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JUS POST BELLUM: MAPPING THE DISCIPLINE(S)

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INTRODUCTION

The law of armed force is typically categorized in two bodies of law, *jus ad bellum* (the law on recourse to force) and *jus in bello* (the law governing the conduct of hostilities).[1] Historically, however,

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there has been an additional parameter in the equation, namely the concept of *jus post bellum* (law after war). This concept has remained at the periphery of legal scholarship,[2] although it has a traditional place in the context of just war theory.[3]

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http://www.swan.ac.uk/ staff/academic/Law/stahnc/; Legal Officer, International Criminal Court. This Essay is based on a paper presented at the joint seminar of the Grotius Centre of International Legal Studies and the Amsterdam Center for International Law, in co-operation with the Hague Institute for the Internationalisation of Law and the Netherlands Ministry of Foreign Affairs, Leiden University, February 2-3, 2007. It is part of my broader research project on *jus post bellum*.

1. The terms emerged in legal writing in the 1920s. Giuliano Enriques used the term *jus ad bellum* in 1928. *See* G. Enriques, *Considerazioni sulla Teoria della Guerra nel Diritto Internazionale* [*Considerations on the Theory of War in International Law*], 7 RIVISTA DI DIRITTO INTERNAZIONALE [JOURNAL OF INTERNATIONAL LAW] 172 (1928).

2. International lawyers have made some contributions. *See, e.g.*, Kristen Boon, *Legislative Reform in Post-conflict Zones:* Jus Post Bellum *and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 289-95 (2005) (providing an overview of *jus post bellum*, and discussing why the concept is distinct from *jus ad bellum* and *jus in bello*); 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, 941-42 (2006) (proposing that a "tripartite conception of the law of armed force" would rectify inadequacies found in the classical dualist conception); Daniel Thürer & Malcolm MacLaren, *"*Ius Post Bellum*" in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?, in* WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK [GLOBAL INTERNAL LAW: ESSAYS IN HONOR OF JOST DELBRÜCK], 753, 776-79 (Klaus Dicke et al. eds., 2005) (examining the post-war occupation of Iraq in the context of International Humanitarian Law and using the Iraqi situation to exemplify possible challenges to the *jus post bello* doctrine).

3. *See generally* BRIAN OREND, THE MORALITY OF WAR 160-62 (2006) [hereinafter OREND, MORALITY OF WAR] (labeling *jus post bellum* as "justice after war," and asserting that "violations of *jus post bellum* are just as serious as those of *jus ad bellum* and *jus in bello*"); BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 57 (2000) [hereinafter OREND, WAR AND INTERNATIONAL JUSTICE] (explaining that Immanuel Kant created the concept of *jus post bellum* to "consider in detail the justice of the move from war back to peace"); Andrew Rigby, *Forgiveness and Reconciliation in* Jus Post Bellum, *in* JUST WAR THEORY: A REAPPRAISAL 177 (Mark Evans ed., 2005); Gary J. Bass, Jus Post Bellum, 32 PHIL. & PUB. AFF. 384 (2004) (discussing the importance of *just post bellum* in creating a complete just war theory); Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining* Jus Post Bellum, 186 MIL. L. REV. 116 (2005); Louis V. Iasiello, *The Moral Responsibilities of Victors in War*, 57 NAVAL WAR C. REV. 33 (2003) (proffering that the difficulty of achieving *post bellum* conflicts demonstrates the need to update and revise just war theory); Brian Orend, Jus Post Bellum, 31 J. SOC. PHIL. 117, 118 (2000) (reviewing the concept of *jus post bellum*, and placing it in the framework of just war theory); Robert E.

Traces of a tripartite conception may be found in different traditions of thought. St. Augustine linked war to the post-war goal of peace in his book *City of God* which became one of the most respected and frequently-cited books of Church history.[4] This thinking was refined by proponents of the just war theory, such as Francisco de Vitoria, the founder of the School of Salamanca, and scholastic Spanish philosopher and theologian Francisco Suárez (1621).[5] These scholars made a compelling argument: If a war has a just cause, and is fought justly, it must also lead to a just post-war settlement.[6]

Hugo Grotius developed a more refined account of this approach in *On the Law of War and Peace*, which secularized just war theory on the basis of principles of natural law which were held to be binding on all people and nations regardless of local custom.[7] Book III of *On the Law of War and Peace* includes not only rules governing the conduct of war, but practical principles on just war termination, such as rules on surrender, good faith, and interpretation

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Williams, Jr. & Dan Caldwell, Jus Post Bellum: *Just War Theory and the Principles of Just Peace*, 7 INT'L STUD. PERSP. 309 (2006) (asserting that inadequate attention has been paid to considerations of *just post bellum* despite the fact that the moral judgments made following a war are just as important as those made during a war).

4. *See* ST. AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST PAGANS 866 (Henry Bettenson trans., Penguin Books 1984) (1467) (insisting that "peace is the instinctive aim of all creatures, and is even the ultimate purpose of war").

5. FRANCISCO SUÁREZ, DE TRPLICI VIRTUTE THEOLOGICA, FIDE, SPE, ET CHARITATE [THE THREE THEOLOGICAL VIRTUES] (1621), *translated in* 20 THE CLASSICS OF INTERNATIONAL LAW 727 (James Brown Scott ed., Gwladys L. Williams et al. trans., 1944); FRANCISCO DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES (1696), *translated in* THE CLASSICS OF INTERNATIONAL LAW 55 (James Brown Scott & Ernest Nys eds., John Pawley Bate trans., 1917).

6. *See* SUÁREZ, *supra* note 5, at 838-40 (advocating the broad view that a sovereign has no reason to continue hostilities where "full and sufficient satisfaction is voluntarily offered" by the opposing sovereign); DE VICTORIA, *supra* note 5, at 185-87 (providing basic rules for the just seizure of a conquered enemy's property and payment of tribute).

7. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE: THREE BOOKS] (1625), *translated in* 3 THE CLASSICS OF INTERNATIONAL LAW 9, 52 (James B. Scott ed., Francis W. Kelsey trans., Carnegie Institution of Washington 1925) (1913) (claiming that the first principles of nature favor war, as the "end and aim of war" is "the preservation of life and limb, and the keeping or acquiring of things useful to life").

of peace treaties.[8] This conception was later taken up in the eighteenth century in the natural law-based works on the law of nations by Christian von Wolff and Emer de Vattel.[9]

Immanuel Kant completed the *tripdichon* and distinguished three categories: Right to War (*Recht zum Krieg*), Right in War (*Recht im Krieg*), and Right after War (*Recht nach dem Krieg*).[10] Kant associated the "law after war" with substantive principles of justice, such as the fairness of peace settlements, respect of the sovereignty of the vanquished state, and limits on the punishment of people (for example, through excessive reparation).[11] Some of these principles foreshadow traces of modern peacemaking.

Surprisingly, this "third leg" in the theory of warfare disappeared in the conceptualization of the laws of war in the nineteenth and twentieth centuries.[12] Thus, *jus in bello* was codified, then *jus ad bellum*.[13] In contrast, *jus post bellum* did not receive much attention. Treatises at the beginning of the twentieth century treated the concept in a cursory fashion, if at all.[14]

This finding begs some questions about the structure of international law and legal scholarship in the twentieth century. How did this discrepancy between just war theory and the theorization of the law of armed force emerge? Why was the absence of *jus post bellum* not perceived as a gap in the structure of international law?

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8. *Id.* at 804-31.

9. *See* E. DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS [THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS] (1758), *translated in* 3 THE CLASSICS OF INTERNATIONAL LAW 3, 14 (James B. Scott ed., Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (stating that natural law empowers a nation to do "whatever is necessary for self-preservation").

10. *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 218-22 (W. Hastie trans., Lawbook Exchange 2003) (1887) (explaining in detail the three different categories of rights).

11. *Id.* at 221-22.

12. OREND, WAR AND INTERNATIONAL JUSTICE, *supra* note 3, at 219.

13. *See* HILAIRE MCCOUBREY & NIGEL WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 217 (1992) (dating the modern era of *jus in bello* to the 1860s).

14. *See* 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 280-98 (1906) (discussing the establishment, implementation, and effect of peace treaties, but lacking any discussion of *jus post bellum*).

To what extent is it necessary to re-think some of these categorizations today?

This Article seeks to shed a closer light on these questions from an inter-disciplinary perspective. Part I analyzes some of the features and contours of *jus post bellum* as a domain of scholarship. It examines why the idea of *jus post bellum* has been neglected in legal scholarship and why it should be taken seriously in the twentieth century.

Part II highlights some of the outstanding scholarship problems. An account of the existing literature indicates that *jus post bellum* is treated differently in various disciplines, for example, between legal scholars and just war theorists, and sometimes even within the very same discipline.[15] At least three areas appear to require further clarification if the concept of *jus post bellum* is to be developed from a theoretical principle into a normative framework for the organization of the transition from conflict to peace: the nature of the concept, its substantive content, and its operation.

I. *JUS POST BELLUM* AS A DOMAIN OF LEGAL SCHOLARSHIP

Throughout much of the twentieth century, the period of transition from conflict to peace has been neglected in legal science.[16] Works by scholars such as Oppenheim[17] and Phillipson[18] outlined a number of principles guiding the ending of wars and the formation of treaties of peace. However, treatises of international law remained largely silent on the question of whether, and to what extent, rules of international law shape the very contents and grand strategies of peacemaking.[19]

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15. *See generally* DiMeglio, *supra* note 3, at 134-62 (comparing three scholars' approaches to analyzing *jus post bellum*).

16. *See* OREND, WAR AND INTERNATIONAL JUSTICE, *supra* note 3, at 218-21 (noting that this neglect has led to "ad hoc, patchwork 'solutions' to very serious outbreaks of violence").

17. OPPENHEIM, *supra* note 14, at 280-98.

18. COLEMAN PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE (1916).

19. *See* OREND, WAR AND INTERNATIONAL JUSTICE, *supra* note 3, at 218 (stating that "there is next to no substantive law regulating the war-ending process").

This omission may be explained by several historical factors—the gradual development of international law and the case-by-case treatment of major peace settlements in the twentieth century[20]—but, at the same time, it has some deeper structural reasons.

A. CAUSES OF SCHOLARLY DISREGARD

At the beginning of the twentieth century, it was difficult to conceive of the period of transition from war to peace as a separate normative paradigm because international law itself was seen as bipolar system focused on the strict distinction between states of war and peace. International law was composed of two sets of rules: the law of peace and the law of war. Both types of rules were treated as alternative frameworks. The law of peace was understood as the body of law governing the normal state of affairs between states, while war was viewed as a distinct concept which gave rise to a different body of legal rules governing the relations between belligerents.[21] War and peace were seen as "ying" and "yang," namely as two aggregates which complemented each other. However, the grey zone between these two poles, namely the transition from war to peace, was not treated as a paradigm in terms of law.[22] This diametrical opposition is epitomized in the first editions of Oppenheim's famous treatise on international law which categorically distinguished the law of war and the law of peace.[23] It was only in the 1940s that international lawyers began to seriously question this bipolar theorization of international law.[24]

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20. *See generally* IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY (2005) (discussing major peace settlements and their effect on international legitimacy).

21. *See* STEPHEN NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 177-96 (2005) (finding that throughout the nineteenth century, war and peace were "seen as entirely distinct legal states, with no overlap").

22. *See id.* at 178 (discussing the need to separate war from peace but failing to address any period of transition).

23. Volume I of this two-part treatise is entitled, "Peace." 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (H. Lauterpacht ed., 6th ed. 1947). Volume II of the treatise is entitled, "Disputes, War & Neutrality." 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (H. Lauterpacht ed., 6th ed. 1940) [hereinafter OPPENHEIM, Volume 2 Sixth Edition].

24. Some authors began to advocate the existence of a grey zone between war and peace in the 1940s, arguing that there are situations in international law that are "incompatible with the states of peace and war." *See* Georg Schwarzenberger, Jus Pacis Ac Belli?, 37 AM. J. INT'L L. 460, 470 (1943) (describing such situations

This finding coincides with a further systemic reason. The absence of legal rules and principles was, to a certain extent, a corollary of a prevailing conception of international law as *jus inter gentes*, rather than a *jus gentium*.[25] In a legal order that was centered on the interests of states and interstate relations, peacemaking itself largely was conceived as a process governed by the discretion of states.[26]

The Treaty of Versailles, for instance, contained several traces of modernity, such as the reference to the criminal accountability of the German emperor, provisions for the protection of national minorities, and integration of the founding instrument of the League of Nations into the peace settlement.[27] However, the goal of sustainable peacemaking was overshadowed by the political interests (*Machtpolitik*) of the victorious powers.[28] The terms of the agreement were essentially set by a bargaining process of the victors of the rights and obligations of the vanquished.[29] Reparations were punitive to the extent that they were based on "war guilt."[30] Moreover, self-

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as a *status mixtus*, a term used to describe periods of time "incompatible with states of peace and war"); *see also* Philip C. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98, 100-01 (1954) (describing three characteristics of a state of intermediacy: a condition of hostility and strain between the opposing nations, the issues between the parties are "fundamental and deep rooted," and an absence of intention or decision to resort to war as a means of resolving these issues).

25. *See* Francisco Forrest Martin, *Our Constitution as a Federal Treaty: A New Theory of United States Constitutional Construction Based on an Originalist Understanding For Addressing a New World*, 31 HASTINGS CONST. L.Q. 269, 311 (2004) (pointing out that "*jus inter gentes* is only a subset of *jus gentium*").

26. *See* Stahn, *supra* note 2, at 941 (arguing that peace-making is now transitioning to "a pluralist and problem-solving approach to peace-making, uniting affected parties, neutral actors and private stakeholders in their efforts to restore sustainable peace").

27. *See* JOHN I. KNUDSON, A HISTORY OF THE LEAGUE OF NATIONS 177-78 (1938) (discussing the novelty of placing administration of Saar and Danzig in the hands of a new international government of peoples, the League of Nations).

28. *See generally id.* at 28-41 (describing how the victorious states negotiated the final peace settlement based solely upon their domestic political interests).

29. *Id.* at 37-38. The Treaty was negotiated primarily by the "Big Three," namely the United States, Great Britain, and France. *Id.* at 29. Germany was not allowed to participate in the drafting of the treaty. *Id.* at 37-38. Only after the Treaty was drafted were its terms communicated to the defeated powers. *Id.*

30. Treaty of Peace Between the Allied and Associated Powers and Germany art. 231, June 28, 1919, 2 Bevans 43 [hereinafter Treaty of Versailles]; *see* JOHN MAYNARD KEYNES, THE ECONOMIC CONSEQUENCES OF THE PEACE 267-68 (1920) (criticizing the severe financial burdens and cessions of territory within the treaty

determination was not viewed as a binding legal rule, but as a flexible principle.[31] It had to yield where it conflicted with overriding strategic interests of the victorious powers.[32] Therefore, it does not come as a surprise that the process of peacemaking after war itself was not codified in the inter-war period when *jus ad bellum* and *jus in bello* began to emerge as legal notions.

The peace settlements after World War II present a slightly more nuanced picture. Human rights clauses and provisions for criminal adjudication became integral features of peace treaties with former enemy powers.[33] In the cases of Germany and Japan, victory was

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as a threat to the financial equilibrium of Europe, and noting that "for at least a generation[,] . . . Germany cannot be trusted with even a modicum of prosperity").

31. *See* KNUDSON, *supra* note 27, at 37-38 (acknowledging that the victorious powers did not permit Germany to participate in framing the treaty and excluded Germany from membership in the League at its inception).

32. *See generally* Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 33 (1998). Self-determination did not serve as a means of ending colonial ambitions or as an instrument to empower groups to foster their own national identity in general. *Id.* at 31-35, 39. "It meant above all that the new borders of Europe would, to the extent possible, be drawn along national lines." *Id.* at 32-33. The Mandates System was partly created in order to ensure the orderly division of the colonies of the defeated nations. *Id.* at 39. The German and Turkish colonies were transferred to Australia, Belgium, Britain, France, Japan, New Zealand, and South Africa as mandates. Treaty of Versailles, *supra* note 30, art. 22. The victors themselves refused to place their own colonial possessions under this regime. *See* Orentlicher, *supra*, at 39. Finally, in the context of territorial delimitation, self-determination was only applied to selected territories of the defeated powers. *Id.*

33. *See, e.g.*, Treaty of Peace with Bulgaria arts. 2, 3, 5, Feb. 10, 1947, 61 Stat. 1915, 41 U.N.T.S. 21; Treaty of Peace with Finland arts. 6, 9, Feb. 10, 1947, 48 U.N.T.S. 203; Treaty of Peace with Hungary arts. 2, 6, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 644; Treaty of Peace with Italy arts. 15, 45, Feb. 10, 1947, 61 Stat. 1245, 49 U.N.T.S. 3; Treaty of Peace with Romania arts. 3, 6, Feb. 10, 1947, 61 Stat. 1757, 42 U.N.T.S. 135 (exemplifying the trend of including human rights clauses and criminal adjudication provisions in peace treaties). These agreements were intended to prevent the resurgence of fascist or militaristic movements through internal democratization on the basis of fundamental human rights. *See, e.g.*, Treaty of Peace with Bulgaria, *supra*, art. 4; Treaty of Peace with Finland, *supra*, art. 8; Treaty of Peace with Hungary, *supra*, art. 4; Treaty of Peace with Italy, *supra*, art. 17; Treaty of Peace with Romania, *supra*, art. 5. A good example is Article 17 of the Treaty of Peace with Italy which expressly states that "Italy . . . shall not permit the resurgence on Italian territory of [Fascist] organizations, whether political, military or semi-military, whose purpose is to deprive the people of their democratic rights." Treaty of Peace with Italy, *supra*, art. 17. A second example can be found in the 1951 Treaty of Peace with Japan, in which Japan agreed to "create within Japan conditions of stability and well-being as defined in

combined with economic, social, and legal reconstruction.[34] But peacemaking continued to be treated as a negotiable settlement, shaped by the open play of realist forces. The Charter rules were declared inapplicable to the process of peacemaking with the "enemy" powers.[35] Germany and Japan were not administered under the supervision of the United Nations or classical occupation law, but under the exceptional rules of post-surrender occupation.[36] The Allied Powers continued to defend the view that forcible acquisitions of territory were an appropriate recompense for wartime losses.[37] Moreover, self-determination was applied in an incoherent fashion in

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Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation." Treaty of Peace with Japan preamble, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45; U.N. Charter arts. 55-56.

34. *See* Treaty of Peace with Japan, *supra* note 33, arts. 11-12 (requiring Japan to give the victorious powers most-favored-nation status regarding the import and export of goods, shipping, and navigation among other commercial activities); Agreement Between the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic on Certain Additional Requirements to be Imposed on Germany ¶ 12, Sept. 20, 1945, 3 Bevans 1254 (granting the Allied powers authority to control all aspects of the German economy).

35. This is reflected in the "enemy state" clause contained in Article 107 of the U.N. Charter, which states that "[n]othing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action." U.N. Charter art. 107.

36. *See* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 91-93 (1993) (positing that the Allied forces justified their actions by reasoning that Germany and Japan were in a state of subjugation and therefore the Allied forces were "entitled to annex the territory or otherwise assume sovereign powers over it").

37. Germany and Japan were stripped of their title to certain territories. Treaty of Versailles, *supra* note 30, arts. 31-117; Treaty of Peace with Japan, *supra* note 33, art. 2. The Königsberg area of East Prussia and South Sakhalin and the Kurile Islands were passed on to the Soviet Union in return for Soviet participation in the war. GERHARD L. WEINBERG, A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II 789 (1994); Andrew Mack & Martin O'Hare, *Moscow-Tokyo and The Northern Territories Dispute*, 30 ASIAN SURV. 380, 381-84 (1990). The U.S. gained exclusive control over the Japanese mandated islands in the Pacific, which were later placed under the Trusteeship System. Treaty of Peace with Japan, *supra* note 33, art. 2. Furthermore, all German territories east of the Oder-Neisse Line (including Danzig and Eastern Prussia) with nearly nine million inhabitants, a majority of whom were German, were ceded to Poland in order to provide a short and more easily defensible border between Poland and Germany. WEINBERG, *supra*, at 789.

territorial settlements.[38] Peacemaking was thus essentially regarded as something exceptional that operated on a case-by-case basis and outside the framework of the U.N. Charter. Some legal scholars like Wilhelm Grewe continued to conceive of peacemaking as an "art" rather than a legal paradigm until the 1980s.[39]

B. THE CASE FOR RENEWED ATTENTION

Why does this conception require a fresh look at the beginning of the twenty-first century? Currently, this very question is answered differently by different protagonists and disciplines.

Scholars in the field of just war theory have offered a number of theoretical explanations. It has been argued that "it is important to better theorize postwar justice . . . for the sake of a more complete theory of just war."[40] Others claim that *jus post bellum* is needed for strategic purposes, namely to avoid a fall into anarchy following intervention.[41] Again others, like Michael Walzer, have argued that we need *jus post bellum* because the post-war execution of the goals of war has an impact on the overall judgment of war[42]—an argument

38. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 162 (1990) (noting that while the overseas empires of Western European states began to dissolve, "large Latvian, Lithuanian, Estonian, Polish, German, Romanian, Hungarian and Slovak-inhabited territories in Europe were being annexed arbitrarily by neighbouring states").

39. Wilhelm G. Grewe, *Peace Treaties*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 938, 945 (Rudolf Bernhardt & Peter MacAlister-Smith eds., 1997). See Bardo Fassbender, *Stories of War and Peace on Writing the History of International Law in the "Third Reich" and After*, 13 EUR. J. INT'L L. 479 (2002), for a further study of Grewe and for a discussion of Grewe's interpretation of modern international law.

40. Bass, *supra* note 3, at 384.

41. *See* NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 2-3 (2004) (arguing that the collapse of law and order and domestic structures following the Iraq intervention created a moral duty for coalition members to stay in Iraq and a moral justification to exercise "temporary political authority as trustee on behalf of the people being governed, in much the same way that an elected government does").

42. *See* Michael Walzer, *Just and Unjust Occupations*, DISSENT, Winter 2004, at 61, *available at* http://dissentmagazine.org/article/?article=400 [hereinafter Walzer, *Just and Unjust Occupations*] (maintaining that fighting a just war can still result in an unjust aftermath, and although a morally acceptable aftermath may not justify an unjust war, it may be just in and of itself); Michael Walzer, *Regime Change and Just War*, DISSENT, Summer 2006, at 103, *available at* http://dissentmagazine.org/article/?article=663 (contending that, although regime

which attracted wide attention in the debate about the intervention in Iraq.

In this latter context, the notion of *jus post bellum* has also gained some prominence in legal doctrine. *Jus post bellum* is increasingly viewed by legal scholars as a framework to deal with the challenges of state-building and transformation after intervention.[43] Recently, it has been associated with different phenomena such as transformative occupation,[44] the conduct of legislative reform in post-conflict zones,[45] or the consolidation of the rule of law after intervention more generally.[46]

These observations provide evidence that the law of occupation is increasingly perceived as an insufficient answer to the legal challenges of peace-building. But it is necessary to go a step further. The fundamental question is whether *jus post bellum* can be understood in a broader normative sense, namely not only as a moral principle or a legal catchword, but as a concept which regulates conflicts of norms and the relationship between different actors in conflict-related situations of transition.

Such a re-thinking of the existing categories of law has been suggested in legal scholarship.[47] It receives support from several

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change is not part of the just war paradigm, it can be justified in the aftermath of a just war when required by moral necessity).

43. *See* Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution Making: Toward a* Jus Post Bellum *for "Interim Occupations"*, 51 N.Y.L. SCH. L. REV. 497, 501 (2006-2007) (arguing that although the *jus post bellum* concept of belligerent occupation was ignored in post World War II reconstruction, its conservation principle of prohibiting major changes to the social, political, legal, and economic institutions of the occupied country remains relevant in contemporary society).

44. Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 619 (2006).

45. *See* Boon, *supra* note 2, at 287 (arguing that "a *just post bellum* based on the principles of trusteeship, accountability, and proportionality is necessary to establish the rule of law" in occupied territories).

46. CHRISTIAN SCHALLER, STIFTUNG WISSENSCHAFT UND POLITIK [FOUNDATION FOR SCHOLARSHIP AND POLICY], PEACEBUILDING UND "IUS POST BELLUM" [PEACE-BUILDING AND "JUS POST BELLUM"] (2006) (F.R.G.).

47. Roberts views "an emerging or future *jus post bellum*" as a basis to deal with shortcomings of *jus in bello*. *See* Roberts, *supra* note 44, at 619 (reasoning that *jus post bellum* could be used to resolve the tension that exists in current international law with regard to the idea of "military intervention with a transformative purpose"). For the argument that the idea of *jus post bellum* cannot

factors: certain structural changes in the international legal order, international practice in the field of peacemaking, and apparent inadequacies in the existing architecture of the law of armed force.

1. Erosion of the War/Peace Dichotomy

First, the classical war/peace dichotomy has lost its raison d'être with the outlawry of war and the blurring of the boundaries between conflict and peace.[48] Traces of the historic distinction between war and peace are still present in some distinct areas of law, like the effects of war on the law of treaties.[49] However, the applicability of law no longer depends on the recognition of a state of war or a state of peace.[50] International law comes into play in situations which are neither declared war nor part of peacetime relations, such as threats to the peace.[51] The most evident example is internal armed violence, which according to recent statistics constitutes ninety-five percent of armed violence in the last decade.[52]

Transitions from conflict to peace are governed by a conglomerate of rules and principles from different areas of law. International military forces, for instance, which are traditionally bound by wartime obligations, may be bound to respect certain peacetime standards (such as habeas corpus guarantees), when exercising public authority in a post-conflict environment.[53] Civilian authorities, by

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simply be inserted into a modern context, but first must be "translated from a moral principle into a legal notion," see Stahn, *supra* note 2, at 936-37.

48. *See* Robert Layton, *The Effect of Measures Short of War on Treaties*, 30 U. CHI. L. REV. 96, 109 (1962) (noting that the "Charter of the United Nations is not dependent on a finding of a 'resort to war' by a state in order to activate its peace-protecting machinery").

49. International Law Commission, *Analytical Guide: Effects of Armed Conflicts on Treaties*, *available at* http://untreaty.un.org/ilc/guide/1_10.htm (last visited Oct. 13, 2007).

50. *See* Layton, *supra* note 48, at 98 (finding that "the outbreak of war does not necessarily terminate treaty obligations").

51. *See id.* at 109 (discussing the applicability of the U.N. Charter to hostilities short of war, including "threats to the peace, breaches of the peace, and acts of aggression"); U.N. Charter ch. VII.

52. *See* HUMAN SECURITY CENTER, HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY 18 (2005) (cautioning that governments which deny legitimacy to political adversaries will label internal violence as criminal, not warfare, therefore stifling attempts to develop statistics on internal armed conflict).

53. *See, e.g.*, EUR. PARL. ASS., *Protection of Human Rights in Kosovo*, Res. No. 1417 (Jan. 25, 2005), *available at* http://assembly.coe.int/main.asp?Link=/

contrast, may invoke certain conflict-related exceptions from peacetime standards, in order to maintain orderly government.

Accordingly, the clear distinction between war and peace has become open to challenge. It is oversimplistic to characterize legal relations exclusively within the parameters of these two concepts. There are multiple situations in which (what was formerly called) the law of war and the law of peace apply simultaneously. Moreover, the very contours of the concepts of war and peace have been blurred. International law applies in situations of transition—in transitions from conflict to peace or transitions from peace to conflict.[54]

2. International Practice

Second, and more importantly, one may witness the crystallization of certain rules and institutional frameworks for the organization of peace in international practice.[55] Most modern peace treaties are framed on the basis of the assumption that the ending of hostilities requires not only measures to terminate conflict, but active steps to build peace.[56] This is reflected in the move from a negative to a positive conception of peace under the U.N. Charter, the peacemaking practice of the Security Council after the revitalization of the collective security after the Cold War, and practice in the field of development assistance, like human rights and democracy clauses.[57] In some contemporary documents, foreign nations have been deemed to hold a "shared responsibility" for human security.[58]

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documents/adoptedtext/ta05/eres1417.htm (requiring international military forces to help create and then follow mechanisms to alleviate human rights problems in Kosovo).

54. *See* Christine Bell et al., *Justice Discourses in Transition*, 13 SOC. & LEGAL STUD. 305, 308 (2004) (explaining that gaps in domestic law and the need for external reference points make international law of heightened importance during periods of transition).

55. According to recent statistics, "[a]pproximately half of all the peace settlements negotiated between 1946 and 2003 have been signed since the end of the Cold War." HUMAN SECURITY CENTER, *supra* note 52, at 153. Empirical data suggest that the "average number of conflicts terminated per year in the 1990s was more than twice the average of all previous decades from 1946 onwards." *Id.*

56. *See generally* W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 TUL. J. INT'L & COMP. L. 5, 29-30 (1998).

57. *See* ROBERT MILLER, AID AS PEACEMAKER: CANADIAN DEVELOPMENT ASSISTANCE AND THIRD WORLD CONFLICT 9-10 (1992) (discussing the use of

Modern peace agreements regularly contain a large regulatory component, including numerous provisions on the organization of public authority and individual rights, such as provisions on transitional government, claims mechanisms, human rights clauses, provisions on demobilization, disarmament and reintegration, as well as provisions on individual accountability.[59] These regulatory norms are complemented by structures and institutional frameworks to foster compliance with legal obligations, including adjudicatory bodies and mechanisms of third-party monitoring.[60]

Peacemaking has become an "international affair." Measures adopted by international authorities to ensure the re-establishment of war-torn territories or to assist in reconstruction are no longer considered as unlawful interventions in domestic affairs of states, but as steps facilitating the return from exception to normalcy.[61] States and international organizations have deployed various institutional models to facilitate the consolidation of peace, such as governance or assistance missions under the umbrella of peacekeeping, U.N.

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development assistance to create durable settlements after the cessation of hostilities); Reisman, *supra* note 56, at 13-15 (discussing the evolution of the United Nations from a body devoted to suppressing war toward an organization authorizing force where necessary to ensure self-determination, freedom, and independence).

58. *See* 2005 World Summit Outcome, ¶¶ 138-139, U.N. Doc. A/60/L.1 (Sept. 20, 2005) (asserting that the United Nations, as representative of the international community, has the responsibility to "help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity").

59. *See* Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 396-97 (2006) (discussing the precision used in peace agreements in order to legalize the obligations contained therein, specifically in regards to immediate military disarmament and the political changes contemplated by the parties).

60. *See id.* at 400-03 (noting that elaborate agreements, underwritten by the Security Council, are often crucial to the peacemaking process).

61. SIMON CHESTERMAN, YOU, THE PEOPLE 153 (2004). The United Nations and regional organizations have not only assisted in the reconstruction of war-torn societies, but have shaped the legal and political foundations of domestic societies in cases such as Namibia, Cambodia, Eastern Slavonia, Kosovo, East Timor, and Liberia. *See, e.g.*, RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION 179-95 (2005); CHESTERMAN, *supra*, at 126-52 (discussing the extent of consultation with local actors and the accountability of international actors within the U.N. transitional governments established in Kosovo and East Timor); JAMES DOBBINS ET AL., THE UN'S ROLE IN NATION-BUILDING: FROM THE CONGO TO IRAQ (2005).

transitional administrations, or multinational forms of administration.[62]

The rise of human rights obligations and growing limitations on sovereignty and non-intervention have not only changed the attitude toward the ending of conflicts, but have also set certain benchmarks for behavior.[63] The process of peacemaking itself has become a domain of international attention and regulatory action.[64] This is evidenced by the regulatory practice of the U.N. Security Council. It is also evidenced by the development of law and practice concerning the accountability of international organizations and peace support operations,[65] the extraterritorial application of human rights norms,[66] and the obligations of states in cases of state succession.[67] It is sometimes suggested that international organizations and states should be subject to comparable obligations in terms of immunity

62. *See* CAPLAN, *supra* note 61, at 179-95 (noting that although executive international authority may be necessary, self governance with international assistance is sometimes possible in post conflict areas); CHESTERMAN, *supra* note 61, at 126-52

63. *See, e.g.*, Treaty of Peace with Bulgaria, *supra* note 33, arts. 2-5 (protecting human rights in Bulgaria, irrespective of citizenship).

64. *See* Bell, *supra* note 59, at 373 (indicating that international standards, such as U.N. guidelines and Security Council resolutions, regulate both the process of negotiation and the substance of peace agreements).

65. *See generally* MARTEN ZWANENBURG, ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS 7–8 (Christopher Greenwood & Timothy L.H. McCormack eds., 2005) (discussing conduct during peace support operations, the scope of applicability of international humanitarian law in peace support operations, and the responsibility and accountability of peace support operations in case of breaches of international humanitarian law).

66. *See, e.g.*, U.N. Hum. Rts. Comm., *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (Apr. 21, 2004) (observing the requirement of states to ensure that rights are afforded to all persons within their territory and subject to their jurisdiction, regardless of nationality or statelessness); Theodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 78 (1995) (emphasizing that the armed forces of a state must adhere to the law of war "regardless of whether they operate in or outside the territory of that state").

67. *See Report of the Human Rights Committee*, ¶ 4, U.N. GAOR, 53rd Sess., Supp. No. 40, U.N. Doc. A/53/40/Annex VII (Sept. 15, 1998) (asserting that once people are afforded rights under the Covenant, such rights will continue to belong to them regardless of state succession or other change in government).

and accountability when exercising public authority.[68] Moreover, some of the grand strategies of peacemaking—like democratization and economic liberalization—are governed by a network of obligations flowing from the law of international organizations, multilateral treaty commitments, or donor conditionality.[69]

It is therefore appropriate and timely to treat peacemaking not only as a political process, but also a legal phenomenon.

3. On the Use of a Jus Post Bellum

This postulate is not reflected in the current architecture of international law. The contemporary law of armed force continues to be based on the traditional distinction between *jus ad bellum* and *jus in bello*.[70] The process of peacemaking after conflict is not reflected as a separate paradigm.[71]

An extension of the existing categories is not without risks. One of the dangers is that *post bellum* motives might be used as a pretext for

68. *See* OMBUDSPERSON INSTIT. IN KOSOVO, SPECIAL REPORT NO. 1 ON THE COMPATIBILITY WITH RECOGNIZED INTERNATIONAL STANDARDS OF UNMIK REGULATION NO. 2000/47 ON THE STATUS, PRIVILEGES AND IMMUNITIES OF KFOR AND UNMIK AND THEIR PERSONNEL IN KOSOVO AND ON THE IMPLEMENTATION OF THE ABOVE REGULATION, ¶ 84 (2001), *available at* http://www.ombudsperson kosovo.org/repository/docs/E4010426a.pdf (recommending that the immunity afforded to UNMIK and the NATO-led Kosovo Force be limited); EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, 60th Sess., Doc. No. 280, ¶¶ 63–64 (2004) (delineating the reasons why international organizations are immune from legal process by courts of member states and other institutional organizations); Res. No. 1417, *supra* note 53, ¶ 5(ix) (reviewing the current state of immunities afforded to UNMIK and KFOR); *see also* Frédéric Mégret & Florian Hoffman, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 342 (2003) (advocating a "three-tiered system allocating human rights responsibility[ies]" to the United Nations depending on its degree of control over a state's sovereignty).

69. *See* Stahn, *supra* note 2, at 937 (indicating that "peace-making is not merely determined by the discretion and contractual liberty of the warring factions, but is governed by certain norms and standards of international law").

70. *Id.* at 924-25.

71. *See id.* at 930 (criticizing the failure to consider peacemaking after conflict as a separate paradigm in light of the inherent link between recourse to force and restoration of peace).

validating of questionable uses of force. However, if properly construed, a *jus post bellum* may ultimately provide certain benefits.

a. Closing a Normative Gap

A *jus post bellum* might, first of all, fill a certain normative gap. At present, there is no organizing framework for transitions from conflict to peace. It is often difficult to ascertain which rules apply to domestic and international actors, since the international and the domestic legal order converge in processes of transition. Acts of international actors may directly become of the domestic legal system, while acts of domestic authorities may be subject to increased international scrutiny. Moreover, there is no clear guidance as to how possible conflicts between applicable norms and principles of international law—human rights law as opposed to international humanitarian law—ought to be resolved.[72]

The articulation of a *jus post bellum* may mitigate these gaps. It may help identify rules of conflict and set limitations to the conduct of international actors. It may also provide guidance concerning the legal policy choices to be made in light of conflicting norms in situations of transition.[73]

b. Closing a Systemic Gap

Second, a re-thinking of the existing categories might serve a certain systemic function. In contemporary international law, the rules governing recourse to force and the prospects of peacemaking after conflict are widely regarded as different paradigms. Each category is treated as its own distinct universe. This vision is open to challenge in an era in which the very justification for the use of force is tied to the very purpose of restoring or enhancing sustainable peace. One of the advantages of a contemporary *jus post bellum* is that it might establish a closer nexus between the justification and motive of the use of force and the corresponding responsibilities in the aftermath of intervention[74] A *jus post bellum* might require states and international actors to assess the implications of the recourse to

72. *Id.* at 941-42.
73. *Id.*
74. *Id.*

force on the post-intervention phase before deciding whether or not to use force in the first place. Moreover, it may compel intervening powers to contemplate and provide the necessary institutional frameworks to ensure sustainable peacemaking after recourse to force.[75]

The case for a *jus post bellum* is to some extent inherent in the conception of *jus ad bellum*.[76] Even under *jus ad bellum*, it is sometimes not enough to establish that the motives which led to the recourse to force pursued a lawful and commonly accepted purpose.[77] A use of force in self-defense or under Chapter VII of the U.N. Charter may have to be followed by action that is appropriate and capable of removing the threat that motivated the use of force by virtue of the principle of proportionality.[78] If it is clear at the outset that an invention will lead to a violent insurgency which may prevent the establishment of a just peace, the *jus post bellum* might provide an argument not to resort to war in the first place.

A *jus post bellum* might also set certain legal constraints and guidelines for the exercise of public authority in a subsequent post-conflict engagement.[79] It "might provide the necessary parameters and benchmarks to determine whether the respective goals have been implemented in a fair and effective manner and in accordance with the law."[80] An assessment of the "*post bellum*" record of an entity might further help distinguish political rhetoric from legitimate motivation in cases of intervention for humanitarian purposes.[81]

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75. *Id.* at 942.

76. OREND, MORALITY OF WAR, *supra* note 3, at 162. A similar argument is made in the context of just war theory, under which one of the criteria of the *jus ad bellum* is reasonable hope of success. *Id.*

77. *See* BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE 135 (2000) (recognizing that a war initiated and fought justly may nevertheless result in unjust terms of settlement).

78. *See* Anand Panyarachun, *Report of the Chairman of the High-level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility*, ¶ 207, *delivered to the Secretary-General*, U.N. Doc. A/59/565 (Dec. 2, 2004) (advocating such an approach and establishing criteria for the authorization of interventions by the Security Council).

79. Stahn, *supra* note 2, at 942.

80. *Id.*

81. Frédéric Mégret, Jus in bello *and* Jus ad bellum, 100 AM. SOC'Y INT'L L. 121, 123 (2006).

c. Reconfiguring *Jus in Bello*

Last but not least, the development of post-conflict law may have certain implications for the contemporary *jus in bello*. The *jus in bello* is designed to address temporary power vacuums after conflict. Its focus lies on the maintenance of public security and order, as well as the protection of the interests of domestic actors. It contains only a "nucleus" of legal principles devoted to the ending of hostilities and the re-establishment of peace. The move towards a *jus post bellum* might prevent an artificial merger and conflation of the *jus in bello* with objectives (like state-building or transformation after intervention) that it is ill-suited to achieve in light of its limited temporal scope of application and its traditional focus on the obligations of armed forces.[82]

Considerations of fair and just peace may be taken into account in an indirect fashion under a tripartite conception of the law of armed force. They might serve as an overarching umbrella for the limitation of the aims and effects of armed conflict. The *jus post bellum* would require the respective parties to conduct their hostilities in a manner which does not defeat the prospects of a fair and just peace settlement after the conflict.[83]

II. THE SCHOLARSHIP AGENDA

Although these considerations make it worthwhile to revive the idea of a *jus post bellum* in modern international law, the concept requires further refinement from a conceptual perspective. At least three areas need further clarification if *jus post bellum* is to be taken seriously as a domain of scholarship, namely the general meaning of the concept, its content, and its operation.

A. THE MEANING OF THE CONCEPT

There is some agreement that the concept of *jus post bellum* is meant to address challenges of conflict termination and peacemaking

82. Stahn, *supra* note 2, at 942-43.
83. *Id.*

which are not covered by *jus ad bellum* or *jus in bello*.[84] The notion has been defined in the Stanford Encyclopedia of Philosophy as a concept which that "seeks to regulate the ending of wars and to ease the transition from war back to peace."[85] However, until present the concept has still had different meanings to different audiences.

1. Foundation

One of the dilemmas of the contemporary discourse over *jus post bellum* is the disregard and occasional misperception of the legal domain. This shortcoming has caused confusion about the foundation of *jus post bellum*.

a. Beyond Morality

Jus post bellum has been mostly considered as a moral paradigm, namely as an extension of just war theory.[86] Part of the justification for this approach has been derived from an assumed lack of legal rules. It has been argued that the issue of morality becomes so important because "[t]here is little international law here—save occupation law and perhaps the human rights treaties."[87] The use of extra-legal parameters has thus been invoked as an argument to strengthen the case for moral reflection on intervention.[88]

This argument needs to be refined. A shift from law to morality is visible and defendable in areas where the parameters of law itself are in flux or dispute, such as in the context of humanitarian

84. *See* Boon, *supra* note 2, at 291-92 (stating that *jus post bellum* has distinct end goals of establishing security, creating the political and economic basis for independence, and promoting a democratic process).

85. STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.3, http://plato.stanford.edu/archives/fall2007/entries/war/.

86. *See* FELDMAN, *supra* note 41, at 3 (proposing a similar argument in the context of nation-building in Iraq); OREND, *supra* note 77, at 135-36 (emphasizing that just war theory proponents have used moral justifications to argue that a "just war" requires a "just peace").

87. STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 85, § 2.3.

88. *See* S.K. Sharma, *Reconsidering the* Jus ad Bellum/Jus in bello *Distinction*, http://www.bisa.ac.uk/2006/pps/sharma.pdf (using the example of the NATO intervention in Kosovo to demonstrate why international law should consider moral and ethical considerations rather than relying exclusively on strict adherence to the division between *jus ad bellum* and *jus in bello*).

intervention.[89] In this area, recourse to extra-legal justifications has even become an integral part of the vocabulary of international law.[90] However, this does not mean that a potential *jus post bellum* must be exclusively of a moral nature.[91]

There is some room to argue that international law contains an existing pool of norms and principles, which goes beyond a moral responsibility after conflict. The substantive components of peacemaking are no longer exclusively determined by the discretion and contractual liberty of the warring factions, but are governed by certain norms and standards of international law derived from different fields of law and legal practice.[92] Some of these obligations are tied to factual considerations such as effective control, and are therefore partly beyond the will of states. This network of law and regulations may be deemed to form the foundations of "*jus*" in the legal sense, which complements the *jus post bellum* under just war theory.[93]

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89. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 180–82 (2002) (providing that international lawyers have used the legality/legitimacy distinction in the case of Kosovo in order to deal with the dilemma of an unauthorized intervention).

90. *See id.* (illustrating this recourse to extra-legal justifications in the context of humanitarian intervention with the NATO intervention in Kosovo, which, although not strictly legal, was legitimate in the sense that it was "congruent with an 'international moral consensus'").

91. *See* OREND, MORALITY OF WAR, *supra* note 3, at 268 (concluding that even moral philosophers occasionally combine ethical considerations with legal argumentation).

92. Article 52 of the Vienna Convention on the Law of Treaties governs the formation of peace settlements and considerations of procedural fairness; the prohibition of annexation and the law of self-determination define the limits of territorial dispute resolution. Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 331. The consequences of an act of aggression are *inter alia* determined by parameters of the law of state responsibility, Charter-based considerations of proportionality and human rights-based limitations on reparations; the exercise of foreign governance over territory is limited by the principle of territorial sovereignty, the prohibition of "trusteeship" (over U.N. members) under Article 78 of the Charter, limits of occupation law under the Fourth Geneva Convention, as well as the powers of the Security Council under the Charter; the law applicable in a territory in transition is determined by the law of state succession as well certain provisions of human rights law, like non-derogable human rights guarantees, and the laws of occupation; finally, the scope of individual criminal responsibility is defined by treaty-based and customary law-based prohibitions of international criminal law. U.N. Charter art. 78.

93. *Compare* BLACK'S LAW DICTIONARY 875 (8th ed. 2004) (defining "*jus*" as

b. Law v. Law

The current theorization of the concept suffers further from a fragmented and sector-specific vision of *jus post bellum* by legal scholars. The notion has been used to describe partially different legal paradigms. International humanitarian lawyers tend to view *jus post bellum* primarily as an alternative, as in, a "law of post-war reconstruction."[94] Criminal lawyers would associate *jus post bellum* more closely with the concept of justice after war, and treat it primarily under the label of criminal accountability.[95] Human rights lawyers would regard it as a surrogate framework of law in situations of emergency.[96] Others again might view it as a nucleus of a "responsibility to rebuild" after military intervention.

This piecemeal approach is misguided. An area-specific vision of *jus post bellum* is neither in line with the historic tradition of the notion, nor helpful from a systemic point of view. It fails to address one of the principal dilemmas of contemporary international law, namely to define the interplay between different legal orders and bodies of law in situations of transition.[97] It is more appropriate to understand *jus post bellum* in a holistic sense, namely as a broader regulatory framework, which contains not only substantive legal

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a "system of law"), *with* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 85, § 2.3 (characterizing the new concept of *jus post bellum* as a set of moral principles).

94. Boon, *supra* note 2, at 285.

95. *See* Davida A. Kellogg, Jus Post Bellum*: The Importance of War Crimes Trials*, PARAMETERS, Autumn 2002, at 87, 91-94 (arguing that *jus post bellum* involves acknowledging that "atrocious crimes [may] have been perpetrated" and "judg[ing] and exact[ing] punishment" for these crimes). The author defines *jus post bellum* as "justice in the wake of war" and argues that "the proper venue for working justice in the wake of war is the war crimes tribunal." *Id.* at 89, 94.

96. *See* Williams & Caldwell, *supra* note 3, at 317-18 (laying out four human rights-based principles of *jus post bellum* that are transitional in nature and aimed at restoring the "*status quo ante bellum*"). In their treatment of *jus post bellum*, Williams and Caldwell argue that "[a] just peace exists when the human rights of those involved in the war, on both sides, are more secure than they were before the war." *Id.* at 309.

97. *See* Stahn, *supra* note 2, at 924 (arguing that it is "increasingly clear that some of the problems arising in the period of transition from conflict to peace cannot be addressed by a simple application of the 'law of peace' or the 'laws of war', but require 'situation-specific' adjustments, such as organizing frameworks and principles which are specifically geared towards the management of situations of transition between conflict and peace").

rules and principles governing transitions from conflict to peace, but also rules on their interplay and relationship in case of conflict.[98]

2. Scope of Application

If *jus post bellum* is developed into a broader concept of law, it is further necessary to define its scope of application. It must, in particular, be specified in which circumstances *jus post bellum* comes into play.

According to its traditional understanding, *jus post bellum* is triggered by inter-state wars. Any modern perspective of this concept would be markedly different from that which occupied the minds of the scholars who first addressed this area. Today, the very notion itself is, to some extent, a misnomer. A modern *jus post bellum* must apply after events other than classical wars. It would need to be connected to the broader notion of international armed conflicts and even certain kinds of interventions that are not directly contemplated by the *jus in bello* under the Geneva Conventions, such as enforcement action under Chapter VII of the U.N. Charter.[99]

In addition, a *jus post bellum* would have to apply in the aftermath of civil wars.[100] Internal armed violence is covered by the contemporary *jus in bello*[101] and has been the object of increased

98. *See id.* at 937-38, 941-42 (discussing the entangled norms that make up this "regulatory framework," and proposing a holistic law that connects *jus ad bellum*, *jus in bello*, and *jus post bellum* to decrease the "uncertainty about applicable law [and] the interplay of different structural frameworks . . . in a post conflict environment"). Sometimes, different legal provisions may conflict or compete with each other. For example, an immediate duty to prosecute may conflict with the parallel responsibility of the host state to protect the security of its people. An individual's right of access to a court may conflict with the immunity of international organizations that exercise public authority in a post-conflict territory. Such conflicts must be solved by way of a hierarchy of norms or a balancing of principles. "Some norms (for instance, *jus cogens* prohibitions) constitute 'hard' law ('rules'). They are applicable 'in an all-or nothing fashion'. Others are based on broader principles which may be balanced against each other . . . ." *Id.* at 937-38.

99. *See* Roberts, *supra* note 44, at 619 (noting that *jus post bellum* also arises "after a foreign military intervention").

100. *Id.*

101. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1997, 1125 U.N.T.S. 17513 ("This Protocol . . . shall apply to all armed

attention and regulation in the past decades.[102] A legal *jus post bellum* would thus need to embrace a corpus of rules of *jus post bellum internum,* which take into account the specificities of peacemaking in internal armed conflicts.

At the same time, the temporal scope of application of *jus post bellum* must be redefined. Historically, the dividing line between war and peace has been the conclusion of a peace treaty.[103] Today, however, reality is more complex. A conflict can no longer be temporally defined simply by looking at the date of signature of the relevant peace treaty, nor will the conclusion of a peace treaty necessarily mean the definitive end of hostilities.[104] The question of when a period can accurately be described as being "after" hostilities may need to be determined on a case-by-case basis. *Jus post bellum* might, for instance, apply after a factual end of hostilities or after a Security Council Resolution.[105]

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conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which . . . exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations . . . ."); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 970 (regulating conduct such as treatment of people not active in hostilities and treatment of the wounded and sick in "conflict not of an international character").

102. *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 67, 134 (Oct. 2, 1995) (applying the law of war to the then ongoing internal conflict in Bosnia and Herzegovina); *see also* Rome Statute of the International Criminal Court art. 8(2)(c), June 17, 1998, 2187 U.N.T.S. I-38544 (specifying behavior that is considered a war crime during a conflict "not of an international character"). *See generally* François Bugnion, Jus ad bellum, Jus in bello *and Non-International Armed Conflicts*, *in* 6 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 167, 190-97 (T. McCormack & Avril McDonald eds., 2003) (looking to *jus in bello* and *jus ad bellum* in seeking to develop the law of non-international armed conflict).

103. OPPENHEIM, Volume 2 Sixth Edition, *supra* note 23, at 469.

104. *See* Williams & Caldwell, *supra* note 3, at 315 (noting, in describing different types of wars, that "some wars are followed by continued resistance or unconventional war").

105. *See* Bardo Fassbender, *Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council After a Decade of Measures Against Iraq*, 13 EUR. J. INT'L L. 273, 279 (2002) (observing that some scholars have pointed to Security Council Resolutions as being the "substitute peace treaties" of recent times).

Greater flexibility is also required with respect to possible length of application. *Jus post bellum* is a law of transition by definition.[106] This means that it must cease to apply at a certain moment.[107] Traditionally, it has been argued that *jus post bellum* is aimed at the preservation or return to the legal *status quo ante*, which formed the logical endpoint of this concept.[108] Today, however, such a vision is overly restrictive.

It may fit in some cases of an international armed conflict where State A has invaded State B and State B fights back. However, it is of little use in cases where the effects of the use of force make the restoration of the pre-war situation impossible.[109] Moreover, the rationale of return to the *status quo ante* itself is misplaced in some contexts. If an intervention has been preceded by an internal armed conflict, it does not make sense to return to the situation that led to the conflict in the first place or to restore the social and political order that caused the humanitarian crisis.[110] In these cases, the establishment of fair and just peace requires positive transformations of the domestic order of a society, since peace settlement should

106. *See* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 85, § 2.3 (stating that *jus post bellum* seeks to regulate the ending of wars and to ease the transition from war back to peace).

107. This type of cessation seems to originally have been envisioned by the Fourth Geneva Convention, which provides that many of its articles are no longer applicable "one year after the general close of military operations." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 973. However, the Convention struggles with the concept of *jus post bellum* ceasing at a specific point and extends the applicability of some provisions "for the duration of the occupation, to the extent that [a] Power exercises the functions of government in [a] territory." *Id.*; *see* Roberts, *supra* note 44, at 587-89 (discussing the timeline for cessation as a challenging concept, even at the time of drafting, and concluding that the concept now "bear[s] little or no relevance to actual occupations" because "not all occupations can be subject to exactly the same rules").

108. Michael Walzer, Speech at the Heinrich Böll Foundation 14 (July 2, 2003), *available at* http://www.boell.de/alt/downloads/aussen/walzer_judging_war.pdf.

109. *See, e.g.*, *id.* (discussing the situation in Iraq following the 2003 U.S. invasion). "Sovereignty can be forfeit . . . in cases of repeated aggression or in the aftermath of a humanitarian intervention . . . . The victorious and now occupying power has to maintain law and order . . . and find some way to establish a new regime." *Id.*

110. OREND, WAR AND INTERNATIONAL JUSTICE, *supra* note 3, at 224 (citing MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 119 (1977)).

ideally achieve a higher level of human rights protection, accountability, and good governance than in the period before the resort to armed force.[111]

A modern *jus post bellum* would be focused on the sustainability of peace, rather than on simply brokering an end to violence.[112] This focus gives *jus post bellum* a dynamic scope of application. It might come to apply in situations which are in reality *in pacem* or *ante bellum.*

B. THE CONTENT

The articulation of a legal *jus post bellum* requires further a refinement of its normative content.[113] Currently, there are various synergies between just war theory and propositions by legal scholars. But there is no agreement on a canon of *jus post bellum* principles.[114]

Moral philosophers have applied classical principles of just war theory when defining *jus post bellum*, such as just cause, right intention, public declaration, legitimate authority, discrimination and proportionality.[115] Brian Orend, for instance, offers the following principles: proportionality and publicity of the peace settlement, rights vindication, discrimination, punishment, compensation, and rehabilitation.[116] Bass suggests that a *jus post bellum* should

111. *See* Williams & Caldwell, *supra* note 3, at 316 (explaining that one principle of *jus post bellum* is that "a war is conducted justly . . . when the human rights of those involved in the war . . . are more secure than they were before the war").

112. *See* OREND, MORALITY OF WAR, *supra* note 3, at 181 (stating that a just peace demands an "*ethical* 'exit strategy'" in addition to a military one); DiMeglio, *supra* note 3, at 162 (arguing that securing a lasting peace is one of three criteria defining "the parameters of a just peace under the general framework of the just war tradition").

113. *See* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 85, § 2.3 (stating that there is a "newness, unsettledness and controversy" connected with the definition and principles of *jus post bellum*).

114. *See* OREND, MORALITY OF WAR, *supra* note 3, at 180-81 (listing some often "discussed and defended" settlement principles despite the need for "flexibility and sensitivity" within the canon).

115. *See* OREND, WAR AND INTERNATIONAL JUSTICE, *supra* note 3, at 232-33 (including all of these terms in his "coherent set of substantive principles for *jus post bellum*"); Bass, *supra* note 3, at 412 (considering prudence along with proportionality in his discussion of *jus post bellum*).

116. OREND, MORALITY OF WAR, *supra* note 3, at 180-81. Orend describes the

encompass, *inter alia*, the conduct of war crimes trials,[117] compensatory reparation,[118] and the "duty to respect to the greatest extent possible the sovereignty of the defeated nation and seek the consent of the defeated in any project for reconstruction,"[119] which would require "that victorious states . . . render themselves accountable to the population they purport to assist, seeking to gain their consent for the actions taken on their behalf."[120] Michael Walzer proposed similar guidelines for a *jus post bellum* following the Iraq intervention.[121] Walzer noted:

> Democratic political theory, which plays a relatively small part in our arguments about *jus ad bellum* and *in bello*, provides the central principles of [post-war justice]. They include self-determination, popular

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listed principles as follows:

> [1] Proportionality and Publicity. The peace settlement should be both measured and reasonable, as well as publicly proclaimed . . . . In general, this rules out insistence on unconditional surrender. [2] Rights Vindication. The settlement should secure those basic rights whose violation triggered the justified war. The relevant rights include human rights to life and liberty and community entitlements to territory and sovereignty . . . . [3] Discrimination. Distinction needs to be made between the leaders, the soldiers, and the civilians in the defeated country . . . . [4] Punishment #1. When the defeated country has been a blatant, rights-violating aggressor, proportionate punishment must be meted out. The leaders of the regime, in particular, should face fair and public international trials for war crimes . . . . [5] Punishment #2. Soldiers also commit war crimes. Justice after war requires that such soldiers, *from all sides to the conflict*, likewise be held accountable to investigation and possible trial. [6] Compensation. Financial restitution may be mandated, subject to both proportionality and discrimination . . . . [7] Rehabilitation. The post-war environment provides a promising opportunity to reform decrepit institutions in an aggressor regime. Such reforms are permissible . . . but they must be proportional to the degree of depravity in the regime. They may involve: demilitarization and disarmament; police and judicial re-training; human rights education; and even deep structural transformation towards a minimally just society governed by a legitimate regime. *Id.*

117. Bass, *supra* note 3, at 404.

118. *See id.* at 408-09 (arguing that the aggressors should pay the costs of economic restoration, in particular war supporters and profiteers).

119. *Id.* at 392.

120. *Id.* at 401.

121. *See* Walzer, *Just and Unjust Occupations*, *supra* note 42, at 61-63 (arguing that the United States must be prepared to invest adequate resources to reconstruct Iraq, committed to seeing through a just post-conflict outcome and, "prepared to cede power to a legitimate and genuinely independent Iraqi government" that may, in the end, not act according to U.S. interests).

> legitimacy, civil rights, and the idea of a common good. We want wars to end with governments in power in the defeated states that are chosen by the people they rule-or, at least, recognized by them as legitimate-and that are visibly committed to the welfare of those same people (all of them). We want minorities protected against persecution, neighboring states protected against aggression, the poorest of the people protected against destitution and starvation.[122]

These general principles are not so far removed from rules and principles which may be derived from a survey of international practice, such as a requirement of fairness and inclusiveness of peace settlements; the exclusion of territorial mutilation as punishment for aggression; the humanization of reparations and sanctions; the distinction between collective responsibility and individual responsibility; and accountability for mass crimes.[123]

However, they leave many questions unanswered. Firstly, the existing propositions continue to be shaped by just war theory, which was developed on the basis of the criteria of classical warfare.[124] *Jus post bellum* principles are thus focused on international armed conflicts.[125] Internal armed conflicts are widely ignored.

Secondly, problems arise when these principles are translated into a more concrete context, such as state- or nation-building.[126] One may easily agree with the argument that principles of accountability, popular consent, and closure—the sustainable assistance beyond the

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122. *Id.*

123. *See* Carsten Stahn, Jus ad bellum – Jus in bello . . . Jus post bellum: *Towards a Tripartite Conception of Armed Conflict*, www.esil-sedi.eu/english/pdf/Stahn2.PDF (discussing each of these principles in detail and advocating that they "form part of an emerging body of post-conflict law").

124. *See* James Turner Johnston, *Just War, As It Was and Is*, FIRST THINGS, Jan. 1, 2005, at 1-2 (describing the historical genesis of classic just war theory with a focus on its theological antecedents, and noting that the past forty years have seen a resurgence of the idea of just war in Christian ethical discourse).

125. *See* Rigby, *supra* note 3, at 179 (noting the increasing prevalence of intra-state wars in the past ten years). The author proposes that elements of durable peace settlements must take into account the unique issues posed by intra-state wars. *Id.* at 188-89.

126. *See, e.g.*, Walzer, *Just and Unjust Occupations*, *supra* note 42, at 61-63 (noting the distinction between the arguments relating to the occupation of Iraq and the arguments for invasion, and the importance of democratic political theory in the formulation of the view that the United States has an obligation to reconstruct Iraq).

point of holding elections—should form part of any *jus post bellum* framework after intervention.[127] Yet, it is doubtful to what extent there can be a "blueprint" for transitions from conflict to peace.

Some proposals to that effect have been made in different contexts. It has been suggested to develop a model code of criminal procedure[128] or a toolkit to create "Government out of a Box."[129] Others have endeavored to formulate a recipe to transform "defeated, rights-violating aggressor regimes into stable [and] peaceful . . . societies," which would include strategies such as policing, capacity-building, or the restoration of local ownership.[130]

Such efforts are guided by noble intentions, but are overly simplistic.[131] The individual situations differ, and so do the policies required to ensure sustainable peace. For example, in some cases, a quick withdrawal of foreign troops may be the best remedy to secure stability and fairness, while a prolonged military engagement may be desirable in other cases.[132] Where some form of support and

127. *See id.* (discussing these principles in the context of the Iraqi occupation and suggesting that U.S. goals of democracy and federalism in Iraq are examples of this sustainable assistance).

128. *See Report of the Panel on United Nations Peace Operations*, ¶¶ 81-83, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/2000/809, A/55/305 (Aug. 21, 2000) (presenting the central idea of an ongoing project to create a criminal code that contains the "basics of both law and procedure to enable an operation to apply due process using international jurists and internationally agreed standards").

129. *See* Michael von der Schulenburg, CRISIS MANAGEMENT INITIATIVE, GOVERNMENT OUT OF A BOX: SOME IDEAS OF DEVELOPING A TOOL BOX FOR PEACE-BUILDING 2-3 (2004), *available at* http://www.cmi.fi/files/GooB_report_2004.pdf (noting that these toolkits would aim to use modern technology to build infrastructure, a local civil service, and foster a sense of national ownership).

130. *See* OREND, MORALITY OF WAR, *supra* note 3, at 204-08 (suggesting a "ten-point recipe for reconstruction" while recognizing that each case will require special "ingredients").

131. *See* The Secretary-General, *Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations*, ¶ 31, *delivered to the General Assembly*, U.N. Doc. A/55/502 (Oct. 20, 2000) (doubting "whether it would be practical, or even desirable given the diversity of country specific legal traditions, for the Secretariat to elaborate a model criminal code, whether worldwide, regional, or civil or common-law based, for use by future transitional administration missions").

132. *See, e.g.*, Walzer, *Just and Unjust Occupations*, *supra* note 42, at 61-63 (noting that the four year occupation of Nazi Germany was necessary to bring Nazi leaders to trial and institute general "denazification," while in Iraq, it might be argued that an extended occupation and comparable "debaathification" is not

assistance in state-building is requested or required in a specific situation, opinions differ greatly concerning the desirable strategy to be applied.[133] Some authorities, such as Roland Paris, argue that institutionalization should generally come before liberalization and standard-setting in order to provide space for domestic dialogue about normative principles of a domestic polity.[134] Others suggest that action in specific sectors such as criminal justice and the rule of law should be prioritized immediately after conflict in order to put the process of peace-building on the right track from the start.[135]

Thirdly, it is still unclear in existing literature from which sources such principles are and ought to be derived.[136] In contemporary scholarship, moral or legal considerations—soft law—are often interwoven with policy assessments or recommendations. This turn

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necessary because a majority of the population was not a part of the Baath regime).

133. *See* ROLAND PARIS, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT 185-87 (2004) (summarizing the approaches of different theorists to peace-building). For example, the author contrasts the arguments "in favor of restricting political participation and political mobilization" with other commentators' emphasis on the "psychological sources of unrest during the modernization process." *Id.* at 186 n.22.

134. *See id.* at 185-88 (examining methods of turning war-torn states into liberal market democracies by avoiding the "destabilizing side effects" of liberalization). Paris explains that peace-builders tend to believe that elections have a pacifying effect without considering their potential negative effects. *Id.* at 188-89. The proposed solution for peacebuilders includes the following:

> 1) postponing elections until moderate political parties have been created, and mechanisms to ensure compliance with the results of the election have been established; 2) designing electoral rules that reward moderation instead of extremism; 3) encouraging the development of civil-society organizations that cut across lines of societal conflict . . . ; 4) regulating incendiary 'hate speech'; 5) promoting economic reforms that moderate rather than exacerbate societal tensions; and 6) developing effective security institutions and a professional, neutral bureaucracy.

Id.

135. *See* Simon Chesterman, *Walking Softly in Afghanistan: The Future of UN State-Building*, SURVIVAL, Autumn 2002, at 37, 37-38 (examining the United Nation's "light footprint" approach in the context of Afghanistan, where it has focused on strengthening Afghan capacity to promote sustainability and a sense of national ownership).

136. *See* Stahn, *supra* note 123, at 4 (noting that the source of post-conflict law is unclear because "few attempts have been undertaken to . . . fill the notion of post-conflict law with concrete legal content," but stating that there is a modern tendency "to move from a statist and national-interest driven conception of conflict termination to a pluralist and problem-solving approach to peacemaking").

to policy may be useful to develop best practices for certain actors (as done by U.N. Department of Peacekeeping Operations[137] or the World Bank,[138] for example), but it is shaky from a normative point of view.[139] Some of the existing institutional frameworks and practices, like the U.N. Interim Administration Mission in Kosovo ("UNMIK") and the Office of the High Representative ("OHR") "standards before status" practice,[140] do not necessarily lend themselves to further replication or elevation to normative rules or principles. Moreover, many of the facets and hidden side-effects of state-building and reconstruction under international auspices are still unexplored.[141] More empirical research appears to be necessary

137. *See generally* PEACEKEEPING BEST PRACTICES UNIT, UNITED NATIONS, HANDBOOK ON UNITED NATIONS MULTIDIMENSIONAL PEACEKEEPING OPERATIONS (2003) [hereinafter PEACEKEEPING OPERATIONS HANDBOOK] (providing an overview of the principles and practices of U.N. peacekeeping operations).

138. *See generally* Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* (World Bank, Soc. Dev. Papers: Conflict Prevention and Resolution, Paper No. 37, 2006) (summarizing initiatives and policies frequently implemented by agencies and institutions undertaking rule of law reform and seeking to highlight issues that may arise in the process).

139. *See* Jean-Marie Guéhenno, *Foreword* to PEACEKEEPING OPERATIONS HANDBOOK, *supra* note 137, at vii (stating that the Handbook is not "intended to provide strategic or policy guidance"). Instead, "it is intended to provide [new] field personnel . . . with general background on the responsibilities of each component of [U.N.] operations and how these fit together to form the whole." *Id.*

140. This policy raises some intriguing questions from the point of view of the right to self-government and political legitimacy. Do such benchmarks require prior domestic consent? Can compliance be assessed objectively? Do such policies ensure that the underlying norms and values are properly internalized in domestic society? See Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate*, 16 EUR. J. INT'L L. 637, 640 (2005), for a critical analysis of the "standards before status" or "earned sovereignty" approach in which progress is determined by benchmarks indicating good governance.

141. *See* DAVID CHANDLER, EMPIRE IN DENIAL: THE POLITICS OF STATE-BUILDING 4 (2006) (emphasizing that even though state-building initiatives are increasing in number, "there has been little theoretical engagement with state-building as a policy framework . . . or in terms of the consequences" for the recipient state); DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 347 (2004) (adopting a critical view of international humanitarianism or state-building, and, in part, criticizing humanitarian policymakers for fleeing "the political struggles which go with the exercise of power and with uncertainty over truth").

in order to identify reliable organizing principles for post-conflict peace.

C. "*JUS POST BELLUM*" IN OPERATION

Last but not least, it is necessary to clarify the relationship between *jus post bellum*, *jus ad bellum*, and *jus in bello*.

Here again, it is clear that the classical conceptions of just war theory cannot simply be transposed to a modern legal setting.[142] Just war theorists and international lawyers may agree with the general proposition that the idea of peacemaking after war is, to some extent, rooted in *jus ad bellum*.[143] However, both disciplines tend to have different point of departures concerning the application of the principle of distinction.[144]

Philosophers have challenged the independence of the (moral) principles of *jus in bello* and *jus ad bellum*.[145] The basic assumption of the principle of distinction, namely that the justification of the recourse to force has no bearing on rights and obligations of combatants in war, has been questioned from a moral point of view.[146] It has been argued that, as a matter of morality, it is "simply not . . . permissible to fight in a war with an unjust cause" since "acts of war that promote an unjust cause cannot be proportionate" and discriminate in terms of the harm that they inflict.[147] The same claim has been made with respect to *jus post bellum*. It has been argued that the "[f]ailure to meet *jus ad bellum* results in automatic failure to meet *jus in bello* and *jus post bellum*" and that from a moral point of view "any serious defection, by any participant, from these principles of just war settlement should be seen as a violation of the rules of just war termination, and so should be punished."[148] Or, as Orend put

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

143. *Id.* at 926.

144. *See* Jeff McMahan, *Morality, Law and the Relation between* Jus ad bellum *and* Jus in Bello, 100 AM. SOC'Y INT'L L. PROC. 112, 112 (2006) (challenging that the principle of distinction—the traditional separation between *jus ad bellum* and *jus in bellum*—means that all combatants are morally equal in war).

145. *See id.* (arguing that there must be "substantial divergence" between the "morality of war and the law of war").

146. *Id.* at 112-13.

147. *Id.* at 113.

148. OREND, MORALITY OF WAR, *supra* note 3, at 181.

it more bluntly: "Once you're an aggressor in war, everything is lost to you, morally."[149]

Such an approach stands in opposition to the traditional stance of international lawyers who have fought for recognition of the principle of distinction over the past century.[150] The general separation of *jus ad bellum* and *jus in bello* became common ground in international law in the second half of the twentieth century.[151] It is *inter alia* reflected in the separate codification of aggression and war crimes in the statutory instruments of international criminal tribunals[152] and the Preamble to Additional Protocol I to the Geneva Conventions which clarifies that the provisions of the Protocol apply in all circumstances without distinction based on the "nature or origin" of the underlying conflict.[153] This principle is designed to absolve compliance with the law from disputes over the causes of armed conflict and meant to enhance protection for victims of violence.

International lawyers would naturally plea for an extension of the principle of distinction to *jus post bellum.* This separation comes into play in the relationship between *jus ad bellum* and *jus post bellum.* Obligations under *jus post bellum* would apply in an objective

149. *Id.*

150. *See generally* Antoine Bouvier, *Assessing the Relationship between* Jus in Bello *and* Jus ad Bellum: *An "Orthodox View,"* 100 AM. SOC'Y INT'L L. PROC. 109, 110-12 (tracing the historical development of the principle of distinction and concluding that no alternative system is available in the rules of international law).

151. *Id.* at 110. The author contrasts the parallel developments of *jus ad bello* and *jus in bello*, noting that the former shrank to the two justifications for war embodied in the U.N. Charter, while the latter grew into the web of conventional and customary rules governing warfare itself. *Id.*

152. *See* Rome Statute of the International Criminal Court, *supra* note 102, art. 5 (addressing war crimes and the crime of aggression separately); Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government for the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (distinguishing between "crimes against peace," defined as "planning, preparation, initiation or waging a war of aggression," and "war crimes," defined as "violations of the laws or customs of war").

153. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Preamble, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

fashion: All sides are under an obligation to settle disputes in a fair and just fashion after the conflict, irrespective of the cause and legality of the original use of force. A similar consideration governs the relationship between *jus post bellum* and *jus in bello*. The *jus post bellum* must *à priori* be independent from compliance with *jus in bello*. If a party violates its obligations under *jus in bello*, it does not lose its entitlement to a fair treatment under *jus post bellum*. Some of the very concepts of *jus post bellum* are designed to remedy previous violations of *jus ad bellum* or *jus in bello*—state responsibility, individual criminal responsibility, compensation, etc.[154]

The starting point of the legal discipline (the neutral application of *jus in bello*) is thus different from just war theory.

Nevertheless, even under contemporary international law, the separation of *jus ad bellum* and *jus in bello* is not an absolute rule.[155] There is a certain convergence in the objectives of *jus ad bellum* and *jus in bello*.[156] Both branches of law ultimately pursue a common rationale, namely to make war a less "viable option" in international relations.[157] Moreover, the scope of application of the principle of distinction itself is limited.

In some cases, it does not make sense at all to argue in terms of the principle of distinction. The operation of the classical principle of distinction is based on the assumption of the identity of parties to a conflict under *jus ad bellum* and *jus in bello*.[158] Modern armed violence, however, is more complex. In the case of authorized collective security operations, it is doubtful whether there are two

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

155. *See* Bouvier, *supra* note 150, at 111 (noting that the distinction between *jus ad bellum* and *jus in bello* has been challenged in the last twenty-five years). The challenges have rested on at least five grounds including "humanitarian intervention," "collective security operations," "asymmetric conflicts," the "war on terror," and the "possible subordination of *jus in bello* to *jus ad bellum*." *Id.*

156. *See* Mégret, *supra* note 81, at 121-23 (acknowledging that the two may "operate more on a continuum than as parallel tracks").

157. *See id.* at 123 (suggesting that in addition to making war a less viable option, "*jus ad bellum* and *jus in bello* are converging towards making war either illegal or . . . onerous legally").

158. *See id.* at 121 (noting that, according to *jus in bello*, "[w]hat makes war war" is that "it is conducted by the sovereign").

parties in the classical sense of *jus in bello* in the first place.[159] Moreover, in many cases, Kosovo and Iraq for example, the actors involved on the post-conflict phase (U.N. civilian presences) are different from those who carried out armed force (NATO, a coalition of states). Such actors should equally come within the ambit of the operation of *jus post bellum* even though they have not been parties to armed force.[160]

Most importantly, just as *jus ad bellum* and *jus in bello* are not fully independent, *jus ad bellum* and *jus post bellum* cannot be entirely independent of each other.[161] The application and interpretation of norms under one body of law may be informed by findings under the other. *Jus in bello*, for instance, contains a built-in reference to *jus ad bellum* in the definition of armed conflict in Article 1(4) of Additional Protocol I, which extends the applicability of the law governing international armed conflicts to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."[162] A similar nexus exists between *jus ad bellum* and *jus post bellum*. The scope of legal obligations under *jus post bellum* may depend on whether or not an intervention was lawful.[163] For example, a very different set of obligations may result in terms of reparation and individual criminal responsibility if armed force was used in aggressive war or in self-defense.[164] Even in the legal discipline, *jus post bellum* is thus not an entirely autonomous branch of law.

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159. *See* The Secretary-General, *Secretary General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, § 1, *delivered to the Secretariat*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) (extending the applicability of "fundamental principles and rules of international humanitarian law" to U.N. forces engaged in "enforcement operations, or in peacekeeping operations" despite the fact that the U.N. is not a sovereign).

160. *Id.*

161. *See* Bouvier, *supra* note 150, at 109; Mégret, *supra* note 81, at 121.

162. *See* Additional Protocol I, *supra* note 153, art. 1(4).

163. *See, e.g.*, Walzer, *Just and Unjust Occupations*, *supra* note 42.

164. *See id.* at 61-63 (presenting the current conflict in Iraq as an example of armed force used in an aggressive war, and expressing the sentiment of some of the international community that, as a result, the United States is solely responsible for "its aftermath . . . [and] attendant burdens").

CONCLUSION

The concept of *jus post bellum* has gained new attention in contemporary scholarship. But its current theorization is still unsatisfactory in several respects. The concept is praised as a promising instrument to enhance the sustainability of peace after conflict, but it is often presented in a one-sided fashion and defined without consideration of related disciplines. This vision should be revisited. At least two factors require further attention.

The first is the general lack of attention to the legal dimensions of *jus post bellum*. The concept itself emerged in the tradition of just war theory, but it has been widely ignored in the legal discipline. This gap may be explained by some structural grounds that are rooted in the development of international law in the twentieth century, but it is increasingly open to challenge from a normative point of view. The exclusive reference to moral obligations in the theorization of transitions from conflict to peace fails to recognize the existing net of legal rules and principles in this area. Contemporary developments suggest that it is time to take the concept of *jus post bellum* seriously as a legal paradigm, both in the context of just war theory and within the legal community.

Second, there is a certain tendency in contemporary scholarship to conflate or misconstrue the mutual roles of law and morality. The fact that a legal *jus post bellum* may be traced back to a historical tradition does not mean that the classical moral and the legal paradigm must be identical. Moral theory and legal science share distinct origins and rationales and approach the relationship between *jus ad bellum*, *jus in bello*, and *jus post bellum* from different angles. Moral philosophy is primarily concerned with the moral justification of warfare, under which the operation of the principles of *jus ad bellum*, *jus in bello*, and *jus post bellum* is closely connected to the overall cause, just or unjust, of the recourse to force. *Jus post bellum* serves primarily as a benchmark to evaluate the legitimacy and ethical implications of interventions. International lawyers, by contrast, tend to view each of these categories as autonomous rules of behavior, with the aim of maximizing compliance and respect for human dignity. It is therefore not contradictory to construe *jus post bellum* differently in each discipline.

Nevertheless, the conceptual development of *jus post bellum* requires more inter-disciplinary discourse. Scholars from different communities would benefit from a closer look at related disciplines. Some of the current (mis)perceptions of the role of moral parameters in the theorization of *jus post bellum* might be adjusted if just war theorists paid greater attention to the impact of legal rules and principles. Conversely, the legal discipline may draw valuable insights from the content of the classical *jus post bellum* under just war doctrine and historical sources when defining the contours of *jus post bellum* in modern international law.