PEACEKEEPING & JUS POST BELLUM: TOWARDS A CONCEPT OF RULES IN POST-CONFLICT SITUATIONS

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Abstract: *This article argues that post-conflict peacekeeping should be seen as highly valuable for further developing jus post bellum, since the UN is the main actor in contemporary post-conflict situations. It elaborates on the historical background of jus post bellum, as well as the revival of the concept within just war theory. Subsequently, it argues that the visible movement towards jus post bellum, making distinctions between the different parts of the just war theory, as well as relations between those parts and the need for a tripartite just war system. This view focuses on the compatibility of just war theory with 21st century post-conflict situations. It presents peacekeeping as the catalyst for a modern just post bellum approach and argues that, firstly, peacekeeping mandates have changed to such an extent that contemporary peacekeeping has actually become peacebuilding. Furthermore, it shows the importance of peacekeeping for modern jus post bellum, to create the catalysing function of peacekeeping. It explores this issue by focusing on recent peacekeeping missions, which established transitional administrations as these missions involve complete UN-(authorised) governments focusing on post-conflict nation building and provide for the broadest available post-conflict practice, as well as a legal foundation for jus post bellum contentions. Finally, it presents a comprehensive jus post bellum proposal based on the examined peacekeeping missions, lessons learned from earlier peacekeeping practice and general UN post-conflict nation building, which includes human rights issues, economic reconstruction and criminal prosecutions.*

Keywords: just war theory, jus post bellum, UN peacekeeping and peacebuilding, transitional administrations, post-conflict nation building

Regulations on the status of war and peace have traces that go back to the contemplations of philosophers in ancient Greece and Rome. Through time the distinction between war and peace evolved into a legal paradigm recognising a just war theory (JWT) existing of *jus ad bellum*, which focuses on the justness and sincere intentions of a war and *jus in bello,* which centred on the legitimacy of actions undertaken during hostilities. The basic rule was that the end of war meant peace, but in the post-World War II era the framework of this war/peace distinction has been subject to changes and a blurring of boundaries.

Peacekeeping missions and post-conflict nation building reflect a call for a renewed attention to JWT.[1] This instigated focus on issues which regulate the transition from war to peace; a third part of JWT which has largely been overlooked despite its origins dating back as far as the peace/war dichotomy. There has been a revival of this third principle, which enhances *jus post bellum* (law after war) and focuses on different post-war elements. In Afghanistan, for instance, a broad UN mission was established to support the reconstruction and democratisation of the country.[2] Similarly, after international intervention, the UN created transitional administrations in Kosovo and East Timor to guide them back into the international community. This is the general contention that circles around the idea of contemporary post-conflict solutions.

The main argument in this article is that post-conflict peacekeeping should be seen as a key to the development of *jus post bellum* because the UN is the main actor in contemporary post-conflict situations. To demonstrate the validity of this argument this work proceeds as follows: First, it provides a historical background to *jus post bellum* and explains its revival in modern international legal theory and JWT. Subsequently, the second section demonstrates the movement towards *jus post bellum* by highlighting distinctions between the parts of JWT, the relations between those parts and the need for a tripartite just war system. This view focuses on the compatibility of JWT with 21st century post-conflict situations. Next, this work turns to peacekeeping as a catalyst for developing a modern *just post bellum* approach and argues, firstly, that peacekeeping mission's mandates have drastically changed

to become peacebuilding missions. Secondly it underscores the importance of peacekeeping for modern *jus post bellum*. The fifth section elaborates on recent peacekeeping missions enhancing transitional administrations since these involve UN-(authorised) governments focusing on post-conflict nation building and provide for the broadest available post-conflict practice, as well as a legal foundation for *jus post bellum* contentions.

The sixth substantive section presents a *jus post bellum* proposal based on: the explored peacekeeping missions, lessons learned from earlier peacekeeping practices, and UN post-conflict nation building, for which both laws and regulations of these missions, international law and reports will be examined and human rights, economic reconstruction and criminal prosecutions play a key role in constructing a sustainable post-conflict peace. Finally, this work elaborates on 21st century challenges of peacekeeping and *jus post bellum*.

This work should not be taken as an all-encompassing proposition towards a conclusive set of rules applicable to post-conflict situations. Neither does it claim that the proposed ideas are alone in assessments of the topic. Instead it contributes solutions for the foundation of interventions in future post-conflict situations which might be valuable for contemporary discussions on the subject and is based on legal and practical grounds as well as an assessment of results obtained in previous post-conflict situations.

Jus Post Bellum: The Old Becomes New

JWT can be traced back to the works of Aristotle, Cicero and Augustine,[3] with the latter linking the concept of *jus post bellum* to *jus ad bellum* by stating that 'it is an established fact that peace is the desired end of war.'[4] Spanish theologians de Vitoria and Suarez called for restraint on certain behaviours of the victors of wars and proposed that a justly fought just war should also be rewarded with a just post-war settlement.

It was Kant who distinguished a tripartite system of war, while recognising a *Recht zum Krieg* (Right to War), *Recht im Krieg* (Right in War) and *Recht nach dem Krieg* (Right after the War),[5] stating the *Recht nach dem Krieg* should involve a situation in which

> neither the conquered state nor its subjects lose their political liberty by conquest of the country, so as that the former should be degraded to a colony, or the latter to slaves [and] that an amnesty is involved in the conclusion of a treaty of peace is already implied in the very idea of a peace.[6]

Kant's conceptualisation should be regarded as light-years ahead of its time since it focused on strengthening peace and justice within an international system largely governed by a "might makes right" attitude.[7]

However, *jus post bellum* practically disappeared in the 19th and 20th centuries, whereas the concepts of *jus ad bellum* and *jus in bello* were codified.[8] The major reason for such neglect is found in the contention that the concept was a part of *jus ad bellum* – rather than acknowledging it as an independent part of JWT – because peace was seen as the objective of going to war.[9] Unlike other arguments for neglecting *jus post bellum*, such as the unwillingness to break out of the dual JWT and the contention that post-war justice should limit itself to war crimes trials,[10] the former recognised the relevance of *jus post bellum*, but did not grant it any independent status in JWT. The shift towards emphasising positive rather than negative peace, and the changing face of armed conflict – two issues which will be returned to below – created an atmosphere in which *jus post bellum* was revived and now finds itself at the heart of international law discussions. A legal assessment of JWT, and the extension of this theory to a tripartite system (as subsequently provided), establishes the need for *jus post bellum* in contemporary international law and supports the call for a renewed view of JWT. This renewed view is applicable to 21st century post-conflict situations, after which the practice of peacekeeping will be presented as a catalyst for a modern *jus post bellum* approach.

Moving towards Jus Post Bellum: Revising Just War Theory

With *jus post bellum* in the spotlight of international law, the question of whether the concept should be part of the existing dichotomy of JWT or whether the extension to a tripartite system should be preferred. This section addresses the need for such a tripartite just war system, after which peacekeeping will be presented as

a catalyst for a modern *jus post bellum* approach where substantive issues revolving around the concept will be fleshed out.

Movement vs. Content

As the conventional approach is to give a substantial overview of *jus post bellum* after which the movement to this content is adjudicated, the concept of *jus post bellum* is not yet widely accepted by international legal scholars or can count on extensive support from legal practice. Therefore, it is better to look at the historical and revived contentions concerning the subject and that *jus post bellum* has recently been brought to the centre of international law.[11] Subsequently, elaboration will follow on the substantial issues of the concept, which are still tempered by a lack of clear definition.

Jus Post Bellum Incorporated in the Jus ad Bellum/ Jus in Bello Distinction

Scholars historically split JWT into *jus ad bellum* and *jus in bello*; two concepts divided by the initiation of hostilities and with a general aim of making war a less viable option. The re-emergence of the idea of *jus post bellum* revealed that the traditional just war divide into *jus ad bellum* and *jus in bello* enjoyed such strong support that some argue for the inclusion of *jus post bellum* be part in JWT, together with *jus ad bellum* rather than as a separate component.[12]

The contention that *jus post bellum* should be combined with *jus ad bellum*[13] must not be accepted merely because the planning of post-war developments as peace building should feature prior to the very initiation of the conflict. Without doubt, such considerations form a part of *jus ad bellum* contemplations, cognitively rather than physically. There must be a distinction between rhetoric and reality as well as a difference between interrelation and independence. Thus, where *jus in bello* are interrelated with *jus ad bellum,* the real *jus in bello* is more tangible since it occurs during conflict. Indications of this interrelation may be found in article 1(4) of the Additional Protocol to the Geneva Conventions, which incorporates a nexus with *jus ad bellum*,[14] as well as the "reverse effect" of *jus in*

bello on *jus ad bellum* which ensued from the Cold War nuclear arms race: decisions on the right to go to war were heavily constrained by the use of these destructive weapons in war.[15]

Similarly, the concept of *jus post bellum* is related to *jus ad bellum,* but the physical behaviour that comes along with the concept is separated from the *jus ad bellum* concept. Blueprints of post-conflict peace-building should exist prior to the initiation or cessation of hostilities and should also be adaptable to the specific situation in which they are employed and furthermore be able to answer the challenges which were the result of *jus ad bellum* and *jus in bello* in the conflict itself.

Furthermore, the claim that peace is not an afterthought of war but a concept present throughout all phases of war is only true to the extent that the final objective of war is peace. But the *attainability* of peace is often overlooked. Just like the *need* for war looms larger before war than after it, the need for peace also looms larger after war than before its initiation. If sustainable peace were possible in the first place war would likely never have been waged – unless we consider an aggressor state which would probably wage an unjust war. The negative interpretation of peace – a situation where there is no war – has lost ground to the positive interpretation of peace.[16] This not only implies the absence of war but includes (relative) freedom, justice, liberty and equity.[17] In other words, the cessation of a war does not necessarily mean peace and, as Kant suggested, when the end of war leaves important issues unresolved, the precedence has been set for a new conflict.

The contention that *jus post bellum* should be conceived as a part of *jus ad bellum* also ignores the fact that peacekeepers – not an uncommon actor in contemporary post-conflict situations – often arrive towards the end or after the cessation of a conflict creating a distinction between parties to the conflict in its various phases.[18] In Kosovo and East Timor for example, peacekeeping forces arrived in response to violence by respective Serbian, Kosovar and Indonesian soldiers and militias. In Afghanistan the NATO-ISAF peacekeeping mission entered the conflict after the US had overthrown the Taliban. This establishes a link between peacekeeping and *jus post bellum,* since the other two aspects of JWT are generally of less relevance for the concept of peacemaking,[19] even though it has been established that the extended

mandates of contemporary peacekeeping missions often refers to the use of 'all necessary means to carry out the mandate.'[20]

The argument that *jus post bellum* should be a category on its own, because *jus ad bellum* would otherwise be too complex,[21] makes sense because the importance of post-conflict peace-building might be underestimated by *jus ad bellum* decision-makers, which the US-led invasion of Iraq serves as a good example. Another reason for the establishment of *jus post bellum* as an independent category is rooted in the contention that the interrelation with *jus ad bellum* and *jus in bello* must provide a system in which aggressors are more constrained in their behaviour; strengthening the focus on accepted just wars. If JWT ends with *jus in bello*, post-war actions of aggressors remain unconstrained when compared to a situation in which a third part of JWT exists which, due to its relation to the other parts, legally rules out the "justness" in the post-conflict behaviour of an aggressor, and is able to constrain its resort to war in the first place.

An Independent, but Interrelated, Tripartite System

Wars have changed over time. Inter-state wars have become relatively rare; replaced by an increase in intra-state conflicts, such as civil wars or insurgencies.[22] The tradition of declaring war before the commencement of hostilities and the signing of peace treaties after has shifted to a more nuanced situation where it is often difficult to pin-point exactly when hostilities begin or end.[23] Since JWT mainly focuses on inter-state war, theoretical and empirical perspectives regarding *just post bellum* and intra-state conflict can be derived from peacekeeping, since the UN is, internationally, the main actor in post-conflict situations.[24] Indeed, Chapter VII enforcement is largely directed at internal conflicts.

Even internal armed conflicts do, however, have a beginning, middle and an end.[25] The fact that the first and last parts are less clearly defined than in the past does not render the concepts less independent *per se*. There is thus a logical interrelation between *jus ad bellum, jus in bello* and – when accepted as an independent part of JWT – *jus post bellum.* Interrelation also does not imply the end of independence and Orend deploys a sunrise analogy to emphasise

the perceptible irrelevance of rejecting a jus post bellum in this respect by noting:

> who can say around dawn, exactly when the night is over and the day begins? But eventually that is irrelevant and we all come to realise a new day has dawned.[26]

Jus post bellum connects with *jus in bello* in relation to the aim of achieving justice for wrongs done during war; thus the idea of war crimes trials can remedy previous violations. It also serves to evaluate how certain aspects of a war were fought and which lessons can be learned from particular combat-related situations. Similarly, *jus in bello* connects with *jus post bellum* in the transition from a state of war to a state of peace, which in contemporary conflicts is often covered in a cloud of transitional uncertainties. The exact initiation of the "post" era may thus not be clear, but the concept focuses on the final objective, rather than on the exact entrance of "post."

The *jus ad bellum* connection with *jus post bellum* is the final achievement of peace, which is based in both concepts as well as the notion of justification for the objective of going to war in the first place. Additionally, a remedy for previous violations must also be sought here for there is a difference in violations attributed to the decision-makers which chose waging war and the violations committed by combatants.[27] Both concepts are addressed legally since satisfying the requirements of *jus ad bellum* creates a stronger legal basis for applying *jus post bellum* and the legality of *jus post bellum* will therefore depend on the motives behind the resort to war.[28]

Similar to *jus in bello*, evaluation should be a part of the *jus post bellum-jus ad bellum* relationship, to reflect on the decisions that were taken and learn from them. The necessity of the independence of these three concepts cannot be overstated. Since contemporary assumptions revolve around the idea that the right to go to war, and the possible violation of this right, is detached from the rights and obligations which belligerents are encumbered with, most legal scholars argue a similar distinction in relation to *jus post bellum,* stating that 'parties must end the dispute in a fair and just fashion irrespective of the cause of resort to force.'[29] Peacekeepers could fulfil this contention, since they will legally fulfil the requirements of justness and fairness. It also means that an aggressor should not be allowed to use *jus post bellum* since it will most likely deploy it as

a vehicle for expansionist or suppressive behaviour, unjustly. Thus the behaviour of a belligerent during the *jus ad bellum* and *jus in bello* will determine its right to engage in *jus post bellum.*[30]

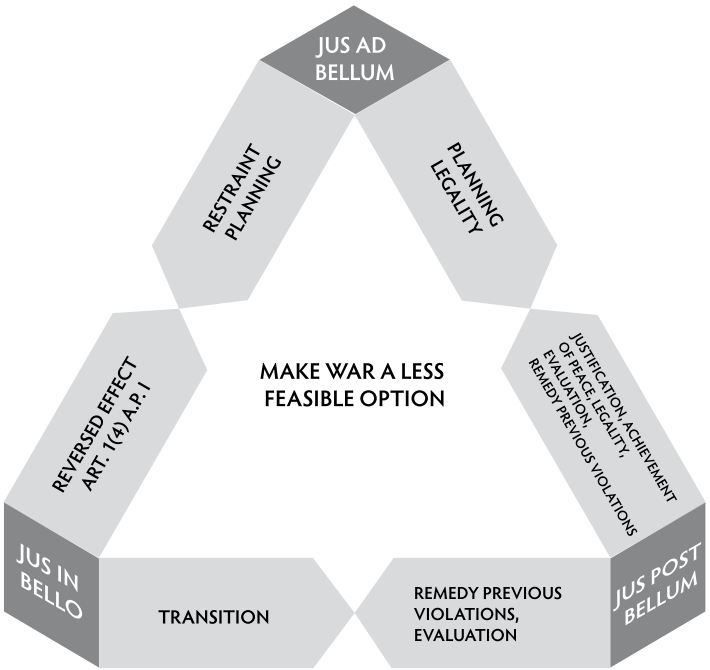
Peacekeeping & Jus Post Bellum

This independence should, subsequently, be put into perspective when assessing JWT in modern international law: the strong presence of internal armed conflicts, the decline in state-vs-state conflicts and the emphasis on peacekeeping missions and post-conflict nation-building. The deployment of peacekeeping missions with nation-building characteristics indicates independence of *jus post bellum* from traditional JWT by means of its objectives, where (limited) participation in *jus ad bellum* and *jus in bello* is subordinated to emphasis on post-conflict nation-building.

The evolving practice requires an altered view of JWT and the addition of a third part is what international law needs, the rules of which should find a strong basis in peacekeeping objectives, a point demonstrated below.

Peacekeeping has become an important factor in the resort to force and post-conflict practices and theoretical and practical knowledge in this field has been gleaned. This is reflected in the doctrine of the Responsibility to Protect (R2P),[31] the call by UN Secretary-General Ban Ki-Moon to implement the R2P,[32] and the establishment of the Peacebuilding Commission aimed at helping countries towards post-conflict peacebuilding and recovery, reconstruction, sustainable development and enlarging the period of attention which the international community gives to post-conflict situations.[33] This need for a tripartite system is strengthened by the advantages that *jus post bellum* brings to the traditional JWT in relation to the removal of *a priori* normative and moral gaps, captured in Info-Graph 1 and assessed below.

Figure 1. The 'Just War Triangle'



Peacekeeping: a Catalyst for Modern Jus Post Bellum

Since the UN is the main international legal actor in post-conflict situations, the practice of UN peacekeeping should be seen as the catalysing factor in the development of revised *jus post bellum*. However, before assessing the importance of peacekeeping for modern *jus post bellum* a legal assessment of the broadening of peacekeeping missions is required.

From Peacekeeping to Peacemaking and Building

Many international legal scholars identify four peacekeeping generations,[34] which reflect the changes to peacekeeping over the (roughly) sixty years of their practise. First generation missions were largely based on constructing a human (re: UN troops) buffer

between belligerents and monitoring ceasefires.[35] Authorisation for such missions was provided by the warring parties themselves and thus lacked automation.[36] Since these missions were not established as an enforcement measure under Chapter VII of the UN Charter, peacekeepers were only allowed to use force when fired upon.[37] Due to political tensions in the UN (re: Cold War), this traditional form of peacekeeping was maintained until the collapse of the USSR after which a more robust set of objectives accompanied each new mission.

Indeed, second generation missions were considered 'multidimensional peace operations,'[38] and endowed with various tasks such as monitoring human rights and elections. Gray notes that the collapse of state institutions, humanitarian emergencies, refugees and civilian casualties enhanced the complexities surrounding such peacekeeping missions when contrasted to their more traditional predecessors.[39]

Third generation peacekeeping was more robust and combined military force where necessary with humanitarian aid for civilians and required a legitimate mandate based on Chapter VII of the UN Charter instead of the consent of the parties themselves.[40]

According to White and Klaassen the fourth and final generation was largely determined by actions in Kosovo and East Timor where peacekeepers were endowed with administrative functions, legislative and executive powers and the establishment of what actually looked like a trusteeship.[41] Indeed

> (t)hey [the missions] are qualitatively different from almost any other the Organisation has ever undertaken. In each place the United Nations is the administration, responsible for fulfilling all the functions of a State – from fiscal management and judicial affairs to everyday municipal services, such as cleaning the streets and conducting customs formalities at the border.[42]

Gray states this generation forms the third generation, while the fourth is formed by operations in Chad and the Central African Republic, where the involvement of the AU and the EU form hybrid operations.[43] This hybrid was however already visible in Kosovo, where the EU bore responsibility for the Pillar of Recovery and Development, and the OSCE for Democratisation and Institution-Building. Likewise, if an organisation similar to the EU had existed

in South East Asia, it would not have been unthinkable that the UN endowed this organisation with similar duties in East Timor. Therefore, although White and Klaassen and Gray follow the doctrine of four peacekeeping operations, the former should be preferred for reasons of practice.

The subject of peacekeeping missions has transformed from international conflicts involving state governments to conflicts within or around the borders of a state concerning different groups fighting for power, often not governmentally-controlled. This means that the notion of separating combatants at the border has been replaced for a far more complex duty of nation-building and the creation of sustainable peace.

The shift from buffering to enforcement and rebuilding in peacekeeping is legally supported by Article 40 of the UN Charter, which notes that 'in order to prevent aggravation of the situation, the Security Council may (…) call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable' whereas 'such provisional measures' refers to Article 39. Former UN Secretary-General Boutros Boutros-Ghali stated in his *Agenda for Peace* that a greater role should be endowed to peacekeepers, whom should according to article 40 be able to 'enforce rather than merely monitor ceasefires.'[44] In the same document, peace-building was referred to as

> action to identify and support structures which will tent to strengthen and solidify peace in order to avoid a relapse into conflict – rebuilding the institutions and infrastructures of nations torn by civil war and strife [and tackling the] deepest causes of conflict: economic despair, social injustice and political oppression.[45]

Also, the *Brahimi Report* called for more robust peacekeeping operations and a modification of understanding the use of force and impartiality.[46] According to Klaasen, neither the Security Council nor the SPCO confirmed the doctrinal shift the Brahimi Panel propred,[47] but the sustainability of this position should be strongly doubted. Ghali confirmed as much during the operations in Kosovo, East Timor and Afghanistan as do more recent UNSC peacekeeping missions, which authorised peacekeepers in Congo 'to use all necessary means'[48] to carry out certain aspects of their mandate and 'to use all necessary means to carry out its mandate'[49]

in the Ivory Coast and Burundi. This echoes the contentions of scholars engaged in exploring peacekeeping and peacemaking.[50]

This defines the shift that has taken place in contemporary international law: the UN is endowed with a broader mandate to interfere in conflict zones. Traditional peacekeeping does not reflect current demands and missions to Kosovo, East Timor and Afghanistan reveal that emphasis has been put on the making and building of peace by UN (-authorised) missions.

The question as to why post-conflict actions, of peacekeepers, are relevant for the creation of such a *jus post bellum*, and what would the content of *jus post bellum* look like? To adjudge further on the apparent extension in peacekeeping missions, the reasons why peacekeeping form such an elementary part of *jus post bellum* will be examined, so legal and practical grounds for the contention that peacekeeping is important for *jus post bellum* is understood.

The Importance of Peacekeeping Missions for the Jus Post Bellum Concept

There are multiple reasons why peacekeeping should play a large role in the defining of *jus post bellum*: 1. peacekeeping under Chapter VII-enforcement is one of the legal resorts to war in JWT and 2. UN peacekeeping exudes a spirit of consent, while 3. the forces can be seen as ethnically neutral towards the various ethnical groups within the population, 4. both peacekeeping and *jus post bellum* aim to create sustainable post-conflict peace and 5. peacekeeping can form the hybrid system combining different legal paradigms within *jus post bellum*.

Article 2(4) of the UN Charter characterises war as illegal except under two conditions: self-defence, and if undertaken under Chapter VII of the Charter. Thus enforcement action requires prior authorisation by the UNSC. However, as explained below, article 2(4) has proven to be more flexible than originally intended. Chapter VII enforcement should play an important role in defining *jus post bellum*, it is one of the two legal ways of going to war and established above, an illegal resort to war cannot lead to *jus post bellum*. The case of self-defence, arguably as in the US-led war against Afghanistan, showed similar involvement of a (UN-authorised) peacekeeping mission in nation-building and the security and infrastructural

reconstruction efforts of this mission should be of relevance for the *jus post bellum* concept.[51] Such post-conflict practice makes the UN the primary source of law in regard to *jus post* bellum.

UN-intervention should, be regarded as "just" in respect to JWT. Within this theory scholars largely agree that an aggressor can never fight a just war and that consequently its post-war actions will most likely be unfair and should not form part of *jus post bellum*.[52] This is indeed true to some extent, but especially the often-quoted contention by Orend that 'once you are an aggressor in war, everything is lost to you morally' should be seen as a simplification of right and wrong.[53] In the past, unauthorised interventions (re: Liberia, Sierra Leone, Kosovo, Afghanistan and Iraq) have been retrospectively legitimised by the UNSC.[54] Furthermore, the Report of the UN High Level Panel on *Threats, Challenges and Change* established criteria which not only applied to the authorisation of the use of force, but also extended to the 'endorse[ment] the use of military force.'[55] This resembles a stretch of Article 2(4) of the UN Charter as referred to above.

Secondly, UN-enforcement actions convey a spirit of consent, since a coalition of states will likely participate in a peacekeeping mission, which is more likely to reduce attempts at diplomatic and economic gain and diminish claims of imperialism.[56] Guided by an international organisation with aims of peace, the mission will enjoy more international support than in the case of unilateral action. Additionally, a broader state practice will become visible after the deployment of multiple missions, which can strengthen the application of certain *jus post bellum* rules.

Thirdly, peacekeeping forces can be seen as neutral to combative ethnic groups. A mission consisting of a broad international coalition will be more persuasive in removing feelings of ethnic prejudices among the local population than the presence of a sole occupier. This can also be seen as a reason for the US's requirement of UN-authorised peacekeeping forces in Afghanistan: it signalled to Afghans that the international community working to better their situation.[57]

Fourthly, the final objective of both peacekeeping and *jus post bellum* is the creation of a sustainable post-conflict peace. This should be of relevance in the defining of the content of *jus post bellum.* As stated above, the UN is the leading actor in post-conflict

situations and is endowed with a considerable amount of knowledge regarding post-conflict peace building. The presence of UN peacekeeping forces, after hostilities, gives insights into the practice established and lessons learned from these situations and may be helpful in bringing *jus post bellum* into a legal conception applicable to 21st century conflicts.

A fifth and final argument for the relevance of peacekeeping missions for *jus post bellum* is that it offers a solution to the argued fragmentation of theorisation of the concept, which focuses on substantive *jus post bellum* aspects in separated legal paradigms.[58] The hybrid system of recent peacekeeping missions deals with the holistic view of *jus post bellum* following assessments of various authors, whereas human rights, criminal prosecution and post-conflict nation building are fused into a hybrid framework in which the aspects of different legal fields receive adequate attention in post-conflict situations.

The contention that UN involvement would not be necessary in post-conflict peace building should therefore be rejected since transitional administrations in Kosovo and East Timor have been successful in their objectives and the disappointing experiences in the DRC, Somalia and Rwanda should not be seen as representative cases since those missions contained co-administrations and belong to the category of third generation peacekeeping. The questioning of the political legitimacy of UNSC decisions in respect to UN involvement contradicts supporting unilateral interventions with subsequent peace building by the interventionist party, since certain political or economic gains will more likely be pursued in the latter case.[59] The involvement of the UNSC, even though it might produce political obstructions, at least involves a more multilateral assessment – legally, as well as politically – of the case in question.

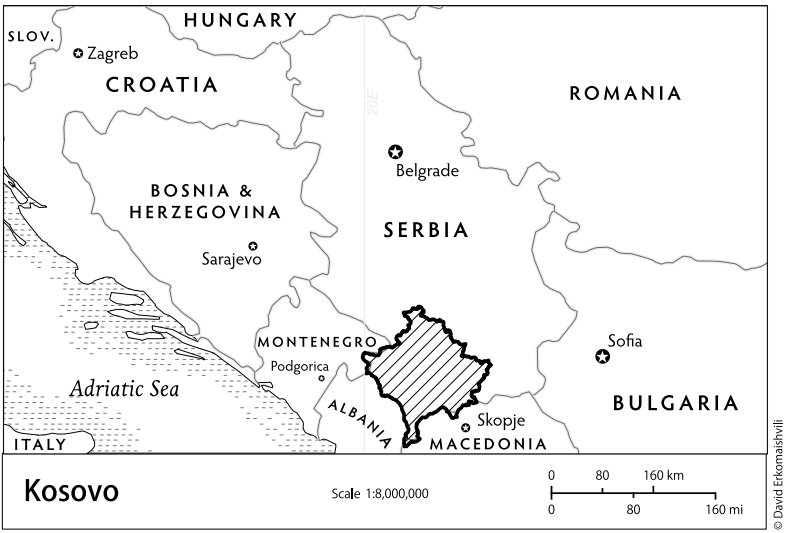
Fourth generation peacekeeping missions, which enhance transitional administrations making the UN run the complete set of governmental responsibilities provides insights to the shift that has taken place towards post-conflict behaviour by looking at mandates establishing these missions. Indeed, these missions provide the broadest possible post-conflict practice in international law with peacekeeping personnel as lawmakers and the creation of a hybrid fusion of different *jus post bellum* components. Therefore these UN transitional administrations should be seen as the primary source

for a substantial *jus post bellum*, while the less far-reaching *fourth generation* peacekeeping missions and the lessons learned from previous generations can be seen as a secondary source.

Transitional Administrations: The Broadest Post-conflict Practice

The concept of transitional administrations is not only linked to the last peacekeeping generation, but is traceable the League of Nations.[60] After World War II the UN created various trusteeships,and in the post-Cold War period followed administrations in Cambodia and Somalia.[61] These can be characterised as "co-administrations," since they existed alongside the governments of the countries concerned and left such governments autonomous decision-making power only in certain areas.[62]

The concept of post-conflict transitional administrations with powers in all branches of governance – which entered the international community within the *fourth* generation of peacekeeping – became visible with the establishment of the United Nations Transitional Authority for Eastern Slavonia (UNTAES), with its duty to peacefully incorporate the Serbian part of Croatia into the newly established Croatian state. UNTAES assumed governing control of Eastern Slavonia, which was not preceded in earlier peacekeeping missions, but the mandate was only stretched for a period of two years, after which Croatian authorities took over responsibility though lacked judicial powers.[63] Therefore, even though this transitional administration can be seen as the first of its kind the concept remained incomplete, as argued by De Wet, since the powers of the transitional administration were not as extensive as those of the transitional administrations established later in Kosovo and East Timor, but on the other hand were more extensive than the powers in earlier transitional co-administrations.[64]



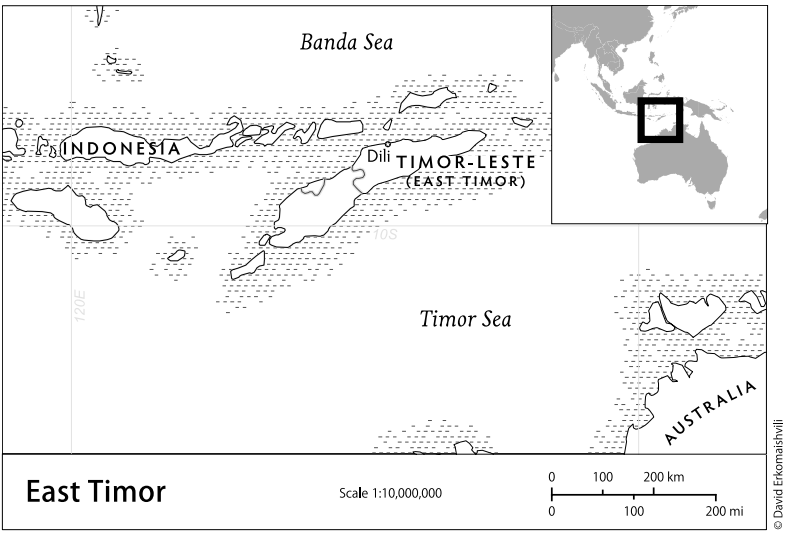
Boundaries of disputed territories reflect de facto status at the time of publication

The UN Transitional Administration in Kosovo (UNMIK) was established on 10 June 1999, following UNSC Resolution 1244. The mission was split into four pillars, of which two were UN-led (Police and Justice, Civil Administration), one OSCE-led (Democratisation and institution building) and one EU-led (Reconstruction and economic development). While recognising that Kosovo remained part of the Federal Republic of Yugoslavia, Yugoslav authorities retained few effective enforcement tools. The splitting of responsibilities into different pillars reiterates the argument made regarding hybrid *fourth generation* peacekeeping missions. Resolution 1244 shifted responsibilities of governance – legislative, executive and judicial – to the UN, creating UN governance. The resolution provided for a transferring of these responsibilities to local authorities in the final stages of UNMIK; a phased transfer 'while overseeing and supporting' and 'overseeing the transfer.'[65] Two years after the establishment of UNMIK a regulation was adopted which decided that some legislative powers had to be transferred to the Kosovar Parliament (re: heath and education), while legal enforcement and judicial decisions, as well as the supervision aspect remained with UNMIK.[66] This regulation suggested the first sign of transferral

from the UN administration to local authorities, but the UN held ultimate responsibility for civilian administration. Although Kosovar Albanian politicians had sought early withdrawal of the UN, the 2004 inter-ethnic riots fuelled fears that the full withdrawal of the UN might lead to a revival of more widespread ethnic violence.

East Timor

In 1999, the UN Security Council established the United National Transitional Administration in East Timor (UNTAET) acting upon Chapter VII of the UN Charter, which was endowed with the responsibility of governance in East Timor, including legislative, executive and judicial authority.[67] In 2000, military control was handed over to the UNTAET by the International Force in East Timor (INTERFET) – a coalition that had intervened in East Timor after serious destabilisation of the country following a separation referendum with the objective of peacekeeping and dispelling violent Indonesian militias from western parts of the country. INTERFET merged into UNTAET, which itself became the United Nations Mission of Support in East Timor (UNMISET) following East Timor's independence (20 May 2002), creating a supportive mission endowed with administrative, law enforcement and security assistance.[48] Compared to the Kosovo mission, UNMISET was the first time the UN gained effective control of a country, whereas Kosovo was an autonomous region, which only in 2008 unilaterally declared its – still disputed – independence from Serbia. A further distinction to UNMIK was that independence was relatively uncontroversial.



This emphasises the contention that transitional governments and the peacekeeping missions covering them have large similarities in objectives and *modi operandi*, but that a careful evaluation of specific applicability's on the mission concerned are of a great importance to have the mission succeed. It reiterates the argument of adaptability: no complete applicable scenario or blueprint exists for peacekeeping and anticipation of situational changes and specific regional dilemmas are of the utmost importance. Nevertheless, close inspection of post-conflict nation building activities of peacekeeping missions provides a set of applicable rules for *jus post bellum*.

Afghanistan

The US-intervention in Afghanistan, as a response to 9/11, fell under the scope of self-defence and outside the scope of peacemaking. Nevertheless shortly after the intervention the UNSC – under Resolution 1386 – established the International Security Assistance Force (ISAF), under NATO command; a result of the Bonn Agreement.[69] The objectives of the mission were 'providing security and law and order'[70] and 'assist[ing] in the rehabilitation of Afghanistan's infrastructure.'[71] Where the mission first concerned Kabul and its surrounding environs, a unanimous UNSC vote (2003) led

to the adoption of a resolution that widened the ISAF-mission to all Afghanistan.[72] The UNSC backed the creation of the Afghan Transitional Administration (ATA).[73] This administration succeeded the Afghan Interim Authority and filled the power vacuum that arose after the removal of the Taliban-regime and paved the way to democratic elections, which occurred in 2004. The Bonn Agreement provided wide powers of the Interim Authority, stating that it 'shall be the repository of Afghan sovereignty, with immediate effect' and gave the administration executive, legislative and judicial powers to in accordance with international humanitarian law and international human rights law; ratified by Afghanistan, and consistent with UNSC Resolution 1378 and other relevant resolutions. The peacekeeping mandate in Afghanistan differs from its predecessors in Kosovo and East Timor in its separation from the transitional administration.[74] Although closely cooperating with the transitional administration, the peacekeeping mission was endowed with objectives of security and infrastructural issues and the transitional administration was representing the political part of the country's rehabilitation.

Peacekeeping & Jus Post Bellum

The cases of Kosovo, East Timor and Afghanistan show the broad set of duties and responsibilities post-conflict peacekeeping missions are endowed with, including a strong focus on nation building. Practical and theoretical lessons can be learned from these missions, in order to create a substantive view on *jus post bellum*. The *Brahimi Report* stated that the concept of transitional post-conflict administrations was likely to recur and claimed that a centre for those tasks had to be established within the UN.[75] It recommended the creation of a panel of international legal experts to evaluate the feasibility of interim codes used by such operations.[76] Efforts by the UNDP to develop a model transitional draft code for criminal law and procedure in post-conflict areas and an International Commission on Intervention and State Sovereignty (ICISS) report on justice packages in post-conflict nation building and re-emergence of institutions[77] show similar movement. These efforts underscore the importance the UN lends post-conflict nation building as well as the creation of a set of rules that can be applied in such situations. Even though there appears to be agreement on certain issues that *jus post bellum* should address, the scope of the concept has yet to be defined. This is partly due to the relatively recent revival of the concept and a reflection in practice which is not yet very broad, although the peacekeeping missions in Kosovo, East Timor and Afghanistan and the aforementioned UN documents can provide for future guidelines. Close examination of the post-conflict rules in these missions and UN Reports on peacekeeping nation building activities will be able to pave the way for the creation of the substantive part of *jus post bellum*.

Fleshing out Jus Post Bellum: Post-conflict Practice

With the UN as a main post-conflict actor, a closer view at recent post-conflict peacekeeping and general UN practice could give a more coherent view of what should be regarded as a set of rules, applicable to post-conflict situations.

As with *jus ad bellum* and *jus in bello*, a set of legal constraints should be applicable to post-conflict situations, thereby mapping

the boundaries of this revived area of law and paving the way for the final objective: a sustainable post-conflict peace. Stahn drafted a list of these restraints in post-conflict situations, but simultaneously recognised that except for the *jus cogens* rules these proposed norms and standards can be superseded by international practice.[78] This superseding international practice can be observed in the case of Iraq, where the UNSC set aside the occupation law of the 1907 Hague Regulations and the Fourth Geneva Convention and triggered the post-war conservationist approach to the extent that it was actually subdued. UNSC Resolution 1483 created a framework in which the socio-economic and political reconstruction of Iraq was centralised, thereby ignoring the preserving of a status quo, which, according to the Hague and Geneva conventions, maintains that pre-conflict laws cannot be changed when valid. A similar practice can be observed in the examples of UN transitional administrations in Kosovo, East Timor and Afghanistan.[79] It is the clash between law and practice that rises to the surface in such contexts and too often international law defied. Ultimately, practice will strongly influence the further development of a set of rules in international law and may suggest the necessity of adaptation to changed circumstances or the rise of new legal challenges. Particularly, the focus on economic reconstruction faces a major legal challenge in *jus post bellum*, given its importance and the relative success that has been achieved in the transitional administration cases. The following part of this article depicts a set of rules which should be focused on post-conflict situations.

Human Rights Emphasis

An important aspect of *jus post bellum* is the final vindication of human rights in a post-conflict situation.

Walzer, in *Just and Unjust Wars,* linked JWT with human rights[80] and the objectives of a just war are the final vindication of human rights – whether it is the right to live or the right of self-determination.[81] The objectives of post-conflict nation building in societies torn by civil war do not differ in that respect, given the extensive attention that has been given to human rights in UNSC peacekeeping mandates.[82] Additionally, the *Agenda for Peace* emphasised the importance of human rights in the post-conflict phase, the *Brahimi*

Report declared human rights to be critical for effective peace building[83] and research and case law in the field of *jus post bellum* and human rights indicates legal support for the extraterritorial application of human rights in situations of non-domestic administrations,[84] something which the practice of peacekeeping has confirmed.

Williams and Caldwell note that 'a just peace is one that vindicates the human rights of all parties to the conflict,'[85] endorsing Orend's definition, suggesting that 'the proper aim of a just war is the vindication of those rights whose violation grounded the resort to war in the first place'[86] with a slight difference. These contentions are to be closely followed since *jus post bellum* tries to create a sustainable peace, and this sustainability should be reflected in the preservation of human rights.

As many peacekeeping mandates and subsequent UNSC resolutions indicate, there is a need for supporting, protecting and promoting human rights.[87] The aforementioned contemplations of Williams, Caldwell and Orend are in line with this peacekeeping practice; they proclaim a focus on human rights in the shift from war to peace as essential for peace itself. In most missions various subparts created within the peacekeeping mission portray this focus. Furthermore, reports from independent organisations such as Human Rights Watch and Amnesty International or reports from the UN High Commissioner for Human Rights may be helpful in the assessment of human rights areas that should be placed under a more scrutinising examination.

A second aspect, further developed supporting, protecting and monitoring emerged from the UN Mission in Bosnia and Herzegovina (BiH) during the 1990's, in which the mission had a clear mandate to investigate human rights violations.[88] The Human Rights Office of this mission had a mandate to 'investigate or assist with investigations into human rights abuses by law enforcement personnel,'[89] which emphasis that states are often violators, rather than defenders, of their citizen's human rights.[90] The *Brahimi Report* recalled the necessity of such investigations by stating that 'United Nations civilian police monitors are not peace builders if they simply document or attempt to discourage by their presence abusive or other unacceptable behaviour of local police officers.'[91] Investigational powers furthermore defy – as *ut res magis valeat*

quam pereat – the idea of the creation of a paper authority in regard to supporting and promoting of human rights.

The precedence set by the United Nations Mission in Bosnia and Herzegovina (UNMIBH) was followed in Kosovo, where the Ombudsperson was allowed to receive and investigate complaints regarding human rights violations by public authorities.[92] This practice has a double-edged effect: signalling to the local community that human rights violations are taken seriously and that victims of violations have an authority to turn to, while simultaneousl deterring (possible) violators.

In East Timor, the Serious Crimes Investigation Unit examined ten major violations and the Serious Crimes Panel investigated a set of serious violations. However, these fell under the caption of war crime trials, although, naturally, they addressed the violations of certain human rights since human rights law is not overruled during armed conflict.[93] Furthermore, the establishment of a special criminal tribunal for East Timor failed after the UNSC could not establish 'the existence of a threat to peace or breach of peace or an act of aggression,'[94] since the entrance of the INTERFET and the UNTEAT into the conflict reduced human rights violations,[95] general calm had returned and the threat to peace. Since the aforementioned investigation units have a strong retrospective nature, they will receive more attention in the section on war crimes trials below. The judicial powers the transitional administration in East Timor was allowed to investigate human rights violations. Also, the UN established the Office of the Ombudsperson of the East Timorese Transitional Administration, but this Office was criticised for lacking a strong mandate and enforcement methods to carry out its objectives.[96] The UNTAET Human Rights Unit was however another channel which complaints could be submitted regarding human rights violations by public authorities.[97]

The Bonn Agreement concerning the transitional administration in Afghanistan provided for the establishment of an independent Human Rights Commission in cooperation with the UN, 'whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions'[98] Additionally, the UN itself was endowed with the power to investigate human rights violations.[99] The precedence of the mission in Bosnia was followed by negotiations leading to

the Bonn Agreement and emphasis was not merely laid on promoting human rights, but also on active investigations of violations.

A third aspect is ensuring that the peacekeeping forces live up to the rules of international human rights law and are endowed with knowledge of this field of law.[100] Violations perpetrated by peacekeepers or soldiers of the "occupying" forces are to be punished equally in relation to violations perpetrated by local individuals.[101] The unequal application of certain rules regarding accountability for human rights violations will not benefit the creation a post-conflict peace, establishes the notion of a *princeps legibus solutus est*[102] and will not match the democratic intent which underscores the concept of peacekeeping missions nor the purpose of the UN. This part of international law is underdeveloped and the need for a further defining of *jus post bellum* begs for a clear set of normative rules. In the past, some accountability for the UN has been acknowledged, but the contemporary legal framework does not provide for sufficient protection.

A fourth and final aspect concerns the transfer of the sovereignty of a nation from the hands of the "victorious party" back into the hands of the local population.[103] Both the missions in Kosovo and East Timor aimed at delivering sovereignty to domestic political institutions. Similarly, the transitional administration in Afghanistan was established to create a government endowed with political sovereignty. The principle of self-determination is one of the most fundamental human rights[104] and has a legal basis in the UN Charter the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and should legally support the reintegration of the nation into the international community.

Indeed, the importance of human rights is captured by:

- **Supporting, protecting and monitoring human rights** – A broad focus on human rights must be established, which focuses on supporting, protecting and monitoring human rights by post-conflict peacekeeping forces. Legal support for the extraterritorial application of human rights law can be seen as a basis for this.
- **Investigating and sanctioning violations of human rights** – Investigational units and a judicial system sanctioning the discovered violations is a requirement for the just vindication

of human rights in post-conflict situations, there it sends strong signals to the community regarding the creation of stabile human rights situation and a deterring message to violators.

- **Accountability for human rights violations by proxy** – Members of international peacekeeping forces and UN personnel should be accountable for human rights violations in a way any other person will be held accountable. The international community must equally apply the rights it endeavours to promote to all sides involved in the conflict.
- **Restitution of sovereignty** – One of the objectives of *jus post bellum* is the return of a government with full domestic sovereignty and thereby the recognition of self-determination. The restitution of this domestic sovereignty by the peacekeeping mission is therefore required and will pave the way for full reintegration into the international community.

Economic Reconstruction

It is undeniable that war has a devastating effect on a nation's economy and there is reasonable support for the contention that poor economic situations increase the possibility of internal or international conflict,[105] and is empirically confirmed: many of the world's "conflict zones" are located in the so-called Global South. As many economists and politicians have embraced the idea that economic globalisation has reduced armed conflict, the concept of post-conflict peace building must strongly emphasise the reconstruction of a state's economy as part of producing sustainable peace.

Furthermore, according to research, the primary reasons for internal armed conflict is also rooted in economic problems, rather than inequality, ethnic problems or a lack of democracy.[106] Additionally, liberal models suggest that an open economy leads to higher levels of economic development, which in turn may lead to peace.[107] In writings on *jus post bellum*, the importance of economic reconstruction has been largely neglected though some ideas have been proposed.[108] The Brahimi Report recognised the importance of economic changes in complex peace operations and a more complete idea of the importance of economic reform might be established when looking at legal reforms in the aforementioned cases of

transitional administrations, of which the reform to secure a market economy is a long-term target.[109] Unlike the previous section on human rights, knowledge on economic reconstruction must be gained from the peacekeeping missions regarding UN transitional administrations and UN-authorised peacekeeping mission and transitional administration in Afghanistan, since a relatively successful post-conflict economic reconstruction has not been pursued in more narrow missions.

In Kosovo, economic reconstruction was boosted by various UNMIK-regulations addressing economic reform, as well as labour and employment measures, taxation, and economic regulation. These decisions were based on UNSC Resolution 1244, which stated that 'supporting (...) economic reconstruction'[110] was to be one of the main responsibilities of the mission in Kosovo. Such resolutions cannot be separated from the results achieved in the post-conflict situation and it is important to look at the effect of these in retrospect, since a relatively short period of time has passed since their adaptation. Figures and reports of international economic and development institutions, such as the World Bank, should be regarded, since they provide insights into economic growth and stability. The economy of Kosovo grew tremendously in the immediate post-war environment (1999). By 2000, growth accelerated to 21.2%, after which it dropped to a more balanced level in 2006 (4.2%)[111] and 2008 (5.4%)[112] Furthermore, a World Bank Report on Poverty in Kosovo predicted an estimated 17% drop in absolute poverty rates within five years of sustainable 5% GDP growth[113] and the International Monetary Fund (IMF) analysed an increase of more than 60% of the per capita GDP in comparison with the immediate post-conflict situation.[114]

Another aspect, which received attention, was the flow of foreign investment into the Kosovar economy.[115] Tax laws were amended to make the country's economy more viable for foreign investment, since the flow of new capital would bring new technologies, employment and a higher production standard. Attracting foreign investment was also a priority for the EU pillar of UNMIK.[116] The successful attempts at attracting foreign capital were reflected in the quadrupling of companies of foreign and mixed ownership between 2004 and 2007.[117]

The transitional administration in East Timor also focused on economic development.[118] This was reflected in the regulations adopted by UNTAET, which sought economic recovery in order to create a system in which capacity-building could take place.[119] Attempts were made to convert East Timor's largely subsistent crop economy to a cash crop economy, since agriculture remained East Timor's major economic sector but this largely failed due to heavy global price drops in the chosen export products. The notion of emphasising the country's main economic sector nevertheless seemed important in the attempt to revive the economy.

Also, progress was made in the development of East Timor's oil and gas fields. An oil-deal with Australia (2006) enhanced the annual revenue of the Timorese government, which between 2002 and 2007 alone increased by more than $600 million (USD)[120] and UNTAET established an Investment Promotion Unit,[121] recognising the importance of attracting foreign capital, which was embraced by the Brahimi Report.[122]

The GDP raised approximately 43% between 2000 and 2007, despite economic problems in 2006 and the GDP per capita rose 2% over the same period.[123] Despite the major income growth in natural resources, East Timor failed to implement these assets to create a stronger economy after independence (2002). A strong indication of the importance of peacekeeping presence followed from the 2006 crisis in East Timor, in a period the UN reduced the operation and the subsequent extension of the mandate of the UN Office in East Timor,[124] after which the economic situation recovered again. This supported the contention in the Report of the High-Panel on Threats, Challenges and Change, in which the importance of a longer-term process of peacebuilding was mentioned.[125]

In Afghanistan – despite remaining among the poorest countries in the world – the post-conflict economy revived with a GDP raising more than $5,500 million (USD) in five years and a GDP per capita rise of $177 (USD) in the same period.[126] The transitional administration was endowed with the right to create financial institutions[127] and the UNDP cooperated with the Afghan government to create stable governance structures, including those of an economic capacity-building nature.[128] Emphasis was put on attracting foreign investors by laws from the transitional administration,[129] as well as the UNSC.[130] UN data shows a relative increase in foreign

investment in Afghanistan in the post-conflict phase, compared to the period of 1990–2000.[131] Nevertheless, the same data indicated the long road ahead, since comparison to other countries shows the enormous foreign investment gap Afghanistan will still have to overcome.

NATO-ISAF peacekeepers also focused heavily on the reconstruction of Afghanistan's economy, in combination with a large scale of projects initiated by international organisations. Emphasis was put on the recovery of the agricultural sector, which provides for 35.5% of the GDP and employs around 80% of Afghan civilians and could secure the spreading of economic development throughout the entire population.[132] Furthermore, a ring road to support growing transportation was created, extensive internet connections and a sustainable power network constructed.

The presence of the UNDP, World Bank and the IMF and the funding of specific economic or development projects shows the importance given to the economic reconstruction of post-conflict zones. In an attempt to revive the economy and development in post-conflict situations, peacekeeping missions consisting of transitional administrations assessed in this section have emphasised number of points, which in the economic development part of *jus post bellum* are relevant. These should be achieved by a transitional administration established by a UNSC resolution (such as in Kosovo and East Timor) or by a UN-authorised transitional domestic government closely cooperating with peacekeeping forces and the UN (such as in Afghanistan):

- **Strengthen domestic capacity-building** – The creation of a domestic taxation system, financial authorities and a general economic policy are indispensable for the consolidation of state finances. Gaining domestic natural resources to create independent resources will strengthen such capacity-building, just as the promotion of entrepreneurship.
- **Revive traditional sectors** – A strong focus on the development of the traditional economic sectors, which employ the largest share of workers, is essential for economic recovery in the immediate aftermath of the conflict-situation since it will quickly provide work for the civilians trained in traditional sector productivity.

- **Attract foreign investment** – Attracting foreign investment in post-conflict areas will positively boost the domestic economy and governmental assets and the creation of employment. Alluring tax systems will be able to attract foreign entrepreneurship and lift domestic technology and production standards to a higher level, but simultaneously a competent rule of law will be needed.

These can provide guidelines for future post-conflict nation building, but they cannot be regarded as exhaustive since more empirical research in the substantive area of economic *jus post bellum* will be valuable for further defining of the concept. Nevertheless, the successful economic rebuilding of the examined post-conflict areas by the peacekeeping missions consisting of transitional administrations should be considered.

Criminal Prosecution

Conflicts frequently go hand in hand with violations of rules pertaining *jus in bello*, while *jus ad bellum* violations are conceivable as well. Post-conflict periods offer opportunities for prosecuting those who have violated rules during conflict from both *jus in bello* and *jus ad bellum* perspectives. Where the human rights component of *jus post bellum* mainly focuses on human rights in the contemporary aspect, criminal prosecution focuses on the violations of human rights law and humanitarian law in a retrospective context. It is embodied in the very notion of *jus post bellum*, justice after war, that justice has to be done for wrongs committed in the preceding phases. Where would the *jus* in *jus post bellum* be if those who violated the most basic norms were left unpunished? This punishment must be meted for both moral and legal reasons: morally for blaming individuals for the wrongs committed[133] and legally for the need to sanction those who blatantly violated the rules of international humanitarian and human rights law. Similar to human rights, war crimes trials signal to victims, potential aggressors and the international community that violations of international law shall not be taken lightly.

The establishment of such post-conflict justice systems is supported by various scholars,[134] as well as a Report published by the UN, which recognised the importance of trials in the transitional

period.[135] The question is to what extent such criminal prosecutions and investigations should be undertaken? There is considerable support, in theory and practice, that war crimes trials be an important part of post-conflict criminal prosecution. Criminal courts such as the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been instituted to adjudicate on violations committed in, respectively, former Yugoslavia and Rwanda; violations which concerned the *jus ad bellum* decision-makers as well as those persons directly involved in armed combat.[136]

These courts were not part of peacekeeping missions, they were established by independent UNSC resolutions. Nevertheless they followed directly from a conflict in which UN peacekeeping troops had been present. War crimes constitute an important part of the Statute of the International Criminal Court (ICC).[137] But what role can peacekeeping missions play in the assessment of this *jus post bellum* aspect?

In Kosovo and East Timor the UN followed precedence from the missions in Cambodia and Sierra Leone,[138] with the sole difference in respect to Kosovo that the ICTY had jurisdiction to prosecute 'high level civilian, police, and military leaders, of whichever party to the conflict who may be held responsible for crimes committed during the armed conflict in Kosovo.'[139]

In Kosovo the judicial system was supported by a group of international judges and prosecutors,[140] having the authority to 'select and take responsibility for new and pending criminal cases within select and take responsibility for new and pending criminal cases within the jurisdiction of the court.'[141] The Kosovar courts have convicted various war criminals in the immediate aftermath of the conflict.[142] International judges formed a part of the courts trying indicted suspects.

Following widespread human rights violations in East Timor and considerable pressure from the international community, Indonesia set up its own court to try those who committed war crimes.[143] In East Timor itself the Serious Crimes Investigation Unit focused on serious violations committed during the armed conflict and was able to bring cases before the Special Panels for Serious Crimes, which were created by the UNTAET.[144] Although the establishment of an international criminal tribunal for East Timor did not gain

enough support, the SPSC consisted of two international judges and one domestic judge.[145] The enormous advantage of the presence of these international judges and prosecutors incorporated within the post-conflict peace building mission is that often these persons have earned international legal respect and have extensive knowledge of the particular field of law they are going to be endowed with. Secondly, due the preceding conflict the neutrality or objectivity of domestic judges might be doubted, something which has been recognised in the recommendations of the UN Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies [hereinafter: 2004 Report].[146] Finally, the presence of international judges and prosecutors guarantees a quick and sound response in the immediate aftermath of a conflict, whereas the national legal system in most situations will have been undermined by the conflict itself.

The post-conflict situation in Afghanistan unfortunately did not provide for the establishment of war crimes trials to punish those who violated the rules of war during the conflict that tormented the country for some 25 years, nor for the period in which the US had invaded. In 2007, President Karzai signed a controversial law granting immunity for war crimes committed in the aforementioned period, with authorisation of parliament.[147] This contravened the 2004 Report, which rejected such amnesties.[148] Nevertheless, the US put some suspects, captured and imprisoned in Guantanamo Bay, on trial for war crimes,[149] but alleged war crimes committed by UN-authorised NATO-forces have not yet been investigated. The lack of criminal prosecution of war criminals in Afghanistan is perhaps attributable to UN-involvement, which is not as robust as it is in Kosovo and East Timor, and the different face of the transitional authorities and peacekeeping forces, which were UN-authorised rather than UN-executed.

Following the 2004 Report, which reiterated the importance of war crimes trials,[150] it is clear that the prosecution of war criminals constitutes an important factor in the post-conflict road to peace. This is supported by measures of the Geneva Conventions and its additional protocols, which are applicable during conflict and post-conflict phases.[151] These conventions call for the prosecution of persons who violated conventions on both international and internal armed conflict.[152] The UN convention against torture calls

for a similar approach and confirms its applicability during a state of war,[153] while the ICC forms the basis for war crimes trials. It must be noted that a substantial view of post-conflict criminal prosecutions within peacekeeping missions is still largely underdeveloped – with Kosovo and East Timor as good examples. The various international tribunals that have been established are not directly linked to the peacekeeping. However, they can, in a broader context, be seen as a post-conflict UN action since they adjudicate on crimes committed in a conflict in which the UN interfered. The criminal prosecutions for war crimes in *fourth generation* peacekeeping missions, consisting of transitional administrations in Kosovo and East Timor, nonetheless explicitly indicate the importance that has been given to war crime trials by means of the establishment of national war crimes trials.

Peacekeeping missions have assisted in criminal prosecutions conducted by national and international courts by means of collecting evidence, capturing criminal suspects and uncovering crimes.[154] The close cooperation between the UNMIBH peacekeeping mission and the UN High Representative is an excellent example of this.[155] The UN High Representative in Bosnia used his Security Council[156] and treaty[157] mandate to create a War Crimes Chamber in Bosnia and Herzegovina[158] in the hybrid form of both national and international judges, as has been done in Kosovo and East Timor as well.[159]

In Kosovo and East Timor, these war crimes trials followed directly from the powers of the UN transitional administration and that such a transitional administration did not exist in BiH, where the UN High Representative used his mandate for the creation of these trials and worked closely with the peacekeeping mission in the country. There is thus a difference between peacekeeping operations consisting of transitional administrations and less far-reaching peacekeeping missions in the way such war crimes trials are established, but they both find their legal basis in Security Council resolutions.

There seems to be more in the concept of post-conflict justice though, such as the establishment of truth commissions and reconciliation. These inquiries have previously been called for in Somalia,[160] used in South Africa in a non-peacekeeping related form,[161] and for the establishment of the Truth and Reconciliation Commission

in Sierra Leone.[162] Furthermore, the UNTAET established the Commission for Reception, Truth and Reconciliation in East Timor.[163] The Brahimi Report reiterated the importance of reconciliation in post-conflict areas, proposing a 'leading role (...) in helping to implement a comprehensive programme for national reconciliation.'[164] Calls have been made for a similar truth and reconciliation commission in Kosovo,[165] but so far the transitional administration has not established such a commission. In addition, the transition from negative to positive peace implies the need for restorative justice, since punitive and retributive justice of war crimes trials will not directly reckon with the victims need for reconciliation.[166]

Also the 2004 Report focused on truth and reconciliation in post-conflict zones[167] and recognised its importance in complementing criminal prosecution with truth commissions.[168]

In this area the connection between criminal prosecution and human rights becomes visible and the findings of investigating commissions may be used to prosecute individuals for war crimes and human rights violations. Alternatively, the findings of criminal prosecutions and war crimes trials will decide whether certain persons will be granted immunity for less serious crimes by the reconciliation commission, a situation which happened in East Timor.[169]

Various factors contribute to prioritising post-conflict criminal prosecution, namely:

- **War crimes trials** – Bringing justice to those who violated *jus ad bellum* and *jus in bello* is an important factor in post-conflict peace building. If no independent UN-established or supported court to adjudicate such crimes is possible, the prosecution of war criminals in domestic war crimes trials with the presence of international judges and prosecutors is highly recommended. A legal basis for this must be included in the UNSC resolutions which authorise the missions in the first place.
- **Aim for truth and reconciliation** – Where war crimes trials punish those who violated *jus ad bellum* and *jus in bello*, the establishment of truth and reconciliation commissions by, or in cooperation with, the peacekeeping mission may assist in reconciling a fragmented and shattered state; reaching out to the victims in truth-finding and complementing the work of criminal trials and human rights investigations.

Conclusion

The blueprint for *jus post bellum* must be rooted in post-conflict UN (-authorised) peacekeeping missions and legitimised through the international laws which regulate them. The need to revise JWT and create a tripartite system which includes *jus post bellum* can act as a step towards legally enframing the concept and developing a methodological outline applicable to post-conflict situations as a means of reinforcing sustainable, post-conflict peace.

The examination of peacekeeping missions and transitional administrations in Kosovo, East Timor and Afghanistan, revealed three main post-conflict focuses which may be supported (directly and/or indirectly) by peacekeeping missions. To reiterate, these are:

1. **Human Rights:** supporting, protecting and monitoring human rights, investigating and sanctioning violations of human rights, increasing accountability for human rights violations by proxy and the restitution of sovereignty,
2. **Economic Reconstruction:** domestic capacity-building, enhancing traditional economic sectors and attracting foreign investment,
3. **Criminal Prosecution:** war crimes trials and truth and reconciliation processes.

These are key, but not the only, elements required in substantiating *jus post bellum*. Indeed, the codification of *jus post bellum* requires significant research and international legal debate so it may eventually be accepted as common post-conflict practise. Within this process it must be recognised that a shift in conflict has occurred; forcing scholars of international law to adapt JWT to the unfolding peace/war-dichotomy. The idea of peace as the absence of war is archaic and the need for coherent and vigorous post-conflict objectives is boosted by the successful implementation of nation building measures in the peacekeeping missions this article has examined, which aimed to achieve sustainable peace. After all, a fragile peace will likely act as the foundation for a subsequent conflict.

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The author would like to thank Dr. Robert W. Heinsch, Assistant Professor at the Grotius Centre for International Legal Studies of Leiden University for his careful guidance during the writing process.

Notes to Pages 75-109

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