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# ‘Jus ad bellum’, ‘jus in bello’ . . . ‘jus post bellum’? – *Rethinking the Conception of the Law of Armed Force*

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## Abstract

*The law of armed force is traditionally conceptualized in the categories of jus ad bellum and jus in bello. This dualist conception of armed force has its origin in the legal tradition of the inter-war period. This essay revisits this approach. It argues that the increasing interweaving of the concepts of intervention, armed conflict and peace-making in contemporary practice make it necessary to complement the classical rules of jus ad bellum and in jus in bello with a third branch of the law, namely rules and principles governing peace-making after conflict. The idea of a tripartite conception of armed force, including the concept of justice after war (‘jus post bellum’) has a long-established tradition in moral philosophy and legal theory. This article argues that this historical concept deserves fresh attention from a legal perspective at a time when the contemporary rules of jus ad bellum and jus in bello are increasingly shaped by a normative conception of law and justice and a broadening notion of human security. Moreover, it identifies some of the legal rules and principles underlying a modern conception of ‘just post bellum’.*

## 1 Introduction

Since Grotius’ *De Jure Belli ac Pacis*, the architecture of the international legal system has been founded upon a distinction between the states of war and peace. At the beginning of the 20th century, it was taken for granted that ‘the law recognizes a state of peace and a state of war, but that it knows nothing of an intermediate

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state which is neither one thing nor the other'.<sup>1</sup> Today, this claim stands to be revisited.

Traces of the historic distinction between war and peace are still present in some distinct areas of law.<sup>2</sup> However, war and peace are no longer perceived as strict organizing frameworks for the categorization of rules of international law. The United Nations Charter has narrowed the grounds on which subjects of international law may legitimately resort to armed violence.<sup>3</sup> There are multiple situations in which (what was formerly called) 'the law of war' and the 'law of peace' apply simultaneously.<sup>4</sup> Moreover, the question of how to make peace in periods of transition following war has become one of the main preoccupations of international law and practice since 1945.<sup>5</sup> These developments raise some doubts as to whether some of the traditional understandings of international law still suffice to explain the complexities of contemporary international law.

Both the increase of interventions and the growing impact of international law on post-conflict peace make it particularly timely and pertinent to take a closer look at the architecture of the law of armed force. The current debate about the law of armed force is mostly focused on a discussion of the *status quo* of *jus ad bellum* and *jus in bello*<sup>6</sup> and the relationship between these two branches of law<sup>7</sup>. This essay seeks to offer a different perspective on the contemporary law of armed force, by suggesting a systemic rethinking of the categories of the law. It argues that some of the dilemmas of contemporary interventions may be attenuated by a fresh look at the past, namely a

<sup>1</sup> See House of Lords, Lord MacNaghten, *Janson v Driefontein Consolidated Mines Ltd.* [1902] AC 484. Lassa Oppenheim's classical treatise on international law divided the entirety of the rules of international law into the categories of peace and war. See H. Lauterpacht (ed.), *Oppenheim's International Law* (6th edn., 1947), i (Peace) and ii ('War and Neutrality').

<sup>2</sup> See, *inter alia*, the project of the ILC on the effects of armed conflict on the law of treaties. For a survey of the various reports of the Commission on this topic, see ILC, *Effects of armed conflicts on treaties*, available at [http://untreaty.un.org/ilc/guide/1\\_10.htm](http://untreaty.un.org/ilc/guide/1_10.htm).

<sup>3</sup> See S. Neff, *War and the Law of Nations* (2005), at 315–356.

<sup>4</sup> A good example is the parallel applicability of human rights law and international humanitarian law. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 [2004] ICJ Rep 136, para. 106.

<sup>5</sup> Multi-dimensional peacekeeping operations and modern interventions have gradually led to a departure from the notion of peace in the mere absence of violence ('negative peace'). This is, *inter alia*, reflected in the concept of collective 'responsibility to protect', which encompasses three dimensions of communitarian conflict management in cases of large-scale atrocities: preventive action, responsive action, and post-conflict engagement ('responsibility to prevent', 'responsibility to react', and 'responsibility to rebuild'). See paras. 138 and 139 of GA Res. 60/1 (2005 World Summit Outcome) of 24 Oct. 2005.

<sup>6</sup> See among others Ratner, 'Jus ad Bellum and Jus in Bello after September 11', 96 *AJIL* (2002) 905; Lietzau, 'Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism', 8 *Max Planck Yearbk UN L* (2005) 383.

<sup>7</sup> See generally on this distinction Scelles, 'Jus in Bello, Jus ad Bellum', 6 *Nederlands Tijdschrift voor Internationaal Recht* (1959) 292; Kolb, 'Origins of the Twin Terms Jus ad Bellum/Jus in Bello', 320 *Int'l Rev of the Red Cross* (1997) 553. On the interplay see Canor, 'When Jus ad Bellum Meets Jus in Bello: the Occupier's Right of Self-defence Against Terrorism Stemming from Occupied Territories', 19 *Leiden J Int'l L* (2006) 129.

(re)turn to a tripartite conception of armed force based on three categories: '*jus ad bellum*', '*jus in bello*' and '*jus post bellum*'.<sup>8</sup>

## 2 The Erosion of the Classical War–Peace Distinction

This exercise requires some reconsideration of formerly established groundwork. The starting point is the bipolar peace and war distinction. This classical distinction has its origin in 19th-century thinking when war and peace were conceived to be completely distinct legal regimes. War and peace were not only distinguished in temporal terms ('state of war'/'state of peace'), but were considered to be independent legal frameworks with mutually exclusive rules for wartime and peacetime.<sup>9</sup> This clear-cut distinction lost its *raison d'être* in the 20th century.<sup>10</sup> Three changes may be observed, in particular:

The gradual outlawry of war as a legal institution in the 20th century has removed one fundamental prerequisite of the classical peace/war dichotomy, namely the recognition of war as a legitimate category of law. War is no longer treated as a legally accepted paradigm, but as a factual event regulated by (different bodies of) law. It has thus become uncommon to treat war and peace as separate and diametrically opposed legal institutions and to theorize the rules of international law on the basis of this dialectical relationship.

Second, there is no (longer a) clear dividing line between war and peace.<sup>11</sup> The classical dichotomy of peace and war has lost part of its significance due to the shrinking number of inter-state wars after 1945 and the increasing preoccupation of international law with civil strife and internal armed violence.<sup>12</sup> International

<sup>8</sup> To date, scholarship on the concept of '*jus post bellum*' has been rare. Where literature exists, it has mostly approached the topic from the angle of just war theory. See B. Orend, *War and International Justice, A Kantian Perspective* (2000), 57; *ibid.*, '*Jus Post Bellum*', 31 *J Social Philosophy* (2000) 117; *ibid.*, *The Morality of War* (2006), at 160–190; Bass, '*Jus Post Bellum*', 32 *Philosophy & Public Affairs* (2004) 384; and DiMeglio, 'The Evolution of the Just War Tradition: Defining Jus Post Bellum', 186 *Military L Rev* (2005) 116. The existing contributions on the subject differ considerably in content. For different treatments see Iasiello, '*Jus Post Bellum. The Moral Responsibilities of Victors in War*', 57 *Naval War College Rev* (2004) 33; Boon, 'Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', 50 *McGill LJ* (2005) 285; and the study by C. Schaller, *Peacebuilding und jus post bellum, Völkerrechtliche Rahmenbedingungen der Friedenskonsolidierung nach militärischen Interventionen* (2006), available at [http://www.swp-berlin.org/de/common/get\\_document.php?id=1663#search=%22Schaller%20Jus%20Post%20Bellum%22](http://www.swp-berlin.org/de/common/get_document.php?id=1663#search=%22Schaller%20Jus%20Post%20Bellum%22). For a short analysis of *jus post bellum* as a legal concept see C. Stahn, *Jus Ad Bellum, Jus in Bello, Jus Post Bellum: Towards a Tripartite Conception of the Law of Armed Force*, ESIL Inaugural Conference Paper, available at [www.esil-sedi.org/english/pdf/Stahn2.PDF](http://www.esil-sedi.org/english/pdf/Stahn2.PDF).

<sup>9</sup> War and peace were diametrically opposed concepts. It was assumed that a 'state of war' excluded the applicability of the law of peace. For an insightful discussion see Neff, *supra* note 3, at 177–196.

<sup>10</sup> See Wright, 'The Outlawry of War and the Law of War', 47 *AJIL* (1953) 356, at 365; H. Lauterpacht, 'The Limits of the Operation of the Law of War', 30 *British Yearbk Int'l L* (1953) 206, at 240.

<sup>11</sup> Some authors began to advocate the existence of a grey zone between war and peace in the 1940s. See Schwarzenberger, '*Jus Pacis, Ac belli?*', 37 *AJIL* (1943) 460, at 470; Jessup, 'Should International Law Recognize an Intermediate Status Between War and Peace?', 48 *AJIL* (1954) 98.

<sup>12</sup> See Human Security Report, *The Changing Face of Global Violence* (2005), at 18 ('[i]n the last decade, 95% of armed conflicts have taken place within states, not between them').

practice has dealt with multiple situations which are neither ‘declared wars’ in the conventional sense, nor part of peacetime relations, such as threats to peace caused by repressive state policies. Moreover, international law comes into play in processes of transition from one stage to the other, namely in transitions from peace to war or in transitions from war to peace.<sup>13</sup> If one were to theorize this phenomenon, it would be more correct to speak of a tri-dimensional (rather than bipolar) system, covering the phases of conflict, peacetime relations and the transition from conflict to peace.

Third, it is becoming 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.<sup>14</sup>

### 3 Revisiting the Dualist Conception of the Law of Armed Force

This transformation is only partially reflected in the contemporary conception of the law of armed force. This body of law is based on a dualist conception of armed force

<sup>13</sup> Principles of the traditional ‘law of peace’ are increasingly applied to societies, which are not in a clear situation of war or peace, but are involved in a process of transition from conflict to peace (e.g. the gradual collapse of state structure).

<sup>14</sup> There appears to be a growing awareness that to end hostilities requires not only measures to terminate conflict (conflict termination), but active steps to build peace (peacemaking). This type of engagement has facilitated the application of norms of international law to situations of transition from conflict to peace, such as standards for transitional justice, elections, and democratization as well as property claims mechanisms, compensation regimes, and individual human rights procedures in (post-)conflict societies. Some of the rules and procedures applicable in situations from conflict to peace require deviations from commonly established norms in order to accommodate the specific tensions of societies in transition. Standards of democratic governance may have to be adjusted to a polity in transition. Caretaker governments, e.g., may be allowed to exercise governing authority without being formally legitimated through the holding of elections. Criminal proceedings may have to be focused on the prosecution of the ‘most serious crimes’ (‘targeted accountability’). Property claims may have to be dealt with in specific mass claims procedures in order to facilitate a speedy reversion of the consequences of armed conflict and/or to facilitate minority returns. For examples in the cases of Bosnia and Herzegovina and Kosovo see Commission for Real Property Claims of Displaced Persons and Refugees (BiH), *End of Mandate Report (1996–2003)* (2004), at 3; OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, *Property Rights in Kosovo 2002–2003* (2003). International military forces, which are traditionally bound by wartime obligations, have been forced to respect certain peacetime standards (such as *habeas corpus* guarantees), when exercising public authority in a post-conflict environment. See Parliamentary Assembly Res. 1417 (2005), *Protection of Human Rights in Kosovo*, available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1417.htm>. See generally S. Chesterman, *You the People: The United Nations, Transitional Administration and State-building* (2004), at 126–152; R. Caplan, *International Governance of War-torn Territories* (2005), at 179–195. See also J. Dobbins *et al.*, *The UN’s Role in Nation-building: From the Congo to Iraq* (2005).

which distinguishes the law of recourse to force (*jus ad bellum*) from the law governing the conduct of hostilities (*jus in bello*).<sup>15</sup>

The distinction between *jus ad bellum* and *jus in bello* has a long tradition in the theory of warfare (*Vitoria*,<sup>16</sup> *Wolff*,<sup>17</sup> *Vattel*<sup>18</sup>). However, it found its place in positive law only at the time of the League of Nations, when the Kellogg-Briand Pact outlawed the absolute power to resort to war by its prohibition of aggressive war.<sup>19</sup>

The recognition of *jus ad bellum* and *jus in bello* as legal concepts has brought important conceptual innovations *vis-à-vis* the legal thinking of the 19th century. It has not only changed the perception of war, but reaffirmed the indiscriminate application of the obligations of warring parties in the conduct in hostilities.<sup>20</sup> *Jus ad bellum* and *jus in bello* were declared to be distinct normative universes, in order to postulate the principle that all conflicts shall be fought humanely, irrespective of the cause of armed violence.<sup>21</sup>

However, the current architecture of the law of force continues to be shaped by certain antinomies. Firstly, the distinction between the justification for the use of force and the *jus in bello* is not always as clear-cut and stringent as is sometimes claimed. While there is agreement that principles and entitlements under *jus in bello* (for instance, the requirements of necessity, proportionality and humanity and the privileges of combatants) should generally apply independently of the cause of armed conflict,<sup>22</sup> there are cases in which findings under one body of law shape the applicability or interpretation of the other body of law.<sup>23</sup> Following the motivation of interventions in cases such as Iraq in 1991 and Kosovo in 1999, there has even been discussion

<sup>15</sup> For a general treatment see Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn., 2005); and *ibid.*, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004).

<sup>16</sup> In his *De inde de de iure belli relectiones*, Vitoria distinguished lawful motives of war from just limits in war. See Vitoria, *De iure belli relectiones* (1539), Nos. 15 ff and 34 ff. For an English translation see E. Nys (ed.), *De iure belli relectiones* (trans. J.B. Pate, 1917).

<sup>17</sup> See C. Wolff, *Jus gentium methodo scientifica pertractatum* (1749), at paras 888 ff.

<sup>18</sup> See E. Vattel, *Law of Nations* (1758), iii, chap. VIII.

<sup>19</sup> It appears in legal writing in the 1920s. Enriques used the term *jus ad bellum* in 1928. See Enriques, 'Considerazioni sulla teoria della guerra nel diritto internazionale', 20 *Rivista di diritto internazionale* (1928) 172. Later, Kunz took up the notion in an article published in 1934: see Kunz, 'Plus de lois de guerre?', 41 *Revue Générale de Droit International Public* (1934) 22. However, the breakthrough came only after the end of the Second World War, when the express distinction between *jus ad bellum* and *jus in bello* gained widespread acceptance in monographs: see, e.g., L. Köttsch, *The Concept of War in Contemporary History and International Law* (1956), at 86 and 89.

<sup>20</sup> This is, *inter alia*, reflected in the preamble to Additional Protocol 1 to the Geneva Conventions which makes it clear that the provisions of the Protocol apply in all circumstances without distinction based on the 'nature or origin' of the underlying conflict.

<sup>21</sup> This is also reflected in the factors triggering the applicability of *jus in bello*. The 'state of war' doctrine provided sovereigns with discretion to recognize the existence of a war in the legal sense. In the 20th century, this subject test was replaced by an objective requirement based on the factual character of a conflict.

<sup>22</sup> This appears to be the official position of the ICRC, according to which international humanitarian law 'addresses the reality of a conflict without considering the reasons for or legality of resorting to force': see ICRC, *International Humanitarian Law: Answers to your questions* (2002), at 14.

<sup>23</sup> The most prominent example of the nexus between *jus in bello* and *jus ad bellum* is the definition of armed conflict in Art. 1(4) of Additional Protocol I, which extends the applicability of the law governing international armed conflicts to 'armed conflicts which people are fighting against colonial domination and

whether there should be a new normative dispensation, according to which egregious violations of *jus in bello* could be regarded as the trigger for rights under the *jus ad bellum*.<sup>24</sup>

Secondly, the dualist conception of the law of armed force carries an idea of exclusiveness which is increasingly anachronistic in the context of the growing diversification and application of international law in all spectrums of public life. The *jus ad bellum/jus in bello* narrative reflects, to some extent, the traditional dichotomy between war and peace. *Jus ad bellum* is traditionally perceived as the body of law which provides grounds justifying the transition from peace to armed force, while *jus in bello* is deemed to define ‘the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in armed conflict in relation to each other and to protected persons’.<sup>25</sup> This understanding suggests that each of these two bodies of law contains its own specific and exclusive system of rules which comes into play in circumstances when the traditional rules of the ‘law of peace’ cease to be of adequate guidance. Such an assumption is misleading, because it is premised on the idea that the underlying period in time is governed by a specific body of law,<sup>26</sup> rather than by a multiplicity of subject-specific legal regimes originating from different sources of law.

Moreover, this dualist system, with its strict focus on the period of armed hostilities, is increasingly artificial since it fails to reflect the growing interrelation between armed violence and restoration of peace. A dualist conception of armed conflict based on the division between *jus ad bellum* and *jus in bello* presents a simplified account of the sequencing and categorization of human conduct throughout armed hostilities. The operation of both systems of rules (governing armed force) is centred on a specific period, namely the period from the outbreak of hostilities to conflict termination. This centralization is open to criticism because it is often impossible to draw a clear-cut distinction between the (continued) conduct of armed hostilities and a post-conflict setting. It also fails to reflect the growing impact of international law on the restoration of peace after conflict.

These findings make it necessary to revisit the classical dualist construction of the law of armed force (*jus ad bellum/jus in bello*) and to think about a broader conception of conflict, including the recognition of principles governing peace-making after war.

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alien occupation and against racist regimes in the exercise of their right of self-determination’. It is occasionally argued that *jus in bello* and *jus ad bellum* constitute ‘sometimes competing, sometimes complementary’ bodies of law. See Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, 43 *Columbia J Transnat’l L* (2004) 6.

<sup>24</sup> See ASIL, 100th Annual Meeting, *The Relationship Between Jus Ad Bellum and Jus In Bello: Past, Present, Future* (2007, forthcoming).

<sup>25</sup> See the definition of *jus in bello* in Wikipedia Encyclopedia, *Laws of War*, available at [http://en.wikipedia.org/wiki/Jus\\_in\\_bello](http://en.wikipedia.org/wiki/Jus_in_bello).

<sup>26</sup> This understanding was reflected in the legal tradition of the 19th century according to which the presence of a state of war precluded the application of all rules applicable in peacetime. See Neff, *supra* note 3, at 178.

## A Features of *jus ad bellum* and *jus in bello*

One of the main achievements of the modern law of armed force is that it provides more than a mere framework outlawing armed violence or setting limitations on the conduct of armed forces.<sup>27</sup> Contemporary rules of armed force do not contain only prohibitions for states and armed forces; they channel armed violence and regulate the relations between different actors (military forces, civilians, ousted government) in situations of armed conflict. However, the classical concepts of *jus ad bellum* and *jus in bello* contain gaps with respect to the management of post-conflict relations.

Concepts such as individual criminal responsibility or the 'humanization' of the conduct of warfare<sup>28</sup> were far less developed at the time, when the current rules of *jus ad bellum* and *jus in bello* were originally conceived. The traditional rules of *jus in bello* are therefore only partially equipped to address the problems arising in the context of peace-making and the transition from armed conflict to peace. The classical rationale of *jus in bello* is to limit the consequences of armed conflicts on non-combatants (including vulnerable groups such as the wounded, women and children), property and the environment. Accordingly, *jus in bello* provides only a fraction of principles governing the process of conflict termination, including capitulations and armistices.<sup>29</sup> Similarly, the principle of international criminal responsibility for the commission of serious crimes is only partially covered by the Geneva Law.<sup>30</sup>

Furthermore, gaps and structural ambiguities exist on at least three other levels: the temporal scope of application of the norms of international humanitarian law, the continuing uncertainty about the feasible scope of application of rules of international humanitarian law, and the difficulty to conduct exercises in state- or nation-building under the auspices of the law of occupation.

The norms of international humanitarian law, by definition, apply only to a limited extent to the period following the cessation of hostilities. Additional Protocol I provides that the application of the Geneva Conventions and the Protocol will cease 'on the general close of military operations'.<sup>31</sup> This moment is usually deemed to occur 'when the last shot has been fired'.<sup>32</sup> Only selected provisions apply after the 'cessation of active hostilities'. A 'post-conflict' duty, namely the obligation to repatriate, is

<sup>27</sup> See recently Berman, *supra* note 23, at 4–5.

<sup>28</sup> See Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) 239. For a human-rights-based interpretation of the laws of war see, e.g., Martin, 'Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict', 64 *Saskatchewan L Rev* (2001) 347.

<sup>29</sup> See Arts 35–41 of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.

<sup>30</sup> See, *inter alia*, the provisions on grave breaches of the Geneva Conventions. In its jurisprudence, the ICTY, found that crimes committed in non-international armed conflicts are punishable under customary international law, although 'common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions': see ICTY, *Prosecutor v Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, at paras 128–132.

<sup>31</sup> See Additional Protocol I, Art. 3(b); See also Fourth Geneva Convention, Art. 6 which provides that the application of the convention shall cease 'on the close of military operations'.

<sup>32</sup> See *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne: Federal Political Department, 1949, repr. 2005), ii–A, at 815. However, the protracted nature of modern conflicts and the involvement of potentially numerous armed groups and factions make it often difficult to determine a definitive

activated in a classical ‘wartime’ situation, namely before the close of military operations, which marks the date of the termination of ‘armed conflict’. Moreover, parts of the ‘law of war’, namely specific duties of the occupant under the laws of occupation, continue to apply in a ‘peacetime’ situation, namely after the close of military operations.<sup>33</sup> The norms of international humanitarian law are therefore only to a limited extent relevant to the broader process of building peace after conflict.

Secondly, there are doubts as to the extent to which it is desirable and feasible to extend the applicability norms of ‘*jus in bello*’ to the process of peace-making. Following the Bulletin of the Secretary-General on the observance of international humanitarian law by UN forces, there is widespread agreement that UN peacekeepers are bound to observe ‘fundamental principles and rules of international humanitarian law’, although the UN is not a party to the Hague or Geneva Conventions.<sup>34</sup> However, it is unclear as to what extent international humanitarian law can and should be used to regulate civilian activities undertaken by such actors in the aftermath of the conflict, whether it be under the umbrella of occupation, the United Nations, or within the framework of a multinational administration. In these situations, the choices of international humanitarian law collide with other frameworks such as international human rights law, which offers, in many ways, a more modern and a more nuanced framework to address challenges of peace-building. International human rights law regulates public authority directly from the perspective of individual and group rights (human rights, minority rights, self-determination), whereas international humanitarian law continues to view public authority, at least partly, through the lens of competing state interests.<sup>35</sup>

The law of occupation, the only branch of the *jus in bello* which deals explicitly with post-conflict relations, is ill-suited to serve as a framework of administration.<sup>36</sup> Both the Hague and the Geneva law are conceived of as legal frameworks to address temporary power-vacuums after conflict. Their focus lies on the maintenance of public security and order and the protection of the interests of domestic actors. These requirements force occupying powers to exercise restraint in the shaping of the law and institutions of occupied territories.<sup>37</sup> The examples of post-war Germany and Japan have shown that the needs and dynamics of processes of post-conflict

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point in time at which the laws of war cease to operate: see Roberts, ‘The End of Occupation: Iraq 2004’, 54 *ICLQ* (2005) 27, at 34.

<sup>33</sup> See Art. 6 of the Fourth Geneva Convention.

<sup>34</sup> See United Nations, Secretary-General’s Bulletin, ST/SGB/1999/13, 6 Aug. 1999, at para. 1. This position has been defended by the Institut de Droit International since the early 1970s. See Institut de Droit International, ‘Resolution, Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged’, 54(II) *Annuaire Institut de Droit International* (1971) 465. See also generally M. Zwanenburg, *Accountability of Peace Support Operations* (2005).

<sup>35</sup> See Mégret and Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’, 25 *Human Rights Quarterly* (2003) 314.

<sup>36</sup> For a discussion see Bhuta, ‘The Antinomies of Transformative Occupation’, 16 *EJIL* (2005) 740.

<sup>37</sup> See Art. 43 of the Hague Regulations as well as Art. 47 of the Fourth Geneva Convention. Arts 64 and 65–70 of the Fourth Geneva Convention provide certain exceptions to the continuation of the previously applicable law.

reconstruction are difficult to reconcile with the provisions of the law of occupation *stricto sensu*.<sup>38</sup>

The limitations of the law of occupation again became apparent in the case of the occupation of Iraq. In this case, the Security Council invented a new model of multi-lateral occupation,<sup>39</sup> which merged the structures of belligerent occupation with elements of peace-making under Chapter VII, in order to facilitate reconstruction under the umbrella of collective security. This model produced more questions than answers. Security Council Resolution 1483 embodied some modern principles of international law into the framework of the occupation.<sup>40</sup> However, the reference of the Council to two parallel legal regimes, namely the continued application of the law of occupation on the one hand,<sup>41</sup> and principles of state-building on the other,<sup>42</sup> left the limits of reconstruction in a legal limbo.<sup>43</sup> Some measures of the Coalition Provisional Authority (CPA), such as the creation of the Iraqi Special Tribunal or the reform of the Iraqi private sector,<sup>44</sup> remained doubtful from a legal perspective.<sup>45</sup>

These examples confirm that the contemporary *jus ad bellum* and *jus in bello* are based on related, but partly distinct, rationales or foundations from the process of peacemaking.<sup>46</sup> It therefore makes some sense to argue that the period of transition from conflict deserves an autonomous legal space in the architecture of the law of armed force.

<sup>38</sup> For a critique of the *debellatio* doctrine see E. Benvenisti, *The International Law of Occupation* (2003), preface and at 72–96.

<sup>39</sup> See also Benvenisti, 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective', 1 *Israel Defense Forces L Rev* (2003) 23, sect. III.

<sup>40</sup> The resolution reaffirmed, in particular, that post-war occupation does not entail a transfer of sovereignty or title over the territory, but rather a mandate to build or restore domestic self-determination or self-government. Furthermore, as occupying powers, the US and the UK were bound to promote the welfare of the local population, including ensuring equal rights and justice, while being subjected to a rudimentary form of public accountability *via* their duty to report to the Security Council: *ibid*.

<sup>41</sup> SC Resolutions 1483 and 1511 recognized the occupation of Iraq but did not authorize it in a formal way. The Coalition Provisional Authority therefore remained bound by the Hague Regulations and the Geneva Conventions. This was set out in a letter dated 8 May 2003 in which the UK and the US stated that they would 'strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq'.

<sup>42</sup> Several responsibilities mentioned in SC Resolution 1483 went beyond the ordinary framework of the maintenance of law and order under the laws of occupation ('effective administration of the territory'; 'creation of conditions in which in which the Iraqi people can freely determine their own political future' (para. 4); establishment of 'national and local institutions for representative governance' (para. 8.c)).

<sup>43</sup> See also Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', 86 *Int'l Rev of the Red Cross* (2004) 745, at 765–766.

<sup>44</sup> CPA Order No. 39 provided the basis for the privatization of the Iraqi economy, while permitting 100% foreign ownership in most sectors. Bids were limited to members of the 'coalition of the willing'.

<sup>45</sup> For a critical survey of the practice of the Coalition Provisional Authority in Iraq see Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *EJIL* (2005) 694.

<sup>46</sup> The need for an autonomous set of criteria for *jus post bellum* under the just war doctrine has been stressed by Michael Walzer with respect to occupations: see Walzer, 'Just and Unjust Occupation', in M. Walzer, *Arguing About War* (2004), at 163. For a full discussion of the separation of *jus ad bellum*, *jus in bello*, and *jus post bellum* see Boon, *supra* note 8, at 292.

## B *Inadequacies of a Dualist Conception of the Law of Armed Force*

Logically, the argument in favour of an extension of the categories of the law of armed force could have been made in the 1930s. However, the claim for recognition of a third branch of the law of armed force is particularly compelling at a time when the restoration of peace and justice in the (post-) conflict stage is conceived as the other side of the coin of intervention.

### 1 *Peacemaking as the Other Side of Intervention*

The case in favour of the regulation of peace-making is in part supported by a change of discourse about the justification of intervention. Traditionally, the use of military force was justified by the purpose of thwarting security threats or conquering foreign territories. The prohibition of the use of force and the revitalization of the collective security system have modified this picture. Today, interventions are often justified by a bundle of post-conflict oriented purposes, including, most notably, the defence of universal and communitarian values such as human rights, democracy or self-determination.<sup>47</sup> Increasingly, attempts are made to justify intervention on multiple grounds, which take into account the effects of the intervention on the post-conflict phase. In such circumstances, it is only logical that this phase be recognized in the equation of armed force.

This tendency is further reflected in contemporary practice. There are multiple initiatives to establish a link between the ‘pre-’ and the ‘(post-) conflict’ phase. The most far-reaching proposition has been made by the International Commission on Intervention and State Sovereignty. In its report, *The Responsibility to Protect*, the Commission suggested a new conception of responsibility following intervention (‘responsibility to rebuild’), noting that modern interventions cannot end after the cessation of military activities, but require ongoing engagement to prevent conflict.<sup>48</sup> Subsequently, this idea was taken up in slightly moderated form in the High-Level Panel Report on Threats, Challenges and Change,<sup>49</sup> the Report of the Secretary-General entitled ‘In Larger Freedom: Towards Development, Security and Human Rights for All’<sup>50</sup> and in the Outcome Document of the 2005 World Summit<sup>51</sup> which lays down certain basic principles concerning the meaning and scope of the international ‘responsibility to protect’.<sup>52</sup> It can also be found in the mandate of the Peacebuilding Commission, which was created to address the challenge of helping countries with

<sup>47</sup> This is partly a result of the ever-widening interpretation of the notion of ‘international peace and security’ in the practice of the Security Council.

<sup>48</sup> See Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001), para. 5.1.

<sup>49</sup> See Report of the UN High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* (2004), at paras 201–203.

<sup>50</sup> See Secretary-General, *In Larger Freedom, Towards Development, Security and Human Rights for All*, 21 Mar. 2005, at para. 135. The UN Secretary-General emphasized a similar need in his report, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 23 Aug. 2004, at para. 2.

<sup>51</sup> See GA Res. 60/1 (2005 World Summit Outcome) of 24 Oct. 2005.

<sup>52</sup> See *ibid.*, at paras. 138 and 139. For an analysis of the concept of ‘responsibility to protect’ see Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, 101 *AJIL* (2007) (forthcoming).

the transition from war to lasting peace.<sup>53</sup> These steps indicate a growing link between the use of force and the restoration of peace.

## 2 From Morality to Legality

Traditionally, this link has been explained in moral terms. Proponents of the just war theory have used moral justifications to argue that a 'just war' requires 'a just peace'.<sup>54</sup> Similarly, 'jus post bellum' was mostly theorized as a moral paradigm.<sup>55</sup> Recently, this line of reasoning was used in the context of modern interventions. It has been argued that humanitarian interventions create a certain moral responsibility to become engaged in reconstruction.<sup>56</sup> A similar argument has been made in the context of nation-building in Iraq.<sup>57</sup> Some scholars have taken the view that the coalition had an ethical responsibility to help rebuild Iraq, because it had been involved in promoting regime change. The collapse of law and order and domestic structures following the intervention, it is argued, 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 governed, in much the same way that an elected government does'.<sup>58</sup> This experience has sparked calls for a better theorization of post-war justice 'for the sake of a more complete theory of just war'.<sup>59</sup>

These suggestions are useful, but they do not go far enough. A purely 'morality-driven' justification of post-conflict engagement does not suffice to explain the reality of contemporary practice. There are some indications that there is a legal connection between the 'pre-' and the 'post-conflict' phase. In contemporary practice, it is not enough to establish that the motives which lead up to the recourse to force pursue a lawful and commonly accepted purpose. The acceptability of an intervention is equally measured by its effects and implications after the use of armed force.

A legal connection between the use of force and post-conflict engagements may be construed in at least two ways. The performance of post-conflict engagements may either be a building block of the legality of liberal interventions or a means to render

<sup>53</sup> See GA Res. 60/1, *supra* note 51, at paras 97–105. For a survey see Stahn, 'Institutionalizing Brahimi's "Light Footprint": A Comment on the Role and Mandate of the Peacebuilding Commission', 2 *Int'l Organizations L Rev* (2005) 403.

<sup>54</sup> For a survey see M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd edn., 2000); see also B. Orend, *Michael Walzer on War and Justice* (2000) and Stanford Encyclopedia of Philosophy, *War*, available at <http://plato.stanford.edu/entries/war/>.

<sup>55</sup> See Orend, 'Justice After War', 16 *J Ethics & Int'l Affairs* (2002) 43, at 44 ('a coherent set of plausible values to draw on while developing an account of just war settlement'). See also the definition of *jus post bellum* in the Stanford Encyclopedia of Philosophy, *supra* note 54. ('[j]us post bellum refers to justice during the third and final stage of war: that of war termination . . . There is little international law—save occupation law and perhaps the human rights treaties—and so we must turn the moral resources of just war theory').

<sup>56</sup> See Korhonen, "'Post' as Justification: International Law and Democracy-Building after Iraq", 4 *German LJ* (2003), No. 7. For a discussion of legality and morality in the context of Kosovo see also Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo', 13 *EJIL* (2003) 323.

<sup>57</sup> See N. Feldman, *What We Owe Iraq: War and the Ethics of Nation-Building* (2004).

<sup>58</sup> *Ibid.*, at 3.

<sup>59</sup> See Bass, *supra* note 8, at 384. A similar argument is made by DiMeglio, *supra* note 8, at 162.

the consequences of an unauthorized use of force more acceptable in the international legal system.

The first type of argument has been made in connection with liberal interventions ('humanitarian intervention', 'democratic intervention') in general. Both humanitarian and democratic interventions are directly founded on the idea of peace-making through the restoration of human rights and standards of good governance.<sup>60</sup> It has therefore been argued that such interventions require states to take sustainable measures to implement the proclaimed goals of the use of force, including efforts to restore basic human rights and democratic governance in the post-intervention phase. This obligation is derived from the very requirements of liberal interventions and considerations of proportionality of the use of force.<sup>61</sup> Such uses of force, so goes the argument, are only permissible if the corresponding action is appropriate and capable of removing the threat that motivated the use of force ('*Verpflichtung zur Nachsorge*').<sup>62</sup> The novelty of this approach lies in the fact that it derives certain (post-) conflict responsibilities from the very requirements of intervention,<sup>63</sup> instead of deducing such duties from the concept of responsibility for internationally wrongful acts (reparation, compensation).<sup>64</sup>

It is more difficult to establish a link between the use of force and post-conflict engagement in the context of unauthorized interventions. There is some ground to argue that the issue of the legality of the use of force and the conduct after intervention should be kept entirely apart in such cases.<sup>65</sup> However, one may witness a certain tendency in practice to invoke post-conflict engagement as a factor to validate

<sup>60</sup> For arguments in this direction see Reka, 'UNMIK as International Governance within Post-Conflict Societies', *New Balkan Politics*, Issue 7/8, available only at <http://www.newbalkanpolitics.org.mk/napis.asp?id=17&lang=English>, sect. II ('[m]aybe the case of Kosovo could represent a contribution towards the new liberal doctrine for the "re-conceptualization of international law", by which the "transnational legal process thereby spurs internal acceptance of international human rights" principles').

<sup>61</sup> The exercise of administering functions by UNMIK and KFOR in Kosovo has been regarded as a formal requirement of the legality of the humanitarian intervention itself, which is said to impose a post-conflict responsibility on the intervening actors ('*Verpflichtung zur Nachsorge*'): see P. Zygojannis, *Die Staatengemeinschaft und das Kosovo* (2002) at 125 ('[d]ie Verpflichtung des Intervenienten zur Nachsorge als Rechtsfolge durchgeführter humanitärer Intervention').

<sup>62</sup> *Ibid.*

<sup>63</sup> Note that this argument has recently been used by the High-Level Panel on Threats, Challenges, and Change in its list of criteria for the authorization of interventions by the Security Council. The Report of the High-Level Panel on Threats, Challenges, and Change linked the legitimacy of interventions to their capacity to meet 'the threat in question': see High-Level Panel, *supra* note 49, at para. 207.

<sup>64</sup> See Arts 31 and 36 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Report of the ILC on the Work of its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc A/56/10 (2001).

<sup>65</sup> In particular, a forcible regime change cannot be justified by the mere invocation of the law of occupation: see Chesterman, 'Occupation as Liberation: International Humanitarian Law and Regime Change', 18 *Ethics & Int'l Affairs* (2004) 51, at 56. For a lack of justification of *jus ad bellum* violations through *jus post bellum* see also Orend, *Morality of War*, *supra* note 8, at 195.

intervention or to respond benevolently to the *status quo* created by it.<sup>66</sup> Some interventions (Liberia, Sierra Leone, Kosovo, Afghanistan, Iraq) have drawn support from different scales of approval and legitimation, which vary according to the intent of the Security Council and the degree of UN engagement: *ex post facto* validation and mitigation.<sup>67</sup>

Both lines of thought confirm one common trend, namely a growing interweaving of the concepts of intervention and the restoration of peace. Some interventions appear to require subsequent (post-) conflict engagement, in order for their outcomes to be recognized as valid or acceptable. This finding lends support to the view that considerations of (post-) conflict peace should form part of the architecture of the law of armed force.

### C Historical Origins of a Tripartite Conception of Armed Force

Calls for an expanded conception of the law of armed force are by no means novel. The plea for a tripartite conception of rules of armed conflict has some precedents in legal history. Several proponents of the 'just war' doctrine discussed post-conflict principles in their writings. Francisco Suarez, for example, argued in favour of extending the just war categories to a third period, namely the ending of justly

<sup>66</sup> For a broader examination see Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002), at 158–162. Such a technique was explicitly applied by the Council in the context of its retroactive endorsement of the unauthorized ECOMOG interventions in Liberia and Sierra Leone: see SC Res. 788 (1992) and SC Res. 1260 (1999). A similar argument was made in relation to the NATO action and subsequent UN involvement in Kosovo in 1999 in Operation Allied Force. Although the Council did not expressly validate NATO's intervention *ex post facto*, the adoption of Res. 1244 (1999) by the Security Council and the subsequent creation of UNMIK could be viewed as an implicit endorsement of NATO action. In the case of Operation Enduring Freedom, it was debated whether the intervention exceeded the parameters of Art. 51 and interfered with the Security Council's responsibilities under Chap. VII, at least insofar as it entailed the overthrow of the Taliban regime. See Frank and Rehman, 'Assessing the Legality of the Attacks by the International Coalition against Terrorism against Al Qaeda and the Taliban in Afghanistan: an Inquiry into the Self-defence Argument under Article 51 of the Charter', 67 *J Crim L* (2003) 415; Delbrück, 'The Fight Against Global Terrorism: Self-defence or Collective Security as Internal Police Action? Some Comments on the International Legal Implications of the "War Against Terrorism"', 44 *German Yearbk Int'l L* (2001) 9, at 21. In that respect, the operation drew some subsequent support from the acknowledgement of the effects of the use of force by the Council through the endorsement of the Bonn Agreement and the subsequent establishment of UNAMA: see SC Res. 1386 (2001). The reaction of the Council to the Iraq crisis may be interpreted as a case of application of the theory of mitigation. Security Council members refrained from acknowledging the (il)legality of Operation Iraqi Freedom, yet they absolved it from legal sanction. Faced with growing security gaps and the need to restore sovereign and democratic institutions in post-war Iraq, the Council decided, as the Secretary-General stated, to 'place the interests of the Iraqi people above all other considerations': see Secretary-General, Press Release SG/SM/8945, 16 Oct. 2003, available at <http://www.un.org/News/Press/docs/2003/sgsm8945.doc.htm>.

<sup>67</sup> Note that the Report of the High-Level Panel on Threats, Challenges, and Changes establishes criteria not only for the authorization, but also for the endorsement of the use of military force: see High-Level Panel, *supra* note 49, at para. 207.

declared and fought wars.<sup>68</sup> In his Disputation XIII on War (1621), Suarez distinguished three periods in his conception of a just war: ‘its inception; its prosecution, before victory is gained; and the period after victory’. Furthermore, he formulated post-conflict principles based on necessity concerning war reparation, the fate of property rights after war and the treatment of the conquered state.<sup>69</sup>

A more refined account of the forms and conditions of conflict termination was given only four years later by Hugo Grotius, who secularized just war theory in his *De Jure Belli ac Pacis*.<sup>70</sup> Grotius placed war within the broader categories of justice and control.<sup>71</sup> Book Three of his work incorporates not only concrete principles on the lawfulness of the waging of war and permissible conduct in hostilities, but also rules on surrender,<sup>72</sup> calls for moderation in the acquisition of sovereignty,<sup>73</sup> guidelines on good faith between enemies,<sup>74</sup> rules for the interpretation of peace treaties<sup>75</sup> and indications ‘in what manner the law of nations renders the property of subjects answerable for the debt of sovereigns’. Grotius concluded his work with ‘admonitions on behalf of good faith and peace, postulating that even ‘in war peace should always be kept in view’. However, overall, Grotius’ work remained focused on the identification of principles concerning the period of hostilities itself.

Findings on the conduct of post-conflict relations may also be found in Vattel’s *Droit des Gens, ou Principes de la Loi Naturelle* of 1758.<sup>76</sup> Vattel repudiated, in particular, Hobbes’ conception of war as the natural state of man and dedicated Book IV of his law of nations to the restoration of peace ‘and the obligation to cultivate it’, which he derived from natural law.<sup>77</sup> Chapter II of Book IV dealt exclusively with peace treaties. It set out general principles concerning the formation, the effect, and the execution

<sup>68</sup> See Suarez, ‘The Three Theological Virtues, Disputation XIII’, in J.B. Scott (ed.), *Classics of International Law* (1995), xx, at 836. See also Vitoria, *supra* note 16, De Indis, iii, at 60 (‘Third Canon: When victory has been won and the war is over, the victory should be utilized with moderation and Christian humility, and . . . so far as possible should involve the offending state in the least degree of calamity and misfortune, the offending individuals being chastised with lawful limits’).

<sup>69</sup> However, his findings were deeply shaped by the scholastic tradition. Suarez endorsed, *inter alia*, a victor’s right to just punishment of the conquered state and the entitlement of the victorious power to deprive citizens of the opponent of their goods and their liberty, if necessary for complete satisfaction: see Suarez, *supra* note 68, at 840 and 843.

<sup>70</sup> See H. Grotius, *De Jure Belli ac Pacis* (trans. F.W. Kelsey), in J.B. Scott (ed.), *Classics of International Law* (1995), ii. See on Grotius and Just War Theory P. Haggemacher, *Grotius et la Doctrine de la Guerre Juste* (1983).

<sup>71</sup> See generally Kingsbury, ‘A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull’, 17 *Quinnipiac L Rev* (1997) 3.

<sup>72</sup> See Grotius, *supra* note 70, Bk 3, at 739–740.

<sup>73</sup> See *ibid.*, chap. XV, at 770.

<sup>74</sup> See *ibid.*, chap. XIX, at 792.

<sup>75</sup> See *ibid.*, chap. XX, at 808–819.

<sup>76</sup> 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* (1758), iii, English translation by C.G. Fenwick, ‘The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns’, in J. B. Scott (ed.), *Classics of International Law*, Vattel, Text of 1758, Books I–IV (1995), at 15.

<sup>77</sup> See Vattel, *supra* note 76, Bk IV, chap. I, at 343.

of peace treaties, which were designed to serve as guidelines for the conduct of sovereign actors.<sup>78</sup>

This thinking was later developed by Immanuel Kant, who may be counted as one of the conceptual founders of a tripartite conception of warfare.<sup>79</sup> Kant introduced the notion of ‘right after war’ (*Recht nach dem Krieg*) in his philosophy of law (*Science of Right*), which formed part of *The Metaphysics of Morals*.<sup>80</sup> Kant expressly divided the ‘right of nations in relation to the state of war’ into three different categories, namely ‘1. the right of going to war; 2. right during war; and 3. right after war, the object of which is to constrain the nations mutually to pass from this state of war and to found a common constitution establishing perpetual peace’.<sup>81</sup> Kant’s ideas were novel, because he linked the rules of war to the broader perspective of eternal peace. He developed this thought in Article 6 of the Articles for Perpetual Peace Among States. He established an express connection between the rules of *jus in bello* and perpetual peace, stating that ‘[n]o state shall during war, permit such acts of hostility which would make mutual confidence in the subsequent peace impossible’, such as ‘the employment of assassins, prisoners, breach of capitulation, and incitement to treason in the opposing state’.<sup>82</sup>

Kant’s preoccupation with (just) war termination did not end here. Kant identified a number of parameters, according to which peace should be shaped. One of the central premises of his post-war theory, which may again be found in the ‘Articles for Perpetual Peace’ is that [n]o treaty of peace shall be considered valid as such, if it was made with a secret reservation of the material for a future war’.<sup>83</sup> Furthermore, he argued that the victor is not entitled to punish the vanquished or to seek compensation merely because of its military superiority. Kant emphasized that peace settlements must respect the sovereignty of the vanquished state and the self-determination of its people, foreshadowing thereby some of the key features of modern peace-making.<sup>84</sup>

## 4 A Modern Framework for an Old Idea

This holistic understanding of the use of armed force gains new relevance in a modern context.<sup>85</sup>

<sup>78</sup> See *ibid.*, at 346–361.

<sup>79</sup> See Orend, *War and International Justice*, *supra* note 8, at 57 and 63 (n. 22).

<sup>80</sup> Kant’s *The Science of Right* was published in 1796, as the first part of his *Metaphysics of Morals* (*Die Metaphysik der Sitten*) (1797).

<sup>81</sup> See I. Kant, *The Science of Right*, *supra* note 80, at 53 (Nature and Division of the Right of Nations).

<sup>82</sup> See I. Kant, *Perpetual Peace* (1795), Sect. 1, Art. 6.

<sup>83</sup> *Ibid.*, Sect. 1, Art. 1.

<sup>84</sup> See Kant, *Science of Right*, *supra* note 80, at 58 (Right after War). A weakness of Kant’s law after conflict is that he still relied on the notion of ‘conquest’ and neglected the concept of individual criminal responsibility. Similarly, he did not rule out the possibility that an ‘unjust enemy’ can be forced ‘to accept a new constitution of a nature that is unlikely to encourage their warlike inclinations’.

<sup>85</sup> See also Stanford Encyclopedia of Philosophy, *supra* note 54, at 2.3. For a survey of the relevant literature see *supra* note 8.

## A From ‘*jus post bellum*’ to ‘*Rules and Principles of (Post-)conflict Peace*’

Of course, the classical conception of ‘justice after war’ cannot simply be transposed to a modern setting. Certain adjustments must be made, if the idea of ‘*jus post bellum*’ is translated from a moral principle into a legal notion.

First, the concept of a fair and just peace must be decoupled from the historical understanding which associated fairness with the idea of justice in favour of the party which had fought a just and lawful war (being a war which was waged for the right reasons) and fought in an appropriate manner. Today, considerations of fair and just peace must be deemed to apply equally to all parties to a conflict. Thus, the principal justification for distinguishing *jus ad bellum* and *jus in bello* applies equally with respect to idea of ‘*jus post bellum*’: parties must end a dispute in a fair and just fashion irrespective of the cause of the resort to force.<sup>86</sup> At the same time, principles of conflict termination apply independently of violations in the conduct of armed force.<sup>87</sup> Such violations may even strengthen the need for fair and just peace-making (accountability, compensation, rehabilitation).

Second, the applicability of principles of post-conflict peace can no longer depend exclusively on moral considerations, such as righteousness of waging war. The concept of a fair and just peace must be framed by reference to certain objective rules and standards that regulate guidelines for peace-making in the interest of people and individuals affected by conflict.<sup>88</sup>

Third, peace-making is not strictly aimed at a preservation or return to the legal *status quo ante*, but must take into account the idea of transforming the institutional and socio-economic conditions of polities under transition. In this sense, peace-making differs from the classical rationale of the law of occupation. The ultimate purpose of fair and just peace-making is to remove the causes of violence. This may require positive transformations of the domestic order of a society. In many cases, a fair and just peace settlement will ideally endeavour to achieve a higher level of human rights protection, accountability and good governance than in the period before the resort to armed force.

<sup>86</sup> See also Boon, *supra* note 8, at 290.

<sup>87</sup> Note also that *jus in bello* makes no distinction between lawful and unlawful combatants when determining duties under the law of occupation. The ICTY has clarified in its jurisprudence that the applicability of the law of occupation is based on factual considerations: see, *inter alia*, ICTY, Appeals Chamber, *Prosecutor v Tadic*, Case No. IT-94-1-A (1999), at para. 168.

<sup>88</sup> This has certain implications for the relationship between *jus ad bellum* and peacemaking. An illegal use of force does not automatically entail the illegality of all engagement in the post-conflict phase. For an insightful discussion see Schaller, *supra* note 8, at 15–18. For a different view see Orend, *Morality of War*, *supra* note 8, at 162 (‘failure to meet *jus ad bellum* results in automatic failure to meet *jus in bello* and *jus post bellum*’). Measures taken by an intervening force after conflict are judged by their own standards. Similarly, violations of principles of conflict termination do not *per se* justify a return to armed violence. The question when it is justified to resort to armed force remains dictated by the rules on the recourse to force.

However, the classical rationale behind the notion of *jus post bellum*, namely the idea of regulating the ending of conflicts and easing the transition to peace through certain principles of behaviour, is highly relevant in the context of international law in the 21st century. It may be argued that the classical concepts of *jus ad bellum* and *jus in bello* are complemented by a specific set of rules and principles that seek to balance the interests of different stakeholders in transitions from conflict to peace. Under this construction, armed force must not only be lawful under the law on the recourse to force and in keeping with the rules of *jus in bello* but must also satisfy certain rules of (post-) conflict settlement.<sup>89</sup>

The regulation of substantive components of 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 derived from different fields of law and legal practice.

Just a few examples suffice to illustrate this argument here. The formation of peace settlements is governed by Article 52 of the Vienna Convention on the Law of Treaties and considerations of procedural fairness; the limits of territorial dispute resolution are defined by the prohibition of annexation and the law of self-determination; 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;<sup>90</sup> the exercise of foreign governance over territory is limited by the principle of territorial sovereignty, the prohibition of 'trusteeship' (over UN members) under Article 78 of the Charter limits 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 as certain provisions of human rights law (for instance, 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.

These norms may be said to be part of a broader regulatory framework ('post-conflict law'), which encompasses substantive legal rules and principles of procedural fairness governing transitions from conflict to peace.<sup>91</sup> These norms are in many cases partly codified, but entangled with or superseded by subsequent international practice. Moreover, they are complemented by legal principles or 'soft law', which are relevant to particular decisions or situations. Some norms (for instance, *jus cogens* prohibitions) constitute 'hard' law ('rules')<sup>92</sup>. They are applicable 'in an all-or-nothing

<sup>89</sup> See also in the context of just war theory Bass, *supra* note 8, at 389. For a proposed separation of *jus post bellum* from *jus ad bellum* and *jus in bello* see also Boon, *supra* note 8, at 290–292 and Schaller, *supra* note 8, at 17–19.

<sup>90</sup> Note that the crime of aggression forms part of the jurisdiction of the International Criminal Court. However, the exercise of jurisdiction by the Court is contingent on the definition of the crime under Statute: see Art. 5(2) of the Rome Statute of the International Criminal Court, 17 July 1998.

<sup>91</sup> For a narrower vision of *jus post bellum* as a 'law of post-war reconstruction' see Boon, *supra* note 8, at 285.

<sup>92</sup> Sometimes, different legal provisions may conflict or compete with each other (e.g., duty to prosecute *v* duty of a state to protect the security of its people; right of individual of access to the Court *v* immunity of international organizations). Such conflicts may be solved by way of a distinction between 'rules' and 'principles': see R. Dworkin, *Taking Rights Seriously* (1978), at 24 ff.

fashion'.<sup>93</sup> Others are based on broader principles which may be balanced against each other, 'taking into account the relative weight of each'.<sup>94</sup>

## B Sketches of Post-conflict Law

It would go beyond the framework of this contribution to present a conclusive account of rules and principles of post-conflict peace. However, six organizing rules and principles may be presented here by way of an example. These principles share some parallels with the parameters of just peace under the just war theory (right intention, legitimate authority for a peace settlement; discrimination and proportionality of the terms of peace),<sup>95</sup> without being identical to the latter. They may be derived from a comparative survey of international law and practice in the three major eras of peace settlements: namely 1919, 1945 and the post-Cold War era.

### 1 Fairness and Inclusiveness of Peace Settlements

Firstly, there is some evidence that the establishment of sustainable peace requires a collective bargaining process, involving a fair hearing of the interests of all parties to the conflict at the negotiating table.

At the time of the Treaty of Versailles, the terms of peace were essentially set by a bargaining process amongst the victors over the rights and obligations of the vanquished. Today, such conduct would conflict with certain standards of peace-making. Article 34 of the Vienna Convention on the Law of Treaties posits that a peace treaty does not bind states that did not consent to its terms. Accordingly, no single state and no group of states may unilaterally make binding determinations for a third state. Moreover, modern practice points towards a neutralization of interests in the bargaining process. If the defeated entity is not present at the negotiation of the peace settlement itself, its interests should be determined by a collective forum with third-party input.<sup>96</sup>

Similar considerations of fairness apply in favour of groups and minorities protected by international law by virtue of the right to self-determination and autonomy

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> No common framework of *jus post bellum* principles has yet been established in the relevant literature. In his *War and International Justice*, *supra* note 8, at 232–233, Orend lists the following five principles: just cause, right intention, public declaration and legitimate authority, discrimination, and proportionality. A more elaborate list is offered by the same author in *Morality of War*, *supra* note 8, at 180–181.

<sup>96</sup> The peacemaking practice of the 1990s indicates that the neutralization of the bargaining process is one of the central parameters of peacemaking. In cases such as Iraq (SC Res. 687) and Kosovo (SC Res. 1244), the authors of the use of force had a say in shaping the content of post-conflict peace under the umbrella of collective security. The former FRY agreed on the principles contained in Annex II to Res. 1244 (1999) (resolution of the Kosovo crisis): see para. 9 of the preamble to SC Res. 1244 of 10 June 1999. The principles contained in Annex II set a framework for Res. 1244. Iraq participated, without voting, in the discussions on SC Res. 687 of 3 Apr. 1991. Moreover, SC Res. 687 contains several elements of consent: see paras 3 (demarcation of the boundary line between Iraq and Kuwait) and 33 (acceptance of a cease-fire). Furthermore, peace settlements such as the Dayton Accord or the Ethiopia–Eritrea agreement transmit the message that a State using force against another entity should be present when the terms of peace are negotiated.

rights. These groups may be represented by state entities in treaty negotiations. However, they are entitled to an adequate representation of their collective interests in a constitutional settlement regulating their status.<sup>97</sup>

### 2 *The Demise of the Concept of Punishment for Aggression*

Secondly, international practice since 1945 indicates the replacement of the harsh concept of territorial punishment for purposes of deterrence by the more moderate techniques of state responsibility, disarmament and institutional security arrangements.<sup>98</sup>

International law has become hostile to the idea of 'punishing' an aggressor through the imposition or dictate of territorial changes in the post-conflict phase.<sup>99</sup> Territorial mutilations or compulsory transfers of populations of the kind that took place at the end of the Second World War would be ruled out today under the UN Charter and the 1949 Geneva Conventions.<sup>100</sup> Peace-makers are required to respect the territorial integrity of the vanquished state and the rights of its people.<sup>101</sup>

The only organ which could theoretically take punitive measures against states that have placed themselves outside the community of peace-loving and law-abiding nations, is the Security Council. However, even the Council's authority under the Charter would hardly suffice to justify *permanent* transfers of territory against or without the will of a state for the purpose of deterring future aggression. Such action conflicts with the limits of the Security Council under Article 24 of the Charter, including the recognition of territorial integrity and the principle of self-determination. Moreover, less intrusive post-conflict measures, such as reparation, disarmament and adjudication of war crimes, are usually at hand and better suited to serve the purpose of peace-making which guides the exercise of powers by the Council under the Charter.

### 3 *The Humanization of Reparations and Sanctions*

A similar trend towards moderation in the treatment of an aggressor may be traced in the area of reparations.<sup>102</sup> Contemporary developments in international law point to the emergence of a rule that prohibits the indiscriminate punishment of a people through excessive reparation claims or sanctions.

Harsh financial loads may not only make a people accountable for misdeeds of an irresponsible regime, but amount to the collective punishment of an entire population.

<sup>97</sup> For a survey of institutional models see M. Suksi, *Constitutional Options for Self-determination: What Really Works?*, available only at <http://www.tamilnation.org/selfdetermination/99suksi.htm>.

<sup>98</sup> For a similar consideration see Bass, *supra* note 3, at 390–393.

<sup>99</sup> The Draft Articles of the International Law Commission on State Responsibility, *supra* note 64, refrain from approving any concept of punishment of a State for the commission of unlawful acts of force. They limit the consequences of internationally wrongful acts to the level of 'civil responsibility', according to which a State can obtain restitution, compensation, and satisfaction only for the harm suffered.

<sup>100</sup> Art. 49 of the Fourth Geneva Convention prohibits forcible transfers of population and deportation.

<sup>101</sup> This may be derived from Art. 2(1) of the UN Charter and the prohibition of annexation under international law. See also GA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

<sup>102</sup> For a similar argument with regard to the proportionality of reparations see Orend, *War and International Justice*, *supra* note 8, at 227–228; Bass, *supra* note 8, at 408–411.

One of the lessons emerging from the practice of peace treaties is that reparation and compensation claims must be assessed in light of the economic potential of the wrongdoing state and its implications for the population of the targeted state.<sup>103</sup>

This conclusion was drawn by the former Article 43(3) of the 1996 Draft Articles on State Responsibility, which stated that reparation shall ‘in no case . . . result in depriving the population of a State of its own means of substance’. This claim receives additional support from the move to targeted sanctions under the collective security regime<sup>104</sup> and the rise of socio-economic human rights obligations preventing states or international actors from imposing economic liabilities on another state which would disable the later in ensuring minimum socio-economic standards (food, health care) *vis-à-vis* its own population.<sup>105</sup>

#### 4 *The Move from Collective Responsibility to Individual Responsibility*

Similarly, there is a move from collective to individual responsibility.<sup>106</sup> This move is reflected in the crystallization of the principle of individual criminal responsibility. This principle prohibits collective punishment, that is, punishment of persons not for what they have done, but for the acts of others;<sup>107</sup> furthermore, it establishes the general rule that individuals are punished for their own wrongdoing, and not on behalf of the state.<sup>108</sup> This differentiation prevents a population from being held accountable for the misdeeds of its rulers and from being exposed to charges of collective guilt.

#### 5 *Towards a Combined Justice and Reconciliation Model*

Fifthly, there is a trend towards accommodating post-conflict responsibility with the needs of peace in the area of criminal responsibility. This specific tension did not receive broad attention in historical peace settlements, partly because the concept of international criminal responsibility was less developed, and partly because peace settlements were less frequently dedicated to the resolution of the problems of civil wars. Today, it is at the heart of contemporary efforts of peace-making. Modern international practice, particularly in the context of United Nations peace-building,

<sup>103</sup> As noted by Professor Brownlie, ‘experience has shown that victors can hardly expect to exact “adequate compensation” in reparations for large-scale aggression without violating the principles of humanity and good policy’: see I. Brownlie, *International Law and the Use of Force by States* (1963), 153.

<sup>104</sup> The effectiveness of targeted sanctions was highlighted in the Report of the UN High Level Panel, *supra* note 49, which emphasized that the threat of sanctions ‘can be a powerful means of deterrence and prevention’, but specifically highlighted the utility of targeted sanctions in ‘putting pressure on leaders and elites with minimum humanitarian consequences . . . and can be tailored to specific circumstances’. See also paras 106–108 of GA Res. 60/1 (2005 World Summit Outcome).

<sup>105</sup> See also the UK’s comment on former Art. 43(3) of the ILC Draft Articles on State Responsibility, noting that reparation must not endanger international peace and security. See UN Doc A/CN.4/488.104.

<sup>106</sup> For a discussion of this problem under the angle of just war theory see Orend, *War and International Justice*, *supra* note 8, at 232.

<sup>107</sup> This principle is expressed in Art. 50 of the Annex to the 1907 Hague Convention No. IV. See also Art. 33 of the Fourth Geneva Civilian Convention which notes that ‘[c]ollective penalties and likewise all measures of intimidation . . . are prohibited’.

<sup>108</sup> The autonomy of individual responsibility from state responsibility is, in particular, expressed in the removal of official immunity from punishment for aggression, genocide, crimes against humanity, and war crimes. See Art. 27 of the Rome Statute, Art. 7(2) of the ICTY Statute, and Art. 6 of the ICTR Statute.

appears to move towards a model of targeted accountability in peace processes, which allows amnesties for less serious crimes and combines criminal justice with the establishment of truth and reconciliation mechanisms.<sup>109</sup>

### 6 *People-centred Governance*

Lastly, there is a shift of focus from state-centred mechanisms of organizing public power to 'people-based' (individual and/or group-based) techniques of political settlement. Peace-making, more than ever before, is tied to the ending of autocratic, undemocratic and oppressive regimes, and directed towards the ideal of 'popular sovereignty' held by individuals instead of states or elites. A procedural legal basis for this claim may be found in Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights. Moreover, a broader notion of internal self-determination has emerged since World War II, which links the protection of a people under international law to the enjoyment of institutional rights (such as autonomy of federalist structures) in the domestic legal system. Finally, human rights guarantees and procedures for holding governments accountable are increasingly part of a treaty-based or 'regional *acquis*', and therefore binding on successor states or regimes.<sup>110</sup>

These norms may be said to create, *inter alia*, a duty for domestic or international holders of public authority in situations of transition to institute political structures that embody mechanisms of accountability *vis-à-vis* the governed population and timelines to gradually transfer power from political elites to elected representatives.<sup>111</sup>

## 5 Conclusion

These few examples indicate that there are certain macro-changes in the conception of peace-making. Modern practice displays a stark tendency to move from a statist and national-interest driven conception of conflict termination 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.<sup>112</sup> This process lends new support to an old postulate, namely the idea of (re-)connecting the concepts of *jus ad bellum* and *jus in bello* to considerations of fair and just peace-making (the former '*jus post bellum*').

The recognition of a tripartite conception of the law of armed force would serve several purposes. It would fill, first of all, a certain normative gap. At present, there is a

<sup>109</sup> For a full discussion see Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *EJIL* (2003) 481; Stahn, 'United Nations Peacebuilding, Amnesties and Alternative Forms of Justice: A Change in Practice?', 84 *Int'l Rev of the Red Cross* (2002), 191; *ibid.*, 'Complementarity, Amnesties and Alternative Forms of Justice—Some Interpretative Guidelines for the ICC', 3 *J Int'l Criminal Justice* (2005) 695.

<sup>110</sup> See, e.g., Human Rights Committee, General Comment No. 26, which established the principle of automatic succession of States into obligations under human rights treaties.

<sup>111</sup> See also Boon, *supra* note 8, at 293–295.

<sup>112</sup> For an excellent survey of the transformation of the international legal system see Kingsbury, 'The International Legal Order', in P. Cane and M. Pushnet (eds), *Oxford Handbook of Legal Studies* (2003), at 271.

considerable degree of uncertainty about the applicable law, the interplay of different structural frameworks as well as the possible space for interaction between different legal orders and bodies of law (international law v. domestic law, human rights law v. law of occupation etc.) in a post-conflict environment. The articulation of a body of law after conflict would identify legal rules, which ought to be applied by international actors (unless an exception applies) and clarify specific legal principles,<sup>113</sup> which serve as guidance in making legal policy choices in situations of transition.

Secondly, the revival of a tripartite conception of armed force has a certain systemic function. It would build a bridge between the ‘pre-’ and the ‘post’-conflict phase, which is lacking in the contemporary architecture of the law of armed force. The recognition of rules and principles of post-conflict peace would establish a closer link between the requirements of the use of force and post-conflict responsibilities in the context of intervention. Under a tripartite conception of the law of armed force, international actors might be forced to consider to a broader extent the impact of their decisions on the post-conflict phase, including modalities and institutional frameworks for peace-making, before making a determination whether to use force.<sup>114</sup>

Moreover, such rules and principles might allow a more nuanced assessment of the legality or legitimacy of the use of force.<sup>115</sup> This argument is particularly compelling in the context of humanitarian and democratic interventions. Such interventions would be judged not only by their purported goals, but by their implications and effects. Post-conflict law 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.

Finally, the development of post-conflict law may have certain implications for the contemporary *jus in bello*.<sup>116</sup> The move to a tripartite conception of the law of armed force would, in particular, avoid an overburdening of the obligations of the military and temper the concerns of those who argue that the contemporary *jus in bello* is not meant to serve as a surrogate framework for governance in peacetime situations,<sup>117</sup> while preserving the interests of peace-making. Considerations of fair and just peace

<sup>113</sup> Principles may be understood as ‘optimization commands’, which ought to be carried out to the greatest possible degree in the circumstances of an environment of transition.

<sup>114</sup> See also Orend, *Morality of War*, *supra* note 8, at 181 who speaks of the need for ‘an ethical “exit strategy” from war’ which deserves ‘at least as much thought and efforts as the purely military exit strategy [which is] so much on the minds of policy planners and commanding officers’.

<sup>115</sup> The 2005 World Summit Outcome document omitted to define standards for the evaluation of interventions. However, the High-Level Panel suggested five basic criteria of legitimacy to be taken into account by the Security Council ‘in considering whether to authorize or endorse the use of military force’, namely: (a) *Seriousness of threat*, (b) *Proper purpose*, (c) *Last resort*, (d) *Proportional means*, (e) *Balance of consequences*: see High-Level Panel, *supra* note 49, at para. 207.

<sup>116</sup> For a brief discussion of the relationship between *jus post bellum* and *jus in bello* see Bass, *supra* note 8, at 386–387.

<sup>117</sup> For a study of this question see M. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999); *ibid.*, ‘Iraq and the Law of Occupation: New Tests for an Old Law’, *6 Yearbk Int’l Humanitarian L* (2003) 127.

would be part of the equation of armed force, however not under *jus in bello* in the proper sense, but under the law after conflict. These principles would have an indirect impact on the phase of armed conflict itself. Parties to an armed conflict would operate under a general obligation to conduct hostilities in a manner which does not preclude a fair and just peace settlement in the post-conflict phase.

It is clear from this survey that some of the features of a tripartite conception of armed force (for instance, the interplay between *jus ad bellum*, *jus in bello* and '*jus post bellum*') require further thought. However, one fact is becoming increasingly evident: the development of rules and principles of post-conflict peace should form part of the agenda and the table of contents of international law in the 21st century.