing a threshold standard by which to assess failure or success were ever established. Had this been done in advance, it would have been possible to determine whether the PBC had reached its goals, or had failed to do so—and to what extent.

Admittedly, this is not an easy exercise as shown by the numerous domestic programs where national governments attempt to address, e.g. street violence or drug-related crime. However, as is also clear from such experiences, it is not impossible. Evidently, such benchmarks ought to be established with due regard to what is feasible, not merely what would be desirable, and they would have to be re-assessed every so often. But it would at least allow some measurement of progress or failure, e.g. in terms of projected financial cost, time frame for achieving results, level of participation of relevant stakeholders, etc. This would contribute to creating global administrative good governance and enduring results of peacekeeping operations.

The PBC Review Committee's opening question "How would success have looked in 2010?" is rather unfair and an example of *Hineininterpretierung* as the benchmarks of what would be considered "success" had never been established.<sup>56</sup> Despite this, the Review Committee did a good job of assessing the PBC's work in the absence of criteria for doing so, and was quite specific in its recommendations as well as surprisingly critical in its conclusions. The Review Committee concluded that the threshold of success, although never defined beyond vague aspirations, had not been achieved:

One would have assumed a wider demand from countries to come on the Peacebuilding Commission agenda; that there would be a clearer sense of how the engagement of the Commission had made a difference on the ground; that peacebuilding would have a higher place among United Nations priorities; that stronger relationships would have been forged between the Commission and the Security Council, the General Assembly and the Economic and Social Council; that the Peacebuilding Support Office would carry more weight within the Secretariat; and that the Commission would be perceived as a key actor by those outside as well as inside the United Nations system, including by the international financial institutions.<sup>57</sup>

This failure was seen as due to "protracted discussion on procedural issues" but also because member states of the Organizational Committee at times failed to invest "commensurate energy in discharging the responsibilities of membership."<sup>58</sup> Paradoxically, some countries claiming to attach major value to being PBC members routinely sent junior level representatives without decision-making powers to the Organizational

<sup>56</sup> "Annex to the identical letters dated 19 July 2010 from the Permanent Representatives of Ireland, Mexico, and South Africa to the United Nations addressed to the President of the General Assembly and the President of the Security Council, Review of the United Nations peacebuilding architecture" (2010) UN Doc. A/64/868-S/2010/393 (PBC Review Report (2010)).

<sup>57</sup> PBC Review Report (2010) para. 9.

<sup>58</sup> PBC Review Report (2010) para. 11.

Committee meetings, thus often rendering the PBC a lame duck with little authoritative clout.<sup>59</sup>

## B. Key issues concerning peacebuilding

In its report, the Review Committee focused on six key issues, namely the complexity of peacebuilding; the imperative of national ownership; the illusion of sequencing; the urgency of resource mobilization; the importance of contribution from women; and the need for connection with the field. The focus here is on the legal implications of these issues.

First, in terms of the complexity of peacebuilding, few will deny that “rebuilding fragile or shattered relationships inevitably takes time” although there is an unmistakable “gravitational pull, for organizations and donors, towards the concrete and more readily measurable.”<sup>60</sup> Indeed, for example, national research funding bodies also seem to favor projects with clear short-term political operationalization possibilities over projects addressing the long-term root causes of a problem. On the one hand, this reaction is understandable as donors wish to hear success stories before investing (additional) funds. On the other hand, focusing mostly on symptoms rather than underlying causes might be precisely what is wrong with the current set-up of the UN peacekeeping and peacebuilding operations as in the long run such *hic et nunc* vision is not sustainable. One ought to distinguish between expecting quick solutions and setting benchmarks to mark the long road to success. The PBC’s added value lies not so much in that it might miraculously shorten the road to peace, but in its contribution to guiding participants to the peace process down that road or even building such a road in the first place by successfully managing security and development issues.<sup>61</sup>

Secondly, one of the most popular contemporary phrases used in the context of peacebuilding is the imperative of national ownership. The starting point that peacebuilding can only take root where it is embedded in local “stakeholders’” minds is unassailable. The Review Committee’s conclusion that “the international community must understand the limits of its role as midwife to a national birthing process,”<sup>62</sup> is open to some qualification. The organization of the international legal system is based on sovereign states as the main international actors and lawmakers, without the consent of which the powers of international organizations in general and the PBC in particular are severely limited.

However, the very formulation “*national birthing process*” speaks of a rather western-nation-state-oriented approach to peacebuilding, bearing in mind that many African states for example, do not follow the “one nation = one state” adage. People’s loyalties may lie with their tribe rather than with their country of nationality, and tribal living spaces often traverse national borders. Disregarding this reality during the “scramble for Africa” and the decolonization period resulted in national borders that are visibly

<sup>59</sup> PBC Review Report (2010) para. 69.

<sup>60</sup> PBC Review Report (2010) para. 15.

<sup>61</sup> See also Stefano Tomat and Cesare Onestini, “The EU and the UN Peacebuilding Commission: A Short Account of How the EU Presence has influenced the Newest UN Body” in Steven Blockmans, Jan Wouters, and Tom Ruys (eds), *The European Union and Peacebuilding: Policy and Legal Aspects* (TMC Asser Press 2010) 157.

<sup>62</sup> PBC Review Report (2010) para. 18.

drawn with a ruler, rather than with regard to the tribal loyalties on the ground. This is a major contributing factor to continuing conflict on the African continent and elsewhere. Hence expecting that the very factor that created the problem, i.e. the lack of “national feeling,” will provide a solution through a “national birthing process” seems unrealistic at best. Amending this concept so as to refer to a regional cross-tribal birthing process, regardless of actual national boundaries, may solve some but not all problems concerning national (or perhaps better: local) ownership.

Additionally, the normative set-up of the PBC’s Country-Specific Configurations and the Strategic Frameworks (the contracts between the agenda countries and the international community) reflect largely western ideals of good governance in its commitment to liberal democracy and a market-oriented economy.<sup>63</sup> Most local stakeholders have their own specific ideas about peacebuilding and equally likely, those ideas differ according to the priorities and background of the stakeholder in question. Some might, for example, prefer to focus on punishment of warlords and deterrence of future perpetrators, while others may favor a system of amnesty and reconciliation in order to allow for maximal means to be directed towards rebuilding a war-wrecked society. Even among the latter, opinions may differ as to whether such rebuilding ought to take place by means of a solid defense system or rather whether substantial investments ought to be made in “soft sectors” such as healthcare and education.

Moreover, state officials may object strongly to increasing the role of civil society on the basis that its spokespersons are unelected and therefore have no legitimate mandate to speak out. Such objection is to be rejected as legitimacy does not solely derive from elections but also from the fact that most civil society organizations aim to further the principles, values, and norms that are embedded in the international legal system.<sup>64</sup> But admittedly, there is a problem of concretizing, institutionalizing, and operationalizing the civil society consultation process, if only to make it more transparent, for example, why a certain NGO is allowed to present its views, while another one is not. The Organizational Committee could for such cases develop a system of accreditation and “rules of engagement.”

In the light of the fact that the international community, together with financial institutions and private donors, is funding peacebuilding operations, is it unreasonable to suggest that these actors ought to have a say in the decision-making process, and be more than merely the midwife to a local process? If such co-decision procedures were executed according to fair standards and participation rights for all stakeholders, would this by definition be a sign of neo-colonialism? Or could it be a form of “new international good governance” whereby every member of the international community is seen as a stakeholder in achieving peace in one particular part of the world? Undoubtedly, peacebuilding today is indeed very much focused on what the international community thinks a certain country emerging from conflict needs, while more

<sup>63</sup> Richard D. Caplan and Richard J. Ponzio, “The Normative Underpinnings of the UN Peacebuilding Commission” in James Mayall and Ricardo Soares de Oliveira (eds), *The New Protectorates: International Tutelage and the Making of Liberal states* (Hurst 2011) 183. For a discussion of how these neo-liberal constructs can negatively impact *jus post bellum*, see Roxana Vatanparast, ch. 8, this volume.

<sup>64</sup> Tim Murithi, “The UN Peacebuilding Commission” in Adekeye Adebajo (ed.), *From Global Apartheid to Global Village: Africa and the United Nations* (University of KwaZulu-Natal Press 2009) 360–1.

attention ought to be focused on what the local community, which will have to continue the peacebuilding process, would like to see happening. Incorporating local practices and preferences into the reintegration and reconciliation efforts will increase their legitimacy as perceived by the local population.<sup>65</sup>

The third key issue is the illusion of sequencing, whereby peacebuilding projects follow peacekeeping operations rather than accompany them from their inception.<sup>66</sup> The Review Committee regretted the prevalent UN adherence to this sequential approach, as it “neither gives adequate weight to peacebuilding nor responds to needs and realities on the ground.”<sup>67</sup> Adopting a synchronized two-pronged approach instead, both in the UNSC’s design of the peacekeeping mandate and in the financial resource allocation could alleviate the cost of both peacekeeping and peacebuilding,<sup>68</sup> particularly as both may partially overlap. It would also help to map the gray zone in which countries may be emerging from and relapsing back into conflict, as well as assist the PBC in fulfilling its preventive role.

The fourth issue is the urgency of resource mobilization, as expressed by the need for a parallel focus on political, security, and developmental needs.<sup>69</sup> Food, shelter, and jobs are of primary importance to people emerging from conflict, forming a developmental need to which international financial institutions and the private sector could contribute.

The fifth issue is the importance of the contributions of women, particularly as the PBC is the first UN body to have the gender dimension explicitly incorporated in its founding resolutions.<sup>70</sup> However, the Commission seems not yet to have undertaken any particular action concerning this specific aspect of its mandate. Commentators have put forward several suggestions aimed at ensuring that all involved in peacebuilding are aware of “the international legal obligations with respect to women, have adequate resources for the performance of these obligations, and that responsibility for monitoring compliance is allocated to a person of sufficient seniority, with sanctioning power for failure to do so.”<sup>71</sup>

Women’s empowerment would bring several of the other key issues together, in terms of local ownership, development, and the need for connection with (and understanding of) the field—which forms the sixth key issue. The review report highlighted

<sup>65</sup> Dustin Sharp, “Bridging the Gap: The United Nations Peacebuilding Commission and the Challenges of Integrating DDR and Transitional Justice” in Chandra L. Sriram et al. (eds), *Transitional Justice and Peacebuilding on the Ground* (Routledge 2013) 34–5.

<sup>66</sup> PBC Review Report (2010) para. 20; see also UN Secretary General, “Identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council” (2000) UN Doc. A/55/305-S/2000/809 (“Brahimi Report”); for a discussion see, for example, Carsten Stahn, “Institutionalizing Brahimi’s ‘Light Footprint’: A Comment on the Role and Mandate of the Peacebuilding Commission” (2005) 2 *International Organizations Law Review* 403.

<sup>67</sup> PBC Review Report (2010) para. 22.

<sup>68</sup> Hereby it would need to be duly considered that the financial arrangements underpinning peacekeeping and peacebuilding are different (PBC Review Report (2010) para. 23).

<sup>69</sup> PBC Review Report (2010) para. 26.

<sup>70</sup> More elaborately set out in UN Secretary General, “Report of the Secretary-General on Women’s Participation in Peacebuilding” (2010) UN Doc. A/65/354-S/2010/466.

<sup>71</sup> Christine Chinkin and Hillary Charlesworth, “Building Women into Peace: The International Legal Framework” (2006) 27 *Third World Quarterly* 937, 953; Torunn L. Tryggestad, “The UN Peacebuilding Commission and Gender: A Case of Norm Reinforcement” (2010) 17 *International Peacekeeping* 159.

how “preoccupations and perspectives on the ground can differ quite radically from those in the corridors of New York,”<sup>72</sup> for example regarding strategic planning requirements which may be viewed as excessively burdensome in the field. The World Bank’s “Adolescent Girls Initiative” provides a good illustration:<sup>73</sup> this project revealed that the main reason for parents in Afghanistan to keep their girls home from school was not so much that they were against women’s education but rather because they feared their daughters would not be safe. Once drafters of peacebuilding plans properly understand such underlying motives, local concerns and perspectives on the ground may serve as a lead for successfully developing and improving projects.

### C. Perspectives from the field

#### *Current and potential agenda countries*

Sierra Leone and Burundi were placed on the agenda in June 2006, Guinea-Bissau in December 2007, the Central African Republic in June 2008, Liberia in September 2010, and Guinea in February 2011. The Review Committee applauded the PBC’s role in promoting inclusive political dialogue by supporting the peaceful election process in Sierra Leone; by creating an environment conducive to holding elections in Burundi; by assisting in the establishment of an electoral commission in the Central African Republic; and by calling for calm and dialogue in Guinea-Bissau.<sup>74</sup> This reflects the—at times rather blind—faith that UN institutions as well as many member states seem to have in the purifying force of elections. Arguably, holding elections is not necessarily conducive of peace and sometimes can even bring the opposite, particularly if there is no root support for this particular expression of democracy.<sup>75</sup>

Furthermore, after an extensive period of institutional dispute both within the UN and between the UN and its partners regarding Sierra Leone and Burundi, a single planning document was developed to improve coherence and national ownership as well as reduce domestic administrative burdens.<sup>76</sup> In the Central African Republic and Guinea-Bissau, the Review Committee found that “drafting processes were prolonged and, to some degree, duplicated the existing poverty reduction strategies and other texts” which was a source of frustration and left civil society organizations feeling marginalized.<sup>77</sup>

Potential agenda countries see clear advantages in having PBC engagement, including international attention, political goodwill, and funding opportunities. Certain potential downsides have to be offset against this, such as the stigma of dysfunctionality,

<sup>72</sup> PBC Review Report (2010) para. 31.

<sup>73</sup> Launched on 10 October 2008 as part of the World Bank Group’s Gender Action Plan, the Adolescent Girls Initiative (AGI) aims to help adolescent girls and young women make a successful transition from school to work. The program is being piloted in eight low-income countries (Afghanistan, Haiti, Jordan, Lao PDR, Liberia, Nepal, Rwanda, and South Sudan) <<http://go.worldbank.org/5PYHEZS360>> (accessed 24 July 2013).

<sup>74</sup> PBC Review Report (2010) para. 36; at the time of writing of the Review Report, Liberia and Guinea were not on the PBC agenda yet and hence have not been taken into account.

<sup>75</sup> In this context, the analysis of David Van Reybrouck in *Congo: A History* (De Bezige Bij 2010) can be extrapolated to other countries with similar governance problems, such as those on the PBC agenda.

<sup>76</sup> PBC Review Report (2010) paras 38–9.

<sup>77</sup> PBC Review Report (2010) paras 40–1.

the heavy administrative burden, and “the mistaken perception that a place on the Commission’s agenda would imply a loss of Security Council attention and the automatic drawdown of a peacekeeping operation.”<sup>78</sup> To alleviate these drawbacks, the Review Committee proposed the development of a “light option” entailing more limited PBC involvement, but this idea needs further elaboration to examine its feasibility and effect in practice.<sup>79</sup>

### *Lessons learned*

Certain lessons can be learned from the country experiences so far, relating to local ownership and capacity; developmental aspects of peacebuilding; coherence and coordination; the regional dimension; and communication strategy.

Concerning local ownership and capacity issues, the Review Committee reiterated that:

[N]ational inputs should, from the outset, form the basis of the engagement of the international community. A stake for national actors must be built in by establishing mechanisms to transfer the management and implementation of plans and projects to the Government and its national partners.<sup>80</sup>

This ought to be accomplished by focusing on capacity building in national administration, political parties, and civil society, including women’s organizations, so as to build expertise and ensure sustainability. Based on positive experiences with Sierra Leone and Burundi, the Review Committee quite sensibly suggested focusing on alleviating administrative burdens, introducing more flexibility with multi-tiered engagement, and strengthening the regional dimension of the PBC’s work.<sup>81</sup> However, this does not imply that the fears expressed by some developing countries that UN peacebuilding would be used to impose a specific type of political order and value-set on fragile states emerging from conflict are entirely unfounded.<sup>82</sup> Moreover, the role of civil society members is still unclear: are they silent observers, only giving input when consulted? Or are they active participants, capable of placing their own issues on the PBC agenda? Regrettably, an almost adversarial relationship between some states, such as Burundi, and civil society members has developed, as the former bear certain suspicions that the latter may use their voice in the PBC to undermine the current regime.<sup>83</sup>

With regard to the developmental aspects of peacebuilding, the Review Committee rather sharply criticized the lack of focus on generating (youth) employment, noting that “[m]any conflict-affected countries are also resource-rich; there needs to be a strong emphasis on local employment in mineral extraction, and transfer of skills should be made a condition for investment.”<sup>84</sup> In principle, using investment as a tool to generate

<sup>78</sup> PBC Review Report (2010) paras 46–7.

<sup>79</sup> Tomat and Onestini, “The EU and the UN Peacebuilding Commission” (n. 61) 158.

<sup>80</sup> PBC Review Report (2010) para. 50.

<sup>81</sup> PBC Review Report (2010) para. 18.

<sup>82</sup> But see Caplan and Ponzio, “The Normative Underpinnings of the UN Peacebuilding Commission” (n. 63) 195.

<sup>83</sup> Murithi, “The UN Peacebuilding Commission” (n. 64) 360.

<sup>84</sup> PBC Review Report (2010) para. 56.

employment and skills transfer seems a workable idea, in particular because the mineral extraction sector in these countries is often in the hands of foreign investment companies which bring in much-needed know-how. Usually, mining concessions as well as contracts for other grand-scale projects are obtained via public procurement so a government can put certain “sustainable development” related conditions in its call for tenders.

However, when making this cursory remark, the Review Committee seems to have overlooked that the setting of conditions such as making it mandatory to use local labor, goods or services, is often prohibited by international law. More precisely, countries may have agreed via bilateral investment treaties (BITs) that foreign investors originating from the other contracting party to the BIT will not be subjected to so-called performance requirements when operating in the host state. In addition, setting such highly prescriptive regulations could be considered in breach of the fair and equitable treatment standard owed to foreign investors under BITs.<sup>85</sup> Not complying with these treaty obligations would open the door to numerous claims from the affected foreign investors against the states in which they are operating, possibly leading to these states having to defend themselves in international investor-state arbitration procedures. Adhering to this particular recommendation of the Review Committee might hence entail unexpected negative consequences.

This is not merely a theoretical possibility: out of the six countries on the PBC agenda, Burundi has signed seven BITs,<sup>86</sup> Sierra Leone has three,<sup>87</sup> Guinea has no less than 19,<sup>88</sup> Guinea-Bissau has two,<sup>89</sup> Liberia has four,<sup>90</sup> and the Central African Republic has four as well.<sup>91</sup> Virtually all of these treaties contain at least a fair and equitable treatment clause.

Not surprisingly, these BITs have often been concluded with the home states of companies that are already active as investors in these six countries. Several arbitral disputes have already arisen under these BITs. For example, under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), Burundi has

<sup>85</sup> For an extensive study of this standard, see e.g. UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II* (UN 2012); Andrea Schernbeck, *Der Fair and Equitable Treatment Standard in Internationalen Investitionsschutzabkommen* (Nomos 2013); Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer Law International 2012); Roland Kläger, “Fair and Equitable Treatment” in *International Investment Law* (Cambridge University Press 2011).

<sup>86</sup> Burundi has signed BITs with Belgium/Luxembourg, Comoros (not in force yet), Germany, Kenya (not in force yet), Mauritius, Netherlands (not in force yet), and the United Kingdom. UNCTAD statistics <[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Country-specific-Lists-of-BITs.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx)> (accessed 24 July 2013).

<sup>87</sup> Sierra Leone has signed BITs with China (not in force yet), Germany, and the United Kingdom (not in force yet).

<sup>88</sup> Guinea has signed BITs with Benin (not in force yet), Burkina Faso, Cameroon (not in force yet), Chad (not in force yet), China (not in force yet), Egypt (not in force yet), Gambia (not in force yet), Germany (not in force yet), Ghana (not in force yet), Italy, Lebanon (not in force yet), Malaysia, Mali (not in force yet), Mauritania (not in force yet), Mauritius (not in force yet), Morocco (not in force yet), Serbia, Switzerland, and Tunisia (not in force yet).

<sup>89</sup> Guinea-Bissau has signed BITs with Gambia (not in force yet) and Portugal.

<sup>90</sup> Liberia has signed BITs with Belgium/Luxembourg (not in force yet), France, Germany, and Switzerland.

<sup>91</sup> The Central African Republic has signed BITs with Egypt (not in force yet), Germany, Morocco (not in force yet), and Switzerland.



acted as a respondent in two concluded cases<sup>92</sup> while one dispute is currently pending.<sup>93</sup> Guinea has been respondent in two concluded cases<sup>94</sup> with three disputes pending;<sup>95</sup> Liberia has been respondent in two concluded cases<sup>96</sup> with one dispute pending;<sup>97</sup> and the Central African Republic has been respondent in three concluded cases.<sup>98</sup> Only Sierra Leone and Guinea-Bissau have never been respondents in an ICSID arbitration. The PBC Strategic Frameworks or related instruments themselves have never formed the object of a dispute thus far, but countries ought to be aware that certain implementation measures might be.

It would be impossible without extensive treaty renegotiation to implement this particular Review Committee recommendation. Even if such renegotiation were to be conducted, the amended provisions would not be retroactive, so they would not apply to investments made before the entry into force of the renegotiated treaties. One possible way to circumvent the finding of BIT violations would be to interpret the scope of the treaties in a narrow manner, allowing only for protection of investors whose investments deliver a “significant contribution to the development of their host state” (and hence only give these investors the possibility to initiate international arbitration procedures). This development criterion is one of the so-called *Salini* criteria for determining whether a certain project qualifies as a foreign investment due to protection under the ICSID Convention.<sup>99</sup> However, two caveats are in place here: first, the *Salini* criteria are understood not to apply cumulatively, hence if an investment fulfills several of the other criteria (which relate to duration, regularity of profit and return, assumption of risk, substantial commitment of capital, etc.), an arbitral tribunal would most likely conclude that the project in dispute is protected by the relevant treaty in spite of its lack of contribution to the host state’s development. Secondly, where the BIT *does* set out an elaborate definition of investment but *does not* refer to any mandatory contribution to the host state’s development, it would seem at odds with the general rules on treaty interpretation to somehow read such an obligation into the treaty in order to exonerate a state that set certain performance requirements in violation of its BIT obligations. Hence, although the Review Committee recommendation that the

<sup>92</sup> *Antoine Goetz et al.*, ICSID Case No. ARB/95/3; *Antoine Goetz et al.*, ICSID Case No. ARB/01/2.

<sup>93</sup> *Joseph Houben*, ICSID Case No. ARB/13/7.

<sup>94</sup> *Atlantic Triton Co. Ltd.*, ICSID Case No. ARB/84/1; *Maritime International Nominees Establishment*, ICSID Case No. ARB/84/4.

<sup>95</sup> *Getma International et al.*, ICSID Case No. ARB/11/29; *Société Industrielle des Boissons de Guinée*, ICSID Case No. ARB/12/8; *Société Civile Immobilière de Gaëta*, ICSID Case No. ARB/12/36.

<sup>96</sup> *Liberian Eastern Timber Corp.*, ICSID Case No. ARB/83/2; *International Trust Co. of Liberia*, ICSID Case No. ARB/98/3.

<sup>97</sup> *Diamond Fields Liberia, Inc.*, ICSID Case No. ARB/11/14.

<sup>98</sup> *RSM Production Corp.*, ICSID Case No. ARB/07/2; *M. Meerapfel Söhne AG*, ICSID Case No. ARB/07/10; *Shareholders of SESAM*, ICSID Case No. CONC/07/1.

<sup>99</sup> Convention on the Settlement of Investment Disputes between states and nationals of other states (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art. 25. Article 25 only contains a definition of investors; as the drafters could not agree upon an appropriate definition of investment, this was left to be developed via case law. The seminal case setting out criteria in this regard is *Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (Decision of the Tribunal on Jurisdiction of 29 November 2004) (2005) 20 ICSID Rev/FILJ 148. These *Salini* criteria have been repeatedly referred to, applied, and further expanded upon in subsequent cases. See Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 71 *et seq.*

PBC ought to focus more on generating employment and skills transfer, particularly in resource-rich countries, is certainly commendable, it ought not to encourage these countries to achieve these objectives by acting in breach of existing treaties.

Regarding the need for coherence and coordination, the bare minimum to expect from the various UN and other international actors in PBC agenda countries (such as the UN Office for the Coordination of Humanitarian Affairs) is that they integrate their projects on the ground. For this purpose, the Commission's political weight could be used to align actors behind agreed overarching objectives, as the Report identified: "Fragmentation, territoriality and competition among United Nations actors as well as among international organizations and donors generally are corrosive of the entire aid effort, and will critically undermine the peacebuilding effort."<sup>100</sup> One seemingly small but critical step toward this goal would be to devise clear inventories of peacebuilding activities in agenda countries to avoid duplication of initiatives, such as possible overlap between PBC projects and the World Bank's Poverty Reduction Strategies.<sup>101</sup>

More attention should be paid to a much-needed regional dimension, for two reasons: first, certain problems such as drug trafficking or the management of refugees and displaced persons are inherently of a cross-border nature; and secondly, many states would "prefer to receive assistance and advice from countries in their own region."<sup>102</sup> This is understandable as receiving assistance and advice from developed countries is often still perceived as tantamount to receiving orders from a former colonizing power. Encouraging countries to develop solutions with the support of their regional peers will certainly contribute to developing a feeling of local ownership, thereby ensuring a long-term commitment to execute the goals set through such planning. Institutionally, though, due to its intergovernmental and consensual nature, this presents difficulties to the PBC.<sup>103</sup>

Finally, the Review Committee recommended developing an effective communications strategy, clearly spelling out what the PBC can offer,<sup>104</sup> thereby defining its added value. This is not the only area in which communication could be enhanced: to raise its profile, the PBC should also aim at improving its visibility at regional and state-level.<sup>105</sup>

## D. PBC performance at headquarters

### *Organizational Committee and country-specific configurations*

#### 1. Practical recommendations

The review report examined in detail the functioning and accomplishments of the Organizational Committee, criticizing that "there is little evidence that the various membership streams have been conscious of particular responsibilities by reference to

<sup>100</sup> PBC Review Report (2010) para 59.

<sup>101</sup> World Bank Poverty Reduction Strategies <<http://go.worldbank.org/FXXJK3VEW0>> (accessed 24 July 2013).

<sup>102</sup> PBC Review Report (2010) paras 61–2.

<sup>103</sup> Tomat and Onestini, "The EU and the UN Peacebuilding Commission" (n. 61) 158.

<sup>104</sup> PBC Review Report (2010) para. 65.

<sup>105</sup> Tomat and Onestini, "The EU and the UN Peacebuilding Commission" (n. 61) 159.

their nominating bodies.”<sup>106</sup> In other words, members of the Organizational Committee ought to better represent and inform their respective constituencies. This is particularly important in light of the criticism that many countries were keen to be elected, yet afterwards showed remarkably little interest in actively contributing by sending their top personnel to ensure the good functioning of the PBC.

The Review Committee made specific recommendations relating to the rotation of troop-contributing countries as PBC members (as is the case for financial donors); the right for PBC agenda countries to attend Organizational Committee meetings; the relationship between the Organizational Committee and the Country-Specific Configurations; fewer but longer meetings; and the identification of strategic themes. Similarly practical recommendations were made with regard to the Country-Specific Configurations, including the addition of a country dimension to the chairing role and the establishment of a liaison committee on the ground in each agenda country.<sup>107</sup> Country-Specific Configurations ought to enhance their resource mobilization functions “to facilitate and advance the kind of broad-based dialogue that will enable a society to heal and rebuild,” which should involve all stakeholders, including civil society (particularly women’s groups) and funding bodies (particularly regional banks and the private sector).<sup>108</sup>

## 2. Mutual accountability

One general recommendation with regard to the Organizational Committee and the Country-Specific Configurations concerned the development of mutual accountability tools. Accountability certainly seems to have been foremost on the agenda of the Review Committee as it was mentioned in no less than five sections of the 41-page report,<sup>109</sup> but it was never explained what precisely is meant by “mutual accountability.” Elsewhere, mutual accountability has been defined as implying that “actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”<sup>110</sup>

Some form of *legal* accountability would be preferable, to offer agenda countries a remedy against actors (UN bodies, donors, etc.) who do not comply with their commitments. However, it would be unrealistic to assume that the political will for such interpretation of mutual accountability would currently exist, exacerbated by the fact that legal accountability requires the adoption of specific legal obligations and sanctions for non-compliance. The PBC is trying to achieve consensus concerning more specific duties to be set out separately for each party involved in the strategic frameworks, but no clear remedies have been agreed upon. Arguably, current references to accountability in PBC configurations are “little more than lip service,” possibly even meant to “divert attention away from the actual interests of an international actor

<sup>106</sup> PBC Review Report (2010) para. 73.

<sup>107</sup> PBC Review Report (2010) 25.

<sup>108</sup> PBC Review Report (2010) paras 91–2.

<sup>109</sup> PBC Review Report (2010) 3 (Executive summary); paras 83 and 93; 25 (Summary of recommendations); para. 169 (Summing up).

<sup>110</sup> Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics” (2005) 99 *American Political Science Review* 29.

within a conflict-affected society.”<sup>111</sup> However, such a conclusion loses sight of the fact that more forms of accountability exist than merely the legal type. Other forms include hierarchical and supervisory accountability, fiscal and peer accountability and perhaps most importantly, public or reputational accountability, involving a measure of transparency which may lead to increased participation of international actors, resulting in enhanced legitimacy of the UN system as such.<sup>112</sup>

Moreover, mutual accountability of any sort implies reciprocity, for example regarding the commitments of the agenda countries towards donor countries:

Ensuring mutual accountability is critical to the entire peacebuilding effort and is a natural corollary of resource mobilization. Applying tools developed by the Organizational Committee, each configuration should map and track delivery of peacebuilding commitments with respect to its agenda country. Combining its evaluations of delivery both by national stakeholders and by the international community, the configuration will be in a position to authoritatively assess how each is meeting its responsibilities.<sup>113</sup>

This raises a number of issues. First, the PBC’s monitoring mechanisms often lack clear benchmarks which could ensure effective quantification of progress, similar to the lack of clear indicators concerning the success or failure of the PBC itself.<sup>114</sup> Secondly, what should be done if agenda countries do not live up to their promises? Is it possible to coerce compliance from countries that already are with their backs against the wall? The issue of accountability merits more thought and it could be seen as a missed opportunity that the review report did not discuss this any further, except for its reiterated assertion that mutual accountability is critical. This cannot have been because the issue is uncharted territory in international law. On the contrary, many international obligations, for example in the field of international environmental law, are phrased as obligations of conduct, not of result. In assessing whether states have complied with them, a due diligence test is applied which takes into account the financial, technical and other capacities of particular states. An act which may hence be a breach if committed by a developed country, may not be considered a violation if performed by a developing state. Moreover, incorporating this “common but differentiated responsibilities” principle, as adopted for example in the UN Framework Convention on Climate Change and other environmental treaties,<sup>115</sup> in the context of peacebuilding assessment would allow for “common mutual accountability” according to a variable standard depending on the capacities of the state whose conduct is under review.

<sup>111</sup> Caplan and Ponzio, “The Normative Underpinnings of the UN Peacebuilding Commission” (n. 63) 194.

<sup>112</sup> Liliana L. Jubilat, “Towards a New *Jus Post Bellum*: the United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability” (2011) 20 *Minnesota Journal of International Law* 26, 60 *et seq.*

<sup>113</sup> PBC Review Report (2010) para. 93.

<sup>114</sup> Tomat and Onestini, “The Normative Underpinnings of the UN Peacebuilding Commission” (n. 61) 158.

<sup>115</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art. 3(1); see also: Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) 2303 UNTS 148; see also UN Conference on Environment and Development “Rio Declaration on Environment and Development” (14 June 1992) UN Doc. A/CONF.151/26/Rev.1 (Vol. I) 3; UN Conference on the

Although the PBC's reach is limited by the political and technical scope of its monitoring instruments and its restricted financial resources, setting up a system to hold non-compliant actors accountable ought to be possible within the current boundaries. So far, the eagerness with which the accountability concept is used in PBC documents has not translated in a corollary zeal to implement it in practice. Members seem most reluctant to institute any remedies when the agenda countries or the international partners fail to uphold their end of the bargain as agreed upon in the Strategic Frameworks.<sup>116</sup> Hence, the PBC needs to develop some form of sanctioning system, as the current periodic reports and *in loco* visits are not sufficient. This would largely depend on the (currently absent) political will of the members, but options could include recourse to international criminal law concerning the accountability of specific individuals (e.g. heads of state of agenda countries) as well as reform of immunity rules, particularly regarding international organizations.

### *Multi-tiered engagement and graduation criteria*

Although the PBC is already significantly tailoring its activities according to each specific country's demands, further vertical and horizontal differentiation is called for. The Review Committee suggested developing a "light" version of PBC involvement that would entail less of a stigma for the country involved, and additionally, more possibilities ought to be created for regional or sectorial tiers of engagement.<sup>117</sup> Furthermore, clear entry and exit criteria ought to be developed,<sup>118</sup> while maintaining flexibility in benchmarks so as to allow for consideration of specific individual circumstances. The biannual reviews allow for "periodic assessments of the extent to which priorities defined when a country came on the agenda have been achieved, and of gaps remaining."<sup>119</sup> Interestingly, the review report emphasized that these benchmarks must be essentially political. Such mapping and measuring of progress in order to determine the right point "to graduate" from the program, giving due weight to the view of the agenda country itself, is not unique: for example under the Generalized System of Preferences (GSP) within the World Trade Organization (WTO), members receiving non-reciprocal benefits "graduate" when their economic competitiveness has increased.<sup>120</sup> Traditionally,

Human Environment, "Stockholm Declaration" (16 June 1972) UN Doc. A/CONF.48/14/Rev.1; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 138; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 preamble; Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

<sup>116</sup> Caplan and Ponzio, "The Normative Underpinnings of the UN Peacebuilding Commission" (n. 63) 195.

<sup>117</sup> PBC Review Report (2010) paras 95–6.

<sup>118</sup> Tomat and Onestini, "The Normative Underpinnings of the UN Peacebuilding Commission" (n. 61) 157.

<sup>119</sup> PBC Review Report (2010) paras 99–100.

<sup>120</sup> T. Ademola Oyejide, "Special and Differential Treatment" in Bernard M. Hoekman, Aaditya Mattoo, and Edward P. English (eds), *Development, Trade, and the WTO: A Handbook* (World Bank Publication 2002) 504–8.

the time of graduation depends on making political choices, but this system has been put into question in recent years. Some commentators are now advocating agreement on a specified set of legal graduation criteria, similar to those implicit in the UN definition of least-developed countries.<sup>121</sup>

Transforming the determination of the graduation point from a political to a legal choice has clear benefits, most importantly the increase in stability and predictability. Countries on the giving as well as on the receiving end would benefit, but making this a legal choice would also entail significant dangers. First, it would be difficult “to transform a historically politicized notion such as graduation into a precise policy outcome” and secondly, such an approach risks applying “a blunt instrument where subtler differentiation is more suitable.”<sup>122</sup>

A needs-based, tailor-made approach could be developed through establishing procedures under which agenda countries are “given the opportunity on a continuing basis to explain in clear developmental terms why they need access.”<sup>123</sup> The problem is that such an approach would rely heavily on a discretionary decision-making mechanism. As with GSP treatment under the WTO system, the question concerning graduation from the PBC agenda would be: who would have the final say in making such decisions? How could sufficient technical precision be assured on a continuing basis to justify these decisions as fair and consistent? Although turning the graduation determination from a political into a legal choice certainly has its advantages, care should be taken that politicization is not increased instead of diminished.

## E. Key relationships with the UN and other partners

### *International partnerships*

The Review Committee examined the PBC’s relationship with the UNSC, the UNGA, ECOSOC, and a number of other partners. Although the substantial scope of the Commission’s connection with the UNGA and ECOSOC could still be improved, the Review Committee was, correctly, most critical of its relationship with the UNSC, which encompasses a dual problem: “the Security Council perceives that the advice of the Commission does not provide much added value, and the Commission does not provide more focused advice, in part because the Security Council does not make more specific requests.”<sup>124</sup> In order to realize its objectives, the PBC could be involved at various stages of the collective security process, giving valuable advice when peacekeeping mandates are being established, reviewed, or approaching drawdown. This change could be implemented under the existing procedural rules.

<sup>121</sup> See <<http://www.un.org/en/development/desa/policy/cdp/ldc/profile/>> (accessed 24 July 2013); Alexander Keck and Patrick Low, “Special and Differential Treatment in the WTO: Why, When and How?” (2004) WTO Economic Research and Statistics Division Staff Working Paper ERSD-2004-03; Stefano Inama, “Trade Preferences and the World Trade Organization Negotiations on Market Access: Battling for Compensation of Erosion of GSP, ACP and Other Trade Preferences or Assessing and Improving their Utilization and Value by Addressing Rules of Origin and Graduation?” (2003) 37 *Journal of World Trade* 959.

<sup>122</sup> Keck and Low, “Special and Differential Treatment in the WTO: Why, When and How?” (n. 121) 9.

<sup>123</sup> Keck and Low, “Special and Differential Treatment in the WTO: Why, When and How?” (n. 121) 10.

<sup>124</sup> PBC Review Report (2010) para. 106.

Enhanced cooperation between the UNSC and the PBC would also counteract the perception of a certain “downgrading” when the situation in a particular country is moved from the UNSC to the PBC agenda, as well as allow for the referral of larger countries and even entire sectors or regions.<sup>125</sup> Having a preventive as well as reactive mandate, the PBC could intervene prior to UNSC involvement, thus stopping a situation from escalating into a threat to or a breach of international peace. Finally, the PBC could strengthen its connections within the UN family, e.g. with the Office of High Commissioner for Human Rights, the Office of the UN High Commissioner for Refugees, the International Labor Organization and the International Organization for Migration.

To ensure international financial institutional support, more structured interaction could be developed with, e.g. the IMF, the World Bank, and the African Development Bank, similar to the PBC’s input in UNSC decision-making processes. This would enhance resource mobilization efforts and guarantee their suitability for addressing development challenges with political implications. For this purpose, the PBC ought to attract not only the usual donors, but also donors who can provide non-financial support in the form of technical assistance, training, and transfer of know-how.<sup>126</sup> Such donors might however be easier to find via regional partnerships.

### *Regional partnerships*

The PBC is encouraged to:

[P]romote and institutionalize linkages with regional organizations to facilitate exchanges of experiences and best practices; ensure fuller collaboration with bodies such as the European Union, the Organization for Economic Cooperation and Development and the Organization for Security and Cooperation in Europe.<sup>127</sup>

The EU in particular aims to contribute in an active and constructive manner to the functioning of the PBC.<sup>128</sup> It is uniquely positioned to do so thanks to the extensive presence of its member states’ delegations in the agenda countries. This way, the EU can mobilize a “full range of instruments, from development projects to political dialogue and from security and defense measures under the [European Security and Defense Policy] to mediation action and financial support.”<sup>129</sup> Furthermore, the EU member states have sought to coordinate their actions via the EU Presidency and the monthly meetings of the Council Working Group on the UN. The EU itself already has provided expertise through its interventions in the Organizational Committee and through meetings with the PBC Chair.

<sup>125</sup> PBC Review Report (2010) para. 126. This issue in itself merits a separate study, for example on the basis of the annual PBC reports to the UNSC, particularly as the permanent UNSC members *de facto* form a permanent force in the PBC as well.

<sup>126</sup> Tomat and Onestini, “The Normative Underpinnings of the UN Peacebuilding Commission” (n. 61) 158.

<sup>127</sup> PBC Review Report (2010) 33.

<sup>128</sup> See e.g. <[http://www.eu-un.europa.eu/articles/articleslist\\_s105\\_en.htm](http://www.eu-un.europa.eu/articles/articleslist_s105_en.htm)> (accessed 24 July 2013).

<sup>129</sup> Tomat and Onestini, “The Normative Underpinnings of the UN Peacebuilding Commission” (n. 61) 155.

The review report briefly referred to partnering opportunities with the African Union's 2006 post-conflict reconstruction and development framework, which has a mandate comparable to that of the PBC, with the African peer review mechanism of the New Partnership for Africa's Development, as well as with sub-regional organizations such as the Southern African Development Community and the Economic Community of West African states.<sup>130</sup> Considering the emphasis on the importance of local ownership and the explicit indication by contributors to the Report that countries would prefer to be assisted by their regional peers, the mere brief mentioning of these regional actors may come as somewhat surprising and disappointing. This is particularly the case because Africa's institutional capacity for peacebuilding in its entirety needs to be enhanced.<sup>131</sup>

#### IV. Conclusion

How does the above analysis link to the topic of this book: mapping the normative foundations of *jus post bellum*? *Jus post bellum* is not explicitly referred to in the PBC's constitutive instruments but the Commission could nevertheless play a vital role. For example, as a forum for discussing peacebuilding strategies, the PBC can gather, centralize, and "codify" information on stakeholders' understanding of the currently applicable rules concerning post-conflict activities. Rather than merely acting as a passive recipient, the Commission could also progressively develop the knowledge offered by those stakeholders—or fill in the gaps—based on common objectives and values.

More specifically, the PBC could contribute to the development of *jus post bellum* in three distinct ways:<sup>132</sup> first, it could help identify the source of *jus post bellum*, for example in terms of its legal nature and its point of activation.<sup>133</sup> Secondly, it could clarify the language in which *jus post bellum* obligations are termed, such as the different types of post-conflict efforts and corresponding obligations. Thirdly, it could elaborate on the precise content of such obligations, as this is currently mostly guided by what individual actors perceive to be essential for achieving peace. As this arguably goes beyond the mostly advisory character of the PBC's mandate, one suggested approach would be for the Commission to "look at the potential development of a modern *jus post bellum* through the lens of global administrative law, which would support the idea of creating frameworks instead of detailed substantive rules."<sup>134</sup> Using principles from international environmental or economic law, the PBC could identify and elaborate upon common grounds such as the rule of law, security, and development as "there can be no peace without development and no development without peace."<sup>135</sup>

<sup>130</sup> PBC Review Report (2010) para. 141.

<sup>131</sup> Murithi, "The UN Peacebuilding Commission" (n. 64) 364–5.

<sup>132</sup> Jubilit, "Towards a New *Jus Post Bellum*" (n. 112) 52 *et seq.*

<sup>133</sup> Eric De Brabandere, "The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept" (2010) 43 *Vanderbilt Journal of Transnational Law* (2010) 119.

<sup>134</sup> Jubilit, "Towards a New *Jus Post Bellum*" (n. 112) 57. See also Christine Bell, ch. 10, and Jennifer Easterday, ch. 20, this volume, who both discuss the merits of this approach.

<sup>135</sup> PBC Review Report (2010) para. 54.



The failure to adequately address basic developmental needs enlarges the risk that a country enters or relapses into conflict. The PBC's task is not to duplicate the work of international and regional development agencies but it could form "a strong and persistent voice in calling for the integration of political and developmental perspectives and in reminding the international community that food, shelter, and jobs are also essential tools of peacebuilding."<sup>136</sup> This would require the Commission to assess compliance using broad standards, rather than prescribing specific norms and procedures. As an illustration, one could think of demanding that a country emerging from conflict provides justice for victims according to international standards—but without requiring this country to do so via victims' participation procedures akin to those applicable in cases brought before the International Criminal Court.

A more holistic assessment would increase the UN's legitimacy as the same principles could be applied to both agenda countries' and international partners' conduct, thereby alleviating worries that UN peacebuilding is merely a new term for imposing western ideas on peace and development as those standards could also allow for other normative choices. The present lack of specific rules carries a significant downside as it maintains the current insecurity as to the precise content of *jus post bellum*.

An analysis of the PBC can be extrapolated into an existential examination of the UN collective security model, or even the UN as such. Should there be a paradigm shift in the interactions between the New York headquarters and the operations in the field? To which extent have decades of peacekeeping operations contributed to securing long-term peace? Are the root causes of conflict being remedied or does the system merely address some of the symptoms? Increasingly, developing countries, particularly those on whose territories UN operations are being or have been executed, demand more of a say in the decision-making process as well as in the manner of implementation of decisions. The present debate on peacekeeping in general and the role of the PBC in particular serves as a *pars pro toto* study of the UN legitimacy problem which will only become exacerbated if it is not properly addressed.

The discussions surrounding the PBC's establishment and functioning are symptomatic of the impasse confronted by advocates of UN reform in general. In the twenty-first century, the UN needs to evolve from a body oft-criticized for producing vague statements of intent and short-term solutions into an organization capable of long-term strategic thinking. In some areas, specific goals, targets, and benchmarks have been set with varying success rates (e.g. the Millennium Development Goals and the UN Development Decades)<sup>137</sup>—so the question is, why not in the field of peacebuilding? This is, however, not a legal query, but rather a question of political will. Undeniably, it is of major importance that peacekeeping operations are not executed in vain because countries relapse into conflict and chaos when the UN forces and international observers leave. The PBC, albeit not as "strongly equipped" as some might have wished, does have some important tools at its disposal as well as the regional support required to help achieve sustainable peace.

<sup>136</sup> PBC Review Report (2010) para. 27.

<sup>137</sup> See UN Millennium Development Goals <<http://www.un.org/millenniumgoals/>> and UN Development Decades <<http://www.un.org/en/events/observances/decades.shtml>> (accessed 24 July 2013).

Unfortunately, the 2010 PBC review report is correct in stating that “[t]he establishment of the Peacebuilding Commission in 2005 was seen as a groundbreaking step, holding new promise for the populations of countries emerging from conflict. Five years later, despite committed and dedicated efforts, the hopes that accompanied the founding resolutions have yet to be realized.”<sup>138</sup> Upon examination of the PBC’s subsequent annual reports,<sup>139</sup> it becomes clear that the Commission is chiefly paying lip service to the 2010 review report’s conclusions in rather vague and non-committal terms, but no significant action seems to be undertaken, let alone that much actual progress in terms of remedying the critical points has already been made. As no conscious re-commitment to peacebuilding at the very heart of the PBC’s work is being undertaken, the Commission seems willing to settle into the limited role that has developed to date.

Finally, pointing out the inherent flaws in the PBC set-up and its failure to significantly ameliorate the peacebuilding process raises a more fundamental question concerning the relative prioritization of peacekeeping and peacebuilding within the UN as a whole. Does the international community seriously wish to maintain peace in conflict-zones, or does it merely wish to give the appearance of doing so by rushing to get elected to a Commission but without being ready to undertake the corollary—legally enforceable—commitments? Should the UN more often dare to abandon its top-down approach, in order to allow for bottom-up solutions, developed by the countries involved, for which the PBC could provide an appropriate platform?

Organizations like the UN do a lot of good, but there are certain basic realities they never seem to grasp [...] Maybe the most important truth that eludes these organizations is that it’s insulting when outsiders come in and tell a traumatized people what it will take for them to heal. You cannot go to another country and make a plan for it. The cultural context is so different from what you know that you will not understand much of what you see. [...] People who have lived through a terrible conflict may be hungry and desperate, but they are not stupid. They often have very good ideas about how peace can evolve, and they need to be asked. That includes women. Most especially women [...]. To outsiders like the UN, [Liberian] soldiers were a problem to be managed. But they were our children.<sup>140</sup>

This quote is from Leymah Gbowee, a Liberian peace activist responsible for leading a women’s peace movement (Liberian Mass Action for Peace), uniting Christian and Muslim women against the war and Charles Taylor, thus bringing an end to the Second Liberian Civil War in 2003. Gbowee, Ellen Johnson Sirleaf, and Tawakkul Karman were awarded the 2011 Nobel Peace Prize for their non-violent struggle for the safety of women and for women’s rights to full participation in peacebuilding work. May this be a lesson to be heeded when setting out the plans and projects of the PBC in the

<sup>138</sup> PBC Review Report (2010) para. 3.

<sup>139</sup> UN Doc. A/67/715-S/2013/63; UN PBC, “Report of the Peacebuilding Commission on its Fifth Session” (2012) UN Doc. A/66/675-S/2012/70; UN PBC, “Report of the Peacebuilding Commission on its Sixth Session” (2011) UN Doc. A/65/701-S/2011/41.

<sup>140</sup> Leymah Gbowee, *Mighty Be Our Powers: How Sisterhood, Prayer, and Sex Changed a Nation at War* (Beast Books 2011) 171.

years to come. The Commission could fill an institutional gap in the light of the need for coordination of the many post-conflict efforts towards peacebuilding, but so far it largely marks a missed opportunity in terms of furthering local ownership, mutual accountability and sustainable development—thereby losing out on a chance to advance *jus post bellum*.



PART 4

THE “JUS” IN *JUS POST BELLUM*



## Peace Agreements as a Framework for *Jus Post Bellum*

Jennifer S. Easterday\*

### I. Introduction

This chapter explores the relationship of post-conflict constitutions that arise out of peace agreements—termed here “constitutional peace agreements”<sup>1</sup>—with *jus post bellum*. *Jus post bellum* is the body of laws, norms, and principles that apply during the transition from armed conflict to peace.<sup>2</sup> This chapter suggests that it should be considered as a broad, holistic concept that includes a spectrum of rules, norms, and principles applied post-conflict with the goal of promoting sustainable peace.<sup>3</sup> This spectrum also includes different functions of *jus post bellum*: *jus post bellum* as providing a body of norms, as an interpretive framework, as a site of coordination, and as a site of discourse or dialogue.<sup>4</sup>

Each of these aspects of a multi-faceted concept of *jus post bellum* can be informed by the norms and practices associated with developing and implementing constitutional peace agreements. Constitutional peace agreements seek to transform conflict to peace by altering societal norms; negotiating and bargaining over the underlying causes of the conflict; creating a method of discursive conflict resolution; and by establishing new state institutions in an effort to embed these changes into the new political structure. These agreements shape the environment in which *jus post bellum* operates.

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<sup>1</sup> Constitutional peace agreements were chosen in order to highlight the transformative goals and the paradoxes of the process of creating a peace agreement that includes or leads to a new constitution. This is something of a “hyper” example. Other types of peace agreements and new “transitional” constitutions may also fit this example, to greater or lesser degrees.

<sup>2</sup> Carsten Stahn, “Mapping the Discipline(s)” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 105; Inger Österdahl and Esther van Zadel, “What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles” (2009) 14 *Journal of Conflict and Security Law* 175, 178. But see Kristen Boon, “Obligations of the New Occupier: The Contours of *Jus Post Bellum*” (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 57, 76 (defining *jus post bellum* more narrowly to “apply to the exercise of governmental and public powers by external entities such as IOs and foreign states”).

<sup>3</sup> Jennifer S. Easterday, “*Jus Post Bellum* in the Age of Terrorism: Remarks by Jennifer Easterday” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 335.

<sup>4</sup> Easterday, “*Jus Post Bellum* in the Age of Terrorism” (n. 3). See also Christine Bell, “Post-Conflict Accountability” in Orna Ben-Naftali (ed.), *International Humanitarian Law and Human Rights Law* (Oxford University Press 2011) 328, 369.

They provide a legal framework for a given situation and influence how the laws and norms of *jus post bellum* would be applied. They can serve as useful indications of the most important issues at the root of the conflict and provide a normative framework for the transition to a sustainable peace. The process of negotiating, drafting, and implementing constitutional peace agreements, and the law of peacemakers—or the “*lex pacificatoria*”<sup>5</sup>—suggest important norms that could shape *jus post bellum* as an interpretive framework. Peace agreements also provide links between the domestic and international spheres; between the past, present, and future; and between the people, the state, non-state actors, and international interveners, influencing the coordination role of *jus post bellum*. Furthermore, peace agreements are a site of confluence between law and politics that can serve as a guide for *jus post bellum* to navigate these issues within a legal context, and provide a space for the *jus post bellum* dialogue to engage with the local population.

However, there are drawbacks to using constitutional peace agreements as a framework or guide for *jus post bellum*. Peace agreements are limited by who sits at the table and can result in counter-productive political arrangements. They can be difficult to implement and risk being undermined by spoilers. They also leave gaps and silences with respect to critical issues, such as gender considerations, that can undermine peace efforts. With international involvement, they may reflect neo-colonialist tendencies or be further weakened by imposed timelines and competing priorities of international interveners. Moreover, drafting and implementing constitutional peace agreements is resource and time intensive. Finally, there is little proof that constitutional reform through peace agreements contributes to lasting or sustainable peace.

Therefore, this chapter suggests that constitutional peace agreements represent a useful, but fraught, framework for *jus post bellum*. The chapter proceeds with a discussion of a multi-faceted approach to *jus post bellum* in Section II. It then describes norms and processes associated with constitutional peace agreements in Section III. Section IV discusses two important risks associated with constitutional peace agreements, including gaps and silences and the perception of neo-colonialist interventions. Section V concludes with an argument about how a broad and multi-faceted *jus post bellum* can be informed and improved by *lex pacificatoria* and a study of constitutional peace agreements, including their particularities and shortcomings.

## II. Towards a Broad Conception of Jus Post Bellum

This chapter argues that rather than viewing *jus post bellum* as a “top-down” set of rigid rules that dictate certain forms of government or society, *jus post bellum* should be considered as pertaining to broad understandings of norms, interpretation, coordination, and discourse. With respect to norms, I argue that *jus post bellum* is comprised of the laws and norms stemming from current settled bodies of international law as well as developing normative practices of non-state actors and organizations. In practice, *jus post bellum* will presumably be engaged in efforts to shape a more peaceful and resilient

<sup>5</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 5, 286–303.



society. The application of *jus post bellum* norms would be done according to particular policy goals—shaped by an interpretive framework based on *jus post bellum* norms and principles that include, inter alia, fostering sustainable peace. It would play a transformative role in society. Thus, the concept could benefit from adopting an “inter-public”<sup>6</sup> approach to understanding the “law” of *jus post bellum* and a broad understanding of the role of law in society.<sup>7</sup> In addition to utilizing these areas of law during the transition from conflict to peace, *jus post bellum* also plays two important functions during the transition: a site of coordination and a site of discourse. Combined, the normative and interpretive frameworks and sites of coordination and discourse included in this functional concept of *jus post bellum* fill gaps currently found in the law and practice of post-conflict peacebuilding. In this way, *jus post bellum* would not be limited to dictating outcomes,<sup>8</sup> and instead would work across fields and practices to foster sustainable peace after conflict.

Legal scholars writing about *jus post bellum*—either supporting or critiquing the concept—tend to consider *jus post bellum* as a body of laws and principles that regulate peacebuilding and the transition from conflict to peace.<sup>9</sup> They debate various granular aspects of this “legal” *jus post bellum*. Some wonder why we are talking about *jus post bellum* at all when there are plenty of other legal regimes that apply in post-conflict contexts and when it is unclear where the application of a new legal regime would positively impact sustainable peace.<sup>10</sup> Others, such as many authors in this volume, debate more technical aspects of *jus post bellum*, such as whether it would or could become a treaty or otherwise codified, what specific rules it would include, whether they would apply to all types of armed conflict or not, when they would begin and cease to apply, and what the sources of authority would be.<sup>11</sup> However, most of these scholars take a narrow view of what law is, and do not address the transformational role of law on society.

There seems to be little doubt that international law plays a central and expanding role in post-conflict transitions to peace.<sup>12</sup> International law can temper, regulate,

<sup>6</sup> See Benedict Kingsbury, “The Concept of ‘Law’ in Global Administrative Law” (2009) 20 *European Journal of International Law* 23.

<sup>7</sup> See Liliana Lyra Jubilut, “Towards a New Jus Post Bellum: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability” (2011) 20 *Minnesota Journal of International Law* 26, 57 (arguing that viewing *jus post bellum* through the lens of global administrative law would help improve the work of the UN Peacebuilding Commission.).

<sup>8</sup> Which may be seen as imposed from neo-colonialists, illegitimate, or based on concepts of democracy inappropriate for a particular context.

<sup>9</sup> See Vincent Chetail, “Post-Conflict Peacebuilding—Ambiguity and Identity” in Vincent Chetail (ed.), *Post-Conflict Peace-Building: A Lexicon* (Oxford University Press 2009) 18; Kristen E. Boon, “The Future of the Law of Occupation” (2009) 47 *Canadian Yearbook of International Law* 107; Matteo Tondini, “Putting an End to Human Rights Violations by Proxy: Accountability of International Organizations and Member States in the Framework of *Jus Post Bellum*” in Stahn and Kleffner (eds), *Jus Post Bellum* (n. 2); Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2009) 43 *Vanderbilt Journal of Transnational Law* 119.

<sup>10</sup> See e.g. Eric De Brabandere, ch. 7; Fionnuala Ní Aoláin and Dina Haynes, ch. 9; and Roxana Vatanparast, ch. 8, this volume; Nehal Bhuta, “New Modes and Orders: The Difficulties of a *Jus Post Bellum* of Constitutional Transformation” (2010) 60 *University of Toronto Law Journal* 799.

<sup>11</sup> See e.g. many chapters in this volume, including Gregory Fox, ch. 12; Kristen Boon, ch. 13; Rogier Bartels, ch. 16; and Cymie Payne, ch. 25.

<sup>12</sup> See e.g. Boon, “The Future of the Law of Occupation” (n. 9).

legitimate, or undermine interventions in post-conflict societies and influence the course of events post-conflict.<sup>13</sup> I suggest that *jus post bellum* will need to incorporate a broad concept of international law that reflects its transformative function in post-conflict societies.<sup>14</sup> Rather than “new” laws, I suggest a concept of *jus post bellum* that is comprised of principles, norms, and rules found in other normative and legal frameworks—some originating in current bodies of international law, and others originating from the normative framework of non-state bodies. These include, inter alia, treaty obligations, customary international law, and soft law found in disparate legal frameworks, such as human rights, international humanitarian law, peace agreements, environmental law, property law, and others.<sup>15</sup> *Jus post bellum* also encompasses principles and norms of concepts such as democratic governance, transitional justice, and the responsibility to protect.<sup>16</sup> A comprehensive concept of *jus post bellum* would also include informal arrangements, non-state actors, and other practices and sources of norms and governing power not typically encompassed under traditional understandings of “international law.”<sup>17</sup> A broad concept such as this sufficiently grasps the wide range of actors and initiatives in post-conflict situations, and reflects the layers of interaction between domestic and international aspects of the transition. At the same time, although taking a broad approach to the concept of “jus,” it would remain bounded by the factual (“bellum”) and temporal (“post”) aspects of *jus post bellum*.

This chapter suggests that consideration of the transition from modern conflicts could benefit from adopting a broader, inter-public theory of international law.<sup>18</sup> As Benedict Kingsbury states:

[T]he normative content of international law is immanent in the public quality of law in general and in the inter-public quality of international law. It emerges through the practice of seeking law-governed relationships rather than as a deduction from a priori principles of morality. The content that emerges through this repeated practice has general and recognizable features that function to constrain actors in their myriad

<sup>13</sup> Brett Bowden et al., “Introduction” in Brett Bowden, Hilary Charlesworth, and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies* (Cambridge University Press 2009) 3, 7, citing Martti Koskeniemi, “The Fate of Public International Law: Between Technique and Politics” (2007) 70 *Modern Law Review* 1.

<sup>14</sup> The “transformative” role of *jus post bellum* is a concept inherent in both legal and just war theory analyses of the concept as variously being a driver of peace, accountability, and societal reconciliation. See e.g. Larry May, ch. 1; and Inger Österdahl, ch. 11, this volume.

<sup>15</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 8–10, discussing the diversity of law-making approaches, and the political and contextual influence on choice of process.

<sup>16</sup> See e.g. Carsten Stahn, ch. 6; and Jens Iverson, ch. 5, this volume.

<sup>17</sup> Kingsbury, “Concept of Law” (n. 6) 26. A deep exploration of these sources of law is beyond the scope of this chapter.

<sup>18</sup> Benedict Kingsbury, “International Law as Inter-Public Law” in Henry R. Richardson and Melissa S. Williams (eds), *NOMOS XLIX: Moral Universalism and Pluralism* (New York University Press 2009) 170. Kingsbury argues that “adherence to a positivist conception of international law sourced in the will and consent of states may be the best way to maintain legal predictability and to sustain rule of law values in international relations. It may be preferable to retain a unified view of an international legal system than to countenance the delegalization and the mosaic pattern that some of the likely alternative approaches may entail. But I will argue that a theory of international law must be concerned with the normative production and the regulatory activities of such entities, at least when they exercise governing powers” (internal citations removed).

interactions with one another. These regulative norms are identifiably present in multiplying sites of international and transnational decision-making. They appear whenever there is felt a demand for presenting decisions as non-arbitrary, as more than the result of power-inflected bargains between parties in a contractual arrangement.<sup>19</sup>

Kingsbury argues that law has a “distinct quality of publicness,” in that it claims to “stand in the name of the whole society and speak to that whole society even when any particular rule may in fact be addressed to narrower groups.”<sup>20</sup> This notion of publicness, Kingsbury argues, is increasingly part of and shaping international law.<sup>21</sup>

*Jus post bellum* also involves aspects of “publicness,” given its focus on sustainable peace and its transformative goals in post-conflict societies. Looking at the moral antecedents of a legal *jus post bellum*, as described by Mark Evans in this volume,<sup>22</sup> we see a central focus in *jus post bellum* scholarship on creating a “just” society after war. Legal scholarship also reflects this “inter-public” dimension of *jus post bellum* when discussing the potential of *jus post bellum* laws to foster peace and promote justice and accountability.<sup>23</sup> And, as I argue below with respect to constitutional peace agreements, the concept of “publicness” shapes the “law” and practice of *jus post bellum* in important ways. *Jus post bellum* principles and goals “speak” in the name of the whole (global) society, and address entire post-conflict societies, even if its laws and practices are directed at specific groups (military, police, human rights organizations, judicial organs, etc.).

Consideration of the transformative relationship of law to post-conflict societies would also implicate principles of interpretation through which laws and norms would be applied in order to achieve the desired transformation. For example, in order to foster sustainable peace, the application of particular *jus post bellum* laws and norms would be measured against peace-oriented policy goals and principles that seek to maximize and reinforce the peace project. This suggests that an expansive view of *jus post bellum* would also comprise an interpretive framework.<sup>24</sup>

I argue that *jus post bellum* can be a new way of conceiving of the body of laws, norms, and practices that exist during the tumultuous transition from conflict to peace. As a point of departure for discussing the post-conflict legal framework, *jus post bellum* offers us theoretical, normative, and practical concepts and tools for dealing with post-conflict situations. Discussing these together under the rubric of “*jus post bellum*” can lead to increased cohesion in post-conflict law and practice. It provides a space for a common legal language for the process of transition from conflict to peace, and a unified mode of interpretation for its different underlying legal frameworks when they are applied in post-conflict situations. It provides a way to connect different discourses dealing with issues of peace and conflict, and can create synergies between disciplines such as international relations, legal anthropology, political science, and peace and

<sup>19</sup> Richardson and Williams (eds), *NOMOS XLIX* (n. 18) 174.

<sup>20</sup> Richardson and Williams (eds), *NOMOS XLIX* (n. 18) 174.

<sup>21</sup> Richardson and Williams (eds), *NOMOS XLIX* (n. 18) 174.

<sup>22</sup> Mark Evans, ch. 2, this volume.

<sup>23</sup> See e.g. Stahn, “Mapping the Discipline(s)” (n. 2); Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 2).

<sup>24</sup> See also James Gallen, ch. 4, this volume.

conflict studies. Indeed, the study of *jus post bellum* has the potential to inspire different concepts of conflict and post-conflict realities that more accurately describe modern armed conflicts. It can also lead to comprehensive practical approaches to post-conflict peacebuilding that understand and minimize potential conflicts between legal regimes.

The choice of a frame with which to describe a legal challenge can determine how the issue is decided.<sup>25</sup> In determining a frame, if there is no meta-regime or rule, courts can decide issues according to their biases.<sup>26</sup> This is especially problematic when there are different institutions that address the problem differently,<sup>27</sup> which can happen in post-conflict situations where multiple international and domestic institutions are dealing with overlapping and complicated legal matters. How a particular issue is framed—whether as a “human rights” or “security” or “environmental” issue—mirrors political battles between various institutions with jurisdiction over such regimes.<sup>28</sup> This in turn means that in post-conflict situations, how issues are framed can fuel inter-institutional battles for power and influence<sup>29</sup> instead of promoting cohesion and a unified strategy for peacebuilding. Although recognizing that “fragmentation and unity are matters of narrative perspective,”<sup>30</sup> in the post-conflict context they can also potentially be a matter of recurrence to war.<sup>31</sup>

A broad concept of *jus post bellum* would encompass its potential to bring together the variety of laws and practices currently employed in post-conflict situations and make the post-conflict transition more coherent and unified.<sup>32</sup> The response to modern conflict termination raises similar questions that can be addressed through a core body of norms and principles that apply during the transition from conflict to peace. Different legal systems sometimes interact (such as IHL and human rights) and sometimes inhabit their own sphere of influence (such as human rights in guiding peacebuilding processes). Over time, laws applied in post-conflict settings have been clarified, modified,<sup>33</sup> or applied directly, depending on the context and particulars of the post-conflict situation. However, application of these underlying laws is patchy and reactive, and does not provide sufficient coherence to ensure or even facilitate

<sup>25</sup> Martti Koskenniemi, “The Fate of Public International Law” in Martti Koskenniemi *The Politics of International Law* (Hart 2011) 336.

<sup>26</sup> Koskenniemi, “The Fate of Public International Law” (n. 25) 336.

<sup>27</sup> Koskenniemi, “The Fate of Public International Law” (n. 25) 337.

<sup>28</sup> Koskenniemi, “The Fate of Public International Law” (n. 25) 337–8.

<sup>29</sup> Martti Koskenniemi, “International Law and Hegemony: A Reconfiguration, in the Politics of International Law” in Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 228–9.

<sup>30</sup> Koskenniemi, “The Fate of Public International Law” (n. 25) 355.

<sup>31</sup> See e.g. Cedric de Coning, “The Coherence Dilemma in Peacebuilding and Post-Conflict Reconstruction Systems” (2009) 8 *African Journal on Conflict Resolution* 85. The author acknowledges the distinction between operational fragmentation or incoherence and legal fragmentation, and the link between these two areas will be the subject of further study.

<sup>32</sup> See e.g. Stahn, “Mapping the Discipline(s)” (n. 2) 105. See also Carsten Stahn, “*Jus Post Bellum: Mapping the Discipline(s)*” (2008) 23 *American University International Law Review* 332; Carsten Stahn, “*Jus ad Bellum, Jus in Bello, ... Jus Post Bellum?* Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 921; Boon, “The Future of the Law of Occupation” (n. 9) 23, arguing “While the scope and content of *jus post bellum* are only developing, a significant contribution of a *jus post bellum* would be to fill existing gaps and establish a uniform legal regime applicable to the exercise of public authority during transitions.”

<sup>33</sup> See Bell, “Post-Conflict Accountability” (n. 4) (describing norm development and institutional innovation to meet particular post-conflict accountability needs).

compliance. Transitions to peace are delicate situations that require nuanced reactions to complicated problems. In these situations, it is vital to avoid “checkerboarding,” or the inconsistent application of rules without a grounding principle—where like cases are not treated alike.<sup>34</sup>

The *jus post bellum* framework offers a space for devising a context-specific, comprehensive, and coordinated approach to post-conflict peacebuilding.<sup>35</sup> This is critical for successful peacebuilding, where there is often a lack of effective coordination and cohesive strategy. Coherence and coordination of international and domestic policies in post-conflict situations—including between and within international and domestic actors and organizations—remains one of the biggest challenges in peacebuilding.<sup>36</sup> Coherence is important because it provides consistency, which legitimates and helps induce compliance with such norms.<sup>37</sup> However, coherence demands a nexus in logic and in practice.<sup>38</sup> The lack of coherence in peacebuilding can be a contributing factor to the high rate of failed peace agreements.<sup>39</sup> In order to promote operational coherence, it is necessary to create an overarching peacebuilding strategy to provide various peacebuilding agents with a framework or benchmark.<sup>40</sup>

*Jus post bellum* can provide the legal backdrop and normative framework for such strategies. The normative framework of *jus post bellum* can provide the needed coherence and determinacy in the post-conflict legal landscape. The legal clarification that comes with the articulation of laws and norms within the *jus post bellum* framework can feed into greater strategic coherence, as interveners better understand the legal framework of peacebuilding. Defining and applying the *jus post bellum* framework could help ensure the best policy approach is taken in a given context, and could help facilitate a stable transition to peace.<sup>41</sup> *Jus post bellum* could also help improve relational coherence between different laws and provide a space for conceptual grounding of the otherwise disparate and increasingly fragmented<sup>42</sup> legal landscape that arises in post-conflict situations. It expands traditional “binary” rules of international humanitarian law, bringing it into closer conformity with the needs of modern post-conflict

<sup>34</sup> Ronald Dworkin, *Law's Empire* (9th edn, Harvard University Press 1986) 179.

<sup>35</sup> Chetail, *Post-Conflict Peace-Building* (n. 9) 18.

<sup>36</sup> Chetail, *Post-Conflict Peace-Building* (n. 9) 26.

<sup>37</sup> Thomas Franck, “Legitimacy in the International System” (1988) 82 *American Journal of International Law* 705, 741.

<sup>38</sup> Franck, “Legitimacy in the International System” (n. 37) 742. Franck provides a case study of self-determination law and how it was delegitimized through incoherent application, at 743–9.

<sup>39</sup> de Coning, “The Coherence Dilemma” (n. 31).

<sup>40</sup> de Coning, “The Coherence Dilemma” (n. 31) 97.

<sup>41</sup> See e.g. Bowden et al., *The Role of International Law in Rebuilding Societies* (n. 13) 10–11, noting that “post-conflict situations are often characterized by a vacuum of legitimate authority, including formal legal authority, which can be both a cause and a symptom of conflict.” They also note that “abstract peace-building concepts such as ‘democracy,’ ‘justice’ and the ‘rule of law’” can be problematic and ineffectual. *Jus post bellum* could arguably face similar challenges, including particularized and imperfect understanding and application. It is hoped that by defining and debating *jus post bellum* as a concept, some of these risks can be foreseen and mitigated.

<sup>42</sup> See e.g. Martti Koskenniemi, “The Politics of International Law 20 Years Later” in Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 65; Boon, “Obligations of the New Occupier” (n. 2) 58 (noting that in post-conflict situations where international organizations and interveners have a transformative goal, further difficult legal questions arise which the current international law frameworks are insufficient to address.).

situations.<sup>43</sup> It is suggested here that the *jus post bellum* paradigm, with its focus on sustainable peace, provides a nexus between its underlying laws and how they are applied during the transition from conflict to peace.

From a practical perspective, *jus post bellum* can also be a site of coordination and can provide an interpretive framework for practitioners and institutions working in post-conflict situations. *Jus post bellum* can provide overarching principles and useful tools for practitioners and policymakers and a framework focused on sustainable peace against which laws and policies can be interpreted. *Jus post bellum* provides a space for stakeholders in distinct legal regimes to communicate about common issues and regime conflicts. Moreover, it provides a space to develop synergies between international and domestic laws and policies.<sup>44</sup> This broad, multi-faceted concept of *jus post bellum* can better capture the complicated relationships between law, practice, and society that permeate post-conflict transitions.

### III. Constitutional Peace Agreements as a Framework for *Jus Post Bellum*

The study of constitutional peace agreements informs this broad concept of *jus post bellum*. Constitutional peace agreements can play analogous roles in fostering peace and transforming society after armed conflict. They are similarly sources of norms, interpretation, coordination, and discourse that aim to create peaceful means of conflict resolution and develop state institutions that can strengthen a peaceful society. As discussed in the sections below, the success of the process of negotiating, drafting, and implementing a constitutional agreement can depend on factors relating to the openness of the process, degrees of inclusion and exclusion, the legal form of a resulting agreement, and the approach of outside interveners.

Peace agreements are increasingly used as the basis for constitutions in post-conflict societies—the constitution and peace-agreement drafting processes frequently coincide and can be synonymous or closely related.<sup>45</sup> Peace agreements often represent a “constitutional moment” in the life of a country and may explicitly or implicitly serve as a constitution for states emerging from conflict. As constitutions or transitional constitutions,<sup>46</sup> they can create the institutional framework that will guide the operationalization of peacebuilding and modify the political environment to allow the conflict to play out in non-violent, political arenas. Constitutional peace agreements provide the normative framework that will shape the future application of domestic and international law. They can also internally and externally legitimize the norms and frameworks they create based on their constitutional design. Post-conflict constitution building can

<sup>43</sup> Boon, “Obligations of the New Occupier” (n. 2) 59. In this regard, it can help to balance asymmetries between different types of armed conflict as defined in IHL.

<sup>44</sup> See e.g. Chetail, *Post-Conflict Peace-Building* (n. 9) 18 (arguing that “the delicate transition from war to peace is located at the intersection of various branches of law, as much international as domestic law”).

<sup>45</sup> See e.g. Hallie Ludsin, “Peacemaking and Constitution-Drafting: A Dysfunctional Marriage” (2011) 33 *University of Pennsylvania Journal of International Law* 239; Kirsti Samuels, “Post-Conflict Peace-Building and Constitution-Making” (2006) 6 *Chicago Journal of International Law* 663, 2.

<sup>46</sup> Ruti Teitel, “The Role of Law in Political Transformation” (1997) 106 *Yale Law Journal* 2009, 2075.

significantly impact the potential for sustainable peace in ways that reflect the broad concept of *jus post bellum* discussed above: they provide normative and interpretive frameworks and sites of coordination and discourse.

For example, post-conflict constitutions offer an opportunity to create new governance frameworks and engage in important social dialogue.<sup>47</sup> A transitional constitution both trenches and modifies the consensus that prevails at the end of a conflict.<sup>48</sup> As Samuels writes:

[P]articipatory and inclusive constitution building, in particular, can provide a forum and process for the negotiation of divisive issues in postwar societies, and it can bring fragmented elements of a state together to think about a future vision of the state and to build a road map on how to get there. Constitution building can also provide basic democratic education to the population, and ensure that the governance structure has legitimacy and local ownership.<sup>49</sup>

The societal changes in political and institutional culture as well as the creation and change in state institutions fostered by constitutional peace agreements are difficult and require complex, wide-ranging, and long-term strategies.<sup>50</sup> They depend on behavioral and normative changes as well as altered expectations of people across society.<sup>51</sup>

However, as discussed further below, constitutional peace agreements are inherently problematic and face significant challenges in achieving the desired transformation. Whether constitutional peace agreements will be successful depends, inter alia, on how the constitutions are drafted, structured, and implemented. The conflict-driven, negotiated nature of constitutional peace agreements means that they are often the result of political trade-offs over power rather than deliberated in the interest of, or with the input of, the public.<sup>52</sup> To increase the potential positive impact of the new political framework contained in the constitution, it is important to focus on how post-conflict constitutions are made and implemented.<sup>53</sup> Factors including who is involved in the drafting process and who is left out; competing and often irreconcilable goals; different implementation intentions; and the potential return to violence if compromises are not properly struck can threaten the creation of sustainable peace and a legitimate post-conflict state.<sup>54</sup> Therefore, this chapter will focus not only on the influence of constitutional peace agreements on *jus post bellum* from a content perspective, but will also examine issues of process, including who sits at the negotiating table and the “bargain” inherent in any constitutional peace agreement. In so doing, this chapter will present a number of suggested principles or norms for *jus post bellum* derived from a close examination of constitutional peace agreements.

<sup>47</sup> Kirsti Samuels, “Postwar Constitution Building: Opportunities and Challenges” in Roland Paris and Timothy Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Taylor & Francis 2009) 173.

<sup>48</sup> Teitel, “The Role of Law in Political Transformation” (n. 46) 2075.

<sup>49</sup> Samuels, “Postwar Constitution Building” (n. 47) 174–5.

<sup>50</sup> Samuels, “Postwar Constitution Building” (n. 47) 173; See also Samuels, “Post-Conflict Peace-Building” (n. 45) 4.

<sup>51</sup> Samuels, “Postwar Constitution Building” (n. 47) 173.

<sup>52</sup> Bell, *Lex Pacificatoria* (n. 5) 152–3; Samuels, “Postwar Constitution Building” (n. 47) 175.

<sup>53</sup> See e.g. Samuels, “Post-Conflict Peace-Building” (n. 45) 5.

<sup>54</sup> Samuels, “Postwar Constitution Building” (n. 47) 174–5.

## A. Constitutional peace agreements as source of laws, norms, and principles

Constitutional peace agreements provide a useful, if incomplete, indication of legal and normative issues that are critical to fostering sustainable peace after conflict. Individual agreements as well as peace agreements as an aggregate body of documents can serve as guides or frameworks for substantive norms that shape the post-conflict state. To be sure, the process of negotiation can limit these normative indicators, as discussed below. Nevertheless, they are a starting point for developing a context-specific *jus post bellum* paradigm. This section provides some observations on norms that are commonly included in peace agreements, based on an examination of a United Nations (UN) peace agreement database. This empirical data shows issues that are considered critical to fostering peace, as well as important areas where peace agreements are silent.

According to the data, the most common substantive issues included in peace agreements are:<sup>55</sup>

1. Security Arrangements<sup>56</sup> (69%)
2. Rule of Law<sup>57</sup> (53%)
3. Socio-Economic and Development Issues<sup>58</sup> (50%)
4. Humanitarian and Refugee Issues (48%)
5. Military (Security) (47%)
6. Statehood, Territory, and Identity (40%)
7. Ceasefire/Cessation of Hostilities (Security) (38%)
8. Justice Sector (RoL) (34%)
9. Constitution Issues (34%)
10. Electoral Framework (33%)
11. Human Rights (RoL) (31%)
12. Media and Communication (30%)
13. Disarmament, Demobilization, and Reintegration (Security) (23%)

<sup>55</sup> These numbers were gleaned from an examination of the UN Peacemaker Database of Peace Agreements, a reference tool with over 750 documents broadly considered as peace agreements and related material. The data has been coded by the UN Peacemaker project. The information was downloaded and analyzed by the frequency of particular codes. These numbers are only meant to be indicative of trends based on coding done by the authors of the database, not the author of this article. More detailed information about how the coding was done or according to what criteria is available online at <http://peacemaker.un.org/document-search> (accessed 9 July 2013). Moreover, numerical evaluations should be treated with caution, given the complexity of how peace agreements are drafted, categorized, and developed. See e.g. Christine Bell and Catherine O'Rourke, "The People's Peace? Peace Agreements, Civil Society, and Participatory Democracy" (2007) 28 *International Political Science Review* 293, 297.

<sup>56</sup> According to the UN database, this is inclusive of the following sub-categories: Ceasefire/Cessation of Hostilities; DDR; SSR; Police; and Military. These sub-categories are also reflected independently in the data.

<sup>57</sup> According to the UN database, this is inclusive of the following sub-categories: Transitional Justice/Truth and Reconciliation; International Justice and Accountability; Amnesties/Immunities; Justice Sector; and Human Rights. These sub-categories are also reflected independently in the data.

<sup>58</sup> According to the UN database, this is inclusive of the following sub-categories: Wealth/Revenue Sharing and Natural Resources. These sub-categories are also reflected independently in the data.



14. Political Power-sharing (22%)
15. Transitional Justice/Truth and Reconciliation (RoL) (22%)
16. Police (Security) (22%)
17. Transitional Political Arrangements (21%)
18. Wealth/Revenue Sharing (Development) (18%)
19. Minorities, Indigenous Peoples, and Other Groups (17%)
20. Women and Gender Issues (16%)
21. Amnesties/Immunities (RoL) (16%)
22. Natural Resources (Development) (15%)
23. Children (12%)
24. Security Sector Reform (Security) (11%)
25. Traditional Actors and Conflict Resolution Mechanisms (10%)
26. International Justice and Accountability (RoL) (8%)

This data is reflected in Figure 20.1 below.

The data shows a prioritization of issues. For example, security issues are more often included than rule of law or other political issues. Humanitarian and refugee issues (48%) are more common than justice sector reform (34%) or constitutional issues (34%). This seems to reflect an immediate prioritization of creating a secure, stable environment before implementing large-scale legal and political reforms. Socio-economic issues (50%) are more frequently included than transitional justice issues (22%), which could signal a priority of development and economic issues over truth and reconciliation or justice for past crimes. Human rights (31%) and media and communication issues (30%) are fairly equally represented, which is surprising given the relative prevalence of human rights in post-conflict discourse. It is also notable that norms dealing with special interest groups are among the least common: minorities (17%), women (16%), children (12%), and traditional actors (10%). As discussed below, these issues are shaped by who sits at the table and the specific context of a given conflict, and may reflect a lack of inclusion in peace negotiations and agreement drafting.

The content of the agreements reflects international legal norms that are important for post-conflict transitions. However, in some ways, substantive peace agreement norms might be distinct from what is dictated by international law, and could, in fact, help fill gaps in international law. Bell argues that peace agreements are not only shaped by international law, but shape international law by both underwriting its moral claims and notions of ideal institutions. She argues that peace agreements go further than what international law requires by addressing wider notions of justice:

[B]y drawing on international law notions of “best practices,” peace agreements underwrite international legal movement towards ideal-type institutional arrangements. In the case of undoing the past, as domestic mechanisms move towards greater accountability, they underwrite the moral stance of international criminal

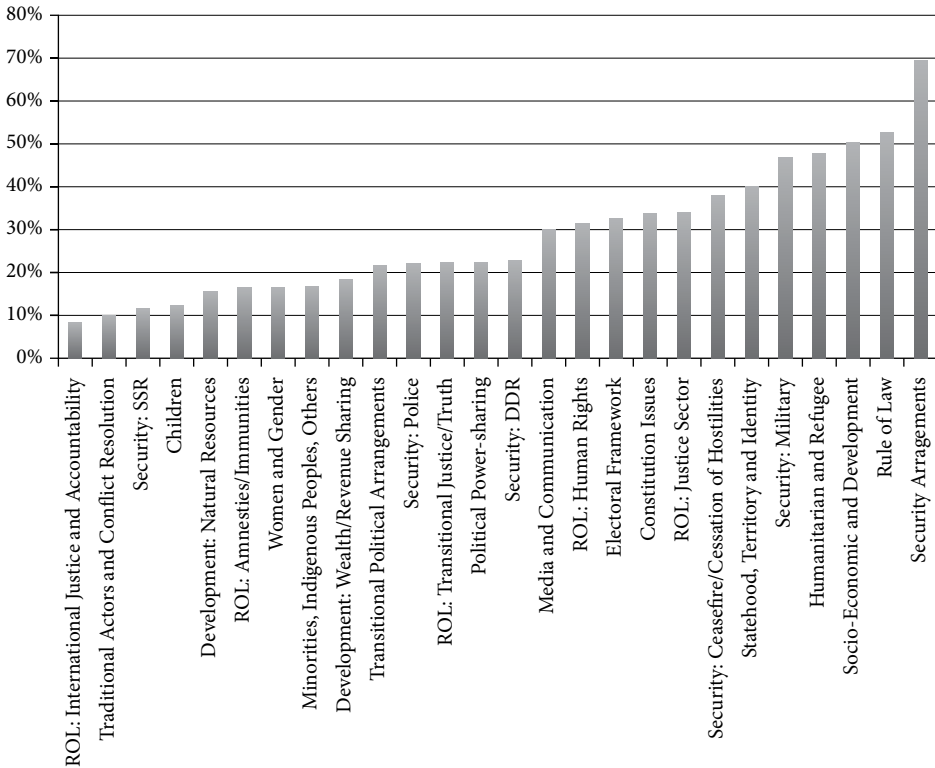


Fig. 20.1 Substantive Provisions in Peace Agreements by Percent

law as important but also practical. However, they also address the wider notions of social truth and the needs of victims in ways that international law has only recently begun to address.<sup>59</sup>

For example, Bell argues that because peace agreements reflect micro-bargains over the meta-conflict, peace agreements might provide for ethnic balance in institutions, while international soft law standards about institutional best practices do not deal with the question of ethnic balance.<sup>60</sup> Other specific areas where international law could learn from peace agreements include: goals for dealing with the past that move beyond accountability/impunity dyad to include notions of restorative justice and reconciliation; the inclusion of a structural place for civil society in peace negotiations; and the impact of peacebuilding operations on civil society.<sup>61</sup> This could be an important source of normative and contextual information for *jus post bellum* that would be missed by looking solely at international law. Indeed, this is a reason why peace agreements can serve as a useful framework for *jus post bellum*—they can go further than the law and address issues that are critical for a holistic approach to the transition to peace.

<sup>59</sup> Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 314.

<sup>60</sup> Bell, *Peace Agreements and Human Rights* (n. 59) 229–30.

<sup>61</sup> Bell, *Peace Agreements and Human Rights* (n. 59) 315–17.

## B. Implementing future institutions

Constitutional peace agreements are drafted with the aim of fostering sustainable peace both through the creation of institutions and governance structures and by advancing new social mores based on constitutionalism. There is significant strain on the ability of the peace agreement to accomplish the successful creation and implementation of such institutions. The following section describes some of the numerous practical challenges involved in creating and implementing new institutions, as well as fostering social change.

As discussed above, one of the most common features of peace agreements is the establishment and design of new governance structures that aim to guide the state into its new peaceful future. However, the creation of new institutions does not necessarily ensure sustainable peace and the implementation of the institutions is fraught with difficult challenges. Changes to government institutions that aim to subsequently change fundamental societal norms face significant implementation challenges, such as “path-dependency, political transaction costs, and inertia.”<sup>62</sup>

There are important questions about how to implement institutions, which institutions are best to ameliorate a particular conflict, and through what processes those configurations are produced.<sup>63</sup> Sequencing is one example. The choice of one process, such as elections, can both politicize and take attention away from the central issues of the peace process.<sup>64</sup> Personnel is another. Selecting new personnel that are not associated with parties to the conflict while allowing some limited room for reintegration of armed fighters into society can be difficult.<sup>65</sup> Other questions that might arise include: How do you fight an increase in crime that might come after the implementation of peace agreements and de-militarization of the country? What is an appropriate timeline for the implementation of new institutions? For how long should the UN be involved? What level of oversight should UN monitors have? How do you overlap old security forces that are to be deconstructed and phased out with the creation of new security forces? This becomes particularly complicated when the government, charged with managing these changes, is party to the conflict and may be displaced following elections.<sup>66</sup> This could threaten both the impartiality and continuity of these changes.

There might also be constraints relating to model bias, historical bias, or pre-existing institutional capacity. For example, a country might adopt a constitutional model based on a bias for models adopted by other countries in their regional or cultural zone or the model used by a former colonial power.<sup>67</sup> There might be a bias for a constitutional

<sup>62</sup> Samuels, “Post-Conflict Peace-Building” (n. 45) 9–10.

<sup>63</sup> Donald Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (2008) 49 *William & Mary Law Review* 1213.

<sup>64</sup> Alvaro De Soto and Graciana del Castillo, “Implementation of Comprehensive Peace Agreements: Staying the Course in El Salvador” (1995) 1 *Global Governance* 189, 190.

<sup>65</sup> De Soto and del Castillo, “Implementation of Comprehensive Peace Agreements” (n. 64) 193.

<sup>66</sup> See e.g. De Soto and del Castillo, “Implementation of Comprehensive Peace Agreements” (n. 64) 194–5.

<sup>67</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1227–8.

model proposed by an influential advisor, who might recommend a model familiar to her but unfamiliar to the domestic drafters.<sup>68</sup> A historical bias might prompt a constitution designed to avoid problems from the country's past, or based on past constitutional models, the effects of which might be misunderstood by the drafters.<sup>69</sup> Pre-existing institutional capacity might make certain models more difficult. For example, federal systems might be difficult to create if there are no pre-existing regional institutions.<sup>70</sup> Moreover, new formal institutions will have to be able to co-exist and not interfere with existing informal institutions.<sup>71</sup>

Financial realities must also be contended with, especially in post-conflict states with severely weakened economies. Some provisions included in peace agreements carry financial implications that are beyond the financial capacity of developing countries emerging from conflict.<sup>72</sup> This puts additional importance on the ability of the economy to recover after the conflict. A stable economy is essential for the reintegration of people into society, which can be impossible in a stagnant economy. However, prioritizing economic austerity can mean sacrificing finances needed for reconciliation and peace consolidation programs. This can cause a dependency on foreign funding, which can have a significant impact on the implementation of peace agreements and increase the power of foreign states in those contexts.<sup>73</sup>

### C. Constitutional peace agreement processes: intervention and inclusion

Using peace agreements as a framework for *jus post bellum* involves paradoxes that relate to the process of how they are developed and drafted. Constitutional peace agreements are driven by conflict. This impacts who authors the agreement, what the agreements say, and how they are implemented. Peace agreements are ultimately the result of political peace negotiations, which stands in tension with constitutional methods of reconciliation. However, constitutional peace agreements are meant to foster peace and both shape and inform a new, peaceful society. Thus, it is important also to consider "how" the constitutions are drafted and implemented, in addition to their substantive provisions.<sup>74</sup>

Vivien Hart argues that process is a critical element for legitimacy. She argues that "the legitimacy of constitutional agreements [. . .] depends upon [. . .] a process both open-ended and open to participation."<sup>75</sup> According to Hart, elite-made constitutions

<sup>68</sup> Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States" (n. 63) 1227–8.

<sup>69</sup> Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States" (n. 63) 1228.

<sup>70</sup> Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States" (n. 63) 1228.

<sup>71</sup> Samuels, "Post-Conflict Peace-Building" (n. 45) 10.

<sup>72</sup> De Soto and del Castillo, "Implementation of Comprehensive Peace Agreements" (n. 64) 197.

<sup>73</sup> De Soto and del Castillo, "Implementation of Comprehensive Peace Agreements" (n. 64) 197–8.

<sup>74</sup> For example, while the South African and Iraqi constitutions might have overlap in certain provisions, the method by which each constitution was negotiated and drafted is quite distinct. Ludsin, "Peacemaking and Constitution-Drafting" (n. 45).

<sup>75</sup> Vivien Hart, "Constitution-Making and the Transformation of Conflict" (2001) 26 *Peace and Change* 153, 166.

will be seen as lacking a cultural element of legitimacy, because the process, not just the final document, is seen as flawed.<sup>76</sup> Constitutions drafted through a peace agreement negotiation process are fraught with challenges of effectively balancing multiple interests.<sup>77</sup> The resulting agreement is often heavily negotiated rather than deliberative.<sup>78</sup> Building compromise into the design of a constitution could mean that difficult trade-offs are deferred rather than resolved through the peace agreement.<sup>79</sup> Moreover, the negotiation process might empower some actors and disempower others, which could ultimately lead to increased division in society and potentially a resurgence of violence.<sup>80</sup> The process might further divide negotiating parties rather than create a unified vision for the future, which could undermine peace efforts.<sup>81</sup>

The drafting process is multi-dimensional and differs for each constitutional peace agreement. There are myriad ways constitutional processes can work and endless variation in completing the tasks necessary for post-conflict constitution making. Processes that work in some contexts, such as promoting dialogue and debate over constitutional issues, could derail constitutional reform in other contexts and increase polarization in divided societies.<sup>82</sup> These processes are particularly sensitive in post-conflict settings where constitution making is intended to end conflict or contribute to sustainable peace. In these situations, one process might serve a double peacebuilding purpose. In addition to creating a governance and constitutional framework, the process might also define agendas for reform, promote national identity, promote the national and international legitimacy of the constitution, or educate the public about democratic theory and practice.<sup>83</sup> The sections below will discuss this by analyzing issues of intervention, inclusion, and balancing priorities.

### *Interventions*

Constitutional peace agreement processes do not occur in a vacuum. Procedural choices can affect the approach of the negotiators, including their willingness to compromise and the balance between persuasion and pretense.<sup>84</sup> There are a number of diverse factors that influence the process of negotiation and drafting, including the nature of leadership and elites; the prior regime; existing institutions and law; participation in the drafting from the broader public; unresolved ethnic cleavages in the society; social welfare inequalities; group identification and interaction; and broader issues of domestic and regional history and context.<sup>85</sup> All of these factors are interactive and

<sup>76</sup> Vivien Hart, *Democratic Constitution Making* (United States Institute of Peace 2003) 3.

<sup>77</sup> Vicki C. Jackson, "What's in a Name? Reflections on Timing, Naming and Constitution-Making" (2008) 49 *William & Mary Law Review* 1249, 1285.

<sup>78</sup> Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States" (n. 63) 1230.

<sup>79</sup> Jane Stromseth, "Post-Conflict Rule of Law Building: The Need for A Multi-Layered, Synergistic Approach" (2008) 49 *William & Mary Law Review* 1443, 1449.

<sup>80</sup> Stromseth, "Post-Conflict Rule of Law Building" (n. 79) 1449.

<sup>81</sup> Samuels, "Postwar Constitution Building" (n. 47) 179.

<sup>82</sup> Michele Brandt et al., *Constitution-Making and Reform: Options for the Process* (Interpeace 2011) 2.

<sup>83</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 2.

<sup>84</sup> Jennifer Widner, "Constitution Writing in Post-Conflict Settings: An Overview" (2008) 49 *William & Mary Law Review* 1513, 1536.

<sup>85</sup> Jackson, "What's in a Name?" (n. 77) 1271.

impact the processes of negotiation and drafting, including decisions about who sits at the table, perhaps the most critical factor in the drafting process.

Who sits at the table often includes external actors. International organizations, institutions, and states increasingly play a significant role in peace negotiations and post-conflict constitution drafting.<sup>86</sup> The involvement of international interveners is complex. In the case of brokering peace agreements, the international influence can vary by actor, modality, degree, and over time.<sup>87</sup>

Various international actors, including the United Nations (UN), foreign occupying powers, regional organizations, groups of states, or individual actors, can exercise influence at different stages of the process.<sup>88</sup> Moreover, these actors can play a variety of roles, such as instigating and setting a framework for the constitutional process but leaving the details to domestic actors (as in East Timor);<sup>89</sup> intervening throughout the process such as by determining the composition of drafting bodies and procedural frameworks or influencing how constitutional committees undertake their work (as in Iraq);<sup>90</sup> or by brokering a peace agreement that becomes the basis for the constitution (as in Sudan).<sup>91</sup>

Typically, the external influence is provided through expert technical assistance in the drafting process,<sup>92</sup> although it may also include political and strategic help; legal and human rights advice; capacity building and institutional development; or logistical, administrative, and financial support.<sup>93</sup> There might also be international involvement as a “check” on domestic drafting processes in order to “guarantee” protection of different minority groups.<sup>94</sup>

With respect to degree, influence on the procedure and substance of the constitutional peace agreement can be total, partial, or marginal.<sup>95</sup> “Total” influence occurs where the *pouvoir constituant*, or the people of a nation as a political body, is essentially excluded from the process. This happened in Bosnia-Herzegovina, where the constitution was

<sup>86</sup> Jackson, “What’s in a Name?” (n. 77) 1296; Philipp Dann and Zaid Al-Ali, “The Internationalized *Pouvoir Constituant*—Constitution-Making Under External Influence in Iraq, Sudan and East Timor” (2006) 10 *Max Planck Yearbook of United Nations Law* 423, 424, 427; Vijayashri Sripathi, “UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989–2011” (2012) 19 *International Peacekeeping* 93 (noting that “since 1989, the UN Security Council has mandated peace missions to assist 12 states in writing new constitutions: Burundi, Namibia, Rwanda, Somalia, Sudan, South Sudan, Afghanistan, Cambodia, East Timor, Nepal, Kosovo and Iraq. It has mandated peace missions to assist states such as Sierra Leone and Liberia in reforming their existing constitutions. The UN Development Program (UNDP) has offered constitutional support to Bhutan, Ecuador, Eritrea, Gambia, Guyana, Malawi, Maldives, Nauru, Solomon Islands, Tokelau, Zambia and Zimbabwe. In 2011 the UN extended its offer of constitutional assistance to new Arab governments in Egypt, Tunisia and Libya.” Internal citations omitted.) See also Ulrich K. Preuss, “Perspectives on Post-conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization” (2006) 51 *New York Law School Law Review* 467, 491–3.

<sup>87</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 428.

<sup>88</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 430.

<sup>89</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 434.

<sup>90</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 442.

<sup>91</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 448.

<sup>92</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 455.

<sup>93</sup> UN Secretary General, “Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes” (UN Rule of Law 2009) 3 <[http://www.unrol.org/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf)> (accessed 18 July 2013) (UN Guidance Note).

<sup>94</sup> Jackson, “What’s in a Name?” (n. 77) 1298.

<sup>95</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 428.

appended to an international peace agreement negotiated by the presidents of the warring parties.<sup>96</sup> On the other end of the spectrum, international actors have a “marginal” influence when domestic actors voluntarily seek out their advice, which allows for the will of the *pouvoir constituant* to be expressed. The more complicated case is when there is “partial” international influence. In those cases, international actors heavily influence the constitutional process but the actual drafting power lies with domestic actors, as occurred in South Africa and much of Eastern Europe.<sup>97</sup> This is the most common type of influence, where the *pouvoir constituant* is neither completely excluded nor entirely whole.<sup>98</sup> This, for example, is how the process worked in East Timor—the UN Transitional Administration in East Timor (UNTAET) provided the legal framework for the constitutional process through Regulation 2001/2,<sup>99</sup> but Timorese did the actual drafting. This is also the kind of assistance that is advocated by the UN.<sup>100</sup>

The influence of outside actors can also vary over time. When this influence or attention to the process wanes, local powerful elites can push for relaxing or rolling back terms of the peace agreement. This happened in El Salvador, where there was a push to relax constitutional reforms as the international pressure waned after elections.<sup>101</sup>

The scope of international influence on post-conflict constitutions appears to be increasing, in particular *vis-à-vis* the UN. Over time, the UN has begun to explicitly recognize constitution drafting as a conflict resolution and prevention mechanism. The UN Secretary-General, for example, has stated that “UN engagement in and assistance to constitution-making increasingly is a core component of the Organization’s peacebuilding and statebuilding strategy [. . .].”<sup>102</sup> The UN Secretary-General has also explicitly outlined “Guiding Principles” for its assistance in constitution drafting. They are:

1. Seize the opportunity for peacebuilding.
2. Encourage compliance with international norms and standards.
3. Ensure national ownership.
4. Support inclusivity, participation, and transparency.
5. Mobilize and coordinate a wide range of expertise.
6. Promote adequate follow-up.<sup>103</sup>

Its influence is more than just technical, as the UN pushes for particular substantive norms to be included in the constitutions—its second priority is to encourage compliance with international norms and standards. The Secretary-General has explicitly called for the UN to:

<sup>96</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 429.

<sup>97</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 429.

<sup>98</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 430.

<sup>99</sup> UNTAET, “On the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor” (2001) UN Doc. UNTAET/REG/2001/2.

<sup>100</sup> UN Guidance Note (n. 93).

<sup>101</sup> De Soto and del Castillo, “Implementation of Comprehensive Peace Agreements (n. 64) 190.

<sup>102</sup> UN Guidance Note (n. 93) 6.

<sup>103</sup> UN Guidance Note (n. 93) 2.

[C]onsistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues. The UN should be the advocate of the standards it has helped to develop. Accordingly, the UN should engage national actors in a dialogue over substantive issues, and explain the country's obligations under international law and the ways in which they could be met in the constitution.<sup>104</sup>

The UN position emphasizes open and participatory processes, human rights, accountability, and anti-corruption measures.<sup>105</sup> Increasingly, the UN is also concerned with protecting the rights of women and minorities.<sup>106</sup> It has developed outreach, consultation, and education programs so that citizens are informed about the new norms of constitutionalism and can comment on draft provisions. The UN has also educated drafters on issues like gender and equality and has pushed the "Paris Principles"—best practices and guidelines on national human rights institutions. The UN also audits draft constitutions. Combined, these efforts arguably have a significant impact on the outcome of the drafting process.<sup>107</sup>

These third parties bring an external group of interests and concerns to the table, some of which might detract from the legitimacy and effectiveness of the resultant constitution. For example, in constitutional negotiations between Sudan and South Sudan, the United States and Norway reportedly "applied significant pressure on the international mediators to tilt a compromised proposal in favor of the South" in order to serve their respective Christian communities and move away from the application of Islamic Sharia law. This caused a negative reaction from the Sudanese delegate, criticism of the international mediators, and relegation of the international mediators and experts to a more background role.<sup>108</sup> International involvement can impact the substance and process of the constitution, and can have a negative impact on the legitimacy of the constitution.<sup>109</sup> The risk for the de-legitimizing effects is greater when the influence comes from a single state, which would inevitably act in its own interests, as opposed to influence exerted by multilateral institutions.<sup>110</sup> Interveners' timetables and agendas often dominate the process and usually prioritize conflict resolution over constitution drafting, a prioritization that can have negative results.<sup>111</sup> Although they may bring expertise and guidance in critical areas of negotiating and drafting constitutional peace agreements, at times, their positions will be largely uniformed about the historic context of the conflict.

In practice, interventions can be marred by a number of factors. These factors can include issues of inclusion and competing interests, such as:

<sup>104</sup> UN Guidance Note (n. 93) 4.

<sup>105</sup> Sripati, "UN Constitutional Assistance Projects in Comprehensive Peace Missions (n. 86) 94.

<sup>106</sup> Sripati, "UN Constitutional Assistance Projects in Comprehensive Peace Missions (n. 86) 94; UN Guidance Note (n. 93) 4.

<sup>107</sup> Sripati, "UN Constitutional Assistance Projects in Comprehensive Peace Missions (n. 86) 94–5.

<sup>108</sup> Dann and Al-Ali, "The Internationalized Pouvoir Constituant" (n. 86) 446.

<sup>109</sup> Dann and Al-Ali, "The Internationalized Pouvoir Constituant" (n. 86) 456–7.

<sup>110</sup> Dann and Al-Ali, "The Internationalized Pouvoir Constituant" (n. 86) 456.

<sup>111</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 260.



## Inclusion:

- engaging primarily with political elites and warring factions;
- favoring one local faction over another;
- failure to develop capacity of national actors and promote national ownership;<sup>112</sup> and
- excluding meaningful participation of or consultation with the public.<sup>113</sup>

## Competing interests:

- a lack of doctrinal or practical guidance for constitutional assistance;
- treating constitution making primarily as a technical exercise;
- stressing electoral solutions to problems of representation and legitimacy;<sup>114</sup>
- the imposition of tight timetables; and
- concluding assistance before the constitution is adopted.<sup>115</sup>

The risk of illegitimacy stemming from the practice of international interventions is thus tied to the extent to which international interveners undermine local ownership over the process and properly balance competing priorities and concerns. The UN recognizes the importance of local ownership, inclusive processes, and context-specific approaches.<sup>116</sup> However, in practice this might be difficult to achieve, especially considering post-conflict states' possible dependency on UN financial and logistical support to carry out constitution drafting.<sup>117</sup> Assistance from the UN in carrying out these and other drafting processes might create dependencies on the UN and other donors that shift the balance of power away from the national.

*Inclusion/exclusion*

Who sits at the table drives the adoption of substantive norms and the perceived legitimacy of the process.<sup>118</sup> Process choices determine who has a voice in deciding the content of an agreement and whether diverse societal interests are taken into account. These choices also influence whether people feel included in—and therefore trust—the resulting constitutional processes.<sup>119</sup> Traditionally, it has been understood that the *pouvoir constituant* is the only entity with the force to create a new political order *vis-à-vis* a constitution.<sup>120</sup> Therefore, the multiplicity of actors at the peace negotiation table—few of which purport to represent “the people”—presents a unique problem when a constitution arises out of a peace agreement. Can these actors legitimately create a constitution that binds the (largely unrepresented) people to a new social contract?

<sup>112</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 322–7.

<sup>113</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 456–7.

<sup>114</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 322–7.

<sup>115</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 322–7.

<sup>116</sup> UN Guidance Note (n. 93) 4.

<sup>117</sup> For example, broad consultations in rural areas can be difficult and expensive to carry out, as can translation of necessary information into various local languages.

<sup>118</sup> Paul R. William, *The Constitution Making Process* (Public International Law and Policy Group 2006) 9, 30 (underscoring that the inclusiveness of the constitution-drafting process bears on its legitimacy). See also Samuels, “Post-Conflict Peace-Building” (n. 45) 29, on unrepresentative constitution.

<sup>119</sup> This underscores the importance of the “publicness” of constitutional peace agreements.

<sup>120</sup> Dann and Al-Ali, “The Internationalized *Pouvoir Constituant*” (n. 86) 426.

Vivien Hart has argued that there are practical and moral imperatives to allowing the broader public to have a voice in the negotiation of a post-conflict constitution. She argues that excluding these voices from the process can risk rejection of the resulting constitution.<sup>121</sup> She notes that with modern constitutions, there is a demand for democratic procedure, transparency, and accountability in the constitution-making process.<sup>122</sup> Moreover, she argues, democratic norms give rise to a moral claim to participation, based on a concept of shared authorship.<sup>123</sup>

David Lanz argues that who sits at the table is driven by practical and normative requirements that are not always in conformity with one another. These requirements are also not always in conformity with ideals of constitution drafting. Practical requirements, he argues, relate to whether the participation of a given actor increases the likelihood of “reaching a sustainable peace settlement.”<sup>124</sup> Normative factors include whether “the participation of a given actor [is] consistent with the values of international mediators and sponsors of peace negotiations.”<sup>125</sup> How these factors interact determines who gets to participate in peace negotiations, he claims. International mediators have a political motive to only include key stakeholders in the peace process who will add value and increase the chance of reaching a sustainable settlement, since sustainable settlements reflect positively on the mediator’s reputation.<sup>126</sup> Negotiators are primarily concerned with reaching an agreement and bringing a stop to fighting.<sup>127</sup> Introducing members of civil society, interest groups, or human rights groups can complicate and detract from this goal.<sup>128</sup> Normative factors of inclusion include fostering democratic peace and popular support for peace, which weigh in favor of including civil society actors and broad segments of society.<sup>129</sup> These normative factors of inclusion consider that “public participation in peace negotiations enhances the legitimacy of both the process and the outcome, effectively increasing the likelihood of durable peace.”<sup>130</sup>

Christine Bell has observed that civil society tends to be involved in peace negotiation processes when the process is primarily internal. Internationally mediated processes, however, tend to approach the problem from an “international relations and violence-focused” paradigm and do not tend to include civil society. She notes that:

Internally driven processes by their nature must preserve the link between politicians and their constituents. Internationally facilitated processes often focus on bringing together those who have directly waged the war, often in secret and isolated locations,

<sup>121</sup> Hart, “Constitution-Making and Transformation” (n. 75) 160.

<sup>122</sup> Hart, *Democratic Constitution Making* (n. 76) 4.

<sup>123</sup> Hart, *Democratic Constitution Making* (n. 76) 4.

<sup>124</sup> David Lanz, “Who Gets a Seat at the Table? A Framework for Understanding the Dynamics of Inclusion and Exclusion in Peace Negotiations” (2011) 16 *International Negotiation* 275, 277.

<sup>125</sup> Lanz, “Who Gets a Seat at the Table?” (n. 124) 277.

<sup>126</sup> Lanz, “Who Gets a Seat at the Table?” (n. 124) 281.

<sup>127</sup> Anonymous, “Human Rights in Peace Negotiations” (1996) 18 *Human Rights Quarterly* 249; Lanz, “Who Gets a Seat at the Table?” (n. 124); Anthony Wanis-St. John and Darren Kew, “Civil Society and Peace Negotiations: Confronting Exclusion” (2008) 13 *International Negotiation* 11, 12–13.

<sup>128</sup> Anonymous, “Human Rights in Peace Negotiations” (n. 127); Lanz, “Who Gets a Seat at the Table?” (n. 124); Wanis-St. John and Kew, “Civil Society and Peace Negotiations” (n. 127) 13.

<sup>129</sup> Lanz, “Who Gets a Seat at the Table?” (n. 124) 282.

<sup>130</sup> Lanz, “Who Gets a Seat at the Table?” (n. 124) 283.

while the skills of those who have waged peace through churches, voluntary associations, women's groups, and trade unions are left at home.<sup>131</sup>

Peace agreement data suggests that the agreements may not be as inclusive as might be ideal. For example, only 9 percent of peace agreements in the UN database provided for national dialogue or consultation mechanisms as part of the implementation arrangements. Twenty-two percent provide for military monitors of implementation, but only 11 percent include civilian monitors. Moreover, in terms of supporting actors, only 13 percent of peace agreements include provisions related to civil society, whereas 40 percent include provisions related to the UN.<sup>132</sup> While this data is not conclusive about the inclusion or exclusion of different groups in peace agreement negotiation and drafting processes, it does suggest that provisions reflecting broad segments of society are not frequently included in peace agreements.

Exclusionary practices can lead to real risks for the durability of a new constitution. As noted above, drafting a constitution during a peace negotiation can limit the participation to representatives of warring factions, given that they are the key audience for peace agreements.<sup>133</sup> Those who get a seat at the table may be seen as those who will have access to power in the future. This can lead to splits in combatant groups, the creation of new groups, or the inclusion of spoilers in the process.<sup>134</sup> There might also be concerns that opening-up the process to others would lead to inflated agendas and empowering groups with no real power. This could lead to un-just constitutional concessions negotiated under the threat of renewed violence.<sup>135</sup> Combatant groups might lack legitimacy in the eyes of the public or international community, which could then undermine the legitimacy of the constitution they helped design. Broader inclusion has also been argued to produce more accountability for parties to the conflict to the process, and can help avoid "quick-fix" solutions that avoid the root causes of the conflict.<sup>136</sup> Further, exclusionary practices could lead to a dependence on a narrow set of actors for the success of supporting or implementing the constitutional peace agreement in the future.

Exclusion and inclusion of the people can directly impact the success of the constitutional peace agreement. Constitutional peace agreements drafted by exclusionary practices risk being seen as "imposed" and unrepresentative.<sup>137</sup> According to one study, durable peace agreements involved direct participation by civil society in the peace negotiations.<sup>138</sup> This was especially the case when the negotiations involved undemocratic elites, such as the case in Liberia, where negotiators were primarily warlords.<sup>139</sup>

<sup>131</sup> Bell, *Human Rights* (n. 59) 231. See also Samuels, "Postwar Constitution Building" (n. 47) 177.

<sup>132</sup> UN Peacemaker (n. 55).

<sup>133</sup> Ludsin, "Peacemaking and Constitution-Drafting" (n. 45) 277.

<sup>134</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 259.

<sup>135</sup> Ludsin, "Peacemaking and Constitution-Drafting" (n. 45) 278.

<sup>136</sup> Catherine Barnes, "Democratizing Peacemaking Processes: Strategies and Dilemmas for Public Participation" (2002) Accord: An International Review of Peace Initiatives, Conciliation Resources, 13.

<sup>137</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 321.

<sup>138</sup> Wanis-St. John and Kew, "Civil Society and Peace Negotiations" (n. 127) 14.

<sup>139</sup> Wanis-St. John and Kew, "Civil Society and Peace Negotiations" (n. 127) 14, 31.

Moreover, constitution drafting can be severely impeded by competing group interests, especially in ethnically divided societies.<sup>140</sup> A desire to limit participation might also lead to efforts to keep the negotiations secret and confidential, in order to lead to a long-lasting agreement. However, excluding significant groups and opaque negotiations might exacerbate tensions in a divided society.<sup>141</sup> The exclusion of certain groups, especially in ethnic conflicts, can lead to an outbreak of violence.<sup>142</sup>

Problems with representation and negotiated settlements extend beyond the drafting stage to implementation and elections. For example, when interim “representative” governments are created through peace processes, the new government leaders, and those who will stand for election, are representative not of the people but of those partisan armed groups that had the capacity to deploy fighters and mobilize segments of the population.<sup>143</sup> The incumbency of the armed groups’ representatives gives them significant influence and leverage in later elections.<sup>144</sup> Bhuta argues that “[t]he people’s ‘choice’ in such contexts is, thus, a choice among leaders bequeathed by the legacy of armed conflict rather than created by any notional ‘market’ in policies and political values.”<sup>145</sup> This, Bhuta argues, detracts from claims that such processes represent the will of the people and an exercise of self-determination.<sup>146</sup>

However, public participation in negotiating and drafting might not be the only way to ascribe legitimacy to a constitution and its bond to the polity. Civil society can play other roles if excluded from the negotiation process. For example, civil society groups can indirectly influence the positions of the elites who are at the table, including by bringing the parties together. This happened in Sierra Leone when civil society helped bring one of the rebel armed groups, the Revolutionary United Front, to the negotiating table.<sup>147</sup> Civil society groups can also monitor the implementation of the agreement.<sup>148</sup> Moreover, some argue that the substantive and institutional provisions of the constitution are likely to be more essential for the democratic future of the state than the fact that the constitution was created through a process that included broad public participation.<sup>149</sup> Constitutions are complex and have significant consequences for the state; most people do not have, and would not seek out, the information required to make informed decisions about constitutional design.<sup>150</sup> While public consultation is

<sup>140</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1229.

<sup>141</sup> Barnes, “Democratizing Peacemaking Processes” (n. 136).

<sup>142</sup> Ludsin, “Peacemaking and Constitution-Drafting” (n. 45) 281.

<sup>143</sup> Bhuta, “New Modes and Orders” (n. 10) 822.

<sup>144</sup> Bhuta, “New Modes and Orders” (n. 10) 822.

<sup>145</sup> Bhuta, “New Modes and Orders” (n. 10) 822.

<sup>146</sup> Bhuta, “New Modes and Orders” (n. 10) 822.

<sup>147</sup> See e.g. Andrea Armstrong and Gloria Ntegeye, “The Devil is in the Details: The Challenges of Transitional Justice in Recent African Peace Agreements” (2006) 6 *African Human Rights Journal* 1, 6.

<sup>148</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 319.

<sup>149</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1232 (arguing that “to make participation and transparency the touchstones of the legitimacy of a constitution is to exaggerate the benefits and underestimate the costs of such a course. A single process model is unlikely to be apt for all situations, and over the long run the content of the institutions embodied in a constitution is likely to be more important for the democratic future of a state than is the presence of the highest levels of public participation and openness in the way in which the constitution is created”).

<sup>150</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1232.

necessary at many points in the drafting process, it may be better to leave technical questions to experts. This trade-off will change depending on the situation. For example, in contexts where there is significant distrust of the regime involved in the drafting process, there might be more need for transparency and more public consultation.<sup>151</sup>

Nevertheless, broad exclusion reduces the sense of ownership over the peace process by the society at large. With modern conflicts that are commonly internal, fought within and between communities and in people's front yards,<sup>152</sup> this makes it more important for the people to have a stake in the peace process. One way to bring the view of the people into peace negotiations is to include members of civil society in the negotiation, drafting, and implementation processes.<sup>153</sup> Inclusion seems to be even more critical when the peace process results in a constitution, which will form the basis of a new pact between the government and society and a continuous conversation about how to sustain peace. Indeed, there appears to be an emerging consensus that legitimate constitution-making processes require public participation and consent,<sup>154</sup> and constitution-drafting norms advocate an open, transparent, and participatory drafting process with input from citizens at all stages of the process.<sup>155</sup> However, there are drawbacks to this approach, which might not work or be necessary in all contexts.<sup>156</sup>

### *Negotiating over competing interests*

In addition to issues of inclusion and exclusion, another feature inherent to peace agreements is that they are the result of negotiations. "The bargain" involves balancing priorities, sequencing, and the creation of institutions. The fact of "the bargain" shapes the process, content, and legitimacy of the constitutional peace agreement. It dictates the nature of the "agreement," the parties to the agreement, and the coherency of the resulting document. The agreement is dynamic, given that the transition from conflict to peace will invariably require new and ongoing bargains after a constitutional peace agreement has been signed and implemented.

There are several challenges that arise out of a bargained constitutional peace agreement. The institutions that are created through the peace agreement process are a direct result of a political bargaining process rather than principled design, even if they might be guided by international law.<sup>157</sup> The parties at the table have different reasons for including certain provisions or institutions and different ideas about how those provisions and institutions will function in the future. Rather than engage in coherent

<sup>151</sup> Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States" (n. 63) 1233.

<sup>152</sup> See Christine Chinkin, "Gender, Human Rights, and Peace Agreements" (2003) 18 *Ohio State Journal on Dispute Resolution* 867.

<sup>153</sup> Wanis-St. John and Kew, "Civil Society and Peace Negotiations" (n. 127) 13.

<sup>154</sup> Hart, *Democratic Constitution Making* (n. 76) 12.

<sup>155</sup> Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States" (n. 63) 1231–2.

<sup>156</sup> See e.g. Jackson, "What's in a Name?" (n. 77) 1293 (arguing that "constitutions negotiated by elite representatives of groups—whether in a special assembly or convention or in a representative parliamentary body—may prove sufficiently durable to move towards constitutionalism without having the added qualities of legitimately entrenched law that popular ratification may be thought to provide").

<sup>157</sup> Bell, *Human Rights* (n. 59) 229.

institutional design, they define institutions based on strategic negotiation. The negotiation dynamic can lead to institutions that are unsound and incapable of effecting real change or fostering a sustainable peace.<sup>158</sup>

Another challenge related to the “bargain” is that it must balance short- and long-term goals. Peacemakers might need to act immediately to solve emerging crises,<sup>159</sup> whereas constitution-makers need more time to allow for deliberate, inclusive procedures. For example, there might be conflicts between short-term interests that require cooperation with warlords or potential spoilers, which could ultimately empower them to later derail the peacebuilding project.<sup>160</sup> Moreover, the conflict could drive—and therefore narrow—the constitutional agenda, leaving other critical societal issues un- or under-addressed.<sup>161</sup> Compromises favoring conflict resolution can result in weak settlements and weak states.<sup>162</sup>

Balancing short and long-term goals raises issues of timing and sequencing. Sequencing constitution drafting with respect to security is a particular challenge. If security has not been established, the constitutional process will be threatened.<sup>163</sup> In Iraq, for example, the United States pressured the transitional government to move ahead with a constitution even though it had not first established a cease-fire with Sunni groups. This posed a serious disadvantage for the success of the constitution, as drafters “faced severe intimidation [and] [t]he public had little access to the drafters and almost no opportunity to observe the process because of security fears.”<sup>164</sup>

Moreover, international concerns with efficiency and cost might be at odds with goals of fostering local ownership or respecting local norms and customs.<sup>165</sup> Iraq serves as another example of this challenge: the United States imposed strict timetables on the Iraqi constitution drafting process. In order to promote broader inclusion, Sunni drafters were included in the process, but only one month before the deadline. In order to meet the deadline, Kurdish and Shiite drafters reportedly went behind the Sunni delegates by holding private meetings to finalize the draft and avoid contested issues. Although the constitution was approved by a referendum, Sunnis largely rejected the draft and some have argued that their alienation from the process may have fueled the insurgency that plagued peace in Iraq.<sup>166</sup> When strict deadlines or pressure to simply

<sup>158</sup> Bell, *Human Rights* (n. 59) 231.

<sup>159</sup> Ludsin, “Peacemaking and Constitution-Drafting” (n. 45) 271; Roland Paris and Timothy D. Sisk, “Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding” (2007) *International Peace Academy* 4–5.

<sup>160</sup> Stromseth, “Post-Conflict Rule of Law Building” (n. 79) 1449; Paris and Sisk, “Managing Contradictions” (n. 159) 4–5; Christine Bell, “Peace Agreements: Their Nature and Legal Status” (2006) 100 *American Journal of International Law* 373, 399 (discussing the value of precision in peace agreements for the short-term, and its limitations for the long-term).

<sup>161</sup> Ludsin, “Peacemaking and Constitution-Drafting” (n. 45) 271. See also Fionnuala Ní Aoláin, “The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis” (1998) 19 *Michigan Journal of International Law* 957, 964; Armstrong and Ntegeye, “The Devil is in the Details” (n. 147) 23 (arguing that “Negotiations focused on the primary purpose of bringing violent conflict to an end are not conducive to designing an inclusive process that takes into consideration the full range of needs society has for reconciliation and justice.”).

<sup>162</sup> Ní Aoláin, “Fractured Soul” (n. 161) 964–5.

<sup>163</sup> See e.g. Larry Diamond, “What Went Wrong and Right in Iraq” in Francis Fukuyama (ed.), *Nation-Building: Beyond Iraq and Afghanistan* 13, 176 (Johns Hopkins University Press 2006).

<sup>164</sup> Ludsin, “Peacemaking and Constitution-Drafting” (n. 45) 256.

<sup>165</sup> Stromseth, “Post-Conflict Rule of Law Building” (n. 79) 1449.

<sup>166</sup> Ludsin, “Peacemaking and Constitution-Drafting” (n. 45) 270.

reach an agreement begin to drive the process, it precludes thoughtful or careful institutional design and inclusion.<sup>167</sup> Longer time-frames between the peace agreement negotiation and constitution drafting can allow for more deliberation and inclusion and can increase the likelihood that the constitution will succeed.<sup>168</sup>

Bargaining also creates a trade-off between negotiation and coherence.<sup>169</sup> Bargaining is usually confused, hazy, and based on uncertain information.<sup>170</sup> Moreover, coordination among politically powerful groups is most difficult in post-conflict situations where no one has “won” and the international community is involved in constitution drafting. In such situations, coherent political visions can be sacrificed in the name of the bargain.<sup>171</sup> Bargaining for points of coordination is not the same as deliberation and may not be done in the public interest. This type of bargaining is usually over the specific interests of those at the table.<sup>172</sup> This could mean that larger issues important to a constitution are left unaddressed. This lack of balance could undermine the broader legitimacy of the constitutional peace agreement.<sup>173</sup>

Although bargained outcomes can be beneficial, since everyone walks away feeling like they have “won” a little, the resulting disjointedness can be problematic in post-conflict situations.<sup>174</sup> In post-conflict societies, the coherence of the constitutional agreement is important, as they will need strong, well-designed institutions that are mutually reinforcing if those institutions are meant to absorb and peacefully resolve the conflict.<sup>175</sup> These kinds of institutions are unlikely to result from a negotiated process, which could ultimately detract from or stymie the settlement.<sup>176</sup> For example, parties will often prioritize government structures over human rights institutions. As Bell notes, human rights institutions “can end up almost hastily tacked on to an agreement without the institutional detail which would make them effective. [ . . . ] This can produce institutions with serious gaps which leave them largely rhetorical and symbolic, rather than capable of effecting real change.”<sup>177</sup> This can result in flawed institutions that will have to be re-negotiated as they are implemented.

These issues about resolving or balancing conflicting interests can influence *jus post bellum* as a coordinating framework. By bringing many groups and interests to the table

<sup>167</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1227.

<sup>168</sup> Samuels, “Postwar Constitution Building” (n. 47) 175. See also Jackson, “What’s in a Name?” (n. 77) 1277–8 (arguing that the Iraq constitutional process should have allowed for more time for deliberations, bargaining, and negotiation).

<sup>169</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1235.

<sup>170</sup> Bhuta, “New Modes and Orders” (n. 10) 845.

<sup>171</sup> Bhuta, “New Modes and Orders” (n. 10) 844, citing Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1230.

<sup>172</sup> Bhuta, “New Modes and Orders” (n. 10) 845.

<sup>173</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 260.

<sup>174</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1235.

<sup>175</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1235.

<sup>176</sup> Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1238.

<sup>177</sup> Bell, *Human Rights* (n. 59) 231.

during the negotiation and drafting of the constitutional peace agreement, priorities can be weighed and balanced in a context-specific way that strives to include the public in determining the content of a “public” body of laws. This helps align interests and set the stage for implementation of *jus post bellum* laws that might conflict with one another and can help mediate conflicts between organizations mandated to assist in disparate peacebuilding efforts. The bargained nature of the agreement also influences the coordination aspect of *jus post bellum*, indicating that timing and the balancing of priorities between actors should be done with the creation of a sustainable peace as the primary consideration as opposed to strategic negotiation or questions of efficiency.

#### D. Extra-legal influences of constitutional peace agreements

When considering the concept of a transformative constitutional peace agreement, it is important to take a broader view of constitutions beyond what they represent according to liberal democratic theories and study the role they can play in creating discourse. Vivien Hart, for example, argues that the negotiated aspect of post-conflict constitutions is key to their transformational goal.<sup>178</sup> She posits that the post-conflict constitution-making process is a site of contest, a process of continuing conversation, and a forum for negotiation rather than a covenant or contract as constitutions are often seen in Western liberal constitutionalism.<sup>179</sup> She argues that in order to deter future conflict, the constitution must include guarantees to continue the “broader constitutional conversation” that takes place before, during, and after its ratification.<sup>180</sup> “From this perspective,” she argues, “the moment of agreement upon a textual constitution is a landmark in the transformation of conflict, rather than a completed map of conflict resolution.”<sup>181</sup> Hart includes pre-agreement documents, accords, and agreements as part of this constitutional conversation, arguing that they form “temporary constitutions” by setting rules and constraining future constitutions by recording agreements on basic principles.<sup>182</sup>

Others also argue that the constitution can provide a non-violent forum and process for further negotiation of the divisive issues that sit at the root of the conflict if constitutional peace agreements adopt a participatory and inclusive approach to constitution drafting.<sup>183</sup> The constitution can bring otherwise disparate groups to a common space to deliberate on the future of the country and how they should get there—the balancing of their interests is a discursive act that itself can foster peace.<sup>184</sup> Haggling over detailed provisions about, for example, who is appointed to an institution, can become a micro-version of the meta-conflict.<sup>185</sup> This is one of the first and principle moments

<sup>178</sup> Hart, “Constitution-Making and Transformation” (n. 75) 154.

<sup>179</sup> Hart, “Constitution-Making and Transformation” (n. 75) 154.

<sup>180</sup> Hart, “Constitution-Making and Transformation” (n. 75) 157, citing Simone Chambers, “Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis” (1998) 26 *Politics and Society* 143.

<sup>181</sup> Hart, “Constitution-Making and Transformation” (n. 75) 157.

<sup>182</sup> Hart, “Constitution-Making and Transformation” (n. 75) 158.

<sup>183</sup> Samuels, “Postwar Constitution Building” (n. 47) 174.

<sup>184</sup> Samuels, “Postwar Constitution Building” (n. 47) 174.

<sup>185</sup> Bell, *Human Rights* (n. 59) 229.



and methods of dialogue about the conflict amongst relevant actors, both domestic and international.

The fact of “the bargain” has a direct impact on the scope of change as well as the language and terms used in the constitutional peace agreement. Depending on the context and cause of conflict, parties to peace agreements might play different roles or have varying degrees of interest in the constitution-making project. For example, secessionist wars might lead to interest in only a few concrete constitutional changes regarding regional autonomy, whereas conflicts arising out of ethnic marginalization might lead to efforts to completely overhaul the system of government.<sup>186</sup> At times, warring groups will draft overly-rigid and detailed provisions to entrench their interests.<sup>187</sup> Other times, the agreed solution will be deliberately ambiguous in order to reach consensus. While this ambiguity can be constructive and move negotiations forward, it can also lead to disappointment and the eruption of future violence if parties feel they have been deceived.<sup>188</sup> Parties can also feel deceived by proposals from international mediators, who can attempt to influence the bargain to serve the interests of their own constituents. Bargaining can also influence the nature of the supposed constitutional contract between the people and the state, as it can lead to individuals contracting between themselves rather than creating a contract between society and the state.<sup>189</sup>

Bargaining over provisions of a constitutional peace agreement raises a unique compliance paradox. On one hand, the legal form of the constitution and its hierarchy and supremacy in the legal system can promote greater compliance and provide incentives to try to make it succeed. Getting combatants to engage in constitutional debate and consider constitutional change can create space for political discussion, improve understanding of competing positions, and help parties redefine their grievances.<sup>190</sup> On the other hand, these factors might make parties hesitate to bargain over a document with such raised stakes.<sup>191</sup> Minority groups might fear the process will lead to further entrenchment of majority power, and powerful elites might fear the embedded loss of power.<sup>192</sup> Another bargaining paradox relates to the types of norms included in constitutional peace agreements. The negotiated process might detract from the inclusion of substantive norms and institutions designed to foster reconciliation or transitional justice.<sup>193</sup> However, peace processes can be useful for fostering a commitment to principles of justice, human rights, and

<sup>186</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 258.

<sup>187</sup> Ludsin, “Peacemaking and Constitution-Drafting” (n. 45) 278; Bell, “Peace Agreements: Their Nature and Legal Status” (n. 160) 392; Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1229 (noting that representatives of ethnic majorities might favor majority rule while minorities might favor consociational arrangements).

<sup>188</sup> Bell, “Peace Agreements: Their Nature and Legal Status” (n. 160) 398; Proceedings, “Workshop on Constitution Building Processes,” Princeton University, 17–20 May 2007, Bobst Center for Peace & Justice, Princeton University, in conjunction with Interpeace and International IDEA, 31–2.

<sup>189</sup> Bell, “Peace Agreements: Their Nature and Legal Status” (n. 160) 398.

<sup>190</sup> Brandt et al., *Constitution-Making and Reform* (n. 82) 257.

<sup>191</sup> Jackson, “What’s in a Name?” (n. 77) 1251–2.

<sup>192</sup> Jackson, “What’s in a Name?” (n. 77) 1251–2.

<sup>193</sup> Armstrong and Ntegeye, “The Devil is in the Details” (n. 147).

reconciliation.<sup>194</sup> These paradoxes show that during the transition from conflict to peace, the use—or not—of legal form is important to post-conflict discourse.

#### IV. Gaps and Risks

The challenges associated with the negotiation, drafting, and implementation processes suggest that constitutional peace agreements should be seen as a foundation or starting point for conflict resolution, but not as a final framework.<sup>195</sup> This section describes some of the risks of using constitutional peace agreements as a source of norms and practices for *jus post bellum*. In particular, constitutional peace agreements have gaps in the norms and institutions they create, including relating to gender. There are also serious practical challenges associated with implementing the institutions created by constitutional peace agreements, which risk being undermined or ineffectively implemented. Finally, there is a risk that international intervention in the process of negotiating, drafting, and implementing constitutional peace agreements can be seen as illegitimate and an imposition.

##### A. Silences: unaccounted for norms that are critical for peace

This section will discuss the importance of including norms with respect to typically excluded or marginalized groups in peace agreements, such as indigenous groups, minorities, women, and others. It will focus on women's participation in negotiations and the inclusion of women's issues in peace agreements as an example that could be extrapolated to other excluded groups.<sup>196</sup> Addressing gender inequalities and access to justice is seen as important for addressing root causes of violence and promoting more resilient societies capable of sustaining peace.<sup>197</sup> However, what is immediately apparent from looking at data about peace agreements is the under-inclusion of issues related to women and gender.<sup>198</sup> The silences in peace agreement norms seem to be

<sup>194</sup> See e.g. Christine Bell, *Negotiating Justice? Human Rights and Peace Agreements* (International Council on Human Rights Policy 2006).

<sup>195</sup> Hart, "Constitution-Making and Transformation" (n. 75) 157. See also, Armstrong and Ntegeye, "The Devil is in the Details" (n. 147) 23–5.

<sup>196</sup> There is a considerable body of scholarship on this issue. This section will only address a few issues relevant to this chapter. For more on this see, for example, Dina Francesca Haynes, Fionnuala Ní Aoláin, and Naomi Cahn, "Gendering Constitutional Design in Post-Conflict Societies" (2011) 17 *William & Mary Journal of Women & Law* 509; Christine Bell and Catherine O'Rourke, "Peace Agreements or Piece of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements" (2010) 59 *International and Comparative Law Quarterly* 941; Paula A. Monopoli, "Gender and Constitutional Design" (2006) 115 *Yale Law Journal* 2643; Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press 2008).

<sup>197</sup> Margaret McGuinness, "Women as Architects of Peace: Gender and the Resolution of Armed Conflict" (2007) 15 *Michigan State Journal of International Law* 63, 64; UN Peacemaker, *Operational Guidance Note: Women in Peace Processes and Agreements* (UN Department of Political Affairs Gender Advisory 2006) 1.

<sup>198</sup> UN Peacemaker Database of Peace Agreements (n. 55). This under-inclusion of women's issues is also reflected in the University of Ulster's Transitional Justice Institute database, which showed that women's issues appeared in 7.45 percent of peace agreements in that sample. Christine Bell and Catherine O'Rourke "Peace Agreement Database" (2010) <[http://www.transitionaljustice.ulster.ac.uk/tji\\_database.html](http://www.transitionaljustice.ulster.ac.uk/tji_database.html)> (accessed 5 June 2013).

related to the inclusionary or exclusionary nature of the bargaining process:<sup>199</sup> historically women have been excluded from peace processes, although there is a growing trend to include them.<sup>200</sup>

Indeed, data about specific terms of agreements shows a steady increase over time of the inclusion of women's issues in peace agreements.<sup>201</sup> This could be related to an increasing international recognition that specific action is needed to address the needs of women after conflict.<sup>202</sup> The 1995 Fourth World Conference on Women in Beijing created a Platform for Action that included a call for governments and international and regional intergovernmental institutions to:

Take action to promote equal participation of women and equal opportunities for women to participate in all forums and peace activities at all levels, particularly at the decision-making level [. . .].

Strengthen the role of women and ensure equal representation of women at all decision-making levels in national and international institutions which may make or influence policy [. . .] in all stages of peace mediation and negotiations [. . .].<sup>203</sup>

UN Security Council Resolution 1325 (2000) specifically recognized the importance of women in the prevention and resolution of armed conflicts and in peacebuilding. Resolution 1325 stresses the importance of the participation of women in peacebuilding efforts and calls on peace agreement negotiators to adopt a gender perspective.<sup>204</sup> The UN has issued an operational guidance note to peace negotiators urging them to include women's issues as part of the peace process.<sup>205</sup> A 2010 UNIFEM report found

<sup>199</sup> See e.g. Pablo Castillo Diaz, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (UNIFEM 2010) 5. Diaz measures the effectiveness of women's participation in peace negotiations by the incorporation of women's priorities and demands in peace agreements.

<sup>200</sup> McGuinness, "Women as Architects of Peace" (n. 197); see also Christine Chinkin, *Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women*, UN Doc. EGM/PEACE/2003/BP.1 31 (United Nations Division for the Advancement of Women 2003) 2; Judith Gardam and Hilary Charlesworth, "Protection of Women in Armed Conflict" (2000) 22 *Human Rights Quarterly* 148, 156.

<sup>201</sup> This is based on a review of the Ulster Transitional Justice Institute peace agreements dataset, examined by frequency of women's issues in peace agreements by year. For example, in 1991, 4.4 percent of 45 peace agreements included provisions about women. In 2006, after a series of ups and downs, that number had grown to 19.05 percent of 21 peace agreements. This correlation warrants further statistical study, which is outside the scope of this chapter. Bell and O'Rourke "Peace Agreement Database" (n. 198). See also Bell and O'Rourke, "Peace Agreements or 'Pieces of Paper'?" (n. 196) and related database <<http://www.transitionaljustice.ulster.ac.uk/current%20projects/documents/WomenandPeaceAgreementDataset.htm>> (accessed 5 June 2013).

<sup>202</sup> Fionnuala D. Ní Aoláin, "Advancing Women's Rights in Conflict and Post-Conflict Situations" 104 *Proceedings of the Annual Meeting (American Society of International Law)* 568.

<sup>203</sup> "Beijing Declaration and Plan of Action on the Advancement of Women" Fourth World Conference on Women (Beijing 4–15 September 1995) (17 October 1995) UN Doc. A/CONF. 177/20, para. 144 (a)–(b).

<sup>204</sup> UNSC Res. 1325 (31 October 2000) UN Doc. S/RES/1325 (2000) para. 8. The provision specifically calls on negotiators to adopt a gender perspective including "(a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary." See also UNSC Res. 1820 (19 June 2008) UN Doc. S/RES/1820; UNSC Res. 1888 (30 September 2009) UN Doc. S/RES/1888; and UNSC Res. 1889 (5 October 2009) UN Doc. S/RES/1889.

<sup>205</sup> UN Peacemaker (n. 197).

that when women occupy formal, official roles during peace negotiations, they usually have a strong impact on the language of the agreement text and there is usually a very high inclusion of provisions specific to women.<sup>206</sup>

The inclusion of provisions related to gender is not necessarily sufficient to create real change for women, however. The UNIFEM report noted that 10 years after Resolution 1325 was adopted, women are still vastly underrepresented in peace negotiations.<sup>207</sup> Others have argued that UN efforts to include women in peace processes have little impact on the lives of women post-conflict because of their shallow scope, conceptualization, and execution.<sup>208</sup> Focusing on the peacemaking stage of conflict ending is an impediment to ensuring positive change for women, as it ignores informal processes and earlier stages of peacemaking that typically exclude women.<sup>209</sup> Even if women are present at the final stages of negotiation, their impact could be minimal if major issues were pre-determined in earlier negotiations.<sup>210</sup>

This gap could be seriously detrimental to the ability to transition from conflict to a sustainable peace. Indeed, some argue that women's participation in peace agreements and influence over the terms of peace is a necessary precondition to sustainable peace.<sup>211</sup> Feminist scholarship suggests that a view of women as victims of conflict as opposed to agents of peace and a failure to include women in peace negotiations could lead to an increased focus on militarism and force.<sup>212</sup> Moreover, peace processes can have more of a long-term impact on women than on the underlying conflict.<sup>213</sup> Neglecting this can perpetuate discrimination and marginalization of women<sup>214</sup> and take away opportunities for a transformation to a society that includes an enhanced social position for women.<sup>215</sup> Silence about women's issues in constitutional peace agreements would entrench these risks into the future governance of the state and would allow related implementation efforts, including mandates by international organizations, to commence their work with no reference to how their work impacts differentially on women.<sup>216</sup> As Christine Chinkin writes, "Without the explicit requirement in the peace

<sup>206</sup> Diaz, *Women's Participation in Peace Negotiations* (n. 199) 5.

<sup>207</sup> Diaz, *Women's Participation in Peace Negotiations* (n. 199) 5. The report noted that the representation of women at peace negotiations remains much lower than in other public decision making roles (at 3).

<sup>208</sup> Ní Aoláin, "Advancing Women's Rights" (n. 202) 568.

<sup>209</sup> Ní Aoláin, "Advancing Women's Rights" (n. 202) 569.

<sup>210</sup> Ní Aoláin, "Advancing Women's Rights" (n. 202) 568.

<sup>211</sup> McGuinness, "Women as Architects of Peace" (n. 197) 64; UN Peacemaker (n. 197) 1.

<sup>212</sup> Chinkin, "Gender, Human Rights, and Peace Agreements" (n. 152) 873 (noting the various ways women construct peace after conflict, including efforts that begin as humanitarian and practical and are rooted in the local context and arguing that excluding these views and experiences "can lead to an impoverished understanding of peace and security that focuses on militarism and power supported by force"). See also McGuinness, "Women as Architects of Peace" (n. 197) 82 (arguing that "there is a complete feminist literature on international law and international institutions that suggests it is the very gendered nature of these formal peace processes within international law that has silenced women's voices and perpetuated a male-dominated international system that favors militarized solutions to global problems that, in turn, perpetuate male dominance").

<sup>213</sup> McGuinness, "Women as Architects of Peace" (n. 197).

<sup>214</sup> Chinkin, "Promoting Gender Equality" (n. 200) 11.

<sup>215</sup> See e.g. Chinkin, "Promoting Gender Equality" (n. 200) 12; Kvinna Till Kvinna Foundation, "Gender Awareness in Kosovo Getting it Right? A Gender Approach to UNMIK Administration in Kosovo" (Report, Kvinna Till Kvinna 2001) 23

<sup>216</sup> Chinkin, "Promoting Gender Equality" (n. 200) 12.

agreement to address questions relating to women, other agenda items that have been included will have greater legitimacy and be given priority.”<sup>217</sup> This includes shaping the priorities of donors, which could lead to reduced programming directed at women during the peacebuilding phase.<sup>218</sup> It would also detract from the democratic legitimization of the peace agreement by reducing the sense of ownership of the process among women.<sup>219</sup>

The importance of inclusion extends to the substantive issues included in constitutional peace agreements as well. Some argue that not only should women’s groups be included in all stages of the peace process with a goal of striking a gender balance in post-conflict constitutions, but the substantive provisions of the agreement should also reflect gender mainstreaming.<sup>220</sup> This is especially important given the hierarchical position of constitutions in the law, as law generally reinforces existing social structures such as discrimination against women.<sup>221</sup> Moreover, moving into the implementation stage presents other challenges for women, as this is a process with little legal content and few formal requirements to ensure representation of women’s issues.<sup>222</sup>

The discussion above about women’s issues is an example of many other substantive and procedural issues that might be excluded from constitutional peace agreements but yet are important for a successful transition to peace. Other important issues might not appear at all in peace agreements or only in general or limited ways. For example, environmental norms and management of natural resources have typically been ignored or superficially treated in peace agreements.<sup>223</sup> Some issues considered important to the peace process and included in the agreement might later suffer because of the negotiated drafting process and other constraints with the peace agreement format.<sup>224</sup> Priorities of those at the negotiating table might not reflect other critical societal problems or necessary changes. Therefore, while peace agreements can serve as useful guides to critical issues for post-conflict peacebuilding, it is important to realize their limitations both in terms of process and substance.

<sup>217</sup> Chinkin, “Promoting Gender Equality” (n. 200) 12. This underscores the need for an interpretive guide to make sure these and other issues (inclusion, local ownership, peace) are prioritized in decision-making under *jus post bellum*.

<sup>218</sup> Chinkin, “Promoting Gender Equality” (n. 200) 12.

<sup>219</sup> UN Peacemaker (n. 197) 1.

<sup>220</sup> Chinkin, “Gender, Human Rights, and Peace Agreements” (n. 152) 875. See also Ustina Dolgopol, “A Feminist Appraisal of the Dayton Peace Accords” (1997) 19 *Adelaide Law Review* 59, 68.

<sup>221</sup> Gardam and Charlesworth, “Protection of Women in Armed Conflict” (n. 200) 164.

<sup>222</sup> Ní Aoláin, “Advancing Women’s Rights” (n. 202) 569; see also Haynes, Ní Aoláin, and Cahn, “Gendering Constitutional Design in Post-Conflict Societies” (n. 196) 542.

<sup>223</sup> Luke A. Patey, “Lurking Beneath the Surface: Oil, Environmental Degradation, and Armed Conflict in Sudan” in Päivi Lujala and Siri Aas Rustad (eds), *High-Value Natural Resources and Peacebuilding* (Earthscan 2012); Nicholas Haysom and Sean Kane, “Negotiating Natural Resources for Peace: Ownership, Control and Wealth-Sharing” (Briefing Paper, Centre for Humanitarian Dialogue Briefing Paper 2009); Kwesi Aning and Samuel Atoubi, “The Neglected Economic Dimensions of ECOWAS’s Negotiated Peace Accords in West Africa” (2011) 3 *Africa Spectrum* 27; see also United Nations Environmental Program, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (UN 2009).

<sup>224</sup> Armstrong and Ntegeye, “The Devil is in the Details” (n. 147) 23; Haynes, Ní Aoláin, and Cahn, “Gendering Constitutional Design in Post-Conflict Societies” (n. 196) 542.

## B. Illegitimate intervention

Another risk with using constitutional peace agreements as a framework for *jus post bellum* is that the international involvement in creating these constitutions can be controversial and detract from efforts to foster sustainable peace. Outside interveners prescribing particular forms of legitimation in attempts to strengthen the acceptance of the new constitution might ultimately be counter-productive or irrelevant to the peace-building process. If such illegitimate interventions are considered the backbone of *jus post bellum*, then the concept itself could suffer theoretically and in practice, leaving its potential unrealized.

For the greatest positive impact, interventions must be perceived as legitimate and legal from the start; it is likely they will be constantly re-assessed during what are usually lengthy interventions.<sup>225</sup> A legitimately perceived intervention can improve cooperation between local and international actors and there is a greater likelihood of success in long-term rule of law development.<sup>226</sup> Some suggest that adhering to international legal norms can influence whether other states and the local population see interventions as legitimate.<sup>227</sup> Improved legitimacy can in turn help strengthen interveners' arguments that law is an important component to rebuilding a peaceful society.<sup>228</sup>

The role of outside interveners also raises questions about the legitimacy of the process and result, in particular through claims that the intervention amounts to little more than neo-colonialism. Some argue that the focus on post-conflict constitution making and statebuilding is based on a particular liberal version of the constitutional order similar to the rationale used for maintaining dependent territories during the colonial era.<sup>229</sup> Others argue that there is a basis in international law for the "liberal" democratic model, based on human rights law and the law of self-determination.<sup>230</sup>

To be sure, there has been a clear push for the idea that liberal democratic ideals are a prerequisite for peace.<sup>231</sup> The UN considers democratic legitimacy as necessary for transformation from conflict to peace and accordingly has approached the creation of democratic institutions as a solution for conflict.<sup>232</sup> The international community has assumed that liberal democratic institutional design, based on the consent of the population expressed through elections, creates the strongest foundations for "cooperative politics."<sup>233</sup> Former UN Secretary-General Kofi Annan has argued that participatory

<sup>225</sup> Stromseth, "Post-Conflict Rule of Law Building" (n. 79) 1448.

<sup>226</sup> Stromseth, "Post-Conflict Rule of Law Building" (n. 79) 1448.

<sup>227</sup> Stromseth, "Post-Conflict Rule of Law Building" (n. 79) 1448.

<sup>228</sup> Stromseth, "Post-Conflict Rule of Law Building" (n. 79) 1455.

<sup>229</sup> Bhuta, "New Modes and Orders" (n. 10) 803. See also Roxana Vatanparast, ch. 8, this volume.

<sup>230</sup> See e.g. Nsongurua J. Udombana, "Articulating the Right to Democratic Governance in Africa" (2002) 24 *Michigan Journal of International Law* 1209. This is a complex issue that cannot be fully explored in the context of this chapter.

<sup>231</sup> See e.g. Roland Paris, *At War's End: Building Peace after Civil Conflict* (Kindle Edition 2004).

<sup>232</sup> Boutros Boutros-Ghali, *An Agenda for Democratization* (United Nations Department of Public Information 1996) para. 59; Gregory Fox, *Humanitarian Occupation* (Cambridge University Press 2008) 46–7; Bhuta, "New Modes and Orders" (n. 10) 826.

<sup>233</sup> Bhuta, "New Modes and Orders" (n. 10) 827–8.

government “will help warring parties move their political and economic struggles into an institutional framework where a peaceful settlement process can be engaged.”<sup>234</sup>

However, the liberal political order of state building after conflict may not be an appropriate way to understand how new political orders are founded and stabilized. As argued by Roland Paris, liberal democratization projects in post-conflict societies since the 1990s frequently failed to bring about peace due to an underestimation of the destabilizing effects of liberalizing post-conflict states.<sup>235</sup> He argues that immediate elections, democratic turmoil, and other speedy efforts to create a democratic society can undermine peace. Instead, he advocates a “more controlled and gradual approach to liberalization, combined with the immediate building of governmental institutions that can manage these political [ . . . ] reforms.”<sup>236</sup> Peacebuilding, he argues, demands recognition of the fact that liberalization—including the drafting of new constitutions—is “an inherently tumultuous and conflict-inducing process that is capable of undermining a fragile peace.”<sup>237</sup> In light of these shortcomings, Paris advocates a modified theory of democratic liberalization, one that employs methods and processes that focus on establishing sound institutions before subjecting the society to the turmoil of liberalization.<sup>238</sup>

Nehal Bhuta has argued that the modern political theory of contemporary statebuilding is based on the notion that statebuilding initiatives should seek to maximize democratic legitimacy, especially when overseeing the creation of a constitution or basic legal order.<sup>239</sup> Bhuta questions the causal relationship between liberal democratic institutions and stable societies. He asks whether liberal democratic institutions can mediate or displace social conflict because they are stable, or whether they are stable because they can mediate conflicts, or because of other unrelated reasons that induce cooperation between powerful social forces.<sup>240</sup> He argues that simply designing liberal democratic institutions does not ensure that they will develop the political behavior typical of liberal democratic politics.<sup>241</sup> Rather, successful constitution making depends on coordinating “socially and politically powerful groups who have the capacity to legitimate the relationship of supremacy and subordination that is essential to an effective state order.”<sup>242</sup> Bhuta argues against the imposition of internationally prescribed rules that encode liberal democratic forms of legitimacy. In particular, he questions whether international law should prescribe rules for constitutional transformation as part of *jus post bellum*.<sup>243</sup> Bhuta’s arguments against a “neo-colonialist” *jus post bellum* support a broader concept of *jus post bellum*, one that would play a functional role in post-conflict

<sup>234</sup> Report of the Secretary-General on “No exit without strategy: Security Council decision-making and the closure or transition of United Nations peacekeeping operations” (20 April 2001) UN Doc. S/2001/394. See also Boutros Boutros-Ghali, *An Agenda for Democratization* (n. 232) paras 17–18.

<sup>235</sup> Paris, *At War’s End: Building Peace after Civil Conflict* (n. 231) Kindle Location 125, 133.

<sup>236</sup> Paris, *At War’s End: Building Peace after Civil Conflict* (n. 231) Kindle Location 148.

<sup>237</sup> Paris, *At War’s End: Building Peace after Civil Conflict* (n. 231) Kindle Location 2277–8.

<sup>238</sup> Paris, *At War’s End: Building Peace after Civil Conflict* (n. 231) Kindle Location 2346–71.

<sup>239</sup> Bhuta, “New Modes and Orders” (n. 10) 829.

<sup>240</sup> Bhuta, “New Modes and Orders” (n. 10) 829.

<sup>241</sup> Bhuta, “New Modes and Orders” (n. 10) 829.

<sup>242</sup> Bhuta, “New Modes and Orders” (n. 10) 806.

<sup>243</sup> Bhuta, “New Modes and Orders” (n. 10) 830. Others have also argued that uniform norms for constitution making might not adequately address specific contextual problems faced by constitution-makers. Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States” (n. 63) 1230.

societies but, as informed by an examination of constitutional peace agreements, would not be limited to a strict “top-down” set of rules imposed from outside.

## V. Constitutional Peace Agreements and *Jus Post Bellum*

This chapter argues that rather than viewing *jus post bellum* as a “top-down” set of rigid rules that dictate certain forms of government or society, *jus post bellum* should be considered as pertaining to broad concepts of norms, interpretation, coordination, and discourse. I argue that *jus post bellum* is comprised of the laws and norms stemming from current settled bodies of international law as well as developing normative practices of non-state actors and organizations, suggesting the need for an “inter-public” approach to law in *jus post bellum*. However, in addition to utilizing these areas of law during the transition from conflict to peace, *jus post bellum* can play other important functions during the transition: it offers an interpretive framework, a site of coordination, and a site of discourse that can help the transition to a sustainable peace.

Constitutional peace agreements offer a valuable framework for this broad concept of *jus post bellum*. The content of peace agreements can set the agenda for the future, entrench or dissipate ideological positions of parties to the conflict, create new or reformed government institutions, or attract the attention and involvement of international interveners. The legal form and content of constitutional peace agreements can impact the conflict and can stimulate sustainable peace.<sup>244</sup> Constitutional peace agreements can bring international law into the domestic legal sphere, even as a superior source of law. They indicate important norms that could reflect root causes of the conflict and provide a space to develop important concepts of justice in post-conflict societies. They also provide an infrastructure for further negotiating those issues through peaceful political processes, offering a framework for coordination and discourse in the post-conflict society.

Peace agreements translate between the different spheres and regimes that *jus post bellum* must navigate, including domestic/international, legal/political, and war/peace. Constitutional peace agreements navigate a “messy” middle way to peace,<sup>245</sup> a tactic that could be useful for a flexible, context-specific *jus post bellum*. Considered broadly, constitutional peace agreements attempt to transform conflict to peace by (1) transforming societal norms; (2) bargaining and negotiating over solutions to the underlying causes of conflict; (3) creating a space for peaceful discursive conflict resolution; and (4) creating new state institutions.

These aspects are also relevant for an expansive concept of *jus post bellum*. The constitutional peace agreement can be seen as one of many sites of *jus post bellum* content, interpretation, coordination, and discourse. According to an expansive view of *jus post*

<sup>244</sup> Cindy Daase, “The Redistribution of Resources in Internationalized Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions” (2011) *Goettingen Journal of International Law* 23, 65; Bell, *Lex Pacificatoria* (n. 5) 28.

<sup>245</sup> Bell, *Lex Pacificatoria* (n. 5) 281.



*bellum*, it would similarly play a transformative role during the transition from conflict to peace.

In undertaking these transformative steps, the study of peace agreements indicates the need for common norms and an interpretive frame that can help foster sustainable peace. Indeed, peace agreements are a richer source of norms for *jus post bellum* than international law, because constitutional peace agreements can go further in addressing wider notions of justice and issues critical for peace than international law.<sup>246</sup> Using peace agreements as a guide, *jus post bellum* could more adequately address issues of justice, social truth, and the needs of victims of conflict. Moreover, in order to approach the transition from conflict to peace from a holistic point of view, *jus post bellum* will need to be able to accommodate changing priorities and learn from peace agreement indicators which priorities are important in a given context. Therefore, it will need to be flexible enough to shift along with priorities at the early stages of peace talks as compared to priorities at the time of implementation.

*Jus post bellum* must operate with and within the institutions created by constitutional peace agreements. The need for coordination amongst various post-conflict endeavors is a central concern of *jus post bellum*. *Jus post bellum* as a site of coordination involves the harmonization of efforts during the transition from conflict to peace. This involves similar issues of sequencing, prioritization, bias, and practical constraints that are faced when negotiating and implementing constitutional peace agreements. It also involves balancing the needs of the post-conflict state with the interests of foreign organizations or states that provide assistance and funding. A coordinating function for *jus post bellum* can learn from practical considerations taken up in related areas of research and practice, including in peace agreement implementation, post-conflict constitutionalism, and peacebuilding.

For example, *jus post bellum* principles would need to recognize that the simple creation of state institutions is not sufficient to engender social change or conflict resolution through political means, just as practitioners have learned that holding elections is not in and of itself sufficient to guarantee a peaceful transition and political reform.<sup>247</sup> Successfully creating a new political order requires understanding local sources of power and the negotiations over power that shape constitutional peace agreements.<sup>248</sup> It should also recognize that there are other, potentially more relevant, modes of legitimation within particular contexts than fostering constitutionalism through state institutions.<sup>249</sup> These alternative modes of legitimation should be harnessed in the transition to peace. These flexible standards or norms, based primarily on the requirement to understand the specific context of a particular conflict, would shape a context-specific *jus post bellum*.

Examining the process of constitutional peace agreement drafting and implementation is also informative for *jus post bellum* as a site of coordination. In particular, the inclusion of multiple voices and the balancing of competing priorities can influence the

<sup>246</sup> Bell, *Human Rights* (n. 59); Christine Bell, ch. 10, this volume.

<sup>247</sup> See e.g. Paris, *At War's End: Building Peace after Civil Conflict* (n. 231) 2391.

<sup>248</sup> Bhuta, "New Modes and Orders" (n. 10) 837.

<sup>249</sup> Bhuta, "New Modes and Orders" (n. 10) 840.

potential success (or failure) of the constitutional peace agreement. In practice, *jus post bellum* will also face similar issues with respect to inclusion and balancing interests.

The process of bargaining is also important for *jus post bellum* as a site of discourse. An examination of the bargained aspect of constitutional peace agreements suggests that the *jus post bellum* discourse should involve a broad range of views and input from society at large. Lessons about the importance of participation and inclusion can inform other sites of discourse during the transition from conflict to peace, especially those related to justice, accountability, and reconciliation. This also suggests that *jus post bellum* should be considered as a broad concept beyond black letter law and strict norms so as to encompass broader areas of discourse that might be lost with a narrow focus on the law.

While constitutional peace agreements can serve as a framework for *jus post bellum*, *jus post bellum* should also learn from the problems and risks associated with constitutional peace agreements. It should be recalled that norms included in constitutional peace agreements might have lacunae that will need to be filled with other norms, such as those promoting broader gender inclusion in peace processes. Association with an illegitimate international intervention could undermine *jus post bellum*'s potential for fostering sustainable peace in the same way it can undermine the success of a constitutional peace agreement. As discussed above, the risks of exclusionary practices and striking the wrong balance can be fatal to the peace process. Observing the shortcomings of international interventions in the constitutional peace agreement practice can inform the role of *jus post bellum* in post-conflict societies. The power and influence of international interveners to determine the level of inclusion in the constitutional peace agreement process suggests that *jus post bellum* should encourage interveners to take an inclusive approach. Studying constitutional peace agreements also suggests that in order to bolster legitimacy, interveners should adopt principles including transparency, especially about certain non-negotiable policies that might arise during consultations (such as amnesties for international crimes); accountability (e.g. adhering to the same human rights standards they are promoting); having a base knowledge of the language and culture of the country; and acting collaboratively with all segments of society.<sup>250</sup>

There are many other useful principles for *jus post bellum* derived from an examination of constitutional peace agreements. They include: prioritizing the interests of society over those of interveners; honing international expertise in the specific context in which the intervention is taking place; improving domestic capacity; taking a long-term, holistic view to normative and practical issues; and taking a unified and coherent approach to balancing competing goals. Additional lessons for *jus post bellum* could include ensuring there is sufficient time for outreach and public education about the peacebuilding processes; maintaining a limited and legitimate international influence over the process; and the inclusion of women's interests and traditional concepts of justice as priorities, amongst others. These principles could form the basis of a *jus post bellum* interpretive framework, in which the application of laws or implementation of peacebuilding projects is undertaken in an effort to maximize, for example, inclusion, local ownership, and coherence.

<sup>250</sup> Stromseth, "Post-Conflict Rule of Law Building" (n. 79) 1456.

These principles of a broad concept of *jus post bellum* could potentially assuage the concerns of some who critique *jus post bellum*. For example, Bhuta does not consider that international outsiders are capable of “designing” the necessary context-specific ordering solutions that can stabilize new post-conflict political systems, unless they go in with force to regulate and stabilize the new order themselves.<sup>251</sup> International law, with its focus on compliance and legitimacy, is inappropriate in this case, Bhuta contends. He proposes a more open, and fluid approach that:

[. . .] tries to avoid a sharp conflict between order and justice, not by rationalizing the complementarity of order and justice at a higher level of abstraction, but by cautiously mediating the tensions between them. Temporizing, capacious, and flexible concepts, gaps and silences: these are the tools and methods of an inter-public-law understanding of international law’s role in such situations. It does not banish human rights and humanitarian law principles as irrelevant; but nor does it insist on the necessity of a rule-governed resolution. Rather, the place of normative principles of justice and political legitimacy is (partially) relativized in and through the practice of negotiating new political orders, a practice that depends on bridging or even avoiding conflicts of social and political legitimacy. [. . .] An overly prescriptive, rule-based ideal of *jus post bellum* might not be functional in the context of the central dilemmas of creating new political orders.<sup>252</sup>

This critique appears to be based on the concept of *jus post bellum* as a set of rigid rules rather than fluid norms that attempt to foster sustainable peace during the transition from conflict to peace. It does not account for other functional conceptions of *jus post bellum*, such as *jus post bellum* as an interpretive or coordinating framework or *jus post bellum* as a site of discourse. Indeed, when considering *jus post bellum* in this broader way, it can play the role that Bhuta claims is necessary: coordinating and fostering discourse between actors shaping the transition from conflict to peace in a way that recognizes its inter-publicness and ability to conform to different contexts.

In this vein, I argue that *jus post bellum* should not be limited to rigid rules or laws. *Jus post bellum* can—and should—be fluid and context-specific and involve the larger polity of a conflict state. Based on an examination of the practice and particularities of drafting peace agreements and post-conflict constitutions, it seems that rather than prescribe hard-and-fast rules for liberal institutional design, it is critical for *jus post bellum* to include a set of flexible standards that aim to optimize sustainable peace within a framework that can function in specific contexts.

<sup>251</sup> Bhuta, “New Modes and Orders” (n. 10) 847.

<sup>252</sup> Bhuta, “New Modes and Orders” (n. 10) 852–3.

# Targeting the State in *Jus Post Bellum*: Towards a Theory of Integrated Sovereignties

*Dov Jacobs\**

## I. Introduction

Discussions on democratic transitions after civil conflict usually cover a vast array of issues that can be approached from a number of perspectives (e.g. law, sociology, political science, and international relations). Transcending these different possible angles are generally two underlying, and related, common features: international intervention and a suspicion against the state. Indeed, it is because there is a growing suspicion against the state, which is seen as the main source of gross human rights violations, that international intervention<sup>1</sup> is seen to be necessary. However, these two dimensions raise a number of conceptual difficulties that will need to be solved by the *jus post bellum* project, most notably in relation to the interaction between the local and the international.

The first premise, that of international intervention, will not be discussed or challenged in the following analysis. The involvement of the international community, at some level or another, is taken as a given. This does not mean that it should not be questioned, as a fundamental dimension of any consideration, both practical and conceptual, of *jus post bellum*, but it would deserve a study in and of itself that is beyond the scope of this contribution. Despite this, accepting international intervention as a methodological starting point is justified, if not necessarily conceptually, at least from a very practical perspective. It is impossible to conceive of a post-conflict situation today existing in isolation of any international involvement, whether as a reality, a wish, or a promise.

This chapter will question the second of these premises, that of the suspicion against the state, through a discussion of the concept of sovereignty. The following sections are a challenge to a dominant approach in the human rights field in relation to sovereignty, which is in large part due to a lack of an adequate theoretical framework to think about the evolving structure of the concept.

The starting observation of this chapter is that while discussions about *jus post bellum* usually focus on a number of interests that need to be catered to (such as justice, reconciliation, reparation for victims, truth, education, etc.), sovereignty of the state is often forgotten or discarded. What is in fact argued here is that one of the main goals of *jus post bellum* should be to *relegitimize* sovereignty rather than *bypass* it. In other words,

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<sup>1</sup> "Intervention" is here used in a broad sense, including military, but also institutional, logistical, economic, legislative, or political.

while the state is often seen as the target (in the sense of *an obstacle*), the state and its sovereignty should become a target (in the sense of *an objective*) of *jus post bellum*.

It should be pointed out from the outset that this chapter does not purport to be a comprehensive overview of the history of sovereignty or its current framework in international law today. Nor is the aim to provide a systematic discussion of specific case studies in the *jus post bellum* context. This chapter is rather about a state of mind in relation to sovereignty and states, and an invitation to think of these matters in a more conceptual framework. In this sense, this chapter is the beginning of a reflection on the ways that the evolutions can be perceived and discussed, rather than the end result of such a thought process.

In order to achieve this, the present contribution will first illustrate how sovereignty comes into play in relation to international law applicable to *jus post bellum* situations (Section II). It will then recontextualize and reconceptualize these examples through a re-reading of Georges Scelle's theory of the *dédoublement fonctionnel* ("role-splitting") (Section III). The conclusion broadens the discussion on the new permanent features of sovereignty today, suggesting that we move towards a theory of integrated sovereignties (Section IV).

## II. Sovereignty, International Law, and *Jus Post Bellum*

This section provides some illustrations of how sovereignty comes into play in two particular areas relevant to post-conflict situations: that of statehood and self-determination (A) and that of prosecutions for international crimes, notably in the case of the International Criminal Court (ICC) (B).

### A. Statehood and self-determination

*Jus post bellum* situations often involve claims to statehood and self-determination, both of which necessarily relate intimately to sovereignty. These claims operate at numerous levels. On the discursive level, they act as justificatory narratives of conflict, and as such require a strong policy response in order for any comprehensive resolution to take place. This resolution takes place more particularly at the level of international law and raises a certain number of questions that can be mentioned briefly here.

The first question relates to the scope of the exercise of the right to self-determination. While this right seems to be easily identifiable in international law today,<sup>2</sup> being consecrated in founding documents of the international legal order<sup>3</sup> and having received an *erga omnes* recognition by the International Court of Justice (ICJ),<sup>4</sup> its exact scope

<sup>2</sup> More generally on the right to self-determination, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1999). See also, Matthew Craven, "Statehood, Self-determination, and Recognition" in Malcolm D. Evans (ed.), *International Law* (Oxford University Press 2010) 203–51.

<sup>3</sup> See Art. 1(2) of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) and common Art. 1 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>4</sup> *Case Concerning East Timor (Portugal v. Australia)*, Judgment [1995] ICJ Rep. 43, 29.

remains elusive. Indeed, clearly developed in the post-colonial context, its application as a more general right in international law today, while advocated,<sup>5</sup> is still contested.<sup>6</sup> This lack of clarity in the existing legal framework therefore creates a normative instability in the conditions of the exercise of the right to self-determination. The *Kosovo Advisory Opinion* issued by the ICJ in 2010<sup>7</sup> was an opportunity to clarify these matters, but the judges interpreted the question in a way to avoid these issues. The strongest voice in favor of a most expansive reading of the right to self-determination therefore came from the separate opinion of Judge Cançado Trindade, who developed his thoughts on remedial secession in a context of gross and historical human rights violations.<sup>8</sup> The ICJ did, however, make one interesting finding in the context of *jus post bellum*, considering that the principle of territorial integrity, which is at the heart of international sovereignty, only operated between states, and could therefore not be violated by non-state actors.<sup>9</sup>

The second question relates to the conditions of statehood and their evolution, as one possible outcome of the exercise of the right to self-determination. In this area, the answers provided by international law are most certainly unsatisfying. Debates on this issue often take either of two roads. First, they revolve around discussions of the formal criteria for statehood, as enshrined in the Montevideo Convention on the rights and duties of states,<sup>10</sup> and whether these criteria have evolved to include more substantial values, such as respect for human rights and democracy.<sup>11</sup> Secondly, they revolve around the question of recognition, and its either declarative or constitutive character.<sup>12</sup> Ultimately, these debates, while maybe necessary in the abstract, seem beside the point when one considers the traditional horizontal and decentralized nature of the international legal order. In the framework of such a legal order, the recognition as a member of the (legal) community is an (non-legal) inter-subjective social fact that ultimately relies on the will of the other members of the community, irrespective of any formal criteria that might or might not be put forward.

The real question, therefore, and possibly the most important one, is who or what entity ultimately decides on the matters. This is probably the area where one can trace the most notable evolution in the contemporary international legal order. Indeed, the international community, embodied in international organizations, most notably the UN, plays an ever-growing role in setting the framework for the realization of the right to self-determination, and possibly in legitimizing the acquisition of statehood. Cases of UN territorial administration are typical examples of this.<sup>13</sup> More generally,

<sup>5</sup> Cedric Ryngaert and Christine Griffioen, "The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers" (2009) 8 *Chinese Journal of International Law* 573.

<sup>6</sup> Peter Hilpold, "The Kosovo Case and International Law: Looking for Applicable Theories" (2009) 8 *Chinese Journal of International Law* 55.

<sup>7</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion [2010] ICJ Rep. 403.

<sup>8</sup> Kosovo Advisory Opinion (n. 7), Separate Opinion of Judge A.A. Cançado Trindade.

<sup>9</sup> Kosovo Advisory Opinion (n. 7) 437.

<sup>10</sup> Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, Art. 1.

<sup>11</sup> Craven, "Statehood, Self-determination, and Recognition" (n. 2) 236; Jure Vidmar, *Democratic Statehood in International Law* (Hart 2013).

<sup>12</sup> Craven, "Statehood, Self-determination, and Recognition" (n. 2) 240.

<sup>13</sup> See generally, Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press 2008); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission never Went Away* (Oxford University Press 2008).

international organizations are increasingly seen as key actors in the recognition of statehood. The recent efforts by Palestine to obtain membership in various international organizations illustrates this point. This increasing verticalization of the international legal order might suggest a paradigmatic shift with respect to the implementation of the right to self-determination and the acquisition of statehood, and therefore affects, ultimately, the dynamics of sovereignty.

This does not solve all previously mentioned legal debates surrounding these concepts and their scope, nor does it remove all political considerations from the picture. What this shift does is to centralize, institutionalize, formalize, and proceduralize a process that has until now been completely random. The question is no longer how 200 states react to claims to statehood and self-determination, but rather how these claims are addressed within the legal framework of international organizations. This might lead to more transparency and clarity, and ultimately might make relevant again the debates on the objective criteria of self-determination and statehood.

This vertical shift of course also raises new questions in relation to the role and eventual responsibility of these organizations under international law. Indeed, what are the limits of what the international community can do within the confines of the existing legal framework?<sup>14</sup> For example, in the case of Kosovo, while the ICJ, as mentioned previously, considered that the territorial integrity of a state could not be violated by a non-state actor, it still left open the question of whether the support of the independence movement by the UN could constitute such a violation. This question was not answered by the ICJ, because, as Yannick Radi and I have argued elsewhere,<sup>15</sup> it did not draw the logical conclusion of the presence of the UN in Kosovo, which would have required that the ICJ contemplate whether the declaration of independence could have been attributed to the UN as the entity exercising authority over the territory.<sup>16</sup>

## B. Accountability mechanisms: the example of the ICC

A second example that comes into play in the context of *jus post bellum* is the ever-developing international framework on the prosecution of international crimes, and more generally, on the accountability mechanisms that are discussed in the aftermath of gross human rights violations. Particularly for the purposes of our present discussion, it is interesting to note that international law increasingly constrains the sovereign margin of appreciation of the state in dealing with human rights violations through the development of

<sup>14</sup> On the question of the possible responses to alleged violations of international law by the UNSC, see Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011).

<sup>15</sup> Dov Jacobs and Yannick Radi, "Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo" (2011) 24 *Leiden Journal of International Law* 331.

<sup>16</sup> More could be said on the specific legal implementation of self-determination claims in post-conflict situations, most notably in the tensions between minority rights and democracy or other human rights. In relation to this, Christine Bell develops the idea of "hybrid self-determination" that emerges from the practice of peace-settlements and analyses the "normative instability" that flows from this practice. See Christine Bell, "Peace Settlements and International Law: From *Lex Pacificatoria* to *Jus Post Bellum*" in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) ch. 15. See also Christine Bell, ch. 10, this volume.

conventional and jurisprudential norms relating to duties to investigate and prosecute.<sup>17</sup> The ICC is one element of this framework, and illustrates this point.

It is well known that one of the most innovative features of the ICC Rome Statute is the adoption of the principle of complementarity.<sup>18</sup> In a nutshell, this principle is often presented as respecting the exercise of a state of its right to prosecute first those alleged to have committed international crimes.<sup>19</sup> With the existence of the principle of complementarity, the ICC is said to be a court of “last resort”<sup>20</sup> that only steps in when the national authorities have failed to take adequate steps to ensure accountability for the crimes that fall within the jurisdiction of the Rome Statute. In this sense, and superficially, the principle can be seen as being in full respect of state sovereignty in relation to criminal prosecutions.

The implementation of the principle is however more complex and there is some evidence that it constitutes an equally strong challenge to state sovereignty. It is beyond the scope of this chapter to elaborate in detail on the ways in which complementarity limits the capacity of states to adopt and enforce their own post-conflict accountability mechanisms, but some examples can be given by way of illustration.

One way in which complementarity challenges sovereignty is procedural. Indeed, while the Prosecutor has a statutory duty to determine that a case is admissible before opening an investigation or proceeding with a prosecution,<sup>21</sup> the Chambers have no such statutory duty. While the Chambers “must” determine that they have jurisdiction, they “may” determine whether the case is admissible.<sup>22</sup> This means, in practice, that challenges to admissibility must originate from a state or an accused,<sup>23</sup> and that as a result the burden of proof will rest on the challenging party to establish that the case is inadmissible. In other words, there is a presumption of admissibility that is not entirely in line with the general philosophy of the principle of complementarity. Moreover, procedurally, the ICC has a final say in the evaluation of the adequacy of national proceedings for any challenge to admissibility to be successful. This once again removes some discretion from the state to evaluate its own justice mechanisms.

Secondly, the scope of the principle has been narrowly defined by the case law. So far, only one challenge to admissibility has been successful.<sup>24</sup> This means that there is very little room for national authorities to implement alternative modes of accountability.<sup>25</sup> I have argued elsewhere that a decision on inadmissibility should not be given too much importance in terms of legal consequences.<sup>26</sup> Indeed, rejecting an

<sup>17</sup> For an overview of these developments, see Dov Jacobs, “Puzzling over Amnesties: Defragmenting the Debate for International Criminal Tribunals” in Carsten Stahn and Larissa van den Herik, *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 305, 307–14.

<sup>18</sup> Articles 1 and 17 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc. A/CONF.183/9 as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999 in PCNICC/1999/INF/3 (Rome Statute).

<sup>19</sup> For extensive analysis of the principle of complementarity, see Carsten Stahn and Mohamed El Zeidy (eds), *The International Criminal Court and Complementarity* (Cambridge University Press 2011).

<sup>20</sup> Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 153.

<sup>21</sup> Article 53 of the Rome Statute (n. 18).

<sup>22</sup> Article 19(1) of the Rome Statute (n. 18).

<sup>23</sup> Article 19(2) of the Rome Statute (n. 18).

<sup>24</sup> ICC, Prosecutor v. Gaddafi and Al-Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi, Case No. ICC-01/11-01/11, PTC I, 11 October 2013.

<sup>25</sup> For an analysis of the ICC framework on this, see Jacobs, “Puzzling over Amnesties” (n. 17).

<sup>26</sup> Jacobs, “Puzzling over Amnesties” (n. 17) 332–5.



admissibility challenge in a particular case does not necessarily invalidate the whole national accountability mechanism, it just means that it cannot be opposed to the court to avoid the exercise of jurisdiction. However, while the importance of a decision on admissibility should not be overstated from a legal point of view, it certainly has a psychological effect that cannot be ignored, and debates surrounding the involvement of the ICC in a number of African countries illustrate this point.<sup>27</sup>

### III. Contextualizing and Conceptualizing Sovereignty

The previous section has provided some examples of how international law, sovereignty, and *jus post bellum* can interact on a number of different levels. While these examples could be multiplied, and each of the cases would deserve fuller developments, the idea of this chapter is to contextualize these occurrences within the current conversation on sovereignty (A) and to propose a conceptual framework to think of the evolving interactions between the national and the international level that are at the heart of the matter (B).

#### A. The transformation of sovereignty and its limits

It is a terse statement to make that the international legal order is traditionally founded on the concept of sovereignty. From its modern foundations, attributed to the Treaty of Westphalia,<sup>28</sup> to the “constitutional” moment of the UN Charter, the international legal order has been conceived of as the interaction between sovereign states. Indeed, the UN Charter stresses the point that “[t]he Organization is based on the principle of the sovereign equality of all its Members.”<sup>29</sup> The different aspects of this principle are well known and cover a certain number of principles, such as sovereign equality, territorial integrity, and non-intervention.<sup>30</sup>

It is unoriginal to point out that both these sovereignties have been challenged in past decades, following a number of overlapping and self-reinforcing phenomena. One of these phenomena is the paradigm shift to the individual as the main object of interest of international law.<sup>31</sup> This is reinforced by the multiplication of international obligations that not only regulate the conduct of states in their mutual relations, but also regulate the conduct of states within their national legal order. This has as a consequence an increased porosity between the international and the national level, where erosions of *external* sovereignty directly lead to the erosion of *internal* sovereignty. An additional factor is the emergence of norms that, while in theory relying on traditional law

<sup>27</sup> Sarah Nouwen and Wouter Werner, “Doing Justice to the Political: The International Criminal Court In Uganda and Sudan” (2010) 21 *European Journal of International Law* 941.

<sup>28</sup> Derek Croxton, “The Peace of Westphalia of 1648 and the Origins of Sovereignty” (1999) 21 *The International History Review* 569.

<sup>29</sup> Article 2(2) of the UN Charter (n. 3).

<sup>30</sup> For some critical takes on these dimensions, see Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004); Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999).

<sup>31</sup> On this, see Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) and A. A. Cançado Trindade, *International Law for Mankind: Towards a New Jus Gentium* (Martinus Nijhoff 2010).

formation mechanisms based on consent, increasingly emerge as quasi-constitutional norms that only remotely relate to the consent and practice of states, or at the very least do not require demonstrating the consent of any particular state at which the norm is directed. An obvious example of these norms are those of *jus cogens*, which under the guise of being just another category of customary rules, appeal to other considerations for their existence, such as community interests of various sorts.<sup>32</sup>

This reappraisal of sovereignty has led to a reconceptualization of the notion as a balance between rights and obligations, as illustrated by what remains in the current state of international law a policy consideration rather than a “hard” norm, that of the Responsibility to Protect.<sup>33</sup>

Two remarks need to be made in relation to this transformation of sovereignty. First, from a descriptive point of view, this transformation does not mean that sovereignty has lost all its relevance in the international legal order as some would like to believe. While the reality of the international legal order today would appear to make the point obvious, it seems nonetheless necessary to recall that sovereignty, and its corollaries, are still key components of the current system of international law, notably relating to issues that are being considered in the *jus post bellum* framework. For example, territorial sovereignty and its sanctity remain important in discussions relating to *jus ad bellum* and the definition of aggression. This attachment can also be found in the Rome Statute, which recalls the right of a state to defend its unity and territorial integrity.<sup>34</sup> In the same way, the dividing line between conflicts that “concern” the international community and conflicts that remain outside the scope of international law, while having been increasingly blurred, still exists, as illustrated by the Rome Statute, which provides that the war crimes provisions do “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”<sup>35</sup>

Secondly, from a normative point of view, there is a tendency to believe that because sovereignty has been used in the past as an excuse for human rights abuses, it should be disregarded altogether as a relevant concept in thinking of post-conflict situations. In essence, because the state cannot be trusted, at a quasi-ontological level, its functions should be exercised by other entities, both at the supra and infra national levels. This tendency, however, misses two fundamental points. The first one, very pragmatically, is that of the importance of institutions in ensuring a stable transition in the post-conflict context. The second one is more sociological: the challenge raised against the state ignores the fact that all societies, when reaching a critical size, will develop in vertical organizational structures that will involve an exercise of power from one level over another. Whether one calls it a “state” or conceptualizes it under the umbrella notion of “sovereignty” is in fact irrelevant and cannot remove this sociological reality. As a result, the reliance on the UN, international NGOs, or local civil society cannot replace, in the long term, the establishment of state institutions capable of allowing a country to

<sup>32</sup> See e.g. the reasoning of the ICJ in relation to the Genocide Convention: *Reservations to the Convention on Genocide*, Advisory Opinion, [1951] ICJ Rep. 15, 23.

<sup>33</sup> On this see Carsten Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” (2007) 101 *American Journal of International Law* 99.

<sup>34</sup> Article 8(3) of the Rome Statute (n. 18).

<sup>35</sup> Article 8(2)(d) of the Rome Statute (n. 18).

function with some level of autonomy in the future. The key discussion should therefore not so much be on challenging sovereignty per se, but rather on the conditions in which sovereignty can be effectively exercised.

What is required is therefore a reconceptualization of sovereignty, rather than a Manichean rejection of the notion. Extensive work has been done in various social sciences on this conceptualization, from a number of philosophical, political, linguistic, or anthropological angles that cannot be elaborated on here.<sup>36</sup> These studies, while comprehensive, do not fit the more specific and possibly less ambitious aim of the current chapter, that of understanding and reconceptualizing sovereignty in a more narrowly international legal sense, and more specifically in the relationship between the international and the national. Therefore, the remainder of the chapter will borrow from the work of Georges Scelle in ways that are relevant for the present discussion, as will be now developed.

## B. Reversed role-splitting as a conceptual framework

In order to rethink sovereignty and the relationship between the national and the international, inspiration can be found in Georges Scelle's theory of *dédoublement fonctionnel* ("role-splitting") and how it can be readapted to the reality of today's international legal order.<sup>37</sup> This section will therefore briefly describe the mechanics of this *dédoublement fonctionnel*, before explaining how it can be rethought in relation to the core point of this chapter, that is, to aim at the relegitimization of the state in post-conflict situations and highlight the questions that this reconceptualization raises.

How does Scelle present this *dédoublement fonctionnel*? His starting point is the absence in the international legal order of a centralized system to ensure the basic functions of the order, which are law-making, adjudication, and enforcement. For him, it is national authorities that ensure these functions by acting in a dual capacity, both as organs of their national systems and as organs of the international system. Scelle's theory was elaborated within a profoundly monist approach to the interaction between the international legal order and national legal orders, with the former being hierarchically superior. It should be pointed out in that respect that by proposing to reverse Scelle's logic, I am not really being faithful to his underlying philosophy. He was indeed very skeptical of sovereignty, which he described as archaic and dangerous. He promoted

<sup>36</sup> For a selection of theoretical works on sovereignty and its evolutions, see Robert Jackson, *Sovereignty* (Polity 2007); Jonathan Hovcraft, *Captives of Sovereignty* (Cambridge University Press 2011); Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 1995); Samantha Besson, "Sovereignty in Conflict" (2004) 8 *European Integration Online Papers* 15; Winston P. Nagan and Aitza M. Haddad, "Sovereignty in Theory and Practice" (2011–12) 13 *San Diego International Law Journal* 429.

<sup>37</sup> While there has not been any theoretical discussions on the reversal proposed of Georges Scelle's *dédoublement fonctionnel* theories, the developments in this section are inspired from the numerous writings of Georges Scelle. See, in particular, Georges Scelle, *Règles Générales du Droit de la Paix* (1933) 46 *Recueil de Cours* 331; Georges Scelle, *Théorie et Pratique de la Fonction Exécutive en Droit International* (1936) 55 *Recueil de Cours* 91; Georges Scelle, *Précis de Droit des Gens: Principes et Systématiques* (Daloz 2008). See also for commentaries in English: Hubert Thierry, "The Thought of Georges Scelle" (1990) 1 *European Journal of International Law* 193 and Antonio Cassese, "Remarks on Georges Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law" (1990) 1 *European Journal of International Law* 210.

laying emphasis on the individual and any other entity that might challenge sovereignty in this sense. However, I am not in complete betrayal of his thoughts, because he did recognize the importance of state institutions in regulating social behavior.

Still following this idea that the goal should be the relegitimization of the state, the second part of my article will propose an original inversion of Scelle's *dédoublement fonctionnel* by discussing how international institutions should be conceptually analyzed as organs of the national legal order, rather than the opposite. This allows a more subtle discussion of how international institutions interact with national institutions and ultimately contribute to the reaffirmation of national sovereignty. There are of course tensions between requirements under international law and national law that would need to be explored, as the model is elaborated on, but the conceptual framework proposed here provides an interesting theoretical context and starting point to think of the way *jus post bellum* can be situated within this proposed interaction between the international and national legal orders.

As a result, the reversal that is proposed here is that rather than seeing how national authorities contribute to the consolidation of the international legal order and act as agents of the international community, we should analyze how international institutions act as agents of the national legal order, and, consequently, how it affects the reconsolidation of that legal order. This reversal is justified by the same logic that has justified the theory in the first place in its original form. Indeed, in certain circumstances, the international legal order, while remaining primitive in a number of respects, is far more developed and functioning than the legal orders of states in post-conflict situations, which will be devoid of the basic state institutions.

In addition, examples of this reversed *dédoublement fonctionnel* already exist. Kosovo and East Timor, where the UN exercised all state functions, are the most typical examples. In fact, discussions of the legal status of international entities involved in territorial administration, particularly in relation to the question of sovereignty, is certainly not absent from the literature. A number of authors have discussed how international territorial administration affects the question of responsibility and sovereignty.<sup>38</sup> What the *dédoublement fonctionnel* theory allows is to cover a broader spectrum of phenomena, not just of formal administration, but also of situations where some of the state functions might be in part or in whole dealt with by international organs. In this sense, the principle of complementarity, at least in theory, might be analyzed in this light, as might be the practice of hybrid tribunals.

With this framework in mind, two series of comments appear necessary. The first one relates to the practical difficulties that arise. It is striking to observe that the difficulties envisioned by Scelle also apply when you reverse the theory. Indeed, he saw this theory as only a temporary solution to the deficiencies of the legal order (in his case, the international one, in our case the national one). He also points out the unilateral decisions

<sup>38</sup> See above (n. 13). See also, Meir Ydit, *Internationalised Territories: From the "Free City of Cracow" to the "Free City of Berlin": A Study in the Historical Development of a Modern Notion in International Law and International Relations (1815–1960)* (Sijthoff 1961); Daniel Smyrek, *Internationally Administered Territories: International Protectorates?: An Analysis of Sovereignty over Internationally Administered Territories with Special Reference to the Legal Status of Post-War Kosovo* (Duncker & Humbolt 2006); Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford University Press 2007).

that might be taken by the “dual agent” (thus, in the reversed approach, raising issues of local legitimacy and ownership), and the difficulties in the law-making process and identification of the appropriate adjudicatory forum. All these issues find an echo in the *jus post bellum* context. Another difficulty is establishing, in the relation between the national and international legal order, the capacity in which the “dual agent” acts. This question arose sharply, if slightly indirectly, in relation to the Kosovo advisory opinion, where the ICJ had to determine the relevant international law and whether regulations adopted by the provisional administration could be deemed as such. As developed elsewhere, the ICJ made what can only be called a mess of the analysis, and a more subtle discussion is warranted in that respect.<sup>39</sup> Another practical question that arises is that of “shared responsibility.”<sup>40</sup> If functions are exercised by different entities, who bears the consequences, notably on the international plane, of failure to adequately perform? Again, the Kosovo example is noteworthy, as it gave rise to discussions on the responsibility of the UN in relation to peacekeeping forces that exercise police powers, or the UN Secretary-General special representative in his legislative function. The question might have even arisen in relation the declaration of independence, had the ICJ addressed the issue correctly.

The second series of comments is more conceptual. Once one applies the reversed *dédoublement fonctionnel*, one accepts that certain functions (if not all) are exercised by entities other than the state, thus bringing into question the unity of the concept of sovereignty, whereby the state would exercise sovereignty over some functions but not others. This ties into the first two sections of the article. Indeed, whereby the first section has shown that the exercise of sovereignty by a state is no longer absolute and may be “contingent” or “conditional,” under the *dédoublement fonctionnel* theory, sovereignty may also be “shared” or “split” among several entities (states and IOs in our case). This has also been called “fragmented”<sup>41</sup> sovereignty or “fuzzy”<sup>42</sup> sovereignty. Moreover, once this sovereignty is split in this way, questions arise as to how it affects the criteria of statehood and the recognition of states, especially if the split sovereignty is not only temporary, but in some cases permanent, which leads us to the concluding section of the chapter.

#### IV. Conclusion: From Sovereignty to Integrated Sovereignties

If one pushes the reasoning a little further and tries to combine both the original version of *dédoublement fonctionnel* (which aimed at providing a strengthening of the international legal order) and the reversed one (which aims at a strengthening of the national legal order), we arrive at a complex situation where the interests of states and the international community as a whole need to be combined. These interests justify that both entities exercise functions that enable their realization. This leads us to accept

<sup>39</sup> See n. 15.

<sup>40</sup> On this, generally, see Dov Jacobs and André Nollkaemper, “Shared Responsibility in International Law: A Conceptual Framework” (2013) 34 *Michigan Journal of International Law* 359.

<sup>41</sup> See e.g. Nir Gazit, “Social Agency, Spatial Practices, and Power: The Micro-foundations of Fragmented Sovereignty in the Occupied Territories” (2009) 22 *International Journal of Politics, Culture, and Society* 83.

<sup>42</sup> Christine Bell, ch. 10, this volume.

that sovereignty is not just a feature of the state, but can also be a feature of the international community when it exercises functions that are legitimately of international concern.<sup>43</sup> This means that we escape the traditional monist/dualist dichotomy, as well as the top-down/bottom-up dichotomy, all levels becoming mutually reinforcing in reaching their own goals. In essence, this means that we have to discuss not just how the state can be relegitimized in its exercise of sovereignty, but how this relates to the increased permanent devolution of functions to an emerging international sovereign. This would be a fundamental shift in the way of thinking about sovereignty in the international legal order, especially in relation to *jus post bellum*. Indeed, this calls for thinking of models of sovereignty that take into account the possible permanence of international exercise of sovereign powers in certain areas, such as peacekeeping or the prosecution of international crimes. What makes the elaboration of such models more complicated is that both levels might exercise sovereignty over the same fields or activities, even if technically they wouldn't be applying the same sovereign power.

Several consequences arise from this invitation to define a new model. First, this means, from a semantic point of view, that terms used until now ("fragmented sovereignty," "fuzzy sovereignty," etc.) do not work anymore, because they imply a single sovereignty that is shared. What we end up with are in fact several sovereignties that interact, overlap, or compete, in the same way that two states may exercise criminal jurisdiction over the same crime for different reasons (territoriality principle, nationality principle, etc.). This is why the ambition of the model must be to describe a system of "integrated sovereignties," a more adequate idiom to analyze this new situation. In that system, some sovereignties would be shared and others separate.

Secondly, a theory of integrated sovereignties, grounded on a double *dédoublément fonctionnel*, implies, as the name says, a more differentiated functional approach, depending on the subject area under consideration. This of course raises once again the question of how you now combine these sovereign powers in defining the sovereign entity. Indeed, the functional approach has as a consequence that it is increasingly difficult to have a "checklist" approach whereby sovereignty over a certain number of fixed issues (territory, population, etc.) implies sovereignty as a quality of the entity. There are three possible solutions: (1) adopt a corresponding functional definition, whereby for each function there is a corresponding sovereign exercise. As a consequence, this would have to explode completely the concept of sovereignty as traditionally defined; (2) define a more flexible list of fields that in combination would identify a distinct sovereign entity; (3) accept that as a consequence of the evolutions of statehood as explained previously, sovereignty is attributed from above (through the UN for example) through compliance with a number of criteria.

Whatever solution one adopts, this complex web of integrated sovereignties shows that beyond the identification of the "jus" in *jus post bellum*, the overall understanding of the concept requires that more theoretical developments, along the lines of those

<sup>43</sup> Dan Sarooshi, "The Essentially Contested Nature of Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government" (2003-04) 25 *Michigan Journal of International Law* 1107.

proposed here, be elaborated on, so that post-conflict situations can be adequately understood within the general framework of the modern evolutions of the international legal order, the reconfigurations of the interaction between the national and the international, and, ultimately, the transformations of sovereignty as a changing but still fundamental principle at the heart of the social contract, be it international or national.

# Post-Occupation Law

*Yaël Ronen\**

## I. Introduction

In January 2008 the Israeli Supreme Court ruled that despite the fact that Israel was no longer an occupying power in the Gaza Strip, Israel remains obligated to provide electricity to the residents of the Gaza Strip. The Court based this obligation, inter alia, on “the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.”<sup>1</sup>

This chapter explores the notion of post-occupation law suggested in this last phrase, namely a former occupant’s obligation based on the dependence of the territory and its inhabitants on that former occupant. It goes beyond the particulars of the controversy over the status of the Gaza Strip, assuming that at some point Israel will relinquish the control that it still maintains over the Gaza Strip at the time of writing, whatever may be its present characterization. At the same time, the chapter does draw on the situation in the Gaza Strip, as well as in the West Bank, to illustrate the scenario of long-term occupation resulting in a dependence of the population in the territory on the former occupant. The question of whether there is a legal basis for obligating a former occupant to provide for the population in the formerly occupied territory should thus properly be placed at the farthest reach of the debate on *jus post bellum*. If *jus post bellum* focuses on the aftermath of hostilities, post-occupation law focuses on the aftermath of the latter.

The next part of the chapter describes the phenomenon which post-occupation law seeks to regulate. This is followed in section III by a discussion of the role of post-occupation law. Section IV examines whether post-occupation law can be grounded in existing bodies of law either directly or by analogy. Unlike other scholarship considered below, which has examined whether a particular situation can be framed in terms of existing legal regimes, the present chapter takes as its point of departure the characteristics of various legal regimes, and examines how broadly their applicability may extend, and specifically whether it can extend to post-occupation situations. Section V follows with some observations on the regulation of post-occupation dependence through post-occupation law in light of existing regimes, and on the relationship between post-occupation law and other legal regimes.

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<sup>1</sup> HCJ 9132/07 *Jaber Al-Bassiouni v. The Prime Minister* (30 January 2008) (unpublished) para. 12. For an official English translation, see the Israeli Supreme Court website <[http://elyon1.court.gov.il/files\\_eng/07/320/091/n25/07091320.n25.pdf](http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf)> (accessed 23 July 2013).



## II. The Phenomenon of Dependence on a Former Occupant

Occupation was envisaged by the drafters of the law of occupation as a short-term phenomenon. Even following the experience of the two world wars, the drafters of GC IV Article 6 assumed that occupation would normally last no longer than a year.<sup>2</sup> From the short-term character of occupation follows the limited scope of changes that the occupant may carry out in the occupied territory: it must respect and maintain the law in force in the territory unless absolutely prevented.<sup>3</sup> Originally, such absolute obstacles consisted of the military exigencies of the occupant within the territory. The occupant's national interests, even military ones insofar as they do not pertain to the territory itself, remain outside the scope of legitimate consideration. This legal framework envisages the occupant's territory and the occupied territory remaining separate from each other (at least to the extent that they had been separate prior to the occupation), with the economic, social, political and other systems in the occupied territory continuing their operation as previously, namely independently of those of the occupant's territory or sovereign institutions, subject to military necessities and the exigencies of maintaining public order.

This model of occupation, as entirely separate from the sovereign operation of the occupant, is premised on a certain *laissez faire* perception of the role of the state and of occupation. However, this notion has not withstood the test of time. As international law began to acknowledge the profound change in the role of the state, particularly the move from *laissez faire* policy toward a responsibility to act proactively for the guarantee of economic and social human rights, the expansion of states' obligations has had an impact also on their obligations when acting as occupants, rendering the "hands off" policy embodied in the traditional law of occupation legally untenable.

It is on this basis that the Israeli Supreme Court has ruled that the obligation of the occupant to maintain civil life not only allows the occupant but requires it to adapt the legal situation to the exigencies of modern times.<sup>4</sup> Once the occupant is enjoined by positive obligations, the distinction between its conduct in its sovereign territory and its conduct in the occupied territory may be all too easily blurred, particularly if the territory of the occupant is adjacent to the occupied territory, as discussed below. As a result of this blurring, connections may develop between the occupied territory and the sovereign territory of the occupant, unforeseen by the law of occupation and not regulated by it. For example, under international human rights law the occupant may be required to provide certain health or education services to the population of the occupied territory. There may be significant differences in the standard of services available within the occupied territory and within the occupant's territory. If the occupant

<sup>2</sup> Oscar Uhler and Henri Coursier, *Commentary on the Geneva Conventions of 12 August 1949* Vol. IV (ICRC 1958) 62.

<sup>3</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, Martens Nouveau Recueil (ser. 3) 461 (adopted 18 October 1907, entered into force 26 January 1910) Art. 43 (Hague Regulations); and, in slightly different wording, in Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV) Art. 64.

<sup>4</sup> HCJ 337/91 *The Christian Society for the Sacred Places v. Minister of Defence*, 26(1) *Piskei Din* 574, 582.

offers access to higher-level services within its own territory, rather than develop them within the territory, this might result in the population's reliance on the occupant's level of services. Severing the population from those services abruptly could result in direct physical harm. Similarly, action in conformity with the tenets of the law of occupation may also create dependence: for example, there may be circumstances where the maintenance of public order would require introduction of a viable currency to ensure economic stability and continuity.<sup>5</sup> Introduction of the occupant's currency might be an appropriate response in the short term, although at a later stage it may result in a dependence of the occupied territory's economy on that of the occupant's.

Another challenge to the traditional law is the merging of military and civilian governance. The notion of "military necessity" has expanded to encompass a wide security agenda, including the authority of the occupant to control the civilian population through non-military means.<sup>6</sup> Thus, some Israeli policies that were *prima facie* unrelated to military needs within the occupied territory have nonetheless been justified precisely on security grounds. For example, the incorporation of Palestinian workforce into the Israeli economy was presented as militarily justified because it raised the population's standard of living significantly; and the ensuing prosperity produced a docile population, less susceptible to provocation by militant forces. Prosperity also enhanced peaceful interaction between the local population and the Israeli authorities,<sup>7</sup> reducing the risk of unrest within the territory<sup>8</sup> and lowering the burden of maintaining military forces in the territories.<sup>9</sup> This prosperity was based, however, on practices which rendered the Palestinian market dependent on the Israeli one.

Dependence is not a natural component of every occupation. In the Israeli context it is common to cite the fact that the occupation is prolonged as a cause for the development of dependence. There is no doubt that the potential for dependence grows as the occupation draws out, but there may be a lengthy occupation which does not create such dependence. Examples include the 4-year occupation of Belgium by Germany during the First World War, the 3-year Allied occupation of Germany and the six-year American occupation of Japan following the Second World War, and even the 51-year occupation of the Baltic States by the USSR from 1940.<sup>10</sup> None of these concluded with any significant immediate-term dependence on the former occupant.

Various factors other than duration may influence the extent of dependence created by occupation. First, dependence is more likely to develop if there is geographical contiguity between the occupied territory and the occupant. This allows easy access of people, goods, and services, and facilitates assimilation (and dependence). Secondly, dependence is largely the result of the occupant's governmental intervention. Accordingly, its chances

<sup>5</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 94, para. 217.

<sup>6</sup> Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 2004) 124.

<sup>7</sup> HCJ 69/81 *Abu Ita and others v. Commander of Judea and Samaria and others*, 37(2) *Piskei Din* 197, 313.

<sup>8</sup> Dinstein, *The International Law of Belligerent Occupation* (n. 5) 36, para 81.

<sup>9</sup> Neve Gordon, *Israel's Occupation* (University of California Press 2008) 62–9.

<sup>10</sup> The Soviet Union had purported to extend its sovereignty to the territory and therefore did not follow the law of occupation.

increase as the occupant expands its goals, whether those are territorial expansion or regime transformation.<sup>11</sup>

Post-occupation dependence may take various forms. During the occupation, individuals may rely on services and infrastructure provided by the occupant or available in its territory, such as employment, education, and health services.<sup>12</sup> An abrupt curtailment of access to such services and infrastructure without local alternatives has an effect at the individual level. A different type of dependence concerns commodities and infrastructure such as electricity and gas, which are provided not to particular individuals but to the territory at large; yet cutting off the supply without ensuring a viable alternative also impacts directly on individuals' survival. There may also be a dependence of the community as a whole, such as when the local economy is so tightly linked to that of the occupant that it becomes directly affected by the occupant's monetary policy. Finally, there may be measures that formally have a direct effect on individuals, but which also affect the capacity of the community as a whole. For example, where the commercial ties of the population in the occupied territory are bound to the occupant's territory, severing them abruptly not only puts the livelihood of the individuals concerned at risk, but also jeopardizes the economy of the community.

### III. The Role of Post-Occupation Law

The purpose of the post-occupation law examined here is to ensure that the new or reconstituted political entity and its population are not devastated by an abrupt discontinuation of the links they have had with the occupant and its territory. At the same time, the goal of this body of law should be not only to respond to a need, but also to facilitate transition to self-sufficiency rather than to perpetuate dependence.<sup>13</sup>

Numerous actors could be involved in addressing a situation of dependence: the occupant, the returning or new sovereign, or the two in concert. The incoming government must assume responsibilities as part of its assumption of sovereignty. Gradually the burden to provide for the formerly occupied population would shift to it.<sup>14</sup> Until it is fully capable of discharging that responsibility, however, only the former occupant is in a position to respond effectively to the dependence.

The notion of regulating this situation raises numerous questions. A first set of questions arises with respect to the element of dependence: What constitutes dependence? It is proposed that post-occupation law should only be concerned with immediate needs that the incoming sovereign cannot provide, irrespective any policy choices

<sup>11</sup> Indeed, it has been argued that the coalition of states invading Iraq in 2003 carries a moral responsibility to help rebuild the state because it had been involved in promoting regime change. Carsten Stahn, "‘*Jus ad Bellum*,’ ‘*Jus in Bello*’ . . . ‘*Jus Post Bellum*’? – Rethinking the Conception of the Law of Armed Force" (2006) 17 *European Journal of International Law* 921, 931.

<sup>12</sup> It is actually in these spheres that Israel has transferred authority to the Palestinian Authority. This does not preclude Israel from holding overall authority and consequently responsibility.

<sup>13</sup> Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)" (2007) 23 *American University International Law Review* 311, 335.

<sup>14</sup> Eyal Benvenisti, "The Law on the Unilateral Termination of Occupation" [2008] Tel Aviv University Legal Working Paper Series 93 <<http://law.bepress.com/cgi/viewcontent.cgi?article=1099&context=taulwps>> (accessed 23 July 2013) 13.

it makes. A further challenge is to determine that true dependence exists. Factually, shortfalls might often be attributed to the choices of the incoming authorities within the territory. Moreover, the question is how narrowly or widely a response is defined. For example, if the population is entirely dependent on the former occupant for employment, a dependence which the incoming sovereign cannot respond to, is that sovereign required to provide access to its territory for continued work? Or must it offer subsistence allowances in lieu of income resources, and thus exempt the former occupant from its obligation?

A second set of issues concerns the second element, namely the process of transition. The main challenge is to determine when the formerly occupied territory has crossed the threshold of independence. Unless clearly identified, self-sufficiency as a standard is prone to abuse.<sup>15</sup> Both the former occupant and the authorities of the territory may have an interest in prolonging the transitional process: The former occupant may find post-occupation law a convenient vehicle for perpetuating its influence over the territory by means other than the territorial control which it wielded previously. The authorities in the formerly occupied territory may find the obligation on the former occupant a convenient means of shirking their own responsibilities. In the absence of clear benchmarks for evaluating self-sufficiency, there are no means of determining excess in the conduct of one party or failure of the part of the other. Yet it is unrealistic to suggest universally-applicable benchmarks, given the natural differences among states. Insofar as concerns the obligations of the former occupant, a possible route might be reference to the territory's previous capability, given that the occupant is not obligated under the law of occupation to advance the territory beyond the status in which it found it when taking over. However, in situations of long-term occupation, past conditions may be outdated and irrelevant as a standard. A similar difficulty beleaguers the attempt to evaluate the sincerity of the incoming authorities in taking over their responsibility. Needless to say, the identity of the agent deciding on these questions will be crucial to their framing.

The basis for imposing an obligation on the former occupant is principally the fact that it is the only actor in a position to respond to the dependence. But it is also significant that the occupant was intimately involved in the creation of the dependence. In this respect dependence on a former occupant differs from the dependence that sovereign states often have on other states. At least formally, sovereign and independent states have a choice whether to entrust other states with the provision of vital resources and services. In contrast, in situations of occupation the terms of the relationship are dictated unilaterally by the occupant. The dependence is therefore created, induced, or at the very least encouraged by the occupant.

A distinction might be argued to exist between occupations, or regimes that qualify as occupations, which are imposed on the population and those which are welcomed by it. For example, it is rarely claimed that that regime in the Turkish Republic of Northern

<sup>15</sup> This problem is not unique to post-occupation situations. It is one of the obstacles to the advancement of the Responsibility to Protect, which is sometimes labeled imperialistic. Carlo Focarelli, "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine" (2008) 13 *Journal of Conflict and Security Law* 191, 209.

Cyprus is *imposed* by Turkey on the Northern Cypriot population. The economic dependence of Northern Cyprus on Turkey<sup>16</sup> is therefore ultimately the consequence of the local population's voluntary attempt to secede from the Republic of Cyprus. The same would apply in other breakaway regions that are supported by the forces of another state, such as South Ossetia and Abkhazia. Arguably, in all these cases the responsibility for any plight suffered by population rests not only with the occupant, but also with the population itself. However, if at issue is the survival of the population, both at the individual and at the political entity level, and the key to this survival is in the hands of the occupant, the circumstances by which that dependence has come to exist are of limited significance. Undoubtedly, however, the circumstances of the occupation and character of the returning or new sovereign inform the balance between the need to respond to dependence and the need to facilitate transition into independence.

#### IV. Sources for Post-Occupation Law

The need for post-occupation law is directly related to the manner in which the occupation ends.<sup>17</sup> Where the occupation ends through a consensual process, such as the conclusion of a peace treaty or consent to independence of the occupied territory, the transition in governance would likely be regulated by agreement. The need to regulate a non-consensual obligation of the occupant after the termination of the occupation seems to be peculiar to situations of unilateral withdrawals. These may follow a variety of events ranging from the violent ousting of the occupant from the territory to a unilateral withdrawal by the occupant of its forces from the territory.

The most prominent examples of dependence persisting beyond occupation may be that of Israel's disengagement from the Gaza Strip (assuming, *arguendo*, that this constituted the end of occupation or that it will constitute such an end once Israel relinquishes the control it currently maintains of the air and sea access to the Gaza Strip), or its withdrawal from southern Lebanon in 2000. Another instance of a unilateral and abrupt withdrawal of an occupant from territory that was heavily dependent on it<sup>18</sup> is Indonesia's withdrawal from Timor-Leste. At the post-occupation phase the question of Indonesian responsibility for immediate vital needs did not arise, largely because Timor-Leste benefited from international assistance. This introduces another factor in regulation of a former occupant's obligation, namely international involvement on

<sup>16</sup> Huseyin Ozdeser, "Foreign Trade and Economic Growth in Northern Cyprus: A Time Series Analysis" (2007) 10 *International Research Journal of Finance and Economics* 88.

<sup>17</sup> On modalities for the termination of occupation, see Adam Roberts, "The Termination of Military Occupations, Background Document, Appendix 2 to First meeting of Experts: the Beginning and End of Occupation" in Tristan Ferraro, *Occupation and Other Forms of Administration of Foreign Territory: Expert Meeting* (International Committee of the Red Cross, March 2012) 41.

<sup>18</sup> The health sector in Timor-Leste was entirely dependent on Indonesia, which had funded it, albeit at a low level, during its occupation of the territory between 1975 and 1999. The withdrawal of Indonesia's military from Timor-Leste in 1999 resulted in the destruction of most of the country's health infrastructure and supplies and the departure of most of the country's senior health managers and doctors. Coupled with the violence that took place in 1999, this resulted in the territory facing a serious risk of communicable disease outbreaks and, as a result, a considerable increase in "excess mortality." Andrew Rosser, "The First and Second Health Sector Rehabilitation and Development Projects in Timor-Leste" (November 2004) <[http://siteresources.worldbank.org/INTSF/Resources/395669-1126194965141/1635383-1154459301238/Rosser\\_HealthProjects\\_Timor.pdf](http://siteresources.worldbank.org/INTSF/Resources/395669-1126194965141/1635383-1154459301238/Rosser_HealthProjects_Timor.pdf)> (accessed 23 July 2013). A similar plight affected the education sector, where 80 percent of

behalf of the former occupant or directly. International assistance may be advantageous in comparison with placing obligations on the former occupant, at least where the interveners are perceived as less interested than the former occupant or the new sovereign. However, since such assistance would be voluntary rather than legally required, the need to establish a source of obligation remains with respect to the former occupant.

The possibility of international assistance nonetheless highlights the characteristic of post-occupation law as a forward-looking, immediate response rather than a matter of international responsibility. This distinction is important since as a negative outcome of conduct attributed to a particular state, it is tempting to regard dependence as harm caused by an internationally wrongful act. However, dependence is not necessarily the consequence of an occupant's wrongful conduct; it may even be the consequence of compliance with international legal obligations, as noted at the outset.

One might argue that any policy that results in the dependence of the occupied territory on the occupant to such an extent that it cannot survive independently is by definition unlawful, as it violates the right to self-determination of the people in the occupied territory. There are a number of difficulties with this line of argument. First, not every occupied territory is a self-determination unit,<sup>19</sup> whose viability is measured independently of other entities. While this is the case with respect to the Gaza Strip and West Bank or to Timor-Leste, other occupied territories, such as Northern Cyprus and South Ossetia, have not been recognized as self-determination units. Secondly, self-determination is a long-term interest, while the measures at issue may respond to immediate needs. In case of conflict between the two, it is far from obvious that self-determination considerations should override all others. For example, if in order to improve the standard of living the occupant undertakes to provide energy sources to the occupied territory,<sup>20</sup> but does not develop the infrastructure within the territory, the immediate benefit may be more valuable to the population in the occupied territory than the abstract—and distant—erosion of the means to exercise its right to self-determination.

All this does not preclude the possibility that in a *particular* instance dependence would be the consequence of a violation of international law (most likely of the law of occupation, or, in case of a self-determination unit, of the right to self-determination). In such a case, the laws of state responsibility would require the former occupant to provide a remedy to the formerly occupied territory. But dependence would constitute, in this context, a specific injury rather than an independent element generating responsibility.

secondary school teachers were from Indonesia. Government of the Democratic Republic of Timor-Leste, ADB, JICA, UNDP, UNICEF, UNMISSET, and the World Bank, *Timor-Leste Poverty Assessment, Poverty in a New Nation: Analysis for Action* (World Bank Publications 2003) 59 para 5.11. The shortage of local administrative and economic skills, sidelined for over two decades by Indonesians, had also left its mark. James Manor, *Aid That Works: Successful Development in Fragile States* (World Bank Publications 2007) 64. The Indonesian occupation also led to a structural change in local economy, with a dramatic shift out of agriculture into other activities, primarily the public sector that served the military presence in the territory. Manor, *Aid That Works* 61; World Bank *et al.*, *Timor-Leste Poverty Assessment* 23 para. 3.13.

<sup>19</sup> James Crawford, *The Creation of States* (Oxford University Press 2006) 127.

<sup>20</sup> HCJ 258/72 *Electricity Co. for Jerusalem District v. Minister of Defence* (1972) 27(1) *Piskei Din* 124, 138.

Proceeding from the need to ground post-occupation law in primary norms, this section explores whether such law can be found in existing bodies of law. It first considers whether the law of occupation and international human rights law, both of which are applicable during the occupation, can be extended to the period following the occupation. It then examines the possibility of drawing analogies from legal regimes regulating discrete situations that share certain pertinent characteristic with post-occupation dependence as described here.

### A. The law of occupation

The law of occupation is premised on the exercise of effective territorial control, and the obligations that it imposes upon the occupant are premised on the occupant's capacity to discharge them through such exercise. Thus, so long as the territory is under occupation, the occupant is obligated under Article 43 of the Hague Regulations<sup>21</sup> to ensure public order and civil life. This requires it to respond to any dependence that has developed, whether intentionally or otherwise. The appropriate response may consist of satisfying the dependence, minimizing it, or eliminating it altogether.

Once effective control comes to a complete end, the law of occupation can no longer be implemented *simpliciter*.<sup>22</sup> Some commentators, concerned that in such case a legal vacuum would result, have therefore proposed extending the law of occupation beyond its traditional limits so as to capture exceptional situations. With respect to the Gaza Strip, they suggest that the law of occupation must still be applicable, either by regarding the occupation as persisting as long as Israel feels that it is free to send back its armed forces into the area whenever such a move is deemed vital to its security;<sup>23</sup> or by interpreting the law of occupation less rigidly and with reference to its functionality so as to cover different obligations under different circumstances.<sup>24</sup> However, these analyses draw closely on the specific circumstances of Israel's present control over the Gaza Strip. They would be inapplicable in the situation envisaged by this chapter, namely of complete surrender of physical control.

Others have therefore focused on adapting the law of occupation to the transitional phase. Benvenisti has suggested an expansive interpretation of Hague Regulation 43, precisely in order to include in it some pre-transitional elements that would have post-transitional effects. He posits that the occupant's withdrawal plans should take into consideration the need to ensure public order and civil life during the termination of the occupation and immediately thereafter. This requires the transfer of physical control over the territory in a manner that would avoid looting and violence. The occupant might therefore be obligated to empower a local cadre for self-government and anticipate a gradual transfer of power rather than an abrupt abandoning of governmental powers. If it fails to do so, it may be in violation of the law of occupation.<sup>25</sup>

<sup>21</sup> Hague Regulations (n. 3).

<sup>22</sup> For an opposing view see Benjamin Rubin, "Disengagement from the Gaza Strip and Post-Occupation Duties" (2009) 42 *Israel Law Review* 528.

<sup>23</sup> Dinstein, *The International Law of Belligerent Occupation* (n. 5) 279, para. 670, but see also 38, para. 86.

<sup>24</sup> Yuval Shany, "Binary Law Meets Complex Reality: The Occupation of Gaza Debate" (2008) 41 *Israel Law Review* 68.

<sup>25</sup> Benvenisti, "The Law on the Unilateral Termination of Occupation" (n. 14) 10, 9, 12.

The guarantee of a smooth governmental transition, referring to “public order and civil life” in their traditional sense is, however, different from a post-occupation response to a dependence created during the occupation. The latter is necessary to ensure “civil life” in a wider sense than prevention of violence, and extends to the phase after any control has been relinquished.

Another avenue explored is the partial application of the law of occupation. This was envisaged by the drafters of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC IV),<sup>26</sup> but not beyond the occupation itself, indeed in the reverse: Article 6 of GC IV foresees the termination of part of the law of occupation, insofar as it is embodied in the Convention, a year after the general cessation of hostilities, and even before the termination of the occupation itself. This restriction of the applicability of the law of occupation was perceived as benefitting the population, the Convention being regarded as the source of the occupant’s coercive powers (even if those powers are limited).<sup>27</sup>

The notion of partial application of the law of occupation has made some headway in recent years in a different sense, in the attempt to provide a framework for Israel’s obligations toward the population in the Gaza Strip.<sup>28</sup> However, rather than serving to diminish the authority of an occupant despite its exercise of effective territorial control as Article 6 stipulates, the law of occupation is now invoked as a source of *preserving* the obligation of a state claiming to no longer be an occupant, which does not have effective territorial control but still exercises some governmental functions contrary to the will of the population in the territory.<sup>29</sup>

Recourse to the law of occupation at this stage in order to obligate the former occupant to perform governmental functions in response to dependence is problematic. The law of occupation concerns a static situation,<sup>30</sup> and does not provide any guidance for a process of transition beyond the desirability of delegation of power implied in Article 6. Under the law of occupation, occupation is a given fact, and the law is not concerned with altering this fact, encouraging the termination of occupation or regulating it. The substantive provisions of the law of occupation are therefore ill-suited as a source of obligation for a process of transition. The attempts to stretch them in order to cover post-occupation challenges encounter various obstacles. One consequence of introducing the notion of post-occupation law into the legal matrix would be to sever the question of responsibility towards the population from that of the status of the territory. This would allow the law of occupation to preserve its original dimensions based on effective territorial control.<sup>31</sup>

<sup>26</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

<sup>27</sup> Jean Pictet (gen. ed.), *The Geneva Conventions of 12 August 1949* (A. P. de Heney tr., ICRC 1952) 62–3.

<sup>28</sup> Sari Bashi and Tamar Feldman, *Scale of Control: Israel’s Continued Responsibility in the Gaza Strip* (Gisha—Legal Center for Freedom of Movement, November 2011).

<sup>29</sup> Tristan Ferraro (ed.), *Occupation and Other Forms of Administration of Foreign Territory—Expert Meeting Report* (ICRC March 2012) 31–2.

<sup>30</sup> Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 43 *Vanderbilt Journal of Transnational Law* 119, 130.

<sup>31</sup> Tristan Ferraro, *Occupation and Other Forms of Administration of Foreign Territory* (n. 29) 32–3.



## B. Human rights law

Like the law of occupation, human rights law is based principally on the exercise of effective territorial control,<sup>32</sup> although the level of control required to trigger human rights law may be lower than that which triggers the law of occupation.<sup>33</sup> The prevailing interpretation of the applicability of human rights law appears to be that obligations can also be triggered by, and be commensurate with, extraterritorial exercise of power over a person rather than over territory.<sup>34</sup> At the post-occupation phase the state exercises no power or control in the formerly-occupied territory. Its actions, such as closure of borders or changes to monetary policy, are within its own territory; the formerly occupied territory is nonetheless affected by these actions because of its dependence.

*Prima facie*, human rights law does not regulate extraterritorial effects of territorial conduct. To address this apparent lacuna, Shany has proposed that the applicability of international human rights law might extend also to such situations on the ground that if states are held responsible for the exercise of governmental power inside their territory and outside it, it would be incoherent for them not to be held responsible for territorial exercises of power with extraterritorial effects.<sup>35</sup> On this basis, a former occupant may be held responsible under international human rights law for the effects of its domestic conduct on the population in the formerly occupied territory. At the same time, Shany acknowledges that a “cause and effect” theory must be circumscribed, otherwise states would be exposed to an infinite number of obligations toward states and territories over which they happen to have an impact.<sup>36</sup>

One might challenge Shany’s argument that as a matter of principle, the absence of responsibility for extraterritorial effects of territorial conduct is not incoherent with the established bases for responsibility. On the contrary: the extension of responsibility to extraterritorial conduct reflects the understanding that if a state acts voluntarily,<sup>37</sup> it accepts responsibility for the effect of its conduct wherever it acts. But if a state acts only within its territory, there is therefore little justification to hold it responsible for the extraterritorial effects of its conduct if those are merely incidental to that conduct.

On the other hand, if the notion of responsibility for extraterritorial effects of territorial conduct is adopted, the scope of cause and effect that justify responsibility may be wider than Shany envisages, if one indeed takes account of the manner in which the capacity to cause the effect has come to exist. For example, Shany rightly regards

<sup>32</sup> ECtHR, *Al Skeini and Others v. UK*, App. No. 55721/07, Grand Chamber Judgment, 7 July 2011, para. 131.

<sup>33</sup> In *Ilascu and Others v. Moldova and Russia* (App. No. 48787/99, Judgment, Reports of Judgments and Decisions 2004-VII, 8 July 2004), the European Court of Human Rights held the Russian Federation responsible under the Convention for human rights violations in the Moldovan Republic of Transdniestria on the ground that it “remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation,” para. 392.

<sup>34</sup> Human Rights Committee, *Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. Supp No. 40 (A/36/40) 176 (1981), 6 June 1979, para. 12; Human Rights Committee, *Montero v. Uruguay*, Communication No. 106/1981, UN Doc. CCPR/C/18/D/106/1981, 31 March 1983, para. 5.

<sup>35</sup> Yuval Shany, “The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. the Prime Minister of Israel*” (2009) 42 *Israel Law Review* 101, 111.

<sup>36</sup> Shany, “The Law Applicable to Non-Occupied Gaza” (n. 35) 113.

<sup>37</sup> Even a state which occupies a territory following armed conflict in which it engaged in self-defense is acting voluntarily.

as excessive an imposition on State A to refrain from undertaking monetary or other reforms only because such new policies might result in increased unemployment in State B.<sup>38</sup> However, if the dependence of employment in State B on the monetary system in State A is the result of State A's deliberate doing, such an imposition might not be excessive. Thus, Shany is correct that if Israel decides to close its market to certain products, it should not be held responsible towards potential exporters from elsewhere around the world, since it has never sought or acted to affect such persons (and this would hold true even if it could foresee the impact of its measures on the economy of other states). However, Israel might be responsible toward Palestinian farmers who rely on export to Israel because Israel has limited their marketing opportunities elsewhere.

The identification of the act which has created a dependence as territorial or extra-territorial and the location of its effects might not be self-evident. Thus, Israel's responsibility toward Palestinian farmers might be characterized as stemming from forcing shut certain commodity markets in the occupied territories (extraterritorial conduct with extraterritorial effect), or from opening up the Israeli market under advantageous terms and then shutting it down (territorial conduct with territorial effect). However, if the decisive criterion is the deliberate nature of a state's conduct, responsibility should accrue regardless of these classifications. Identifying intent to create extraterritorial effects is also difficult. However, where at issue is the conduct of a state when acting as occupant, that state may be presumed to be aware of the effects of its conduct within the occupied territory to such extent that this conduct cannot be unintentional.

Recourse to international human rights law to hold a former occupant responsible under international human rights law, even under the most expansive interpretation, nonetheless encounters various obstacles. For one thing, not every conduct of the former occupant impacts directly on a human right as opposed to a mere interest. For example, where the territory's monetary system is dependent on that of the occupant's, the latter's adoption of a new fiscal policy may have a devastating effect on the population in the formerly occupied territory; but the effect on particular *human rights* will be only indirect. This is particularly true where the dependence is the result of the operation of economic and other institutions, where the occupant's conduct does not affect the individual directly but concerns the community as a collective entity. Dependence cannot always be framed as an injury to the individual and therefore may be difficult to vindicate through human rights law.

A further difficulty is that at issue are principally obligations in the social and economic spheres, which entail, often although not exclusively, positive conduct and investment of resources. The obligation of a former occupant could only encompass the minimal core obligations. However, minimal core obligations under human rights terminology might not meet the needs of a dependent community.

Finally, like the law of occupation, human rights law is static in that it does not challenge existing power structures. It certainly makes no attempt to regulate inter-state relations or to coordinate different states' priorities. In conclusion, while international human rights law may offer a framework for addressing certain instances or aspects

<sup>38</sup> Shany, "The Law Applicable to Non-Occupied Gaza" (n. 35) 113.

of dependence, it does not cover the full array of possible types of dependence in the aftermath of occupation.

### C. Post-colonialism

Colonialism as a phenomenon of international relations is a practice of territorial domination, which involves the subjugation of one people to another, intended to benefit the colonial power economically and strategically.<sup>39</sup> It is also a political and ideological concept, grounded in the conviction of the anthropological, cultural, and political superiority of the dominating power and its people.<sup>40</sup> It is thus characterized by that power's exploitation of the territory's natural and human resources. The term colonialism has never had a distinct legal definition, and while it has often been associated with assertion of sovereignty over the subjugated territory, modern discourse refers to neo-colonialism, which consists of any form of alien economic, political, or cultural domination in present international relations that resembles classic colonialism,<sup>41</sup> even in the absence of any territorial control.

Legally, colonialism and occupation are distinct regimes. Colonialism is a violation of international law, while occupation may be a lawful status; colonialism is not limited in time, while occupation is by definition temporary.<sup>42</sup> The goals of territorial control under each of the regimes are also different. In practice, the two phenomena may overlap in those instances where the occupation involves exploitation by the occupant of the resources of the occupied territory for its own benefit. Accordingly, transition from long-term occupation may effectively resemble post-colonial situations.

There are precedents of overlap between occupation and colonialism, such as South Africa's administration of Namibia, and, to some extent, the Indonesian purported annexation of Timor-Leste. In both cases, occupation was the applicable regime only formally, since neither occupant admitted its status as such. South Africa became the occupant of Namibia after its mandate was revoked. This administration was, much as the mandate had been,<sup>43</sup> colonialist in character. Indonesia's invasion and purported annexation of Timor-Leste were motivated primarily by strategic concerns, subsequently fortified by economic interests. Both in South Africa and in Timor-Leste the transition into the new regime was perceived essentially as a late process of decolonization from centuries of colonialism.

In the case of the territories occupied by Israel, the 19-year Jordanian rule hiatus since the termination of the British mandate over Palestine (which was much less overtly colonialist than the South African mandate over Namibia) makes it more difficult to argue that the occupation is a continuation of historical colonialism. However, Israel

<sup>39</sup> Margaret Kohn, "Colonialism" in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (The Metaphysics Research Lab, Stanford University 2012).

<sup>40</sup> Jörn Axel Kämmerer, "Colonialism" in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) para. 2.

<sup>41</sup> Kämmerer, "Colonialism" (n. 40) para. 3.

<sup>42</sup> Yaffa Zilbershatz, "IDF Control of Judea, Samaria and Gaza: Belligerent Occupation or Colonialism" (2004) 20 *Mechkarey Mishpat* 547, 554–7 (in Hebrew).

<sup>43</sup> UN General Assembly, Res. 2074(XX), UN Doc. A/RES/2074(XX) (17 December 1965).

has often been accused of turning the occupation regime itself colonialist in character, structured to realize political and economic interests which go beyond the temporary maintenance of military advantage following an armed conflict. This is claimed to be manifest in oppressive management of the occupation; and, conversely, in the adoption of the “benevolent occupant” model to justify various measures as materially beneficial to the local population (in the short term)—even at the face of the population’s express objection<sup>44</sup>—while disregarding the long-term, political ramifications of these measures, which facilitate the dependence of the population on Israel and thereby Israel’s hold over the territories.

Overall, the most striking feature of the consolidation of occupation was Israel’s attempt to improve the population’s standard of living and individual prosperity, even as it undermined Palestinian attempts to create a self-sufficient and independent economy and stifled its industrial and agricultural development.<sup>45</sup> Life in the occupied territories became intimately linked to Israel, as their residents developed—with Israeli encouragement and coercion—a dependence on Israel for basic commodities,<sup>46</sup> employment,<sup>47</sup> access to services and commerce.<sup>48</sup> This dependence has not gone unnoticed. Already at the outset of the occupation, an Israeli government publication noted, in introducing “directives for economic and civil policy,” that “naturally and unavoidably the [occupied] territories are becoming dependent upon Israel for all their economic and service needs.”<sup>49</sup>

The similarity between a long-term occupation that has created a dependence of the population and colonialism raises the question of whether dependence in the aftermath of occupation should be regulated by reference to post-colonialist law or practice. One avenue for legal guidance may be post-colonial arrangements to the extent that those were aimed at ensuring the viability of the new states.<sup>50</sup> The arrangements agreed upon between the former colonial power and the new states from which they exited in the second half of the twentieth century focused on economic aid and cooperation. Former French territories were accorded the privilege of remaining within the franc zone,<sup>51</sup> and received technical assistance and teachers.<sup>52</sup> Britain also invested substantially in education and defense in its former colonies.

However, the arrangements for continued support of former colonies were not based on any legal obligation. They were grounded in voluntary undertakings by the

<sup>44</sup> David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press 2002) 70.

<sup>45</sup> Gordon, *Israel’s Occupation* (n. 9) 72–5, 85–6.

<sup>46</sup> Shlomo Swirski, *The Burden of Occupation: The Cost of the Occupation to Israeli Society, Polity and Economy, 2008 Update* (ADVA Center 2008) 19.

<sup>47</sup> Gordon, *Israel’s Occupation* (n. 9) 81, 84.

<sup>48</sup> Gordon, *Israel’s Occupation* (n. 9) 73; Swirski, *The Burden of Occupation* (n. 46) 17, 19.

<sup>49</sup> *Three Years of Military Government 1967–1970: Data on Civilian Activities in Judea and Samaria, The Gaza Strip and Northern Sinai* (Coordinator of Government Operations in the Administered Territories, Ministry of Defence) 4.

<sup>50</sup> It is widely admitted that one of the main reasons for the economic and financial collapse of post-independence Mozambique was the hasty departure of the majority of about 200,000 Portuguese residing in the country on the eve of the Portuguese revolution.

<sup>51</sup> Richard Joseph, “The Gaullist Legacy: Patterns of French Neo-Colonialism” (1976) *Review of African Political Economy* 4, 7.

<sup>52</sup> Joseph, “The Gaullist Legacy” (n. 51) 10.

post-colonial powers. Moreover, given the goal which this assistance sought to secure, the value of these arrangements is limited even as models. Despite the appeal to high morals in the rhetoric of decolonization,<sup>53</sup> such as to the colonial powers' "duty to spread to other nations those advantages which through the course of centuries they had won for themselves,"<sup>54</sup> decolonization was in reality a hasty, disorganized scramble by the colonial powers to contain the impact of a political process which they were unable to prevent, while attempting to preserve their political, economic, and military interests.<sup>55</sup> Thus, the post-colonial arrangements reflected not so much a moral obligation of the former colonial power to ensure a viable transition of the former colonial territory to substantive independence, as the exact opposite: a strategic investment toward future influence and cooperation.<sup>56</sup> Great Britain assumed that in return for the assistance, the new rulers would align themselves with Britain's political and economic policies. This was the rationale for fostering the Commonwealth,<sup>57</sup> careful nurturing of educational links, and a drastic increase in the economic aid to Commonwealth countries.<sup>58</sup> Financial recovery from post-war economic weakness also required Great Britain to retain tight links with the same territories.<sup>59</sup> Similarly, the French support for the currency of former colonies in Africa was presented as an act of national generosity; but the reliance of the new states on technical assistance and education services provided France with control over their administrative hierarchy and research institutions, and permitted it to impose its policies of choice on these states.<sup>60</sup> In short, the post-colonial arrangements pursued veiled—and at times not so veiled—control and subjugation,<sup>61</sup> through new techniques of influence and new commitments. Where the former colonial power had no interests in its former territory, as was the case of the Netherlands in Indonesia, for example,<sup>62</sup> disjunction between the former colonial state and the new state was complete.

<sup>53</sup> The term "decolonization" is used here in the sense of "accession to independence," notwithstanding the wider scope of options which decolonization as a means of exercising the right to self-determination may take. *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep. 554, separate opinion of Judge Luchaire.

<sup>54</sup> Harold Macmillan, cited in John Darwin, "British Decolonization Since 1945: A Pattern or a Puzzle?" (1984) 12 *Journal of Imperial and Commonwealth History* 187, 188.

<sup>55</sup> John Darwin, *Britain and Decolonisation: The Retreat from Empire in the Post-war World* (Macmillan 1988) 127–30, 285; Tony Chafer, *The End of Empire in French West Africa: France's Successful Decolonization?* (Berg 2002) 225, 227, 229.

<sup>56</sup> Darwin, *Britain and Decolonisation* (n. 55) 278–88; R. F. Holland, *European Decolonization, 1918–1981: An Introductory Survey* (Macmillan 1985) 161; William Roger Louis, "The Dissolution of the British Empire" in Judith M. Brown and William Roger Louis (eds), *The Oxford History of the British Empire*, vol 4 (Oxford University Press 1999) 329, 330, 333.

<sup>57</sup> Anita Inder Singh, "Keeping India in the Commonwealth: British Political and Military Aims, 1947–49" (1985) 20 *Journal of Contemporary History* 469, 471.

<sup>58</sup> Darwin, *Britain and Decolonisation* (n. 56) 298–9; Phillipa Levine, *The British Empire: Sunrise to Sunset* (Pearson 2007) 203.

<sup>59</sup> B. R. Tomlinson, "Imperialism and After: The Economy of the Empire on the Periphery" in Judith M. Brown and William Roger Louis (eds), *The Oxford History of the British Empire* vol. 4 (Oxford University Press 1999) 357, 374; Darwin, *Britain and Decolonisation* (n. 56) 140.

<sup>60</sup> Richard Joseph, "The Gaullist Legacy: Patterns of French Neo-Colonialism" (1976) 6 *Review of African Political Economy* 4, 8–10.

<sup>61</sup> It was the apparent perpetuation of dependence that led French Guinean leader Sekou Touré to reject the French offer of Community and Cash as a new version of western imperialism. Holland, *European Decolonization, 1918–1981* (n. 56) 161.

<sup>62</sup> Holland, *European Decolonization, 1918–1981* (n. 56) 93.

In conclusion, reference to post-colonial transition policies does not seem to be helpful in shaping post-occupation law. Not only do these policies not offer a precise legal framework, but their goals were not such that are worthy of duplication.

#### D. Responsibility to protect

One of the characteristics of post-occupation law as envisaged in this chapter is that it obligates a state to facilitate change in a territory over which it does not have effective control. Yet as noted above, international law rarely imposes an obligation on states to act for the benefit of individuals or communities over which they do not have effective control. One such exceptional regime is the responsibility to protect, which invokes the moral responsibility of the international community to act in situations where states are unable or unwilling to halt or avert the suffering of serious harm by people within their own territories.<sup>63</sup> The obligation to intervene under the responsibility to protect, militarily or otherwise,<sup>64</sup> arises only in situations that involve the most egregious human rights violations, such as genocide, war crimes, and crimes against humanity.<sup>65</sup> This exclusivity can be traced to the notion of peremptory norms that operate *erga omnes*, which justifies the international monitoring of the situation<sup>66</sup> and, where necessary, eventual intervention. In contrast, dependence created through long-term occupation does not necessarily reach this severity (although dependence in this context concerns basic life-sustaining commodities such as water and food), and in fact does not necessarily involve violation of international law of any kind. If grave human rights violations occur after the withdrawal of the occupant, the responsibility to protect may come into play but this would not be the result of dependence on the occupant. Since post-occupation law is not a specific instance of a responsibility to protect, this section examines whether the responsibility to protect can serve as a *model* for post-occupation law.

The responsibility to protect comprises three stages: prevention, reaction, and rebuilding. The second and third stages are most comparable with post-occupation situations as considered in this chapter, since they concern a process, and are remedial rather than preventive. The responsibility to protect and post-occupation law as considered here are both based on the ability to assist a population in distress, but they differ with respect to the identity of the duty-holder and with respect to the basis for the obligation.

The responsibility to protect is a permissive legal regime based on a moral obligation,<sup>67</sup> which lies, when the territorial state fails to discharge it, with the international

<sup>63</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001), Core Principle 1(B)m.

<sup>64</sup> For a mapping of the relationship between humanitarian intervention and the responsibility to protect, see James Pattison, "Assigning Humanitarian Intervention and the Responsibility to Protect" in Julia Hoffmann and André Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press 2012) 173, 174–6.

<sup>65</sup> World Summit Document, UN Doc. A/RES/60/1 (24 October 2005) paras 138–40.

<sup>66</sup> Gentian Zyberi, "The Responsibility to Protect through the International Court of Justice" in Julia Hoffmann and André Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press 2012) 305, 309.

<sup>67</sup> Unless grounded in a specific regime, such as humanitarian law or the law on prevention of genocide, Zyberi, "The Responsibility to Protect through the International Court of Justice" (n. 66) 308–12.

community as a whole. In this it differs from post-occupation law, which would be a mandatory regime imposed on a former occupant as the state responsible for generating the dependence, rendering the involvement of the international community in post-occupation situations at most indirect. Yet the difference may not be as great as may appear at first sight, since even the abstract responsibility of the international community to protect must be assigned to a particular actor, at least as a practical, if not as a normative, measure.<sup>68</sup> For example, in the *Bosnia-Herzegovina v. Serbia* case, the ICJ suggested that the obligation of states to prevent genocide depends on their

capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.<sup>69</sup>

While this was enunciated in the context of prevention as a legal obligation with respect to genocide rather than of reaction or rebuilding as elements in the responsibility to protect, the assignment of responsibility on the basis of effectiveness can be expanded to other aspects of the responsibility to protect.<sup>70</sup>

As for the nexus between the obligation to act and the capacity to respond to the need: The responsibility to protect is forward-looking and unrelated to past conduct, and therefore arises only where a state can respond effectively—both in terms of assistance to the population in distress and in terms of the costs to itself. States that have been involved in the creation of the crisis would not be under a greater obligation than other states. In contrast, post-occupation law is expressly based on past conduct, and the standard of commitment of a former occupant in terms of the cost for itself might not be as lenient as that which would be applied on the basis of the responsibility to protect. A general exemption of a state which was involved in the creation of the problem from having to resolve or address it because of the toll that such assistance would take on it would undermine the very notion of legal obligation. However, here too the regimes approximate each other, since even under the responsibility to protect past conduct is certainly likely to be a relevant factual factor in identifying the state that has the greatest potential of being effective, rendering states that have been involved in the creation of the crisis likely to be the ones that can most effectively prevent or halt its progression.<sup>71</sup>

Notwithstanding these similarities, there are difficulties in analogizing from the responsibility to protect to the notion of a former occupant's obligation towards the formerly-occupied territory. Legal scholarly attention has to date focused only on the first two stages of the responsibility to protect. Even for these stages the parameters

<sup>68</sup> Leaving aside whether for the obligation to be conceptually perfect there must be an identifiable duty-bearer (e.g. James Pattison, "Whose Responsibility to Protect? The Duties of Humanitarian Intervention" (2008) 7 *Journal of Military Ethics* 262, 264) or not (e.g. Carla Bagnoli, "Humanitarian Intervention as a Perfect Duty: A Kantian Argument" (2006) *Nomos XLVII: Humanitarian Intervention* 117).

<sup>69</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep. 2007, 43, [430].

<sup>70</sup> Pattison, "Assigning Humanitarian Intervention and the Responsibility to Protect" (n. 64) 178.

<sup>71</sup> Pattison, "Whose Responsibility to Protect?" (n. 68) 271–2.

remain highly controversial, making them poor benchmarks from which to proceed.<sup>72</sup> The concept of responsibility to rebuild has received even less explicit support. In the 2005 World Summit Outcome Document, heads of state and government merely expressed their intention to commit themselves, “as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”<sup>73</sup> Such a weak commitment constitutes a poor model for establishing a legal obligation.

### E. Other-regarding obligations

Eyal Benvenisti has suggested that there is a moral need to reconceptualize sovereignty in a manner which would obligate states to take other-regarding considerations seriously into account when formulating their national policies.<sup>74</sup> The legal obligation would be based on a perception of sovereignty as trusteeship of humanity and in principle would apply equally to all states. Acknowledging the difficulty in demanding of states to expand their legal responsibility in this manner, Benvenisti’s proposal puts forward only a limited set of obligations, focusing on procedural requirements and emphasizing conduct rather than outcome. These include minimal deliberative obligations to accommodate others’ interest when the state sustains no loss.<sup>75</sup>

Benvenisti’s proposal expands the notion of international solidarity beyond the responsibility to protect, but is still limited, namely to spheres where the moral call for international assistance stems from the arbitrarily unequal distribution of wealth, particularly natural resources. It is this arbitrariness that precludes the stronger states—insofar as concerns a particular resource—from remaining impassive against the weaker states’ plight.

Benvenisti’s proposal corresponds to the notion of a former occupant’s responsibility towards the occupied territory in a number of aspects. First, his model applies in the context of community goods as opposed to individual interests, thereby complementing the response to non-human rights based needs. Furthermore, while it is based on solidarity, it can accommodate gradations in legal responsibility based on particular relationships, including a unique responsibility due to past acts (such as former colonialism or occupation) or omissions (e.g. the failure to control exploitation by non-state actors).<sup>76</sup>

At the same time, the proposal addresses a particular type of situation that may not necessarily apply to post-occupation, namely a disparity in the distribution of resources, where some states have in excess of their need while others are in a deficit. According to Benvenisti’s proposal, the particular relationship between the states is only secondary

<sup>72</sup> Carsten Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” (2007) 101 *American Journal of International Law* 99, 110.

<sup>73</sup> UN General Assembly Resolution 60/1 (24 October 2005) UN Doc. A/RES/60/1, para. 139.

<sup>74</sup> Eyal Benvenisti, “Sovereigns as Trustees of Humanity: The Concept and Its Normative Implications” [2012] <<http://ssrn.com/abstract=1863228>> (accessed 23 July 2013) 2.

<sup>75</sup> Benvenisti, “Sovereigns as Trustees of Humanity” (n. 74) 24. Benvenisti also mentions particular obligations under international criminal law or under the Responsibility to Protect, 27.

<sup>76</sup> Benvenisti, “Sovereigns as Trustees of Humanity” (n. 74) 21.



to the question whether the state has resources available for sharing.<sup>77</sup> This may not be an appropriate framework for obligating a former occupant, whose resources may be limited, and whose first priority is its own constituency.

## V. Concluding Observations

The post-occupation law considered in this chapter is intended to regulate transition, from long-term dependence based on occupation to self-sufficiency. The analysis above indicates that existing bodies of law do not offer a comprehensive response to post-occupation dependence. Neither the law of occupation nor international human rights law can apply *tout court*, because both bodies of law hinge on effective control and have no mechanism for facilitating transition. Post-occupation law is also distinct from forward-looking regimes such as the responsibility to protect and the proposed others-regarding obligations, which attach little if any significance to the responsibility for the crisis which they address. Nor can post-occupation law be relegated to the realm of secondary norms.

While this chapter queries whether there is already an applicable legal regime rather than whether a new regime should be pursued, the finding that in the absence of a directly and comprehensively applicable regime, post-occupation law, as a branch of *jus post bellum*, must be developed as a distinct body of law seems self-evident. Yet as demonstrated by others,<sup>78</sup> adopting a new body of law carries its own shortcomings. Accordingly, post-occupation law should be crafted by drawing on existing bodies of law. This calls for two comments. First, it may be argued that application of norms from other bodies of law to a post-occupation situation may constitute a negative incentive to the termination of occupation. The answer to this is two-fold. First, occupation is not illegal in itself. The imperative of post-occupation law should therefore be not the bringing of occupation to an end but the regulation of that end when it occurs. Moreover, applicability of norms from other bodies of law may incentivize the occupant to bring the dependence itself to an end, even if the occupation continues.

Secondly, while post-occupation law may draw on existing regimes with respect to discrete issues, pertinent differences must be taken into consideration. For example, both the responsibility to protect and other-regarding obligations are very modest in that they do not require states to assist others at a significant cost to themselves.<sup>79</sup> Arguably, the burden on a former occupant might be heavier, given its role in creating the dependence to which it responds. However, it is noteworthy that even under the law of state responsibility as developed in the context of *jus post bellum*, reparation and compensation claims must be assessed, *inter alia*, in light of the economic potential of the wrongdoing state.<sup>80</sup> This trend will surely inform post-occupation law as well.

Another aspect of the relationship between a proposed post-occupation law and other legal regimes is the potential for their simultaneous application.<sup>81</sup> In the Gaza

<sup>77</sup> Benvenisti, "Sovereigns as Trustees of Humanity" (n. 74) 21.

<sup>78</sup> For such critique, see Roxana Vatanparast, ch. 8, this volume; Dominik Zaum, ch. 18, this volume.

<sup>79</sup> James Pattison, "Whose Responsibility to Protect?" (n. 68) 269–70; Benvenisti, "Sovereigns as Trustees of Humanity" (n. 74) 21.

<sup>80</sup> Stahn, "Jus Post Bellum?" (n. 11) 940.

<sup>81</sup> On a related overlap, see Jann Kleffner, ch. 15, this volume.

Strip, for example, post-occupation law might apply simultaneously with the laws of armed conflict. While there is nothing inherently impossible about a situation being governed by more than one body of law, difficulties may arise where the basic precepts of the regimes are contradictory. For example, the laws of armed conflict are premised on animosity and conflict of interests,<sup>82</sup> while post-occupation law requires some level of cooperation. Would a former occupant be obligated to allow entry into its territory of workers dependent on it for their livelihood merely on the basis of post-occupation law, when it is involved in armed conflict with their state? Or, if the former occupant is in a position to weaken an adversary by affecting its economy, is it precluded from doing so when the particular adversary's dependence on the occupant's economy was induced by the latter? As for the provision of commodities, the laws of armed conflict guarantee only a certain minimal standard, required for subsistence even during armed conflict. Post-occupation law might call for a higher standard, since it is geared toward self-sufficiency. In some instances the laws of armed conflict would clearly override the post-occupation law standard.<sup>83</sup> Whether that would be the case in all instances would depend on the contours of post-occupation law.

In conclusion, the tension between post-occupation law and other regimes indicates the need for a careful delineation of the place of post-occupation law, so as not to undermine its own potential efficacy and that of other regimes.

<sup>82</sup> This question calls to mind the controversy of whether human rights law applies simultaneously with the laws of armed conflict, other than in situations of occupation. See special issue on parallel applicability of international humanitarian law and international human rights law, (2007) 40(2) *Israel Law Review* 306.

<sup>83</sup> But see Bashi and Feldman, *Scale of Control* (n. 28) 44–6.

# Creating Popular Governments in Post-Conflict Situations: The Role of International Law

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## I. Introduction

There is no specific international legal framework for the post-conflict development of a popular mandate for governance. There is, though, the international law on political participation, which specifies an electoral process as a means for a population to be involved in governance.<sup>1</sup> This law applies regardless of the post-conflict condition of a state. Accordingly, there is a basis upon which to depict *jus post bellum*—understood as “(t)he laws and norms of justice that apply to the process of ending war and building peace”—as regulating the process of creating governments in post-conflict settings.

Still, the extant law targets the conditions of a stable state, in which the government is expected to have sufficient control of the territory to respect and ensure the rights of the individuals within its jurisdiction.<sup>2</sup> In such a state, control of the territory is expected to stem from the support of the population for the government.<sup>3</sup> In contrast, governance in post-conflict settings is often sustained through the provision of external military, financial, technical, and administrative assistance.<sup>4</sup> Dependence on external actors for territorial control can be expected to affect the nature of the relationship between the population and the government. It might mean that an interim government is more inclined to pursue political participation proactively as a means of enhancing its legitimacy and consolidating its control, but it also might lead to the calculation that political participation is not a priority, especially if there are signs of a lack of support amongst a population for its continuing authority. Either way, there is reason to take a particular interest in how the extant law on political participation operates in post-conflict settings.

Interest in the relevance of the extant law on political participation can be expressed in two ways. One is about the substance of the law. Is what the law prescribes appropriate for post-conflict settings? The other is about the impact of the law. Does the law have useful effects in practice?

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<sup>1</sup> See Art. 25 of the International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR).

<sup>2</sup> See Art. 2 of the ICCPR (n. 1).

<sup>3</sup> See Art. 1 of the ICCPR (n. 1).

<sup>4</sup> See United Nations Department of Economic and Social Affairs and United Nations Development Programme, “The Challenges of Restoring Governance in Crisis and Post-Conflict Countries” (2007) UN Doc. ST/ESA/PAD/SER.E/101, xi.

The issue of whether the substance of the international legal requirement of an electoral process and associated standards are appropriate for the post-conflict period has been addressed as part of the broader debate on the value of democracy promotion. Gregory Fox, for instance, has drawn upon theories about the nature of compliance in international law to argue that given the likelihood of a lack of capacity to fully comply in the short term, the appropriateness of the law for post-conflict settings should be assessed through consideration of the compliance record over the long term.<sup>5</sup> The value of the substance of international law related to electoral processes has also been considered as part of the debate on the relationship between post-conflict power sharing agreements and international law. Christine Bell, for example, in mapping case law of human rights bodies related to power sharing arrangements, has highlighted how legal specifications on political participation can provide a basis for human rights bodies to assess whether or not a political system operates with a free and fair franchise, but struggle as a framework for human rights bodies to engage with broader questions about the legitimacy of a regime.<sup>6</sup> Still, little attention has been given to the actuality of the constraint the law of political participation places on the decision making of an interim post-conflict government with regard to the process for the creation of a new popularly mandated government. This is an important issue. If the law is overly constraining, it will hinder the ability of the interim government to tailor the process for the identification of a new government to suit the context. If it is overly lenient, it leaves open the possibility that the self-interest of the interim government will drive the process for the identification of a new government.

This chapter addresses how the extant law on political participation relates to the decision making of post-conflict interim governments. A particular focus of the analysis is on how the construction of the legal requirement of an electoral process and the associated mechanisms for compliance relate to the practice that unfolded in Sierra Leone during 2000–05. The relevance of the chapter for the *jus post bellum* debate is two pronged. In identifying and assessing how the right to political participation has operated after conflict, the chapter highlights and helps to develop a clearer understanding of an important legal component of *jus post bellum*. In addition, as the central argument that underpins the analysis is relevant for other sectors that require reconstruction after conflict (such as the security, justice, economic, and social sectors), the chapter also provides a basis for reflecting on how international law might contribute to *jus post bellum* more generally.

As a means to highlight the importance of the issue at stake and to provide a reference point for the subsequent analysis, the chapter proceeds with consideration of how popular governance relates to the legitimacy and effectiveness of post-conflict reconstruction and what this suggests about the scope for a useful role for international

<sup>5</sup> Gregory H. Fox, “International Law and the Entitlement to Democracy after War” (2003) 9 *Global Governance* 179; see also Marc Cogen and Eric De Brabandere, “Democratic Governance and Post-Conflict Reconstruction” (2007) 20 *Leiden Journal of International Law* 669.

<sup>6</sup> Christine Bell, “Power-Sharing and Human Rights Law” (2013) 17 *International Journal of Human Rights* 204–37; for assessment of the legality of power sharing arrangements, see Jeremy I. Levitt, *Illegal Peace in Africa: An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta* (Cambridge University Press 2012).

law.<sup>7</sup> Attention is then turned to the nature of the extant international legal framework for the development of a popular mandate for governance, specifically its substantive requirements and compliance mechanisms. This leads to discussion of the practice in Sierra Leone. Here, the analysis addresses compliance with the law, but a core concern is with how the nature of the legal framework relates to the broader reconstruction process and what this suggests about its appropriateness. The central argument of the chapter that informs the analysis is that the suitability of this extant legal component of *jus post bellum* is linked to the balance that it strikes between coercion and flexibility *vis-à-vis* the decision making of interim government.

## II. The Value and Complexity of Popular Governance in the Aftermath of War

The question of how a population should be involved in decision making on reconstruction has received a particularly high level of attention from policy scholars.<sup>8</sup> The population of a state can be involved in the governance of post-conflict reconstruction in two main ways. One is through participation in the selection of the actors that will exercise political authority. The other is through the communication of views to the actors that exercise political authority. This can be direct, through governmental consultations with groups of individuals, for instance. It can also be indirect, through the means of a free media, for example. A key reason the approach taken to popular governance in the aftermath of war has received attention in the policy debate is its centrality to the legitimacy and effectiveness of internationally enabled reconstruction efforts.<sup>9</sup>

Popular input in decision making can improve the legitimacy of reconstruction because it generates a sense of influence which offsets the sense of imposition that stems from the dependence on external actors for reconstruction.<sup>10</sup> An increase in legitimacy helps with effectiveness because it generates positive engagement on behalf of the target population, rather than resistance.<sup>11</sup> However, post-conflict periods often

<sup>7</sup> Reconstruction is defined as “the mechanics of achieving a stable, reconstituted, and sustainable society after conflict.” Fionnuala Ni Aoláin, Dina Francesca Haynes, and Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Cambridge University Press 2011) 87.

<sup>8</sup> See e.g. Robert D. Orr, “Governing When Chaos Rules: Enhancing Governance and Participation” (2002) 25 *The Washington Quarterly* 139; Timothy Donais, “Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes” (2009) 34 *Peace and Change* 3; Simon Chesterman, “Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations” (2007) 1 *Journal of Intervention and Statebuilding* 3; Jens Narten, “Dilemmas of Promoting Local Ownership: The Case of Postwar Kosovo” in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge 2009); Tobias Pietz and Leopold von Carlowitz, “Local Ownership in Peacebuilding Processes in Failed States: Approaches, Experiences, and Prerequisites for Success” (Center for International Peace Operations 2007) <[http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/veroeffentlichungen/Local\\_Ownership\\_Workshop\\_Report\\_Dezember\\_07.pdf](http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/veroeffentlichungen/Local_Ownership_Workshop_Report_Dezember_07.pdf)> (accessed 24 July 2013).

<sup>9</sup> See Orr, “Governing When Chaos Rules” (n. 8) 141; Donais, “Empowerment or Imposition?” (n. 8) 20.

<sup>10</sup> See, though, Jennifer Widner, “Constitution Writing in Post-conflict Settings: An Overview” (2008) 49 *William and Mary Law Review* 1513.

<sup>11</sup> See Donais, “Empowerment or Imposition?” (n. 8) 20; Annika Hansen, “From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser

involve circumstances—such as political flux, a lack of security, and a general lack of capacity—which are not conducive to popular governance. In particular, mechanisms for popular involvement in governance—such as national elections, consultations, and a free media—can draw attention to differences amongst a society and re-ignite underlying societal tensions that have fuelled a prior conflict.<sup>12</sup> Hence, there is a risk that attempts to involve a population in decision-making might actually hinder rather than enhance a reconstruction effort. This underpins a key message from the policy debate on best practice in this area: that the legitimacy and effectiveness of post-conflict reconstruction can benefit from a proactive approach to popular involvement in governance, but that it must be tailored to suit the context in order to avoid negative side-effects.<sup>13</sup> Consider the specific case of national elections.

The utility of elections in the post-conflict period has been the subject of considerable debate. A generally accepted position is that an electoral process is likely to be of value in a post-conflict situation, but this will depend on matching the approach taken—particularly with regard to “timing, sequencing, mechanics, and administration issues”—<sup>14</sup> to the context in question. For example, in a situation where there is a major concern about the legitimacy of an interim government, it might be in the best interests of a situation for the elections to be held very close to the end of a conflict.<sup>15</sup> In contrast, where there is a major risk of violence if elections are held, then it might be preferable to delay elections.<sup>16</sup>

Post-conflict contexts can vary in a variety of ways, including the level of social differentiation amongst a community (for instance, ethnic, religious, or tribal),<sup>17</sup> the level of ongoing hostility, the extent to which state and civil infrastructure has been shattered by the conflict, the levels of economic activity, the strength of security, and

Press 2008) 135; Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge University Press 2006) 52–3; Andrea Talentino, “Perceptions of Peacebuilding: The Dynamic of Imposer and Imposed Upon” (2007) 8 *International Studies Perspectives* 153.

<sup>12</sup> See Annika S. Hansen and Sharon Wiharta, “The Transition to a Just Order—Establishing Local Ownership After Conflict: A Policy Report” (Folke Bernadotte Academy 2007) para. 37; Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011) 144; Dan Smith, *Towards a Strategic Framework for Peacebuilding: Getting Their Act Together* (Royal Norwegian Ministry of Foreign Affairs 2004) 26.

<sup>13</sup> See Donais, “Empowerment or Imposition?” (n. 8) 20–1.

<sup>14</sup> See Benjamin Reilly, “Post-War Elections: Uncertain Turning Points of Transition” in Anna K. Jarstad and Timothy D. Sisk, *From War to Democracy: Dilemmas of Peace Building* (Cambridge University Press 2008) 181; also see Timothy D. Sisk, “Pathways of the Political: Electoral Processes after Civil War” in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding* (n. 8); also Samuel H. Barnes, “The Contribution of Democracy to Rebuilding Postconflict Societies” (2001) 95 *American Journal of International Law* 86.

<sup>15</sup> See Simon Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (Oxford University Press 2004) 208.

<sup>16</sup> Chesterman, *You the People* (n. 15) 208–9; (other contextually driven issues include whether or not certain political parties should be banned), Tara Mikkilineni, “The Regulation of Political Parties in Post-Conflict Societies” (2009) Institute for International Law and Justice. Emerging Scholar Paper <<http://www.iilj.org/publications/documents/MikkilineniESP13-09.pdf>> (accessed 24 July 2013); and whether or not provision should be made to guarantee of representation in government for certain groups, see David Wippman, “Practical and Legal Constraints on Internal Power Sharing” in David Wippman (ed.), *International Law and Ethnic Conflict* (Cornell University Press 1998) 235–8.

<sup>17</sup> Richard Caplan, *International Governance of War-Torn Territories—Rule and Reconstruction* (Oxford University Press 2005) 136.

the position of neighboring states.<sup>18</sup> The scope for contexts to vary widely and the importance of tailoring the approach to popular governance to the context are significant in terms of the likely relevance of international law. There is a risk that legal specifications could hinder contextual sensitivity, or lead the population to perceive a lack of space for autonomous decision making by the interim government. Hence, the possibility arises that it could be preferable (for the overall legitimacy and effectiveness of a reconstruction process) for the actors with authority in the aftermath of war to be permitted to determine the approach taken to popular governance without any international legal restraint.

However, it is also important to recognize that the actor with authority for how popular governance initiatives are approached is not without self-interest in the matter.<sup>19</sup> For instance, if the actor in question is an interim government that is kept in authority through international support, there is a risk that they might seek to delay an election not because they judge it the right thing to do for the context, but rather because they recognize that such an occurrence will remove their authority. A self-interested approach to the questions of popular governance could clearly be damaging for the legitimacy and effectiveness of a reconstruction process. This is a reason to be interested in the scope for such actors to be held accountable for the approach taken.<sup>20</sup>

One might expect the domestic legal system to be a key source of accountability for issues of popular governance. However, in the post-conflict setting the domestic legal system can be a site of reconstruction that does not function in a manner that places meaningful restraint on the government.<sup>21</sup> This can place the onus on international law as a source of legal accountability. An international legal framework for popular governance has the potential to make a number of useful contributions to the practice of post-conflict reconstruction. It could provide a basis for action to address conduct deemed inappropriate with regard to the approach taken to the involvement of the population in governance. In turn, the possibility of sanction could serve as a motivator for an appropriate approach, whilst also operating as a source of reassurance for the affected population that the actors in authority undertake decision making in a responsible manner.<sup>22</sup> As these benefits could contribute to the legitimacy and effectiveness of

<sup>18</sup> For consideration of the relative importance of different contextual factors in post-conflict settings, see Otwin Marenin, "Understanding Mission Environments: Local Contexts and the Legitimation of Reforms" (2010) 14 *Journal of International Peacekeeping* 223–47; also Ruth Wedgwood and Harold K Jacobson, "State Reconstruction after Civil Conflict: Symposium (Foreword)" (2001) 95 *American Journal of International Law* 1–6.

<sup>19</sup> On the idea that a post-conflict government that is dependent on international actors is more likely to disregard the interests of the population, see Michael Barnett and Christoph Zürcher, "The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood" in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge 2009) 23, 31–5.

<sup>20</sup> Accountability involves "the justification of an actor's performance *vis-à-vis* others, the assessment or judgment of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to applicable standards." Ruth W. Grant and Robert O. Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99 *American Political Science Review* 29, 29–30 (as paraphrased by Deirdre Curtin and André Nollkaemper, "Conceptualising Accountability in International and European Law" (2005) 36 *Netherlands Yearbook of International Law* 3, 4).

<sup>21</sup> See also Barnes, "The Contribution of Democracy to Rebuilding Postconflict Societies" (n. 14) 92.

<sup>22</sup> See also Nigel D. White, "Peace Operations" in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press 2009) 225.

the reconstruction process, there is also a basis upon which to suggest that there should be international legal regulation of the approach taken to popular governance.

However, it is evident that—even starting from the position of a clearly defined category of post-conflict situations in mind, and focusing on just one aspect of popular governance—it will be difficult to craft an appropriate international legal framework for popular governance.<sup>23</sup> This is because two of the key considerations that should underpin its design are far from complimentary.<sup>24</sup> A move to strengthen accountability, be it through more detailed provisions or more coercive supervisory arrangements, will be likely to constrain the discretion of an interim government to allow for the particular circumstances of the target situation to be accommodated. This chapter does not seek to propose an ideal international legal framework. But the idea that the law should strike a balance between contextual discretion and accountability provides a useful reference point for the assessment of the relevance of extant law for the development of a popular mandate in the sections that follow.

### III. International Legal Regulation of the Development of a Popular Mandate for Governance

The creation of a popular mandate for governance is about involving the population of a state in the selection of the actors that will exercise general political authority. It is possible to envisage a range of processes that will help to connect a governance arrangement to the will of the people in a post-conflict setting. For instance, representatives of different groups within a society might come together to select leaders. Alternatively, leaders might be selected on the basis of consultations with members of the population. The approach required by extant international law is national elections, an approach found in a number of human rights instruments.<sup>25</sup> The most generally applicable provision is Article 25 of the International Covenant on Civil and Political Rights (“ICCPR”). As such, a focus on the meaning of this provision and its compliance procedures is a reasonable starting point, in an attempt to establish a view on the

<sup>23</sup> For additional reasons to query the desirability and feasibility of such an enterprise, see Christine Bell, “Peace Settlements and International Law: From *Lex Pacificatoria* to *Jus Post Bellum*,” University of Edinburgh School of Law Research Paper Series No. 2012/16 <[http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2061706\\_code941689.pdf?abstractid=2061706&mirid=3](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2061706_code941689.pdf?abstractid=2061706&mirid=3)> (accessed 24 July 2013) 52–6; although see also Inger Österdahl and Esther van Zandel, “What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles” (2009) 14 *Journal of Conflict and Security Law* 175, 192 “When combining the concept of local ownership with the concept of a ‘tailor-made’ *jus post bellum*, one can think of designing a framework of *jus post bellum* rules which is flexible enough to take local preferences and sensibilities into account, while not compromising on the minimum set of rules which states are to abide by.”

<sup>24</sup> The two key considerations identified here—contextual sensitivity and accountability—can perhaps be read as subsets of one of the six conditions that Larry May identifies (ch. 1, this volume) for *jus post bellum*: rebuilding. However, it should be stressed that they are used here in relation to a setting in which an interim government is kept in authority by external actors that have not been party to the main conflict. This is different from the setting upon which May’s theory is constructed, where “[r]ebuilding is the condition that calls upon all those who participated in devastation during war to rebuild as a means to achieve a just peace.” Larry May, text to fn. 10 in ch. 1, this volume. As such, the relevance of contextual sensitivity and accountability for May’s condition of rebuilding should not be too readily assumed.

<sup>25</sup> For an overview, see Gregory H. Fox, “The Right to Political Participation” in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance in International Law* (Cambridge University Press 2000) 53–70.



appropriateness of the extant international legal framework for this aspect of the post-conflict reconstruction process.

### A. The requirements of Article 25 of the ICCPR

Article 25 of the ICCPR reads:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The key elements of this provision—rights for individuals to take part in the conduct of public affairs, to vote and be elected at genuine periodic elections, and to have access to public service—clearly have some connection to the development of a popular mandate for governance in the aftermath of war. However, the lack of precision in the terms of the provision entails that the exact nature and extent of its relevance is not readily apparent.<sup>26</sup>

A useful guide to the meaning of Article 25 is found in the work of the UN Human Rights Committee (“HRC”), particularly the HRC’s General Comment on Article 25 from 1996.<sup>27</sup> This comment sets out what the committee understands as required to ensure fulfillment of each of the three key elements of the Article. Aspects of particular note when contemplating the development of a popular mandate for governance include the view that it is implicit in Article 25 that:

- the freely chosen representatives do in fact exercise governmental power;<sup>28</sup>
- to be periodic means that elections “must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors”;<sup>29</sup>
- voters must be free to form opinions and oppose the government without undue influence or coercion of any kind;<sup>30</sup>

<sup>26</sup> See Fox, “The Right to Political Participation” (n. 25) 55; Wippman (ed.), *International Law and Ethnic Conflict* (n. 16) 235; Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press 1999) 330, 332. The lack of precision has been explained on the basis of the Cold War tensions that provided a backdrop for the negotiation of the ICCPR (1948–66). The vague nature of its terms allowed for a broad range of different approaches to governance to be within the law, and ensured the agreement of states with different views on how a state should be organized.

<sup>27</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (12 July 1996) UN Doc. CCPR/C/21/Rev.1/Add.7 (General Comment No. 25); (on the debate regarding the value of the practice of international election monitoring for the meaning of Art. 25 of the ICCPR, compare Fox, “The Right to Political Participation” (n. 25) 85–6, with Roth, *Governmental Illegitimacy in International Law* (n. 26) 342).

<sup>28</sup> General Comment No. 25 (n. 27) para. 7.

<sup>29</sup> General Comment No. 25 (n. 27) para. 9.

<sup>30</sup> General Comment No. 25 (n. 27) para. 19.

- voter education and registration campaigns are necessary;<sup>31</sup>
- an independent electoral authority should be created to oversee the process;
- the security of ballot boxes must be guaranteed;<sup>32</sup> and
- conditions on eligibility to vote or stand for office cannot be based on factors such as descent or political affiliation.<sup>33</sup>

The issue of multiparty elections is not tackled directly, but when one reads that “elections must be held at intervals [...] which ensure that the authority of government continues to be based on the free expression of the will of the electors”<sup>34</sup> with the statement that “political parties play a [...] significant role in the election process,”<sup>35</sup> the implication appears one of incompatibility with one party states.<sup>36</sup> The comment also identifies the rights of freedom of expression, assembly, and association as essential conditions for the effective exercise of the right to vote, and indicates what these rights require in the context of Article 25 (this includes steps to combat illiteracy, paragraph 12).<sup>37</sup>

The work of the HRC helps to make clear the nature of the international legal limits that a post-conflict government encounters with regard to the approach taken to the development of a popular mandate. However, in many instances the requirements of the right remain imprecise. This entails discretion for post-conflict governments with regard to the approach taken to compliance with the law. For instance, the specification of the HRC with regard to timing is that “elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.” Such a formulation indicates that elections must occur at some point following conflict, but provides scope for debate about exactly when they must occur to remain compliant with the law. Moreover, the focus of the law is relatively limited. It makes an electoral process mandatory and sets procedural standards, but leaves a number of elements unregulated. For instance, in terms of the voting system, the HRC identifies that “the principle of one person, one vote, must apply” and that votes should be of equal worth, but also recognizes that “the Covenant does not impose any particular electoral system.”<sup>38</sup> As such, it is for the post-conflict government to determine matters such as whether or not there will be a majority based or proportional representation based approach to elections.

The scope for a post-conflict government to operate in the manner it deems suitable and remain within the parameters of the law is increased by a couple of additional features of Article 25. One of these is found in the first clause of Article 25, which reads that: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without *unreasonable restrictions*” (emphasis added). This indicates that it is within the law for reasonable restrictions to be placed on the exercise of the right protected by Article 25. The drafting history of the

<sup>31</sup> General Comment No. 25 (n. 27) para. 11.

<sup>33</sup> General Comment No. 25 (n. 27) para. 15.

<sup>35</sup> General Comment No. 25 (n. 27) para. 26.

<sup>36</sup> Nigel D. White, “The United Nations and Democracy Assistance: Developing Practice Within a Constitutional Framework” in Peter Burnell (ed.), *Democracy Assistance: International Co-operation for Democratization* (Frank Cass 2000) 73; cf. Roland Rich, “Bringing Democracy into International Law” (2001) 12 *Journal of Democracy* 20, 24.

<sup>37</sup> General Comment No. 25 (n. 27) para. 12.

<sup>32</sup> General Comment No. 25 (n. 27) para. 20.

<sup>34</sup> General Comment No. 25 (n. 27) para. 9.

<sup>38</sup> General Comment No. 25 (n. 27) para. 21.

provision suggests that it should be read as focused on matters of eligibility to vote,<sup>39</sup> and this finds support in the nature of the examples given by the HRC in its comment.<sup>40</sup> But as Fox and Nolte have noted, “neither the legislative history nor the text precludes use of this clause to evaluate more far-reaching restrictions on the right to be elected, such as excluding a party from taking part in elections.”<sup>41</sup> In addition, the assessment of whether particular restrictions would be reasonable is an issue for which there is a lack of clear guidance.<sup>42</sup> This vagueness gives post-conflict governments the space to claim that questionable electoral practices are in fact consistent with Article 25.<sup>43</sup>

A post-conflict government can derive additional discretion with regard to how it approaches compliance with the requirements of Article 25 given that according to Article 4 of the ICCPR, it is possible to derogate from Article 25.<sup>44</sup> Article 4 reads:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

In its General Comment 29 on Article 4, the HRC has stressed that for a suspension of rights to be valid, a state “must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.”<sup>45</sup> The HRC has also noted that “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation,”<sup>46</sup> and indicated that the assessment of a derogating measure will concentrate on whether it was both necessary and proportionate in relation to the situation at stake.<sup>47</sup> This means that although the fact of a recent conflict within a state will not in and of itself justify a derogation, if there is a clear connection

<sup>39</sup> Gregory H. Fox and Georg Nolte, “Intolerant Democracies” (1995) *Harvard International Law Journal* 1, 46.

<sup>40</sup> General Comment No. 25 (n. 27) paras 4, 10.

<sup>41</sup> Fox and Nolte, “Intolerant Democracies” (n. 39) 46.

<sup>42</sup> See Fox and Nolte, “Intolerant Democracies” (n. 39) 48; Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate 2009) 52.

<sup>43</sup> On the relevance of the margin of appreciation concept in relation to the HRC and its assessment of compliance with the ICCPR, see Conte and Burchill, *Defining Civil and Political Rights* (n. 42) 43–6.

<sup>44</sup> This is a point of distinction with regard to the corresponding provision in the American Convention on Human Rights, Art. 27(2), see Fox and Nolte, “Intolerant Democracies” (n. 39) 54.

<sup>45</sup> HRC, “CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency” (31 August 2001) UN Doc. CCPR/C/21/Rev.1/Add.11 (General Comment 29) para. 5.

<sup>46</sup> HRC, General Comment 29 (n. 45) para. 3; the comment mentions “armed conflict” and “a natural catastrophe, a mass demonstration including instances of violence, [and] a major industrial accident”; see also Sarah Joseph, “Human Rights Committee General Comment 29” (2002) 2 *Human Rights Law Review* 81, 83 (“It would however seem that the emergency does not have to actually threaten the entire nation; its impact can probably be geographically confined so long as it reaches the necessary threshold of extreme seriousness”).

<sup>47</sup> HRC, General Comment 29 (n. 45) para 5.

between the conduct of elections and a return to extensive violence,<sup>48</sup> there is scope for a departure from the requirements of the provision, such as a delay in the holding of the election, to be within the law.<sup>49</sup> In this respect, there is a requirement of a declaration of a public emergency within its territory, and a requirement of a notification, through the UN Secretary General, to the other state parties<sup>50</sup>—although it is arguable that derogation can be relied upon even without appropriate notification.<sup>51</sup>

A final point related to the latitude afforded post-conflict governments in this area is about the value of the work of the HRC in terms of establishing the meaning of the Article 25. The interpretations provided by the HRC are the most authoritative,<sup>52</sup> and provide a useful guide for ensuring that conduct is definitely consistent with the law. However, the interpretations of the HRC are not legally binding upon the state parties.<sup>53</sup> This means that even where the HRC has addressed a particular issue, there is still scope for this to be contested as a point of law. This scope is increased where, as Roth has noted, there is not a clear explanation of the methodology that has been adopted by the HRC in formulating its view (particularly in the sense of how the assertions of what is the law relate to the interpretive rules found in Vienna Convention of the Law of Treaties).<sup>54</sup> To the extent that this is the case with the comment on Article 25, there is a basis for a post-conflict government to resist compliance with certain aspects of the HRC's account—such as the implication that there is a requirement of multi-party elections<sup>55</sup>—on the grounds that the assertion in question remains contentious as a point of law.<sup>56</sup>

In sum, international law sets out a framework for the development of a popular mandate in the post-conflict setting. The law provides direction with regard to the timing and procedure of a mandatory electoral process. Hence, there is a basis for actors with authority to be held accountable under international law for the approach taken to the development of a popular mandate for governance. However, the efficacy of the international law in this area as a source of accountability is brought into doubt by factors such as the vague nature of many of the requirements and the grounds for contestation of the authentic meaning.<sup>57</sup> This is a reason to depict the nature of the extant

<sup>48</sup> See also UN Commission on Human Rights, “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights” (28 September 1984) UN Doc. E/CN.4/1985/4, paras 39–41, stressing that the internal conflict and unrest must constitute a threat to life of the nation, and that this would include the physical integrity of the population.

<sup>49</sup> See Fox and Nolte, “Intolerant Democracies” (n. 39) 54; Wippman, “Practical and Legal Constraints on Internal Power Sharing” (n. 16) 240; see also Christopher McCrudden and Brendan O’Leary, “Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements” (2013) 24 *European Journal of International Law* 477, 489.

<sup>50</sup> HRC, General Comment 29 (n. 45) paras 5, 16, 17.

<sup>51</sup> See Joseph, “Human Rights Committee General Comment 29” (n. 46) 96.

<sup>52</sup> White, “The United Nations and Democracy Assistance” (n. 36) 72; see also Roth, *Governmental Illegitimacy in International Law* (n. 26) 334.

<sup>53</sup> White, “The United Nations and Democracy Assistance” (n. 36) 72.

<sup>54</sup> Roth, *Governmental Illegitimacy in International Law* (n. 26) 332.

<sup>55</sup> See also HRC, “*Chiiko Bwalya v. Zambia*, Communication No. 314/1988” (1993) UN Doc. CCPR/C/48/D/314/1988.

<sup>56</sup> See Jure Vidmar, “Multiparty Democracy: International and European Human Rights Law Perspectives” (2010) 23 *Leiden Journal of International Law* 209.

<sup>57</sup> On the benefit of this quality as a general matter see Roth, *Governmental Illegitimacy in International Law* (n. 26) 338.

regulation as a light approach with regard to its impact on the discretion of an interim post-conflict government. This theme is expanded on through consideration of the mechanisms for ensuring compliance with the law.

## B. Generating compliance with Article 25 of the ICCPR

The significance that international law will have in practice is not only about its substantive requirements, but also the factors that can compel compliance. The stronger the coercive nature of the compliance mechanisms, the more difficult it will be for a post-conflict government to simply disregard the law where it runs contrary to what it judges to be best for the context. In relation to Article 25 of the ICCPR, a number of factors might compel a government to comply with the law. These include consequences for the legal authority of government in question under international law, action by other states, and assessment by an international court. Thinking about these possibilities is an opportunity to develop a clearer idea of how likely it is that a post-conflict government would seek to comply with the requirements of Article 25 regardless of the implications for the success of post-conflict reconstruction. Such inquiry also serves to highlight the options that are available for concerned international actors under international law, with regard to a post-conflict government that chooses to determine the approach taken to the development of a popular mandate on the basis of its own interests rather than the best interests of a situation.

In the first place, it should be noted that there is no explicit link made in Article 25 between the violation of its requirements and the continuation of governmental authority as a matter of international law.<sup>58</sup> This means that a disregard of the law will not directly impact the authority of the government to enter into agreements related to the reconstruction process. Still, a disregard of the law could lead to a refusal of other states to afford recognition of governmental status. This could have consequences for the standing of the government from an international legal perspective,<sup>59</sup> but it would require an extensive and coordinated effort to extinguish governmental status. This might be possible where there is evidence of a grave and serious breach of a peremptory norm, but it is unlikely for a breach of the obligation to develop a popular mandate for governance, which is generally not identified with this status.<sup>60</sup>

Another possible basis for an international response stems from the *erga omnes partes* nature of the obligations created by human rights instruments such as the ICCPR. This means that it is open to any other state party to invoke responsibility for a breach of the treaty, regardless of whether or not it is directly injured.<sup>61</sup> This provides

<sup>58</sup> See also Roth, *Governmental Illegitimacy in International Law* (n. 26) 332.

<sup>59</sup> See Matthew Saul, "Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement" (2011) 16 *Journal of Conflict and Security Law* 165, 185–7; Jean d'Aspremont, "Legitimacy of Governments in the Age of Democracy" (2006) 38 *New York University Journal of International Law and Politics* 877.

<sup>60</sup> See Matthew Saul, "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?" (2011) 11 *Human Rights Law Review* 609, 640.

<sup>61</sup> International Law Commission, "Report of the International Law Commission on the work of its Fifty-third session" (November 2001) UN Doc. A/56/10, ch. 4 (Draft Articles on Responsibility of States for Internationally Wrongful Acts) Art. 48.

a basis to demand cessation and to call for reparation for the injured party. This could serve as part of a strategy to encourage a non-compliant government to become compliant. As signaling that the government is not complying with its international legal obligations could impact its legitimacy. But for this sort of consideration to affect the thinking of an interim government supposes that the government is concerned about its legitimacy and views attempting to comply with the law as a means to improve its legitimacy. At least in relation to a situation where the government is willfully disregarding the legal obligations for the development of a popular mandate, this can hardly be assumed.

Article 54 of the International Law Commission's Articles on State Responsibility provides a basis for countermeasures to coerce compliance. However, the nature of the measures that are permissible in this context remains uncertain and largely untested in practice. Practice reveals examples of economic sanctions and cessation of certain types of relations.<sup>62</sup> The utilization of such measures against a non-compliant interim post-conflict government are unlikely, given that they would risk contributing to destabilization of the situation and would not necessarily persuade a change in policy. In this respect, the scope for a removal of the support that was keeping the government in authority, which would be possible without a legal explanation, might be a more effective deterrent. But the extent to which it would influence the thinking of an interim government is likely to be linked to the scope for a coordinated effort amongst all actors providing support. This is unlikely to be readily achieved, given the risk that its implementation would pose of a return to conflict. It should also be stressed that there is no duty on states to monitor or to invoke responsibility where a breach of the obligation is found. This helps to explain why it is possible for international actors to continue to provide support in spite of the approach taken by an interim post-conflict government to the legal requirement to develop a popular mandate.

The scope for international legal accountability to arise from within the state through members of the affected population taking action in an international judicial forum is also limited. The relevant forum for the ICCPR is the HRC. It is possible for individuals to bring claims directly to the HRC (when the state in question is a party to the First Optional Protocol).<sup>63</sup> However, there are factors that reduce the relevance of this possibility in a post-conflict setting. These include the considerable period of time that can elapse before a decision will be made and publicized; and the need for individuals to have the motivation and capacity to bring a claim. Factors such as these reduce the prospect of a judicial judgment being passed during a period of time where it might be most useful as a means of generating a change in conduct from an interim government. But even if it was possible for a decision to be rendered in a timely manner, the non-legally binding nature of the decisions of the HRC further weakens its value as a source of constraint on the discretion of an interim post-conflict government.

<sup>62</sup> UN Doc. A/56/10, ch. 4 (Draft Articles on Responsibility of States for Internationally Wrongful Acts) Art. 54, commentary para. 3.

<sup>63</sup> Fewer states have agreed to the First Optional Protocol than are states parties to the ICCPR (114 compared to 167 states parties).

### C. An appropriate international legal framework?

The analysis of the requirements of Article 25 and its associated compliance mechanisms supports the depiction of the extant international legal framework for the development of a popular mandate for governance in the aftermath of war as a light approach to regulation. This is a reference to the idea that the provisions are of such a nature that they allow for a broad range of approaches to the conduct of an electoral process to come within the parameters of the law. It is also a reflection of the limited possibility of an international judicial forum hearing the concerns during the practice, and the lack of a requirement for other state parties to take action, which means that a departure from the law has the potential to prompt little in the way of a legal response.

Such a light approach to regulation can be read in two ways with regard to appropriateness for the post-conflict setting. In terms of the call for the approach taken to the development of a popular mandate for governance to be tailored to the context, it has merit. This is because although the law directs a post-conflict government to hold a national election, it affords the government room to tailor the approach taken to an electoral process to suit the needs of the circumstances. In terms of the call for a basis for accountability, however, it appears more problematic. This is because the law provides little to guard against the risk that a government will tailor the popular mandate process to suit its own interests rather than those of the situation. To help develop a clearer view on the appropriateness of this framework, it is useful to consider how it has fared in practice.

In identifying relevant practice, a useful consideration is the manner in which a post-conflict government is able to control its territory. It is more likely that the drafters of Article 25 were targeting governments with an independent capacity for control of the state's territory, on the basis that it is the common condition of states. As such, it is reasonable to be more interested in post-conflict situations in which governance is dependent on external actors, especially military support, than situations in which the governance is sustainable without external support. The dependence on external support increases the likelihood that difficulties with the light approach to regulation found in Article 25 will be made apparent. This is because it weakens the link between authority and the views of the population that one would expect to help drive a responsible approach to the development a popular government by an interim government.

While there have been a number of examples of practice of the development of a popular mandate for governance in the aftermath of war in circumstances where governance has been dependent on an international military presence,<sup>64</sup> the focus in the following section is on the case of Sierra Leone.<sup>65</sup> Specifically, the period following the war between the government of President Kabbah and a group of rebels (including

<sup>64</sup> In particular, instances in the recent past of Haiti, Afghanistan, Liberia, and Iraq figure prominently in the now extensive literature on post-conflict reconstruction. See e.g. Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge 2009); Brett Bowden, Hilary Charlesworth, and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge University Press 2009); Matthew Saul, "From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law" (2009) 11 *International Community Law Review* 119–48.

<sup>65</sup> Sierra Leone ratified the ICCPR in 1996, and is a party to the First Optional Protocol, 1966.

despondent members of the military), which at one point forced President Kabbah into exile in Guinea. This war was officially declared over in 2002,<sup>66</sup> but there was a tentative peace from 2000 onwards,<sup>67</sup> and the extensive external military presence that secured the authority of the government did not leave until 2005. The focus on Sierra Leone is explained by the relatively conducive nature of the context to the suitability of the extant international legal framework. In particular, there was recent experience of an internationally monitored electoral process, and a government (President Kabbah's) with a basis to expect that its authority would be enhanced through an electoral process. Such factors support the view that if the extant, light international legal framework was not satisfactory in Sierra Leone, it is unlikely that it will have been more suitable in more demanding contexts.

#### IV. The Practice of Developing a Popular Mandate for Governance in Sierra Leone

During 2000–05 there was one clear attempt to develop a popular mandate for the exercise of general political authority in Sierra Leone. It was in the form of a national election,<sup>68</sup> which the incumbent government of President Kabbah won convincingly. Determining the extent to which international law was a factor in the decision of the government to hold elections and the way that the subsequent process unfolded is difficult, not least because the government often specified a commitment to the advancement of democracy in Sierra Leone without any reference to international law.<sup>69</sup> Support for the view that the decision making on the development of a popular mandate for governance was motivated to come within the terms of the relevant international legal requirements is found in a number of considerations. One of these is that international human rights law provides a starting point for an assessment of the government's commitment to democracy.<sup>70</sup> If the government were to have just abandoned the law, it would be difficult for it to make a convincing case that it was committed to democracy. Another consideration is that the government stated its commitment to international human rights law on various occasions.<sup>71</sup> As elections are a relatively visible aspect of human rights practice, if the government was concerned to demonstrate

<sup>66</sup> "Speech by the President of Sierra Leone His Excellency, Alhaji Dr. Ahmad Tejan Kabbah at the ceremony marking the conclusion of disarmament and the destruction of weapons" (18 January 2002) <<http://www.sierra-leone.org/Speeches/kabbah-011802.html>> (accessed 24 July 2013).

<sup>67</sup> Abuja Ceasefire Agreement between the Government of Sierra Leone and RUF, 10 November 2000 (the agreement reaffirmed a commitment to the general terms of the Lomé Peace Accord) <<http://www.ucdp.uu.se/gpdatabase/peace/SiL%2020001110.pdf>> (accessed 24 July 2013); see also UNAMSIL Press Release, "Sierra Leone Ceasefire Review Meeting Concludes in Abuja" 3 May 2001 <<http://reliefweb.int/report/sierra-leone/sierra-leone-ceasefire-review-meeting-concludes-abuja>> (accessed 24 July 2013).

<sup>68</sup> Local elections were held in May 2004.

<sup>69</sup> See e.g. "His Excellency the President's Address on the Occasion of the State Opening of the Fourth Session of the First Parliament of the Second Republic of Sierra Leone" (16 June 2000) <<http://www.sierra-leone.org/Speeches/kabbah-061600.html>> (accessed 24 July 2013).

<sup>70</sup> See Matthew Saul, "The Search for an International Legal Concept of Democracy: Lessons from the Post-Conflict Reconstruction of Sierra Leone" (2012) 13 *Melbourne Journal of International Law* 540, 542.

<sup>71</sup> See e.g. *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (signed and entered into force 7 July 1999) <[http://peacemaker.un.org/sites/peacemaker.un.org/files/SL\\_990707\\_LomePeaceAgreement.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf)> (accessed 24 July 2013); Commission on Human Rights, "Summary Record of the 49th Meeting" (25 April 2003) UN Doc. E/CN.4/2003/SR.49, para. 49.



the strength of these claims, it would be likely to be concerned to come within the relevant legal parameters. In addition, accounts of the electoral process by external observers provide a basis to argue that the practice did, for the most part, come within the parameters of the law.<sup>72</sup> It is through considering how international law relates to particular issues that arose during the electoral process that a clearer understanding of the suitability of the extant international law is formed.

One of the key issues that arose in the practice of the development of a popular mandate for governance of post-conflict reconstruction in Sierra Leone was with regard to the timing of the parliamentary and presidential elections. In line with the constitution, the elections were due to be held in 2001 (a five-year term of office—the previous elections were in 1996). Yet the elections were not held until 14 May 2002 (around one year overdue). The explanation given by the government for the delay was the on-going condition of war.<sup>73</sup> No notice of derogation was sent to the UN Secretary General, but it is reasonable to posit that the circumstances were such in Sierra Leone that the conduct of elections in line with the scheduled date could have had consequences that would have satisfied the substantive requirements of Article 4 of the ICCPR (on derogation in times of public emergency). Although a disarmament process was underway, it was not complete, and the ceasefire remained tentative. To hold elections in such a setting would have risked reigniting a conflict that already involved a number of failed peace agreements. Thus, there is reason to welcome the discretion that the law provided the government. This point is supported by the fact that the criticisms that were directed at the government by opposition groups and NGOs concentrated on aspects of governmental conduct that stemmed from the delay but were not about the fact of a delay in and of itself.

In particular, the government was criticized for how it approached the composition of the government during the period of delay and for failing to wait longer before the initiation of an electoral process once conditions were deemed suitable. With regard to the composition of the government during the delay, opposition groups called for an interim government to be formed. Such a call would address the concern that the period of delay was being used as means for the government to cement its position. However, there is also a risk that such an approach could bring actors together who could not, as a result of competing perspectives on how the state should be developed, function as an effective government *vis-à-vis* leadership of the reconstruction process.<sup>74</sup> Moreover, this was a situation in which the incumbent government already had a claim to popular endorsement (having been elected in 1996), whereas the most vociferous opposition group, the RUF, had little evidence to support such a claim (a point

<sup>72</sup> See e.g. Commonwealth Secretariat, *Sierra Leone Presidential and Parliamentary Elections 14 May 2002: The Report of the Commonwealth Observer Group (2002)* <[http://www.thecommonwealth.org/shared\\_asp\\_files/GFSR.asp?NodeID=141360](http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=141360)> (accessed 24 July 2013) 28.

<sup>73</sup> US Department of State, “2002 Country Reports on Human Rights Practices: Sierra Leone” (see also 2001 report) <<http://www.state.gov/j/drl/rls/hrrpt/2002/18225.htm>> (accessed 24 July 2013); local elections were repeatedly delayed, see e.g. US Department of State, “2002 Country Reports on Human Rights Practices: Sierra Leone” (scheduled to take place in 1999, eventually occurring in May 2004) <<http://www.state.gov/j/drl/rls/hrrpt/2000/af/755.htm>> (accessed 24 July 2013).

<sup>74</sup> For instance, it was during this period of delay that the details of the Special Court for Sierra Leone were negotiated (actually signed two days before the declaration of the end of war).

illustrated by its struggles as a political party in the elections of 2002). Accordingly, a requirement that the government include opposition groups would have been likely to add little, in terms of the connection between the government and the population during the period of delay. As such, it is reasonable to be satisfied in this instance that the extant law does not condition the legality of a delayed electoral process on such steps.

In terms of the timing of elections once conditions were deemed suitable, the concern was that the short period of notice given (around six months) was not sufficient.<sup>75</sup> In particular, concerns were expressed about the infrastructure that was in place for voter registration and the capacity of the National Election Commission that was charged with overseeing the process.<sup>76</sup> If one sees the quick organization as simply a means for the government to capitalize on the popularity that it was enjoying as a result of being associated with the international support,<sup>77</sup> then the lack of attention to this issue in international law might be seen as problematic. This is because a rapid rush to elections increases the likelihood of a flawed election process, which will not be conducive to building a culture of a responsible approach to future elections. However, a key part of the explanation for the quick organization of the elections was the interest of the government in silencing the call for an interim government to be created.<sup>78</sup> From this perspective it can be seen as positive for the reconstruction process that the government was not hindered by international law, as it helped to ensure that the reconstruction process could proceed without the question of whether or not the government had sufficient legitimacy to lead the process.

Another of point of interest is with regard to the procedural matters concerning the elections. The electoral process has been criticized in a number of respects. For instance, it has been reported that “(t)here is no doubt that the SLPP [Sierra Leone People’s Party] benefited from the perks of incumbency, certain electoral rules, an apparent policy of low-key harassment and a confused registration process which suffered from omissions, multiple and underage registrations, and a non-functioning voter transfer system.”<sup>79</sup> There is little reason to suspect that occurrences such as these affected the overall outcome of the elections,<sup>80</sup> but they are problematic for a number of reasons. In particular, they can affect the way in which the electoral process is perceived by the public, and thereby reduce its value as a means of a generating a sense of connection between the people and the government. Accordingly, there is reason to

<sup>75</sup> The development of the schedule involved a consultative process, at which proposals by the National Electoral Commission were endorsed by “Representatives from civil society, political parties and government.” International Crisis Group (ICG), “Sierra Leone: Ripe for Election” (19 December 2001) <<http://www.crisisgroup.org/~media/Files/africa/west-africa/sierra-leone/B006%20Sierra%20Leone%20Ripe%20for%20Elections.pdf>> (accessed 24 July 2013) 2.

<sup>76</sup> See David Harris, *Civil War and Democracy in West Africa* (I. B. Tauris 2012) 106–7; International Crisis Group, “Sierra Leone After Elections: Politics as Usual?” (15 July 2002) <<http://www.crisisgroup.org/~media/Files/africa/west-africa/sierra-leone/Sierra%20Leone%20After%20Elections%20Politics%20as%20Usual.pdf>> (accessed 24 July 2013) 4.

<sup>77</sup> See David Harris, “Post-Conflict Elections or Post-Elections Conflict: Sierra Leone 2002 and Patterns of Voting in Sub-Saharan Africa” (2003) *Cadernos de Estudos Africanos* 39, 43.

<sup>78</sup> See International Crisis Group, “Ripe for Election” (n. 75) 2; International Crisis Group, “Politics as Usual?” (n. 76) 4.

<sup>79</sup> See Harris, “Post-Conflict Elections or Post-Elections Conflict” (n. 77) 42.

<sup>80</sup> Harris, *Civil War and Democracy in West Africa* (n. 76) 110.

be concerned about the present condition of international law related to electoral procedures. Although the law prohibits a host of activity that can bring the nature of an election into question, it hardly serves as a guarantee that such activity will not occur.

A more stringent compliance mechanism might have incentivized greater effort to comply with the law. However, the nature of the context in which the elections were held must be kept in mind. The elections were held amidst a shattered state and civil infrastructure, and involved the participation of groups that had recently been on opposing sides in an armed conflict. In relation to this setting, it is questionable whether the electoral procedure could have been readily enhanced. And it is difficult to imagine that the gains that this would produce for the situation would outweigh the cost, in terms of the other aspects of the reconstruction process that could be neglected as result of the redirection of resources. This is a reason to welcome the light approach to regulation. In addition, the present condition of the law meant that it was possible for interested international actors to project the elections as a success.<sup>81</sup> If the law had been more demanding, this could have drawn more attention to the failings of the process, and made the message of a success less convincing; with potential implications for the level of external support that the government would receive for the reconstruction.

A further point of note stems from the results of the elections. Kabbah won the presidential election with over 70 percent of the votes. In the parliamentary election, Kabbah's SLPP party won 83 of the 112 seats.<sup>82</sup> This reflected a significant increase in the popularity of president Kabbah and his party in comparison to the 1996 elections. In terms of explanation for this increase in popularity, a prominent suggestion has been the association of President Kabbah with the presence of the UN and broader international support.<sup>83</sup> This view is supported by the disappointing showing of the SLPP in the subsequent election in 2007, when the UN military presence had already left. But at the time of the 2002 election, the concern was expressed that the absence of viable opposition in parliament and the failure of President Kabbah to accommodate representatives of other parties in the cabinet could be problematic for the stability of the situation. In particular, it was suggested that it could be a factor in encouraging the return of "regional and ethnic inequities and abuses that fuelled the civil war in the early 1990s."<sup>84</sup> There was, though, little reason to query this approach to the establishment of government from the perspective of Article 25 of the ICCPR. The variation on proportional representation that was adopted as the voting system satisfied the limited requirements of the law.<sup>85</sup> And it is difficult to argue that the approach taken to the formation of the government departed from the requirement that the elected representatives should exercise authority. One might consider that there should be more provision in the law to guard against the scope for a one-party system to develop in the aftermath of war. However, it is important to recognize that the concerns that were expressed at the time with regard to stability did not materialize.

<sup>81</sup> See Harris, *Civil War and Democracy in West Africa* (n. 76) 110.

<sup>82</sup> International Crisis Group, "Politics as Usual?" (n. 76) ii.

<sup>83</sup> Harris, "Post-Conflict Elections or Post-Elections Conflict" (n. 77) 42.

<sup>84</sup> International Crisis Group, "Politics as Usual?" (n. 76) 2.

<sup>85</sup> See Harris, *Civil War and Democracy in West Africa* (n. 76) 105 (describing the District Block System).

The flexibility that President Kabbah was afforded by the law in terms of the selection of the government also had benefits for the reconstruction process. The legitimacy of the previous term of the government was affected by the suspicion of corrupt behavior on behalf of some of its members. If President Kabbah's discretion was more constrained, in terms of selection of the government, it might have been more difficult to keep actors associated with corruption out of government.<sup>86</sup> Moreover, the dominance of the SLPP in Parliament can also be seen as a positive development for the efficacy of the reconstruction process, because it reduced the likelihood of necessary legislative and constitutional revisions being delayed.<sup>87</sup>

In sum, the Sierra Leone example provides clear reasons to be satisfied with the present approach to international legal regulation of the approach taken to development of a popular mandate for governance. The law can be seen as one of the factors that created an impetus for elections to be held, but it still allowed for the timing of elections to follow the best interests of the situation, for the electoral procedures to be in line with what is reasonably achievable, and for the approach taken to composition of the government to be based on an assessment of what is in the best interests of the situation. The law can hence be read as consistent with the best practice literature on post-conflict reconstruction, which recognizes a role for elections but calls for contextual sensitivity in how they are implemented. In addition, the practice is revealing with regard to the call for accountability of interim governments. The government generally operated in line with the parameters set by the law, and the discretion that the legal parameters provide was largely exercised in the best interests of the situation. This provides support for the idea that the absence of a stronger accountability mechanism might not be problematic, as it demonstrates that is not fundamentally unreasonable to expect interim post-conflict governments to exercise the discretion that they are presently afforded by international law in a responsible manner.<sup>88</sup>

## V. Conclusion

Presently, international law does not include a regulatory framework created specifically for the development of a popular mandate for governance following armed conflict. Yet there is an international legal framework that is applicable in such situations. This chapter has proceeded on the basis that this framework was not created with the complexities of the post-conflict setting in mind and that is a reason to be concerned about its suitability *vis-à-vis* the legitimacy and effectiveness of post-conflict reconstruction.

<sup>86</sup> See Harris, *Civil War and Democracy in West Africa* (n. 76) 120.

<sup>87</sup> See also International Crisis Group, "Politics as Usual?" (n. 76) 6; International Crisis Group, "Ripe for Election" (n. 75) 2 (reporting prior to the elections that "Donors wish to avoid an interim government in order to block the RUF from a share of power and because they believe there is need to establish a more powerful, politically secure government before popular agitation about the lack of basic services reaches a critical point").

<sup>88</sup> Although see also Jeremy I. Levitt, "Illegal Peace?: An Inquiry into the Legality of Power-Sharing With Warlords and Rebels in Africa" (2006) 27 *Michigan Journal of International Law* 495, 575.

To help determine the appropriateness of the extant law, practice in Sierra Leone has been considered. This has helped to show that the present approach to international legal regulation can have value in the post-conflict setting. This is in the sense that in a context, such as Sierra Leone, where the government was arguably motivated to comply with international human rights law, the law on political participation helps to ensure the occurrence of elections, but allows for the details of the process to be tailored to suit the circumstances of a situation. In relation to Sierra Leone, it has been shown that the current condition of the law facilitated the timing of elections to follow the interests of the situation, for the procedures to be in line with what is reasonably achievable, and for the approach taken to the composition of the government to be based on an assessment of what is in the best interests of the situation. Such flexibility is in line with the call from the policy debate in this field for the approach taken to popular governance to be tailored to suit the context in question, in order for it to have maximum benefit for the legitimacy and effectiveness of a reconstruction process.

However, this flexibility is at the expense of the strength of the law as a basis for accountability. This has been suggested to be potentially problematic, particularly because of the interest that a post-conflict government has in exercising its authority for the process in a manner that prioritizes its own interests. Yet to try to address this concern through the creation of more detailed provisions or stringent compliance mechanisms, or to develop a more rigid interpretative practice for the post-conflict setting,<sup>89</sup> could impinge on the discretion of an interim government to tailor the approach to suit the context. In this respect, the review of the practice in Sierra Leone has been argued to demonstrate that it is not fundamentally unreasonable to expect a post-conflict government to exercise the discretion it is afforded by the law in a largely responsible manner. As such, it supports retaining the status quo in terms of the extant international legal framework.

The focus of the chapter has been on international legal regulation of the development of a popular mandate for governance after conflict. But the arguments also have relevance when thinking about what international law might contribute to *jus post bellum* more generally. There are many other important decisions on reconstruction that must be made by interim governments following conflict across a range of sectors (e.g. security, economic, justice, and social sectors). In these instances, the best practice literature also points to the importance of the approach taken being tailored to the context. This underpins why scholars have warned against the development of an international legal blueprint for reconstruction.<sup>90</sup> The analysis in this chapter is consistent with this call, but it shows that this is not a reason to dismiss the potential for international law to be useful. This chapter has shown that a light touch approach to regulation—through broad standards and limited compliance mechanisms—can be useful as a means of motivating a best practice approach, while still allowing the scope for policy making in a manner that is sensitive to the context. It should not be assumed

<sup>89</sup> On the interpretative practice of human rights bodies *vis-à-vis* assessment of post-conflict power sharing arrangements see Bell, "Power-Sharing and Human Rights Law" (n. 6); also Martin Wählisch, ch. 17, this volume.

<sup>90</sup> See e.g. Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)" (2008) 23 *American University International Law Review* 311, 339.

that such an approach would be useful for other sectors where the decisions that need to be made can vary considerably from those surrounding an electoral process. But it could be worth exploring the possibility as part of a fuller investigation into the extant and future legal components of *jus post bellum*.<sup>91</sup>

Finally, it is important to stress that the Sierra Leone context was arguably one of the most ideal, in terms of the potential suitability of the extant, light touch international legal framework (this was on the basis that there was recent experience of an electoral process and an interim government with a basis to expect enhancement of its authority through an electoral process). As such, the argument that the nature of the extant international legal framework for developing a popular mandate was appropriate in the Sierra Leone context should not be assumed to be susceptible to extension to all post-conflict situations. Nonetheless, the case study helps to indicate that any attempt to change the regulatory framework to enhance accountability in response to a finding of a misuse of discretion in other situations would need to be carefully measured, so as to avoid removing benefits and creating complications for situations where greater accountability does not appear so pressing. A more definitive determination of whether the present law is sufficient will require consideration of how it has fared in more demanding post-conflict contexts. In the meantime, the perception of the suitability of the extant law will benefit from interim post-conflict governments recognizing and proceeding to exercise responsibly the discretion they are afforded by the extant international law: prioritizing what is in best interests of situation rather than self-interest.

<sup>91</sup> A light touch approach to regulation could, for instance, be a way for the six conditions that May identifies for *jus post bellum* to be given a more concrete form without completely losing the flexibility that is inherent in May's depiction of the conditions as "not strictly speaking *lex lata* but [...] also more than mere *lex ferenda*." Larry May, text to n. 35 in ch. 1, this volume.

# The Status of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles

*Aurel Sari\**

## I. Introduction

The end of armed conflict is often characterized by the presence of foreign armed forces. Foreign military deployments in post-conflict environments may come about in various ways. Sometimes, the end of an armed conflict does not lead to the prompt and complete withdrawal of all belligerent forces from the territory of their former adversary. Instead, foreign troops may remain deployed abroad for several years or even decades, occasionally in large numbers as they did in Germany after the Second World War or more recently in Afghanistan. Foreign forces may also intervene in armed conflicts between third parties and remain in theatre after the end of hostilities in order to stabilize the security situation, as happened in the case of Bosnia following the adoption of the Dayton Peace Agreement.<sup>1</sup> Equally, foreign troops may deploy in a post-conflict environment in order to carry out an international mandate after the active phase of a conflict in which they did not participate has come to an end, as certain coalition forces did in Iraq.<sup>2</sup>

Regardless of how foreign armed forces end up in a post-conflict situation, their presence is often controversial. One of the rather obvious lessons of the conflict in Iraq is that the continued deployment of foreign troops in the territory of their former adversary can attract substantial opposition from the local population and become a significant source of instability in its own right.<sup>3</sup> Even where foreign forces intervene at the request of the local authorities or in pursuit of an international mandate, their

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<sup>1</sup> General Framework for Peace in Bosnia and Herzegovina (Dayton Agreement), 14 December 1995, (1996) 35 *International Legal Materials* 75. On the expiry of the mandate of the UN Protective Force (UNPROFOR) on 31 January 1996, 17,000 of its troops were incorporated into the NATO-led Implementation Force (IFOR). See Lawrence S. Kaplan, *NATO and the UN: A Peculiar Relationship* (University of Missouri Press 2010) 165.

<sup>2</sup> Marten Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation" (2004) 86 *International Review Red Cross* 745, 753–5.

<sup>3</sup> Sean Rayment, "Secret MoD poll: Iraqis support attacks on British troops," *The Sunday Telegraph* (London, 23 October 2005) (describing an unpublished opinion poll commissioned by the UK Ministry of Defence showing that up to 65 percent of Iraqi citizens support attacks against coalition forces and that fewer than 1 per cent think that the presence of coalition forces is helping to improve security in Iraq) <<http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1501319/Secret-MoD-poll-Iraqis-support-attacks-on-British-troops.html>> (accessed 25 July 2013); Amit R. Paley, "Most Iraqis Favor Immediate U.S. Pullout, Polls Show," *The Washington Post*, (Washington DC, 27 September 2006) (describing

presence may not meet the approval of all factions of society. In such circumstances, the rules of international law regulating the legal status of such forces assume particular importance.

The privileges and immunities enjoyed by foreign armed forces during their presence abroad are rarely seen as a purely technical matter. Instead, they are widely perceived as a reflection of the broader political relationship between sending states and host states. Given the controversial nature of many post-conflict military deployments, it is not surprising to find that questions surrounding the legal status of the foreign troops concerned are not free from controversy either. It is not uncommon for status questions to act as a lightning rod for political rows and the grievances of the local population.<sup>4</sup> Nevertheless, as norms of law, the rules of international law regulating the legal status of foreign military deployments carry with them a promise of predictability and procedural legitimacy. If the aim of *jus post bellum* is to achieve a just and lasting peace, as we are told,<sup>5</sup> then the rules of international law applicable to post-conflict military deployments should contribute to this aim. Accordingly, we may expect these rules to lay down certain standards of behavior and offer a framework for interaction between sending states and host states that recognizes their often competing interests and provides means for balancing them.<sup>6</sup>

The aim of the present chapter is to investigate to what extent international law fulfills this promise. In doing so, the chapter explores to what extent the legal status of armed forces deployed in post-conflict environments is governed by principles and considerations of international law that are unique to *jus post bellum*. The chapter begins by noting that the rules of international law regulating the privileges and immunities of foreign armed forces do not form a single legal regime, but derive from diverse sources (section II). From these sources, five principles of general application may be derived (section III). Understood as a normative framework, *jus post bellum* raises certain special legal considerations and priorities (section IV). Superimposing these on the five general principles identified earlier suggests that two sets of questions relating to the legal status of foreign forces are of particular importance in post-conflict environments. The first concerns the challenges entailed by the transition from the non-consensual to consensual presence of foreign troops (section V). The second concerns the appropriate balance to be drawn between the competing legal interests of sending states and host states in post-conflict environments (section VI).

the findings of an opinion poll commissioned by the US Department of State showing that most Iraqis favored an immediate withdrawal of coalition forces) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/09/26/AR2006092601721.html>> (accessed 25 July 2013).

<sup>4</sup> A vivid example is offered by Ayatollah Khomeini's speech of 26 October 1964 (Speech 16) denouncing the extension of diplomatic immunities to American military personnel in Iran <[http://rkhomeini.org/temporaryurl.net/eBook/imam\\_eBook.cfm?book\\_id=238&start\\_page=259](http://rkhomeini.org/temporaryurl.net/eBook/imam_eBook.cfm?book_id=238&start_page=259) > (accessed 4 October 2013).

<sup>5</sup> Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) 17.

<sup>6</sup> In other words, we may expect international law to play a role both as rules and as process: see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 2–12.



## II. The Status of Foreign Forces: No Self-Contained Regime

*Jus post bellum* can be located between two main domains of public international law: the law of peace and the law of armed conflict.<sup>7</sup> With the blurring of the legal institution of war and the dividing line between peace and armed conflict,<sup>8</sup> today these two domains are no longer treated as two discrete branches of international law, if they ever were. It is becoming increasingly accepted that rules and principles originating in one domain may apply outside their main area of application.<sup>9</sup> In recent years, we have thus witnessed the extension of the applicability of international human rights law to conduct carried out in situations that do not resemble normal peacetime conditions.<sup>10</sup> The applicability of rules of law outside their center of gravity and the potential for normative friction that this creates—primarily between international human rights law and the law of armed conflict<sup>11</sup>—is one of the challenges faced by contemporary legal scholarship and practice in this area. This challenge also forms a key part of the study of *jus post bellum*.

<sup>7</sup> Carsten Stahn, “‘*Jus ad Bellum*,’ ‘*Jus in Bello*’ ... ‘*Jus Post Bellum*’? Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 921, esp. 923–4.

<sup>8</sup> Christopher Greenwood, “The Concept of War in Modern International Law” (1987) 36 *International and Comparative Law Quarterly* 283.

<sup>9</sup> So far, this has mainly involved arguments in favor of extending the application of the laws of peace, in particular international human rights law, to conflict situations. See e.g. Esther Rosalind Cohen, *Human Rights in the Israeli-occupied Territories, 1967–1982* (Manchester University Press 1985) 8–9 and *passim*. Arguments for the *de facto* application of the laws of armed conflict, including the law of belligerent occupation, to situations where they are not formally applicable have been voiced less frequently, e.g. Tristan Ferraro (ed.), *Occupation and Other Forms of Administration of Foreign Territory: Expert Meeting* (International Committee of the Red Cross 2012) 85–7 (cataloguing reasons both for and against the *de facto* application of the law of belligerent occupation to territories under international administration). See also Steven R. Ratner, “Foreign Occupation and International Territorial Administration: The Challenges of Convergence” (2005) 16 *European Journal of International Law* 695; Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press 2008) 115–46; Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge University Press 2008) 243–7.

<sup>10</sup> The jurisprudence of the European Court of Human Rights is particularly rich in such cases: see e.g. *Loizidou v. Turkey*, App. No. 15318/89 (preliminary objections), 20 EHRR 99; *Isayeva v. Russia*, App. No. 57950/00, 24 February 2005, 41 EHRR 38; *Isayeva, Yusupova and Bazayeva v. Russia*, App. No. 57947/00, 57948/00, and 57949/00, 24 February 2005, 41 EHRR 39; *Issa v. Turkey*, App. No. 31821/96, 16 November 2004, 41 EHRR 27; *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08, 2 March 2010, 51 EHRR 9; *Al-Jedda v. United Kingdom*, App. No. 27021/08, 7 July 2011. For commentary on some of these cases, see William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya” (2005) 16 *European Journal of International Law* 741; Marko Milanovic, “Al-Skeini and Al-Jedda in Strasbourg” (2012) 23 *European Journal of International Law* 121. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep. 136, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (2005) ICJ Rep. 168, para. 216.

<sup>11</sup> The literature on the relationship between these two branches of international law is substantial. For a range of views, see Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation” (2005) 99 *American Journal of International Law* 119; Cordula Droegge, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict” (2007) 40 *Israel Law Review* 310; Alexander Orakhelashvili, “The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?” (2008) 19 *European Journal of International Law* 161; Jann K. Kleffner, “Human Rights and International Humanitarian Law: General Issues” in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 51.

*De lege lata, jus post bellum* is not an established branch of international law.<sup>12</sup> While some regard it primarily as a set of moral imperatives rather than legal norms,<sup>13</sup> it would be wrong to assume that *jus post bellum* is an area devoid of rules of law.<sup>14</sup> On the one hand, international practice may already have given rise to special rules of international law applicable to post-conflict situations,<sup>15</sup> even if these rules have not congealed into a distinct branch of international law so far.<sup>16</sup> Whether or not such special rules exist must be determined with reference to the rules applicable to the identification of norms of international law.<sup>17</sup> On the other hand, post-conflict situations do not constitute some sort of legal vacuum:<sup>18</sup> whatever the shortcomings of the current legal regulation may be, a rather large body of existing rules of international law obviously does apply in such environments.<sup>19</sup> In this respect, the challenge to *jus post bellum*, understood as a scholarly project aimed at filling the normative gap that is said to exist in the period of transition from a state of conflict to a state of peace,<sup>20</sup> appears to be two-fold: to better understand the particular legal considerations and requirements raised by post-conflict situations and to identify ways in which the existing rules and principles of international law may be utilized to meet those requirements.

In attempting to identify the principles of international law that govern the legal status of foreign armed forces deployed in post-conflict environments, it is therefore useful to start from what we already know about their legal position under international law in general. Here we are immediately confronted with a considerable difficulty: the applicable rules do not seem to form a coherent and interrelated set of norms. In other words, there is little evidence that a distinct “law of foreign forces” or a “law of foreign forces immunity”<sup>21</sup> exists as a self-contained regime of international law<sup>22</sup> that is

<sup>12</sup> Cf. Carsten Stahn, “*Jus Post Bellum: Mapping the Discipline(s)*” (2008) 23 *American University International Law Review* 311, 316.

<sup>13</sup> May, *After War Ends* (n. 5) 5 (“[j]us post bellum principles are normative in that they are moral norms and they tell us what should become law”).

<sup>14</sup> As argued amongst others by Stahn, “*Jus Post Bellum*” (n. 12) 330–1.

<sup>15</sup> For an argument to this effect concerning an emerging rule on the promotion of the “rule of law” in post-conflict environments, see Christina C. Benson, “*Jus Post Bellum* in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries” (2012) 11 *Richmond Journal of Global Law & Business* 315.

<sup>16</sup> This is not to suggest that such a development will necessarily take place.

<sup>17</sup> James Crawford, *Bronwlie’s Principles of Public International Law* (Oxford University Press 2012) 23–30.

<sup>18</sup> For example, Ralph Wilde, “Are Human Rights Norms Part of *Jus Post Bellum*, and Should They Be?” in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 163.

<sup>19</sup> The fact that transition from war to peace to a large extent is already covered by existing rules and principles of international law has led some commentators to question whether there is any added value in recognizing *jus post bellum* as a distinct legal framework, considering that the concept appears to merely replicate what is already there: see Eric De Brabandere, “The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept” (2010) 43 *Vanderbilt Journal of Transnational Law* 119, 142–8. For one response to this objection, see n. 87 and the accompanying text.

<sup>20</sup> Stahn, “*Jus Post Bellum*” (n. 12).

<sup>21</sup> Although the term “law of visiting forces” is commonly used in the literature to describe the rules of international law regulating the legal position of foreign armed forces, see in particular Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford University Press 2001), so far no sustained attempts have been made to investigate whether or not these rules can be characterized as a self-contained regime.

<sup>22</sup> Famously, the ICJ used the term “self-contained regime” to describe the rules of diplomatic law in the *Case concerning the United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, (1980) ICJ Rep. 41, para. 86. For a critical review of the concept, see Bruno Simma and Dirk Pulkowski, “Of Planets and the

comparable in its function and identity to, for instance, the law of diplomatic relations.<sup>23</sup> Let me illustrate this with reference to three points.

### A. State immunity and foreign armed forces

First, it is unclear to what extent the general rules of state immunity apply to foreign armed forces.<sup>24</sup> Since national armed forces constitute one of the organs of their state, there is little doubt that their activities are in principle covered by the law of state immunity, just like the activities of any other state organ.<sup>25</sup> However, there are various indications that suggest that the general rules of state immunity defer to any special rules applicable to armed forces. Article 31 of the European Convention on State Immunity of 1972 (ECSI) declares that “[n]othing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.”<sup>26</sup> As the Explanatory Report to the ECSI points out, the purpose of Article 31 is to recognize that the Convention is not intended to govern situations which may arise in the event of an armed conflict or to resolve problems which may arise between allied states as a result of the stationing of forces, as these problems are generally dealt with by special agreements,<sup>27</sup> which operate as *lex specialis*.

The UN State Immunity Convention does not contain a provision similar to Article 31 of the ECSI nor does it include the immunities of armed forces on the list of privileges and immunities that remain unaffected by the Convention.<sup>28</sup> However, there is other evidence to suggest that the legal status of foreign armed forces is governed by more specific rules, including a statement made by the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, Professor Gerhard Hafner,

Universe: Self-contained Regimes in International Law” (2006) 17 *European Journal of International Law* 483, esp. 490–505.

<sup>23</sup> See also Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (Oxford University Press 2009) 171 (noting that “[i]nternational law recognizes no relationship of a general nature between the inhabitants of the territory in which a foreign military force is deployed, and the State or organization that has deployed the force”).

<sup>24</sup> As Dieter Fleck has suggested, “[t]he starting point of deliberations is the principle of immunity of foreign armed forces which, as vaguely as it is defined in various agreements and ongoing state practice over the last centuries, remains essential for all activities of armed forces permanently or temporarily stationed on foreign territory”; see Dieter Fleck, “Introduction” in Fleck, (ed.), *The Handbook of the Law of Visiting Forces* (n. 21) 3.

<sup>25</sup> See Gerhard Hafner and Ulrike Köhler, “The United Nations Convention on Jurisdictional Immunities of States and their Property” (2004) 35 *Netherlands Yearbook of International Law* 3, 13–17. During its work on the law of state immunity, the International Law Commission recognized in express terms that armed forces are one of the autonomous state organs to which the law of state immunity applies. See Draft Articles on the Jurisdictional Immunities of States and their Property, with Commentaries Report of the International Law Commission on the work of its forty-third session (29 April–19 July 1991), (1991) II(2) *Yearbook of the International Law Commission* 13, 15–16.

<sup>26</sup> European Convention on State Immunity, 16 May 1972, 1495 UNTS 182.

<sup>27</sup> Council of Europe, Explanatory Reports on the European Convention on State Immunity and the Additional Protocol (1985) 39; reprinted in Andrew Dickinson et al. (eds), *State Immunity: Selected Materials and Commentary* (Oxford University Press 2004) 64.

<sup>28</sup> Article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Annex to GA Res. 59/38 (2 December 2004).

in the Sixth Committee on 25 October 2004, in which he pointed out that a “general understanding had always prevailed” that military activities were not covered by the Convention.<sup>29</sup> Basing itself partly on this statement as well as the fact that no state ever appears to have questioned it,<sup>30</sup> the International Court of Justice (ICJ) held in the *Jurisdictional Immunities of the State Case* that the territorial tort exception to the principle of state immunity does not apply to acts committed on the territory of the forum state by the armed forces of a foreign state acting in the conduct of an armed conflict.<sup>31</sup>

### B. *Lex specialis* rules of immunity?

Secondly, the content of the *lex specialis* rules of international law governing the legal status of foreign forces to which the ECSI and the UNCSI defer is far from certain. One possible source for these rules may be found in the very substantial number of status of forces agreements concluded by states and international organizations since the First World War.<sup>32</sup> The main purpose of status of forces agreements is to create a legal framework for the presence of foreign forces by defining their privileges and immunities in express terms. Status of forces agreements thereby provide sending states and host states with an opportunity to balance their competing interests, in particular by resolving potential conflicts of jurisdiction over the foreign forces, and to address various practical matters. Where such agreements apply, their specific terms will prevail over the more general terms of the ECSI and the UNCSI. However, whether or not they also prevail as a matter of customary international law is a more challenging question to answer. Although a strong argument can be made that international practice in this area follows certain recurrent patterns,<sup>33</sup> establishing whether the terms of status of forces agreements have passed into customary international law is fraught with difficulties.

The existence of a large body of such agreements may be taken as a material source of international practice that, if combined with the existence of *opinio juris*, could constitute evidence of customary international law. However, status of forces agreements “come in a variety of sizes and flavors,”<sup>34</sup> with distinct classes of agreements designed to

<sup>29</sup> Summary Record of the 13th Meeting of the Sixth Committee, UN Doc. A/C.6/59/SR.13, 22 March 2005, para. 36. Both the status and the accuracy of the Professor Hafner’s statement have been called into question: Andrew Dickinson, “Status of Forces Under the UN Convention on State Immunity” (2006) 55 *International and Comparative Law Quarterly* 427, 428–31.

<sup>30</sup> In addition to relying on Professor Hafner’s statement, the Court also noted the fact that the ILC Commentary on the Draft Articles on Jurisdictional Immunities of States and Their Property declared Art. 12 of the UNCSI to be inapplicable to “situations involving armed conflicts”; see *Case concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, para 69.

<sup>31</sup> *Case concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, paras 62–79. On the Court’s treatment of the territorial tort exception, see Andrew Dickinson, “Germany v. Italy and the Territorial Tort Exception: Walking the Tightrope” (2013) 11 *Journal of International Criminal Justice* 147.

<sup>32</sup> Generally, see Derek W. Bowett, “Military Forces Abroad” in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Elsevier 1997) 388.

<sup>33</sup> See e.g. Aurel Sari, “Status of Forces and Status of Mission Agreements under the ESDP: The EU’s Evolving Practice” (2008) 19 *European Journal of International Law* 67.

<sup>34</sup> Max S. Johnson, “NATO SOFA: Enunciating Customary International Law or Just a Model, and What Does the Future Portend?” in Horst Fischer et al. (eds), *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (2004) 287, 291.

apply to distinct sets of circumstances. This not only suggests that international practice relating to status of forces agreement is confined to the specific circumstances for which each type of agreement was designed and cannot be presumed to contribute to the development of customary international law beyond those circumstances,<sup>35</sup> but it also raises the question whether or not status of forces agreements are by their very nature nothing more than compromises of a contractual character, so that no general inferences may legitimately be drawn from their specific terms.<sup>36</sup>

In addition, it is at least conceivable that status of forces agreements may have given rise to new rules of customary international law on their own impact, that is because they were intended by their parties to do so.<sup>37</sup> To have this effect, their provisions would have to “be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.”<sup>38</sup> This requirement is often understood to mean that only multilateral treaties are capable of creating new rules of customary international law of their own impact.<sup>39</sup> If this is correct,<sup>40</sup> it means that the potential influence of status of forces agreements on the development of customary international law is limited to the handful of multilateral instruments currently in existence.<sup>41</sup>

<sup>35</sup> For example, this means that the provisions of the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951, 199 UNTS 68 (NATO SOFA) at most could only have become rules of customary international law in the context of the mutual stationing of allied forces on the basis of political and legal reciprocity, but not in the context of peace support operations, ceremonial visits, and other deployments normally governed by different arrangements.

<sup>36</sup> In the *Case Concerning the Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)*, (Second Phase) (1970) ICJ Rep. 3, para. 62, the ICJ refused to consider as relevant for the purposes of lifting the corporate veil “the various arrangements made in respect of compensation for the nationalization of foreign property” on the basis that “[t]heir rationale [...] derived as it is from structural changes in a State’s economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are sui generis and provide no guide in the present case.”

<sup>37</sup> On the distinction between treaties serving as a material source of state practice and creating customary international law of their own impact, see Maurice H. Mendelson, “The Formation of Customary International Law” (1998) 272 *Recueil des Cours* 155, 322–32. See also Anthony D’Amato, “Manifest Intent and the Generation by Treaty of Customary Rules of International Law” (1970) 64 *American Journal of International Law* 892 and N. G. Onuf, “Further Thoughts on a New Source of International Law: Professor D’Amato’s ‘Manifest Intent’” (1971) 65 *American Journal of International Law* 774.

<sup>38</sup> *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)*, (1969) ICJ Rep. 3, para. 72.

<sup>39</sup> For example, Bing Bing Jia, “The Relations between Treaties and Custom” (2010) 9 *Chinese Journal of International Law* 81, 92–3. See also “Resolution on Problems Arising from a Succession of Codification Conventions on a Particular Subject” (1995) 66 II *Annuaire de l’Institut de Droit International* 435.

<sup>40</sup> A number of authors admit that a succession of similar or near identical bilateral agreements may also generate new rules of customary international law: see Mendelson, “The Formation of Customary International Law” (n. 37) 329–32; Yoram Dinstein, “The Interaction between Customary International Law and Treaties” (2006) 322 *Recueil des Cours* 243, 375–6.

<sup>41</sup> In addition to the NATO SOFA of 1951 (n. 35), other examples of multilateral status of forces agreements include the Partnership for Peace Status of Forces Agreement, 19 June 1995, TIAS 12666 and the Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Art. 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), 17 November 2003, OJ [2003] C 321/6. On the latter agreement, which is not in force, see Aurel Sari, “The EU Status of Forces Agreement: Continuity and Change in the Law of Visiting Forces” (2007) 46 *Military Law and Law of War Review* 9.

### C. The effect of armed conflict

Thirdly, it is unclear to what extent the rules and principles governing the legal status of foreign armed forces in times of peace, in particular the law of state immunity and any *lex specialis* rules derived from status of forces agreements, apply when foreign forces are involved in active hostilities. The reasoning of the ICJ in the *Jurisdictional Immunities of the State Case* provides some useful food for thought in this respect. In its judgment, the Court emphasized on several occasions that it was confining itself to the law of state immunity applicable to the acts of armed forces committed in the context of an armed conflict.<sup>42</sup> Nonetheless, it is striking that the majority of the evidence of state practice adduced by the Court did not relate to armed conflicts nor did the Court at any point recognize the need to consider whether the law of state immunity was subject to any modifications or special rules in times of armed conflict, including in its application between former belligerents, such as between Germany and Italy.<sup>43</sup>

For the purposes of the present analysis, it suffices to note that there is some evidence to suggest that the applicability of the law of state immunity may be subject to certain modifications as a result of an armed conflict. For instance, while there is some disagreement as to what the legal effects of legislative and administrative measures adopted by occupying powers are following the termination of the occupation regime, it seems that the domestic courts of some former occupied territories have shown little hesitation in subjecting measures adopted by the occupant during the course of the occupation—including measures which undoubtedly constituted *acta jure imperii* and as such in principle should have been immune from judicial review<sup>44</sup>—to their scrutiny.<sup>45</sup> This suggests that it is unsafe to assume that the law of state immunity applies in the same manner in peace and armed conflict alike.

<sup>42</sup> *Jurisdictional Immunities of the State* (n. 31), for example paras 65, 73, and 77–8. The Court thus extracted a rather narrow question of law from the central aspect of the dispute between Germany and Italy. This may be contrasted with the much broader scope of analysis adopted by the Italian Court of Cassation in *Ferrini v. Germany* (Italy, Court of Cassation, All Civil Sections) Judgment No. 5044/04, 6 November 2003, 128 *International Law Reports* 658, the case which gave rise to the proceedings before the ICJ, which examined whether a state is exempt from the civil jurisdiction of another state in proceedings relating to crimes committed under international law generally.

<sup>43</sup> While the Court declared proceedings concerning acts allegedly committed by foreign armed forces in the course of an armed conflict to be the “most pertinent” for the purposes of the case before it, see *Jurisdictional Immunities of the State* (n. 31) para. 73, this merely begs the question of why it considered state practice relating to acts carried out by foreign armed forces in times of peace relevant *at all* in the present case and, if so, why it did not regard it as equally relevant.

<sup>44</sup> This assumes that the occupying power is exercising its own jurisdiction or that the authorities of the occupied territory act under its control and instructions, so that the measures in question are attributable to the occupying power. See Eighth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 24 January, 5 February, and 15 June 1979, UN Doc. A/CN.4/318 and ADD. 1–4, (1979) II(1) *Yearbook of the International Law Commission* 3, 19–21.

<sup>45</sup> See Felice Morgenstern, “Validity of the Acts of the Belligerent Occupant” (1951) 28 *British Yearbook of International Law* 291; Romulus A. Picciotti, “Legal Problems of Occupied Nations After the Termination of the Occupation” (1966) 33 *Military Law Review* 25; Arnold McNair and Arthur Desmond Watts, *The Legal Effects of War* (4th edn, Cambridge University Press 1966) 408–18; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Martinus Nijhoff 2009) 147–57, with extensive references to the relevant case-law.

### III. General Principles

The foregoing points underline that the rules and principles of international law governing the legal status of foreign armed forces do not add up to a distinct set of interrelated norms: they derive from multiple sources and do not constitute an autonomous or self-contained legal regime of their own.<sup>46</sup> The absence of such a single set of rules applicable either in times of peace or in times of armed conflict is significant in the present context in so far as it means that the legal position of troops deployed in post-conflict environments cannot be determined by applying an existing regime either directly or by way of analogy. Rather, it is necessary to identify, as a preliminary step, the key legal principles and considerations governing the status of foreign forces in general before examining whether and to what extent these need to be adapted to the special circumstances of post-conflict situations. Five relevant principles and considerations may be identified for this purpose.

#### A. Consent to presence and legal status

The first point to raise concerns the relationship between the rules governing the presence of foreign armed forces and the rules governing their legal status whilst deployed abroad. Although distinct, these are two closely related questions. Modern international law is based in large part on the principle of territorial sovereignty, which entitles every state to assert its exclusive authority within its territory.<sup>47</sup> The principle implies the right of each state to decide freely whether to permit foreign troops to enter into its territory or to deny them admission as well as to request troops already present to leave:<sup>48</sup> it follows that the presence of foreign armed forces always requires the express consent of the territorial sovereign,<sup>49</sup> unless their deployment can be justified with reference to another legal basis which renders the need for such consent redundant.<sup>50</sup>

<sup>46</sup> Consequently, while it may be convenient to refer to the different norms relevant to the consensual deployment of foreign armed forces as the “law of visiting forces,” the law in question lacks the internal coherence that would justify describing it as a distinct regime or branch of international law. This and similar labels are therefore better employed in a weaker sense to refer to the subject as an area of legal practice.

<sup>47</sup> As Max Huber famously put it: “[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State”; *Island of Palmas Case* (1928), 2 *Reports of International Arbitral Awards* 829 (PCA) 838.

<sup>48</sup> Examples demonstrating that consent to the presence of foreign troops may be withdrawn include the case of the United Nations Emergency Force in Egypt and France’s withdrawal from NATO’s integrated command: see, respectively, Nabil Elaraby, “United Nations Peacekeeping by Consent: A Case Study of the Withdrawal of the United Nations Emergency Force” (1968) 1 *New York University Journal of International Law & Policy* 149; Eric Stein and Dominique Carreau, “Law and Peaceful Change in a Subsystem: ‘Withdrawal’ of France from the North Atlantic Treaty Organization” (1968) 62 *American Journal of International Law* 577.

<sup>49</sup> This point was confirmed by Chief Justice Marshall in the case of *The Schooner Exchange v. McFaddon*, 11 US 116 (US Sup. Ct. 1812) 140–1, where he noted the dangers involved in the presence of foreign forces and held that “the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper conduct.”

<sup>50</sup> The consent of the territorial sovereign is not required in enforcement operations authorized by the Security Council acting under Chapter VII of the UN Charter or in cases where the deployment of armed

Where the territorial sovereign has granted its prior consent to the presence of foreign forces, their legal status will be subject to the applicable rules of general international law, including the principle of state immunity, as well as any specific agreements that the sending states or organizations and the host state may have entered into. The host state may invite foreign troops into its territory for a broad range of reasons, including to participate in an internal or international armed conflict.<sup>51</sup> It may also decide to entrust them with wide-ranging executive functions, including the use of armed force.<sup>52</sup> Should the foreign forces in question become engaged in active hostilities with third parties inside the host state as a result of such an invitation, they may also be subject to the laws of armed conflict.<sup>53</sup> However, this does not fundamentally change their legal relationship with the host state, which continues to be governed primarily by rules of general international law and any applicable agreements already mentioned.<sup>54</sup>

By contrast, military deployments taking place without the consent of the territorial state are likely to breach the principle of non-intervention and possibly the prohibition of the use of force in international law.<sup>55</sup> Except for special cases, for example where the non-consensual presence of foreign forces is the result of an emergency or error,<sup>56</sup> their

forces abroad can be justified as a necessary and proportionate act of self-defense within the meaning of Art. 51 of the UN Charter.

<sup>51</sup> However, foreign military intervention into an internal conflict at the invitation of the local government may not be permissible under all circumstances, in particular where the right to self-determination is at play. See Louise Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government" (1985) 56 *British Yearbook of International Law* 189; Georg Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Springer 1999).

<sup>52</sup> Thus, pursuant to Art. I(2)(b) of Annex 1A (Agreement on the Military Aspects of the Peace Settlement) to the Dayton Peace Agreement (n. 1), the parties to the latter agreed to authorize "IFOR to take such actions as required, including the use of necessary force, to ensure compliance with this Annex, and to ensure its own protection." As pointed out by Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford University Press 2002) 264, the parties to the Peace Agreement "in effect consented to the use of force against themselves." More generally on the exercise of foreign governmental functions under the Dayton Peace Agreement, see Simon Hennes, *Externe Hoheitsgewalt in Krisengebieten* (Nomos 2006) 128–65.

<sup>53</sup> Cf. Dieter Fleck, "Status of Forces in Self-Defense Operations" in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (n. 11) 199.

<sup>54</sup> Ademola Abass, "Consent Precluding State Responsibility: A Critical Analysis" (2004) 53 *International and Comparative Law Quarterly* 211, 242 ("[a] consensual use of force cannot be viewed as a coercive use of force, which Article 2(4) of the UN Charter must be understood to prohibit").

<sup>55</sup> Cf. Art. 3(a) and (e), GA Res. 3314 (XXIX), Definition of Aggression, 14 December 1974. See David Wippman, "Treaty-Based Intervention: Who Can Say No?" (1995) 62 *University of Chicago Law Review* 607, 621–2 ("the prohibition on the use of force contained in Article 2(4) of the UN Charter [...] should be understood as a prohibition on the coercive use of force, that is, on force used without the consent of the affected state"); Théodore Christakis and Karine Mollard-Bannelier, "Volenti non fit injuria? Les effets du consentement à l'intervention militaire" (2004) 50 *Annuaire Français de Droit International* 102, 111–20.

<sup>56</sup> An example of the first scenario is the Hainan Island Incident, see Yann-Huei Song, "The EP-3 Collision Incident, International Law and Its Implications on the U.S.-China Relations" (2001) 19 *Chinese (Taiwan) Yearbook of International Affairs* 1; Margaret K. Lewis, "An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident" (2002) 77 *New York University Law Review* 1404; Eric Donnelly, "The United States-China EP-3 Incident: Legality and Realpolitik" (2004) 9 *Journal of Conflict & Security Law* 25. An example of the second is the accidental crossing of 170 Swiss troops into Liechtenstein in 2007, see Peter Stamm, "Switzerland invades Liechtenstein" *The New York Times* (New York, 13 March 2007) <[http://www.nytimes.com/2007/03/13/opinion/13iht-edstamm.4893796.html?\\_r=0](http://www.nytimes.com/2007/03/13/opinion/13iht-edstamm.4893796.html?_r=0)> (accessed 25 July 2013). Apparently, the incident is not without precedent: see "Swiss Militiamen (Whoops!) Invade Little Liechtenstein" *The New York Times* (New York, 1 September 1976), and "Swiss Inform Liechtenstein of Error in Troop Maneuvers" *The New York Times* (New York, 18 October 1992).



relationship with the territorial state is likely to be governed by the law of armed conflict, including the law of belligerent occupation.<sup>57</sup> Consequently, as far as the legal relationship of foreign forces with the territorial sovereign is concerned, the key criterion is not whether those forces are engaged in active hostilities in its territory, but whether their presence and activities are consensual or not.<sup>58</sup>

## B. Territorial sovereignty and respect for local law

The principle of territorial sovereignty confers on every state the right to perform the functions of government within its territory, in particular by establishing and enforcing its own legal and political order.<sup>59</sup> The territorial principle thus enables the state to exercise their jurisdiction over all persons and objects located in its territory and over any activities and events taking place therein.<sup>60</sup> When foreign armed forces are present within its borders, their members and activities are therefore subject, in principle, to the law of the host state in both criminal and civil matters.

This principle of territorial jurisdiction is reflected in most modern status of forces agreements, which usually contain provisions requiring foreign troops to respect the law of the host state.<sup>61</sup> Some commentators have argued the duty to respect local law does not actually compel foreign forces and their members to abide by the laws and regulations of the host state, but merely requires them to take these into account in the course of their activities:<sup>62</sup> a duty to respect is not equivalent to a duty to obey. Others have argued that such a restrictive interpretation of the duty to respect local law is incompatible with its underlying purpose.<sup>63</sup> Bearing in mind that the purpose of the duty to respect local law is to give effect to the territorial sovereignty of the host state, the latter does indeed seem to be the better view. Nevertheless, it is important to recognize that the duty to respect local law is concerned solely with the need to respect the law of the host state, but not with the applicability of that law to foreign forces nor with the scope of the host state's competence to exercise its prescriptive jurisdiction over

<sup>57</sup> It is worth recalling in this context that in accordance with their common Art. 2, the Geneva Conventions of 1949 are applicable "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

<sup>58</sup> For examples of situations where consent to the presence of foreign forces alone may not be sufficient, but consent to their activities may also be required, see Arai-Takahashi, *The Law of Occupation* (n. 45) 597–9.

<sup>59</sup> See n. 47.

<sup>60</sup> See e.g. *Laker Airways v. Sabena and KLM*, 731 F.2d 909 (DC Cir. 1984) 921 (noting that territoriality "is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power").

<sup>61</sup> For example, Art. II of the NATO SOFA (n. 35); para. 6 of the Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General (UN Model SOFA), UN Doc. A/45/594, 9 October 1990; Art. 3 of the EU SOFA (n. 41); Art. 2(1) of the Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, Council Doc. 11894/07, 20 July 2007; Art. 2(1) of the Draft Model Agreement on the status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), Council Doc. 17141/08, 15 December 2008.

<sup>62</sup> For example, Mark D. Welton, "The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics" (1988) 122 *Military Law Review* 77, 95–6.

<sup>63</sup> For example, Hermann Kortland, *Die Rechte und Pflichten der in der Bundesrepublik Deutschland stationierten ausländischen Streitkräften auf den von ihnen benutzten Liegenschaften, insbesondere bei der Durchführung militärischer Baumaßnahmen* (Dissertation 1987) 48–55.

them. Accordingly, the duty merely affirms that foreign forces are bound to observe any *applicable* laws and regulations of the host state, but it neither implies that all norms in force in the host state are actually applicable to foreign forces nor does it say anything about which of those local norms are so applicable.

The duty to respect the law of the territorial sovereign is also recognized by the law of armed conflict. Most importantly, Article 43 of the Hague Regulations of 1907 provides that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>64</sup>

By underlining that an occupying power must respect the laws and regulations in force in the occupied territory, Article 43 of the Hague Regulations limits the legislative powers of the occupant and reaffirms the underlying sovereignty of the occupied state.<sup>65</sup> This respect for local law and legislative competence is further reinforced by Article 64 of Geneva Convention IV,<sup>66</sup> which provides that the:

[P]enal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.<sup>67</sup>

### C. Exemptions from local jurisdiction

While the principle of territorial sovereignty demands that foreign forces must respect local law, this does not necessarily mean that the host state is entitled to enforce its laws by subjecting foreign troops to its legal processes. In fact, foreign armed forces and their individual members benefit from various exemptions from local adjudicative and enforcement jurisdiction.

First, as already mentioned, armed forces are state organs and as such are covered by the principle of state immunity.<sup>68</sup> This means that acts performed by foreign armed forces in the territory of the host state are exempt from the jurisdiction of the local courts, subject to any exceptions recognized by the law of state immunity.<sup>69</sup> Secondly,

<sup>64</sup> Regulations concerning the Laws and Customs of War on Land, Annex to Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, reprinted in Adam Roberts and Richard Guelff, *Documents on the Laws of War* (3rd edn, Oxford University Press 2000) 73.

<sup>65</sup> The provision thus attempts to draw a balance between the interests of the occupying power and the occupied state; see Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 89–95.

<sup>66</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

<sup>67</sup> However, it should be noted that the second paragraph of Art. 64 goes on to invest the occupying power with broader legislative authority than Art. 43 of the Hague Regulations does. See Benvenisti, *The International Law of Occupation* (n. 65) 95–102.

<sup>68</sup> See n. 25 and the accompanying text.

<sup>69</sup> Although the activities of the armed forces are widely understood to fall within “the core area of State sovereignty,” see *McElhinney v. Ireland*, App. No. ECtHR, 34 EHRR 322, para. 38, this does not of course mean that all their activities are of a sovereign character and enjoy immunity: see e.g. *Trendtex Trading Corp*

pursuant to the principle of functional immunity, all members of foreign armed forces are exempt from the adjudicative and enforcement jurisdiction of the local authorities in civil and criminal matters in relation to acts performed in the course of their official duties,<sup>70</sup> regardless of their operational environment or the purpose of their presence abroad. This duty-related immunity in civil and criminal matters represents the minimum standard of legal protection enjoyed by members of foreign armed forces under customary international law. Thirdly, foreign armed forces also enjoy those privileges and immunities that are reasonably necessary for their continued functioning as an effective military unit in the territory of the host state. For example, sending states are entitled to maintain discipline among members of their military contingents abroad and to take measures that are necessary for their internal administration.<sup>71</sup>

As regards exemptions in times of armed conflict, during the active phase of hostilities invading forces are not, as a matter of fact, subject to the legal authority of the enemy and for this reason it is generally assumed that they are exempt from local jurisdiction.<sup>72</sup> However, there is surprisingly little discussion of this question in the literature. In particular, it is not clear whether the complete exemption of hostile forces from local jurisdiction simply reflects a *de facto* state of affairs or whether it gives effect to legal principles. In the former case, local jurisdiction is merely suspended and there is no reason why the local authorities should not take cognizance of events that took place during this period as soon as the territorial sovereign has acquired control over enemy personnel<sup>73</sup> or managed to re-establish its authority over its territory.<sup>74</sup> In the latter case, it is unclear whether this alleged principle also prevents third parties from claiming the right to exercise their jurisdiction over the forces concerned.

The legal position of occupation forces is not free from ambiguity either. While it is well established that occupying powers may set up and operate their own military courts in the occupied territory, they are also under an obligation to respect, unless absolutely prevented, the laws in force in the occupied territory, including the continued

*v. Central Bank of Nigeria* [1977] QB 529 (CA) 558. However, as Hoffmann L.J. suggested in *Littrell v. USA* (No. 2) [1995] 1 WLR 82 (CA) 95, there is no single test or “bright line” by which sovereign military activities may be distinguished from non-sovereign transactions performed by the armed forces.

<sup>70</sup> *Mario Luiz Lozano*, Judgment No. 31171/2008, 24 July 2008 (Italy, Court of Cassation, First Criminal Division), 91 RDI 1223; ILDC 1085 (IT 2008) 1230–2. On the notion of functional immunity generally, see Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008) 103–57.

<sup>71</sup> For example, German Federal Labor Court, Judgment of 25 May 2012, 2 AZR 163/11, para. 27 (noting that the internal organization of a foreign force falls within the sovereign jurisdiction of the sending state and therefore decisions in this area are not, in principle, subject to review by the local courts).

<sup>72</sup> Cf. Eric Stein, “Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre” (1947–48) 46 *Michigan Law Review* 341, 361.

<sup>73</sup> Article 85 of the Geneva Convention III declares that a detaining power is entitled to prosecute prisoners of war for acts committed prior to capture under its own laws. The existence of this provision implies that at least some of the enemy belligerent’s penal laws are binding on enemy combatants and that the latter do not enjoy immunity from prosecution under those laws. However, Art. 85 does not clarify to what extent prisoners of war are subject to the prescriptive, and hence the adjudicative and enforcement, jurisdiction of their enemy in any greater detail, leaving the scope of this provision uncertain and prompting speculation about the intentions of its drafters. See Jean de Preux, *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* (Vol. III) (International Committee of the Red Cross, 1960) 416–22.

<sup>74</sup> This would be one way of reading the judicial review by the local courts of acts adopted by an occupying following the end of occupation: see n. 45.

operation of the local judicial system.<sup>75</sup> Belligerent occupation therefore does not displace the territorial jurisdiction of the occupied state and the local courts retain their competence to exercise jurisdiction over occupation forces. However, in practice occupation forces are subject only to the jurisdiction of their own military authorities.<sup>76</sup> It is unclear whether this exemption from local jurisdiction is the consequence of a specific immunity conferred upon all occupation forces by the law of belligerent occupation or whether it flows from the occupying power's right to fully withdraw its forces from the jurisdiction of the local courts for security reasons.

#### **D. Operational necessity**

States and international organizations deploy military forces under their control under highly diverse operational conditions. This great range of operational environments is one of the main reasons why the legal status of foreign armed forces is not regulated in a uniform manner under international law. Military advisors passing through the territory of a political ally, for example, do not face the same security risks as troops participating in peace support operations or active hostilities. It stands to reason that the extent to which foreign forces should be subject to local legal and administrative measures should therefore vary according to their operational circumstances. This is why in the event of hostilities the NATO SOFA, which was devised to apply to allied forces stationed in non-hostile conditions, provides for the immediate review of some of its provisions and also entitles its Contracting Parties, subject to certain conditions, to suspend the application of any of the provisions of the Agreement.<sup>77</sup>

Looking at international practice as a whole therefore suggests that the extent to which foreign forces are subject to local jurisdiction is governed by the principle of military or operational necessity. In other words, the balance between the right of the sending state and the right of the host state to exercise their respective powers of jurisdiction over the foreign forces moves on a sliding scale depending on the level of operational risk they face. As a minimum, the principle of functional immunity exempts members of foreign forces from the adjudicative and enforcement jurisdiction of the host state in civil and criminal matters in relation to acts carried out in the performance of their official duties. However, this minimum level of legal protection for official duty acts is normally augmented with additional privileges and immunities should the operational objectives or environment in which the foreign troops are deployed entail greater security risks. Status of forces agreements adopted for the purposes of peace support operations thus typically provide for the complete

<sup>75</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press 2004) 283–4.

<sup>76</sup> For example, *Bennett v. Davis*, 267 F.2d 15 (10th Cir. 1959) 17–18 (holding that “crimes committed in occupied foreign countries by members of United States Armed Forces are subject to military law and within the exclusive jurisdiction of constituted [United States] military tribunals”). See also Preamble, CPA Order 17 <[http://www.usace.army.mil/Portals/2/docs/COALITION\\_PROVISIONAL.pdf](http://www.usace.army.mil/Portals/2/docs/COALITION_PROVISIONAL.pdf)> (accessed 21 March 2013) (“[r]ecalling that under international law occupying powers, including their forces, personnel, property and equipment, funds and a sets, are not subject to the laws or jurisdiction of the occupied territory”).

<sup>77</sup> Article XV of the NATO SOFA (n. 35).

exemption from local criminal jurisdiction of members of national military contingents.<sup>78</sup> The higher end of the scale is represented by the very extensive privileges and immunities conferred on foreign military authorities under the law of armed conflict, including the law of belligerent occupation.

### E. *Jus dispositivum*

The rules of international law governing the legal status of foreign armed forces derive from multiple sources, both customary and conventional in character. The relationship between these different sources is complex and multifaceted. Status of forces agreements both reflect general rules of international law and arguably have also contributed to the emergence of new rules of customary international law. However, while states and international organizations which repeatedly deploy armed forces abroad in similar operational environments and for similar purposes usually request the same jurisdictional immunities and privileges from host states, nothing prevents the contracting parties from entering into different arrangements, even at the expense of deviating from standard practice and any applicable rules of customary international law.<sup>79</sup>

Certain jurisdictional arrangements may be more acceptable politically to some states than others. Since its adoption in 1951, the NATO SOFA has stood as an example of complete reciprocity in relations between sending states and host states, making it more difficult in some cases to justify the adoption of fundamentally different arrangements.<sup>80</sup> Conversely, influential states and international organizations are sometimes capable of securing conditions of stay for troops under their control which are more favorable than those they would be prepared to grant to foreign forces present within their own territory or which depart from international practice applicable under comparable circumstances.<sup>81</sup> Accordingly, the widespread use of status of forces agreements has injected a considerable measure of dynamism into this area: the rules governing the status of foreign military deployments are not necessarily static, but may be modified by the contracting parties in the light of diverse political and changing operational circumstances.

## IV. The Principles of *Jus Post Bellum*

Understood as a legal concept, *jus post bellum* is based on the notion that post-conflict situations give rise to special legal considerations which are distinct from those applicable either in times of peace or in times of armed conflict and that, consequently, special

<sup>78</sup> Compare the jurisdictional arrangements in Art. VII of the NATO SOFA (n. 35) with those found in paras 46–9, UN Model SOFA (n. 61).

<sup>79</sup> With the exception, of course, of rules of *jus cogens*. However, this constraint is of limited relevance in the present context.

<sup>80</sup> The United States was thus forced to renegotiate on successive occasions the one-sided military base agreement it had concluded with the Philippines in 1947 in order to bring it into line with the NATO SOFA. See William E. Berry, *US Bases in the Philippines: The Evolution of the Special Relationship* (Westview Press 1989) 47–68; Rafael A. Porrata-Doria, “The Philippine Bases and Status of Forces Agreement: Lessons for the Future” (1992) 137 *Military Law Review* 67, 70–81.

<sup>81</sup> For example, Sari, “Status of Forces and Status of Mission Agreements under the ESDP” (n. 33) 75–83.

rules and principles of international law may be required to address these considerations. However, this broad idea still admits at least three different paradigms of *jus post bellum*.

At one end, *jus post bellum* may be conceived as a self-contained regime of international law in a strong sense, that is as an interrelated set of primary and secondary rules that form a clearly distinguishable system or branch of international law.<sup>82</sup> However, there is little support for such an approach in the literature.<sup>83</sup> This should not come as a surprise, considering the uncertain content and ambiguous status of the concept. At the other end, *jus post bellum* may be understood as nothing more than a convenient moniker for an area of legal practice that draws together a range of relevant norms from other areas and branches of international law. This conception of *jus post bellum* has been criticized as lacking in ambition, in particular as it has little analytical value and does not reflect the historic traditions of the concept.<sup>84</sup> Moreover, as Carsten Stahn has argued, it “fails to address one of the principal dilemmas of contemporary international law, namely to define the interplay between different legal orders and bodies of law in situations of transition.”<sup>85</sup>

A third possible understanding falls between these two extremes and conceives *jus post bellum* as an independent normative framework which comprises certain substantive principles and concerns of its own without amounting to a full-blown sub-system or branch of international law. It has been suggested that the advantage of this approach is that it puts the “post-conflict phase and the important period of post-conflict reconstruction at the center of attention of the international community.”<sup>86</sup> From a methodological point of view, the main appeal of understanding *jus post bellum* as a distinct normative framework is that doing so emphasizes certain substantive values and objectives which can serve as interpretative reference points for identifying the rules and principles of international law most relevant to post-conflict situations and for balancing these norms and prioritizing between them should they come into conflict. This, arguably, is the added value of recognizing and promoting *jus post bellum* as a distinct legal framework.<sup>87</sup>

The central question of course is this: what is the content and source of these substantive values?<sup>88</sup> Various candidates have been proposed in the literature. They include the objectives of establishing a lasting peace (including political restructuring),

<sup>82</sup> On the concept of a self-contained regime, see n. 22. See also Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/Law.682, 13 April 2006, paras 128–9.

<sup>83</sup> For example, Inger Österdahl and Esther van Zadel, “What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles” (2009) 14 *Journal of Conflict & Security Law* 175, 179.

<sup>84</sup> Stahn, “*Jus Post Bellum*” (n. 12) 332–33; Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 83) 178.

<sup>85</sup> Stahn, “*Jus Post Bellum*” (n. 12) 332.

<sup>86</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 83) 185.

<sup>87</sup> Based on this understanding, the main purpose of *jus post bellum* is not to reinvent the wheel by replicating or replacing existing rules. It would indeed be of limited value if it were merely posing as an alternative legal framework, as has been suggested by De Brabandere, “The Responsibility for Post-Conflict Reforms” (n. 19). However, that is not the case if *jus post bellum* is understood as an interpretative framework, as advocated here.

<sup>88</sup> See Stahn, “*Jus Post Bellum*” (n. 12) 336–42.

holding morally culpable individuals to account, extracting reparations;<sup>89</sup> the fairness and inclusiveness of peace settlements, the demise of the concept of punishment for aggression, the humanization of reparations and sanctions, the move from collective responsibility to individual responsibility, a combined justice and reconciliation model and people-centered governance;<sup>90</sup> accountability, stewardship, good economic governance, and proportionality;<sup>91</sup> the “restoration of order, restoration of sovereignty, economic reconstruction, seeking a durable peace, extracting post-conflict reparations, and punishment of rights violators”;<sup>92</sup> and the principles of rebuilding, retribution, restitution or reparation, reconciliation and proportionality.<sup>93</sup>

Despite the absence of an overarching consensus, it is clear that there are several common themes and a good many overlaps among these values and objectives. However, it is also fair to say that many, if not the majority, of the values and objectives proposed in the literature are not strictly confined to post-conflict environments. Principles such as accountability, proportionality, criminal responsibility, and good governance are of general applicability. By contrast, the emphasis on reconciliation, rebuilding, restitution, and stewardship does appear to be distinct. The common thread among this second set of values and objectives is that they envisage a process of transition from a state of conflict marked by social discord and a breakdown of the rule of law to a state of peace based on a stable political settlement and good governance. *Jus post bellum* is by definition “a law of transition.”<sup>94</sup> Seen from this perspective, *jus post bellum* should not be understood simply as a set of rules, but as a normative process which envisages the progressive evolution of the legal framework applicable to post-conflict situations over a period of time. To be effective, *jus post bellum* must therefore provide the parties with appropriate legal means to effect this transition, while they in turn must adjust their legal expectations in line with the progressive transformation of their legal environment. Superimposing these requirements of *jus post bellum* onto the general principles and considerations governing the legal status of foreign armed forces identified earlier suggests that the two questions of critical importance arise in post-conflict scenarios: the impact that changes in the legal basis of the presence of foreign forces during the transition from conflict to peace have on their legal status and the need for the applicable status arrangements to draw an appropriate balance between the principle of territorial sovereignty and the exemptions to which foreign forces are entitled in a manner which reflects the particular features of post-conflict environments.

<sup>89</sup> Richard P. DiMeglio, “The Evolution of the Just War Tradition: Defining *Jus Post Bellum*” (2005) 186 *Military Law Review* 116, 146–62.

<sup>90</sup> Stahn, “‘*Jus ad Bellum*,’ ‘*Jus in Bello*’ ... ‘*Jus Post Bellum*?’” (n. 7) 938–41.

<sup>91</sup> Kristen E. Boon, “Obligations of the New Occupier: The Contours of *Jus Post Bellum*” (2009) 31 *Loyola LA International and Comparative Law Review* 57, 75–82. For an earlier list, see Kristen Boon, “Legislative Reform in Post-Conflict Zones: *Jus Post Bellum* and the Contemporary Occupant’s Law-Making Powers” (2005) 50 *McGill Law Journal* 285, 293–5 (trusteeship, accountability, and proportionality).

<sup>92</sup> Österdahl and van Zadel, “What Will *Jus Post Bellum* Mean?” (n. 83) 180–1.

<sup>93</sup> May, *After War Ends* (n. 5) 19–23.

<sup>94</sup> Boon, “Obligations of the New Occupier” (2009) (n. 91) 68.

## V. Presence and Status under *Jus Post Bellum*

Describing a set of circumstances as a “post-conflict situation” to which *jus post bellum* applies seems to imply that active hostilities have ceased and that the main body of the law of armed conflict no longer applies within the territory of the host state. Also, we may presume that a “post-conflict situation” is different from one of belligerent occupation and therefore that the applicability of *jus post bellum* excludes, in principle, the direct applicability of the law of belligerent occupation. Accordingly, the legal status of foreign forces deployed in a post-conflict environment to which *jus post bellum* applies is, for the most part, not governed by the main body of the law of armed conflict. However, this does not necessarily render the legal position of such forces more straightforward. On the contrary, there are a number of challenges entailed by the transition from conflict to peace which seem specific to post-conflict situations.

### A. Certain difficulties

Given that *jus post bellum* is located in the legal space falling between the state of armed conflict and the state of peace, the end of the applicability of the law of armed conflict might serve as the threshold event which triggers the applicability of *jus post bellum* principles. However, contemporary armed conflicts typically do not end with the overwhelming defeat of one of the parties. Instead, they frequently “result in unstable cease-fires, continue at lower intensity, or are frozen by an armed intervention by outside forces or by the international community.”<sup>95</sup> Consequently, it may be unclear at what exact point in time armed hostilities or a regime of belligerent occupation have come to an end and therefore when the applicability of the main body of the law of armed conflict to foreign forces terminates, thus triggering the applicability of *jus post bellum*. A recent case in point is that of Iraq. On 28 June 2004, the Coalition Provisional Authority (CPA) formally handed over authority to the Interim Government of Iraq, yet it seems doubtful whether the belligerent occupation of the country did in fact come to an end with immediate effect on that date.<sup>96</sup> The question has major implications for the legal regime governing the activities of any foreign forces deployed in Iraq at that point in time.<sup>97</sup>

<sup>95</sup> Marco Sassóli et al., *How Does Law Protect in War: Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, International Committee of the Red Cross 2011) 34.

<sup>96</sup> See Adam Roberts, “The End of Occupation: Iraq 2004” (2005) 54 *International and Comparative Law Quarterly* 27; Andrea Carcano, “End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government” (2006) 11 *Journal of Conflict & Security Law* 41; Robert Kolb, “Occupation in Iraq since 2003 and the Powers of the UN Security Council” (2008) 90 *International Review of the Red Cross* 29, 43–7; Benvenisti, *The International Law of Occupation* (n. 65) 254–6.

<sup>97</sup> As pointed out by several authors, including Knut Dörmann and Laurent Colassis, “International Humanitarian Law in the Iraq Conflict” (2004) 47 *German Yearbook of International Law* 293, 309; Daniel Thürer and Malcolm MacLaren, “‘*Jus Post Bellum*’ in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?” in Klaus Dicke et al. (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück* (Nomos, 2005) 753, 770.



In this respect, it is important to underline that the termination of active hostilities does not automatically transform the non-consensual presence of foreign forces into a consensual one. Unless the presence of foreign troops can be justified on the basis of one of the recognized exceptions to the prohibition of the use of force in international relations,<sup>98</sup> their continued deployment in the territory of the host state is likely to be in breach of that prohibition.<sup>99</sup> To avoid this outcome, sending states must therefore ensure that they obtain the host state's consent to their continued military presence.<sup>100</sup> Such consent cannot be presumed or implied, but must be expressed by the territorial sovereign in explicit terms.<sup>101</sup> This gives rise to several difficulties.<sup>102</sup>

The legitimacy of an invitation may be called into question, for instance where it was issued by interim authorities not enjoying the support of the majority of the local population or by governments installed and sustained by former occupying powers, a concern raised in relation to Iraq.<sup>103</sup> Questions may arise as to who is entitled to formally express the territorial sovereign's consent in cases where the status of the territory itself is contested or changes. The case of Kosovo illustrates the problem. To the extent that the presence in Kosovo of the NATO-led Kosovo Force (KFOR) authorized under Security Council Resolution 1244 of 10 June 1999 was based on the consent of the Governments of the Federal Republic of Yugoslavia (FRY) and the Republic of Serbia, as expressed by their adoption of the Peace Plan of 3 June 1999<sup>104</sup> and the Military Technical Agreement (MTA) of 9 June 1999,<sup>105</sup> it follows that the continued presence of KFOR following Kosovo's declaration of independence on 17 February 2008 required the consent of the newly independent Kosovar authorities. However, it appears that their formal consent has not been sought by NATO.<sup>106</sup>

<sup>98</sup> See n. 50.

<sup>99</sup> Such a situation may be described as "forcible peacetime occupation," see Adam Roberts, "What Is a Military Occupation?" (1984) 55 *British Yearbook of International Law* 249, 274–6.

<sup>100</sup> If they do not, the law of armed conflict is likely to continue to govern the legal status of their troops: see n. 57.

<sup>101</sup> *The Schooner Exchange* (n. 49).

<sup>102</sup> For a more detailed assessment of these difficulties, see David Wippman, "Military Intervention, Regional Organizations, and Host-State Consent" (1996–97) 7 *Duke Journal of Comparative & International Law* 209. In more general terms, see Abass, "Consent Precluding State Responsibility" (n. 54) 213–17.

<sup>103</sup> Dörmann and Colassis, "International Humanitarian Law in the Iraq Conflict" (n. 97) 311–12; Kolb, "Occupation in Iraq since 2003" (n. 96) 45; Benvenisti, *The International Law of Occupation* (n. 65) 254–55.

<sup>104</sup> Agreement on the Principles (Peace Plan) to Move toward a Resolution of the Kosovo Crisis Presented to the Leadership of the FRY by the President of Finland, Mr. Ahtisaari, Representing the European Union, and Mr. Chernomyrdin, Special Representative of the President of the Russian Federation, 3 June 1999 and FRY, Statement from the Federal Government's Meeting, Belgrade, 3 June 1999, both reprinted in Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974–1999* (Cambridge University Press 2001) 360–1.

<sup>105</sup> "Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999" (1999) 38 *International Legal Materials* 1217.

<sup>106</sup> At their Bucharest Summit held on 3 April 2008, NATO Heads of State and Government reiterated that "KFOR will remain in Kosovo on the basis of United Nations Security Council Resolution (UNSCR) 1244 to ensure a safe and secure environment, including freedom of movement, for all people in Kosovo unless the Security Council decides otherwise" <[http://www.nato.int/cps/en/natolive/official\\_texts\\_8443.htm](http://www.nato.int/cps/en/natolive/official_texts_8443.htm)> (accessed 2 April 2013). This suggests that the member states of NATO consider SC Res. 1244 to be the overriding legal basis of KFOR's presence in Kosovo. This may be contrasted with bilateral deployments: on 18 February 2012, the Government of Kosovo and the United States signed a status of forces agreement to regulate the legal position of US forces operating alongside the international security presence, <[http://pristina.usembassy.gov/ds\\_bill\\_burns\\_visit\\_to\\_kosovo.html](http://pristina.usembassy.gov/ds_bill_burns_visit_to_kosovo.html)> (accessed 28 March 2013).

Difficulties may also arise regarding the scope of local consent, in particular as to what kind of foreign military operations and activities the local authorities have in fact agreed to. In the case of Iraq, the fact that the Interim Government was heavily dependent on the support of coalition forces, which moreover continued to carry out their activities with a very substantial degree of autonomy following the handover of authority, has led some commentators to suggest that the Iraqi invitation to the continued presence of foreign forces after June 2004 could at best be characterized as “circumscribed consent.”<sup>107</sup>

Matters may be further complicated by the fact that foreign forces deployed in a post-conflict environment are covered by an international mandate issued by the Security Council under Chapter VII of the UN Charter.<sup>108</sup> In so far as such a mandate aims to provide a legal basis for and legitimize the presence of foreign forces, it may affect the meaning and scope of local consent. In the case of Kosovo, the adoption of Security Council Resolution 1244 helped to quell concerns about the validity of the consent expressed by the Governments of the FRY and Serbia to KFOR's presence and activities in Kosovo under the Peace Plan of 3 June 1999 and the MTA of 9 June 1999, both of which were adopted after a prolonged bombing campaign waged by NATO forces against the FRY.<sup>109</sup> According to some commentators, the adoption of Security Council Resolution 1244 superseded the consent expressed by the Yugoslav and Serb authorities in these instruments, which therefore did not constitute an independent legal basis for the presence of KFOR in Kosovo.<sup>110</sup> This also appears to be the view taken by the member states of NATO.<sup>111</sup>

As these difficulties illustrate, the deployment of foreign troops in post-conflict environments may raise several problems that are idiosyncratic to this context. Does the concept of *jus post bellum* offer any guidance as to how these problems should be addressed? Sending states must secure an invitation by the local authorities as a precondition of the legality of their continued presence as a result of the general rules of international law: there is little benefit to be had from postulating that *jus post bellum* imposes a self-standing duty on sending states to place the presence of their forces in the territory of the host state on a consensual basis. By contrast, bearing in mind that *jus post bellum* is concerned with the transition from a state of conflict to a state of peace, and thus must be preoccupied with restoring sovereignty both in a formal and a

<sup>107</sup> Siobhán Wills, “Occupation Law and Multi-National Operations: Problems and Perspectives” (2006) 77 *British Yearbook of International Law* 256, 300.

<sup>108</sup> See Christine Gray, “Host-State Consent and United Nations Peacekeeping in Yugoslavia” (1996–97) 7 *Duke Journal of Comparative & International Law* 241, 257–63.

<sup>109</sup> John Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo” (2001) 12 *European Journal of International Law* 469, 484; Enrico Milano, “Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status” (2003) 14 *European Journal of International Law* 999, 1004–09; Knoll, *The Legal Status of Territories* (n. 9) 44–7. No such doubts were entertained by the European Court of Human Rights, which in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, App. No. ECtHR, 45 EHRR SE10, para. 69, declared that the FRY “had agreed in the MTA, as it was entitled to do as the sovereign power [...] to withdraw its own forces in favor of the deployment of international civil (UNMIK) and security (KFOR) presences.”

<sup>110</sup> Christian Tomuschat, “Yugoslavia's Damaged Sovereignty over the Province of Kosovo” in Gerard Kreijen et al. (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002) 323, 338–9.

<sup>111</sup> See n. 106.

substantive sense, a strong case can be made that it does impose a duty on sending states and organizations deploying troops abroad on the basis of an international mandate to transform the latter into a consensual arrangement. Relying on an international mandate for a prolonged period of time is not compatible with the objective of restoring the territorial state's ability to exercise its sovereignty. However, the implementation of this principle is often hampered by serious practical and legal difficulties, as the experiences in Kosovo and Iraq—to which we will now turn—demonstrate.

## B. Kosovo

The requirement for putting the presence of foreign forces on a consensual footing has important implications for the arrangements governing their legal status, which must then rest on a consensual basis too: if it is for the territorial state to agree to the presence of foreign forces, it must be for the territorial state to determine the conditions of their presence, including their legal position.<sup>112</sup> This principle is reflected in the MTA of 9 June 1999 concluded between the FRY and the Republic of Serbia and KFOR concerning the withdrawal of FRY forces from Kosovo and the deployment of KFOR in their place. Although the MTA did touch on certain questions related to the status of KFOR and its personnel,<sup>113</sup> its primary purpose was not to regulate their legal position, but to provide for the phased withdrawal of FRY security forces from Kosovo and the synchronized entry of KFOR. As far as the legal status of KFOR was concerned, the MTA therefore provided for the conclusion of a separate status agreement, declaring that “[t]he parties will agree on a Status of Forces Agreement (SOFA) as soon as possible.”<sup>114</sup> Despite this commitment, no status of forces agreement was ever concluded between the FRY and KFOR. Instead, the legal position of KFOR was regulated unilaterally by the United Nations Interim Administration Mission in Kosovo (UNMIK). On 17 August 2000, UNMIK and KFOR adopted a Joint Declaration designed “to affirm, within Kosovo, the status of UNMIK and KFOR and their personnel, and privileges and immunities to which they are entitled.”<sup>115</sup> The following day, the Special Representative of the Secretary General implemented the Joint Declaration by promulgating UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo.<sup>116</sup>

<sup>112</sup> Cf. Gray, “Host-State Consent” (n. 108) 263–5.

<sup>113</sup> Article 3, Appendix B (“International Security Force (‘KFOR’) Operations”) to the MTA (n. 105) excludes the liability of KFOR and any of its personnel or staff for any damages to public or private property that they may cause in the course of duties related to the implementation of the Agreement.

<sup>114</sup> Article 3, Appendix B (“International Security Force (‘KFOR’) Operations”) (n. 113).

<sup>115</sup> Preamble, UNMIK/KFOR Joint Declaration, CJ(00)0320, 17 August 2000, reprinted in Fleck (ed.), *The Handbook of the Law of Visiting Forces* (n. 21) 596.

<sup>116</sup> UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, UN Doc. UNMIK/REG/2000/47, 18 August 2000 <<http://www.unmikonline.org/regulations/2000/reg47-00.htm>> (accessed 2 April 2013). Section 2(1) of the Regulation provides that “KFOR, its property, funds and assets shall be immune from any legal process,” while Section 2(4) declares that “KFOR personnel [...] shall be: immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending States; and immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States. If erroneously detained, they shall be immediately turned over to KFOR authorities.”

Whether or not the unilateral regulation of KFOR's legal status was compatible with the MTA is an open question. The answer depends largely on the relationship between the MTA and the mandate given to UNMIK and KFOR under Security Council Resolution 1244. Although it is true that the MTA does not take pride of place in Resolution 1244,<sup>117</sup> its first operative paragraph nevertheless declares that a political solution to the Kosovo crisis shall be based, *inter alia*, on the principles and other required elements elaborated in the Ahtisaari-Chernomyrdin Peace Plan,<sup>118</sup> which specifically provides for the conclusion of a military-technical agreement.<sup>119</sup> The Security Council thus affirmed the MTA, but did so indirectly. The legal effect of this affirmation is open to two opposing interpretations.

First, while Resolution 1244 endowed UNMIK with the authority to adopt legislative measures in the implementation of its mandate,<sup>120</sup> it restricted the exercise of this authority to the terms of the MTA. Consequently, UNMIK did not enjoy the authority to define KFOR's status in a unilateral fashion. Moreover, KFOR was in breach of its obligation under the MTA to negotiate a status agreement with the FRY when it participated in the adoption of the Joint Declaration of 17 August 2000. This was the view put forward by the Russian Federation during debates in the Security Council.<sup>121</sup> Secondly, Resolution 1244 did not render the exercise of UNMIK's legislative authority subject to the terms of the MTA. Consequently, the FRY had to endure the unilateral determination of KFOR's status by UNMIK as a result of the binding effect of Resolution 1244, notwithstanding the terms of the MTA. This was the view taken by the Assistant Secretary General for Peacekeeping Operations<sup>122</sup> and supported by the United Kingdom and the United States.<sup>123</sup> Bearing in mind that Resolution 1244 affirmed the MTA only indirectly, this second interpretation is more convincing.

However, it does not necessarily settle KFOR's own obligations under the MTA. The undertaking given by KFOR in the MTA was a classic *pacta de contrahendo*, imposing on it a duty to negotiate a status agreement with the FRY. As long as such negotiations

<sup>117</sup> Milano, "Security Council Action in the Balkans" (n. 109) 1006.

<sup>118</sup> Agreement on the Principles (Peace Plan) (n. 104). SC Res. 1244 reproduced the text of the Peace Plan as Annex 2.

<sup>119</sup> Agreement on the Principles (Peace Plan) (n. 104) Point 10.

<sup>120</sup> On the scope of UNMIK's legislative powers, see Leopold von Carlowitz, "UNMIK Lawmaking between Effective Peace Support and Internal Self-determination" (2003) 41 *Archiv des Völkerrechts* 336; Michael Bothe and Thilo Marauhn, "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration" in Christian Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International 2002) 217, 224–6.

<sup>121</sup> According to the Russian representative, the legal status of KFOR and UNMIK had to be established "through negotiations with the host country and through the signing of an agreement on the status of forces." He proceeded to remind the Council that KFOR committed itself to such a process under the MTA and has violated this commitment. He also declared that the Russian Federation considered UNMIK Reg No. 2000/47 to have "no legal force." See Security Council, 4190th Meeting, 24 August 2000, UN Doc. S/PV.4190, 8–9. The Russian Federation had already expressed its opposition to a unilateral solution and called for the conclusion of a status agreement in earlier debates: see Security Council, 4138th Meeting, 11 May 2000, UN Doc. S/PV.4138, 9.

<sup>122</sup> According to the Assistant Secretary General, "it was felt, after a careful legal review of the matter, that it was necessary to enable [personnel operating under Resolution 1244] to carry out their functions under normal conditions, that it was necessary to grant them the basic privileges and immunities that are normally granted in such situations." See S/PV.4190 (n. 121) 19.

<sup>123</sup> See S/PV.4190 (n. 121) 10 and 11, respectively.

were initiated and conducted in good faith, a failure to arrive at a mutually acceptable agreement did not necessarily constitute a violation of the MTA. However, it appears that KFOR did not pursue negotiations with the FRY.<sup>124</sup> If that was the case, KFOR was in breach of its obligation to find a negotiated status solution, unless the adoption of either Resolution 1244 or UNMIK Regulation No. 2000/47 extinguished that obligation. The United States took the latter position when it declared that in its view Resolution 1244 “conferred upon UNMIK and KFOR the legal status necessary for them to fulfill their respective mandates” and that “UNMIK and KFOR were therefore acting within their authority in issuing a joint statement confirming their legal status and their privileges and immunities.”<sup>125</sup> Clearly, Resolution 1244 did not define the legal status of UNMIK and KFOR directly and in express terms. At most, it did so indirectly by entrusting them with enforcement mandates, which in turn may be said to imply certain privileges and immunities.<sup>126</sup> This notion that the Joint Declaration and UNMIK Regulation No. 2000/47 gave effect to pre-existing norms is supported by the wording of the Joint Declaration itself, which was adopted to “affirm” the privileges and immunities to which UNMIK and KFOR considered themselves “entitled.”<sup>127</sup> The statement of the Assistant Secretary General for Peacekeeping Operations that these instruments were meant to grant UNMIK and KFOR “the basic privileges and immunities that are normally granted in such situations” also supports this view. Consequently, on this interpretation of the legal framework, the non-consensual legal basis of KFOR’s presence under Chapter VII of the UN Charter overrode its obligation under the MTA to pursue a negotiated solution to the status question.<sup>128</sup> This conclusion also has important implications for the compatibility of the privileges and immunities accorded to KFOR with international human rights norms.<sup>129</sup>

However, it should be noted that this interpretation of the applicable law was not shared by the Russian Federation, which continued to press for a review of the status of UNMIK and KFOR.<sup>130</sup> More generally, it may be questioned whether maintaining these unilateral status arrangements indefinitely is compatible with the interim, and by

<sup>124</sup> Marc Guillaume, “Le cadre juridique de l’action de la KFOR au Kosovo” in Christian Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International 2002) 243, 253.

<sup>125</sup> See n. 115.

<sup>126</sup> See Dieter Fleck, “Status of Forces in Enforcement and Peace Enforcement Operations” in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (n. 11) 94.

<sup>127</sup> See S/PV.4190 (n. 121) 19.

<sup>128</sup> This is in line with Tomuschat’s view of the legal effect of SC Res. 1244 on the FRY’s acceptance of the Peace Plan and the MTA. See n. 110. Incidentally, this conclusion also has important implications for the compatibility of UNMIK Reg No. 2000/47 with international human rights norms.

<sup>129</sup> The Ombudsperson Institution in Kosovo has declared UNMIK Reg No. 2000/47 to be incompatible with recognized international human rights standards in his Special Report No. 1 On the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000), 26 April 2001 <<http://www.ombudspersonkosovo.org/repository/docs/E4010426a.pdf>> (accessed 31 March 2013). However, the Report ignores that SC Res. 1244 may displace or qualify the exercise of some of the rights affected by UNMIK Reg No. 2000/47. The possibility that Security Council resolutions based on Chapter VII of the Charter may have this effect was accepted by the European Court of Human Rights in *Al-Jedda* (n. 10) paras 99–105.

<sup>130</sup> Security Council, 4200th Meeting, 27 September 2000, UN Doc. S/PV.4200, 10; Security Council, 4225th Meeting, 16 November 2000, UN Doc. S/PV.4225, 12. It should also be noted that the representative of Yugoslavia declared his country ready to “commence dialogue and cooperation with the representatives of the international community” with the aim of concluding a status agreement, UN Doc. S/PV.4225, 23.

implication transitional, nature of the legal framework created by Resolution 1244, as confirmed by the ICJ.<sup>131</sup>

### C. Iraq

The legal and practical difficulties involved in moving to a negotiated status settlement are further illustrated by the experiences in Iraq. According to press reports, American officials were keen to conclude a status of forces agreement with Iraq in advance of the handover of authority scheduled for June 2004. However, these attempts failed when influential Iraqi politicians including Grand Ayatollah Ali al-Sistani declared that the provisional Iraqi Governing Council lacked the authority to enter into such a binding agreement, leading the CPA and US officials to conclude in March 2004 that no status of forces agreement could be negotiated before the end of the occupation.<sup>132</sup> The solution lay in extending the applicability of CPA Order 17 adopted on 26 June 2003. The purpose of CPA Order 17 as originally adopted was to exempt from the Iraqi legal process the personnel of those coalition partners that did not participate in the invasion of Iraq and consequently did not benefit from the legal status accorded to occupying powers under the law of armed conflict.<sup>133</sup> On 27 June 2004, that is one day before the formal handover of authority to the Iraqi Interim Government, the CPA promulgated a revised version of CPA Order 17 which extended these exemptions from the Iraqi legal process to all forces and personnel acting under the Security Council resolutions authorizing the deployment of a Multinational Force (MNF) to Iraq.<sup>134</sup>

The adoption of the Revised CPA Order 17 heralded an important change in the legal justification of the status arrangements applicable to coalition forces. The original CPA Order 17 of 26 June 2003 was adopted squarely on the basis of the powers enjoyed by the CPA under the law of belligerent occupation, albeit its preamble underlined that it was meant to be consistent with Security Council Resolution 1483.<sup>135</sup> The revised CPA Order 17 adopted a similar approach, referring to “laws and usages of war” as its legal basis and emphasizing that it was consistent with the relevant Security Council resolutions on Iraq.<sup>136</sup> However, its preamble also made the following additional points:

*Recalling* that there are fundamental arrangements that have customarily been adopted to govern the deployment of Multinational Forces in host nations,

<sup>131</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (2010) ICJ Rep. 403, para. 99.

<sup>132</sup> See United Press International, “Analysis: U.S. forces status in Iraq ambiguous” 23 April 2004; Robin Wright and Colum Lynch, “U.N. Iraq Resolution A Tough Sell” *The Washington Post* (Washington DC, 26 April 2004).

<sup>133</sup> Preamble, CPA Order 17 (n. 76). In addition, CPA Order 17 also granted various exemptions from Iraqi legal process to contractors and sub-contractors supplying goods and/or services to or on behalf of coalition forces or the CPA.

<sup>134</sup> Coalition Provisional Authority, “Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq” <<http://www.refworld.org/docid/49997ada3.html>> (accessed 26 July 2013).

<sup>135</sup> Preamble, CPA Order 17 (n. 76). On the status of the CPA under the law of belligerent occupation, see Rüdiger Wolfrum, “Iraq—from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference” (2005) 9 *Max Planck Yearbook of United Nations Law* 1, 20–2.

<sup>136</sup> Preamble, Revised CPA Order 17 (n. 134).

*Conscious* of the need to clarify the status of the CPA, the MNF, Foreign Liaison, Diplomatic and Consular Missions and their Personnel, certain International Consultants, and certain contractors in respect of the Government and the local courts,

*Recognizing* the need to provide for the circumstances that will pertain following June 30, 2004, and noting the consultations with the incoming Iraqi Interim Government in this regard and on this order.

These passages clearly reveal how the transition from a non-consensual to a consensual presence had caught the CPA and coalition forces between a rock and a hard place. The customary way to regulate the deployment of multinational forces in host states is of course by way of a status of forces agreement. However, as we saw, it was not possible to conclude such an agreement before the end of the occupation regime for political reasons. Yet leaving the legal status of coalition forces unaddressed pending the conclusion of a status agreement at some uncertain point in time after the handover of authority clearly was not an option. The solution, therefore, was to settle these matters by way of a unilateral act of the CPA, whilst expressly recognizing that Iraq was about to transform from an occupied territory into a “host nation” and that the incoming Iraqi Interim Government were to be consulted on the status arrangements applicable after the occupation.

Although Revised CPA Order 17 thus appeared to accept the need to put the post-occupation status arrangements on a consensual basis, the fact remains that it was a unilateral instrument promulgated by the outgoing occupying power.<sup>137</sup> However, at this point we must note the close connection between Revised CPA Order 17 and the Security Council resolutions authorizing the presence of the MNF in Iraq. Pursuant to Section 20 of Revised CPA Order 17, the latter remained in force solely for the duration of the mandate of the MNF. Tying its validity to the duration of the MNF’s mandate not only gave Revised CPA Order 17 a transitional character, but it indirectly also made it dependent on the consent of the Iraqi authorities in so far as the continued presence and mandate of the MNF were both at the request of the Interim Government of Iraq.<sup>138</sup> In authorizing the presence of the MNF, Security Council Resolution 1546 of 8 June 2004 moreover took note of a letter sent by the US Secretary of State, Colin Powell, to the President of the Council on 5 June 2004, which declared that the:

MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes.<sup>139</sup>

<sup>137</sup> Besides, it is doubtful whether the law of belligerent occupation entitled the CPA to adopt legislative measures that were not connected with the normal administration of the occupied territory and were aimed at laying down a regulatory framework for events after the end of occupation. It seems that US officials were aware of these difficulties: see United Press International, “Analysis: U.S. forces status in Iraq ambiguous” (n. 132).

<sup>138</sup> The role of Iraqi consent is reinforced by operative para. 12 of SC Res. 1546, where the Security Council declared itself ready to terminate the mandate of the MNF if requested to do so by the Government of Iraq.

<sup>139</sup> Annex, SC Res. 1546.

Although the operative paragraphs of Security Council Resolution 1546 do not expressly refer to the status arrangements of the MNF, it may nevertheless be assumed that the Security Council approved these arrangements by taking note of them.

Accordingly, the consent of the Interim Government of Iraq to the presence and mandate of the MNF, the authorization issued to the MNF by the Security Council under Chapter VII of the UN Charter and the adoption of Revised CPA Order 17 pursuant to the law of belligerent occupation combine to form the legal justification of the status arrangements applicable to the MNF following the end of the occupation in Iraq.<sup>140</sup>

## VI. Balancing Competing Interests under *Jus Post Bellum*

There can be little doubt that the two fundamental principles applicable to the presence of foreign armed forces identified earlier—the principle of territorial sovereignty and the exemption of foreign forces from local jurisdiction—apply to post-conflict situations. It is not immediately obvious, however, whether any considerations apply in this respect that are specific to *jus post bellum* and, consequently, where the balance between these two principles lies in post-conflict environments. While international practice on status of forces agreements offers several paradigms on which the status arrangements of forces deployed in such environments may be modeled, considerable confusion seems to prevail about the relationship between the relevant instruments and the circumstances in which they apply. The judgments of the Italian courts in the *Lozano* case offer some useful lessons in this respect.

### A. The *Lozano* case

The *Lozano* case arose out of the fatal shooting of Nicola Calipari, an Italian military intelligence officer, by US armed forces at a roadblock in Iraq in March 2005.<sup>141</sup> Mario Lozano, the soldier responsible for firing the shots that killed Calipari and wounded two other Italians, was charged with murder by the Italian authorities and was subsequently tried *in absentia*. The circumstances of the case were somewhat unusual. Typically, judicial proceedings involving visiting armed forces arise between foreign troops on the one hand and the local authorities and residents on the other hand. By contrast, the *Lozano* case concerned a situation where one sending state, Italy, sought to exercise its criminal jurisdiction over a member of the military forces belonging to another sending state, the United States, for acts committed by the latter against its personnel and nationals in the territory of a third state, namely Iraq. The Italian courts decided that this set of circumstances was not addressed by any of the applicable legal instruments and therefore proceeded to examine whether they were competent to exercise criminal jurisdiction over the US soldier in question on the basis of customary international law.

<sup>140</sup> See also Wolfrum, “Iraq—from Belligerent Occupation to Iraqi Exercise of Sovereignty” (n. 135) 36.

<sup>141</sup> The background and political fallout from the case are described in greater detail by Marco Clementi, “Italy and World Affairs: The Sgrenà-Calipari Case” (2006) 21 *Italian Politics* 85.



Delivering its judgment at first instance, the Court of Assizes of Rome found that the United States enjoyed exclusive jurisdiction over its armed forces in Iraq.<sup>142</sup> The Court began its analysis by considering the legal context in which the incident occurred. According to the Court, the initial occupation of Iraq by US and British armed forces constituted an armed conflict. However, the adoption of Security Council Resolution 1546—which welcomed the pending termination of the occupation regime and noted that the continued presence of the MNF in Iraq was at the request of the incoming Interim Government<sup>143</sup>—fundamentally changed the purpose and legal character of the presence of coalition forces in Iraq.<sup>144</sup> The shooting of Calipari in March 2005 thus occurred in a context that in the Court's view could be qualified “as an armed conflict in a broad sense, involving the presence of multinational forces under the aegis of the UN for humanitarian missions in a substantially occupied nation.”<sup>145</sup>

Turning its attention to the question of jurisdiction, the Court held that in such situations of “warfare or quasi-warfare or the presence of multinational forces carrying out humanitarian missions in foreign territory,”<sup>146</sup> the customary principle of the law of the flag (*principio del diritto di bandiera*) overrides jurisdictional principles of a more general character, including the territorial principle. The Court saw this principle of the law of the flag confirmed by international practice relating to multinational forces that occupy the territory of other states for humanitarian purposes. The Court here specifically referred to the UN Model SOFA of 1990, which it described as “a kind of general framework norm.”<sup>147</sup> In the present context, it also saw the principle confirmed by Colin Powell's letter annexed to Security Council Resolution 1546 and by Revised CPA Order No. 17, both of which envisaged the continuation of the existing status arrangements after the end of the occupation. Based on these findings, the Court of Assizes concluded that the exclusive jurisdiction enjoyed by the United States pursuant to the principle of the law of the flag prevailed over the passive jurisdiction claimed by the Italian state,<sup>148</sup> and accordingly dismissed the case against Lozano.

On appeal, the Court of Cassation affirmed the outcome reached by the lower court, but reversed the reasoning. The Court of Cassation began by considering the legal character of the MNF in Iraq,<sup>149</sup> but found it difficult to reconcile its multinational and multifunctional nature with classic patterns of belligerent occupation. Since Security Council Resolution 1546 transformed the MNF into a peace support operation authorized under Chapter VII of the UN Charter, at the material time it was not some sort of quasi-occupation force as the Court of Assizes suggested. The Court of Cassation consequently considered it “highly inappropriate” for the Court of Assizes to deny the

<sup>142</sup> *Italy v. Mario Luiz Lozano*, Judgment No. 07/21, 14 October 2007 (Italy, Court of Assizes, Rome) (on file with the author). All page references to the judgment refer to the original Italian text; all quotations in English are based on an English translation of the case on file with the author. For commentary, see Matteo Tondini and Federica Bertolin, “La sentenza Calipari: Volenti non fit iniuria?” *Forum di Quaderni costituzionali*, 3 April 2008, <[http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0036\\_tondini\\_bertolin.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0036_tondini_bertolin.pdf)> (accessed 2 April 2013); Eric Talbot Jensen, “Exercising Passive Personality Jurisdiction Over Combatants: A Theory in Need of a Political Solution” (2008) 42 *International Lawyer* 1107.

<sup>143</sup> Operative paras 2 and 9, SC Res. 1546. <sup>144</sup> *Lozano* (n. 142) 8–9.

<sup>145</sup> *Lozano* (n. 142) 9.

<sup>146</sup> *Lozano* (n. 142) 25.

<sup>147</sup> *Lozano* (n. 142) 19.

<sup>148</sup> *Lozano* (n. 142) 21.

<sup>149</sup> *Lozano* (n. 70) 1226–8.

passive jurisdiction of the Italian state by relying on the principle of the law of the flag.<sup>150</sup> More fundamentally, the Court of Cassation rejected the very idea that the principle of the law of the flag confers exclusive jurisdiction on sending states as a matter of customary international law. Instead, it suggested that current international law now gives effect to the territorial jurisdiction of the receiving state alongside the principle of the law of the flag, as evidenced by the sophisticated arrangements governing the exercise of criminal jurisdiction by sending states and receiving states under Article VII of the NATO SOFA.<sup>151</sup>

Turning its attention to international treaty practice,<sup>152</sup> the Court of Cassation argued that the great diversity of modern peace support operations has made it increasingly difficult to identify their legal position in municipal and international law. Sending states and host states therefore tend to enter into status of forces agreements in order to regulate the legal position of multinational operations and their personnel in express terms. Like the lower court, the Court of Cassation identified the UN Model SOFA of 1990 as a key reference point for drafting such agreements. However, the Court noted that bilateral and multilateral status of forces agreements, even the most sophisticated ones, are concerned solely with the allocation of the right to exercise jurisdiction on a “vertical” level between sending states and the receiving state, rather than on a “horizontal” level between one sending state and another. Consequently, since neither customary international law nor treaty practice allocates jurisdictional competences on a horizontal level, the Court of Cassation concluded that no specific rules of international law actually exist which govern the legal status of national contingents participating in multinational operations *vis-à-vis* other sending states. Accordingly, the jurisdictional arrangements contained in Resolution 1546 were irrelevant to the present case. The Court then went on to find that the acts of Lozano were covered by the principle of functional immunity under customary international law and dismissed the case against him on these grounds.<sup>153</sup>

The *Lozano* case constitutes an exceptionally rich source of jurisprudence on the status of foreign armed forces under customary international law. For our purposes, the following points are of particular interest. The Court of Cassation was right to doubt whether the principle of the law of the flag prevailed over all competing jurisdictional principles as a matter of customary international law currently in force. Yet by asking itself this question it clearly missed the point of what the Court of Assizes had argued. Instead of declaring that sending states enjoyed exclusive jurisdiction over their armed forces at all times and under all circumstances, the Court of Assizes suggested that the principle of the law of the flag applied only in war and what it termed “warlike” conditions. The Court of Assizes thus recognized that the legal status of foreign forces depends on their operational context.<sup>154</sup> Earlier, we have described this idea

<sup>150</sup> *Lozano* (n. 70) 1228.

<sup>151</sup> *Lozano* (n. 70) 1228–9.

<sup>152</sup> *Lozano* (n. 70) 1229–30.

<sup>153</sup> *Lozano* (n. 70) 1230–6.

<sup>154</sup> See in particular *Lozano* (n. 142) 23–6. The Court of Assizes was adamant that applying any “precedents that occurred in very different situations is totally misleading; accordingly the episodes recalled in various quarters (the Achile Lauro case, Cermis etc.) must absolutely not be taken as reference points, not so much because in some cases they gave rise to discordant decisions, but instead because they do not involve situations of war or quasi-war, let alone the management of multinational forces in foreign territory” (at 17–18).

as the principle of military or operational necessity. By contrast, the Court of Cassation adopted a completely linear view of the matter: whereas the principle of the law of the flag may have prevailed in the past, it has since given way to the more progressive principle of concurrent jurisdiction. This image may have been inspired by the classic understanding of the evolution of the law of state immunity from the absolute doctrine of old to the restrictive theory of today. However, there is little evidence to support the view the legal status of foreign armed forces underwent a similar evolution under customary international law. On the contrary: in modern practice exclusive sending state jurisdiction has never been accepted as a universally applicable principle; rather, different types of military deployments have been subject to different status arrangements.

With some of this subtlety lost, it is not surprising to see that the Court of Cassation also misapprehended the legal basis and effect of Revised CPA Order 17 and Security Council Resolution 1546. The status arrangements adopted in those two instruments were based on the law of belligerent occupation and were not inspired, as the Court of Cassation erroneously held,<sup>155</sup> by the UN Model SOFA. Consequently, while it is true that status of forces agreements such as the UN Model SOFA typically do not regulate the “vertical” relationship between sending states, this fact in no way rendered Revised CPA Order 17 and Security Council Resolution irrelevant to the *Lozano* case as the Court of Cassation held.<sup>156</sup> Neither of these two instruments was a status of forces agreement; both were unilateral acts.<sup>157</sup> Whether or not they were binding on Italy and barred its courts from exercising their jurisdiction thus depended on their individual terms and status.<sup>158</sup>

## B. The sliding scale

The more nuanced judgment of the Court of Assizes in *Lozano* supports the idea that the extent of the jurisdictional privileges and immunities accorded to foreign armed forces in international practice moves on a sliding scale: the greater the operational risks faced by foreign troops are, the more extensive their immunities tend to be. Of course, this notion of a sliding scale only offers a crude guide as to where the balance between the exercise of authority by the sending state and by the host state over the foreign troops should lie. While the existence and scope of certain operational risks may be determined in a more or less objective manner, for instance with reference to

<sup>155</sup> *Lozano* (n. 70) 1229.

<sup>156</sup> *Lozano* (n. 70) 1230.

<sup>157</sup> This point was clearly lost on the Court of Cassation, as revealed by the fact that the relevant section of its judgment was entitled “the Iraq SOFA,” *Lozano* (n. 70) 1230.

<sup>158</sup> Pursuant to Section 2(3) of Revised CPA Order 17, personnel covered by the Order were subject “to the exclusive jurisdiction of their Sending States.” The Italian courts therefore should have deferred to the exclusive jurisdiction of the US over Mario Lozano, provided that the Order was binding on Italy. As a legislative act of the former belligerent occupant, Revised CPA Order 17 had the status of Iraqi law that Italy as a sending state was obliged to respect. Whether the Italian courts were also bound to give effect to the Order as a matter of Italian law seems to depend on its status under Italian law and whether it prevailed over other jurisdictional principles under international law. The position would have been more straightforward had SC Res. 1546 endowed the Order with binding effect under Chapter VII. However, it is questionable whether the fact that the Security Council took note of Colin Powell’s letter had this effect. But see Fleck, “Status of Forces in Enforcement and Peace Enforcement Operations” (n.126) 103, who suggests that third states had to respect the exclusive jurisdiction of sending states pursuant to SC Res. 1546.

the likelihood of foreign forces being subject to armed attacks during their deployment, other operational risks are more subjective in nature. For example, a lack of trust in local legal and administrative processes may render sending states reluctant to subject their personnel to the jurisdiction of the host state. For this reason, the level of operational risk faced by foreign forces is not something that can be determined with reference to legal criteria alone, but is subject to a political and military judgment call.

The Court of Assizes clearly struggled with this problem in *Lozano*. The Court distinguished warfare and warlike conditions (*contesto bellico o parabellico*), which it believed are governed by the principle of the law of the flag, from the stationing of foreign forces within military alliances, where more balanced jurisdictional arrangements such as those found in the NATO SOFA apply.<sup>159</sup> However, this distinction is problematic in as much as the Court drew it in the wrong place by treating war and warlike situations alike. As we saw earlier, there exists a fundamental difference, in fact as well as in law, between the consensual and non-consensual presence of foreign armed forces. Foreign military forces locked into an armed conflict with the territorial state to a large extent place themselves outside its legal authority through the use of arms,<sup>160</sup> while foreign forces stationed abroad at the invitation of the territorial state are subject to its legal authority and to any conditions it may attach to its invitation.<sup>161</sup> What is missing from the Court's assessment is an appreciation that "warlike" situations such as those prevailing in Iraq at the time of the shooting of Nicolai Calipari fall in the domain located between armed conflict and the peacetime stationing of foreign forces, that is in the domain of *jus post bellum*.

With this in mind, one would expect the privileges and immunities applicable in *jus post bellum* to fall somewhere in between the legal arrangements applicable between belligerent parties in the context of an armed conflict on the one hand and those applicable between close military and political allies on the other hand. This is so because post-conflict situations do not mirror either of those operational environments, but combine elements of both. At one end of the spectrum, the law of armed conflict provides foreign forces with the broadest exemptions from local jurisdiction. As far as prescriptive jurisdiction is concerned, it is interesting to note that CPA Order 17 as originally adopted on 26 June 2003 recalled in its preamble that "under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the *laws or jurisdiction* of the occupied territory."<sup>162</sup> This clearly overstates the case, as a glance at the Hague Regulations of 1907 shows

<sup>159</sup> *Lozano* (n. 142) 25.

<sup>160</sup> As the Operational Law Handbook prepared by the US Judge Advocate General's Legal Center and School puts it dryly, "during the Persian Gulf War, the coalition invasion force did not bother to stop at Iraqi traffic lights in late February 1991." John Rawcliffe (ed.), *Operational Law Handbook* (Judge Advocate General's Legal Center and School 2007) 68.

<sup>161</sup> For instance, the territorial state may consent to the presence of foreign forces only for certain defined purposes and periods. A violation of these conditions may constitute an act of aggression under Art. 3(e) of GA Res. 3314 (XXIX), Definition of Aggression, 14 December 1974. In addition, a receiving state may impose new conditions on the presence of foreign forces or revoke its consent to their presence in accordance with any applicable treaty rules, as France did in 1966. See Eric Stein and Dominique Carreau, "Law and Peaceful Change in a Subsystem: 'Withdrawal' of France from the North Atlantic Treaty Organization" (1968) 62 *American Journal of International Law* 577.

<sup>162</sup> Emphasis added.

that occupying powers must respect local law and in this sense are clearly subject to it. Nevertheless, it is generally considered self-evident, even if there is scant doctrinal or judicial consideration of this point, that the military authorities and forces of a belligerent state are not subject to the adjudicative and enforcement jurisdiction of their adversary, at least for the duration of the hostilities.

At the other end, status arrangements between allied states are typically based on the principle of reciprocity. Reciprocity as a guiding principle was first explicitly recognized in a multilateral setting by the Brussels Treaty Status of Forces Agreement (“Brussels Treaty SOFA”) of 21 December 1949,<sup>163</sup> which set up a system of concurrent jurisdiction in an attempt to balance the competing legal interests of sending states and host states in an equitable manner. Although it never entered into force, the Brussels Treaty SOFA served as the basis for the negotiation of the NATO SOFA.<sup>164</sup> By upholding the principle of concurrent jurisdiction, but at the same time enabling sending states to exercise their authority in those cases where their interests were most directly affected,<sup>165</sup> in particular on-duty cases, the drafters of the NATO SOFA were able to devise a flexible system for the allocation of the right to exercise jurisdiction “which each side could accept as being equitable.”<sup>166</sup> The NATO SOFA is thus generally regarded as having attained an equitable balance between the interests of sending states and host states and has thus attained a high level of international legitimacy, serving as a blueprint for numerous bilateral and multilateral status of forces agreements.<sup>167</sup>

Since *jus post bellum* falls between the domains of war and peace, it would be reasonable to conclude that neither the near-complete exemption of foreign forces from local jurisdiction seen in times of armed conflict nor the concurrent exercise of jurisdiction between close military and political allies in times of peace as seen under the NATO SOFA provide an appropriate model for status arrangements in post-conflict situations. Indeed, the legitimacy of Revised CPA Order 17 may be questioned precisely on the grounds that it provided for the complete exemption of the MNF for the entire duration of its mandate, thus prolonging status arrangements based on the law of belligerent occupation until the termination of the MNF on 31 December 2008.<sup>168</sup>

<sup>163</sup> “Agreement Relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers, 21 December 1949” (1950) Cmd 7868. The agreement was adopted to define the legal status of forces operating pursuant to the Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-defense, 17 March 1948, 19 UNTS 53, concluded between Belgium, France, Luxembourg, the Netherlands, and the United Kingdom.

<sup>164</sup> Status of Forces Agreement—Draft Submitted by the United States Deputy, 23 January 1951, D-D(51) 23, in Joseph M. Snee (ed.), *NATO Agreements on Status: Travaux Préparatoires* (United States Government Printing Office 1966).

<sup>165</sup> Summary Record of a Meeting of the Working Group, on Status (Juridical Subcommittee), 8 February 1951, MS(I)-R(51) 2 in Snee (ed.), *NATO Agreements on Status* (n. 164) paras 14–17.

<sup>166</sup> Summary Record of a Meeting of the Council Deputies, 2 March 1951, D-R(51) 15 in Snee (ed.), *NATO Agreements on Status* (n. 164).

<sup>167</sup> Including the EU SOFA. See Sari, “The EU Status of Forces Agreement” (n. 41).

<sup>168</sup> While the terms of Revised CPA Order 17 may have been perfectly appropriate during the immediate aftermath of the occupation, its continued existence without change does not seem to be compatible with the transitional character of the *jus post bellum*. At the same time, the re-affirmation of the MNF’s mandate in successive Security Council resolutions at the request of the Iraqi Government may be understood as an implicit re-affirmation of its terms. The broad immunities granted to KFOR under UNMIK Regulation No. 2000/47 raise similar concerns.

Similarly, the appropriateness of applying the terms of the NATO SOFA at the beginning of a post-conflict situation may be questioned on the basis that relations between sending states and the host state simply do not reflect the principle of complete reciprocity.<sup>169</sup> The difficulty with both of these scenarios is that they involve applying a jurisdictional regime outside its normal context of operation in an attempt to tip the balance of jurisdiction in favor of the sending state or the host state, as the case may be. In principle, it may well be appropriate to comprehensively exempt foreign troops deployed in a post-conflict environment from local jurisdiction in the early stages of the transition from conflict to peace or to negotiate status arrangements based on some form of concurrent jurisdiction towards the final stages of that transition process: it is applying these regimes in reverse order that is problematic.

By contrast, the jurisdictional provisions of the UN Model SOFA provide something of an intermediate arrangement. Pursuant to the UN Model SOFA, all members of UN peacekeeping operations are “immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.”<sup>170</sup> This immunity extends to both civil and criminal matters.<sup>171</sup> The local authorities may institute legal proceedings against the civilian personnel of the operation with the agreement of the Special Representative/Commander, but military members of a UN operation are subject to the exclusive jurisdiction of their respective contributing states in respect of any criminal offences committed by them in the territory of the host state.<sup>172</sup> As far as military personnel are concerned, the arrangements set out in the UN Model SOFA thus go beyond the principle of concurrent jurisdiction by granting sending states exclusive jurisdiction over their troops in criminal matters, yet stop short of endowing them with near-complete exemptions applicable under the law of armed conflict by limiting their immunity in civil matters to acts performed in their official capacity. For this reason, the status arrangements under the UN Model SOFA may be viewed as drawing a balance between these two ends of the spectrum and as such may be deemed particularly appropriate for post-conflict environments.

Nevertheless, commentators have criticized the extent of the immunities conferred by the UN Model SOFA as excessive. Róisín Burke, for example, has argued that the jurisdictional immunities granted to military personnel deployed on UN peacekeeping operations must not be absolute and ought to be limited to what is strictly necessary to enable the operation to function.<sup>173</sup> Clearly, the immunities conferred by the UN Model SOFA are not absolute at all, bearing in mind that foreign troops are subject to local jurisdiction in civil proceedings relating to acts not performed in the course of their official duties. Burke suggests that granting sending states exclusive jurisdiction over their troops in criminal matters is not strictly necessary to enable a peacekeeping

<sup>169</sup> As rightly pointed out by the Court of Assizes of Rome in *Lozano* (n. 142) 25.

<sup>170</sup> UN Model SOFA, para. 46.

<sup>171</sup> Paragraph 46 of the UN Model SOFA is based on Section 22 of the Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15, which provides in express terms that experts on mission for the UN are “immune from legal process of every kind” for acts performed on duty.

<sup>172</sup> UN Model SOFA, para. 47.

<sup>173</sup> Róisín Burke, “Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity” (2011) 16 *Journal of Conflict & Security Law* 63, 93.

operation to function, yet she does not explain why this is so. Nor does she clarify what functional necessity requires in these circumstances, beyond referring to a proposal by August Reinish to the effect that it may be more appropriate to determine functional necessity with reference to the consequence which the denial of immunity would have for the beneficiary of immunity, in particular whether it would impede its activities, rather than with reference to the nature of the acts covered by immunity.<sup>174</sup> This is not a particularly compelling idea when applied to military operations.<sup>175</sup> Essentially, it would entail making the availability of immunity applicable to military personnel dependent on the consequences of its denial to the operation as a whole. The task of answering this question would presumably fall to the forum courts on a case-by-case basis. Not only does this pose a threat of inconsistency,<sup>176</sup> but it would almost certainly compel the local courts to determine the availability of immunity on the basis of the merits of the case, something that the principle of immunity was meant to prevent in the first place.<sup>177</sup> Most importantly, it would empower those courts to decide what level of impediment to its operational effectiveness and mandate a peacekeeping force must endure before the immunity applicable to its members would become available. This scheme would not only make a mockery of the immunity from criminal jurisdiction enjoyed by individual military personnel, but also undermine the immunity attaching to the operation and its sending state or organization as a whole.

Bearing in mind the general principles applicable to foreign forces described earlier, it follows that the concept of functional necessity must either already include considerations of operational necessity or that functional and operational necessity must be applied side by side. Peacekeeping forces may be deployed in environments where a break-down in the rule of law has for the most part rendered the local criminal justice system ineffective, where fundamental human rights standards and fair trial guarantees are not observed and where foreign military personnel detained by the local authorities may face a risk of mistreatment. Based on these considerations, granting sending states exclusive jurisdiction over their forces in criminal matters in such operational environments does not appear to be grossly excessive. Since similar considerations apply in post-conflict environments, and may do so with even greater force, the application of the jurisdictional arrangements set out in the UN Model SOFA to *jus post bellum* appear to be equally justified.

## VII. Conclusion

*Jus post bellum* is a law of transition: the transition from a state of armed conflict to a state of peace. Foreign armed forces frequently play an important part in this process, but their presence more often than not is a source of controversy and even instability.

<sup>174</sup> August Reinish, *International Organizations before National Courts* (Cambridge University Press 2000) 365–6.

<sup>175</sup> To be fair to Reinish, he made his proposal whilst writing about the immunities of international organizations in general and not specifically, or necessarily, in relation to the immunity enjoyed by military personnel from local criminal jurisdiction.

<sup>176</sup> A point that both Reinish, *International Organizations before National Courts* (n. 174) 366, and Burke, "Status of Forces Deployed on UN Peacekeeping Operations" (n. 173) 93, acknowledge.

<sup>177</sup> Cf. *Jurisdictional Immunities of the State* (n. 31) para. 82.

Under these circumstances, we may legitimately expect the rules of international law governing the legal status of such forces—which tends to be a highly controversial topic in its own right—to serve a dual function: they should lay down certain general standards of behavior and provide a framework for interaction between sending states and host states, thus injecting a measure of predictability and procedural legitimacy into an otherwise highly volatile legal and political environment. The fact that the legal status of foreign armed forces is not governed by a self-contained regime of international law, but instead derives from multiple sources, renders this task more difficult. However, as we have seen, a number of basic principles and considerations may be derived from international practice which are applicable to foreign military deployments in general terms, in particular the close relationship between the rules regulating their presence and the rules governing their status, the principle of territorial sovereignty, the principle of exemption from local jurisdiction, the principle of military or operational necessity, and the wide-spread use of status of forces agreements as regulatory instruments.

Bearing in mind the objectives usually associated with *jus post bellum*, I have suggested that two distinct concerns relating to the legal position of foreign forces arise in post-conflict situations: the effect that the inevitable change in the legal basis of their presence has on their legal status and the need to balance the principle of territorial sovereignty and the jurisdictional exemptions of foreign forces in a manner that reflects the specific features and demands of post-conflict environments. On the first question, our analysis of international practice relating to Kosovo and Iraq, the two most important test cases of recent years, has demonstrated the close legal link between the presence and status of foreign forces. In particular, both cases have highlighted how consensual and non-consensual elements combine, for legal and for practical reasons, to make up the legal framework of foreign military deployments, which as a result is multilayered and complex. On the second question, our analysis of the *Lozano* case, arguably one of the most significant judicial considerations of the legal position of foreign forces under customary international law in recent decades, has shown the difficulties and pitfalls involved in translating the recurrent patterns identifiable in international practice into legal principles of general application. The judgments in *Lozano* thus demonstrate the need for greater conceptual clarity to make sense of the multitude of legal regimes and principles applicable in this area.

This is precisely where, I would suggest, the concept of *jus post bellum* promises real added value. Conceiving of *jus post bellum* as a process of transition, rather than just as a set of norms, emphasizes that the legal standards applicable in post-conflict environments are not static but evolutionary. This is both a factual and a normative claim. On the one hand, conditions on the ground change as the transition from conflict to peace progresses. The legal interests of sending states and host states therefore cannot be balanced in the abstract with reference to absolute principles, but must be weighed against the background of the changing environment, including their mutual relationship. This is where the principle of operational or military necessity assumes paramount importance: recognizing that the privileges and immunities of foreign forces move on a sliding scale introduces a degree of normativity and objectivity into the task of determining the status of foreign forces which otherwise would be lacking. On the other hand, the transitional nature of *jus post bellum* underlines that actors operating in post-conflict



environments must not only adjust their legal expectations in line with the overarching objective of the transition from a state of conflict to a state of peace, but that they must also actively pursue that objective. Seen from this perspective, *jus post bellum* imposes a duty on sending states and host states to put the status arrangements applicable in post-conflict environments onto a consensual basis.

The contextual and dynamic approach to the legal status of foreign armed forces deployed in post-conflict situations advocated here does not translate into hard and fast rules that can be applied out of the box. It would be unrealistic to expect this. The general nature of the principles identified in this chapter and the great variation in the legal and factual circumstances of different post-conflict scenarios rules this out. Moreover, while I have argued that there are certain patterns and base lines in international practice, such as the principle of functional immunity, the law applicable in this area can be adjusted by mutual consent, above all through the conclusion of status of forces agreements. To the extent that such agreements are political bargains, it is difficult to assess their compatibility with standard international practice from a strictly legal point of view.<sup>178</sup> What the contextual approach proposed in this chapter offers instead is a framework for a more nuanced understanding of international practice and the interaction between different legal regimes applicable to foreign armed forces. By emphasizing the transitional nature of the law, it hopes to inject greater conceptual clarity and offer a vantage point from which the position of sending states and host states can be critically and more realistically assessed.

<sup>178</sup> A case in point is the agreement concluded between the United States and Iraq following the end of the MNF's mandate. See Chris Jenks, "A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement" (2009–10) 11 *San Diego International Law Journal* 411.

# The Norm of Environmental Integrity in Post-Conflict Legal Regimes

Cymie R. Payne\*

## I. Introduction

Discussion of post-conflict legal regimes—*jus post bellum*—must include measures for the protection and rehabilitation of the environment as well as international humanitarian law, human rights, and international criminal law. A standard approach to the topic would be to review the literature on theories of *jus post bellum*, and to discuss them with regard to relevant environmental norms and examples. However, the environmental norm has not been well-defined. This chapter defines the environmental norm and then discusses it in relation to current theories of post-conflict law, particularly those put forward by other contributors to this book. It considers whether an environmental integrity norm may provide support for a theory of *jus post bellum*, and how *jus post bellum* theory advances environmental integrity.

A goal that environmental integrity shares with human rights and humanitarian law is prevention—or at least minimization—of harm. The nature of harm to the environment inflicted by armed conflict can be astonishingly varied. Industrial facilities may be damaged intentionally or incidentally; military vehicles cause damage to the earth similar to off-road vehicles; spent and unused ordnance is toxic, flammable, and explosive and is so persistent that remnants from the Second World War are still found in European farm fields; refugees overburden water supplies, cut forests, and overgraze in their host countries; troops leave behind landfills with sanitary, medical, and toxic waste. Crops and livestock are destroyed, water and air pollution are caused by any number of military activities. To be effective, legal measures to address these harms need to recognize biological and physical systems, rather than focusing on instances of private property or infrastructure; rapid response to assess, mitigate, and remediate are also of the essence.

Traditionally, the law of war recognized water and cultural sites for special protection. The doctrine of state responsibility provided for reparations, with a “you broke it, you fix it” approach to civil liability where a belligerent breached obligations under *jus ad bellum* or *jus in bello*. International criminal and human rights law had little to say on the topic, until recently. A modern understanding of the underlying concern requires a more coherent norm of environmental integrity and attention to its distinctive characteristics and particular problems. As the International Court of Justice (ICJ) said in its

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*Nuclear Weapons Advisory Opinion*, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>1</sup> The rapporteur for the International Law Commission (ILC) on “Protection of the environment in relation to armed conflicts,” a topic adopted in 2013, noted that damage to the environment is of particular concern because it may persist long after the conflict and may prevent effective rebuilding.<sup>2</sup> Moreover, the increasing scale and frequency of insults to the environment are eroding the ecosystems that support human life. By articulating a so-far neglected norm of environmental integrity, this concern can be more effectively integrated into theory and practice.

The post-conflict phase of the war-peace continuum includes many applications of law that exemplify the diversity described in some accounts of post-conflict peacebuilding.<sup>3</sup> Reparations programs are prominent elements of post-conflict legal responses, and where they address environmental harms they are especially useful in understanding the content of a norm because reparations focus on specific facts of damaged environment, they reveal the scope of harm that conflict causes and thus highlight gaps in the formal legal regime of *jus in bello*. The law of war was developed at an early stage of modern environmental science and law, with an inadequate appreciation of the extent and type of harm suffered by the environment during armed conflict.

In addition to measures that will lead to environmental restoration, the reestablishment of pollution management and regulation is an important part of the reestablishment (or establishment) of the rule of law in post-conflict societies. An aspect of environmental regulation that is more specific to the *jus post bellum* period, is the role of law in requiring military forces—whether foreign or domestic, peacekeeping, occupying or demobilizing—to practice better environmental management of their operations.<sup>4</sup>

Although this chapter focuses on liability for the harm done to the environment in waging those wars and strengthening the environmental integrity norms that already exist in peacetime law and, implicitly, in the law of war, it should be mentioned that conflicts are often about control of natural resources, particularly high-value natural resources like oil, other minerals, and timber. Recent wars in Liberia,<sup>5</sup> the Democratic Republic of Congo,<sup>6</sup> and Iraq were fought over “conflict resources.” The growing scarcity of water causes defense analysts to evaluate whether water wars may become a

<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, para. 29 (*Nuclear Weapons Advisory Opinion*).

<sup>2</sup> ILC, “Report of the International Law Commission on the Work of its 63rd Session Annex E” (26 April–3 June and 4 July–12 August 2011) UN Doc. A/66/10, 351, 351.

<sup>3</sup> Carsten Stahn, “*Jus ad Bellum*, ‘*Jus in Bello*’... *Jus Post Bellum*?—Rethinking the Conception of the Law of Armed Conflict” (2007) 17 *European Journal of International Law* 921, 941.

<sup>4</sup> For example, military waste that is incinerated in open pits may cause toxic exposures to humans and the environment. Institute of Medicine (IOM), *Long-term Health Consequences of Exposure to Burn Pits in Iraq and Afghanistan* (The National Academies Press 2011).

<sup>5</sup> Republic of Liberia, Truth and Reconciliation Commission, “Economic Crimes and the Conflict, Exploitation and Abuse” (vol. 3, Appendices, Title III, 2009) para. 8(ii) (including illegal mining, natural resource extraction, and toxic waste dumping as economic crimes, along with such crimes as sexual slavery and arms dealing) <[http://trcofliberia.org/resources/reports/final/volume-three-3\\_layout-1.pdf](http://trcofliberia.org/resources/reports/final/volume-three-3_layout-1.pdf)> (accessed 23 July 2013).

<sup>6</sup> Republic of Uganda, Ministry of Foreign Affairs, “Final Report of the Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo 2001” (Republic of Uganda, Ministry of Foreign Affairs 2002).

source of armed conflict.<sup>7</sup> Work in this area is directed at post-conflict governance measures to ensure that issues like territorial control and natural resource extraction contracts are managed to eliminate corruption, violence, and the seeds of future conflict,<sup>8</sup> which also falls into the purview of *jus post bellum*.

As discussed in other chapters, legal division of the three phases of armed conflict—beginning and conducting a war, and its aftermath—is blurred.<sup>9</sup> For instance, reparations commissions are typically established in the *post bellum*, but they address the legality of actions leading to war and fighting a war and reparations can be practiced while conflict is ongoing. Restoration of the environment, including natural resources, ecosystem services, and cultural heritage will generally take place once hot conflict has ceased. But environmental principles require all parties to mitigate environmental harm to the extent possible even during conflict. Third parties to the conflict may decide to assist with abatement and prevention of environmental and public health damage as a matter of environmental solidarity.<sup>10</sup> Environmental reparations may extend decades beyond the end of the conflict, involving cooperation between the former enemies.<sup>11</sup>

While these efforts imply that there is a norm of environmental integrity, it is poorly defined and insufficiently integrated into historical and contemporary notions of *jus post bellum*. Although the impacts of war on the environment are severe, it seems to take extraordinary, intentional violence to the environment for it to be reported by the press or to appear in legal proceedings. So, when Iraq set oil-wells ablaze and caused massive oil spills in Kuwait, it was widely reported, yet there is little mention of environmental damage from recent conflicts in Iraq, Syria, or Afghanistan. Similarly, while effects of war on the environment are briefly mentioned in the ICJ's decision relating to the conflict in the Democratic Republic of Congo (DRC), in the end there are few details and no judicial remedy. The judgment is chiefly notable for recognizing the role of conflict resources in armed conflict;<sup>12</sup> other environmental impacts are not discussed despite reports including severe impacts on the World Heritage site, Kahuzi Biega National Park, and its rare gorillas.<sup>13</sup>

<sup>7</sup> US Senate Select Committee on Intelligence, "US Intelligence Community Worldwide Threat Assessment Statement for the Record" (12 March 2013) 9 (describing current and impending water shortages as a potential source of conflict) <<http://www.dni.gov/files/documents/Intelligence%20Reports/2013%20ATA%20SFR%20for%20SSCI%2012%20Mar%202013.pdf>> (accessed 25 July 2013).

<sup>8</sup> For a discussion of appropriate *jus post bellum* responses to "economic" crimes involving conflict resources, see Joanna Kyriakakis, "Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War" in Larry May and Andrew Forchimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 113.

<sup>9</sup> See Jann K. Kleffner, ch. 15, this volume (fluid, fact-driven); Rogier Bartels, ch. 16, this volume (fixed period); Martin Wählisch, ch. 17, this volume; Yaël Ronen, ch. 22, this volume.

<sup>10</sup> Peter H. Sand, "Compensation for Environmental Damage from the 1991 Gulf War" (2005) 35 *Environmental Policy and Law* 244, 247.

<sup>11</sup> See section III.A. below.

<sup>12</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ Rep. 168, para. 245. For a discussion of conflict resources, see Carl Bruch and Akiva Fishman, "Institutionalizing Peacebuilding: The UNCC, Conflict Resources, and the Future of Natural Resources in Transitional Justice" in Cymie R. Payne and Peter H. Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011) 221.

<sup>13</sup> International Alert, "The Role of the Exploitation of Natural Resources in Fuelling and Prolonging Crises in Eastern DRC" (2010) para. 15 <[http://www.international-alert.org/sites/default/files/publications/Natural\\_Resources\\_Jan\\_10.pdf](http://www.international-alert.org/sites/default/files/publications/Natural_Resources_Jan_10.pdf)> (accessed 23 July 2013); Ian Fisher, "In Congo War's Wake, a Massacre of the Wildlife" *New York Times* (New York, 28 July 1999).

There are two approaches to this topic in the literature: one asks “what is moral?” while the other asks “what works?”<sup>14</sup> Deterrence, revenge, and accountability are often identified as *raisons d'être* for *jus post bellum*; while those goals may also be served, they are not the primary aim. The theoretical frame for this work is functional; justice is defined to mean minimization of destruction of human and natural communities through prevention and remediation.

The next section will first describe the environmental integrity norm and how it is applied, and then it will turn to theories of *jus post bellum* to answer two questions: how does environmental integrity fit theories of *jus post bellum*? and how do *jus post bellum* theories contribute to the norm? I conclude that *jus post bellum* theories that prioritize peacebuilding over retribution accord best with environmental integrity, in terms of explanatory power and consonance with goals.

## II. Environmental Integrity

### A. Definition and scope

This section describes briefly a normative approach that is taking shape, as evidenced by the examples described in this chapter: law and policy recognize that environmental integrity is an obligation owed to the international community, present and future generations, by states and individuals, just and unjust belligerents, civilians, and peacekeepers. Work remains to be done to describe all of its limits and characteristics, but some of its characteristics can be described. Environmental integrity recognizes human needs and reflects scientific knowledge of the “living space of [...] human beings.”<sup>15</sup> States, communities and individuals have rights to environmental integrity, though by its nature it is not an absolute right. In international law, the environment is a common concern of humanity, and as such the right may be vested in a trustee, acting on behalf of the public.<sup>16</sup> Future generations of the human species have the right to long-term care for the environment, on which their existence depends. The rights of post-conflict communities to reconstruction hinge on environmental integrity. As a legal matter it is rooted in principles of human rights, public trust,<sup>17</sup> and just war. Only rarely will

<sup>14</sup> See the seven-volume project of The Environmental Law Institute, the United Nations Environment Programme (UNEP), the University of Tokyo, and McGill University <<http://www.routledge.com/books/series/PCPNRM/>> (accessed 23 July 2013). A military handbook puts it this way, “Judge advocates [military lawyers] tend to think of the ROE [Rules of Engagement] in academic terms—definitions and rules. Soldiers tend to operationalize the materials (i.e., put the rules in terms of something that has happened or a set of facts they can visualize).” US Army Rules of Engagement Vignettes Handbook (May 2011).

<sup>15</sup> *Nuclear Weapons Advisory Opinion* (n. 1) para. 29.

<sup>16</sup> See David Caron, “The Profound Significance of the UNCC for the Environment” in Payne and Sand, (eds), *Gulf War Reparations and the UN Compensation Commission* (n. 12) 267–72 (explaining that some aspects of environmental claims are profoundly different from property claims, and that “a claims process addressing the environment inevitably seeks representation of a community’s interest in the environment”).

<sup>17</sup> The concept of public trust in the environmental context has a very different history and content from the notion of “trusteeship” that is discussed elsewhere (see e.g. Eric De Brabandere, ch. 7, this volume). It is, rather, as explained by Peter Sand, a legal doctrine that “(a) certain natural resources—regardless of their allocation to public or private uses—are defined as part of an ‘inalienable public trust’; (b) certain authorities are designated as ‘public trustees’ to guard those resources; and (c) every citizen, as beneficiary of the trust, may invoke its terms to hold the trustees accountable and to obtain judicial protection against encroachments or deterioration.” Peter H. Sand, “Public Trusteeship for the Oceans” in Tafsir Malick

criminal law be invoked on behalf of the environment; rather, strict, civil liability is preferred. It applies through all phases of armed conflict.

The international community has duties of care, restraint, assistance, mitigation, and remediation to safeguard the environment. The community has a right to environmental integrity in terms of functioning and complete environmental systems. These rights and duties together create a normative framework that provides guidance for post-conflict legal regimes.

The scope of the norm includes the positive elements of ecosystem services, non-human species, and sustainability. It also includes the negative elements of pollution and natural resource depletion. The definition of “environment” is encompassing. It is generally conceded to include natural resources such as minerals, oil and gas, agricultural land, forests, and fisheries. Human life and health; amenities, particularly cultural and religious objects and landscapes; and certain kinds of property are also generally accepted as subject to environmental damage, such as pollution, poisons, or other destructive forces. These are the elements of environment that are accounted for in the earlier legal regimes discussed below. Since then, science and economics have advanced and environment is now more often described in terms of ecosystem services, habitats, watersheds—linked living and non-living, interdependent systems. Harm to these is sometimes referred to as “pure environmental damage.”<sup>18</sup> A fairly comprehensive definition is: “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape.”<sup>19</sup>

Integrity means, simply, soundness, completeness. It is primarily analyzed in scientific terms,<sup>20</sup> not interpreted through a cultural, economic, or political lens, although these are strong influences on how differently it will be interpreted and applied. Like domestic environmental governance, it seeks to manage human activity that pollutes or erodes ecological complexity and resilience.

## **B. Environmental integrity in law and practice**

The scope of the environmental concern expressed in existing law is too restricted, incomplete, inadequately integrated into military activities, and too rarely enforced. The United Nations Environment Programme (UNEP) post-war assessments of conflict

Ndiaye, Rudiger Wolfrum, and Chie Kojima (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Thomas A. Mensah* (Martinus Nijhoff 2007). An implication of the doctrine is that compensation paid to the government (the trustee) for damage to natural resources (the corpus of the trust) may only be used for the benefit of the trust corpus. This would explain the UNCC’s Follow-up Programme, discussed below.

<sup>18</sup> Thomas A. Mensah, “Scope of Definition of Environmental Damage” in Alexandre Timoshenko (ed.), *Liability and Compensation for Environmental Damage* (UNEP 1998) 61.

<sup>19</sup> Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (1993) Art. 2(10).

<sup>20</sup> This is translated into operational terms in various international agreements. For example, the secretariat of the Convention on Wetlands of International Importance (the Ramsar Convention) summarizes the detailed requirements of the convention as “the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development” <<http://www.ramsar.org>> (accessed 23 July 2013).

zones<sup>21</sup> and the United Nations Compensation Commission (UNCC) reports detailing environmental damage awards from the 1990–91 Gulf War<sup>22</sup> provide a picture of harms that are left from land and marine mines, targeting decisions, choice of weapons, other tactical decisions (other military engagements), and normal operations. Farther consequences of armed conflict that result from non-military actors are not addressed by humanitarian law, but include serious impacts from refugees and the failure of environmental regulation and management systems.<sup>23</sup>

Effective realization of a strong environmental integrity norm would close the gaps in current “black letter” law, legal rules, and institutions to enforce violations of the law of war affecting the environment more stringently and consistently. Tools include civil and criminal sanctions where appropriate; integration into military practice so that harm is more likely to be avoided; and remediation of environmental damage that would violate international peacetime standards as part of the post-conflict legal regime. Existing law provides some of what is required, as discussed below. It falls particularly short in defining the threshold of excessive damage and in failing to require assessment and response actions as soon as reasonably feasible after damage has occurred. The latter is a lesson from the Gulf War experience that was repeatedly remarked on by scientists and lawyers who worked with that environmental damage during the UNCC proceedings.<sup>24</sup>

### Jus ad bellum *and* post bellum *reparations*

The legal consequences for beginning a war unlawfully may be visited on the unjust belligerent after conflict. Such unjust belligerents, even if they respect *jus in bello*, may nonetheless be liable for foreseeable environmental damage under the law of state responsibility. The basic justice theory that requires a wrongdoer to compensate the victim of wrongful action finds expression in international law in this doctrine.<sup>25</sup> Indeed, “[t]he mixed commission, to many international lawyers, is synonymous with the origins of their discipline” and such tribunals “were significant in the development of

<sup>21</sup> UNEP, *UNEP in Iraq: Post-Conflict Assessment, Clean-up and Reconstruction* (UNEP 2007) (UNEP *Iraq Assessment*).

<sup>22</sup> UNCC, “Report and recommendations made by the Panel of Commissioners concerning the second instalment of ‘F4’ claims” (3 October 2002) UN Doc. S/AC.26/2002/26; “Report and recommendations made by the Panel of Commissioners concerning the third instalment of ‘F4’ claims” (18 December 2003) UN Doc. S/AC.26/2003/31; “Report and recommendations made by the Panel of Commissioners concerning part one of the fourth instalment of ‘F4’ claims” (9 December 2004) UN Doc. S/AC.26/2004/16; “Report and recommendations made by the Panel of Commissioners concerning part two of the fourth instalment of ‘F4’ claims” (9 December 2004) UN Doc. S/AC.26/2004/17; “Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of ‘F4’ claims” (30 June 2005) UN Doc. S/AC.26/2005/10.

<sup>23</sup> UNEP *Iraq Assessment* (n. 21); UNCC, “Report and recommendations made by the Panel of Commissioners concerning part one of the fourth instalment of ‘F4’ claims” (9 December 2004) UN Doc. S/AC.26/2004/16, paras 103–55.

<sup>24</sup> See e.g. Michael Huguenin et al., “Assessment and Valuation of Damage to the Environment” in Payne and Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (n. 12) 92 (urging damage assessment in the immediate aftermath of the conflict).

<sup>25</sup> ILC, “Report of the International Law Commission on the Work of its 53rd Session” (23 April–1 June and 2 July–10 August 2001) UN Doc. A/56/10 (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries).

the rules of state responsibility.”<sup>26</sup> When a state breaches an international obligation to other nations without a valid excuse, its responsibility is engaged. So, for example, a state that attacks its neighbor breaches the prohibition on aggressive war; without an acceptable excuse such as self-defense, state responsibility requires that the wrongdoer provide reparations. They may be: (1) satisfaction, which means acknowledgement of the wrong by the wrongdoer; (2) restitution of assets that can be returned, such as land or goods; and (3) compensation in the form of money paid, in principle, to restore the victim to the condition in which it would have been had the wrongdoing not occurred.<sup>27</sup> Compensation is the form of reparation that contributes most directly to environmental integrity because it provides funds to pay for environmental remediation.<sup>28</sup>

Among the recent successors to those bodies is the Eritrea-Ethiopia Claims Commission, established by a treaty between the belligerents. Its mandate was to settle all claims for loss, damage or injury of either government or their nationals.<sup>29</sup> Presumably the broad scope of the Commission’s mandate would have allowed for a variety of environmental claims, but the opportunity was neglected. Ethiopia claimed compensation for losses of gum Arabic and resin plants, and damage to terraces in the Tigray region for a value of approximately US\$1 billion;<sup>30</sup> and for loss of wildlife. It failed to provide evidence of harm beyond the claim forms, with no details and no supporting evidence, and the Commission rejected the claims on that basis; the wildlife claim was withdrawn.

While in the past reparations were more likely to compensate lost commodities or real property, such as agricultural resources, rather than pure environmental losses such as wildlife,<sup>31</sup> the UNCC is an illustration of modern practice that includes non-market environmental and natural resource damage<sup>32</sup> and costs incurred by third party states to assist in responding to environmental emergencies<sup>33</sup> as compensable losses. Complex claims with serious financial consequences and opportunities for post-conflict environmental recovery resulted from Iraq’s 1990 invasion of Kuwait. The United Nations Security Council used its authority under Chapter VII of the UN Charter to create an institution, the UNCC, that would process and pay claims for compensation against

<sup>26</sup> Sean D. Murphy, Won Kidane, and Thomas R. Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commission* (Oxford University Press 2013) xv.

<sup>27</sup> David Bederman, “Historic analogues of the UNCC” in Richard B. Lillich (ed.), *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (Transnational Publishers 1995); Margery M. Whiteman, *Damages in International Law* (US Government Printing Office 1937).

<sup>28</sup> The Permanent Court of International Justice articulated the standard as “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” *Case Concerning the Factory at Chorzów (Germany v. Poland)* (Merits) PCIJ Rep Series A No. 17, 47.

<sup>29</sup> Agreement Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (Eritrea-Ethiopia) (adopted and entered into force 12 December 2000) 2138 UNTS 94, reprinted in 40 ILM 260.

<sup>30</sup> Murphy, Kidane, and Snider, *Litigating War* (n. 26) 146.

<sup>31</sup> Bruch and Fishman, “Institutionalizing Peacebuilding” (n. 12).

<sup>32</sup> UNCC, “Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of ‘F4’ claims” (n. 22) paras 52–8; José R. Allen, “Points of Law” in Payne and Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (n. 12) 155; Peter H. Sand, “Environmental Principles Applied” in Payne and Sand (n. 12) 180–4.

<sup>33</sup> Sand, “Environmental Principles Applied” (n. 32) 185–6.



Iraq.<sup>34</sup> The legal basis for Iraq's liability was its breach of its international responsibility to refrain from the use of force against another state; the remedy was financial compensation, as provided by state responsibility. For the first time in such proceedings, the Security Council included "environmental damage and the depletion of natural resources" as heads of damage. Iraq eventually paid over US\$5.2 billion for assessment, response and remediation costs, damage to public health, and lost environmental resources.<sup>35</sup> This, and compensation for other claims from individuals, corporations, and states, was paid by Iraq from a percentage of its oil revenues.

### Jus in bello

The distinction between lawful and unlawful acts in Iraq's conduct of the war was not determinative of its liability for the UNCC,<sup>36</sup> but in other conflicts the *jus in bello* will matter.<sup>37</sup> Humanitarian, military, and criminal law prohibit very severe environmental harm, but fall far short of what is needed to preserve functioning environmental systems in accord with the right to environmental integrity. The limits on what is considered lawful in armed conflict will influence the sanctions imposed *post bellum*, and the ability of post-conflict societies to reconstruct their economies and communities.

Wanton attacks on food and water supplies, and scientific, cultural and educational sites and objects, are prohibited by customary principles of necessity, proportionality and military purpose<sup>38</sup> and treaty rules intended to protect civilians may be interpreted to extend to the environment, with limited application to date.<sup>39</sup>

Two treaties that specifically refer to the environment have not proved useful and may be problematic.<sup>40</sup> Additional Protocol I to the 1949 Geneva Conventions prohibits means and methods of warfare that are intended to cause "widespread, long-term and severe damage" to the natural environment, and reprisal attacks against the environment.<sup>41</sup>

<sup>34</sup> Cymie R. Payne, "The UNCC Program: Environmental Claims in Context" in Payne and Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (n. 12) 7–10.

<sup>35</sup> Payne, "The UNCC Program: Environmental Claims in Context" (n. 34) 2.

<sup>36</sup> UNSC Res. 687 (3 April 1991) UN Doc. S/RES/687, para. 16, states that Iraq "is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources [...] as a result of Iraq's unlawful invasion and occupation of Kuwait." See, generally, Payne, "The UNCC Program: Environmental Claims in Context" (n. 34).

<sup>37</sup> See Stahn, "'Jus ad Bellum,' 'Jus in Bello'... 'Jus Post Bellum'" (n. 3) 925–6 (discussing the nexus between *jus ad bellum* and *jus in bello*).

<sup>38</sup> Francis Lieber, Instructions for the Government of Armies of the United States in the Field (24 April 1863) Art. 14 <<http://www.icrc.org/ihl/INTRO/110>> (accessed 31 May 2013).

<sup>39</sup> UNEP (Elizabeth Maruma Mrema, Carl Bruch, and Jordan Diamond), *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (UNEP 2009) section 2.

<sup>40</sup> Erik V. Koppe argues that "a new fundamental principle of the law of armed conflict must be induced" from Additional Protocol I, which he proposes should be called the principle of "ambituity." Erik V. Koppe, "The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict" (2013) 82 *Nordic Journal of International Law* 53.

<sup>41</sup> Additional Protocol I Relating to the Protection of the Victims of International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1979) 1125 UNTS 3, reprinted in 16 ILM 1391, Arts 35(1), (3), 55.

The Convention on Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)<sup>42</sup> echoes Additional Protocol I's threshold for damage, "widespread, long lasting or severe effects." This threshold reflects limited appreciation of the complexity of environmental systems. The UNCC, on the other hand, recognized that:

[...] it is appropriate to have regard to the extent of the damage involved. [...] Other factors, such as the location and nature of the damage and its actual or potential effects on the environment may also be relevant. Thus, for example, where damage that might otherwise be characterized as 'insignificant' is caused to an area of special ecological sensitivity, or where the damage, in conjunction with other factors, poses a risk of further or more serious environmental harm, it may not be unreasonable to take remediation measures in order to prevent or minimize potential additional damage.

UNEP has also criticized these criteria as both too stringent and too imprecise.<sup>43</sup> The International Committee of the Red Cross finds that customary law prohibits destruction of any part of the natural environment that is not a military objective.<sup>44</sup> This qualification so limits the treaties' application that some scholars thought that these agreements would not have prohibited Iraq's environmental assaults had Iraq been a party;<sup>45</sup> and the Committee advising the International Criminal Tribunal for the former Yugoslavia Prosecutor ("ICTY advisory Committee") decided that "the environmental damage caused during the NATO bombing campaign does not reach the Additional Protocol I threshold."<sup>46</sup>

Another fundamental weakness in the implementation of the current legal regime was exposed when the ICTY advisory Committee prefaced this conclusion with a statement that it suffered a lack of reliable information about the present and long-term effects of "contamination" from the conflict.<sup>47</sup> In the post-conflict period, assessment of the extent and cause of environmental damage must be higher on the priority list so that losses can be reduced by rapid response actions and so that sanctions can be appropriately applied.

International criminal law appropriately makes intentional, severe violations of the environmental integrity norm a war crime. Here, again, environmental integrity demands a standard for harm that is better aligned with scientific knowledge about the environment. The Rome Statute, Article 8(b)(iv), defines an attack that is intentionally launched, knowing that it will cause "widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" as a war crime within the jurisdiction of the International Criminal Court (ICC). Taken seriously by the ICC Prosecutor and charged where appropriate and applied with an appreciation of the best contemporary

<sup>42</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151, reprinted in 16 ILM 88.

<sup>43</sup> UNEP, *Protecting the Environment During Armed Conflict* (n. 39) 11.

<sup>44</sup> ICRC (Jean-Marie Henckaerts & Louise Doswald-Beck, eds.) 2005. *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press) Rule 43, see also Rules 44, 45.

<sup>45</sup> UNEP, *Protecting the Environment During Armed Conflict* (n. 39) 8; cf. Allen, "Points of Law" (n. 32) 156.

<sup>46</sup> Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (ICTY Committee), "Final Report to the Prosecutor" (13 June 2000) paras 14–25 (applying law of armed conflict principles of necessity and proportionality) <[http://www.icty.org/x/file/About/OTP/otp\\_report\\_nato\\_bombing\\_en.pdf](http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf)> (accessed 24 July 2013).

<sup>47</sup> ICTY Committee (n. 45) paras 16–17.

scientific understanding of which impacts are severe, Article 8(b)(iv) is a useful and necessary component of the sanctions for harm to the environment and should be considered part of *jus post bellum*.

However, the threshold criteria are the same and are again inadequate. Though not included explicitly as an element of jurisdiction in the statute of the International Criminal Tribunal for the former Yugoslavia, the Committee advising its Prosecutor evaluated liability for environmental damage from the NATO bombing of Kosovo; as noted above, it recommended against charging it as a crime.<sup>48</sup> At the time of the 1990–91 Gulf War there were advocates of bringing such charges against Saddam Hussein and other Iraqi officials based on the “environmental terror” as well as “the rape and pillage of Kuwait;”<sup>49</sup> but the state responsibility approach was chosen instead. In both these cases, we have seen that experts believed the environmental damage would not meet the criteria of “widespread, long-term and/or severe.”

The last category of potential liability is not addressed by the law of war, leaving a question: what environmental liability flows from environmentally damaging actions of a belligerent that embarked on armed conflict legally and has acted in compliance with the canon of conventions and customary international law applicable to armed conflict? It scarcely needs to be said that war is likely to have collateral impacts on the environment that fall roughly either into the categories of fighting or “housekeeping.” International legal instruments do not address normal operational damage to the environment that is left after hostilities cease, from sources such as the use of tracked vehicles on fragile desert surfaces; disposal of solid, toxic, and medical waste; depletion of scarce water resources; and incomplete recovery of ordnance.

Modern armed forces do show increasing concern for better management of wastes and use of resources, although it is often motivated by tactical interests: US troops have pressed concerns that exposure to toxic materials in “burn pits” is causing serious illness after they return home;<sup>50</sup> solar panels reduce the need for vulnerable supply lines to provide fossil fuel. This quote from a US field manual identifies multiple motivations:

Environmental considerations are not solely focused on protection of the environment. For example, force health protection (FHP) issues may be directly linked to operational affects [*sic*] on the environment. FHP will significantly benefit from the integration of environmental considerations in the conduct of operations. Integrating environmental considerations also sustains resources, reduces the logistics footprint, promotes positive foreign nation relations, and supports postconflict stability efforts. All of these objectives contribute to the effectiveness of the mission and, when properly integrated, serve as force multipliers rather than mission distracters.<sup>51</sup>

<sup>48</sup> ICTY Committee (n. 45). Thilo Marauhn, “Environmental Damage in Times of Armed Conflict—Not ‘Really’ a Matter of Criminal Responsibility?” (2000) 840 *International Review of the Red Cross* 1029 (criticizing the report for creating further ambiguity).

<sup>49</sup> Richard L. Berke, “After the War; Senate Urges War-Crimes Trials” *New York Times* (New York, 19 April 1991) A.8; Adam Roberts, “Failures in Protecting the Environment in the 1990–91 Gulf War” in Peter Rowe (ed.), *The Gulf War 1990–91 in International and English Law* (Routledge 1993) 146.

<sup>50</sup> IOM (n. 4).

<sup>51</sup> US Army, “Environmental Considerations in Military Operations” (16 February 2010) FM 3-34.5/MCRP 4-11B (FM 3-100.4) <[http://armypubs.army.mil/doctrine/DR\\_pubs/dr\\_a/pdf/fm3\\_34x5.pdf](http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_34x5.pdf)> (accessed 25 July 2013).

The Swedish Defence Research Agency is evaluating environmental vulnerability and considering how peacekeeping forces can minimize the “bootprint” of their operations.<sup>52</sup> This work promises to lead to eventual development of standards that strike an acceptable balance between protecting natural systems and the demands of armed conflict.

Existing peacetime law provides standards and sometimes legally binding rules. Standards for limits on pollution, land degradation, etc., can be found in the domestic law of the country where the fighting occurs. The domestic law applicable in the belligerents’ home countries may be relevant to its own personnel,<sup>53</sup> and multilateral environmental agreements (MEAs) may be indicative or legally binding.

However, the relationship between these legal regimes and the law of war is not clear, other than the provision in the rules of occupation that require the occupying power to respect “unless absolutely prevented, the laws in force in the country.”<sup>54</sup> The Vienna Convention notes the issue of whether treaties apply during conflict but declines to resolve it.<sup>55</sup> The ICJ recognized that peacetime MEAs most likely were not intended by their parties to preclude the right to self-defense; but in tension with that, the court states, “[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality;”<sup>56</sup> and state submissions to the ICJ on this point differed substantially as to whether and when environmental multilateral agreements continued to apply during armed conflict. The ILC commentary to its draft articles on effects of armed conflicts on treaties favored the presumption that MEAs continue to apply during armed conflict,<sup>57</sup> but that view did not make it into the agreed articles. That leaves clarity only for MEAs in force between the parties that are specific as to their effectiveness with respect to military activities, national security, and conflict.<sup>58</sup> As discussed below, the co-existence of the peacetime

<sup>52</sup> Annica Waleij, Timothy Bosetti, Russ Doran, and Birgitta Liljedahl, “Environmental Stewardship in Peace Operations: The Role of the Military” in Carl Bruch, William Carroll Muffet, and Sandra S. Nichols (eds), *Strengthening Post-Conflict Peacebuilding through Natural Resource Management, Vol. 6: Governance, Natural Resources, and Post-Conflict Peacebuilding* (forthcoming 2014).

<sup>53</sup> US Army (n. 50) 6-1, Appendix A (Commander’s environmental responsibilities include compliance with appropriate federal, state, and local laws and regulations; “Military facilities are subject to federal, state, local, and foreign nation environmental laws. When requirements differ, facilities should apply the most stringent regulations.”)

<sup>54</sup> Regulations concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 Consol TS 277, Art. 43.

<sup>55</sup> It states that it “shall not prejudice any question that may arise in regard to a treaty from [...] the outbreak of hostilities between States” and that it does not apply to measures taken under the UN Charter in response to an aggressor state. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 75.

<sup>56</sup> *Nuclear Weapons Advisory Opinion* (n. 1) para. 30. The Vienna Convention on the Law of Treaties (n. 54) does not resolve the question. The International Law Commission’s Draft articles on effects of armed conflicts on treaties lists environmental agreements as “treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict.” ILC, “Report of the International Law Commission on the Work of its 63rd Session” (n. 2), Annex: Indicative list of treaties referred to in Art. 7.

<sup>57</sup> ILC, “Report of the International Law Commission on the Work of its 63rd Session” (n. 2).

<sup>58</sup> For example, the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (a site threatened by armed conflict may have special protections). The Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997) UN Doc. A/RES/51/229

legal regime with the law of armed conflict is one of the conundrums that *jus post bellum* may be able to address.

Evidence that belligerents recognize the importance of ecosystem services, especially water and sanitation, is found in the practice of compensating injured states and civilians for damage, including environmental damage, caused by combat where there is no fault, or none is admitted.<sup>59</sup> For example, the United States has sometimes provided compensation payments on an ad hoc basis through various means. Sometimes the funds have been handled within the military structure,<sup>60</sup> other times outside. Both programs have occurred in the ongoing transitional period. It would be useful to investigate the extent to which these programs represent widespread practices of other nations' armed forces and the normative value that they carry for the parties on both sides of the transaction.

### III. *Jus Post Bellum* and Environmental Integrity

*Jus post bellum* is variously conceived as a "branch of the Just War tradition,"<sup>61</sup> as post-war justice,<sup>62</sup> and as a set of legal rules that are international and specific to a unique period characterized by military control of territory.<sup>63</sup> Some authors define it even more narrowly as the "law of post-war reconstruction."<sup>64</sup> Carsten Stahn's outline of the dimensions of and need for *jus post bellum* are more comprehensive, as "a body of law after conflict [that] would identify legal rules, which ought to be applied by international actors (unless an exception applies) and clarify specific legal principles, which serve as guidance in making legal policy choices in situations of transition."<sup>65</sup> Stahn intends for *jus post bellum* to recognize contemporary practice of "a pluralist and problem-solving approach to peace-making, uniting affected parties, neutral actors and private stakeholders in their efforts to restore sustainable peace;" and to clarify the obligations of states that intervene militarily.<sup>66</sup> He also suggests that greater legal coherence would result from eliding the phases of conflict that are no longer usefully

(1997) Art. 29, is merely ambiguous, stating that principles and rules of law of armed conflict apply, but not indicating whether they suspend protections in the convention or enhance them. See UNEP, *Protecting the Environment During Armed Conflict* (n. 39) section 4.2.

<sup>59</sup> For example, the US government paid US\$28 million to China as compensation for accidentally bombing the Chinese embassy in Belgrade during the NATO attack in 1998, killing embassy staff and damaging the building. "U.S. to Pay China for Bombing," *New York Times* (New York, 16 December 1999). Such payments are often *not* accompanied by an admission of fault.

<sup>60</sup> In Iraq and Afghanistan, the Commander's Emergency Response Program (CERP) was established to provide humanitarian relief and reconstruction assistance, including water and sanitation infrastructure. LTC Mark Martins, "No Small Change of Soldiering: The Commander's Emergency Response Program in Iraq and Afghanistan" in *The Army Lawyer*, US Department of the Army Pamphlet 27-50-369 (February 2004) <[http://www.loc.gov/rr/frd/Military\\_Law/pdf/02-2004.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/02-2004.pdf)> (accessed 29 April 2013). The United States initially funded the CERP with cash and other assets determined to be the property of the Iraqi government that had been hidden by certain officials. Subsequently, the US government funded it with taxpayer dollars; the first appropriation was for US\$180 million.

<sup>61</sup> Larry May, ch. 1, this volume.

<sup>62</sup> Gary J. Bass, "*Jus Post Bellum*" (2002) 32 *Philosophy & Public Affairs* 384, 385.

<sup>63</sup> Dieter Fleck, ch. 3, this volume.

<sup>64</sup> Kristen Boon, "Legislative Reform in Post-conflict Zones: *Jus Post Bellum* and the Contemporary Occupant's Law-Making Powers" (2005) 50 *McGill Law Journal* 285.

<sup>65</sup> Stahn, "*Jus ad Bellum*," "*Jus in Bello*" ... "*Jus Post Bellum*" (n. 3) 942; see also Carsten Stahn, "*Jus Post Bellum*: Mapping the Discipline(s)" (2008) 23 *American University International Law Review* 311, 332.

<sup>66</sup> Stahn, "*Jus ad Bellum*," "*Jus in Bello*" ... "*Jus Post Bellum*" (n. 3) 941-2.

sliced into a dualist system of war or peace.<sup>67</sup> Stahn's reflections on the need for *jus post bellum* have explanatory power for what we have seen is a fragmented set of legal protections for environmental integrity.

Stahn's observation that *jus post bellum* needs to address the issue of multiple sources of law that may apply at different stages and in overlapping ways is particularly useful in the context of environmental integrity.<sup>68</sup> The confusion over when and how domestic and international environmental regulation applies during conflict and in its aftermath can lead to avoidable pollution and natural resource damage. A simplistic view that would suspend peacetime environmental law for the duration of hostilities, and then snap it back into place on the signing of a peace treaty is inconsistent with legal theory and practice, as discussed previously. Yet there is not a clear understanding or consistent body of law to say what is legally required in international or internal conflicts.

Some of the base assumptions that preoccupy *jus post bellum* theorists are not apt to the experiences where environmental integrity has been tested. These theories tend to assume that the victor of a conflict will be just, which would be ideal if true. "Victor's justice" is a frequent, scathing criticism of reparations that challenges this assumption; if the defeated enemy were always the only guilty party there would be no problem. Alas, sometimes unjust aggressors win; sometimes even just victors have dirtied their hands in the course of the conflict. The difficulty is that victors are presumed to have no interest in this entire legal regime: they are unlikely to subject themselves voluntarily to judgment. That may not be entirely accurate: the unilateral reparations practice of the United States, a powerful state, can be seen as an effort to do justice; although it may be interpreted as an exercise of power by other means and the United States likely does not consider it legally mandated. In the field of environment, which is perhaps more focused on physical results than on moral and ethical concerns, the practical incentive to make the conquered land habitable and productive might predominate and make it easier for powerful states to conform their behavior to the modes of justice.

Discussions of *jus post bellum* also tend to focus on two belligerent parties and assign them roles of victor and defeated. Wars that provide recent examples of environmental integrity in action (or not so much) do not fit this pattern. The 1990–91 Gulf War left the aggressor, Iraq, defeated but in full control of its territory and the victor, Kuwait plus the Allied Coalition, facing massive reconstruction in many different states. The Eritrea-Ethiopia war had no clear victor and both states remained in control of their territories. The DRC is still struggling with conflict, and it is neither victorious nor defeated. These varied scenarios engage a multiplicity of actors in different roles, and complicate the analysis of where duties and rights lie.

Three intertwined elements of *jus post bellum* are necessary to realizing environmental integrity. One is reparations, which provide means for reconstruction, create a record of what happened, and may provide disincentive for repetition of unlawful acts. A second is collective concern, which is a basis for community action on several fronts to contribute to reconstruction of war-torn states. The third is reconstruction itself.

<sup>67</sup> Stahn, "'Jus ad Bellum,' 'Jus in Bello' ... 'Jus Post Bellum'" (n. 3) 926.

<sup>68</sup> Stahn, "'Jus ad Bellum,' 'Jus in Bello' ... 'Jus Post Bellum'" (n. 3) 926.

## A. Reparations

Reparations are a central element of *jus post bellum*, in both traditional and modern theories, although some theorists place reparations in *jus in bello*.<sup>69</sup> There is clearly a doctrinal link to *jus ad bellum* and a temporal link to *jus post bellum*. Reparations are generally determined and performed after conflict ends, but the example of US practice in Iraq and Afghanistan, mentioned above, indicate that reparations and their near relatives, *ex gratia* payments and reconstruction assistance, are part of the extended periods of occupation, reconstruction, and peacebuilding that are associated with *jus post bellum* by Stahn and others. Reparations may be between multiple parties and are equally suited to international and internal conflicts.<sup>70</sup> Innovations in the UNCC's environmental compensation practice, discussed below, emphasized the potential for reparations to contribute to peacebuilding rather than retribution and punishment. Although the principle and practice is ubiquitous, it is also a matter of discomfort: the shadow of the Treaty of Versailles looms, and mutterings of "victor's justice" are frequent—despite the successful counter-example of post-Second World War.<sup>71</sup>

Bearing in mind that prevention of environmental harm and restoration of damage are central to the environmental norm, reparations may often be justifiable and even necessary. They do not have to be crushing.<sup>72</sup> Creating a broader base of funding than single-respondent reparations would address the concerns of just war theorists about the apparent unfairness of wealthy states compelling poor states, crushed already by the burdens of war, to pay reparations and those of environmental theorists about the peripheral role assigned to environmental recovery.

Successful recovery requires early response to environmental hazards and scientifically well-founded measures for recovery. A major cause of failed environmental claims is lack of sufficient evidence of causation and quantum of damage attributable to the alleged illegal acts. Parties in fora where proof of causation is required, such as the ICJ, commissions like the UNCC, and domestic courts, would benefit from an objective, reliable source of information. This can be to the benefit of respondents as well as claimants.<sup>73</sup> But because compensation processes are slow—even the comparatively swift UNCC process took six years to review all the Gulf War claims—it has been suggested that mechanisms need to be found to allow rapid first response.<sup>74</sup> A cooperative,

<sup>69</sup> Bass, "*Jus Post Bellum*" (n. 61) 387.

<sup>70</sup> The International Law Association states that "States shall assure that victims have a right to reparation under national law" as well as under international law in Art. 13 of its "Resolution No. 2/2010 Reparation for Victims of Armed Conflict" in *Report of the Seventy-Fourth Conference of the International Law Association* (International Law Association 2010).

<sup>71</sup> Richard M. Falk, "Reparations, International Law, and Global Justice" in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press 2006) 478.

<sup>72</sup> Larry May argues that, although the practice of reparations is a principle of *jus post bellum* in the Just War tradition, it should be interpreted with the principle of proportionality, or *meionexia* and recognizing that "even the just victor may have duties of reparation to the unjust vanquished [...] crucial for reestablishing trust."

<sup>73</sup> UNCC, "Report and recommendations made by the Panel of Commissioners concerning the third instalment of 'F4' claims" (n. 22) para. 30 ("The Claimants have submitted amendments to some of the claims based on results of monitoring and assessment activities. In some cases, these amendments increase the amount of compensation claimed, while others decrease the claimed amounts").

<sup>74</sup> Huguenin et al., "Assessment and Valuation of Damage to the Environment" (n. 24) 92.

international effort to make resources immediately available could be compensated when and to the extent that at-fault states are able.

## B. Collective concern

Several theorists hint at collective responsibilities in *jus post bellum*, a position that aligns with the view that the environment is quintessentially a collective concern.<sup>75</sup> Consequently, Bass's claim that "in most cases the primary *jus post bellum* responsibility of a victorious state is to get out as soon as is possible"<sup>76</sup> is inapposite when the defeated state is unable to cope with severe environmental damage and governance failures on its own. States have a mutual concern and an obligation to the global community to care for the environment. Where the environment is damaged—species threatened by damaged habitat, air contaminated by burning toxic chemicals, watercourses fouled by failed sewage plants, or oil spills spreading toward drinking water supplies—states that are able to provide assistance for response measures appear to be encouraged to do by having their "environmental solidarity costs" compensated.<sup>77</sup>

In a practice that reflects the common concern aspect of environmental integrity, the UNCC established two programs that were innovations in reparations practice. One required oversight of long-term environmental remediation projects for which it had awarded compensation and the other engaged former enemy states to share environmental information and cooperate on restoration.<sup>78</sup> The oversight Follow-up Programme was a continuation of UNCC practice for humanitarian, corporate, and government claims programs that required governments to report whether they had transferred awards from the UNCC to the real claimants in interest.<sup>79</sup> This oversight measure was itself an innovation that is part of the general shift described by *jus post bellum* scholars to a less state-based, more law-based approach. Under the Follow-up Programme for Environmental Awards, governments that received awards for the cost of environmental remediation reported on the progress of the remediation projects to assure the UNCC Governing Council that the projects remained scientifically and financially reasonable.<sup>80</sup> This is in contrast with traditional reparations doctrine that would have allowed governments to use compensation awards as they pleased.<sup>81</sup> Like other innovations implemented by the UNCC and its environmental panel of

<sup>75</sup> Jutta Brunnée, "Common Areas, Common Heritage and Common Concern" in Daniel Bodansky, Jutta Brunnée, and Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 564–7 (explaining that where all states derive common benefits from protective action, environment is a common concern of humankind, whether the environment in question is located within or beyond national territory).

<sup>76</sup> Bass, "Jus Post Bellum" (n. 61) 412.

<sup>77</sup> UNCC, "Report and recommendations made by the Panel of Commissioners concerning the second instalment of 'F4' claims" (n. 22) paras 32–5; Sand, "Compensation for Environmental Damage from the 1991 Gulf War" (n. 10) 247.

<sup>78</sup> Cymie R. Payne, "Oversight of Environmental Awards and Regional Environmental Cooperation" in Payne and Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (n. 12).

<sup>79</sup> UNCC Governing Council, "Decision 18" (24 March 1994) UN Doc. S/AC.26/Dec.18.

<sup>80</sup> UNCC Governing Council, "Decision 258" (8 December 2005) UN Doc. S/AC.26/Dec.258.

<sup>81</sup> John R. Crook, "The UNCC and Its Critics" in Richard B. Lillich (ed.), *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (Transnational 1995) 80.



commissioners, the Follow-up Programme was based on “the common concern for the protection and conservation of the environment, and [...] obligations towards the international community and future generations.”<sup>82</sup>

### C. Reconstruction

Gary Bass argues that, for genocidal states, “*jus post bellum* must permit foreigners to interfere in the defeated country’s affairs in ways that can reasonably be expected to prevent a new outbreak of an unjust war.”<sup>83</sup> He also proposes that there should be a presumption against any right of victors to reconstruct society politically, except in cases of genocide, but sees an obligation to contribute to economic and infrastructure restoration. Environmental integrity often requires political and physical reconstruction.

An interesting question is whether a foreign victor is justified in undertaking environmental projects in the name of environmental integrity, and if so, subject to what constraints. Were the US contributions to efforts to restore the Mesopotamian Marshes in Iraq, drained by Saddam Hussein’s government in part to put pressure on Shiite “Marsh Arab” communities, a legitimate exercise of *jus post bellum*?<sup>84</sup> The 2003 US invasion not only halted the drainage program but in the following occupation supported the rehabilitation of the marshes.<sup>85</sup> How much does it matter that the re-flooding of the marshes was initiated by local water managers and the Marsh Arabs, or that outside assistance was multinational (Canada, Italy, and the United States contributed support for scientific research and monitoring; most of the work was conducted by Iraqi researchers from the University of Basrah)?<sup>86</sup> On these facts, the restoration of the Marshes was fully consistent with Bass’s additional criteria for reconstruction—participation of a broad array of governments, the citizens of the host state acting as a moral agent.

Again taking the US occupation of Iraq as an example (whether the United States is held to be a just or unjust victor), environmental reconstruction fits rationally into Bass’s requirements. Having been the agent of destruction of infrastructure and other environmental damage and interrupted the government’s environmental regulation and management,<sup>87</sup> the environmental integrity norm would require that the victor

<sup>82</sup> UNCC, “Report and recommendations made by the Panel of Commissioners concerning the third instalment of ‘F4’ claims” (n. 22) para. 42.

<sup>83</sup> Bass, “*Jus Post Bellum*” (n. 61) 396.

<sup>84</sup> Although it had not previously participated in the Convention, in 2007 Iraq designated the Hawizah Marsh in the southern part of the system as a Wetland of International Importance under the Ramsar Convention, for its unique and threatened biota.

<sup>85</sup> Curtis J. Richardson and Najah A. Hussain, “Restoring the Garden of Eden: An Ecological Assessment of the Marshes of Iraq” (American Institute of Biological Sciences 2006) 56 *BioScience* 477 <[http://dx.doi.org/10.1641/0006-3568\(2006\)56\[477:RTGOEA\]2.0.CO;2](http://dx.doi.org/10.1641/0006-3568(2006)56[477:RTGOEA]2.0.CO;2)> (accessed 25 July 2013). After a brief period of recovery, in 2004, Iran began construction of a dike that diverts water from the marshes and oil development is an additional threat.

<sup>86</sup> Richardson and Hussain, “Restoring the Garden of Eden” (n. 84) 480.

<sup>87</sup> UNEP *Iraq Assessment* (n. 21) (identifying pollution associated with power supply failures; oil-well fires; defensive oil-filled trench fires threatening public health, groundwater and soil; physical degradation of ecosystems from military vehicles, ground and air fighting; possible depleted uranium presence; looting of industrial sites and oil pipeline sabotage leading to release of serious toxic pollutants to land, air, and water; and solid waste, including military waste).

should supply emergency temporary environmental governance and restore (or help create) national governance bodies to assume responsibility for matters like municipal waste removal, environmental regulation of industry, land use decisions, and other normal activities. In a post-conflict context, it is likely that special facilities will be needed to address unusual recovery problems, especially emergency environmental assessment of reconstruction projects, de-mining, and safe disposal of ordnance and other military waste. There may be environmental disasters caused by the previous (unjust) regime that, like the Mesopotamian marshes, need immediate attention.

#### IV. Conclusion

This chapter began with two questions: whether an environmental integrity norm may provide support for a theory of *jus post bellum*, and how *jus post bellum* theory advances environmental integrity. I conclude that the investigation of these two questions is itself a useful framing tool to understand, and perhaps to improve, the layers of normative expectations, law and practice that guide belligerents and civilians in their interactions with the environment during armed conflict. There are no overarching generalizations that fit all circumstances, so I offer neither a theory of *jus post bellum* that will dictate how to satisfy normative expectations for environmental integrity, nor a theory of environmental integrity that will define *jus post bellum*: that would be too simplistic. I will offer some observations.

The first is that *jus post bellum* theories that prioritize peacebuilding over retribution accord best with environmental integrity, in terms of explanatory power and consonance with goals. The practices of legal bodies and armed forces described here show how this approach has led to implementation of environmental protection and restoration, not mere words deploring environmental destruction.

Secondly, the *jus enim naturae* (norm of environmental integrity) has been shown to incorporate law from multiple sources. Rather than narrow the sources of *jus post bellum*, it will be more productive to clarify how domestic law, environmental treaties, customary international environmental law, humanitarian law, human rights law, and international criminal law apply in times of peace, conflict, and the in-between.

Thirdly, strict time frames for a period of *jus post bellum* are of limited value. They may aid in identifying a limited number of legal obligations that are specific to the post-conflict period, but they will not contribute to the compelling concerns for environmental integrity.

Fourthly, the legal regime associated with the normative demand for environmental integrity needs to be publicized, analyzed, and integrated so that belligerents know how to conduct themselves and when issues come before courts and tribunals, claimants can make better presentation of their environmental losses, respondents can defend their actions, and judges can render well-informed decisions based on the relevant science and a clear legal framework.

## Should Rebels Be Amnestied?

*Frédéric Mégret\**

### I. Introduction

One of the most vexing issues to beset post-conflict settings is the question of what to do with former rebels. How is one to deal with those who have risen up in arms, who may have killed state soldiers and civilians in the process? In particular, should rebels be amnestied? There is certainly consensus that rebels can commit war crimes<sup>1</sup> and should be, just as the state's agents,<sup>2</sup> accountable for violations of the laws of war and other international crimes they may have committed. Here, arguments for amnesty have clearly been on the defensive for more than a decade,<sup>3</sup> reflecting a strong sense that war crimes are beyond the pale, although the debate is still alive.<sup>4</sup> It is this issue that is most often covered in the literature. But it obscures the more difficult question of how the fact of having taken up arms in itself should be treated, as well as the killing of combatants. Is rebellion to be something on which the humanitarian mind is neutral, something that it condemns, or that it applauds? What role is there for the *jus post bellum* in regulating these issues?

The scenario this chapter has in mind is one where the state has vanquished the rebel movement, or is at least in a position to decide about its fate normatively. Obviously, if the rebels win the issue will be much less complicated, as it is only to be expected that they will amnesty their own rebellion, assuming that is even legally needed. The normative context within which the argument must unfold is one in which on the one hand there is no privilege of belligerency in non-international armed conflicts, but on the other hand Protocol II encourages the granting of amnesties. It is not hard to see how the granting of such amnesties amounts analytically to something very similar to retrospectively granting a privilege of belligerency, effectively relieving rebels of their criminal responsibility. It therefore belongs to the same family of debates as whether there should be a privilege of belligerency in non-international armed conflict in the first place, or whether there is still a role for recognitions of belligerency (an issue that

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<sup>1</sup> William A. Schabas, "Punishment of Non-State Actors in Non-International Armed Conflict" (2002) 26 *Fordham International Law Journal* 913.

<sup>2</sup> Anne-Marie La Rosa and Carolin Wuerzner, "Armed Groups, Sanctions and the Implementation of International Humanitarian Law" (2008) 90 *International Review of the Red Cross* 327.

<sup>3</sup> Simon M. Meisenberg, "Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone" (2004) 86 *International Committee of the Red Cross Current Issues and Comments* 837.

<sup>4</sup> Yasmin Naqvi, "Amnesty for War Crimes: Defining the Limits of International Recognition" (2003) 85 *International Review of the Red Cross* 583; Laura M. Olson, "Provoking the Dragon on the Patio Matters of Transitional Justice: Penal Repression vs. Amnesties" (2006) 88 *International Review of the Red Cross* 275.

has garnered some recent interest),<sup>5</sup> except with a particular *post bellum* twist. But what is the logic of international law both denying the privilege during the conflict and, almost as an afterthought, nonetheless encouraging states to absolve rebels of their rebellion after the conflict? Is the taking up of arms against the sovereign in and of itself a humanitarian matter? What are its connections, if any, to the way a rebellion is waged (in violation or not of the laws of war)? What if the rebellion involved overthrowing a democratic government, or pursuing a manifestly unjust cause, not to mention had as one of its goals the commission of acts of terrorism or crimes against humanity? How does one reconcile this fact with sovereignty or the aspirations of international human rights?

This chapter will not be interested in establishing the positive law case for amnesties in non-international armed conflict as such, but rather aims to develop a better theoretical understanding of what might be the best case for international law's granting of amnesties to rebels in non-international armed conflict. In doing so, it hopes to show what can be gained by conceptualizing the *jus post bellum* as a legal regime whose specificity and usefulness lies in how it can help more dynamically combine *jus ad bellum* and *jus in bello* than is typically thought possible or wise during armed conflict. The first section outlines some of the ambiguities of the international law of amnesties for non-international armed conflict. A brief critique follows of these ambiguities as resulting from a number of unanswered theoretical dilemmas. I then examine a number of possible foundations for the duty to amnesty rebels, including both non-humanitarian and humanitarian ones, finding all to be wanting. I suggest instead, through an exploration of the foundation of the privilege of belligerency in international armed conflict, that we need to think of the privilege as consolidating a particular vision of the international as a sphere of irreducible interests in which war remains "somewhat legitimate," even in an age of *jus contra bellum*. Such reasoning is then applied to non-international armed conflicts, which are shown to be potentially and ideal-typically international. However, that minimalist political view of the privilege of belligerency fails to take into account the progresses of the *jus contra bellum*, and how it makes an automatic privilege of belligerency on both sides a tricky issue. When it comes to rebels, the granting of an amnesty should ultimately depend less on whether the rebels have succeeded in internationalizing (figuratively rather than technically speaking) their conflict with the state than on whether a non-state *jus ad bellum* can be said to exist. The chapter then briefly outlines the contours of a "right to rebel" in international law that should be relevant for deciding amnesties, alongside performance in the *jus in bello*. The conclusion is devoted to a clarification of the usefulness of this entire debate occurring within the very peculiar confines of *jus post bellum*.

Methodologically the chapter is somewhat iconoclastic, with an emphasis on identifying the "best possible moral theory" of existing international law as a dynamic and open system that is more rife with normative potentialities than its dominant positivist-formalist-technicist reading suggests. As such, the chapter also hopes to be a small contribution to bridging the gap between international humanitarian lawyers

<sup>5</sup> Rymn J. Parsons, "Combatant Immunity in Non-International Armed Conflict, Past and Future" (unpublished, 2013) available at <[http://works.bepress.com/rymn\\_parsons/3](http://works.bepress.com/rymn_parsons/3)> (accessed 3 October 2013).

and moral philosophers working in the just war tradition on the regulation of war,<sup>6</sup> and whose agendas have for too long remained insulated from each other.

## II. The Ambiguities of the Humanitarian Law of Amnesty in Non-International Armed Conflict

In international armed conflicts, the issue of amnesty between states' troops for acts of belligerency has no reason to arise: it is assumed that combatants incur no liability *ab initio*.

They are not insurgents, simply members of a state's army who benefit fully from the privilege of belligerency. According to Article 43.2 of Protocol I of the Geneva Conventions, "members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, *they have the right to participate directly in hostilities.*"<sup>7</sup> Non-international armed conflicts, in a sense, present an inverted image of this normative reality. Although combatants may be entitled to some basic humanitarian protections, they are not authorized in any sense of the term to engage in armed conflict. The combatant is a criminal, not an enemy.

This notoriously means that there is no POW status in non-international armed conflicts and that combatants can suffer the full force of the criminal law of their state. In effect, rebels are sufficiently considered combatants to be the beneficiaries of humanitarian protections, but not enough to benefit from a privilege of belligerency. Humanitarianism gains a very precarious foothold in non-international armed conflict but only at the cost of going along with states' predominant desire to not see their authority radically challenged by excluding the killing of soldiers from the ambit of criminality. The prospect of recognition of a privilege of belligerency to rebels is one that seems remote at this stage.<sup>8</sup>

The granting of an amnesty in this context is an ambiguous move, but one that could be interpreted as effectively granting rebels a partial privilege of belligerency; not, evidently, in granting them a POW status that no longer has any pertinence, but in at least helping them avoid the penal consequences of having engaged in armed rebellion against the state. It is clear, on the one hand, that there is what one might describe as a broad leaning toward leniency *vis-à-vis* both insurgents and rebels. Additional Protocol II of the Geneva Conventions (Protocol II), Article 6(5) speaks of granting the "broadest possible amnesty at the end of hostilities."<sup>9</sup> Perhaps surprisingly, the rule was adopted by consensus. It has also been found to have acquired customary status

<sup>6</sup> David Rodin and Henry Shue, *Just and Unjust Warriors: The Moral and Legal Status of Soldiers: The Moral and Legal Status of Soldiers* (Oxford University Press 2008); David Rodin, "The Ethics of War: State of the Art" (2006) 23 *Journal of Applied Philosophy* 241–6.

<sup>7</sup> My emphasis. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

<sup>8</sup> Nils Melzer, "Bolstering the Protection of Civilians in Armed Conflicts" in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 516.

<sup>9</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

by the ICRC's study on customary law,<sup>10</sup> and there is evidence of reasonably significant practice in this direction. The "Draft Model Declaration on Internal Strife" includes a similar clause as Protocol II.<sup>11</sup>

By the same token, for example, the obligation is not strictly to grant amnesties, only to "endeavor" to do so—a rather tenuous standard. In the study, the ICRC duly noted that "states are not absolutely obliged to grant an amnesty at the end of hostilities but are required to give this careful consideration and to endeavor to adopt such an amnesty."<sup>12</sup> Indeed, most of Article 6 of Protocol II that ends up encouraging amnesties is devoted to prescribing the conditions under which persons can be tried for "criminal offences relate to the armed conflict." The reception of Article 6.5 during the Geneva negotiations was characteristically lukewarm, minimizing the rigor of the obligation.<sup>13</sup> The ICRC Commentary recognizes that this is "a matter within the competence of the authorities."<sup>14</sup> Although many substantive and procedural safeguards are included, such offences are not clearly restricted to war crimes and therefore quite clearly anticipate prosecution for mere participation in hostilities. Strikingly, the Commentary to Protocol II does not highlight the quite broad range of situations in which individuals can be prosecuted. Many authors seem to entertain no doubt that rebels can be prosecuted after conflict.<sup>15</sup>

The apparent certainty about the customary nature of the obligation to "endeavor," it seems, is not matched by a very strong confidence or consensus about how far states are supposed to "endeavor." Indeed, it is very hard to see why states would want to recognize *a posteriori* the sort of privilege of belligerency that they were not willing to recognize during conflict, except that states were somehow "tricked" by Protocol II into committing themselves to granting amnesties that they would not normally consider in their interest (the record does not attest to this, and therefore one is tempted to treat Article 6.5 as not very serious or representative of states' real views on the question).

Alternatively, if one *does* think that states will and should retrospectively recognize rebels as belligerents, why then not go the whole way and insist that states recognize an actual privilege of belligerency during conflict. Why should one have to wait until after

<sup>10</sup> Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict" (2005) 87 *International Review of the Red Cross* Rule 159.

<sup>11</sup> Theodor Meron, "Draft Model Declaration on Internal Strife" (1988) 28 *International Review of the Red Cross* 59, Rule 159.

<sup>12</sup> Jean-Marie Henckaerts, Louise Doswald-Beck, and Carolin Alvermann, *Customary International Humanitarian Law: Volume 1, Rules*, vol. 1 (Cambridge University Press 2005) 611.

<sup>13</sup> See the declaration of the Canadian delegate, "Paragraph 7 was merely a recommendation, in which authorities were exhorted to grant the broadest possible amnesty to persons who had participated in the armed conflict." *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977* (Federal Political Dept 1978) vol. II. See also the declaration of the Zaire delegate ("It is in no way a binding obligation, nor even a simple obligation in the technical sense, that is, a legal bond requiring any sovereign State to amnesty") vol. VII, 105.

<sup>14</sup> Claude Pilloud, Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, *Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 4617.

<sup>15</sup> Robert Kogod Goldman, "International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua" (1987) 2 *American University Journal of International Law and Policy* 546.

an armed conflict to grant what was always seen as desirable? What kind of normative trickery is at work here? There is nothing particularly rational about the idea that states are opposed to the privilege of belligerency when it comes to conceding POW status during conflict, but will not be opposed to it when it comes to forgiving the penal consequences of having taken up arms after the conflict (if anything, one would think that the contrary should be true). I understand of course that Protocol II was the result of difficult compromises between those who would have granted the privilege to rebels and those who would not, and that it is the nature of such compromises that they are messy, but the current halfway position of international humanitarian law seems to be inherently weak normatively.

Finally, the sometimes heard argument that the distinction between international and non-international armed conflicts has been gradually reduced and that therefore the privilege of belligerency granted to combatants in international armed conflicts should naturally be extended to those in internal conflicts seems to this author to be merely an instance of rhetorical flight.<sup>16</sup> Simply because the two regimes have grown closer on some issues does not mean they should for all, especially in the face of quite strong evidence by states that they never intended to do more than consider amnesties, and never intended to divest themselves of the ability to punish those who take up arms against them.<sup>17</sup>

I conclude this first section by suggesting that the law of amnesties following non-international armed conflict remains ambiguous. The quite widespread practice of amnesties does not necessarily result from a feeling of legal compulsion. In what follows, I trace this ambiguity to a number of unsettling questions about the possible foundations of amnesties in international law.

### III. Amnesties in Non-International Armed Conflict: A Brief Critique

Beyond the law's ambiguity, three systemic normative critiques can be addressed to the idea that amnesties should be granted to rebels. First, the critique of sovereignty. Put simply, it is not clear why the state should simply forgive and forget. Those who took up arms against the state have deeply offended its public order. Historically, states have largely condemned and repressed armed violence against them from within, and one can see how a state that failed to repress such violence is one that could be seen as essentially abdicating part of its sovereignty, as not manifesting with enough vigor its aspiration to be sovereign. Treason, sedition, insurrection, and other armed subversive activities are often repressed with particular rigor, even in the presence of humanitarian

<sup>16</sup> Antonio Cassese, "Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane" in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012).

<sup>17</sup> Antonio Cassese, despite his clear inclination toward recognizing a privilege of belligerency in non-international armed conflicts, does not hesitate to draw the only conclusion possible from an examination of the practice, namely that "no customary rule has yet emerged suppressing or curtailing the freedom of every state to treat as it pleases (subject of course to the requirements of human rights law) its own nationals or any other individual on its territory participating in a civil strife," Cassese, "Should Rebels be Treated as Criminals?" (n. 16) 522.

safeguards. The Lieber Code in its days had made much of the fact that “[t]reating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly.”<sup>18</sup> Traditionally, international law would have granted considerable latitude to sovereigns to repress their subjects. If ever there was a matter that was solidly within the grasp of sovereignty, it must surely be the repression of rebellion. Given that respect for sovereignty is, all other things being equal, a significant goal for international law, it is not clear how that goal can be so easily sidestepped.

Secondly, the critique of moral hazard. The paradoxes of requiring amnesty after an armed conflict, then, can be stated as follows: it is almost as if it is those rebels whose action has been most nefarious—those who have engaged in a full-on armed conflict with the state—who are prioritized for an uncommon form of generous treatment. Knowing that they will eventually be rescued from their infamy by an amnesty that has been promised by international law, their expectation will probably be of at worst being kept in a legal limbo during the hostilities, only to eventually be pardoned (in case of defeat) by the state. Bizarrely, one might argue this creates a perverse incentive to intensify conflictuality to Protocol II level (or at least to argue that it reached that level) in order to benefit from an amnesty.<sup>19</sup> Morally speaking, it is almost impossible to understand why those engaging in the gravest type of violence against the state—those who therefore both destabilize peace, offend the state, and lead to violence in society—should receive amnesty.

Thirdly, the critique of functional specialization. The encouragement to grant amnesties is framed in an international humanitarian law treaty. But it is not clear what the connection to the humanitarian project is, as I will go on to examine. This raises the question of whether, in encouraging amnesties from a humanitarian point of view, international humanitarian law has not, in a sense, exceeded its welcome. It may be, for example, that the granting of amnesties to rebels could have consequences on other branches of the law or legal interests that are significantly broader than a conflict’s humanitarian stakes. Put simply, why should it be international law’s business how states deal with former rebels in a non-international armed conflict? In the real world, as opposed to the world of specialized professional lawyers committed to one branch of the law, the international community pursues diverse goals simultaneously. All of these goals are important and, even though there may occasionally be operational trade-offs between the two, these trade-offs should ideally be minimized so that the best policy option is the one that seeks to pursue these different goals simultaneously. *Jus in bello* arguably does require a trade-off in the form of the silencing of *jus ad bellum* determinations during war for the purposes of humanitarian norm promotion. But that does not mean that *jus in bello* should absorb the entire regulation of war under the humanitarian mantel at the risk of absorbing *jus ad bellum*, or that there is

<sup>18</sup> Francis Lieber, “Instructions for the Government of Armies of the United States in the Field,” 24 April 1863 (Lieber Code) Art. 154.

<sup>19</sup> Melzer, “Bolstering the Protection of Civilians in Armed Conflicts” (n. 8) 516.



no room at all within *jus in bello* for discriminating between the justness or legality of either party's cause.<sup>20</sup>

In the sections that follow, therefore, I seek to explore a more normative line of reasoning to see how amnesties might be understood and justified by exploring several arguments that are typically made in their defense, as well as some arguments that are more implicit.

#### IV. Non-Humanitarian Foundations for Amnesties

Amnesties, of course, do not only belong to international humanitarian law, or to legal discourse for that matter. They are and have long been part of the jargon of transitions from conflict, in ways that mix peace-making, diplomatic, and political negotiations, moral and religious dimensions, as well as the operation of the justice system's criminal component. In looking at justifications of amnesties beyond the humanitarian project, one will find that some are hardly convincing, and others raise questions about why they should be cast as part of international humanitarian law.

A number of justifications of amnesties in non-international armed conflict exist that hardly seem like good candidates for the purposes of our search. For example, offers of amnesty are sometimes made by the state on paternalistic grounds, the suggestion being that those who joined the insurgency were young, did not know what they were doing, and must be brought back into the fold. As the Zairian delegate put it at the Geneva Conference:

Our vote for this provision was based [...] above all on national considerations. For we are convinced that in the interests of a young nation's unity, it is essential to establish a climate of understanding, and to encourage the widest degree of reconciliation in order to bring back into the fold those strayed members of the flock who unwittingly contribute to the destruction of their nation in order to please outsiders.<sup>21</sup>

The granting of an amnesty in such a case is given on condition that they renounce that cause and as a manifestation of the state's largesse. This much was evident in the Syrian very partial amnesty offer to insurgents of 4 November 2011, one that was not necessarily intended as a serious proposal, and was at any rate quite far from the spirit of Protocol II. In other cases, it may be rebels who, negotiating from a position of force, may be in a position to obtain an amnesty in exchange for surrendering arms. In these cases, amnesties are just part of the politics of threats and incentives, a way of breaking the solidarity of the rebel movement by hoping to encourage defections, or conversely of taking advantage of a temporary advantage against the government to seek an exit strategy. It is unclear why this should be a matter for international law to ratify and not simply a matter for the parties to negotiate, given the prevalence of force and power involved.

<sup>20</sup> For a recent and timely raising anew of this old but frequently ignored question, see Alexander Orakhelashvili, "Overlap and Convergence: The Interaction Between *Jus Ad Bellum* and *Jus in Bello*" (2007) 12 *Journal of Conflict and Security Law* 157.

<sup>21</sup> *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977* (n. 13) vol. VII, 105.

At the other end of the spectrum, the justification for obliging states to endeavor to grant amnesties might be as a form of idealistic *meionexia*, i.e. the idea that states should ask less than they could, perhaps as a manifestation of a sort of sovereign *grandeur*.<sup>22</sup> Maybe this is indeed what is required of states, and one might even argue that generosity may lay the foundations of transitional, national, or constitutional renewal. Again, however, it is far from clear what the justification for such a temperament should be, and it is certainly unclear why (not to mention whether) it should come as a matter of legal obligation. Why should states demand less than they could—both in terms of sheer national interest but also of upholding a culture of the rule of law—given what we know of the interests at stake?

Intermediary reasons for granting amnesties emphasize its role as a central element in peacemaking and reconciliation. For example, amnesties may in some cases be used strategically, including by the international community, to lure rebels out of conflict. This “carrot” conception of amnesty can be seen currently in Syria, in Somalia, in Kenya, and also earlier in Iraq, and often comes with deadlines to accept the amnesty in question. It is also generally coupled with a “stick,” such as the threat of prosecutions for those who do not surrender before a certain deadline (e.g. Sunnis in Iraq, Al-Shabaab in Kenya, the Salafist Group for Call and Combat in Algeria). Amnesties, moreover, have a central role to play in transitional processes, allowing societies to move beyond recrimination and violence, and towards reconstruction.

The commentary to Protocol II does seem to validate this purely pragmatic and peace oriented goal of Article 6.5. It states that “[t]he object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.”<sup>23</sup> However, there are several problems with such a justification. First, the idea that amnesties are an unmitigated good from the perspective of peace is hardly convincing. One might argue that amnesties precisely do not encourage peace because of the already highlighted moral hazard problem they create. Although risky, engaging in rebellion is sure to be recompensed eventually. Moreover, one can only speculate about the impact of amnesties of rebels on the rule of law and stability in the post-conflict order.

Even if encouraging amnesties generally is seen as conducive to peace, and although there is a long and distinguished tradition of emphasizing the contribution of humanitarian values to peace, Protocol II’s interest in encouraging peace measures of this sort or what might be a specifically humanitarian case for amnesties is not clear. This was essentially the opinion of Spain at the Geneva Conference, whose delegate emphasized that:

The adoption of measures of clemency in general and of an amnesty in particular is necessarily subject, as regards application, to considerations of expediency which can be neither appreciated nor foreseen by the drafters of a text like the one under consideration; for the same reasons, such measures fall within the exclusive competence of States, which, bearing always in mind the common good of the community they

<sup>22</sup> This is proposed by Larry May as a principle of justice useful for the concept of *jus post bellum*. Larry May, ch. 1, this volume.

<sup>23</sup> Pilloud et al., *Commentary on the Additional Protocols* (n. 14) 4618.

govern, can alone decide whether or not an amnesty is conducive to the restoration of public peace.<sup>24</sup>

“Legislating peace” via amnesties, in other words, sounds like a bizarre measure, and one that at any rate somewhat exceeds the humanitarian ambition.

## V. The Weakness of Humanitarian Foundations for Amnesties

To avoid simply engaging in issues that are beyond the humanitarian mandate, one should therefore ideally find arguments to the effect that amnesty has some specifically *humanitarian* rationale. Indeed, the argument is often made that the prospect of amnesties might prospectively encourage respect for the laws of war and essentially act as a second-best substitute for the granting of a privilege of belligerency. But what exactly is the nature of the link between respect for the laws of war and amnesties of rebels?

There has long been a perception that the failure to recognize a privilege of belligerency or POW status in non-international armed conflict weakens what rebels can hope to derive from it, and therefore the incentives to ultimately respect international humanitarian law. Waldemar Solf mentions the fact that “without the combatants’ privilege and prisoner of war status, there is very little incentive for insurgents to comply with them other than the realization that atrocities are politically and militarily counterproductive.”<sup>25</sup> Antonio Cassese also contended in strong terms that “rebels, knowing that in any case upon capture they will be punished not only for any war crime they may have committed but also for the simple fact of taking up arms against the government, have no incentive to comply with humanitarian law rules.”<sup>26</sup>

The argument, then, although it is rarely sketched thoroughly and with much normative sophistication, is something to the effect that rebels are more likely to behave like responsible combatants if they at least have the prospect of an amnesty in the “second round” as it were (and of course even more so if they enjoy a privilege of belligerency from the start).<sup>27</sup> *Jus post bellum* here holds up the promise of eventually obtaining what one could not achieve in the course of hostilities. Having failed to obtain recognition as belligerents during armed conflict in Protocol II, rebels can at least look forward to a happy post-conflict moment in which what states could not quite bring themselves to grant them during conflict they grudgingly concede. There

<sup>24</sup> *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977* (n. 13) vol. VII, 103.

<sup>25</sup> Waldemar A. Solf, “Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict” (1983) 13 *Georgia Journal of International and Comparative Law* 291, 292. See also Marco Sassòli, “Terrorism and War” (2006) 4 *Journal of International Criminal Justice* 959.

<sup>26</sup> Cassese, “Should Rebels be Treated as Criminals?” (n. 16) 516. See also Sandesh Sivakumaran, “Re-envisioning the International Law of Internal Armed Conflict” (2011) 22 *European Journal of International Law* 219, 245 (“immunity from prosecution is a crucial incentive for compliance with international humanitarian law”).

<sup>27</sup> Sandesh Sivakumaran, “How to Improve upon the Faulty Legal Regime of Internal Armed Conflicts” in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012).

is some evidence of this being a pregnant rationale in the literature. For example, José Doria points out that:

As common Article 3 does not confer on rebels any legal status, the only expectation and incentive that the rebels have to obey the laws of war (and provided that they really do so) is to be treated as political offenders not bandits, and to be amnestied at the end of hostilities.<sup>28</sup>

The amnesty thus exists as an incitement not to commit war crimes, in the sense that the rebels do not have everything to lose if captured or defeated.

Although this reasoning is repeated *ad nauseam* in every piece on the question, its empirical and normative basis is quite unclear and would really deserve analysis. Indeed, the very idea that the lack of a privilege of belligerency is an impediment to the enforcement of humanitarian norms, which seems so central to the demonstration,<sup>29</sup> is, I would contend, a *cliché* that needs to be questioned. The process through which this system of incentives is supposed to operate, for example, is very unclear. What does one imagine is going through the mind of the rebel—busy as he surely is planning a victory that will make all of these issues evaporate—as he plans his forthcoming military actions? In what way exactly does the prospect of very hypothetically not being prosecuted for killing state combatants then encourage him to not commit excesses against civilians? If this logic does work, it must do so only in the most indirect and symbolic psychological way, perhaps because the rebel “feels the love” of international humanitarian law a little, and will therefore make a softer target for dissemination.

Still, it should be stressed that the acts of killing combatants and non-combatants can hardly be conflated normatively, so that it is not clear how not being prosecuted for the killing of combatants would have an effect on the motivation to not target non-combatants (or, inversely, how being also prosecuted for targeting combatants would incite one to further target non-combatants). After all, regardless of whether one is prosecuted for the mere fact of participating or attacking combatants, one thing is certain—one *will* be prosecuted for war crimes targeting non-combatants, and this is surely what international humanitarian law is and should be most concerned about. I doubt that a rebel commander that is reasonably committed to not targeting civilians will, in a gesture of defiance, actually engage in such killings because he has just learned he risks prosecutions for killing combatants; and I doubt that a commander that is not committed to not targeting civilians will change his mind merely because his participation in a rebellion is portrayed in a slightly rosier light as a result of the recognition of a privilege of belligerency. This simply makes too much of issues of status and recognition in a context of breakdown of relations between the rebellion and the sovereign, where one must hope that respect for laws of war hinges on less subtle considerations.

There remains one possibility, which is little discussed in the literature. A privilege of belligerency or amnesty for acts of belligerency may make sense, again in a subtle psycho-social way, as part of non-state combatants’ relationship to state combatants. In

<sup>28</sup> José Doria, “Angola: A Case Study in the Challenges of Achieving Peace and the Question of Amnesty or Prosecution of War Crimes in Mixed Armed Conflicts” (2002) 5 *Yearbook of International Humanitarian Law* 3, 23.

<sup>29</sup> Cassese, “Should Rebels be Treated as Criminals?” (n. 16).

effect, the absence of a privilege of belligerency for rebels creates a normatively asymmetrical situation in which the rebel combatants kill state combatants illegally, but not vice versa. Specifically, this means that in that particular respect, the laws of war are *normatively*<sup>30</sup> deprived of that most indispensable of sociological and psychological substratum—reciprocity. One may think that being other combatants' normative equal under the *jus in bello* acts, all other things being equal, as an incentive to abide by the laws of war. But the concrete incidence of this situation needs to be spelled out with precision. One can imagine that a rebel commander who was infuriated upon learning that he would be held to a much harsher standard than his state counterpart would perhaps seek to kill even more state combatants. But the laws of war do not particularly seek to restrict the killing of combatants in the first place; at any rate, if the rebel combatant did have a privilege of belligerency *he could kill with even more impunity*. One might think that *not* having a privilege of belligerency is just as plausibly a constraining factor on the enemy combatant death toll: at least the rebel soldier will be aware that on each occasion s/he is committing a murder.

All in all, therefore, I find that the argument that the prospect of amnesty might induce higher compliance with international humanitarian law to be a surprisingly shaky claim when scrutinized closely and not just repeated as a mantra. The absence of a privilege of belligerency may of course make war less appealing for non-state violence entrepreneurs, but surely that is at least partly the point, and one that, all other things being equal, reasonable international humanitarian lawyers not rushing to “see war” everywhere should support, lest the privilege of belligerency be granted too easily and end up contributing to the very sort of violence that international humanitarian law is supposed to constrain. Especially in a context where more and more creativity is going into encouraging non-state actors, under the partial influence of international human rights law, to respect international humanitarian law for its own sake rather than as part of a quid pro quo for a recognition of legitimate belligerency,<sup>31</sup> one may begin to form the impression that the argument for recognition of belligerency is in fact related to a quite distinct family of motivations. Humanitarianism, as ever, can easily become part of a sophisticated apology for war.<sup>32</sup>

## VI. The Foundation of the Privilege of Belligerency in International Armed Conflict

I have argued that the case for amnestying rebels simply because of the humanitarian results it might yield reflects a rather weak viewpoint. In fact, I am not even convinced for that matter that the privilege of belligerency in *international armed conflicts*

<sup>30</sup> When it comes to the targeting or killing of non-combatants, reciprocity may be lacking in practice, but at least Protocol II obligates both parties to essentially the same standards, so that reciprocity is at least theoretically possible.

<sup>31</sup> Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law” (2010) 1 *Journal of International Humanitarian Legal Studies* 5.

<sup>32</sup> Frédéric Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’” in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press 2006).

follows strictly from the needs of boosting humanitarian compliance. Again, why would combatants in an international armed conflict simply be encouraged to kill fewer civilians because they are not prosecuted for killing combatants? One simply does not follow from the other. Perhaps startlingly, the privilege of belligerency for illegal/unjust warriors could be taken away from the laws of war without them *normatively*<sup>33</sup> falling apart systemically. In that respect, this chapter's efforts to understand the question of amnesty in non-international armed conflict can also help shed light on the inclusion of the privilege of belligerency in international ones.

I do believe, however, that the key to understanding the normative foundation of the privilege of belligerency (and conversely why it is denied in non-international armed conflict save indirectly and hesitantly via the possibility of amnesty) lies in a better understanding of its essence in international armed conflicts, beyond its weak instrumental rationalizations. This section will therefore advance the notion that the privilege of belligerency in international armed conflicts is less reflective of peace or humanitarian concerns than it is, fundamentally, a function of continued international legal tolerance for war as an institution of international society. Conversely, the denial of a privilege of belligerency to rebels reflects the rather lesser esteem in which rebellion as a form of political violence is held. The argument then is that the privilege of belligerency is nothing more than the manifestation of a particular tolerance for certain forms of violence.

The starting point in assessing why a privilege of belligerency is granted in international armed conflict, fundamentally, is that war, regardless of its motivations, is considered an at least *somewhat legitimate activity*. This does not mean and is not the same as saying that war is desirable—humanitarians can lay claim to being tragic pacifists of sorts—but certainly that war is a particular social institution that is distinguishable from other types of violence that are not considered legitimate in such a manner. After all, war is *at least legitimate enough to be regulated*. As such, we can certainly distinguish it from genocide or terrorism, which are *ipso facto* illegitimate. The way we know war occupies this intermediary and rather unique position is that it would be meaningless and shocking to say something to the effect that “genocide is illegal but if one does engage in it then one should do so in such or such humane way.” Genocide is genocide and is beyond redemption; war may be unjust and/or illegal but even a party that engages in it unjustly/illegally is bound to respect certain norms and partly redeems itself if it does. Indeed, much of the current understanding of international criminal law seems to be to the effect that violating the laws of war is graver than committing aggression (quite wrongly, I would contend, but this is beyond this chapter).

Why, then, is war *relatively legitimate*? One argument might be that war (understood as international conflict) is relatively more legitimate because it is conducted by responsible parties that are overall more capable of enforcing humanitarian restraints. Indeed, one motivation for considering that various forms of irregular combatants (*levée en masse*, resistance movements) should have a privilege of belligerency, traditionally, is

<sup>33</sup> Note that I am not saying here that this is a plausible scenario *politically*. I am obviously well aware—this is in fact precisely the point—that a war without a privilege of belligerency would be unacceptable to at least some states.

that they behave in a way compatible with the upholding of humanitarian law. Criteria of responsible command and willingness to implement the laws of war all go, essentially, to validating this ability, suggesting that the armed actors in question are, in fact, remarkably state-like.<sup>34</sup> Actors that do not display these characteristics, conversely, are delegitimized as participants in armed conflict.

This reflects, essentially, a statist bias in international law (non-state actors are recognized only insofar as they are willing to act like states) but also a sort of circular humanitarian logic: there are no political actors that can inherently be subjects of the laws of war, only actors who show themselves capable of upholding them. The privilege of belligerency, then, is either derivative of particular states or a result of a strong family resemblance with them. This is why when Antonio Cassese seeks to prescribe the conditions that rebels would need to follow to be granted the privilege of belligerency, he naturally falls back on the tried and tested formula experimented to deal with non-state actors in international armed conflicts from the late nineteenth century onwards.<sup>35</sup>

However, there are several problems with this idea that it is greater propensity to promote humanitarian law that characterizes the ability to be covered by the privilege of belligerency. For one thing, there is something a bit strange about the notion that legitimate participation in war is based not on some antecedent theory of the right to participate but on expected performance in the actual waging of war, almost as if the only validating criterion for war were that it is humanitarian. If humanitarian performance is really the test, then why do troops (state or non-state) not lose their privilege of belligerency when they start trampling the laws of war? And if expected performance under the *jus in bello* is the criterion for just participation in war, then do we not have plenty of reason based on the experience of the last century to think that states are hardly paragons of humanitarian virtue? Moreover, if humanitarianism was the only criterion, why are members of the armed forces *ipso facto* considered combatants but irregulars only to the extent that they have a certain humanitarian potential?

The state-like element does capture something, but it is arguably not greater propensity to respect humanitarian law. Rather, the privilege of belligerency is a way of dignifying violence between *public* actors, and those private actors (individual soldiers) that participate in war only within that public framework, and as such a manifestation of international law's fundamental *publicness*. In other words, my suggestion is that the privilege of belligerency, even though it has some evident *jus in bello* implications and may even be loosely tied in practice to an ability to respect it—and herein lies the confusion—in *fact* has a *jus ad bellum* or *quasi-jus ad bellum* foundation, to the effect that war is legitimate insofar as it is engaged in by states or entities close to them.<sup>36</sup> It thus quintessentially manifests first-order rules about who can legitimately participate in armed conflict that are logically antecedent—and in a way much more powerful—to second-order rules outlining further conditions for the use of force by these legitimate actors.

<sup>34</sup> Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art. 4(2).

<sup>35</sup> Cassese, "Should Rebels be Treated as Criminals?" (n. 16).

<sup>36</sup> On the *jus in bello* thus encapsulating a minimum *jus ad bellum* component in at least prescribing "who can do war," see Frédéric Mégret, "Jus In Bello as Jus Ad Bellum" (2006) 100 *American Society of International Law Proceedings* 121.

The privilege of belligerency happens to have found its way (or at least is understood as such) in laws of war instruments but it hardly expresses a specific law of war ethos, and is better seen as a somewhat baroque ornamental addition to the edifice of the Geneva Conventions. It reflects the fact that even though one party may be engaged in an unjust/illegal war (under the just war tradition/a collective security system) and therefore be in a less legitimate/legal position than the other, *even that party is still in a more legitimate/legal position than a non-state actor* (not associated with a state) engaged in violence. This bias in favor of the state (reflected in the decreasing demands to qualify as legitimate combatant the closer one gets to the state) is in a sense nothing more than that, part of an international consolidation of the monopoly over legitimate force in international relations and domestically,<sup>37</sup> beyond which one would be hard pressed to find much primary moral justification.<sup>38</sup>

From there, the only quasi-moral<sup>39</sup> justification for at least the origins of the privilege of belligerency that one can conjure up is international law's traditional skepticism about the merits of just war theory and the fear that it might not provide much of an incontrovertible criterion to assess who is on the right side of war and who is not. In the context of a very decentralized and polarized anarchic world that fails to agree on some overarching criterion of just/unjust war, then, it is only fair that combatants should be given the benefit of the doubt and not be punished for engaging in an activity which international law cannot resolutely find in itself to condemn and which they, at any rate, only secondarily engage in. The privilege of belligerency, therefore, is a manifestation and indeed a survival of an era which fundamentally bowed to the reality of a particularly muscular notion of sovereigns "agreeing to disagree," occasionally by force, in a morally irreducible world. As such, it bears little relation to *jus in bello*, and is simply a manifestation of the overarching ethos of public international law.

Now one would think that in an era of *jus contra bellum*—which is supposed to have provided much clearer criteria to assess legal or illegal wars—the idea of the privilege of belligerency would have been rethought. However, it seems it was just carried over into the Geneva Conventions and Protocol I without much reconsideration. Today, it is most likely to be rationalized when it comes to combatants in accordance with the post-Nuremberg "Generals" case which found that soldiers in an aggressing army retained their privilege of belligerency. Although this reasoning is sometimes justified by the idea that at least lowly combatants cannot engage in aggression, that is a fairly weak argument (what if for example they *intend* to engage in aggression). Rather, the fact that the privilege of belligerency applies even to unjust/illegal warriors follows from a desire to maintain war's status as a practicable activity, unencumbered by considerations of morality or validity.

<sup>37</sup> Mégret Frédéric, "Theorizing International Humanitarian Law" in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2014).

<sup>38</sup> Frédéric Mégret, "L'étatisme spécifique du droit international" (2012) 24 *Revue québécoise de droit international* 105.

<sup>39</sup> I say quasi-moral because it in a sense only expresses (morally, as it were) the moral limitations of the international world.



## VII. Extending the Privilege of Belligerency to Rebels by Analogy?

That the privilege of belligerency, if a leftover from an age arch-bent on preserving the dignity of the state, then, accounts for why it is unlikely to be extended to rebels fighting in non-international armed conflicts. This should come as no surprise—it is after all the conventional story that states are simply manifesting their sovereignty in denying the privilege of belligerency to non-state actors, which they do not and will not recognize as their equals. The only route by which the privilege of belligerency might be recognized (or an amnesty granted) in a non-international armed conflict is if such a conflict resembles an international one to such a degree that this reality can no longer be denied.

The view has long been held, at least for the purposes of finding certain humanitarian constraints applicable, that some domestic armed conflicts so approximate the normative conditions of international armed conflicts that they in effect should be treated like them.<sup>40</sup> To the extent that a rebel group manages to behave like a state—seizing territory, launching sustained military operations, etc.—this situation drives a fundamental wedge within the state such that the internal effectively becomes a manifestation of the international and is reconfigured normatively by it. Concretely, of course, this may be reinforced by the fact that the rebels are being recognized externally as alternative or competing sovereigns. But what matters is the more essential fact that the rebel group, in effectively breaking the challenged state's monopoly on the legitimate use of force, forcefully breaks apart the unity of the sovereign. Its ability to construe the situation as one that is fundamentally domestic and should therefore entitle it to the full extent of its repressive powers is thus rendered moot. So, for example, one might argue that the situation in Syria in 2012–13 is one that the Syrian state can no longer truly describe as ideal-typically internal—even though it occurs within the borders and among the peoples of a recognized state under public international law—because Syria's sovereignty on the territory is no longer exclusive.

This view is, in fact, quite widely shared in the classical expositions of the normative nature of civil wars that emphasize how little some may differ from actual international conflicts. Although the argument is principally about why the laws of war broadly speaking should apply, it can also be considered to illustrate the proposition that the regime applicable to combatants should include a privilege of belligerency. The author who is most telling on this issue is no other than Vattel, who argued that:

A civil war breaks the bands of society and government, or, at least, suspends their force and effect: it produces in the nation two independent parties, who consider each

<sup>40</sup> Note that the argument is not the same as saying that the legal regimes applicable to international and non-international armed conflicts are in and of themselves converging, or that both international and non-international armed conflicts may involve non-state actors who are superficially difficult to distinguish on the surface in terms of their methods (e.g. how does one distinguish the Revolutionary Armed Forces of Colombia (FARC) and a national liberation movement, even though the two are fundamentally treated differently), except by looking at context. Rather, the argument is that some, perhaps even all, non-international armed conflicts of a certain intensity ideal-typically approximate conditions of internationalization.

other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Though one of the parties may have been to blame in breaking the unity of the state and resisting the lawful authority, they are not the less divided in fact. Besides, who shall judge them? who shall pronounce on which side the right or the wrong lies? On earth they have no common superior. They stand therefore in precisely the same predicament as two nations, who engage in a contest and, being unable to come to an agreement, have recourse to arms. [...] When the nation is divided into two absolutely independent parties, who acknowledge no common superior, the State is broken up and war between the two parties falls, in all respects, in the class of public war between two different Nations.<sup>41</sup>

The “rebel as criminal,” then, does become the “rebel as enemy,” one with whom one “agrees to disagree” rather than punish, and which one ultimately treats as one’s equal.

Why international and civil wars should be treated differently despite this forceful reasoning, then, has less to do with some incontrovertible feature than, presumably, with the continued ability of states at the helm of the laws of war’s formulation to deny in broad terms *ex ante* in a diplomatic conference such as that from 1974 to 1977 what they probably can no longer deny when confronted with an effective territorial or governance breakup by rebels challenging their hold on a country. This would account for the fact that reactions to Article 6.5 were so cautious and negative in 1977, yet that the practice of granting amnesties to rebels is fairly widespread, in ways that suggest a deeper normative mooring. State reluctance to recognize *vis-à-vis* themselves that they may be involved in profoundly divisive struggles ultimately must eventually bow to that reality when it manifests itself and when its recognition may be precisely one of the conditions of peace and reunification of the polity.

### VIII. The Problem With the Privilege of Belligerency in an Age of *Jus Contra Bellum*

Yet there is another normative element at work here. The recognition of a privilege of belligerency in international or, by analogy, non-international armed conflicts based on a pure perception of the pluralist irreducibility of the parties involved is only so strong as a society’s concept of the *jus ad bellum* is weak. In a system that stands to prioritize the fight against unjust or illegal uses of force, then the granting of a privilege of belligerency to a state in an international armed conflict simply because it is a state or to a rebel group in a non-international armed conflict simply because it approximates a state would appear as a sort of normative capitulation. It is as if the *jus in bello* conspired to undermine some of the strictures of the *jus ad bellum*.

Surely the fact that in international armed conflict combatants are granted a privilege of belligerency automatically, even in cases where they may have been fully aware that they were involved in an unjust or illegal war (not to mention even in cases where they commit war crimes systematically), should make that privilege seem less legitimate. Indeed, moral theorists—rarely read as they may be by humanitarian lawyers—have

<sup>41</sup> Emer de Vattel et al., *Le droit des gens*, vol nouv éd (Librairie de Guillaumin et cie 1863) paras 293–5.

now for more than a decade been debunking the idea that the privilege of belligerency can be justified under a primary moral theory of war, at least when it comes to the party that is on the unjust/illegal side of an armed conflict.<sup>42</sup> Amongst international lawyers, the notion that the privilege of belligerency and the *jus contra bellum* are in tension has witnessed renewed interest,<sup>43</sup> although no one to my knowledge has gone as far as saying that the privilege of belligerency is part of the problem (given its undeniable status in positive international law).

The question, then, is whether there is anything in international law that would allow us to consider the conferral of a privilege of belligerency to rebels as more or less legitimate on the basis of an evaluation of the justness of their rebellion in the first place, and not simply on the basis of whether a rebel group can put the international community before the *fait accompli* of having violently carved for itself a foothold in the world of states. There is certainly no particular moral significance—from a fundamental *jus ad bellum* point of view—to the fact of having control of territory and an ability to launch sustained military operations through sheer force of arms. This begs the question of course of whether there is such a thing as a non-state *jus ad bellum* in non-international armed conflict, but one can note from the outset that if there is such a thing, then the granting of a privilege of belligerency to rebels should ultimately hinge more on how said rebels fulfill its criteria than the poverty of any notion of affectivity.

In fact, it is worth noting that in granting a privilege of belligerency, for example in international armed conflicts, the laws of war arguably subtly undermine *jus ad bellum*. For if war is truly unjust/illegal, and at least in some cases individual combatants know that it is, then their privilege of belligerency is at the very least an immoral privilege (notwithstanding that it is clearly a legal one), and one that does not particularly incite them to compute the consequences of their acts. In an age in which war is no longer seen as a fatality but as a scourge to be combated, it is to be wondered how long the privilege of belligerency can continue to provide full cover to all involved in fundamentally unjust or illegal acts. International humanitarian law's encroachment on the domain of the *jus ad bellum* is all the harder to defend given that, as I have argued, the specifically humanitarian grounds why one would grant the privilege of belligerency are thin, so that its granting cannot be presented as a "*jus ad bellum* price to pay for *jus in bello* abidance" (there is, I have argued, simply no such trade-off).

## IX. Amnesties and the Possibility of a Non-State *Jus Ad Bellum*

Three things are worth noting at the outset. First, the scope of the amnesty recommended by Article 6.5 of Protocol II is in a sense very broad and covers two distinct elements, although very few authors have recognized that dimension.<sup>44</sup> On the one

<sup>42</sup> Jeff McMahan, "The Ethics of Killing in War" (2004) 114 *Ethics* 693; Jeff McMahan, "The Morality of War and the Law of War" in David Rodin and Henry Shue, *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford University Press 2010).

<sup>43</sup> Orakhelashvili, "Overlap and Convergence" (n. 20).

<sup>44</sup> Melzer, "Bolstering the Protection of Civilians in Armed Conflicts" (n. 8).

hand, the actual killing or wounding of state combatants (what is normally covered by the privilege of belligerency); on the other hand, the very taking up of arms, the “breach of the peace” element as it were. The two are quite distinct. The former is principally a humanitarian issue, although it might be recharacterized as also flowing from *jus ad bellum* considerations; the latter is more clearly a penal or *jus ad bellum* issue that bears little relation to international humanitarian law. By analogy with international armed conflicts, one could say that a high ranking official may be covered by the privilege of belligerency (so that the killing of enemy soldiers is not a crime) but not immune from prosecution when it comes to his part, as the case may be, in a war of aggression.

Secondly, in conflating the two issues and merely speaking of the granting of amnesties without further precision, Protocol II creates confusion and risks overextending its humanitarian mandate. Whilst an amnesty for killings in combat arguably falls within IHLs remit, the issue of whether the taking up of arms should be pardoned is one that is clearly beyond it. This is a bit as if Protocol I recommended a full amnesty for aggression following international armed conflicts, something that would be seen as quite awkward.<sup>45</sup> To link and absorb the issue of amnesty almost entirely within the fabric of humanitarian law is in fact to render oneself guilty of the sort of cardinal sin that humanitarians so often rightly condemn: mixing *jus in bello* and *jus ad bellum* categories in a way that needlessly overrides the priorities of the other (a bit in the way proponents of the *jus ad bellum* have at times been tempted—quite wrongly—to make the required level of respect for IHL dependent on the validity and legitimacy of one’s cause in the conflict).

Thirdly, the granting of amnesties to rebels cannot be based solely on the agnostic intuition that a rebel movement has acted in a state-like manner so that a quasi-international situation has arisen. Rather, a coherent theory of when amnesties should be granted that takes resort to (and not simply use of) violence seriously can in my view only result from a diagnosis that the insurgents have engaged in a legitimate/legal struggle under international law. That recognition can be a grudging one from the state, but it points to the fact that the state does not have the monopoly of determination of the virtue or law of resort to violence. It is under such conditions that the radical difference of view between rebels and the state can be subsumed in a broader theory of normatively desirable amnesties, because it occurs against the background of international values.

Failing that, Article 6.5 seems to be either over-inclusive or under-inclusive. It is over-inclusive to the extent that it promotes amnesty as, essentially, the default rule, when clearly some forms of rebellions should not deserve to be amnestied. It is far from clear why we should want reconciliation at any cost with those who have rebelled against the state. Why not amnesty murderers to reconcile with them if it helps public order? Do we want to reconcile with Al-Qaeda? The latest putschist generals? Would it not better serve the protection of civilians and non-combatants in the long run if insurgents were not amnestied? It is under-inclusive in that states are only required to “endeavor to grant amnesties,” when clearly some rebellions would seem to be

<sup>45</sup> It is enough, in a sense, that the privilege of belligerency in international armed conflicts may end up objectively eroding respect for *jus ad bellum*, without the laws of war in addition freeing combatants of all responsibility in the launching of an unjust or illegal war.

sufficiently meritorious that granting them an amnesty should be an obligation under international law (e.g. a rebellion to protect oneself against a genocide directed by the state that is itself carried in strict respect for the laws of war).

The reasoning, then, is that a fully articulated theory of appropriate amnesties must posit the existence or at least be heavily dependent on the existence of a theory of *jus ad rebellionem*. The absence of an international *jus ad bellum* for non-state actors is very occasionally highlighted as one of the key obstacles to the introduction of combatant privilege for non-state belligerents.<sup>46</sup> International law is classically only interested in regulating the use of force by states. Even when it comes to disciplining non-state actors for their violence, the emphasis of international criminal law is on war crimes and other excesses in the use of force rather than the legality of the use of force per se. However, that absence may be overstated, and it certainly should not be an obstacle to critical thinking about what ought to be some of the factors taken into account in assessing which rebellions ought to be worthy, via amnesties, of some sort of recognition of privileged belligerency. At any rate, a coherent theory of amnesties in non-international armed conflict must stand or fall depending on the extent to which such a body of non-state *jus ad bellum* norms can be said to exist.

## X. Just Rebellion?

Before I give some indications as to what might be a just rebellion worthy of amnesty, I should point out two contexts in international armed conflicts where, for all the professed dichotomy between *jus ad bellum* and *jus in bello*, and the insistence that the privilege of belligerency is merely a result of the latter, the moral worthiness of certain uses of force by non-state actors has traditionally been considered to warrant lenient treatment. In other words, the idea that the justness of a cause has a role in conditioning privilege of belligerency is much less anomalous than it might seem at first.

The first is the well-known case of struggles of national liberation, which became conceptualized as international armed conflicts, not as a result of some predominantly humanitarian criterion (ability to control territory, responsible command), but on account of the fundamental legitimacy with which such struggles had come to be endowed in the 1970s. In that respect, the Protocol I conferral of a privilege of belligerency to national liberation movements which is often understood as an unorthodox inclusion of *jus ad bellum* considerations in a *jus in bello* instrument is, I would suggest, not that unorthodox. One might argue that it is the blanket conferral of a privilege of belligerency to states' troops regardless of *jus ad bellum* considerations that is the oddity.

The second situation is particularly interesting because it lies somewhere at the intersection of international and non-international armed conflicts, and is that in which an insurgent movement fights an occupying power. As I have explored elsewhere,<sup>47</sup> there has long been a tradition of relative understanding for insurgents fighting occupations.

<sup>46</sup> Melzer, "Bolstering the Protection of Civilians in Armed Conflicts" (n. 8) 516.

<sup>47</sup> Frédéric Mégret, "Grandeur et déclin de l'idée de résistance à l'occupation: à propos des 'insurgés'" (2010) 24 *Revue Belge de Droit International* 105.

This used to be defended on the basis of the inevitable and praiseworthy “patriotic” reaction of the population, something that could not be entirely discouraged; today, it may be argued that resistance to an occupation that results from an illegal invasion is part of the very decentralized reaction to an illicit act (even though the occupation is “legal” from a *jus in bello* point of view). Although it does not extend to conferral of a privilege of belligerency, it does result in the laws of war in calls for indulgence.<sup>48</sup> Again, it is unclear that this indulgence can be justified on humanitarian grounds alone; rather it seems premised on the notion that there are certain uses of force against an occupying power that are legitimate or understandable enough in the circumstances to require a particular form of clemency.

This is not the place to explicit an entire theory of *jus ad rebellium*, a project that I have begun elsewhere.<sup>49</sup> I can only outline how it is plausible that such an international legal body of law does exist and some of the conditions that I think a rebellion needs to satisfy to be considered just here. The starting point is that although international law is not very loquacious on this, there must surely be cases (and there need only be one to make this chapter’s basic point) where it would not consider that a taking up of arms against the state is illegal. For the sake of argument, if a state were engaged in a genocide against its people, then armed resistance against such a genocide would most likely be considered legal.<sup>50</sup> There may be an argument that use of force ought to be allowable by non-state groups in self-defense against grave threats, in application of general principles of law recognized internationally and by analogy with the inter-state *jus ad bellum*. One might also think that there should be conditions to any such violent reaction, such that it be necessary and strictly proportional, again drawing on the more general international law on the use of force. The existence of a “right of resistance” in international law is attested directly or indirectly by General Assembly resolutions,<sup>51</sup> extradition or refugee law,<sup>52</sup> customary international law, etc.

The finding that a rebellion is just, then, should be a very significant element in deciding to amnesty those who engage in it, at the very least for the mere fact of taking up arms. A presumption that the privilege of belligerency applies should probably follow, since otherwise the law would basically discourage what it had just legitimized. It is conceivable that one would make the privilege of belligerency (or an amnesty conceding

<sup>48</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Arts 67 and 68. A further sign that the issue is very germane to the one that interests us in this chapter is the fact that proposals were made to the same effect during the negotiations of Protocol II concerning rebels, including the non-imposition of the death penalty and general penal leniency.

<sup>49</sup> Frédéric Mégret, “Le droit international peut-il être un droit de résistance? Dix conditions pour un renouveau de l’ambition normative internationale” (2008) 39 *Études Internationales* 39; Frédéric Mégret, “Civil Disobedience and International Law: Sketch for a Theoretical Argument” (2010) 46 *Canadian Yearbook of International Law* 143.

<sup>50</sup> David B. Kopel, Joanne D. Eisen, and Paul Gallant, “Is Resisting Genocide a Human Right?” (2006) 81 *Notre Dame Law Review* 1275.

<sup>51</sup> Richard A. Falk and Burns H. Weston, “The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada” (1991) 32 *Harvard International Law Journal* 129.

<sup>52</sup> Jasmine Still, “Terrorists, Freedom Fighters and Refugees: Non-Political Crimes in Article 1F (b) of the Refugee Convention” (2000) 12 *Practice* 295; Walter Kalin and Jorg Kunzli, “Article 1F (b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes” (2000) 12 *International Journal of Refugee Law* 46.

it *a posteriori*) conditional on substantial respect for the laws of war. Conversely there should be no amnesty for those who are considered under international law not to have engaged in a rebellion that can be justified. The absence of an amnesty for the taking up of arms in that case might still lead to an amnesty for the actual killing of combatants, for example as a result of a perception that notwithstanding the unjustness of the struggle it could still create conditions of quasi-internationality between sovereign and rebels; but it could also, under a strong concept of disciplining the unjust/unlawful use of force by non-state actors, lead to the denial of any such amnesty.

## XI. Conclusion

This chapter set out to investigate how the granting of amnesties to rebels who have risen against the state could possibly be justified. It found the law's ambiguity to betray a fundamental hesitation about the proper foundation of such amnesties. Neither pragmatic, peace-oriented nor humanitarian rationales for amnesties were found to be entirely cogent. As to the former, it is not clear how amnestying persons for grave and systematic violence or breaches of public order might be compatible in the long run with the rule of law and stability. As to the latter, it is unclear why the prospect of being amnestied for the killing of combatants would necessarily have an impact on restraints on violence against non-combatants (or for that matter against combatants). Looking at the foundation of the privilege of belligerency in international armed conflict for inspiration, the chapter found the state-like character of some non-state combatants is often held up as the reason why they should have such a privilege. However, this is not because state-like entities necessarily respect humanitarian law more but because they manifest the public character of a dispute and its irreducibility to the domestic (including criminal) legal order. In internationalizing the dispute, they transform the "criminal" into an "enemy" and enjoin a sort of grudging concession of equality and reciprocity. The privilege of belligerency in this context reflects a rather dim view of the possibility of enforcing a concept of just/legal war, and seems instead to let unjust/illegal combatants too easily off the hook. A proper theory of just/legal amnesty, conversely, was presented as one that would enter the difficult legal question of which rebellions more generally conform to a sort of non-state *jus ad bellum*, and would reward those that do.

In doing so the chapter hopes to have suggested one way in which the specificity and the usefulness of the *jus post bellum* notion can be conceptualized: as a place where the law of force's rigid dichotomies between *jus ad bellum* and *jus in bello*—helpful and necessary as they may be for principally humanitarian reasons in the course of conflict—are attenuated as part of a global exercise of evaluation of the legitimacy of a particular rebellion. The goal is to neither excessively legitimize rebellion under the guise of humanizing war by granting the privilege of belligerency too freely, nor excessively delegitimizing rebellion as a result of ignoring whatever claims to legitimacy/legality it may make. In particular, one can imagine that a state's reflection on whether to grant amnesty to former rebels would be informed by both a sense of whether the cause pursued was legitimate (enough) in the first place, whether it was pursued reasonably, and whether it did not involve excessive violations of the

laws of war. In that way, the appreciation of the *jus ad bellum* dimension of rebellion would also, in line with an old just war tradition, go beyond the assessment of “just cause” to compute how force was actually used in an overall retroactive evaluation of amnesty-worthiness.

This exercise of fusing the two is of course exactly the opposite of what is normally sought in this context,<sup>53</sup> but it is argued that *jus post bellum*’s own insulation from the actual, on-going practice of combat and its largely retroactive character attenuate any risk in that respect. Moreover, the issue is characteristically not one of releasing combatants from their *jus in bello* obligations, but precisely of putting in the balance how their *jus in bello* performance during conflict will weigh on their likelihood of obtaining an amnesty. It therefore arguably further constitutes them as responsible belligerents, with an eye to how the present will affect their future prospects. The fact that their *jus ad rebellium* status will also be taken into account should not be seen as detracting from their incentive to respect the laws of war, given the range of other reasons why non-state actors do and should want to respect these obligations, the uncertainty concerning that determination at some point in the future (which means that one may at any rate consider that one will win that argument). The privilege of belligerency, then, could become the crowning event in a legitimate and scrupulous rebellion after conflict, exerting a genuine pull on the behavior of rebels.

Although the lack of a systematic privilege of belligerency (or amnesty) in non-international armed conflict is frequently deplored by humanitarians on the basis of the rather unsubstantiated idea that it would maximize humanitarian safeguards, it may be something to applaud, in that it is the automatic attribution of the privilege of belligerency (as in international armed conflicts) that rewards both the deserving and the undeserving.

Perhaps more importantly, the proposal outlined in this chapter makes most sense of the idea that an amnesty that is too certain is in fact a disincentive to engage in restraint in war rather than the contrary. It is almost as if international humanitarian law plays the amnesty card too easily and too willingly, missing out on opportunities to use that card as leverage for the particular results it wants to achieve. The more or less unconditional promise of amnesty (just as the automatic recognition of a privilege of belligerency), by releasing the overall breaks on the prohibition of the use of force, might encourage conflicts. Indeed, the laws of war sometimes seem oblivious to the underhanded way in which they may occasionally perpetuate what must surely be the primary cause of violations of the laws of war: the existence of war in the first place. The benefit of, hypothetically, fewer war crimes being committed would then in all likelihood be offset by the fact that war had been objectively encouraged.

Conversely, if a rebel group knows that, as far as international law is concerned, at least, an amnesty is something that will be dependent on a host of factors linked to its performance in war, then it is reasonable to think that this prospect will have significant normative leverage both in terms of the decision to resort to violence and the way

<sup>53</sup> Melzer, “Bolstering the Protection of Civilians in Armed Conflicts” (n. 8).



in which that violence is used.<sup>54</sup> In other words, surely knowing that an amnesty will have to be “earned” rather than just thrown in automatically can have a greater impact on actual combat behavior.<sup>55</sup> Precisely because amnesties are retroactive, locating the determination of these issues after the conflict, *jus post bellum* can be a way of maximizing the incentives for respect of both *jus in bello* and *jus ad bellum*, where both too often seem to operate on the basis of broad *a priori* licenses to engage in violence.

<sup>54</sup> The interaction of peace agreements, amnesties, and respect for IHL along somewhat similar lines is the object of Priscilla Hayner, “Creating Incentives for Compliance: Between Amnesty and Criminalization” in International Institute of Humanitarian Law (ed.), *Non-state Actors and International Humanitarian Law. Organized Armed Groups: a Challenge for the 21st Century* (Franco Angeli 2010).

<sup>55</sup> The argument on the importance of certain rights and privileges being “earned” rather than inherent to a certain quality I have explored in more detail in the very different context of self-determination. See Frédéric Mégret, “The Right to Self-Determination: Earned, Not Inherent” in Fernando R. Teson (ed.), *A Theoretical Assessment of the Right to National Self-Determination* (Cambridge University Press 2014).

# Epilogue: *Jus Post Bellum*—Strategic Analysis and Future Directions

Jens Iverson, Jennifer S. Easterday, and Carsten Stahn

## I. Introduction

War does not terminate, and peace is not built, in a moral or legal vacuum. This volume has attempted to clarify and refine some of the foundational parameters of the moral and legal framework that applies during the transition from armed conflict to peace, termed by some “*jus post bellum*.” A necessary follow up question remains, however: What challenges lie ahead for this emerging concept?

Most contributors to this volume, not surprisingly, recognize a need for *jus post bellum*. Given the complexity of the issues and the relatively recent nature of the contemporary discourse on the subject, it is also unsurprising that there remains substantial disagreement about it. While some of this disagreement may turn out to be short-term productive friction, there is a distinct risk that no enduring consensus will emerge that will frame and direct scholarship and practice in this area. There also remains the significant potential for original thinking about how *jus post bellum* relates to some of the most difficult problems of contemporary international legal scholarship and practice.<sup>1</sup> As authors in this volume have noted, *jus post bellum* could strengthen and improve diverse areas of law and contemporary challenges that arise after war.

There are many other risks and benefits that arise with the concept of *jus post bellum*, some addressed by authors in this volume and others that remain unexamined. These concluding reflections address the strengths, weaknesses, opportunities, and threats of and for the concept of *jus post bellum*. This approach, modeled after what is sometimes known as SWOT analysis, is usually used for strategic planning for businesses.<sup>2</sup> This may seem like an unorthodox choice for the concluding remarks to a scholarly volume. This approach is not meant to deny the complexity of *jus post bellum*, nor should it be viewed as an attempt to understand the concept as an entrepreneurial construct.<sup>3</sup> It has the virtue of being simple to understand and given the risk that *jus post bellum* will not cohere into a consensus definition and realize its potential, something akin to strategic analysis may be useful. Applying SWOT analysis to a subject matter it was never designed for may not produce the predictable results it is known for producing in the

<sup>1</sup> For example, while a number of chapters provide original takes on material already referenced in the *jus post bellum* literature, other chapters such as the nexus between *jus post bellum* and Responsibility to Protect (Carsten Stahn, ch. 6), critical theory (Roxana Vatanparast, ch. 8), gender (Dina Francesca Haynes and Fionnuala Ní Aoláin, ch. 9), deference and subsidiarity (Kristen Boon, ch. 13) and post-occupation (Yaël Ronen, ch. 23) are wholly original.

<sup>2</sup> See e.g. David W. Pickton and Sheila Wright, “What’s SWOT in Strategic Analysis?” (1998) 7 *Strategic Change* 101. This type of analysis is not without its critics. See e.g. Terry Hill and Roy Westbrook, “SWOT Analysis: It’s Time for a Product Recall” (1997) 30 *Long Range Planning* 46.

<sup>3</sup> For an analogy of “business” and “war,” see David Parrott, *The Business of War: Military Enterprise and Military Revolution in Early Modern Europe* (Cambridge University Press 2012).

business sphere, but occasionally bringing approaches from one area and applying them to another can prove productive.

It is useful to analyze aspects of the subject across two dimensions: the internal/external dimension and the positive/negative dimension. Strengths are the internal, positive aspects of the subject. Weaknesses are the internal, negative aspects of the subject. Opportunities are the external, positive aspects of the subject. Threats are the external, negative aspects of the subject. This can be visualized in the following simple table.

	Internal	External
Positive	Strengths	Opportunities
Negative	Weaknesses	Threats

In ordinary strategic planning, the internal/external divide is relatively clear-cut, with external aspects often involving entities such as business competitors or relationships with other entities. In this case, applying SWOT to *jus post bellum*, the “external” aspects are harder to define. *Jus post bellum* will be addressed in its current form with respect to internal factors (strengths and weaknesses), with opportunities and threats (external factors) focusing on the future of the concept.<sup>4</sup>

Rather than a comprehensive review of all of the strengths, weaknesses, opportunities, and threats, the following summary will focus on key factors that are of particular importance or which might otherwise be overlooked. The strengths, weaknesses, opportunities, and threats discussed below include:

- Key strengths:
  - Broad and increasing interest
  - Solid foundation
- Key weaknesses:
  - Lack of consensus
  - Difficulties of integrating a range of sources
- Key opportunities:
  - The opportunity to clarify a range of areas of law
  - The opportunity to contribute to the establishment of just and enduring peace
- Key threats:
  - The threat of politicization
  - The threat of discouraging peace

There are certainly others that currently exist or that will emerge as the concept matures.

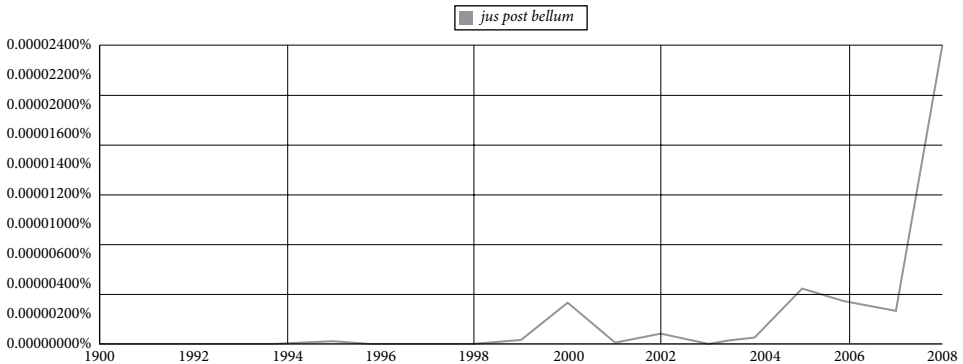
<sup>4</sup> “Opportunities” and “threats” are more future-oriented terms than “strengths” and “weaknesses,” so this modification makes some natural sense, particularly in a chapter ultimately focused on the future of the concept.

## II. Strengths, Weaknesses, Opportunities, Threats

### A. Key strengths

#### *Broad and increasing interest*

There have been an increasing number of references in published works overall. This can be illustrated in the following chart showing usage of the phrase “*jus post bellum*” in an extremely large corpus of printed work scanned by Google.<sup>5</sup>



The increasing number of references indicates that scholars’ interest in *jus post bellum* is more than superficial and is unlikely to disappear anytime soon. There is a risk, however, that with increased usage there will be an increased lack of clarity and consistency as to the meaning of the term.

In addition to increased usage of the term in general, there has recently been an increase in study of the concept in various disciplines. As reflected by the authors in this volume, philosophers, lawyers, political scientists, and those studying international relations have taken an interest in *jus post bellum*. This shows that the concept has broad reach and applicability. However, there is a risk that the multi-disciplinary study of *jus post bellum* will lack inter-disciplinary dialogue—with each field taking siloed approaches—which could confuse or fragment the concept.

#### *Foundation*

While “*jus post bellum*” as a term is of relatively recent vintage, the just war tradition and history of thought and practice with respect to the transition from armed conflict to peace is ancient.<sup>6</sup> To take just a few examples, St. Augustine, often referenced as the founder of the just war tradition, connected the goal of establishing peace to the justice of fighting a war.<sup>7</sup> Hugo Grotius, a foundational figure in international law,

<sup>5</sup> Source: Google Books Ngram Viewer, dataset 20090715 <[https://books.google.com/ngrams/graph?content=jus+post+bellum&year\\_start=1990&year\\_end=2008&corpus=0&smoothing=0&share=&direct\\_url=t1%3B%2Cjus%20post%20bellum%3B%2Cc0](https://books.google.com/ngrams/graph?content=jus+post+bellum&year_start=1990&year_end=2008&corpus=0&smoothing=0&share=&direct_url=t1%3B%2Cjus%20post%20bellum%3B%2Cc0)> (accessed 18 November 2013)

<sup>6</sup> See e.g. Larry May ch. 1, this volume.

<sup>7</sup> St. Augustine, *Concerning the City of God Against the Pagans* (originally published 426, tr. Henry Bettenson, Penguin 1984), bk 19, ch. 12, 866.

extensively discussed justice in the context of transition to peace.<sup>8</sup> Immanuel Kant stated “The Right of Nations in relation to the State of War may be divided into: (1) The Right of *going to War*; (2) Right *during War*; and (3) Right *after War*, the object of which is to constrain the nations mutually *to pass from this state of war, and to found a common Constitution establishing Perpetual Peace.*”<sup>9</sup> This idea is not new, even if the surge of scholarship on the subject is vibrant.

*Jus post bellum* is founded not only on an ancient ethical tradition, but also builds upon a modern legal tradition that lies at the heart of the international system. The development of the concepts of *jus ad bellum* and *jus in bello* and their translation into law during the twentieth and twenty-first centuries has transformed the international order. The richness, depth, and power of these “sister concepts” of *jus post bellum* mean that *jus post bellum* is not operating in a vacuum or starting from scratch, but is working within a specific context and foundation regarding the regulation of armed force.

*Jus post bellum* builds upon an extensive field of contemporary practice. *Jus post bellum* is emerging as a subject of renewed interest in the context of peacekeeping, peacebuilding, occupation, and international involvement and administration of territories such as East Timor, Bosnia and Herzegovina, and Kosovo. A nucleus of norms may be found in different areas, such as the law of peace operations,<sup>10</sup> state responsibility, responsibility of international organizations, human rights instruments, international criminal law, or the law of peace treaties.<sup>11</sup> Codifications in these areas provide an initial starting point. But in many cases further guidance must be sought in practice in order to solve specific conflicts of interests or tensions inherent in transitions from conflict to peace. This has ramifications for methodology. Some rules and principles may be derived from primary sources.<sup>12</sup> But many concepts will need to be specified inductively, i.e. through a systematic look at practice.

*Jus post bellum* has institutional implications. It touches on challenges facing international and regional organizations such as the United Nations (UN) (and its various sub-organizations, including the UN Security Council, the Peacebuilding Commission, and others) the World Bank, the Organization for Security and Co-operation in Europe (OSCE) and the Economic Community of West African States (ECOWAS), to name a few. Practitioners across a wide range of professions are beginning to recognize *jus post bellum* norms as important for decisions related to various aspects of peacebuilding practice, including political and legal strategies; cooperating with domestic civil society; taking an inclusive and context-specific approach to their activities; sequencing and prioritization; and creating and interpreting mandates. It is likely that this practical foundation will continue to develop.

<sup>8</sup> Hugo Grotius, *De Jure Praedae* (On the Law of Prize and Booty, originally published 1605, tr. by Gwladys L. Williams, Clarendon Press 1950); Hugo Grotius, *De Jure Belli Ac Pacis* (On the Law of War and Peace, originally published 1625, tr. by Francis W. Kelsey, Clarendon Press 1925).

<sup>9</sup> Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, originally published 1887, tr. W. Hastie, The Lawbook Exchange 2002) (emphasis added) 214.

<sup>10</sup> On this, see Dieter Fleck, ch. 3, this volume.

<sup>11</sup> See Christine Bell, ch. 10; and Jennifer Easterday, ch. 20, this volume.

<sup>12</sup> For a preliminary survey, see Carsten Stahn, “‘*Jus in Bello*,’ ‘*Jus ad Bellum*’ . . . ‘*Jus Post Bellum*’?: Rethinking the Conception of the Law of Armed Force” (2006) 17 *European Journal of International Law* 921, 937–41.

## B. Key weaknesses

### *Lack of consensus*

The challenges of transition from armed conflict to peace are inherently difficult, contentious, and pressing. The challenges raised in any one area—legal, moral, or practical—are complex on their own. Together, they present a thicket of interlocking problems. But as long as armed conflict exists, the challenge of ending it will be have to be faced. Ideally, it will be faced not with blindness towards criticism, but with open eyes towards the pitfalls and problems of *jus post bellum*. However, there is a lack of consensus about important aspects of the concept—between critics and supporters as well as *among* supporters of the concept.

As reflected by authors in this volume, given the complexities and difficulties highlighted, one response would be to avoid the concept or proceed with extreme caution.<sup>13</sup> Analysis and development of *jus post bellum* might be too difficult or perilous a task. It might make the post-conflict environment worse, not better. It might detract from existing frameworks, such as transitional justice, or perpetuate existing injustices, such as unequal treatment of women. One might suggest that there is no need for any effort to integrate different legal areas, varied moral considerations, and practical difficulties under a common study—that the current conceptions are sufficient, but perhaps need more enforcement.<sup>14</sup> Others might argue that the current conceptions are insufficient and should be further clarified and refined before serving as a basis for a new framework.<sup>15</sup>

Even among those who agree that the concept should be embraced—albeit with full awareness of its potential risks—there is a lack of consensus about *jus post bellum*. In at least one key aspect, the definition of *jus post bellum* is unsettled. That respect has to do with the relative importance of fixing the definition by using a timeline with sharp divisions marking the end of armed conflict, which this chapter refers to as the “temporal aspect” or “temporal dimension” of *jus post bellum*.<sup>16</sup> To be sure, the temporal aspect of *jus post bellum* is not a mere technical concern, but lies at the very heart of the concept.

However, although the temporal aspect is widely recognized as a critical one, its treatment can also be divisive amongst scholars. Some consider the temporal aspect to be determinative of all else related to the concept, and take a narrow view as to when *jus post bellum* can be said to “begin” and “end.” Others see the temporal as one of many determinative aspects of the concept, which can vary in importance depending on the context. These scholars tend to focus more on the function of *jus post bellum*, which can apply before, during, and after the conflict. This division is a risk. If there is no agreement about what is meant by “post,” the concept could quickly begin to lose value and import.

<sup>13</sup> See Robert Cryer, “Law and the *Jus Post Bellum*: Counseling Caution” in Larry May and Andrew Forchimes, *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 223.

<sup>14</sup> See Eric De Brabandere, ch. 7, this volume.

<sup>15</sup> See e.g. Fionnuala Ní Aoláin, “*Jus Post Bellum* in the Age of Terrorism: Remarks by Fionnuala Ní Aoláin” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 337.

<sup>16</sup> See Jann Kleffner, ch. 15; Rogier Bartels, ch. 16, this volume.

An example may help clarify the difference between the two approaches to *jus post bellum*. Imagine a targeting decision during an armed conflict. Specifically, imagine that a military target has been placed within an important cultural site in a manner such that attacking the target would destroy the cultural site. There is existing *jus in bello* law to help decide the legality of such an attack, but it is unclear whether *jus post bellum* would have anything to say about the question because of the definitional dichotomy between a temporal approach and a functional approach. A temporal approach would clearly rule out *jus post bellum* playing a role. Under a temporal approach, the armed conflict is ongoing, so *jus post bellum* has not begun. A primarily functional approach may allow *jus post bellum* to speak. While the normal application of *jus in bello* principles of proportionality and distinction might permit destruction of a cultural site in some instances, the simultaneous application of *jus post bellum* principles, either as a second-order method of interpretation or as a first-order application of discrete rules, might forbid the destruction of the site.

The unclear definition of *jus post bellum* might be described as its original sin. Take the following quote from Brian Orend's foundational essay, *Jus Post Bellum*.

It seems, then, that just war theorists must consider the justice not only of the resort to war in the first place, and not only of the conduct within war, once it has begun, but also of the termination phase of the war, in terms of the cessation of hostilities and the move back from war to peace. It seems, in short, that we also need to detail a set of just war norms or rules for what we might call *jus post bellum*: justice after war.<sup>17</sup>

On one hand, Orend refers to the termination phase of the war and the move back from war to peace. On the other hand, he speaks of "justice after war," which, taken literally, would not obviously include the termination of phase of the war and the move back from war to peace. This ambiguity has been there from the beginning.

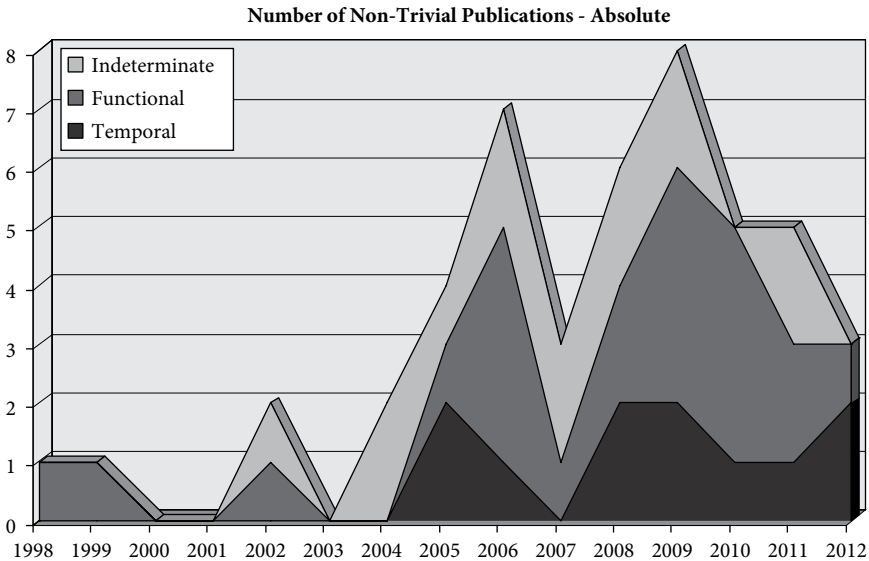
To explore this dichotomy, it is useful to point to a database of articles referencing *jus post bellum*, allowing for trends in *jus post bellum* scholarship to be analyzed systematically.<sup>18</sup> Some of this data is summarized in a graphical format below. Many of the works analyzed for this database are only ambiguously categorizable as using a temporal or functional definition of *jus post bellum*. Some are not categorizable one way or another. No work represents a Weberian "ideal type" of self-consciously using a temporal or functional definition of *jus post bellum*. However, the data shows interesting trends.

The overall findings could be summarized as follows: There has been an expansion of references to *jus post bellum* in a variety of journals. With the expansion of references, there has been an increase of ambiguity, not a consolidation around a consensus definition. The trend is generally an increase in trivial references to *jus post bellum*, in addition to a trend towards a simpler, literal temporal definition. Whether a consensus focus will be achieved, and what that consensus might be, is as yet unclear.

<sup>17</sup> Brian Orend, "Jus Post Bellum" (2000) 31 *Journal of Social Philosophy* 117, 118.

<sup>18</sup> For more information on the methods of his research, see Jens Iverson's SSRN page, <<http://ssrn.com/author=1861204>> (accessed 25 July 2013).

The following visualization excludes trivial references in the dataset:



The graph shows the early use of functional definitions, a period of indeterminate definition, and an increasing use of temporal references compared to functional approaches in 2012, with fewer indeterminate usages.

The question “what is ‘*jus post bellum*’” ultimately brings us to the question: “Why use the term ‘*jus post bellum*?’” What are those interested in the subject of *jus post bellum* are trying to accomplish? It may be that in using the term, we are merely attempting to describe what law applies during early peace. An alternative effort would be to describe and advance the law that has the function of establishing a sustainable peace. Indeed, sustainable peace is often referenced as a goal of *jus post bellum*, which inherently implies the need for a functional approach—a body of law cannot be said to be aspirational unless it is assumed to have functional components. Indeed, it could be argued that the functional is inherent in the very concept of law. The ancient maxim *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) could certainly guide the development of any new law or means of legal interpretation in this area. One can hardly think of a greater benefit than the aim of *jus post bellum*: a just and sustainable peace. It is possible, however, that focusing on the functional or aspirational aspects of *jus post bellum* will cause clarity (or at least simplicity) to suffer.

#### *Difficulties of integrating a range of sources*

Whichever definition of *jus post bellum* is used, *jus post bellum* will be informed by, operate upon, and may borrow from a diverse range of sources. While this diversity is a potential strength in many respects, the difficulty of integrating this range of sources in a coherent fashion is a serious challenge. As pointed out by Vincent Chetail (and reiterated by Dieter Fleck in this volume), post-conflict peacebuilding alone includes:



[I]nternational humanitarian law; international human rights law; international criminal law; international refugee law; international development law; international economic law; the law of international organizations; the law of international responsibility; the law relating to the peaceful settlement of disputes; treaty law which governs in particular ceasefire agreements; and the law relating to the succession of states in the case of territorial dismemberment due to conflict.<sup>19</sup>

Even beyond these diverse areas of law, *jus post bellum* can be considered as broader than the legal ambit of post-conflict peacebuilding, as it incorporates moral philosophy<sup>20</sup> and is rooted in the long just war tradition. There is a danger that the discourse communities and interpretive communities that have been built around these various areas of law and philosophy will use terms in ways that will cause confusion when they are used in a cross-cutting manner.<sup>21</sup> From a practical perspective, the same risk applies: if practitioners working simultaneously in post-conflict situations adopt principles of *jus post bellum* but apply them inconsistently, it could create additional confusion and inconsistency in peacebuilding practice.

If people use multiple definitions of the same term, particularly without realizing it, the clarity of their communications lessens. This is true in an interpretive community or a discourse community. It may be particularly important with respect to *jus post bellum* if it is defined functionally, as a discourse community with actively shared goals.

### C. Key opportunities

#### *The opportunity to clarify a range of areas of law and practice*

This opportunity is, in a sense, the other aspect of the previous weakness. Should the difficulties inherent in integrating various areas of law and philosophy be overcome, these various areas of law themselves will be enriched and clarified with respect to their application to the specific *jus post bellum* context.

Including a philosophical dimension that is not encompassed by purely legal sources may present a singular opportunity to clarify the application of a variety of legal fields to the transition from armed conflict to peace. Larry May's work<sup>22</sup> may be particularly

<sup>19</sup> Vincent Chetail, "Introduction: Post-conflict Peacebuilding—Ambiguity and Identity" in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press 2009) 18.

<sup>20</sup> See e.g. Larry May, ch. 1, this volume.

<sup>21</sup> Erik Borg contrasted the terms "discourse community" and "interpretive community" as follows:

We do not generally use language to communicate with the world at large, but with individuals or groups of individuals. As in life, for discussion and analysis in applied linguistics these groups are gathered into communities. One such grouping that is widely used to analyse written communication is *discourse community*. John Swales, an influential analyst of written communication, described discourse communities as groups that have goals or purposes, and use communication to achieve these goals. [...] "Interpretive community" (Fish 1980), on the other hand, refers not to a gathering of individuals, but to an open network of people who share ways of reading texts [...] [U]nlike an interpretive community, members of a discourse community actively share goals and communicate with other members to pursue those goals.

Erik Borg, "Key Concepts in ELT: Discourse Community" (2003) 57 *English Language Teaching Journal* 398.

<sup>22</sup> See e.g. Larry May, ch. 1, this volume.

important in this respect. James Gallen's suggestion that *jus post bellum* can function as an interpretive framework, providing second-order rules that act upon first-order rules in other areas of law is also extremely helpful on this point.<sup>23</sup> Similarly, Jennifer Easterday argues that *jus post bellum* can create sites of coordination and discourse, which can help to improve practical aspects of applying *jus post bellum* on the ground.<sup>24</sup>

*Jus post bellum*'s potential to clarify a range of areas of law does not end with areas of law that might be partially included in *jus post bellum*—it also includes the potential to clarify issues in areas discreet from *jus post bellum*. Transitional Justice, properly understood, can be clearly defined as a separate concept from *jus post bellum*.<sup>25</sup> The Responsibility to Protect and *lex pacificatoria* are likewise conceptually discreet from *jus post bellum*, albeit with some overlap.<sup>26</sup> Clarity comes not only from what such concepts are, but also what they are not.

*Jus post bellum* also provides the opportunity to clarify the practice of peacebuilding. *Jus post bellum* can help clarify the obligations of interveners, whether they are individual states, international organizations, or, as Gregory Fox discussed, multilateral groups.<sup>27</sup> It could help set policy objectives and determine mandates. For example, as Zaum argued in this volume, *jus post bellum* is relevant to exit strategies, influencing political decisions, local ownership, and the practicalities of concluding peacebuilding missions.

The post-conflict environment can become crowded with various international organizations, regional organizations, donors, NGOs, civil society groups, and others working on a myriad of peacebuilding tasks. They might include, amongst others, lawyers, political advisors, economic advisors, public health specialists, doctors, journalists, development specialists, artists, or athletes. Each practitioner will come with her or his professional and personal worldview and priorities on how to tackle the challenges of peacebuilding. By setting out legal and moral rules, principles, and guidelines, *jus post bellum* can help streamline the practice of peacebuilding. If all of these various actors can speak a common "*jus post bellum*" language and understand its underlying values, it might help clarify mandates, reduce redundancies, or stimulate partnerships and collaboration amongst practitioners.

### *The opportunity to contribute to the establishment of just and enduring peace*

Placing this opportunity so far down in this concluding chapter is an artifact of the SWOT format, not a measure of its importance. This opportunity is, in fact, the *raison d'être* of the concept and is mentioned extensively in this volume. However, it is probably the most difficult opportunity to evaluate or analyze. It is hard to define what "peace" means, and even harder to define a "just peace." Beyond the well-known distinction between positive and negative peace,<sup>28</sup> Astri Suhrke argues persuasively in this volume that there are different "types" of peace, and examines how the differences in post-conflict situations

<sup>23</sup> See James Gallen, ch. 4, this volume. Regarding first-order and second-order laws, see e.g. H. L. A. Hart, *The Concept of Law* (Oxford University Press 1961).

<sup>24</sup> Jennifer Easterday, ch. 20, this volume.

<sup>25</sup> Jens Iverson, ch. 5, this volume.

<sup>26</sup> Carsten Stahn, ch. 6 (on Responsibility to Protect); Christine Bell, ch. 10 (on *lex pacificatoria*), this volume.

<sup>27</sup> Gregory Fox, ch. 12; Dominik Zaum, ch. 18, this volume.

<sup>28</sup> Johan Galtung, "Violence, Peace, and Peace Research" (1969) 6 *Journal of Peace Research* 167.

can affect peacebuilding and statebuilding efforts. This opportunity also begs the question of what a “just” peace might look like. Does it involve addressing and solving the root causes of a conflict? This might be an impossible task, as root causes might be disputed by the parties to the conflict<sup>29</sup> or might be so deeply entrenched into the social and economic fabric of the society (e.g. conflicts arising out of ethnic divides or long-standing poverty) that *jus post bellum* would require or encourage extremely long-term interventions. Moreover, even if it were possible to claim that a just and enduring peace had been achieved, it would be difficult to attribute that to any single concept, even one as potentially broad as *jus post bellum*.

However, the opportunity exists. Some argue for the creation of a new Geneva Convention for *jus post bellum*<sup>30</sup> and suggest that its contribution to legal certainty and the creation of obligation will contribute to peace. Others have suggested that *jus post bellum* can improve policy and practice, and have suggested that a “*Jus Post Bellum* for Dummies” might be useful for practitioners.<sup>31</sup> However, perhaps the added value of *jus post bellum* to achieving peace will be subtle and nuanced, such as by increased coordination and discourse,<sup>32</sup> the development of “soft law” and policy instruments, changing rules of engagement, newly emerging legal norms,<sup>33</sup> the encouragement of looking forward after conflict, instead of backwards,<sup>34</sup> or through promoting moral norms, such as those proposed by Larry May.<sup>35</sup> Whatever the source of influence, it will be necessary for scholars and norm entrepreneurs who support the concept to take a humble and self-reflexive approach to their work.

## D. Key threats

### *The threat of politicization*

Roxana Vatanparast provides a welcome and innovative application of critical theory and international relations theory to the question of *jus post bellum*'s potential.<sup>36</sup> The risk of manipulation and instrumentalization of the legal framework by international actors, as well as the embedding and legitimation of neo-colonial projects through law, are critical threats that advocates of *jus post bellum* would be wise to guard against. Indeed, a recognized shortcoming is the lack of diversity amongst the scholars who have formed the intellectual basis of the concept.

However, one interesting question that critical theorists and international relation theorists do not seem to have analyzed fully is why a tripartite, comprehensive just war

<sup>29</sup> As discussed by Christine Bell, ch. 10, and Jennifer Easterday, ch. 20, this volume.

<sup>30</sup> See e.g. Brian Orend, Preface, this volume.

<sup>31</sup> Michael Semple, “*Jus Post Bellum* in the Age of Terrorism: Remarks by Michael Semple” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 337.

<sup>32</sup> See e.g. Jennifer Easterday, ch. 20, this volume.

<sup>33</sup> On the emergence and reception of norms, see Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Chance” (1998) 52 *International Organization at Fifty: Exploration and Contestation in the Study of World Politics* 887, 895 (discussing a “norm lifecycle” in three stages: first a “norm emergence,” then a “norm cascade,” and finally “norm internalization”).

<sup>34</sup> See e.g. Ruti Teitel, “Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May” (2013) 24 *European Journal of International Law* 335 (arguing that *jus post bellum* will be most useful if it is forward-looking).

<sup>35</sup> Larry May, ch. 1, this volume.

<sup>36</sup> Roxana Vatanparast, ch. 8, this volume.

theory that covers the initiation of armed conflict, prosecution of armed conflict, and transition out of armed conflict was *not* fully developed during the twentieth century (when the terms *jus ad bellum*, *jus in bello*, and *jus post bellum* were coined)<sup>37</sup> or previously. One possible answer might be that *jus post bellum* has in fact been *inconvenient* for great military and colonial powers, and that, *contra* Vatanparast, the emergence of *jus post bellum* may be a rejection of twentieth-century realpolitik and colonialism more than the fruit of neo-colonial projects. *Jus post bellum* might also provide an opportunity to acknowledge the importance of local/national ownership over peacebuilding projects and the need to apply context-specific policy decisions in interventions, and help reduce the risk of neo-colonialism.<sup>38</sup> Regardless of historical questions and policy goals, Vatanparast's warning is important going forward.

### *The threat of discouraging peace*

This threat is directly tied to the key opportunity listed previously, the opportunity to contribute to the establishment of just and enduring peace. Inger Österdahl's contribution to this volume was not intended as criticism of the concept of *jus post bellum*, but it provides a critical warning: introducing *jus post bellum* might diminish the force of *jus ad bellum*.<sup>39</sup> Eric De Brabandere, similarly, warns of reintroducing an older version of just war theory that has less of a *jus contra bellum* component and a more permissive approach towards the initiation of armed conflict.<sup>40</sup> It would be a terrible tragedy if, directly against the principal driving need behind the idea of *jus post bellum*, the reality of *jus post bellum* turned out to initiate further armed conflict. While some<sup>41</sup> might not agree with Österdahl and De Brabandere's analysis on this point, suggesting instead the strong likelihood that a reinvigorated, modern, comprehensive just war theory would serve as an additional barrier to the resort to armed force, Österdahl and De Brabandere raise an important warning that must be kept in mind. Emphasizing the continuing legal prohibition on the use of armed force in almost all circumstances may be especially incumbent upon those wishing to develop *jus post bellum*.

It is worth noting that, for Larry May, *jus post bellum* leads *away* from a more permissive structure for the use of force and towards a broad but not universal pacifism. In *After War Ends: A Philosophical Approach*,<sup>42</sup> May argues for contingent pacifism based on the unlikely nature of armed force passing the stringent standards of a modern tripartite just war theory.<sup>43</sup> Between a more warlike world and pacifism, there is certainly a broad range of predictions as to the effect of a more widespread adoption of *jus post bellum*.

<sup>37</sup> See Robert Kolb, "Origin of the Twin Terms *Jus Ad Bellum*/*Jus In Bello*" (1997) 37 *International Review of the Red Cross* 553; Carsten Stahn, "*Jus Post Bellum*: Mapping the Discipline(s)" (2008) 23 *American University International Law Review* 311, 312; Jens Iverson, ch. 6, this volume.

<sup>38</sup> See e.g. Dominik Zaum, ch 18; and Jennifer Easterday, ch 20, this volume.

<sup>39</sup> Inger Österdahl, ch. 11, this volume.

<sup>40</sup> Eric De Brabandere, ch. 7, this volume.

<sup>41</sup> For example, see Larry May, ch. 1, this volume.

<sup>42</sup> See Larry May, *After War Ends: A Philosophical Approach* (Cambridge University Press 2012).

<sup>43</sup> May, *After War Ends* (n. 41) 232.

### III. Conclusion: Advancing the Concept in Scholarship and Practice

If the chapters in this volume and the preceding SWOT analysis tell us anything, it is that much work remains to be done. The fact that various cautions and criticisms emerge in both just war theory and international law is not necessarily a troublesome development. On the contrary, it may be an indication that *jus post bellum* is coming of age. The growth of scholarship in past decades and its increasing practical relevance appear to suggest that we would lose something if we were to detract from the concept or abandon it. If the successful transition from armed conflict to peace is one of the greatest challenges arising from contemporary warfare, one that raises moral, legal, and practical problems, it must be addressed as comprehensively as scholars and practitioners in many disciplines can manage. At this point, there may be more questions and answers. Some of the most important, which might drive future research, include:

1. Who is the addressee of *jus post bellum*? How does it impact the societies in which it is applied or practiced? In particular, how does it impact or meet the needs of different constituencies, such as women?
2. To what extent is it helpful to distinguish “moral” and “legal” principles? What is their mutual space?
3. How, exactly, does *jus post bellum* incorporate, blend, or otherwise draw on the its various legal sources? To what extent is it feasible to contemplate further regulation and stocktaking, and what form should it take? What would “guiding principles”<sup>44</sup> include?
4. What are the “blind spots” and biases of *jus post bellum*? How can they be addressed?
5. How can, or should, *jus post bellum* be adopted and applied by practitioners? How does the answer differ with respect to audience, whether it is an international organization, domestic civil society, or other diverse actors?

There are many others, which hopefully will be addressed by the scholars who have contributed greatly to advancing the discussion on *jus post bellum* in this volume and others. The debate will certainly not be simple or smooth, and will likely continue to produce friction and disagreement. This can only add to the depth and substance of the concept.

<sup>44</sup> For an example, see John Ruggie’s “UN Guiding Principles on Business and Human Rights.” UN Human Rights Council, “Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie” (2011) UN Doc. A/HRC/17/31.



# Index

- accountability 5, 9–10, 54–5, 64, 71, 72–4, 79, 87–90, 113, 120–1, 127, 133, 135–41, 163, 167, 169, 175, 177, 182, 184, 187, 189–94, 196, 200–2, 205, 238, 245, 266, 273–4, 283, 294, 329, 333, 341, 347, 351–2, 355, 367–9, 375, 383, 389–90, 396, 398–9, 414, 419–21, 451–2, 456, 458–9, 464–6, 483, 505
- ACHR, *see* American Convention on Human Rights
- ADB, *see* Asian Development Bank
- Additional Protocol I, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- Additional Protocol II, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
- admissibility 95, 420–1
- Afghanistan 25, 59, 96–7, 146–7, 154, 181, 194, 231, 250–1, 255, 257, 272, 275, 278–9, 281, 314, 327, 339–41, 362, 467, 504, 515
- Africa, *see also* African Union, Economic Community of West African States 63, 97, 155, 165, 244, 308, 322, 324, 351–2, 355, 359–60, 371–2, 421, 441, 448, 462–4, 545
- African Union 47, 50, 97, 351, 372
- Algeria 526
- Al-Qaeda 150, 310–13, 536
- America, *see also* American Convention on Human Rights
- Latin 63, 95–7, 301
- North 181
- South 97
- American Convention on Human Rights 288, 321–2, 455
- amnesty 9, 24, 78, 187, 190–3, 196, 200–1, 300, 360, 519–22, 524–30, 533, 535–41
- Andersonville Prison 89
- Angola 273, 334, 337, 528
- AP I, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- AP II, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
- Arab Charter on Human Rights 321–2
- ArCHR, *see* Arab Charter on Human Rights
- Asia, *see also* Asian Development Bank 97
- Asian Development Bank 251, 434
- AU, *see* African Union
- Australia 199, 248
- authority 45, 47, 49, 61, 73, 75–6, 92–3, 103–4, 115–16, 119–20, 124, 126, 128–32, 135, 138–9, 141, 204, 229–30, 235–6, 238, 241–2, 247, 249–258, 288, 316, 327, 332, 334–7, 339–40, 434, 351, 381, 419, 430, 436, 448–9, 451–4, 456–60, 463, 465–6, 475, 478–9, 484, 486, 488–91, 495–7, 508, 521, 534
- Bangladesh 94, 106
- belligerent, *see also* belligerency 23, 45, 63, 92–3, 98–9, 115–16, 129, 134, 142, 154, 174, 247, 264, 269, 288–92, 297, 301–4, 430, 435, 439, 467, 469, 474, 477–81, 484, 490–7, 502, 505–14, 518, 519–23, 527–40
- belligerency 519–23, 527–40
- bilateral investment treaties 364–5
- BINUCA, *see* United Nations Integrated Peacebuilding Office in the Central African Republic
- BITs, *see* bilateral investment treaties
- BNUP, *see* United Nations Office in Burundi
- bounded discretion, *see also* discretion 8, 260, 265–6, 268
- Bosnia and Herzegovina 76, 121, 156, 164, 169, 173, 181, 184, 198–9, 231, 243, 272–3, 314, 316, 324–7, 331, 334, 337–40, 394, 443, 467, 545
- Brahimi Report on United Nations Peace Operations 245, 361
- Britain, *see* United Kingdom
- Burma, *see* Myanmar
- Burundi 52, 303, 337, 342, 346, 350–1, 356, 362–4, 394
- Cambodia 93–4, 244, 273, 334, 337, 394
- Canada 106, 189, 517
- capital, *see* finance, market
- capitalism, *see* finance, market
- CDO, *see* common but differentiated obligations
- ceasefire 332, 390
- CEDAW, *see* United Nations Committee on the Elimination of Discrimination against Women
- Central African Republic 52, 337, 350, 353–4, 356, 362, 364–5
- CERD, *see* United Nations Committee on the Elimination of Racial Discrimination
- CERP, *see* Commander's Emergency Response Program
- Chapter VII, *see* United Nations Charter
- Chechnya 227, 308, 469
- child *see also* education, girl, Sexual Exploitation and Abuse Victim Assistance Mechanism 117, 174, 326, 341, 354, 374, 389–90
- sexual exploitation of 341
- soldiers 354, 374
- China 150, 255, 342, 476, 513
- civil law 23, 94
- civil war, *see* non-international armed conflict
- Coalition Provisional Authority (Iraqi) 251–5, 257–8, 343, 484, 490–3, 495–7
- Cold War 81, 97, 105, 154–5, 175, 183, 208, 213, 243, 247, 270–1, 275, 278, 283, 314, 453

- Colombia, *see also* Revolutionary Armed Forces of Colombia 52, 59, 96, 150, 310–11, 533
- colonialism 7, 63–4, 92, 109, 156, 164–5, 185, 193, 221, 226, 262, 272–5, 334, 342–3, 359–60, 366, 380–1, 391, 410–11, 418, 439–42, 444, 529, 551–2
- Commander's Emergency Response Program 513
- common but differentiated obligations 245–8
- compensation, *see also* restitution, United Nations Compensation Commission 17, 21, 33, 134, 167, 187, 331, 341, 370, 445, 473, 504–9, 513, 515–16
- comprehensive peace agreement 50, 273, 280, 332
- consent 5, 9, 45, 53, 61, 63, 74–5, 93, 105, 116, 119–20, 126, 129, 131, 184, 187–8, 200, 204, 288, 291, 302, 336, 342, 349, 359, 401, 410, 422, 433, 475–6, 485–6, 491–2, 501
- constitutionalism 9, 60, 77, 391, 396, 404, 413
- Convention on Military or Any Other Hostile Use of Environmental Modification Techniques 510
- Council of Europe, *see also* European Court of Human Rights, European Convention on Human Rights 185, 189, 471, 506
- CPA, *see* Coalition Provisional Authority (Iraq)
- CPA, *see* comprehensive peace agreement
- criminal law, *see also* international criminal law 93, 133, 136, 145, 150, 200, 265, 267, 317, 321, 479, 506, 509, 521
- critical theory 150–8, 542, 551
- Croatia 309
- customary law 2, 24, 51, 54, 113, 118, 134, 217, 238–9, 245, 247, 258, 261, 263–4, 302, 305, 382, 402, 422, 472–3, 479, 481, 490, 492–5, 500, 509, 511, 518, 521–3, 538
- customary norm, *see also* customary law 54, 238–9, 402, 490
- customs, tax and 236, 249
- Cyprus 433–4
- DAC, *see* Organization for Economic Cooperation and Development, Development and Assistance Committee
- DDR, *see* demobilization, disarmament, and reintegration
- decolonization, *see* colonialism
- demobilization, disarmament, and reintegration 43, 66, 70, 295–6, 332, 390
- democracy 9, 20, 24–5, 29, 41, 43–4, 58, 60, 64–5, 78, 81, 87, 90, 97, 115–16, 130–1, 147, 154, 157–8, 164, 182, 186, 188–92, 195, 197–9, 201–2, 205, 207–25, 236, 242, 244, 249, 265, 267, 271–3, 277, 283, 294, 329, 330, 336–7, 340, 343–4, 350–6, 360, 362, 381–2, 385, 387, 393, 398–401, 404, 409–11, 416, 418–19, 448, 450–7, 460–4, 520
- democratic, *see* democracy
- democratization, *see* democracy
- Democratic Republic of the Congo 158, 276, 282, 341, 503–4  
Ituri 289–90, 308, 313
- dependence 60, 76, 158, 168, 399, 428, 430–43, 445–6, 447, 449, 459
- derogation 5, 55, 242, 288–9, 316, 320, 332, 455–6, 461
- developed world, *see also* development, economic 246, 366
- developing world, *see also* development, economic 74, 203, 246, 283, 363, 370, 392
- development  
economic, *see also* finance, market 4, 9, 43, 48–9, 59–61, 66, 72–4, 77, 87, 104, 143, 154–5, 167, 169, 173, 211, 246, 250–1, 268, 269, 282, 294, 316, 319, 335, 346, 348–52, 354, 356, 359–61, 364, 370–5, 388–92, 440, 548  
human 60, 166, 294
- discretion, *see also* bounded discretion 8, 47, 84, 109, 251, 260, 265–8, 270, 420, 452, 454–61, 464–6
- domestic law 57, 184, 187, 204, 386, 512, 518
- DRC, *see* Democratic Republic of the Congo
- East Timor, *see also* Indonesia, United Nations Mission of Support in East Timor, United Nations Transitional Administration of East Timor 156, 231, 236, 248–9, 257, 274–5, 282, 338, 343, 356, 394–5, 424, 545
- ECHR, *see* European Convention on Human Rights
- ECJ, *see* European Court of Justice
- Economic Community of West African States 47, 280–1, 352, 355, 372, 545
- economic development, *see* development, economic
- economic reconstruction, *see* post-conflict reconstruction, reconstruction, development
- ECOSOC, *see* United Nations Economic and Social Council
- ECOWAS, *see* Economic Community of West African States
- ECSI, *see* European Convention on State Immunity
- ECtHR, *see* European Court of Human Rights
- education, *see also* child, girl 64, 89, 117, 166–7, 177, 270, 282, 319, 360, 362, 387, 396, 414, 429, 431, 433–4, 440–1, 454, 509
- Egypt 17, 394, 474
- El Salvador 395
- electoral process 10, 447–8, 450, 454, 456, 459–62, 466
- England, *see* United Kingdom
- ENMOD, *see* Convention on Military or Any Other Hostile Use of Environmental Modification Techniques
- environmental integrity 10, 502–10, 512, 514, 516–18
- environmental law 9, 86, 93, 157, 246, 258, 368, 382, 514, 518
- Eritrea 342, 508, 514
- Ethiopia 342, 508, 514
- EU, *see* European Union
- Europe, *see also* colonialism, Council of Europe, European Community, European Convention on State Immunity, European Convention on Human Rights, European Court of Justice, European Union, Organization for Economic Cooperation and Development, Organization for Security and Cooperation in Europe 240, 275, 371, 502  
Eastern 97, 198, 395  
Western 208, 226



- European Community, *see also* European Union 237
- European Convention for the Protection of Human Rights and Fundamental Freedoms *see* European Convention on Human Rights
- European Convention on State Immunity 471–2
- European Convention on Human Rights 237–8, 267, 322–3
- European Court of Human Rights 78, 121, 190, 198, 227, 253, 316, 324–6, 331, 437, 469, 478, 486, 489
- European Court of Justice 78, 237, 238, 242
- European Union 47, 324–6, 331–2, 350, 371, *exit, see also transition* 5, 8–9, 25, 39, 64, 110, 114, 117, 244, 333, 334–45, 369, 411, 440, 525, 550
- fairness 21, 133–4, 139, 294, 483
- FARC, *see* Revolutionary Armed Forces of Colombia
- Federal Republic of Yugoslavia, *see* Yugoslavia
- femininity, *see* women
- feminist, *see* gender
- finance, *see also* development, International Monetary Fund, international financial institutions, market, World Bank 34, 78, 349–50, 392, 433, 441
- First World War, *see* World War I
- foreign armed forces 9–10, 71, 467–8, 470–1, 474–5, 477–81, 483, 492, 494–6, 499–501
- formalization 159
- France 251, 328, 441, 475, 496–7
- Franco, Francisco, *see also* Spain 275–7
- FRY, *see* Yugoslavia
- Gaza, *see* Palestine
- GC IV, *see* Geneva Convention (IV) (1949) Relative to the Protection of Civilian Persons in Time of War
- gender, *see also* gender justice, men, women 7, 9, 11, 53, 89, 95, 161–77, 186, 193, 196, 355, 361–2, 380, 389–90, 396, 401, 406–9, 414
- gender justice 89, 162, 167, 169
- General Assembly, *see* United Nations General Assembly
- Geneva Conventions, generally 261–3, 267, 288, 297–8, 302, 305, 317, 532
- Additional Protocol I *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- Additional Protocol II *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
- Geneva Convention (I) (1949) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 260, 300
- Geneva Convention (III) (1949) Relative to the Treatment of Prisoners of War 301, 479, 531
- Geneva Convention (IV) (1949) Relative to the Protection of Civilian Persons in Time of War 44, 50, 62, 93, 115, 117, 130, 144, 234–5, 252, 291, 300, 302, 333, 429, 436, 478, 538
- Geneva Convention, Common Article 2 260–1, 298, 312, 477
- Geneva Convention, Common Article 3 197, 261, 298, 300–1, 304–6, 312, 528
- Geneva Convention, new 69, 196, 551
- Germany 17, 21, 25, 62, 115, 164, 270, 430, 467, 474
- Great Britain, *see* United Kingdom
- Greece 24
- geographical scope 6, 81, 300
- girl, *see also* gender, women 95, 186, 362, 407  
education of 64, 362
- Global North, *see* developed world
- Global South, *see* developing world
- Grotian Tradition 81–4, 88, 99–101
- Grotius, Hugo *see also* Grotian Tradition 15–19, 22–4, 56, 82–3, 88, 127, 145, 194, 544–5
- GSP, *see* World Trade Organization, Generalized System of Preferences
- Guatemala 277–8, 282, 317
- Guinea 52, 280, 350, 355–6, 362, 364–5, 460
- Guinea-Bissau 52, 350, 352–3, 356, 362, 364–5
- Haiti, *see also* United Nations Stabilization Mission in Haiti 337–8, 341–2, 362, 459
- harms 21, 168, 171–7, 502, 507
- history 24, 45, 83–4, 89, 92, 98–9, 105, 127
- hostilities 1, 43, 46, 49–50, 54, 77, 99, 114, 143–4, 146–7, 168, 210, 223, 232–3, 251, 261–2, 291, 299–303, 311–14, 318–20, 328–9, 332, 350, 388, 390, 428, 436, 468, 474, 476–7, 479–80, 484–5, 497, 511, 514, 521–2, 524, 527–8, 547
- HRC, *see* United Nations Human Rights Committee
- human development, *see* development, human
- human rights 9–11, 52, 58–62, 65–66, 76, 78, 83–84, 85–92, 96, 98, 100–1, 117–18, 133, 135–6, 138–9, 143–5, 150, 157–8, 164, 169, 183–7, 190, 191–3, 197–8, 200–4, 208–27, 230, 235–43, 245, 247, 249, 253, 255–8, 260, 263–8, 270, 273, 277–82, 288, 292, 294–6, 311–12, 315–33, 338, 343, 351, 354–5, 382–4, 388, 396, 398, 403, 405, 410, 414–5, 416, 418–9, 422, 429, 435, 437–8, 442, 445, 448, 452–60, 465, 469, 489, 499, 502, 505, 518, 520, 529, 545, 548  
accountability 72, 74  
obligations of the sending state 47  
and women 164, 169, 172–3
- Hugo de Groot *see* Grotius, Hugo
- human security 66, 68, 103, 105, 294
- humanitarian intervention, *see also* intervention, international intervention, military intervention 94, 142, 156, 168, 172, 210, 213, 442
- humanitarian law, *see* international humanitarian law
- IACs, *see* international armed conflicts
- ICC, *see* International Criminal Court
- ICCPR, *see* International Covenant on Civil and Political Rights
- ICISS, *see* International Commission on Intervention and State Sovereignty

- ICJ, *see* International Court of Justice
- ICRC, *see* International Committee of the Red Cross
- ICSID, *see* International Centre for the Settlement of Investment Disputes
- ICTJ, *see* International Center for Transitional Justice
- ICTR, *see* International Criminal Tribunal for Rwanda
- ICTY, *see* International Criminal Tribunal for the former Yugoslavia
- IDPs, *see* internally displaced persons
- IFIs, *see* International Financial Institutions
- IGC, *see* Iraqi Governing Council
- IHL, *see* international humanitarian law
- ILA, *see* International Law Association
- ILC, *see* International Law Commission
- IMF, *see* International Monetary Fund
- immunity, *also* privileges and immunities 34, 48, 72–3, 95, 97, 121, 142, 150, 230, 240, 341, 369, 388–90, 468, 470–2, 474, 476, 478–81, 487–9, 494–7, 498–501
- IMPP, *see* integrated mission planning process
- INGO, *see* international non-governmental organization
- India 243, 342
- indigenous people 118, 185–6, 277, 389–90, 406
- Indonesia, *see also* East Timor 248–9, 274, 433–4, 439, 441
- institutional coordination 69, 122
- insurgent, *also* insurgency 2, 10, 112, 264, 278–9, 402, 521, 525, 527, 536–7
- integrated mission planning process 336–7, 341
- integrity 4, 10, 20, 59–60, 69–74, 79, 92, 134, 158, 185, 200, 277, 418–19, 421–2, 502–10, 514, 516–18
- internal conflict, *see* non-international armed conflict
- intensity 9, 260, 263, 269–70, 278, 290–91, 303–7, 309–11, 313–14, 484
- internal displacement, *see also* internally displaced persons 279–80
- internally displaced persons 186, 281, 309
- international administration 129, 156, 162, 168, 188, 325, 342–3
- international armed conflicts 25, 84, 94, 196, 259–62, 265, 268, 300–3, 310, 312–14, 328–30, 527
- International Center for Transitional Justice 86, 98
- International Centre for the Settlement of Investment Disputes 364–5
- International Commission on Intervention and State Sovereignty 103, 106, 109, 120, 210–11
- International Committee of the Red Cross 118, 234–5, 260–1, 263, 300, 304–5, 311, 329, 522
- international cooperation 46
- International Court of Justice 118, 139, 232, 264, 289–90, 417–19, 425, 443, 472, 474, 490, 502, 504, 512, 515
- International Covenant on Civil and Political Rights 134, 322–3, 452–3, 455, 457–8, 461, 463
- International Criminal Court 25, 203, 243, 273, 306, 373, 417, 420–2, 510
- international criminal law 84, 93, 144, 169, 172, 183, 187, 191, 263, 267, 369, 420, 444, 502, 510, 518, 530, 537, 545, 548
- International Criminal Tribunal for Rwanda 263, 305
- International Criminal Tribunal for the former Yugoslavia, *see also* Yugoslavia 9, 263, 289–91, 300, 304–6, 308, 310, 312, 314, 325–6, 510–11
- international financial institutions, *see also* World Bank, International Monetary Fund 154
- international humanitarian law 2, 5, 7, 50, 53–4, 84, 113, 117, 133, 135–6, 139, 143–5, 157, 183–4, 187, 190–2, 197, 203, 216, 218, 220, 222–3, 225, 228, 235, 243, 245–7, 258, 260–5, 298–304, 306–7, 310, 312–14, 317, 382, 384–5, 415, 502, 507, 518, 520, 523–5, 527–9, 531, 535–6, 539–40
- international human rights law, *see* human rights
- international intervention 161, 181, 183–4, 187–90, 193, 196, 203, 210, 218, 280, 319, 324, 328, 397, 406, 414, 416
- International Law Association 93, 269, 299, 301, 303
- International Law Commission 73, 239, 458, 503, 512
- International Monetary Fund 154, 348, 350, 353, 371
- international non-governmental organization 63, 70, 74, 229, 294
- international organization(s) 8, 43–4, 46–8, 51, 55, 57, 59–60, 69, 71–75, 77, 93, 97, 125, 126, 128–9, 135, 139–40, 156, 166, 168, 188–9, 205, 208, 218, 221, 234–40, 245–7, 255, 379, 425
- international security assistance force, *see also* Afghanistan, North Atlantic Treaty Organization 250–1, 279, 314, 339–40
- international territorial administration 44, 51, 61–3, 75, 81, 93, 247–8, 418, 424
- interpretation 2, 6, 19, 28, 38, 65, 67, 69–71, 79, 86, 108, 113, 131, 182, 192–3, 204, 219, 271, 287, 317, 325–6, 346, 365, 367, 380, 383, 386, 412, 435, 437–8, 456, 477, 488–9, 547–8
- intersectionality 176
- intervention, *see also* humanitarian intervention, international intervention, military intervention 33, 45, 52, 78–9, 103–4, 109, 110–3, 128, 131–2, 140, 144, 146, 150, 158, 161, 165, 172, 181, 183–4, 187–90, 193, 196, 203, 208, 210–11, 218, 222, 243, 250, 251, 265, 277, 278, 280, 282, 283, 314, 319, 324, 328, 335, 337, 345, 356, 380, 382, 393, 396, 397, 406, 410, 416, 421, 430, 442, 476, 551, 552
- intrastate conflicts, *see* non-international armed conflict
- investment, *see also* bilateral investment treaties, development, finance, International Centre for the Settlement of Investment Disputes 68, 348, 363–5
- IO(s), *see* international organization(s)
- Iraq, *see also* Coalition Provisional Authority (Iraqi), Iraqi Governing Council, occupation of Iraq, United Nations Assistance Mission for Iraq 25, 38, 115–16, 125, 131,

- 147, 154–5, 181–2, 194, 203, 216, 231, 241, 251–5, 257–8, 292, 302, 310, 313–14, 329, 343–4, 394, 402, 467, 484–7, 490–3, 495–6, 500, 503–4, 507–11, 514–15, 517, 526
- Iraqi Governing Council** 253–4, 258, 490
- ISAF**, *see* international security assistance force
- Israel** 17, 114, 117, 148, 313, 428–30, 433, 435–6, 438–40
- Italy** 474, 492, 495, 517
- Japan** 17, 21, 25, 62, 115, 150, 270, 430
- Jordan** 256, 439
- jurisdiction** 95, 109, 119, 169, 175, 240, 250, 299–300, 330–1, 384, 420–1, 426, 447, 471–2, 474, 477–81, 491–500, 510–11
- jus ad bellum*** 1, 5, 7, 11, 15, 24, 35, 37–8, 43, 45, 55, 58, 80–1, 83–6, 88, 92, 94, 98–9, 101, 111, 113–14, 116, 124, 126–8, 131–2, 138, 140, 143–5, 166, 170–1, 194, 207–16, 219, 221–8, 230, 232–3, 243, 247, 257, 288–9, 315, 317–18, 320–1, 422, 502, 515, 520, 524, 531, 534–41, 545, 552
- jus cogens*** 51, 62, 73, 233, 242, 422
- jus ex bello*** 27, 36–7, 39, 42
- jus in bello*** 1, 5, 7–8, 11, 15, 24, 35, 43–5, 50, 55–6, 58, 80–1, 83–6, 88, 92–4, 98–9, 101, 111, 113–16, 118, 124, 126–7, 131–2, 138, 140, 143–5, 147, 150, 170–1, 194, 207–10, 215–17, 219–25, 227–8, 230, 261, 288–9, 293, 296–9, 314, 316–18, 320–1, 328, 332, 502, 507, 509, 515, 520, 524–5, 529, 531–2, 534–41, 545, 547, 552
- just peace** 16–18, 24–5, 28–32, 34–6, 39, 42, 104, 183, 191, 213, 550
- just rebellion**, *see* rebellion
- just war** 1, 3, 5, 7, 11, 15–19, 21, 26–8, 31–4, 36–9, 41–2, 64, 69, 77, 83, 86, 97, 105, 106, 108, 111–12, 117–18, 124–9, 131–2, 140, 143, 145, 162, 181, 201, 209–10, 212, 224–9, 245, 505, 513, 515, 521, 532, 540, 544, 547, 549, 551–3
- just war theory** 1, 5, 7, 11, 31–3, 36, 38–9, 42, 69, 77, 86, 97, 105, 106, 108, 111–2, 117, 143, 145, 146, 162, 167–8, 181, 212, 227, 229, 245, 382, 532, 551, 552–3
- justice**, *see* transitional justice, gender justice
- justice cascade** 95, 96
- justification** 10, 33, 35, 41–2, 60, 61, 70, 103, 131, 132, 150, 182, 203, 213–15, 222, 226, 490, 492, 525–6, 532
- Kant, Immanuel** 84–5, 93, 127–8, 143, 545
- Kenya** 526
- KFOR**, *see* NATO-led Kosovo Force
- KLA**, *see* Kosovo Liberation Army
- Korea, Republic of** 271
- Kosovo**, *see also* Kosovo Liberation Army, NATO-led Kosovo Force, United Nations Interim Administration Mission in Kosovo 62, 103, 131, 154, 181, 194, 236, 243, 290, 299, 308, 313, 338, 339, 342, 343, 394, 419, 424–5, 485–8, 500, 511, 545
- Advisory Opinion** 418, 425
- Liberation Army** 262, 304, 313
- Kurdish Working Party**, *see also* Turkey 313
- Kuwait** 504, 508–14
- Lauterpacht, Hersch** 81–3, 86, 88, 98, 99, 101
- Latin America**, *see* America, Latin
- law of armed conflict**, *see* international humanitarian law
- law enforcement, robust** 44, 46
- Lebanon** 117, 313, 316, 324, 327–8, 331, 364, 433
- lex pacificatoria*** 2, 10, 182, 185, 191–3, 196, 200–2, 204–5, 380, 550
- liberal democracy**, *see* democracy
- liberal norms** 336, 340, 344
- Liberia** 52, 190, 280–2, 350, 355, 362, 364–5, 374, 399, 503
- Libya** 216, 231, 233, 255–7, 308, 310, 313, 316, 324, 328–31
- Libyan National Transitional Council** 313, 329
- Liechtenstein** 106, 476
- local ownership** 9, 11, 63–4, 69, 75, 77, 116, 120, 157, 165, 255, 266, 271, 292, 335, 336, 341, 344, 360, 361, 363, 366, 372, 375, 387, 397, 402, 409, 414, 452, 550
- LTTE**, *see* Tamil Tigers
- lustration**, *see* vetting
- Macedonia** 299, 308
- Mali**, *see also* United Nations Stabilization Mission in Mali 235, 261, 364
- market**, *see also* development, finance 154–5, 164, 167, 177, 271–2, 332, 360, 430, 438, 508
- Martens Clause** 23–4
- masculinity**, *see* men
- MCC**, *see* Millennium Challenge Corporation
- MDTF**, *see* multi-donor trust fund
- MEAs**, *see* multilateral environmental agreements
- meionexia*** 15, 18–23, 29, 41, 56, 515, 526
- men**, *see also* feminism, gender, girl, Sexual Exploitation and Abuse Victim Assistance Mechanism, women 164, 165, 169–70, 172, 175, 176, 186
- memorialization** 89–90
- Mexico** 96, 358
- military intervention**, *also* armed intervention, *see also* intervention, humanitarian intervention 25, 103, 112, 115, 125, 128, 129, 131–2, 140, 164, 181–2, 210–4, 216, 222, 224–5, 316, 476, 484
- military technical agreement** 485–9
- Millennium Challenge Corporation** 77
- minority** 91–2, 267, 329, 331, 394, 405, 419
- MINUSMA**, *see* United Nations Stabilization Mission in Mali
- MINUSTAH**, *see* United Nations Stabilization Mission in Haiti
- mission agreements**, *see also* status of forces agreements 49, 72
- MNF**, *see* multinational force
- moderation** 16, 19, 21–3
- morality** 11, 23, 26, 27, 36–8, 42, 139, 163, 171, 201, 382, 532
- Mozambique** 272–3, 440
- MTA**, *see* military technical agreement
- multi-donor trust fund** 76

- multilateral** 34, 97, 153, 230–2, 234, 235, 236, 243, 245, 248, 251–2, 254, 256–8, 324, 338, 353, 356, 396, 473, 494, 497, 550  
**multilateral environmental agreements** 512  
**multinational force** 235, 254, 258, 314, 490–4, 497, 501  
**mutual accountability** 9, 341, 347, 352, 367–8, 375  
**Myanmar** 318, 327  
  
**Namibia** 439  
**national liberation movement** 264, 533, 537  
**NATO**, *see* **North Atlantic Treaty Organization**  
**NATO-led Kosovo Force** 485–9, 497  
**Nepal** 273, 342  
**neocolonialism**, *see* **colonialism**  
**NGOs**, *see* **non-governmental organizations**  
**NIACs**, *see* **non-international armed conflicts**  
**non-governmental organizations** 55, 63, 71, 73–5, 173, 229, 231, 248, 294, 360, 422, 461, 550  
**non-international armed conflict** 25, 50, 89, 96, 97, 120, 147, 181, 226, 233, 243, 247, 259–63, 269, 272, 275–83, 308, 316, 318–19, 324–33, 350–2, 374, 400, 463, 479, 533–4  
**North America**, *see* **America, North**  
**North Atlantic Treaty Organization** 47, 255, 313, 324, 325, 329, 331, 332, 467, 473, 480–1, 485–6, 494, 496–8, 510–11, 513  
**Northern Ireland**, *see also* **United Kingdom** 252, 323  
**NTC**, *see* **Libyan National Transitional Council**  
  
**occupation**, *also* **occupying forces**, **powers**; **occupier**; **occupied territory**; **transformative**; *see also* **post-occupation law** 3, 10, 36, 38–9, 43–5, 51, 81, 86, 88, 93, 97, 107, 114–18, 126, 129–31, 139, 148, 150–1, 190, 235, 241, 247, 252, 254–5, 257, 262, 270, 290–2, 301–2, 328, 333, 334, 394, 428–46, 474, 477–80, 485, 493, 496–7, 503, 512, 515, 537–8, 545  
**belligerent** 63, 92–3, 288–90, 292, 477, 480–1, 484, 490, 492–3, 495, 497  
**of Iraq** 490, 251–4, 257, 310, 314, 343, 490–3, 517  
**law(s) of** 45, 62, 115–16, 129–31, 135, 138, 174, 190, 203, 230, 234–7, 243, 247, 251–4, 257–8, 429, 432, 434–8, 445, 512  
**OECD**, *see* **Organization for Economic Cooperation and Development**  
**Office of the High Representative**, *see also* **Bosnia and Herzegovina** 121, 340  
**OHR**, *see* **Office of the High Representative**  
**Organization for Economic Cooperation and Development** 269, 271, 273, 274, 371  
**Development and Assistance Committee** 64, 68, 72  
**Organization for Security and Cooperation in Europe** 371, 545  
  
**Pakistan** 97, 243  
**Palestine** 17, 117–18, 419, 428, 433–40, 445, 538  
**PBC**, *see* **United Nations Peacebuilding Commission**  
  
**PCIJ**, *see* **Permanent Court of International Justice**  
**peace agreement** 9–10, 60, 62, 72, 86, 88, 92, 94–5, 100, 133–5, 147, 148, 161, 167, 183–6, 188–9, 191–4, 197, 199, 200, 206, 243, 259, 260, 268, 271–3, 276–8, 280–1, 290–1, 300, 302, 310, 313, 324–5, 332, 337, 379–80, 382, 383, 385–97, 399, 401, 403–10, 412–15, 461, 467  
**peace operations** 47–52, 56, 57, 218, 245, 282–3, 314, 334, 336–45, 480, 493, 494, 545  
**peacebuilding** 2–6, 9, 11, 27, 33, 35–6, 43, 45–50, 52–7, 59–62, 66–7, 70, 78, 81, 86, 88, 105, 107, 114, 119, 125–6, 128–31, 146, 169, 174, 189, 191, 204, 213, 218, 220, 221, 224, 241, 244, 265–6, 269–72, 274, 276, 282–3, 316, 319–21, 335–6, 338–9, 341, 344–5, 347, 349–63, 366, 368, 372–5, 381, 384–6, 393, 395, 402, 404, 407, 409–10, 411, 413–14, 503, 505, 515, 518, 545, 548–50, 552  
**Peacebuilding Commission**, *see* **United Nations Peacebuilding Commission**  
**peacekeeping** 47–51, 53–5, 62, 73, 86, 96–7, 158, 168, 169, 173, 188, 189, 193, 256, 265, 276, 281–2, 319–20, 333, 339, 341–2, 348, 349, 370, 373, 374, 425, 426, 503, 505, 512, 545  
**operations** 93, 124, 174, 244, 334, 339, 347, 357, 358, 359, 361, 363, 373, 488, 489, 498–9  
**peacemaking** 54, 84, 105, 112, 144, 146, 153–6, 159, 169, 173, 174, 182, 183, 185–7, 189, 191–2, 194, 200, 201, 203, 205, 319–20, 380, 402, 408, 513, 525, 526  
**Permanent Court of International Justice** 508  
**Peru** 303, 308  
**Pinochet, Augusto** 95–6  
**PKK**, *see* **Kurdish Working Party**  
**pluralism** 204  
**politics** 5, 11, 65, 86, 97, 142, 149, 156, 159, 166, 173, 182, 252, 271, 279, 283, 344, 357, 380, 410, 411  
**popular governance**, *see* **democracy**  
**Portugal** 281, 352  
**post-Cold War**, *see* **Cold War**  
**post-conflict** 1, 2, 4–5, 7, 8–11, 43, 44, 50, 51, 53, 55–6, 58–9, 63, 79, 97, 102, 105, 112, 113, 115, 118–20, 123–33, 137–40, 142–7, 151–3, 155–7, 159–60, 161–73, 175–7, 181–4, 186–7, 189, 194–5, 197, 205, 208–11, 214, 217–18, 221, 223, 229–32, 235, 237, 239, 241–2, 244–5, 248, 255, 256–7, 264, 268–9, 294–5, 311, 316, 319–22, 324, 326, 328, 330–1, 342, 345, 348–9, 372, 375, 379, 381–6, 389, 392–3, 403, 408, 411–15, 416, 417, 420, 422–4, 427, 447–52, 456, 458–9, 464–8, 470, 475, 481–4, 486, 492, 496–501, 502–5, 508–10, 518, 519, 526, 527, 546, 549–50  
**administration** 9, 156, 324  
**constitutions**, *also* **constitution building**, **constitution making** 9, 156, 171, 177, 324, 333, 379, 386–7, 393–7, 398, 403–4, 409, 410, 413, 415  
**elections** 318, 320  
**government(s)** 10, 344, 448, 454–9, 464–6  
**law** 146, 171, 202, 383, 502

- legal regime, *also* legal framework 151, 169, 383, 502, 506, 507
- mission 131, 138, 236, 238, 242, 245
- obligations 124, 126, 128, 372
- reforms 107, 128, 129, 333
- responsibilities 106, 124, 125, 128, 130, 132
- settlement 56, 84, 194
- states, *also* countries 156, 229–31, 235–6, 240–3, 245–8, 251, 357–8, 320, 333, 387, 388, 392, 397, 411, 413
- post-occupation law *see also* occupation 428, 431–6, 442–3, 445–6
- POWs, *see* prisoners of war
- prisoners of war, *see also* Geneva Convention (III) (1949) Relative to the Treatment of Prisoners of War 314, 521, 523, 527
- procedural law 51, 91, 94, 95, 97, 238, 348, 370, 409, 444, 454
- proportionality 1, 6, 15, 16, 18, 34, 53, 71, 77–9, 112–4, 118, 127, 137–9, 141, 174, 176, 198, 311, 483, 509, 512, 515, 547
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 50, 93, 113, 189, 226, 262, 297–8, 291, 301–2, 317, 509–10, 521–2, 526, 532
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 50, 57, 182, 262, 298, 291, 297–8, 300–4, 313, 317, 521
- Protocol I, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- Protocol II, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
- purging, *see* vetting
- R2P, *see* Responsibility to Protect
- racism, *also* racist 262
- raison d'état*, *see* reason of state
- ratione temporis* 289, 295, 296
- reason of state 83–4, 99
- rebellion, rebel 261, 519–21, 524, 526, 528, 530, 535–40
- just 535, 537–8
- right to 520
- rebel(s), *also* rebel forces, groups, movement 232, 247, 255, 262, 264, 273, 280, 281, 262, 280, 310, 350, 353–4, 400, 519–31, 532, 525, 533
- rebuilding 1, 15, 17, 25, 93, 104, 106, 107, 114, 166, 174, 176, 210, 230, 265–70, 319, 324, 360, 410, 442, 443, 452, 483, 503
- reconciliation 1, 10, 15–16, 18, 20, 24, 35, 41, 52, 55, 57, 60, 66, 87, 114, 135, 169, 174, 176, 244, 327, 329, 355–6, 360, 361, 389–90, 392, 405, 406, 414, 416, 483, 525–6, 536
- reconstruction 1, 5, 7, 10, 33–5, 57, 78, 95, 104, 107–8, 115–17, 124–33, 135–41, 143, 145, 153–7, 159, 161–2, 164–9, 173, 181–3, 186, 208, 210, 220–1, 229, 231, 243–4, 248–9, 256, 257, 265–72, 276, 283, 318, 327, 331, 334, 346, 348, 356, 372, 448–53, 457, 461–5, 482, 483, 505, 513–15, 517, 526
- refugees 186, 192, 196, 200, 277, 281, 309, 319, 366, 388, 389, 390, 502, 507
- regime change 25, 85, 88–9, 150, 208, 265
- assistance in performing 44–5
- regional integration 331
- reparation(s) 1, 10, 15, 17–19, 21, 24, 25, 35, 41, 57, 66, 78, 83, 87, 89, 92, 93, 97, 134–5, 145, 164, 174, 176, 187, 294, 416, 445, 483, 502–4, 507–8, 514, 515–16
- responsibility 35, 49, 72–3, 76, 86, 88, 92–3, 97, 107–10, 113, 120, 121, 128, 130, 139, 159, 219, 230, 235, 236, 238, 239, 240, 246, 247, 249, 290, 319, 339–41, 419, 424–5, 429, 431–4, 436–8, 444–5, 457, 458, 483, 502, 507–9, 511, 516, 519, 545
- Responsibility to Protect 2, 5, 7, 25, 94, 102–11, 113, 119–22, 174, 210, 213, 224, 382, 422, 432, 442–5, 550
- responsibility to rebuild 46, 94, 103–7, 224, 444
- restitution, *see also* compensation, 15, 17–19, 21, 34, 174, 176, 483, 508
- Revolutionary Armed Forces of Colombia 310–11, 533
- Revolutionary United Front 303, 400, 461, 464
- role of law 82, 195, 198, 203, 381, 503
- role-splitting 417, 423
- Rome Statute, *see also* International Criminal Court 263, 273, 420, 422, 510
- RUF, *see* Revolutionary United Front
- rule of law 4, 16, 18, 20, 25, 43, 47, 50–1, 55–7, 60, 65–72, 74, 76–7, 79, 83, 87, 99, 114, 154, 188, 190, 192, 197, 208–14, 216–18, 220–1, 224–5, 241, 246, 249, 255–6, 265, 273, 294–6, 311, 320–1, 324, 329–30, 348, 351, 353–5, 372, 382, 385, 389, 390, 410, 470, 473, 483, 499, 503, 526, 539
- Russia, *see also* Chechnya 255, 342, 488, 489
- Rwanda, *see also* International Criminal Tribunal for Rwanda 20, 63, 173, 274, 276, 282, 303, 342, 394
- Scelle, Georges 423–4
- screening, *see* vetting
- SEA/VAM, *see* Sexual Exploitation and Abuse Victim Assistance Mechanism
- secession 92, 94, 185, 193, 405, 418
- Second World War, *see* World War II
- Security Council, *see* United Nations Security Council
- security sector reform 4, 43, 59, 60, 62, 64, 66, 68, 72, 89, 270, 316, 332, 338, 351, 353–5, 389, 390
- self-defense 45, 77, 130
- self-determination 9, 51, 64, 92, 116, 117, 120, 143, 154, 155, 156, 170, 184–6, 193–4, 226, 263, 266, 335–6, 340, 342–4, 400, 410, 417–9, 434
- Serbia, *see also* Yugoslavia 313, 443, 485–7
- sex, *see* gender, girl, men, Sexual Exploitation and Abuse Victim Assistance Mechanism, women

- Sexual Exploitation and Abuse Victim Assistance Mechanism** 73
- Sierra Leone** 52, 154, 190, 303, 339, 342, 350–3, 356, 362–5, 394, 400, 448, 449, 459, 460–1, 464–6  
 People's Party 462–4
- slavery** 84, 91, 277, 503
- SLPP**, *see* Sierra Leone People's Party
- SOFA**, *see* status of forces agreement
- SOMA**, *see* status of mission agreement
- Somalia** 308, 394
- South America**, *see* America, South; America, Latin
- South Africa** 20, 63, 392, 395, 439
- South Ossetia** 433–4
- South Sudan** 50, 97, 394, 396
- sovereignty** 5, 9–10, 45–7, 53, 75–6, 115, 119, 128–30, 145, 185, 220, 229, 253–4, 258, 262, 268, 276, 342, 416–27, 431, 439, 444, 475, 477–8, 483, 486–7, 492, 500, 520, 523–4, 533
- Spain** 199, 275–7, 282, 526
- Special Court for Sierra Leone** 190, 280
- special political mission** 338
- Special Representative to the United Nations Secretary-General** 253–4, 258, 425, 487
- SPM**, *see* special political mission
- Sri Lanka** 302
- SRS**, *see* Special Representative to the United Nations Secretary-General
- SSR**, *see* security sector reform
- state of normalcy** 105, 318, 321, 329, 332, 333
- state sovereignty**, *see* sovereignty
- state transitions** 316, 324, 331
- statebuilding** 46, 55, 59, 60, 64, 105, 108, 115, 144, 269, 271, 274–5, 335–44, 395, 410–4, 550
- statehood** 184, 202, 249, 324, 388, 390, 417–9, 425, 429
- status of armed forces on foreign territory agreements**, *see* status of forces agreement
- status of forces agreement**, *see also* status of mission agreement 49–51, 93, 472–4, 477, 480–1, 485, 487, 490–9, 494–5, 497, 500, 501
- status of mission agreement** 49, 51
- statute of limitation** 95
- stewardship** 71, 75–7, 79, 138, 483, 512
- subsidiarity** 266–7
- substantive law** 63, 69, 71, 81, 91–2, 94–5, 97, 122, 126–7, 136–8, 141, 144, 184, 217, 225, 238, 264, 266, 268, 278, 372, 388–90, 392, 395, 397, 400, 405, 409, 436, 449, 457, 461, 482, 522
- Sudan** 50, 97, 394, 396
- sustainable development** 9, 104, 346, 348, 350, 364, 375
- Syria** 17, 261, 308, 504, 525, 526, 533
- Taliban** 250, 278–80, 314
- Tamil Tigers** 302–3, 310
- tax** 236, 249
- temporal scope** 8, 9, 145–6, 148, 159, 287–90, 292, 294–6, 299–301
- temporality** 197, 199, 319, 324, 331
- temporary rules** 53, 57, 320, 342, 404
- threshold** 30, 48, 49, 109, 113, 233, 234, 269, 270, 290, 291, 298–300, 303–6, 310–12, 314, 336, 432, 484, 507, 510–11
- Timor Leste**, *see* East Timor
- transition(s)** 1, 2, 4, 6, 8–10, 25, 35, 52, 58–65, 67–79, 84–86, 89–98, 101, 115, 125–8, 132–4, 143–9, 151–3, 157, 159, 161–3, 165, 167, 168, 176, 177, 182, 188, 192–200, 204–5, 236, 243–4, 249–50, 253–7, 259, 266, 270, 280–1, 283, 292–3, 295–7, 311, 316, 320, 324–5, 328–32, 334–40, 343, 352, 355, 379–86, 389–90, 401, 406, 408, 409, 412–6, 422, 431–3, 435–6, 439, 441, 445, 470, 482–4, 486, 491, 498–501, 513, 525–6, 542, 544–6, 549, 551, 553
- transitional constitution** 259, 379, 386, 387
- transitional government**, *also* authority, regime 71, 76, 92, 116, 244, 348, 402
- transitional justice** 2, 4, 5, 6, 15, 24–5, 32, 35, 58–60, 62, 66–7, 70, 72, 78, 80–1, 83, 85–91, 93, 95–101, 108, 120, 135, 166–7, 173, 174, 187, 191, 193, 196, 199, 201, 270, 273, 294, 295, 296, 316, 331, 332, 351, 382, 388, 389, 396, 405, 546, 550
- transitional political arrangement** 320, 389, 390
- transitional power-sharing** 316, 318, 320
- transitional society** 4, 60, 63–6, 69–72, 74–6, 79, 161
- transition(s)**  
 to democracy 81, 90, 115
- treaty law** 9, 24, 51, 57, 297, 300, 549
- tripartite just war theory** 551, 552
- truth** 60, 65, 66, 77, 78, 83, 88, 388, 389, 390, 413, 416  
 finding 135  
 seeking 87, 196–7, 332  
 telling 135
- truth commission** 20, 24, 57, 66, 70, 89–90, 273
- Turkey** 256, 313, 432–3
- Uganda** 90, 167, 233, 289–90
- UN**, *see* United Nations
- UNAMA**, *see* United Nations Assistance Mission to Afghanistan
- UNAMI**, *see* United Nations Assistance Mission for Iraq
- UNAMSIL**, *see* United Nations Assistance Mission in Sierra Leone
- UNCC**, *see* United Nations Compensation Commission
- UNCIS**, *see* United Nations Convention on Jurisdictional Immunities of States and Their Property
- UNDP**, *see* United Nations Development Program
- UNEP**, *see* United Nations Environment Programme
- UNGA**, *see* United Nations General Assembly
- UNICEF**, *see* United Nations Children's Fund
- UNIFEM**, *see* United Nations Development Fund for Women
- unilateral**, *see also* multilateral 110, 212, 229–33, 241, 243, 245, 248, 251–2, 256–8, 338, 424, 432–3, 487–91, 495, 514
- UNIOGBIS**, *see* United Nations Integrated Peacebuilding Office in Guinea-Bissau
- UNIOSIL**, *see* United Nations Integrated Office in Sierra Leone

- UNIPSIL, *see* United Nations Integrated Peacebuilding Office in Sierra Leone
- United Kingdom, *see also* Northern Ireland 95, 254, 256–7, 323, 328, 440–1, 488
- United Nations 43, 46–9, 73–4, 92, 96, 105–9, 111, 129, 153, 158, 172–3, 188, 204, 216, 218, 221, 224, 232, 234–42, 244–5, 247–8, 250–3, 255–8, 264–5, 270–4, 276, 278–9, 281–3, 316, 318–20, 324, 326–9, 331, 333, 336–9, 341, 346–50, 356–9, 361–3, 366–8, 370–1, 373–4, 388, 391, 394–7, 399, 407–8, 410, 418–19, 422, 424, 425, 426, 463, 471, 493–5, 498–9, 545
- United Nations Assistance Mission to Afghanistan 250
- United Nations Assistance Mission for Iraq 254, 258
- United Nations Assistance Mission in Sierra Leone 339
- United Nations Charter 92, 94, 105, 129, 183–4, 188, 203, 215, 233, 239–40, 242, 243, 252, 317, 347, 421
- Article 2(4) 105, 232–3, 476
- Article 2(7) 45–6
- Article 51 232, 288, 476
- Article 103 230, 236, 240–1, 245, 257
- Chapter VI 92, 188
- Chapter VII 43, 46, 48, 52, 92, 112, 188, 230–1, 233, 237, 240, 242, 245, 247–50, 253–7, 325, 328, 475, 486, 489, 492, 493, 495, 508
- Chapter VIII 233
- Chapter XII 63
- United Nations Children's Fund 354, 434
- United Nations Committee on the Elimination of Discrimination against Women 327, 331
- United Nations Committee on the Elimination of Racial Discrimination 327, 331
- United Nations Compensation Commission 507–10, 515–16
- United Nations Convention on Jurisdictional Immunities of States and Their Property 471–2
- United Nations Development Fund for Women 407–8
- United Nations Development Program 350, 354, 394, 434
- United Nations Economic and Social Council 346, 348–50, 370
- United Nations Environment Program 506–10
- United Nations General Assembly 46, 50, 73, 104, 106, 109, 304, 342, 347–50, 358, 370
- United Nations Human Rights Committee 322–3, 328, 331, 453–6, 458
- United Nations Integrated Mission in Timor-Leste 338
- United Nations Integrated Office in Sierra Leone 339
- United Nations Integrated Peacebuilding Office in the Central African Republic 52
- United Nations Integrated Peacebuilding Office in Guinea-Bissau 52
- United Nations Integrated Peacebuilding Office in Sierra Leone 52, 352
- United Nations Interim Administration Mission in Kosovo 333, 487–9
- United Nations Mission in Liberia 52, 281, 282, 355
- United Nations Mission of Support in East Timor 338, 434
- United Nations Office in Burundi 52
- United Nations Peacebuilding Commission 9, 46, 52, 224, 244, 265, 341, 346–74, 545
- United Nations Protection Force 467
- United Nations reform 347, 73
- United Nations Secretary-General 46, 49, 54, 87, 107, 109, 110, 121, 234–6, 244, 253, 255, 256, 271, 273, 290, 318–20, 327, 329, 333, 334, 337, 347–9, 395, 410, 456, 461, 488
- United Nations Security Council 8, 43, 46–50, 52, 53, 61–3, 74, 75, 92, 95, 104, 112, 116, 117, 126, 129, 131–2, 134, 138–9, 158, 172, 173–4, 204, 210, 211, 213, 215, 216, 230–33, 235, 236, 239, 240–44, 247, 248–51, 253–8, 263, 273, 304, 307–9, 325, 326, 328, 329, 331, 337, 342, 346, 358, 363, 370, 394, 407, 475, 485–6, 488, 490–3, 495, 508, 509, 545
- United Nations Stabilization Mission in Haiti 282, 337, 338
- United Nations Stabilization Mission in Mali 235
- United Nations Support Mission in Libya 255–6
- United Nations Transitional Administration of East Timor 236, 249, 257, 275, 337, 395
- United States of America 21, 25, 77, 89, 150, 181, 199, 203, 208, 241, 243, 250, 251–4, 256, 257, 264, 275, 276–82, 282, 292, 302, 310, 312, 314, 328, 343, 344, 396, 402, 468, 480, 481, 485, 488–93, 495, 501, 511, 513–15, 517
- UNMIK, *see* United Nations Interim Administration Mission in Kosovo
- UNMIL, *see* United Nations Mission in Liberia
- UNMISSET, *see* United Nations Mission of Support in East Timor
- UNMIT, *see* United Nations Integrated Mission in Timor-Leste
- UNPROFOR, *see* United Nations Protection Force
- UNSC, *see* United Nations Security Council
- UNSMIL, *see* United Nations Support Mission in Libya
- UNTAET, *see* United Nations Transitional Administration of East Timor
- US, *see* United States of America
- USA, *see* United States of America
- usufruct 129, 138
- VCLT, *see* Vienna Convention on the Law of Treaties
- vetting 87, 89, 197, 318
- Vienna Convention on the Law of Treaties 93–4, 134, 456, 512
- war, *see* international armed conflicts, non-international armed conflict
- on drugs 96, 150
- on terror 96, 148, 150, 279, 303, 312
- West Bank, *see* Palestine
- women, *see also* feminism, gender, girl, men, Sexual Exploitation and Abuse Victim Assistance Mechanism, United Nations Committee on the Elimination of Discrimination against Women, United

- Nations Development Fund for Women**, 2, 7, 11, 95, 161–77, 186, 200, 329, 341, 347, 356, 359, 361–3, 367, 374, 389, 390, 396, 399, 406–9, 414, 546, 553
- World Trade Organization** 78, 369, 370  
Generalized System of Preferences 369–70
- WTO**, *see* **World Trade Organization**
- World Bank** 73, 74, 154, 231, 251, 264, 271, 338, 348, 350, 353, 362, 366, 371, 434
- World War I** 81, 98–9, 430, 472
- World War II** 17, 20, 21, 25, 56, 63, 99, 164, 230, 270, 275, 301, 324, 342, 430, 467, 502, 515
- Yugoslavia**, *see also* **International Criminal Tribunal for the former Yugoslavia**,  
**NATO-led Kosovo Force** 9, 154, 263, 307–8, 325, 485–6, 510–11























