

# The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept

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## ABSTRACT

*The increasing involvement of international actors in various forms of international missions set up to supervise reconstruction or peace-building processes has raised many questions with respect to both the legal framework applicable to such activity and the authority to engage in such reforms. Recently, new normative propositions on the subject have been labelled jus post bellum. This Article challenges the usefulness and accuracy of jus post bellum as a legal concept. Such theories either amount to an explicit or implicit challenge of the crucial objectivity of the post-conflict phase by linking the rights and obligations of foreign actors to the legality of the use of force, or they simply bring together previously existing obligations.*

## TABLE OF CONTENTS

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 120 |
| II.  | PEACEKEEPING, PEACEMAKING AND POST-CONFLICT<br>PEACE-BUILDING .....                  | 122 |
| III. | AUTHORITY, TITLE AND LEGAL RESPONSIBILITIES<br>IN POST-CONFLICT RECONSTRUCTION ..... | 126 |
|      | A. <i>Sovereignty, the Security Council and<br/>Foreign Administration</i> .....     | 126 |
|      | B. <i>Belligerent Occupation and the Occupiers’<br/>Limited Authority</i> .....      | 129 |

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|     |   |     |
|-----|---|-----|
| IV. | A CHALLENGE TO <i>JUS POST BELLUM</i> AS A LEGAL CONCEPT.....   | 132 |
| A.  | <i>Linking the Legality of the Use of Force and (Post-Conflict) Peace-Building</i> .....                  | 134 |
| 1.  | The Independence of Post-Conflict Reconstruction .....  | 135 |
| 2.  | <i>Jus Post Bellum</i> and “Just Wars”.....   | 137 |
| B.  | <i>The Legal Framework of Post-conflict Reconstruction: Jus Post Bellum as “Law after Conflict”</i> ..... | 141 |
| 1.  | Rules, Principles and Restrictions on Peace Settlements.....  | 142 |
| 2.  | Rules and Principles of Post-Conflict Governance.....   | 145 |
| V.  | CONCLUSION.....   | 148 |

## I. INTRODUCTION

The reconstruction processes in Kosovo, East Timor, Afghanistan, and Iraq are some of the most important examples of comprehensive international efforts to rebuild societies emerging from years of conflict and civil strife. The emphasis that the United Nations and other international actors have placed on the post-conflict phase is a recent phenomenon in international law and clearly contrasts with previous “non-interventionist” approaches to conflicts in which the accent lay too much on negotiating and maintaining a ceasefire, with scant attention paid to addressing the very reasons behind the conflict. The increasing involvement of international actors in various forms of international missions to supervise reconstruction or peace-building processes has raised many questions regarding the applicable legal framework, in terms of both the rights and obligations of the actors involved in the post-conflict phase and the content of reconstruction and reform.<sup>1</sup> The increasing

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1. See, e.g., MICHAEL J. KELLY, *RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS: THE SEARCH FOR A LEGAL FRAMEWORK* (1999) (discussing and analyzing such questions); Patrick Gavigan, *Introduction* to HONORING HUMAN RIGHTS UNDER INTERNATIONAL MANDATES: LESSONS FROM BOSNIA, KOSOVO AND EAST TIMOR 3, 6–10 (Alice Henkin ed., 2003) (reflecting on the post-conflict security strategy and the implementation of a post-conflict legal framework in light of the U.N. peace operations in Kosovo and East Timor); 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*, 44 GERMAN Y.B. INT’L L. 353 (2001); Antonio F. Perez, *Legal Frameworks for Economic Transition in Iraq—Occupation Under the Law of War vs. Global Governance Under the Law of Peace*, 18

role of foreign states and international organizations in these processes is undeniable. However, scholars often claim that the focus on the activities in post-conflict scenarios has resulted in a “legal void” in the transition from war or conflict to peace because the traditional difference between the law applicable in war and the law applicable in peacetime is considered no longer relevant.<sup>2</sup> Several scholars have 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* resurfaced principally in political philosophy<sup>3</sup> and ethics,<sup>4</sup> international legal scholars have taken up the case for a renewed attention to and recognition of *jus post bellum* as legal concept.<sup>5</sup>

This Article challenges the existence and usefulness of *jus post bellum* as a legal concept. The importance of post-conflict reconstruction and the evolution of the United Nations’ and states’ policies geared toward tackling the root causes of conflicts are beyond doubt. The factual changes in the international law relating to the maintenance of peace and security and the need to tackle the root-causes of conflicts are irrefutable. However, the suggested normative implications of this evolution are troubling. While some legal scholars claim that it is premature to include *jus post bellum* in the law relating to the use of force,<sup>6</sup> I argue 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

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TRANSNAT’L LAW. 53 (2004–2005) (analyzing the limits imposed by the law of war and the options available under international occupation).

2. See, e.g., Carsten Stahn, ‘*Jus ad Bellum*’, ‘*Jus in Bello*’... *Jus Post Bellum*?—*Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT’L L. 921, 923–24 (2007) (exploring the “bipolar peace and war distinction”). But see Alexander Orakhelashvili, *Legal Stability and Claims of Change: The International Court’s Treatment of Jus ad Bellum and Jus in Bello*, 75 NORDIC J. INT’L L. 371 (2006) (discussing the consistency of the International Court of Justice’s jurisprudence in respect of both *jus ad bellum* and *jus in bello* as undermining arguments relating to legal change in these fields).

3. See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS* 122–23 (1977) (discussing how the theory of ends in war is consistent with *jus ad bellum*).

4. See, e.g., Brian Orend, *Jus Post Bellum*, 31 J. SOC. PHIL. 117–37 (2000) [hereinafter Orend, *Jus Post Bellum*] (advocating for the inclusion of *jus post bellum* into just war theory); Brian Orend, *Jus Post Bellum: The Perspective of a Just-War Theorist*, 20 LEIDEN J. INT’L L. 572 (2007) [hereinafter Orend, *Just-War Theorist*] (discussing the implications of *jus post bellum* on international law).

5. See, e.g., *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* (Carsten Stahn & Jann Kleffner eds., 2008) (introducing collection of several articles discussing “the origins, contents and contemporary challenges of *jus post bellum*”).

6. Alex J. Bellamy, *The Responsibilities of Victory: Jus Post Bellum and the Just War*, 34 REV. INT’L STUD. 601, 602 (2008).

challenge of the crucial neutral stance in the post-conflict phase or simply bring together already existing obligations under a new name.

Part II briefly depicts the factual context in which this debate must be situated, namely the evolution of dealing with post-conflict situations. Part III addresses the legal responsibilities and authority in post-conflict reconstruction. The analysis of the legal authority in post-conflict situations will evaluate the existing rules on responsibility for post-conflict reconstruction, namely the laws of occupation and the role of the Security Council. Part IV challenges existing conceptions of *jus post bellum* as a legal notion. Part IV.A addresses how such theories frequently link *jus post bellum* to the legality or “justness” of the use of force, leading to an explicit or implicit reintroduction of *just war* theories in international law. Part IV.B tackles the usefulness of *jus post bellum* as an “objective” notion pertaining to the legal framework containing rules and principles applicable to post-conflict peace building.

## II. PEACEKEEPING, PEACEMAKING AND POST-CONFLICT PEACE-BUILDING

United Nations mission mandates have substantially evolved throughout the years. The differences between the first “traditional” United Nations peacekeeping operations and cases such as Kosovo and East Timor reveal that the United Nations’ role has evolved from the interposition of neutral military contingents in a conflict to the supervision of long-term, post-conflict reconstruction processes. Traditionally, the United Nations’ task in conflict or post-conflict situations was limited to the deployment of military personnel and a limited number of civilian staff to assist or advise the existing governmental structures.<sup>7</sup> Recent peace-building or post-conflict reconstruction missions are the latest manifestation of the evolution in the approach toward situations presenting a potential threat to international peace and security. Operations in the 1990s underestimated the importance of political, economic, social, and civil reconstruction in building a sustainable peace.<sup>8</sup> The growing awareness of the interrelatedness of political affairs, economy, social

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7. See The Secretary-General, *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 Peace-Keeping*, ¶ 20, delivered to the Security Council, U.N. Doc. S/24111, A/47/277 (June 17, 1992). The Secretary-General’s report contains the rather formal definition of peacekeeping given by former Secretary-General Boutros-Ghali: “[T]he deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well.” *Id.*

8. Roland Paris, *Post-Conflict Peacebuilding*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS* 404, 417 (Thomas G. Weiss & Sam Daws eds., 2007).

services, and governance resulted in the gradual introduction of such elements in peacekeeping activities. A report by former Secretary-General Kofi Annan summarized the evolution from peacekeeping to peace-building as follows:

While United Nations efforts have been tailored so that they are palpable to the population to meet the immediacy of their security needs and to address the grave injustices of war, the root causes of conflict have often been left unaddressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways, that the international community can help prevent a return to conflict in the future.<sup>9</sup>

The United Nations' experience in Cambodia in the 1990s can be seen as the starting point of this development. The United Nations Transitional Authority in Cambodia (UNTAC) was given a mandate with limited legislative power that included many aspects related to human rights—the organization and conduct of free and fair elections; military arrangements; limited civil administration; the maintenance of law and order; the repatriation and resettlement of Cambodian refugees and internally displaced persons; and the rehabilitation of essential Cambodian infrastructure.<sup>10</sup> Many subsequent operations—such as the second United Nations Operation in Somalia (UNOSOM II);<sup>11</sup> the United Nations Mission in Bosnia and Herzegovina (UNMIBH) in combination with a United Nations International Police Task Force (IPTF);<sup>12</sup> and the United Nations Transitional Administration for Eastern Slavonia (UNTAES)<sup>13</sup>—were equally granted some administrative and legislative powers.

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9. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 4, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

10. Agreement on the Comprehensive Political Settlement of the Cambodia Conflict, art. 6, Annex I, U.N. Doc. S/23177, A/46/608 (Oct. 23, 1991) (authorized under S.C. Res. 745, U.N. Doc. S/RES/745 (Feb. 28, 1992)).

11. S.C. Res. 814, ¶ 4, U.N. Doc. S/RES/814 (Mar. 26, 1993) (explaining that the mandate was not limited to humanitarian assistance and the observation of the cease-fire agreement, but also included elements of restoration of the state's institutions, such as providing assistance in the reorganization of the police and judicial system and in the political process in Somalia); see also S.C. Res. 897, ¶ 2, U.N. Doc. S/RES/897 (Jan. 31, 1994) (same).

12. S.C. Res. 1035, ¶ 2, U.N. Doc. S/RES/1035 (Dec. 21, 1995). The IPTF's main objectives were to monitor, observe and inspect law enforcement activities and facilities, and to advise and train law enforcement personnel. UNMIBH was given a limited civilian mandate, mainly aimed at the co-ordination of UN activity in the field of humanitarian relief, refugees, human rights, elections, rehabilitation of infrastructure and economic reconstruction. General Agreement for Peace in Bosnia and Herzegovina, Annex 11, U.N. Doc. S/1995/999 (Dec. 14 1995); The Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1026 (1995)*, delivered to the Security Council, U.N. Doc. S/1995/1031 (Dec. 13, 1995).

13. S.C. Res. 1023, U.N. Doc. S/RES/1023 (Nov. 22, 1995). The mission was *inter alia* mandated to undertake tasks relating to civil administration and to the functioning of public services, economic reconstruction and to organize elections, assist

Within this evolution, international administrations hold a special place. The cases of Kosovo and East Timor are, to a certain extent, a culmination of this evolution since the United Nations has taken over the entire administration of a territory in post-conflict scenarios.<sup>14</sup> It is this particular type of operation that has prompted many discussions on the legal obligations of the United Nations and other international actors. Following NATO's armed intervention in Kosovo in March 1999, the Security Council adopted Resolution 1244 (1999), establishing the United Nations Interim Administration Mission in Kosovo (UNMIK).<sup>15</sup> Resolution 1244 called upon UNMIK to promote the establishment of substantial autonomy and self-government in Kosovo; perform basic civilian administrative functions; support the reconstruction of key infrastructure; maintain civil law and order; promote human rights; and assure the safe return of all refugees and displaced persons.<sup>16</sup> UNMIK's competences included full legislative and executive power in the areas of responsibility laid out in Resolution 1244.<sup>17</sup> A few months later, the Security Council authorized the establishment of the United Nations Transitional Authority in East Timor (UNTAET).<sup>18</sup> An earlier "popular consultation" among the East Timorese revealed a clear wish to begin a process of transitioning towards independence.<sup>19</sup> In the transitional process, UNTAET 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>20</sup> In Afghanistan and Iraq, the United Nations was not granted any direct administrative powers. The Afghan post-conflict reconstruction process relied principally on local capacity with minimal international participation.<sup>21</sup> In Iraq, on the other hand, the occupying forces exercised administrative powers

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in their conduct, and certify the results. To that end, the transitional administrator was also granted legislative power. *Report of the Secretary-General Pursuant to Security Council Resolution 1026 (1995)*, *supra* note 12, ¶ 17.

14. See M. J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76, 76 (2001) (describing the UN's role in the governance of various societies affected by conflicts); Matthias Ruffert, *The Administration of Kosovo and East-Timor by the International Community*, 3 INT'L & COM. L.Q. 613, 622-27 (2001) (focusing specifically on Kosovo and East-Timor).

15. S.C. Res. 1244, Annex 2, U.N. Doc. S/RES/1244 (June 10, 1999).

16. *Id.* ¶ 11(a)-(k).

17. Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, ch. 5 (May 15, 2001), *available at* <http://www.unmikonline.org/regulations/2001/reg09-01.htm>.

18. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

19. *Id.*

20. *Id.* ¶ 1.

21. See Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001) (providing a structure for the interim government while "[a]cknowledging the right of the people of Afghanistan to freely determine their own political future.").

based on both the laws of occupation and Security Council resolutions.<sup>22</sup>

An analysis of the mandates entrusted to recent international administrations and subsequent reconstruction missions such as Afghanistan and Iraq clearly reveals an unambiguous aim to introduce democracy into these states and territories.<sup>23</sup> More recent peace-building missions with less intrusive administrative mandates are equally centered on the creation or reinforcement of democratic states. One of the tasks of the 2004 Mission in Haiti (MINUSTAH), for example, is to support “the constitutional and political process . . . and foster principles and democratic governance and institutional development.”<sup>24</sup> Although the link between democracy and peace remains controversial, it was explicitly taken up by the former United Nations Secretary-General Boutros Boutros-Ghali in his “Agenda for Democratisation,” in which he observed that “[d]emocratic institutions and processes . . . minimiz[e] the risk that differences or disputes will erupt into armed conflict or confrontation. . . . In this way, a culture of democracy is fundamentally a culture of peace.”<sup>25</sup> The United Nations’ role in relation to peace and security has shifted undoubtedly from purely preserving peace and security to building peace and security through a systematic insistence on democratic governance. This evolution is linked to the United Nations’ involvement in the maintenance of peace and security and is not necessarily related to the pre-existence of an international armed conflict. 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.<sup>26</sup> It is more than doubtful that victory confers any entitlement or obligations in the post-conflict phase.

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22. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

23. See M. Cogen & E. De Brabandere, *Democratic Governance and Post Conflict Reconstruction*, 20 LEIDEN J. INT’L L. 669, 674 (2007) (noting the trend of UN-mandated missions growing involvement in “introducing democratic governance” into countries such as Afghanistan and Iraq); J. d’Aspremont, *Post-Conflict Administrations as Democracy-Building Instruments*, 9 CHI. J. INT’L L. 1, 1 (2008) (analyzing modern democracy-building institutions in post-conflict nations).

24. S.C. Res. 1542, ¶ 7(II)(a), U.N. Doc. S/RES/1542 (Apr. 30, 2004).

25. The Secretary General, *Report of the Secretary-General on an Agenda for Democratisation*, ¶ 17, delivered to the General Assembly, U.N. Doc. A/51/761 (Dec. 20, 1996).

26. See generally DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* (1999) (discussing the parameters of delegation of the Security Council’s powers).

### III. AUTHORITY, TITLE, AND LEGAL RESPONSIBILITIES IN POST-CONFLICT RECONSTRUCTION

The questions of which actor is responsible for the reconstruction of states or territories and from which norm the legal authority and title originates are matters currently regulated by general international law and the law of the United Nations. State sovereignty, from which a 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. Under current international law, the authority to engage in comprehensive post-conflict reforms is limited. First, the only institution that can impose a comprehensive peace-building or international administration mission on a foreign state or territory without the consent of the host state is the Security Council, since such a power has been delegated to it.<sup>27</sup> Second, 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 for which the laws of occupation provide.

#### A. *Sovereignty, the Security Council, and Foreign Administration*

Sovereignty is closely related to international legal personality and can be described as the right to exercise, to the exclusion of any other state, the functions of a state.<sup>28</sup> The relation between sovereignty and the exercise of administrative functions by international actors has often been misconceived in recent cases.<sup>29</sup> Sovereignty is distinct from the competences of the state and distinct

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27. U.N. Charter art. 39.

28. *Cf.* Island of Palmas (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 22 AM. J. INT'L L. 867, 875 (Perm. Ct. Arb. 1928) ("Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, the exclusion of any other state, the functions of the state.").

29. With regard to Iraq, the concept of sovereignty has frequently been used and misused by the CPA and the Security Council. In one of its resolutions, the Security Council "reaffirm(ed) the independence, sovereignty, unity, and territorial integrity of Iraq," although it also stated at the end of occupation that "Iraq will reassert its full sovereignty." S.C. Res. 1546, pmbl., ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004). However, sovereignty as such was never transferred to the CPA, as the CPA was merely the administering authority in Iraq. As noted by Brownlie, "the important features of 'sovereignty' in such cases are the continued existence of a legal personality and the attribution of territory to that legal person and not to the holders for the time being." IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 107 (6th ed. 2003). In such cases, a reference to the transfer of *authority* instead of *sovereignty* would therefore have been more appropriate. *See also* A. Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27, 41 (2005) (noting that few states today exercise sovereignty in its purest form due to the growing body of international law).

from its administration.<sup>30</sup> Certain situations—one of them being the transfer of administrative powers—can moderate a state's exclusive competence. A state's transmission of parts of its administrative power and competences to another entity should be understood as the *exercise* of the rights of a sovereign state. As the Permanent Court of International Justice noted in the well-known *Wimbledon* case: “[T]he right of entering into international engagements is an attribute of State sovereignty.”<sup>31</sup> The delegation of certain competences to other actors can be accomplished either by consenting to the deployment of a mission that is granted certain administrative functions or by granting the power to the United Nations Security Council to establish such a mission under the terms of the United Nations Charter.

Despite some contentions to the contrary,<sup>32</sup> there are clear bases for the legal authority to exercise administrative functions in post-conflict situations. When the Security Council authorizes comprehensive peace-building efforts, such efforts can, without doubt, be seen in conformity with United Nations institutional law, especially when viewed in the context of the Security Council's competences under Chapter VII of the United Nations Charter.<sup>33</sup> When created by the Security Council pursuant to Chapter VII of the

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30. BROWNLIE, *supra* note 29, at 107; J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 33 (2d ed. 2006).

31. *S.S. Wimbledon (Gr. Brit. v. Ger.)*, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17).

32. See e.g., Hollin K. Dickerson, *Assumptions of Legitimacy and the Foundations of International Territorial Administration*, 100 AM. SOC'Y INT'L L. PROC. 144, 145 (2006) (questioning the legal authority of the United Nations to carry out international administration of post-conflict nations).

33. Ruffert, *supra* note 14, at 620–21; see also Nico Schrijver, Lecture Commentary, *The Complex Role of the Legal Adviser When International Organizations Administer Territory by R. Wilde*, 95 AM. SOC'Y INT'L L. PROC. 259 (2001) (noting that the Security Council's authority to provide administration is arguably an implied power under Chapter VII of the United Nations Charter). For a discussion on the establishment of UNMIK and the authorization of KFOR, see *Behrami v. France*, App. No. 71412/01, & *Saramati v. France, Germany and Norway*, App. No. 78166/01, 45 Eur. Ct. H.R. 85, ¶ 130 (2007).

While the Resolution referred to Chapter VII of the Charter, it did not identify the precise Articles of that Chapter under which the UNSC was acting and the Court notes that there are a number of possible bases in Chapter VII for this delegation by the UNSC: the non-exhaustive Article 42 (read in conjunction with the widely formulated Article 48), the non-exhaustive nature of Article 41 under which territorial administrations could be authorised as a necessary instrument for sustainable peace; or implied powers under the Charter for the UNSC to so act in both respects based on an effective interpretation of the Charter. In any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK.

*Id.*

United Nations Charter, peace-building missions and international administrations must be seen as a method to maintain international peace and security, the primary responsibility of the Security Council. There is no reason to differentiate between the Security Council's power to organize the reconstruction of a state following a military intervention and its power to do so based on humanitarian grounds, since practice shows that peacekeeping and peace-building activities are not necessarily linked to the prior authorization to use force.<sup>34</sup> Despite some reluctance in legal literature to accept the expanding role of the Security Council and range of measures the Security Council adopts under its Chapter VII powers,<sup>35</sup> recent comprehensive peace-building mandates have not encountered objections by United Nations member states.<sup>36</sup>

The consent of the host state is not absolutely necessary when the Security Council acts under Chapter VII. However, when possible, the consent of the host state is often sought and obtained for intrusive reconstruction activities<sup>37</sup> since, from a practical perspective, international administrations cannot adequately operate without the consent of the sovereign state. This seems to have been the reason Indonesia's consent was sought for UNTAET, despite the

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34. See ERIC DE BRABANDERE, POST-CONFLICT ADMINISTRATIONS IN INTERNATIONAL LAW: INTERNATIONAL TERRITORIAL ADMINISTRATION, TRANSITIONAL AUTHORITY AND FOREIGN OCCUPATION IN THEORY AND PRACTICE 15–34 (2009) (providing a historical survey of the United Nation's use of administrative power after military intervention or humanitarian assistance); see also B.S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 71 (2004–2005) (noting that only the Security Council “can bring together the credibility, expertise, and Chapter VII authority, all of which are necessary to wrap together and reconcile the various interests and obligations concerned into a politically palatable, and therefore at least potentially workable, package”).

35. For a critical overview, see BENEDETTO CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS 205–06 (3d rev. ed. 2005).

36. E. de Wet, *Beginning an End of Occupation—UN Security Council's Impact on the Laws of Occupation*, 34 COLLEGIUM (SPECIAL ISSUE) 34, 37 (2006) (noting that the international community has accepted such mandates, either through explicit support in the General Assembly, or indirectly by the acceptance of the expenses for such missions as expenses of the organization). De Wet nevertheless notes the absence of implicit or explicit approval by the International Community of the mandate granted to the US-led Coalition Provisional Authority in Iraq. *Id.* However, notwithstanding clear controversies as to the legality of the use of force, there was near unanimity about the need to have a genuine reconstruction process. Cf. U.N. SCOR, 58th Sess., 4791st mtg., U.N. Doc. S/PV.4791 (July 22, 2003) (recording statements made after the adoption of Security Council Resolution 1441).

37. In the case of Kosovo, the plan presented by Martti Ahtisaari and Victor Chernomyrdin, which contained the general principles of an agreement on the Kosovo crisis, was accepted by the Federal Republic of Yugoslavia. Agreement on the Principles (Peace Plan) to Move Towards a Resolution of the Kosovo Crisis, U.N. Doc. S/1999/649 (June 3, 1999). See also S.C. Res. 1244, *supra* note 15, at pmbl. (containing the same principles).

very doubtful character of Indonesian sovereignty over East Timor.<sup>38</sup> East Timor was still formally a non-self-governing territory as of the 1999 popular consultation that led to the establishment of an international administration. According to the principles applicable to non-self-governing territories,<sup>39</sup> one could assume that Portugal retained formal sovereignty over East Timor. Therefore, Portugal and Indonesia entered an agreement to organize the referendum and the international administration in the event of a vote in favor of independence.<sup>40</sup> In cases where the consent of the state cannot be obtained, the lack of consent of the host state is often advanced as the reason why such intrusive operations lack legitimacy.<sup>41</sup> In such cases, one need rely solely on the powers given to the United Nations—particularly those with respect to threats to or breaches of international peace and security.

### B. *Belligerent Occupation and the Occupiers' Limited Authority*

In the case of foreign military occupation not based on the consent of the host state, the question of title seems more complex, but this complexity is only a false impression. 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 regulating such a situation is that the resort to force and the subsequent occupation of foreign territory cannot lead to the annexation of territory, extensive reforms, or the exercise of transformative powers by the occupying forces. Both the Hague Regulations<sup>42</sup> and the Fourth Geneva Convention<sup>43</sup> adopt the principle that occupation of territory does not result in the transfer of sovereignty. The occupied state's exercise of state competences is

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38. East Timor (Port. v. Austl.), 1995 I.C.J. 90, ¶ 37 (June 30); see also S. R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695, 697 n.6 (2005) (noting that Indonesia was not "clearly the lawful sovereign" over East Timor).

39. CRAWFORD, *supra* note 30, at 614.

40. Agreement on the Question of East Timor, Indon.-Port., May 5, 1999, 2062 U.N.T.S. 7.

41. See, e.g., Dickerson, *supra* note 32, at 145 ("In place of host-state consent in those situations, there is instead Security Council authorization, which raises the problems that are inherent in the structure and decisionmaking processes of the Security Council.")

42. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227 [hereinafter Hague Regulations]. The rules concerning occupation are contained in articles 42 to 56 of the Hague Regulations of 1907.

43. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 27–34, 47–78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

merely “suspended,”<sup>44</sup> but, as noted above, issues of sovereignty and exclusive state competence are often misconceived.

The legal title to the administration of the hostile state is subject to several exceptions limited to maintaining the state’s internal structures as they exist. The rights and obligations of the occupiers are restricted in the sense that the laws of occupation are centered on the maintenance of a status quo in the occupied territory. The Hague Regulations stipulate that the occupier must be regarded as “administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”<sup>45</sup> With regard to the existing legal system of the occupied territory, the Hague Regulations establish the principle of continuity of the legal system of the occupied territory, unless absolutely prevented.<sup>46</sup> Article 64 of the Fourth Geneva Convention specifies an analogous obligation concerning penal laws.

Obviously, the laws of occupation are an inadequate framework for peace-building exercises, particularly in light 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 post-conflict reconstruction of states.<sup>47</sup> By the same token, the very reason the laws of occupation are inadequate to deal with comprehensive post-conflict reconstruction missions—their rigid focus on maintaining the 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

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44. See ROBERT KOLB, *IUS IN BELLO: LE DROIT INTERNATIONAL DES CONFLITS ARMÉS* 191 (2003); UK MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 283–84, § 11.25 (2004).

45. Hague Regulations, *supra* note 42, art. 55.

46. *Id.* art. 43. On the limited legislative powers of the occupying forces, see Marco Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT’L L. 661, 664 (2005).

47. On the purpose of the laws of occupation see generally EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 3–31 (1993); Hans-Peter Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 237, 270 (Dieter Fleck ed., 2008); Adam Roberts, *What is a Military Occupation?*, 55 BRIT Y.B. INT’L L. 249, 295 (1984). On the inadequacy of the laws of occupation to the United States’ occupation of Iraq, see Ash Ü. Bâli, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431 (2005); Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195 (2004); Kaiyan H. Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004*, 54 INT’L & COMP. L. Q. 253 (2005); Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10 J. CONFLICT & SECURITY L. 43 (2005); David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT’L L. 842, 847–53 (2003).

laws of occupation and, especially, the limited character of the occupiers' authority must be maintained.

If the Security Council expands the powers of the occupier, the authority is transformed, and one must then refer to the previous paragraphs on the authority and legal bases for the Security Council to authorize the creation of administrative missions.<sup>48</sup> Since the laws of occupation cannot be seen as norms of *jus cogens*, states are free to modify them or accept changes to them; similarly, the Security Council can decide to expand the authority and mandate of the occupying force.<sup>49</sup> In Iraq, for instance, Security Council Resolution 1483 contained the basic provisions for the administration of the territory and clarified the different responsibilities in Iraq.<sup>50</sup> Resolution 1483 confirmed that the Coalition Provisional Authority (CPA), as the occupying power, had the primary responsibility in the administration of Iraq. The Security Council called on the CPA to fulfill its obligations under the Hague Regulations and the Geneva Conventions.<sup>51</sup> At the same time, the Security Council considerably expanded the CPA's mandate by calling on the occupying powers to promote the welfare of the Iraqi people through the effective administration of the territory. Despite claims that the relevant paragraphs of Resolution 1483 were not precise enough to supplant the rules relating to foreign occupation,<sup>52</sup> the wording of Resolution 1483 left no doubt as to the extension or modification of the CPA's powers.<sup>53</sup> Indeed, one cannot ignore that the mandate 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

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48. On the emerging concept of "transformative occupations" see Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006). On the relation between international administrations and the laws of occupation see also Ratner, *supra* note 38.

49. However, for the claim that a Security Council resolution cannot derogate from the laws of armed conflict, see Luigi Condorelli, *Le statut des Forces des Nations Unies et le droit international humanitaire* [The Status of the United Nations Forces and International Humanitarian Law], in *LES CASQUES BLEUS: POLICIERS OU COMBATTANTS? [BLUE HELMETS: POLICEMEN OR COMBATANTS?]* 87, 105–06 (Claude Emanuelli ed., 1997); cf. ERIC DAVID, *PRINCIPES DE DROIT DES CONFLITS ARMÉS* (1994).

50. S.C. Res. 1483, ¶¶ 1–23, U.N. Doc S/RES/1483 (May 22, 2003).

51. *Id.* ¶ 5.

52. See e.g., Robert Kolb, *Occupation in Iraq since 2003 and the Powers of the UN Security Council*, 90 INT'L REV. RED CROSS 29, 48 (2008) (stating that the language of the relevant provisions is vague and imprecise).

53. See Rudiger Wolfrum, *Iraq—From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power Versus International Community Interference*, 9 MAX PLANCK Y.B. U.N. L. 1, 16–17 (2005) (stating that the mandate in Security Council Resolution 1483 "goes beyond the powers assigned to a belligerent occupant under international humanitarian law, in general").

which the Iraqi people can freely determine their own political future” goes well beyond the general powers of an occupying force.<sup>54</sup>

The title to engage in post-conflict reconstruction is thus restricted to two specific cases. Under customary law relating to the occupation of foreign territory, generally after an armed conflict, the occupier-administrator cannot derive any comprehensive responsibilities other than the usufructuary administration. The Security Council is the only institution, besides the host state, that can either expand the occupier’s administrative and transformative powers or decide to establish such a mission independently from either the existence of a conflict or the formal application of the laws of occupation. *Jus post bellum* theories that transpose such a responsibility to other actors, such as the intervening state(s), fall short for several reasons. Most importantly, *jus post bellum* fails to convincingly explain why intervening actors should<sup>55</sup> bear a responsibility for the “post” phase or why the normative framework containing post-conflict obligations needs to be remodelled.

#### IV. A CHALLENGE TO *JUS POST BELLUM* AS A LEGAL CONCEPT

In contemporary research, *jus post bellum* is used in several ways in numerous disciplines. This is also the reason why it is difficult to grasp such a notion, let alone to use it as an emerging legal concept. On the whole, modern analyses of *jus post bellum* can be grouped into two different clusters. The first category of *jus post bellum* theories focuses 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 and aims at a redistribution of the obligations of states and international organizations towards the states or territory in which the reconstruction process takes place.<sup>56</sup> States and

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54. See, however, the discussion by Robert Kolb on the question whether the Resolution was precise enough to include an explicit derogation from the laws of armed conflict. Robert Kolb, *supra* note 52, at 38–48. For an overview of the relation between the powers of the occupying forces under the laws of occupation and the Security Council see Fox, *supra* note 47, at 255–62.

55. 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., MICHAEL WALZER, *JUST AND UNJUST WARS* 122-23 (1977); Orend, *Jus Post Bellum*, *supra* note 4, at 122–23.

56. See e.g., Louis V. Iasiello, *Jus Post Bellum: The Moral Responsibilities of Victors in War*, 57 *NAVAL WAR C. REV.* 33, 40–44 (2004) (“[T]hey may help a former

international organizations that have actively participated in the *jus ad bellum* stage of a conflict could thus be endowed with special compulsory responsibilities in the post-conflict scenario. In a sense, such arguments tie rules related to *which* actor should be involved in post-conflict reconstruction to rules related to *what* is allowed in post-conflict reconstruction.<sup>57</sup>

The preceding debate on the authority and title in post-conflict reconstruction is difficult to completely detach from the content of such responsibilities, namely the legal delimitation of the rights and obligations of actors involved in post-conflict situations. The legal limits to the exercise of powers by occupying forces and other actors have been subject to scholarly debate since the existence of international administrations<sup>58</sup> and occupation,<sup>59</sup> but they have thrived since the re-use of international administrations in post-conflict environments. This recent re-focus on the obligations of foreign actors in such situations has led equally 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. Thus, *jus post bellum* would be a corpus of legal rules and principles as a complement to *jus ad bellum* and *jus in bello*.<sup>60</sup> The contents of that legal framework would include not only positive obligations such as the holding of trials to try serious crimes committed by former regimes but also rules pertaining to the conduct in the post-conflict reconstruction process of states that have participated in the armed conflict or of international organizations involved in the post-conflict phase—rules relating to the way in which the authority and the mandate should be exercised.<sup>61</sup>

The reconstruction of states or territories emerging from conflict should be distinguished clearly from the nature and legality of the

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enemy move beyond the devastation of the present to eventual healing and success *post bellum*.”).

57. See e.g., Orend, *Just-War Theorist*, *supra* note 4, at 578 (arguing that “if an aggressor wins the war, the peace terms will necessarily be unjust”).

58. See generally JACQUES LEPRETTE, *LE STATUT INTERNATIONAL DE TRIESTE* (1949); MÉIR YDIT, *INTERNATIONALISED TERRITORIES: FROM THE “FREE CITY OF CRACOW” TO THE “FREE CITY OF BERLIN”* (1961) (discussing the state competences in the Free Territory of Trieste following World War II); J.H.W. VERZIJL, *II INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* (1969) (discussing the concept of sovereign states as international persons).

59. See, for example, the discussions of Virally regarding the Allied powers during the occupation of Germany after the Second World War M. VIRALLY, *L’ADMINISTRATION INTERNATIONALE DE L’ALLEMAGNE DU 8 MAI 1945 AU 24 AVRIL 1947* 11–23 (1948).

60. For such an approach, see Stahn, *supra* note 2, at 936–37.

61. Kristen Boon, Note, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers*, 50 *MCGILL L. J.* 285, 293–95 (2005).

armed conflict. Post-conflict peace building and reconstruction requires a neutral and legal approach. Moreover, recent practice has shown that military intervention does not necessarily imply post-conflict responsibility. Some military interventions are justified from a legal perspective as a method of self-defense, making the link with the post-intervention scenario not only problematic but also incomprehensible. 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.<sup>62</sup> There is no need for a “new” distinct legal framework to address post-conflict reconstruction or the transition from law to peace. Besides relying on the fact that positive international law does not support such theories, there is no normative gap in the law of transition from war to peace—recent cases have shown that there already exists an adequate, flexible, and neutral legal framework to address such situations.<sup>63</sup>

A. *Linking the Legality of the Use of Force and  
(Post-Conflict) Peace-Building*

Transferring rights and obligations to intervening states and establishing a link between forcible intervention and post-conflict responsibilities are problematic for two reasons. First, peace building and post-conflict reconstruction are concepts that emerged independently from the legality of the use of armed force, and this independence is clearly traceable from recent practice.<sup>64</sup> The clear distinction between *post bellum* responsibility and the use of force should be maintained. Indeed, the only cases in which the use of force can be justified in function of the outcome of the conflict is when the use of force is precisely aimed at obtaining changes after the conflict. *Jus post bellum* advocates often neglect to mention that such situations are not recognized by customary international law, limiting the ‘just’ causes of war to self-defense and collective security as authorized by the Security Council. In these two cases, the connection with the post-conflict result is difficult to accept for several reasons.<sup>65</sup>

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62. See *infra* Part IV.A.

63. See *infra* Part IV.B.

64. See *infra* Part IV.A.

65. See *infra* Part IV.B.

## 1. The Independence of Post-Conflict Reconstruction

Notwithstanding the possibility of having a moral obligation to engage in reconstruction after the armed conflict,<sup>66</sup> the *lex lata* does not permit any transposition of post-conflict responsibilities to an intervening state. Additionally, there is neither a reason to fashion incentives for states not to wage war as a set of additional obligations in the post-conflict phase nor a single legal rule that allows the measurement of the “acceptability of an intervention . . . by its effects and implications after the use of armed force.”<sup>67</sup> The reasons that states can resort to force are clearly established in international law and are clearly independent of the post-conflict phase. Post-conflict peace building is a phenomenon that emerged outside the formal use of armed force—in situations other than post-international armed conflict—an often overlooked but highly relevant reality. Despite the fact that the notion makes an inevitable reference to situations after a conflict, Part II illustrated that the United Nations’ involvement in post-conflict scenarios is part of a broader evolution in addressing the causes of a conflict, which might be purely internal. This evolution fits into the 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 or imply the intervention of a third party.

When comprehensive post-conflict missions are set up after the use of armed force that is not authorized by the Security Council and has no clear legal justification—as in Kosovo or Iraq—the authority to engage in post-conflict reconstruction is based on the consent of the host state, the Security Council’s power in this respect, or both. The relevant Security Council resolutions are drafted very carefully to avoid the possibility that the post-conflict mandates are interpreted as *ex post facto* validation of the unauthorized use of force.<sup>68</sup> Security Council Resolution 1244 established the United Nations international administration in Kosovo and cannot be interpreted as a validation of the use of armed force. The fact that the United Nations was almost unanimous regarding the post-conflict phase cannot overshadow the division of Security Council members on the legality of the use of

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66. Outi Korhonen, “Post” As Justification: *International Law and Democracy-Building after Iraq*, 4 GERMAN L.J. 709, 710 (2003); see generally Brian Orend, *Justice After War*, 16 ETHICS & INT’L AFF. 43 (2002) (offering guidelines for the conduct of victors after a war); Louis V. Iasiello, *supra* note 56 (same).

67. Stahn, *supra* note 2, at 931, 943.

68. See, however, Inger Österdahl, *Preach What You Practice. The Security Council and the Legalisation Ex Post Facto of the Unilateral Use of Force*, 74 NORDIC J. INT’L L. 231, 238 (2005).

armed force.<sup>69</sup> The situation, to a certain extent, is very similar to the situation in Iraq.<sup>70</sup> The fact that such missions are set up notwithstanding the questionable legality of the use of armed force is clear evidence of the “neutrality” of post-conflict peace-building towards the issue of the use of force. In the case of Afghanistan, despite some criticism in legal literature, the international community accepted the right of the United States to act in self-defense.<sup>71</sup> Notwithstanding a different division of responsibilities between the actors involved in the reconstruction, the post-conflict mandate and process in Afghanistan was very similar to other cases in which the use of force was more controversial, such as Kosovo and Iraq. Moreover, actors operating in the post-conflict situation are not necessarily the same as those who resorted to the use of force. *Post bellum* activities in Kosovo, East Timor, Afghanistan, and Iraq provide sufficient support for this. In Kosovo, for example, the military operation was launched by NATO member states while other international organizations—including the United Nations, even though it was explicitly bypassed in the *ad bellum* stage—handled the civil reconstruction process. In Afghanistan and Iraq, the United States carried out the principal military intervention, but the

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69. For more on the legality of the unilateral military intervention in Kosovo, see generally Martha Brenfors & Malene M. Petersen, *The Legality of Unilateral Humanitarian Intervention—A Defense*, 69 NORDIC J. INT'L L. 449 (2000); Antonio Cassese, *Ex Iniuria Jus Oritur: Are We Moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847 (1999); Thomas Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT'L L. 824 (1999); Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597 (2002); Nico Krisch, *Morality and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT'L L. 323 (2002); W. M. Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999); Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1 (2000); Ralph Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923 (2001).

70. See U.N. SCOR, 58th Sess., 4791st mtg., U.N. Doc. S/PV.4791 (July 22, 2003) (describing the situation in Iraq); see also David Wippman, *Sharing Power in Iraq*, 39 NEW ENG. L. REV. 29 (2004) (same). For more on the question of the legality of the use of force in the case of Iraq, see Jutta Brunnée & Stephen J. Toope, *The Use of Force: International Law after Iraq*, 53 INT'L & COMP. L.Q. 785 (2004); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003).

71. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). On the ‘lawfulness’ of the use of self-defense against non-state actors see Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 839–40 (2001); Mary E. O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PA. L. REV. 889, 892 (2002); Jordan Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond*, 35 CORNELL INT'L L. J. 533, 533–35 (2002); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L & COMP. L.Q. 141, 151 (2007).

reconstruction process equally involved other actors such as the United Nations and NATO.

The independence of *post bellum* should be maintained. Under the existing exceptions to the prohibition on the use of force, the advocated connection of post-conflict responsibilities is problematic. It is interesting to note that the potential positive outcome of post-conflict effects is used often as a justification for the resort to force when there is no general acceptance of the intervention's legality, especially when dealing with either "humanitarian" or "pro-democratic" interventions.<sup>72</sup> In such cases, the positive outcome of the reconstruction process is often used to legalize *ex post facto* a controversial use of force. If we disregard the fact that a humanitarian justification for interventions is not a legally accepted motive for the use of force, the *post bellum* outcome clearly would justify the use of force in such cases, since the use of force is precisely aimed at obtaining changes after the conflict. Such theories, however, amount to reintroducing notions of "just" war as a new but unwarranted exception to the prohibition on the use of force.

## 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.<sup>73</sup> These two areas of international law are rightly not connected in the sense that the state's violation of its obligations under one system does not, by itself, amount to a violation of the laws of the other.<sup>74</sup> Similarly, the application of the *jus in bello* does not depend on the legality of the military intervention. Adding a third branch to the dualistic regulation of the use of armed force is not problematic per se, but 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>75</sup> The need for *jus post bellum* to fill a "systemic gap," as suggested by Stahn,<sup>76</sup> is very similar.

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72. 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 see Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom,"* 95 CAL. L. REV. 2295, 2335–37 (2007).

73. See, e.g., Stahn, *supra* note 2, at 924–26 (discussing this "dualist conception of armed force").

74. *Id.* at 925.

75. See, in particular, Oren, *Just-War Theorist, supra* note 4, at 575–77 (arguing why *jus post bellum* should be part of the just-war theory).

76. Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 AM. U. INT'L L. REV. 311, 328 (2008).

Before the recent re-emergence of *jus post bellum*, 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 Immanuel Kant 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>77</sup> Grotius, for instance, in his discussion of *The Law of War and Peace*, addressed the *jus ad bellum* and *jus in bello* issues and added several legal rules pertaining to the period *after* war, such as how to treat enemy property.<sup>78</sup> The rules set out by Grotius result from the just cause of the war, which was, according to Grotius, the only valid source for the rules on the conduct of war and after the war.<sup>79</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.<sup>80</sup> Kant was one of the first to establish a complete 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>81</sup>

Furthering the continuous peace was the underlying reason for this theory because it was viewed as a continuation of the right to resort to force, which was seen as lawful if aimed at establishing this eternal peace.<sup>82</sup> The recent re-emergence of the *jus post bellum* also has principally been the work of a new generation of just war theorists such as Orend, who notes that

the 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>83</sup>

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77. For an overview, see WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 105–18, 201–28 (Michael Byers trans., 2000). See also M. COGEN, *THE COMPREHENSIVE GUIDE TO INTERNATIONAL LAW* 56–57, 150–55 (2008).

78. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, reprinted in *II THE CLASSICS OF INTERNATIONAL LAW* 757–60 (James B. Scott ed., Francis W. Kelly trans., Clarendon Press 1925) (1646).

79. *Id.* at 599–601.

80. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 223–24 (William Hastie trans., Augustus M. Kelley 1974) (1887).

81. *Id.* at 214.

82. *Id.* at 222. For a very similar but more recent theory see Louis V. Iasiello, *supra* note 56.

83. Orend, *Jus Post Bellum*, *supra* note 4, at 122.

This intrinsic<sup>84</sup> link with the justness of an armed conflict is the inherent flaw of this conception of *jus post bellum*. In a time when international law is moving from a *jus ad bellum* to a *jus contra bellum* approach,<sup>85</sup> it seems even more imprudent to assess the legality of an armed conflict by its effects or to grant certain post-conflict responsibilities and rights to states based on the “justness” of their cause.

When the use of force is in conformity with international law, *jus post bellum* theories fail to explain why states and organizations involved in the conflict should, or can, bear responsibility for post-conflict reconstruction, especially when the use of force is justified for reasons such as self-defense.<sup>86</sup> When a state has resorted to the use of force in self-defense, it would indeed be illogical to impose upon the defending state certain obligations towards the state that triggered the exercise of the right of self-defense.<sup>87</sup> The use of force in an exercise of the inherent right to self-defense can only be aimed at exercising that right. One could, however, consider that the state that acts in self-defense might go further to remove the threat of the armed attack that triggered the application of the right to self-defense. Originally, self-defense was an action against an armed attack that had to fulfill several criteria, including the principle of proportionality.<sup>88</sup> Self-defense is an exception to the use of force and not necessarily concerned with comprehensive reforms after the use of force. The lawfulness of the act of self-defense, particularly its compliance with the requirements of necessity and proportionality, needs to be evaluated by the extent to which the use of armed force is necessary to halt or repel the armed attack.<sup>89</sup> The Special Rapporteur of the International Law Commission on the Responsibility of States noted that self-defense does not “preclude the wrongfulness of conduct in all cases or with respect to all

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84. See, for example, Stahn arguing that “*jus post bellum* is to some extent inherent in the conception of *jus ad bellum*.” Stahn, *supra* note 76, at 328.

85. See, e.g., OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE: L'INTERDICTION DU RECOURS À LA FORCE EN DROIT INTERNATIONAL CONTEMPORAIN* (2008).

86. Alex J. Bellamy, *The Responsibilities of Victory: Jus Post Bellum and the Just War*, 34 *REV. INT'L STUD.* 601, 602 (2008).

87. See *id.* (discussing problems with the maximalist approach to governance and reconstruction).

88. For a description of the principle of proportionality and an application to a recent conflict, see Michael Bonafede, Note, *Here, There and Everywhere: Assessing the Proportionality Doctrine and U.S. Use of Force in Response to Terrorism After The September 11 Attacks*, 88 *CORNELL L. REV.* 155 (2002).

89. For an example of adjudication on the use of proportionality and self-defense, see *Oil Platforms (Iran v. U.S.)*, 2003 *I.C.J.* 161, 198 (Nov. 6). See also N. Ochoa-Ruiz & E. Salamanca-Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self-Defence*, 16 *EUR. J. OF INT'L L.* 499, 517 (2005) (analyzing the court's decision in *Oil Platforms*).

obligations.”<sup>90</sup> Such a stretch of the right of self-defense, thus, can be acceptable under current international law, provided that it remains limited to the function of self-defense. An excessive extension of the right of self-defense, however, is dangerous in practice because the causality between the armed attack and its cause is often difficult to establish or may be controversial. Similarly, an expansion of the right to self-defense in that respect would open the door for abuses of the right to achieve post-conflict reforms, bringing such suggestions close to just war theories.

The only time a close link between *jus ad bellum* and *jus in bello* can be defended without resorting to the justification based on potential positive results is when the Security Council has authorized the use of force on humanitarian or related grounds.<sup>91</sup> In that limited case, however, the post-conflict activity should not necessarily be directly linked to the use of force. Practice has shown that the Security Council’s activity in this field is independent from any inquiry into the legality of the use of force. However, one might assume that when the Security Council authorizes the use of force on humanitarian or related grounds, there would be no reason to postpone internal reforms in the state in question to eradicate the threat that caused the use of force. In fact, there is a tendency to point to the Security Council’s responsibility to address such post-conflict situations.

The International Commission on Intervention and State Sovereignty (ICISS) made one of the first attempts to institutionalize the “post” phase of a conflict. This attempt resulted in the “responsibility to rebuild,” which, when taken together with the “responsibility to prevent” and the “responsibility to react,” forms a part of the more widely-known “responsibility to protect.”<sup>92</sup> The Commission’s idea of a “responsibility to rebuild” would include a responsibility for the international community, when it is intervening as part of its responsibility to protect, to subsequently address post-conflict reconstruction. To date, however, the responsibility to rebuild paradigm has neither obtained support from practice nor gathered unanimous political adherence as an emerging legal norm.<sup>93</sup> In addition, even in such a theoretically coherent tripartite conception of responsibility and sovereignty, post-conflict

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90. Int’l Law Comm’n, *Report of the International Law Commission*, Art. 21(3), U.N. Doc. A/56/10 (Apr. 23–June 1 & July 2–Aug. 10, 2001).

91. U.N. Charter art. 42.

92. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* 11, 19, 29, 39 (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

93. See, e.g., Carsten Stahn, Notes and Comments, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT’L L. 99, 110 (2007) (describing a lack of support by the international community for the concept of the responsibility to rebuild at the 2005 World Summit).

responsibilities are limited to cases where the responsibility to prevent has failed and where the international community—via the Security Council—decided to react.<sup>94</sup> In addition, a more in-depth examination of the notion of the responsibility to rebuild reveals that it is in fact more reasonable to have adequate exit-strategies than to add responsibilities to the victorious states. The need to have an adequate exit-strategy is certainly beyond doubt, but such a requirement addresses the conditions under which peace-building missions may scale down, not to the conditions under which the military intervention can come to an end. Such conditions are thus independent from the use of force and relate more to the legal framework of post-conflict reconstruction than to who bears the responsibility for post-conflict reconstruction.

B. *The Legal Framework of Post-conflict Reconstruction:  
Jus Post Bellum as “Law after Conflict”*

The idea of *jus post bellum* as a legal framework to address post-conflict peace building is thus seen as a normative rather than a systemic notion that encapsulates the laws or rules applicable in the transitory phase from conflict to peace. This category of legal rules, together with *jus ad bellum* and *jus in bello*, would be the third of three distinct and independent frameworks applicable to armed conflicts.<sup>95</sup> *Jus 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>96</sup> The advantage of such an approach to *jus post bellum*, in sharp 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>97</sup> This normative gap in the law of transition from war to peace refers to both the obligations of states and international organizations in the post phase and to the limits on the exercise of these obligations. When *jus post bellum* is used in this sense, the real questions are whether the whole legal framework of post-conflict

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94. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 92, at 39 (discussing the responsibility to rebuild).

95. See, e.g., Boon, *supra* note 61 (surveying recent legal reforms in occupied territories); Jean L. Cohen, *The Role of International Law in Post Conflict Constitution-Making: Toward a Jus Post Bellum for “Interim Occupation,”* 51 N.Y.L. SCH. L. REV. 497 (2006–2007) (discussing traditional theories of occupation law and the need for a *jus post bellum* law of armed conflict); Stahn, *supra* note 2 (arguing for the need for rules and principles governing peace-making after conflict and an updated view of the scope of the historical concert of war).

96. Boon, *supra* note 61, at 290–92.

97. Stahn, *supra* note 2, at 936.

interventions can be categorized as a distinct set of legal rules and whether the use of such new terminology has some added value.<sup>98</sup>

### 1. Rules, Principles and Restrictions on Peace Settlements

Scholars' opinions on the necessity of creating a new set of rules and principles differ to some extent, but they all concur that the differentiation between times of war and times of peace is not only factually impossible to make but also legally flawed. Neither the laws of peace, *ius pacis*, nor the laws of war, *ius in bello*, contain principles or a framework suitable for managing the transition or post-conflict phase.<sup>99</sup> To some extent, it is arguable that the traditional dichotomy between the law applicable in war and the law applicable in peacetime is losing significance. For example, human rights, traditionally seen as part of the law applicable in peacetime, have been considered also applicable (albeit subject to several exceptions) in wartime.<sup>100</sup> It is unclear, however, why the factual changes in addressing post-conflict zones should bring about a departure from existing rules in this respect. There are, without question, certain tendencies regarding post-conflict governance and administration that can be observed from recent practice. These include the creation of compensation commissions to manage reparations, the focus on principles of democratic governance, and the creation of mechanisms to determine individual criminal responsibility for past crimes. However, the reasons behind the claimed need to couple existing obligations in post-conflict reconstruction with suggested new rules and principles in a third category in the transition from war to peace remain vague.

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98. See Gelijin Molier, *Rebuilding After Armed Conflict: Towards a Legal Framework of the Responsibility to Rebuild or a Jus Post Bellum?*, in PEACE, SECURITY AND DEVELOPMENT IN AN ERA OF GLOBALIZATION: THE INTEGRATED SECURITY APPROACH VIEWED FROM A MULTIDISCIPLINARY PERSPECTIVE 317, 317–18 (Gelijin Molier & Eva Nieuwenhuys eds., 2009) (addresses the question of “whether or not there is a development into legal principles or a necessity for a legal framework for . . .” the concept of *ius post bellum*).

99. Stahn, *supra* note 76, at 322–23.

100. The International Court of Justice confirmed the disintegration of this dichotomy in two cases: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (9 July); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 1996 I.C.J. 226, 238–40 (8 July). The Human Rights Committee similarly confirmed the complementary and inclusive character of both legal frameworks in U.N. Human Rights Comm., *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). See also Ratner, *supra* note 38 (discussing the differences between occupation by states and administration by international organizations); Ralph Wilde, *The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA J. INT'L & COMP. L. 489 (2005) (discussing the applicability of international human rights law in wartime).

One can be rather brief on the issue of fairness in peace settlements—often seen as one of the fundamental principles in the law of transition from war to peace<sup>101</sup>—because elements of fairness are already included in various international legal norms. Generally, peace agreements are negotiated according to the relevant rules of the Vienna Convention on the Law of Treaties, which in large parts is reflective of customary international law.<sup>102</sup> There is no need to depart from existing rules concerning the legal capacity of persons 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.<sup>103</sup> Recent peace treaties are not simply a means for the victor to impose its conditions on the vanquished state. Rather, there is a clear evolution towards settling peace agreements in an objective manner, with due consideration of the equality of all parties and international peace and security.<sup>104</sup>

One issue might nevertheless pose a problem in post-conflict settings. In such environments, there is not often an authority capable of binding the state. The Bonn Agreement for instance, concluded in the aftermath of the U.S. military intervention in Afghanistan, was signed by non-elected representatives of the different ethnic groups in Afghanistan.<sup>105</sup> These representatives might be considered to be lacking not only the necessary democratic legitimacy but also the legal capacity to engage Afghanistan. However, the Bonn Agreement is not an international treaty, since the agreement was only signed by Afghan representatives and witnessed by the United Nations Special Representative.<sup>106</sup> The Bonn Agreement is more a sort of internal roadmap of the different political and ethnical factions. The subsequent endorsement of the text by the Security Council under a Chapter VI resolution

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101. Stahn, *supra* note 2, at 938–41.

102. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 12–13 (2d ed., 2007).

103. Vienna Convention on the Law of Treaties arts. 19–23, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331. These principles include coercion of a State by the treaty or use of force. *Id.*

104. See CHRISTINE BELL, *ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA* 105 (2008) (analyzing the common peace agreement in relation to types of conflict); see also Stephen Neff, *Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective*, in *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE*, *supra* note 5, at 77 (comparing the historical and modern conceptual origins of jus post bellum); STEPHEN NEFF, *WAR AND THE LAW OF NATIONS* 279–284 (2005) (discussing the rebirth of just wars).

105. Agreement on Provisional Arrangements in Afghanistan Pending the Reestablishment of Permanent Government Institutions, Dec. 5, 2001, <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm> [hereinafter Bonn Agreement].

106. Bonn Agreement, *supra* note 105.

transformed the document into an official Security Council recommendation,<sup>107</sup> but it remains a purely national document.

The prohibition on the acquisition of territory through the use of force—a principle that is firmly embedded in international law—is additional evidence of the balance of the rights of both parties.<sup>108</sup> There is no need to add this standard to the list of principles for a just termination of war. The vanquished state's territorial integrity cannot be altered by the victors. Arguably, the Security Council, when acting to maintain international peace and security, is the only entity capable of altering territorial rights.<sup>109</sup> Similarly, the question of reparations for the damages caused by the conflict is already addressed in Article 3 of the Hague Regulation, 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.”<sup>110</sup> The Draft Articles on the Responsibilities of States for Internationally Wrongful Acts contain equally sufficient provisions in this regard.<sup>111</sup>

There is a tendency to establish mechanisms to implement the responsibility to pay reparations either as a part of a peace treaty or under a Security Council resolution.<sup>112</sup> Although such post-war reparations had comprised drastic effects on the lives of the population in the past,<sup>113</sup> norms have evolved to limit the effects of reparations. The International Covenant on Civil and Political Rights, for example, provides that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>114</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. 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. These additional settlements would cover

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107. S.C. Res. 1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001).

108. G.A. Res. 2734, U.N. Doc. A/RES/25/2734 (Dec. 16, 1970).

109. For a discussion on this point, see DE BRABANDERE, *supra* note 34, at 68–70 (examining the conflict between Security Council action and domestic jurisdiction); Frederic L. Kirgis, *Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making*, 95 AM. J. INT'L L. 579 (2001).

110. Hague Regulations, *supra* note 42, art. 3.

111. Int'l Law Comm'n, *Draft Articles on the Responsibilities of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10 (Apr. 23–June 1 & July 2–Aug. 10, 2001).

112. For example, see the United Nations Compensation Commission After the Iraqi Invasion of Kuwait, S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991).

113. For a (historical) overview of post-war settlements, including after the World Wars, see COGEN, *supra* note 77, at 150.

114. G.A. Res. 2200A, art. 1, ¶ 2, U.N. Doc. A/6316 (Mar. 23, 1976).

issues such as transitional justice, i.e. how to deal with past crimes.<sup>115</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.<sup>116</sup> The overall objective of transitional justice is 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. In many cases, alternative mechanisms such as a truth and/or reconciliation commissions have been established.<sup>117</sup> The accountability for past crimes, although vital in the reconstruction process, thus cannot be part of a compulsory and previously established framework. Moreover, such issues are best addressed at the national rather than international level, taking into account local culture and legal tradition.

## 2. Rules and Principles of Post-Conflict Governance

Implementation of the mandate in accordance with relevant Security Council resolutions or treaties remains the first and foremost source of legal obligations, but additional obligations for international and foreign actors can be found in both human rights law and the laws of occupation<sup>118</sup>—the laws of occupation being particularly important when their formal application is not contested, such as in the case of Iraq. It does not seem necessary to resort to the application of other legal concepts such as trusteeship to these operations.<sup>119</sup>

Post-conflict administrations and peace building missions principally draw their authority, and thus their international legal obligations, from Security Council resolutions and international treaties.<sup>120</sup> Post-conflict administrations and peace building missions do not operate in a legal vacuum, as their mandate delimits the

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115. See, e.g., Stahn, *supra* note 2, at 940 (proposing a principle for post-conflict peace of shifting from collective criminal responsibility to individual criminal responsibility).

116. See, e.g., Bellamy, *supra* note 86, at 12–13 (discussing adjudication of war crimes in international tribunals).

117. See, e.g., United Nations Transitional Administration in East Timor, On the Establishment of a Commission for Reception, Truth and Reconciliation, in East Timor, § 3, U.N. Doc. UNTAET/REG/2001/10 (July 13, 2001) (describing the objectives of the Commission on Reception, Truth and Reconciliation).

118. Boon, *supra* note 61, at 292, 304.

119. As suggested by Boon. *Id.* at 305.

120. See, e.g., S.C. Res. 1885, U.N. Doc. S/Res/1885 (Sept. 15, 2009) (authorizing a peacekeeping mission in Liberia).

boundaries of their authority. In addition, human rights law<sup>121</sup> and the laws of armed conflict<sup>122</sup> provide adequate legal restraints on foreign actor's conduct in such circumstances. The problems encountered under post-conflict peace-building missions with respect to human rights and other violations are not a question of applicable law but rather a question of accountability and the need to improve it. It is unquestionable that the accountability of international organizations performing administration functions still needs to be improved, but there is no reason to change the human rights obligations of international actors. Rather, establishing alternative review mechanisms to determine the compatibility of certain official acts with internationally recognized human rights standards, particularly with respect to executive or military detention orders, should be put in place.

The only additional set of legal rules that could be envisaged would be a consequence of the application of a fiduciary or trusteeship type of authority of post-conflict administrations.<sup>123</sup> The idea of

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121. For more on the application of human rights law to international organizations in post-conflict situations, see ROBERT KOLB ET AL., *L'APPLICATION DU DROIT INTERNATIONAL HUMANITAIRE ET DES DROITS DE L'HOMME AUX ORGANISATIONS INTERNATIONALES: FORCES DE PAIX ET ADMINISTRATIONS CIVILES TRANSITOIRES* (2005); Lindsey Cameron, *Human Rights Accountability of International Civil Administrations to the People Subject to Administration*, 1 HUM. RTS. & INT'L LEGAL DISCOURSE 267 (2007) (discussing limitations upon international organizations engaged in peace operations and civil administration and proposing mechanisms to protect local populations); J. Cerone, *Reasonable Measures in Unreasonable Circumstances: a Legal Responsibility Framework for Human Rights Violations in Post-conflict Territories Under UN Administration*, in *PROLIFERATION OF INTERNATIONAL ORGANIZATIONS—LEGAL ISSUES* 469–71 (N.M. Blokker & H.G. Schermers eds., 2001); Eric De Brabandere, *Human Rights Accountability of International Administrations Theory and Practice in East Timor*, in *ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS FOR HUMAN RIGHTS VIOLATIONS* (JAN Wouters et al. eds., forthcoming 2010) (manuscript at 2–11) (discussing the paradox that no international organizations is bound by an international human rights treaty and describing other forms of limitations upon international organizations). On the application of human rights to foreign military forces, see John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469 (2001) (delineating the various types of international law that apply to KFOR); Wilde, *supra* note 100; Ralph Wilde, *Legal "Blackhole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739 (2005) (examining post-9/11 policy on extraterritorial activity by states and the law that governs such activity).

122. See 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*, 44 GERMAN Y.B. INT'L L. 353, 354 (2001) (discussing the legal constraints on the UN's use of force); Kelly et al., *Legal Aspects of Australia's Involvement in the International Force for East Timor*, 841 INT'L REV. OF THE RED CROSS 101 (2001) (analyzing the international legal framework of the U.N. operation in East Timor).

123. See Bernhard Knoll, *Legitimacy and UN-Administration of Territory*, 8 GERMAN L.J. 39, 45 (2007) (describing a fiduciary duty in relation to the occupation of Kosovo); Carstan Stahn, *International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead*, 61 ZEITSCHRIFT FÜR

fiduciary authority originates from the private law institution of trust, which implies that a person, called the trustee, holds property for and on behalf of another person.<sup>124</sup> Trust also implies that the trustee exercises these rights for the benefit of the other person. The main differences between individual trusteeships and international trusteeships is that, in the latter case, the trustee is not a private person but a state or an international organization and the object of the trust is not property but administering authority over a state or territory.<sup>125</sup> The principle that international actors administer the territory on behalf and for the benefit of the population, and not for themselves, is very relevant but is not a consequence of the application of the concept of trust or the fiduciary character of the authority. When the laws of occupation apply, the notion of trust is encompassed by the usufructuary nature of the occupier's authority.<sup>126</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 established. The provision of basic civil services, humanitarian relief, and reconstruction, as well as the long-term objectives, is obviously intended for the population and for the international community that has entrusted the Security Council with the maintenance of international peace and security. The objectives of such missions thus imply governance on behalf of and for the benefit of the population. In addition, peace building missions and international post-conflict administrations are, by definition,

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AUSLÄNDISCHES ÖFFENTLICHES RECHTS UND VÖLKERRECHTS 107, 114 (2001) (discussing modern day examples of the principle of trusteeship).

124. RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. f (2003).

125. HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 566 (1951). Judge McNair, in a separate opinion in the South West Africa case, identified several general principles which can be derived from the notion of trust in private law, and which could be applied in international law:

- (a) That the control of the trustee, *tuteur* or *curateur* over the property is limited in one way or another ; he is not in the position of the normal complete owner, who can do what he likes with his own, because he is precluded from administering the property for his own personal benefit ;
- (b) That the trustee, *tuteur* or *curateur* is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purpose ;
- (c) That any attempt by one of these persons to absorb the property entrusted to him into his own patrimony would be illegal and would be prevented by the law.

International Status of South West Africa, Advisory Opinion, 1950 I.C.J. REP. 128, 149 (July 11) (separate opinion by Sir Arnold McNair). In that particular case however, this referred to the mandates system of the League of Nations and the UN Trusteeship System. It is doubtful whether these principles apply to every form of international administration.

126. Roberts, *supra* note 47, at 295.

temporary in nature. This is mainly a direct consequence of the fact that these recent operations were established by the Security Council under Chapter VII of the United Nations Charter.<sup>127</sup> Chapter VII allows the Security Council to take measures aimed at maintaining or restoring international peace and security. Once international peace and security are re-established or a threat to international peace and security no longer exists, the mission must by definition come to an end.<sup>128</sup> This is in accordance with the central aim of modern peace building missions and international administrations. The powers granted are exercised with specific purposes—reconstructing states emerging from years of conflict or internal strife and creating stable institutions as a method of maintaining international peace and security.

The basic principles derived from the fiduciary character of the authority can nevertheless be seen as applicable only in a subsidiary manner in cases of ambiguities or uncertainties in the mandate. In these events, the fiduciary character can be seen as a useful method of interpretation of the mandate. The administering authority, however, remains primarily bound by the main objectives of the missions, and the mandates under Security Council Resolutions take precedence over the fiduciary principle.

## V. CONCLUSION

The importance of post-conflict settlements and the need to move beyond the mere maintenance of a status quo in cases 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 must be curtailed. The neutral approach towards the post-conflict reconstruction process, as distinct from the issues of both *jus ad bellum* and *jus in bello*, must be maintained. Recent practice shows that, notwithstanding clear controversies as to the legality of the use of force, there was almost unanimity about the need to have a genuine reconstruction process. In Iraq, for example, the only quandary was related to the scale of United Nations' and United States' involvement in this process.<sup>129</sup>

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127. U.N. Charter art. 39.

128. For a similar analysis, see generally Michael Bothe & Thilo Marauhn, *The United Nations in Kosovo and East Timor—Problems of a Trusteeship Administration*, 6 INT'L PEACEKEEPING 152 (2000).

129. James Glantz, *Official History Spotlights Iraq Rebuilding Blunders*, N.Y. TIMES, Dec. 13, 2008, [http://www.nytimes.com/2008/12/14/world/middleeast/14reconstruct.html?\\_r=1](http://www.nytimes.com/2008/12/14/world/middleeast/14reconstruct.html?_r=1); see also Greg Bruno, *Rebuilding Iraq*, BACKGROUNDERS, Jan. 17, 2008,

This Article has shown that *jus post bellum* theories that link post-conflict reconstruction to the legality of the intervention or change the rights and obligations of actors in post-conflict reconstruction according to the legality of the intervention are not only unacceptable but also run contrary to current international law and practice. Any attempt to transpose or impose legal obligations on intervening states—whether implicitly or explicitly—aims at evaluating the legality of a military intervention as a function of the potential positive outcomes of the *post bellum* effects.

If one takes the notion of *jus post bellum* as a law after conflict (or to fill an alleged normative gap) with no reference to the resort to force, the added value of the notion seems rather limited. It is then used only as an alternative for the existing legal framework, which consists principally of international treaties and Security Council resolutions that contain the basic norms and mandate for the exercise of post-conflict authority. Limits inherent to treaty law and the power of the Security Council when exercising its responsibility in the maintenance of international peace and security are also applicable when dealing with post-conflict zones. Beyond the rules relating to the mandate and what foreign states and international organizations are allowed to do after conflicts, other rules and principles apply to the conduct of these foreign actors. Human rights, the laws of occupation, and, in a subsidiary manner, the principle of trust form an adequate and already existing legal framework. There is neither a need to depart from existing rules and principles nor any utility in categorizing already existing norms in this respect.