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Christian Schaller

Towards an International Legal Framework for Post-conflict Peacebuilding

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Ludwigkirchplatz 3–4
10719 Berlin
Germany
Phone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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Dr. Christian Schaller is a Senior Associate in the Global Issues Research Division

Introduction

The concept of post-conflict peacebuilding aims at assisting war-torn states and societies to avoid a relapse into armed conflict. It combines mechanisms of peacekeeping with elements of state and nation building, humanitarian action, transitional justice, and reconciliation. Although such efforts sometimes may be limited to strengthening and reconstructing certain political, economic and social structures which have been eroded in the course of the hostilities, the underlying idea of the concept is more ambitious: to eliminate the root causes of war and to establish the conditions for a stable and sustainable peace. Achieving such transformation requires political determination, tailor-made strategies, enormous resources, and a coordinated, coherent and integrated approach to planning and implementation. Considering the variety of different post-conflict scenarios, it is difficult to develop any general practical standards or guidelines for peacebuilding. Thus, many activities in this field are characterised by ad hoc decision-making and patchwork approaches. Even the United Nations (UN) Peacebuilding Commission, which was established in 2005 by the Security Council and the General Assembly, concentrates most of its efforts on formulating country-specific strategies. Apart from all these practical challenges,[1] the creation of a new post-conflict environment also raises considerable legal issues. So far, however, the international law dimension of peacebuilding seems to have attracted only little attention among scholars and practitioners.[2]

1 Roland Paris and Timothy D. Sisk (eds.), *The Dilemmas of Statebuilding. Confronting the Contradictions of Postwar Peace Operations*, London and New York: Routledge, 2008; Ulrich Schneckener, "Frieden Machen: Peacebuilding und peacebuilder", in: *Die Friedens-Warte*, Vol. 80, No. 1–2, 2005, pp. 17–39; Roland Paris, *At War's End. Building Peace after Civil Conflict*, Cambridge: Cambridge University Press, 2004; Elizabeth M. Cousens and Chetan Kumar (eds.), *Peacebuilding as Politics: Cultivating Peace in Fragile Societies*, Boulder: Lynne Rienner, 2000.

2 See, for example, Volker Epping and Hans-Joachim Heintze (Eds.), *Wiederherstellung staatlicher Strukturen in Nach-Konflikt-Situationen, Theoretische Fragen und Fallstudien*, Berlin: Berliner Wissenschafts-Verlag, 2007; Stefan Oeter, "Post-Conflict Peacebuilding – Völkerrechtliche Aspekte der Friedenskonsolidierung in Nachkriegsgesellschaften", in: *Die Friedens-Warte*, Vol. 80, No. 1–2, 2005, pp. 41–60. On the subject of "jus post bellum": Carsten Stahn and Jann K. Kleffner (eds.),

The legal dilemma of peacebuilding may be described as follows: The concept is about actively shaping the future of a particular state and its people. To be successful in managing the transformation from a state of armed conflict to a state of long-term and sustainable peace, the international community must to some extent interfere with the domestic affairs of the war-torn country. Such interference may affect the sovereign sphere of the target state as well as certain collective and individual rights of its population such as the right to self-determination or human rights. Moreover, the whole process may even have a significant impact on the country's foreign relations and its standing in the international community. Although the concept of peacebuilding is non-military in nature, there are extreme cases in which peacebuilding efforts must be bolstered by means of coercion, especially if there is a need to create a safe and stable environment for the operation of civilian personnel on the ground. The intrusive dimension of peacebuilding becomes most visible in situations of complete state failure and forced regime-change. Especially after a large-scale military intervention, as in Afghanistan and Iraq in 2001 and 2003, there may be no alternative to creating a whole new fabric for the target state and its institutions. In both cases the burden of the "responsibility to rebuild" was shared by a broader community of states and international actors which were not necessarily involved in the preceding military operation.

Although the basic rationale of peacebuilding is to serve the benefit of the affected states and their populations – thereby contributing to the restoration and maintenance of international peace and security – there always remains a certain risk of arbitrary and self-interested intervention. Taking into account the transformative and potentially intrusive nature of peacebuilding, it is important that such action always be guided by clear normative standards. International law should provide a yardstick for what kind of action may be permissible in a specific case. In particular there must be some clarity as to the legal basis of the action, the legal status of the actors, and the limits of their powers. Legal certainty and predictability are fundamental cornerstones of any stable and sustainable post-conflict order. Moreover, adherence to international law is a vital precondition for generating political and moral legitimacy. Therefore, international and local support for a specific peacebuilding process largely depends on whether the responsible actors are able to credibly demonstrate their respect for the rule of international law.

The relevant question, however, remains as to what is the substance of the law applicable to such cases. Whilst international treaty law contains clear provisions governing the use of force in international relations and the conduct of the parties during an armed conflict no such specific rules exist for the post-conflict phase. In particular there is no international instrument offering a systematic and comprehensive catalogue of definite criteria for how to deal with war-torn states and societies in the aftermath of an armed conflict. Nevertheless, international law is by no means indifferent in this regard. It contains many general principles that may be applied to post-conflict situations. This study is not aimed at providing a detailed legal analysis. Its purpose is to identify some basic normative parameters for post-conflict peacebuilding and to sketch the contours of a modern "jus post bellum".

Jus Post Bellum. Towards a Law of Transition From Conflict to Peace, The Hague: T.M.C. Asser Press, 2008

The Internationalisation of Peacebuilding through the United Nations

In order to attract broad international and local support, a post-conflict peacebuilding process must be perceived as legitimate. For the actors involved in peacebuilding this is not just about demonstrating that there is sufficient legal authority for their activities. Rather there is a need to show that specific action which may be in line with international law is also necessary under political and moral considerations and that it is in the best interest of the state and people concerned. The design of the process is of particular importance in this regard. On the one hand it is necessary to create, as early as possible, the conditions for transparency and inclusiveness and to enable local stakeholders and civil society to actively participate in the process. On the other hand, the activities on the ground must be embedded into a suitable international framework. Internationalising the peacebuilding process may significantly affect the extent to which it is perceived as impartial and even-handed. Moreover, such a multilateral approach underpins the credibility of the quest for establishing certain universal values in the post-conflict order. Finally, the internationalisation of peacebuilding allows for fair burden-sharing and makes it much easier to facilitate the reintegration of war-torn states into the international community.

The United Nations represents such an international framework for the development and realisation of a modern concept of peacebuilding. Although its Charter of 1945 does not contain any specific reference to this concept, it establishes fundamental legal principles which may very well form the cornerstones of a modern "jus post bellum". The Charter which has a quasi-constitutional character for the international community is a living instrument whose dynamic interpretation allows the United Nations and its members to take all the measures necessary for ending wars and building sustainable peace. In the Preamble of the Charter, UN member states declared their firm commitment not only to maintain international peace and security, but also to promote social progress and better standards of life in larger freedom. The determination to eliminate the root causes of war and lay the foundations for sustainable peace is also reflected in the purposes of the organisation as stipulated by Article 1 of the Charter.

Former UN Secretary-General Boutros Boutros-Ghali in his "Agenda for Peace" in 1992 for the first time presented a concrete conception of post-conflict peacebuilding.[3] Since then the concept has repeatedly been referred to and further developed by various other UN bodies.[4] In particular the Security Council and the Secretary-General have contributed substantially to raising the peacebuilding profile of the United Nations in recent years. One of the latest achievements in this regard was the establishment in 2005 of a Peacebuilding Commission, a Peacebuilding Support Office within the Secretariat, and a UN Peacebuilding Fund.[5] The Peacebuilding Commission is an intergovernmental advisory body and a subsidiary organ, both of the Security Council and the General Assembly. It is supposed to close an institutional gap in the system of the United Nations with a special focus on bringing together relevant actors and coordinating their activities, marshalling resources, developing integrated strategies and best practises, helping to ensure predictable financing, and extending the period of atten-

3 *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping.* Report of the Secretary-General (UN Doc. A/47/277–S/24111, 17 June 1992, paras. 55–59); *Supplement to an Agenda for Peace:* Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations. Report of the Secretary-General (UN Doc. A/50/60–S/1995/1, 3 January 1995, paras. 47–56).

4 See, for example, the latest Statement by the President of the Security Council, UN Doc. S/PRST/2008/16, 20 May 2008; earlier statements: UN Doc. S/PRST/2005/20, 26 May 2005; UN Doc. S/PRST/2004/33, 22 September 2004; UN Doc. S/PRST/2001/5, 20 February 2001; see also the annual Reports of the General Assembly Special Committee on Peacekeeping Operations and its Working Group: http://www.un.org/ Depts/dpko/dpko/ctte/spcmt_rep.htm. Even several landmark documents on peacekeeping contain ample reference to peacebuilding: UN Department of Peacekeeping Operations/Department of Field Support, United Nations Peacekeeping Operations: Principles and Guidelines, New York, 18 January 2008; Report of the Panel on United Nations Peace Operations ("Brahimi Report", UN Doc. A/55/305-S/2000/809, 21 August 2000).

5 Security Council Resolution (SC Res.) 1645 (2005), 20 December 2005; General Assembly Resolution (GA Res.) 60/180, 20 December 2005.

tion given by the international community to post-conflict peacebuilding. In practise it has already assumed a central role in the coordination of various country-specific peacebuilding processes.[6] The composition of the Commission's Organisational Committee as well as the criteria for participation in its meetings reflect a desire to take into account demands for fair representation, transparency, and legitimacy by involving as many concerned actors as possible. While the Commission will be mostly active in situations in which the target states are extremely cooperative, it cannot be excluded that it once will have to deal with cases that are much more controversial from a legal point of view.

The spectrum of actors involved in the planning, financing, coordination and implementation of peacebuilding measures ranges from international and regional intergovernmental institutions, individual states and coalitions of the willing to non-governmental organisations and transnational corporations. Due to its global reach, the United Nations is virtually predestined to bring together all these different actors and coordinate their activities. In some cases the support of the United Nations is limited to opening small offices on the ground which merely serve as points of contact or which advise the local authorities. In other cases civilian missions are entrusted with concrete monitoring and implementation tasks, for example during elections or in the context of security-sector reform. Larger and more complex mission formats of UN peacebuilding include multidimensional peacekeeping operations and international territorial administrations.[7]

6 Christian Schaller and Ulrich Schneckener, *Das Peacebuilding-System der Vereinten Nationen. Neue Mechanismen – neue Möglichkeiten?*, Berlin: Stiftung Wissenschaft und Politik, 2009; Center on International Cooperation/International Peace Institute, *Taking Stock, Looking Forward: A Strategic Review of the Peacebuilding Commission*, New York 2008.

7 For a comprehensive analysis of the role of the United Nations in post-conflict settings see Simon Chesterman, *You, The People. The United Nations, Transitional Administration, and State-Building*, Oxford and New York: Oxford University Press, 2004.

The Potential Impact of Peacebuilding

Post-conflict peacebuilding has an impact on many different areas of public life and order in the target state. Typical measures include, for example, a restructuring of general public services and public transport infrastructure, the health system, educational institutions, and various sectors of the economy as well as of the security sector. Such measures usually go hand in hand with the reintegration and rehabilitation of former combatants, the repatriation of refugees and internally displaced persons, and the promotion of reconciliation projects. Sometimes the domestic legal order and law enforcement structures must be reformed which leads to a complex interplay between existing national laws and the norms set by international actors. These norms are supposed to have a direct regulatory impact at the domestic level, while acts of local authorities often become subject to international scrutiny. In some cases external interference also extends to sensitive political areas triggering fundamental changes in the constitutional order and the political system of the target state. A particularly delicate issue, for instance, is whether and to what extent the selective support or exclusion of certain political groups is permissible. Ultimately, a comprehensive peacebuilding process may even have an impact on the foreign policy of the target state and lead to new geopolitical configurations.

Any such action which qualifies as an intervention in the sovereign sphere of a state requires a title under international law, irrespective of whether it is carried out for the purpose of post-conflict peacebuilding or any other purpose. Respect for state sovereignty as reflected by the principle of sovereign equality of all states, enshrined in Article 2 (1) of the UN Charter, is one of the basic pillars of international law. It implies that each state has the right to freely choose and develop its own political, economic, social, and cultural system.[8] Under customary international law state sovereignty is bolstered by the principle of non-intervention. According to this principle, states must refrain from intervening in matters which are essentially within the domestic jurisdiction of other states. Even the United Nations as an organisation is bound to respect the principle of non-intervention pursuant to Article 2 (7) of their Charter. Therefore, the legality of country-specific peacebuilding activities generally depends on the approval of these measures by the target state.

State sovereignty, however, does not enjoy absolute protection under international law. The *domaine réservé* of a state ends where the state bears certain responsibility under international law. Therefore, it becomes more and more difficult for states to ward off external interference by simply invoking their sovereign rights and the principle of non-intervention.[9] For example, every state is obliged under international law to protect its population from grave human rights violations and to eliminate trans-border threats emanating from its territory. Thus, it has been stated that "[t]he growing deconstruction of state sovereignty, the crystallisation of the concepts of erga omnes obligations and 'international community', and the increasing 'individualization of international law' in the 20th century have contributed to an erosion of the principle of non-intervention, which facilitates peacebuilding and reconstruction efforts through multidimensional peacekeeping operations."[10] The most important qualification of the principle of non-intervention is laid down in the UN Charter: Under a system of collective security the members of the United Nations have conferred on the Security Council the primary responsibility for the maintenance of international peace and security. This includes the Council's competence

8 Bardo Fassbender and Albert Bleckmann, in: Bruno Simma (ed.), *The Charter of the United Nations – A Commentary, Second Edition*, Vol. 1, Oxford and New York: Oxford University Press, 2002, Article 2 (1), p. 86.

9 *The Responsibility to Protect.* Report of the International Commission on Intervention and State Sovereignty, Ottawa: International Development Research Centre, 2001, http://www.iciss.ca/pdf/Commission-Report.pdf; Francis M. Deng et al., *Sovereignty as Responsibility. Conflict Management in Africa*, Washington, DC: Brookings, 1996.

10 Carsten Stahn, *Jus ad bellum – jus in bello... jus post bellum: Towards a tripartite conception of armed conflict*, ESIL Inaugural Conference, Florence, 15 May 2004; for a later version of the text see: "'Jus ad bellum', 'jus in bello'... 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force", in: *European Journal of International Law*, Vol. 17, No. 5, 2006, pp. 921–943.

under Chapter VII to authorise enforcement measures which otherwise would be in conflict with the principle of non-intervention or the prohibition on the use of force.

The Consent of the Target State as a Basic Precondition for Peacebuilding

A state is generally free to allow other states or international organisations to send personnel, maintain premises, carry out certain activities, and exercise specific powers on its territory. Therefore, most peacebuilding projects do not raise any general legal concerns if they are initiated and carried out in close cooperation between the country in need and the international community. Burundi and Sierra Leone, for example, were the first two states to address the Security Council with their request to be placed on the agenda of the UN Peacebuilding Commission, thereby indicating their general willingness to broadly cooperate under that new format. If the United Nations plans the establishment of a peacebuilding office or the deployment of a larger mission, implementation regularly requires the drafting of a special agreement which contains the technical terms and conditions concerning the status of the international presence in that country (Status of Missions Agreement, SOMA). The question of legal title, however, deserves closer consideration whenever external actors assume executive, legislative or judicial functions on behalf of the host state. Such action, if not based on a Chapter VII mandate of the Security Council, would require a formal delegation of rights by the host state.

A particularly interesting example of a unilateral delegation of powers is the Declaration of Independence by the Assembly of Kosovo of February 2008 which, inter alia, concerns the relationship between Kosovo and the international civilian and military presence on its territory.[11] In this Declaration the Assembly "clearly, specifically, and irrevocably" affirmed that Kosovo shall be legally bound to comply with the obligations under the Ahtisaari Plan which was drafted as a blueprint for establishing statehood. At the same time the Assembly expressly invited and welcomed the UN Mission in Kosovo (UNMIK), the European Union rule of law mission (EULEX), and NATO to supervise and assist in the implementation of the Ahtisaari Plan.

Apart from this unique example there are many other ways for states to articulate that they are willing to accept foreign peacebuilding assistance. Afghanistan, for example, expressed its consent to a strong international engagement on its territory several times since the beginning of the Bonn Process in December 2001. One of the landmark political documents paving the way for sustained cooperation on various sectors between the Afghan government and the international community was the Afghanistan Compact of February 2006.[12]

Where an armed conflict was formally ended by a peace treaty the parties may also settle certain aspects of the post-conflict phase in that treaty.[13] Such negotiations often involve the United Nations, other international or regional organisations, or third states. One of the more recent examples is the Lomé Peace Agreement of July 1999 between the Government of Sierra Leone and the Revolutionary United Front.[14] By this agreement the parties, inter alia, envisaged an expanded peacebuilding role of the Economic Community of West African States (ECOWAS), its Cease-Fire Monitoring Group (ECOMOG), and the UN Mission in the country (UNOMSIL, later UNAMSIL). As far as the UN Security Council is actively seized of a particular conflict, it often formally endorses the following peace process and authorises further measures to facilitate its implementation.[15]

11 Republic of Kosovo, Assembly, Kosovo Declaration of Independence, 17.2.2008, http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en.

12 The London Conference on Afghanistan, *The Afghanistan Compact*, London, 31 January – 1 February 2006, http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf.

13 Christine Bell, *On the Law of Peace. Peace Agreements and the Lex Pacificatoria*, Oxford and New York: Oxford University Press, 2008.

14 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, 7 July 1999, http://www.usip.org/library/pa/sl/sierra_leone_07071999_toc.html.

15 See, for example, SC Res. 1260 (1999) of 20 August 1999 relating to the Lomé Peace Agreement. See also Res. 1383 (2001) of 6 December 2001 endorsing the "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions" of 5 December 2001 (Bonn Agreement, UN Doc. S/2001/1154, 5 December 2001).

In reality, however, there are also cases in which the country in need is too weak to guarantee a safe environment which is necessary for carrying out civilian peacebuilding projects. State failure often provides an ideal breeding ground for terrorism, organised crime and other forms of violence. Such conditions may lead to serious violations of human rights and international humanitarian law; and they may cause the spread of infectious diseases, famine, and large refugee flows. These threats can also seriously affect other states, contribute to the destabilisation of a whole region, or evolve into threats to international peace and security. Sometimes the process of state failure makes it even impossible for external actors to find competent and capable local authorities to cooperate with.

A legally valid consent for the purpose of peacebuilding is especially hard to attain after an internal armed conflict if it is not clear which faction has the authority to act on behalf of the state. Under such extreme conditions an implied consent may not be assumed too easily. Even a failed state does not lose its sovereignty and is basically protected by the principle of non-intervention.[16] This means that the internal affairs of failed states do not automatically fall within the competence of the international community. In all these situations which still may pose a threat to the peace, it is the responsibility of the UN Security Council to provide the necessary legal basis for a more robust approach to post-conflict peacebuilding.

16 Volker Epping, "Völkerrechtliche Aspekte defektiver Staatlichkeit", in: Epping and Heintze (eds.), *Wiederherstellung staatlicher Strukturen in Nach-Konflikt-Situationen* [note 2], pp. 9–23 (16); Robin Geiß, *"Failed States". Die normative Erfassung gescheiterter Staaten*, Berlin: Duncker & Humblot, 2005, pp. 120–126.

Peacebuilding and Coercive Measures under Chapter VII of the UN Charter

Under the critical conditions just described above, external action should be first and foremost concentrated on restoring and maintaining basic public security and public order. Local security institutions have to be strengthened, former members of the armed forces or civilians who were taking part in the hostilities must be disarmed and demobilised, and sometimes concerted international action is necessary to effectively combat criminal or terrorist structures. To achieve a minimum amount of security on the ground it may even be inevitable to temporarily restrict the exercise of certain individual rights and freedoms. Responses to insurgents or terrorist threats, for instance, often comprise measures such as curfews, assembly bans, house searches, interrogations, or preventive internment. Even limited military operations may be a last resort to bolster and protect civilian personnel engaged in peacebuilding projects at an early stage of the process. Therefore, it is important that the UN Security Council issue a binding mandate under Chapter VII of the Charter authorising the necessary action on the ground. If the host government withdraws its consent or if its consent proves invalid after the operation has been deployed, a Security Council mandate would provide sufficient legal cover for continuous external interference.

If the Security Council determines the existence of a threat to the peace according to Article 39 of the UN Charter, the door is open for a wide range of measures in order to maintain or restore international peace and security. Pursuant to Articles 25 and 48, all states must comply with and implement Security Council resolutions adopted under Chapter VII. Moreover, it follows from Article 103 that binding resolutions take precedence over the obligations of UN member states based on other international agreements – with the exception of jus cogens. Chapter VII provides the Security Council with wide discretion.[17] In some cases the Council classified situations as a threat to the peace in which hostilities have just been ended but in which there still remained a serious danger for the parties to relapse into armed conflict, such as in Haiti, Sierra Leone or Liberia.

Since the mid 1990s the Security Council has increasingly embraced elements of a positive concept of peace[18] as well as of a wider understanding of the notion of security.[19] This change in the perspective of the Council has cleared the way for reacting to serious violations of human rights and international humanitarian law,[20] for setting up international criminal tribunals for the Former Yugoslavia and Rwanda, and for establishing transitional administrations as in Kosovo or East Timor.[21] Even liberal values, such as the rule of law, and basic democratic principles of good governance have since played a greater role in the Council's deliberations on conflict prevention and peacebuilding.[22]

Another important trend in the practise of the United Nations is the readiness of the Security Council

17 Jochen A. Frowein and Nico Krisch, in: Simma (ed.), *The Charter of the United Nations* [note 8], Introduction to Chapter VII, p. 705; Article 39, pp. 719–720.

18 Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)", in: Stahn and Kleffner (eds.), *Jus Post Bellum* [note 2], pp. 93–112 [100].

19 See the numerous thematic debates held by the Security Council which reflect a wider understanding of the notion of security. Active Thematic Issues on the Security Council's Agenda include: Children and Armed Conflict; Cooperation with Regional Organisations; Energy, Security and Climate; Justice, Impunity & Rule of Law Issues; Natural Resources and Conflict; Protection of Civilians in Armed Conflict; Security Council Working Methods; Security Sector Reform; Sexual Exploitation; Small Arms; Terrorism; Women, Peace and Security. For an overview see http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1080535/k.9AFD/THEMATIC_ISSUES.htm.

20 Georg Nolte, "Practice of the UN Security Council with Respect to Humanitarian Law", in: Klaus Dicke et al. (eds.), *Weltinnenrecht. Liber amicorum Jost Delbrück*, Berlin: Duncker & Humblot, 2005, pp. 487–501; Thomas G. Weiß, "The Humanitarian Impulse", in: David M. Malone (ed.), *The UN Security Council. From the Cold War to the 21st Century*, Boulder: Lynne Rienner, 2004, pp. 37–54; Joanna Weschler, "Human Rights", in: *ibid.*, pp. 55–68.

21 Jochen A. Frowein and Nico Krisch, in: Simma (ed.), *The Charter of the United Nations* [note 8], Article 39, pp. 722–726 Article 41, pp. 743–745.

22 See, for example, the Security Council Declaration on Strengthening the Effectiveness of the Security Council's Role in Conflict Prevention, Particularly in Africa, Res. 1625 (2005), 14 September 2005, Annex; and UN Doc. S/PRST/2005/30, 12 July 2005.

to assign more and more specific peacebuilding tasks to multidimensional peace operations. Some of the most prominent examples are MONUC in the Democratic Republic of the Congo, UNMIL in Liberia, UNMIS in Sudan, UNOCI in Côte d'Ivoire, and MINUSTAH in Haiti.[23] These operations are usually based on a robust mandate under Chapter VII of the UN Charter and contain a military and civilian component including police personnel. Their mandates typically comprise such tasks as the protection of civilians including humanitarian personnel, the disarmament, demobilisation, and reintegration of former combatants, the preparation for security sector reforms, the reconstruction of judicial authorities, the promotion of the rule of law, or the investigation of human rights violations. Although peace operations deployed under Chapter VII do not require the consent of the host state, such consent is desirable for several reasons as has been pointed out in the previous chapters of this paper. As far as consent is actually attained, the United Nations and the host state usually conclude an additional Status of Forces Agreement (SOFA). Such agreements, inter alia, regulate the status of the military or police contingents, their freedom of movement within the areas of operation, the privileges and immunities of the operation and its personnel, the applicability of local laws, the settlement of claims and disputes, and other related issues.

The most far-reaching and intrusive form of peacebuilding, however, are international territorial administrations such as the UN Transitional Authority in Cambodia (UNTAC), the UN Transitional Administration for Eastern Slavonia (UNTAES), the UN Interim Administration Mission in Kosovo (UNMIK) or the UN Transitional Administration in East Timor (UNTAET).[24] The primary characteristic of this format is the fact that the United Nations or other external actors assume governmental functions on behalf of the administered state or territory. Such missions have gradually been developed from the classical concept of peacekeeping operations. Many of the traditional peacekeeping missions of the first and second generation which were deployed with the approval of the host states have been based on Chapter VI of the UN Charter. Under this Chapter the Security Council may investigate any dispute or other situation which might endanger international peace and security and make adequate recommendations for settlement. As these recommendations are not binding, the settlement under Chapter VI essentially depends on the willingness of the parties to cooperate. In practise, however, the idea of an impartial, neutral and rather passive role of the United Nations in peacekeeping under Chapter VI does hardly match the realities and necessities of an effective territorial administration. Therefore, such administration is usually established by the Security Council as some form of enforcement mechanism on the basis of Chapter VII of the UN Charter. Within this Chapter, Article 41 constitutes the legal basis for any type of non-military enforcement action. This Article provides the Security Council with wide discretion in cases in which it determined the existence of a threat to the peace according to Article 39 of the Charter. On the basis of Article 41 the Council is even entitled to intervene in matters which are essentially within the domestic jurisdiction of a state if it decides that the intervention is necessary to maintain or restore international peace and security. This includes the authority "to fill governance gaps, to replace existing governmental institutions or to shape the internal political organisation of a territorial entity. [...], providing that the measures of the Council itself are temporary in nature and applied in accordance with the constraints binding the Council under Article 24 (2) of the Charter and general international law."[25] If a territorial administration also has a military component, such as in the cases of Kosovo and East Timor, the legal basis for the deployment of troops would be Article 42 of the UN Charter which authorises the Security Council to adopt enforcement measures involving the use of armed force.

23 For a summary of their current mandates see http://www.un.org/Depts/dpko/dpko/. See also the Annual Review of Global Peace Operations 2008. A Project of the Center on International Cooperation, Boulder: Lynne Rienner, 2008.

24 On the legal aspects of international territorial administration see Carsten Stahn, *The Law and Practice of International Territorial Administration. Versailles and Beyond*, Cambridge: Cambridge University Press, 2008; Rüdiger Wolfrum, "International Administration in Post-Conflict Situations by the United Nations and Other International Actors", in: Armin von Bogdandy and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 9, 2005, pp. 649–696.

25 Stahn, *The Law and Practice of International Territorial Administration* [note 24], p. 428.

Building Peace in a Positive Sense

The concept of post-conflict peacebuilding is inextricably linked to the notion of a "positive peace" describing a situation which is not only characterised by the absence of hostilities but by many other political, economic and social accomplishments.[26] Accordingly, a comprehensive understanding of peacebuilding must include the establishment of liberal values, such as the rule of law, and basic democratic principles of good governance; and it must respect peoples' right to self-determination and human rights.[27]

Self-determination

In the context of peacebuilding, peoples' right to self-determination may come into play especially in situations in which external actors attempt to establish a new political system within a state which suffered a total breakdown or elimination of its former regime. This right, which is referred to in Article 1 (2), and Article 55 of the UN Charter and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966, has become one of the core principles of customary international law. It states that all peoples have the right to decide freely and without any external interference about their political status and to determine their own economic, social, and cultural development.[28] Every state is obliged to respect this right in accordance with the provisions of the Charter.[29] Only the Security Council under Chapter VII of the UN Charter has the authority to temporarily override the exercise of the right to self-determination. Yet it is understood that a people must not be prevented from exercising this right indefinitely. Even in the case of an international territorial administration or a military occupation, any changes in the internal order of the administered or occupied state must leave the door open for the people of that state to effectively reassert its right to self-determination as soon as possible. Sometimes, however, armed conflicts are fought over the territorial status of a state. The prototype are secessionist conflicts in which a people fights for independence or unification with another state. Even if the war has been formally ended, these claims for secession may promptly recur in the context of the following peacebuilding process. Such an offensive assertion of the right to external self-determination is always in conflict with the sovereign interests of the state whose territory is concerned. Moreover, the pursuit of secessionist ambitions also has repercussions for the international order since it may affect the security and stability of neighbouring states or regions. Therefore, the issue of secession is much more contentious than the claim for autonomy or other forms of internal self-determination.[30] As such it places an immense burden on a peacebuilding process – the recent case of Kosovo is a prime example.[31]

Human rights

The establishment of conditions for a positive and durable peace is also inseparably linked to effectively guaranteeing human rights.[32] International cooper-

26 On the concept of "positive peace" see various seminal works by Johan Galtung, many of which are collected in: Johan Galtung, *Essays in Peace Research 1–6*, Copenhagen: Ejlers, 1975–1988.

27 The connection between the elements of good governance and the achievement of true peace and security in any new and stable political order was already recognised by the Secretary-General in his Agenda for Peace [note 3], para. 59.

28 Daniel Thürer, "Self-determination", in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam et al.: North-Holland, 2000, pp. 364–374.

29 See also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration), Annex to GA Res. 2625 (XXV), 24 October 1970.

30 See Marcelo G. Kohen (ed.), *Secession. International Law Perspectives*, Cambridge: Cambridge University Press, 2006.

31 Christian Schaller, "Die Sezession des Kosovo und der völkerrechtliche Status der internationalen Präsenz", in: *Archiv des Völkerrechts*, Vol. 46, 2008, pp. 131–171.

32 On the relationship between jus post bellum and human rights: Ralph Wilde, "Are Human Rights Norms Part of the Jus Post Bellum, and Should they Be?", in: Stahn and Kleffner (eds.), *Jus Post Bellum* [note 2], pp. 163–186.

ation in promoting and encouraging respect for human rights and fundamental freedoms is already listed among the purposes of the United Nations in Article 1 (3) of the UN Charter. Moreover, the connection between peace and human rights is also reflected in the Preamble of the Universal Declaration of Human Rights of 1948 and numerous human rights treaties. In the context of post-conflict peacebuilding, human rights play a particularly important role whenever the intervening parties at an early stage of the process have to take far-reaching enforcement measures in order to restore and maintain public security and order. Even under critical security conditions, deviation from specific obligations is only permitted within the strict prerequisites of the emergency clauses contained in the relevant human rights treaties.[33]

Respect for human rights, however, is more than just a normative requirement that guides the intervening parties' behaviour vis-à-vis the local population. Rather, one of the primary objectives of peacebuilding must be to establish human rights as a fundamental pillar of the post-conflict order. Special emphasis should also be given to the building of institutions which are able to monitor respect for human rights and prosecute violations. Creating a sustained commitment to human rights in post-conflict societies, however, poses a particular challenge if the population of the war-torn state was long deprived of such rights and if arbitrary acts of government have systematically undermined the rule of law within that state. Ideally, the foundations for a culture of human rights are laid as early as possible. To this end the multidimensional mandates of peacekeeping operations regularly contain specific provisions on the protection and promotion of human rights and on enforcing the rule of law.[34] Moreover, human rights elements have become an essential component of modern peace treaties.[35] These treaties do not only provide for a body of substantial rights but, at the same time, arrange for the establishment of the necessary institutional and procedural structures.

33 See Article 4 of the International Covenant on Civil and Political Rights; Article 15 of the European Convention on Human Rights; Article 27 of the American Convention on Human Rights.

34 See note 23.

35 See Stahn, "Jus Post Bellum: Mapping the Discipline(s)" [note 18], pp. 97, 100; Christine Bell, "Peace Agreements: Their Nature and Legal Status", in: *American Journal of International Law*, Vol. 100, No. 2, 2006, pp. 373–412.

Rule of law

In his report of 2004 entitled "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", Secretary-General Kofi Annan described the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[36] This brief description points at the manifold conceptual and practical challenges linked to the establishment of the rule of law in the context of post-conflict peacebuilding. Considering the specific role of the United Nations in filling the rule of law vacuum evident in many post-conflict societies, the Secretary-General emphasised that it was important not to build international substitutes for national structures, but to help build the capacity of national justice sector institutions, and facilitate national consultations on justice reform and transitional justice. Moreover, it must be noted that the rule-of-law standards to be implemented in a typical post-conflict setting cannot be simply transferred from sophisticated law systems as they may be found in some western democracies. Under German constitutional law, for example, the principle which is called "Rechtsstaatsprinzip" has been developed over many decades by courts and academics. The many dogmatic subtleties which characterise the application of this principle make it an unsuitable yardstick to be applied to each and every post-conflict context, particularly not in the critical early stages of a peacebuilding process. Although the promotion of the rule of law has become a principle which is part of almost every peacebuilding strategy, the concept still needs much more doctrinal clarification.[37]

36 UN Doc. S/2004/616*, 23 August 2004, para. 6.

37 On the promotion of the rule of law in the UN context in general see a section of various articles by Thomas Fitschen and others, in: Armin von Bogdandy and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 12, 2008, pp. 345–483. On the establishment of the rule of law in post-conflict societies: Hans-Joachim Heintze, "Völkerrechtliche

Democratic principles

Post-conflict peacebuilding in states which have experienced long periods of non-democratic rule raises the question of whether the international community has a responsibility to push for the establishment of democratic structures in the reconstruction of these states.[38] International law traditionally takes a neutral stance towards different forms of government and the underlying ideologies. It is the conduct rather than the constitution of a state which is of relevance from the perspective of international law. Although there is no universal definition of democracy, certain concepts under international law, such as the right to self-determination and human rights, certainly contribute to the realisation of democratic elements in the international community. The International Covenant on Civil and Political Rights, for instance, includes the rights to freedom of opinion, information, assembly and association, as well as the rights to participate in the conduct of public affairs directly or through freely elected representatives, to vote and stand for election, and to have access to public service.[39] References to the connection between democratic practises and the achievement of true peace and security can be found already in the Secretary-General's Agenda for Peace of 1992.[40] In the 2000 Millennium Declaration UN member states expressly confirmed that freedom as a fundamental value in international relations can be best assured through democratic and participatory governance based on the will of the people. Moreover, they expressed that they will "spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognised human rights and fundamental freedoms, including the right to development." They have therefore agreed to strengthen the capacity of all states to implement the principles and practises of democracy and respect for human rights, including minority rights, to work collectively for more inclusive political processes, allowing genuine participation by all citizens in all countries, and to ensure the freedom of the media to perform their essential role and the right of the public to have access to information.[41]

In addition, basic democratic principles are also increasingly reflected in the statements and decisions of the Security Council. Examples include early resolutions on South Rhodesia and South Africa as well as reactions to the crises in Somalia, Haiti, Sierra Leone and numerous other states.[42] In a declaration on the role of the Security Council in humanitarian crises in July 2005, its President emphasised that democratic, economic and social reforms were essential elements of a successful consolidation of peace.[43] Shortly thereafter the Security Council at the level of heads of state and government reaffirmed the necessity of fostering good governance and democracy.[44] It cannot be examined in this paper whether a right to democratic government is actually emerging under international law. The practise of the United Nations just described seems to corroborate such claims. In any case, however, if coupled with a crises which itself constitutes a threat to the peace, violations of democratic principles may be sanctioned by the Security Council under Chapter VII of the UN Charter.[45]

Aspekte der Wiederherstellung der Rule of Law in Nachkriegsgesellschaften", in: Epping and Heintze (eds.), *Wiederherstellung staatlicher Strukturen in Nach-Konflikt-Situationen* [note 2]; pp. 25–44.

38 On the issue of "democratic entitlement" see Thomas M. Franck, "The Emerging Right to Democratic Governance", in: *American Journal of International Law*, Vol. 86, 1992, pp. 46–91.

39 Articles 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights.

40 See note 3, paras. 19, 59, 81, 82.

41 UN Millennium Declaration, GA Res. 55/2, 8 September 2000, paras. 6, 24, 25.

42 See, for example, SC Res. 814 (1993), 26 March 1993 (Somalia); SC Res. 940 (1994), 31 July 1994 (Haiti); SC Res. 1132 (1997), 8 October 1997 (Sierra Leone); SC Res. 1423 (2002), 12 July 2002 (Bosnia and Herzegovina). Most recent examples include resolutions on the peace process and the formation of a democratically elected government and institutions in Nepal (SC Res. 1864 [2009], 23 January 2009), and on the further development of democratic structures in Iraq, Burundi, Sierra Leone, Haiti, and Timor-Leste. See also: Gregory H. Fox, "Democratization", in: David M. Malone (ed.), *The UN Security Council. From the Cold War to the 21st Century*, Boulder: Lynne Rienner, 2004, pp. 69–84.

43 UN Doc. S/PRST/2005/30, 12 July 2005.

44 Declaration on Strengthening the Effectiveness of the Security Council's Role in Conflict Prevention, Particularly in Africa, SC Res. 1625 (2005), 14 September 2005.

45 Jochen A. Frowein and Nico Krisch, in: Simma (ed.), *The Charter of the United Nations* [note 8], Article 39, p. 725.

The Challenge of Peacebuilding after Military Intervention

Particular problems arise if a military intervention is supposed to provide the ground for a comprehensive transformation of the political design of the target state. In this context it is requisite from a legal perspective to elaborate on the nexus between the justification of the use of force and the responsibilities of the intervening parties in the aftermath of the intervention. The prohibition on the use of force as enshrined in Article 2 (4) of the UN Charter is one of the fundamental pillars of international law. According to this provision, every state shall refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any other state, as well as from such threat or use of force which is in any other manner inconsistent with the purposes of the United Nations. Therefore, military interventions may be carried out under international law only with the authorisation of the Security Council acting under Chapter VII, or on the basis of the right to self-defence as laid down in Article 51 of the UN Charter. These norms, however, do not automatically vest the intervening party with a legal title for further transformative action on the territory of the target state after the military operation is completed. The authorisation to enforce such changes cannot simply be derived from the legal basis of the preceding military intervention but must be provided for by a clear decision of the Security Council who determines the parameters for any subsequent interference with the sovereignty of the target state. The only exception are situations of belligerent occupation during an international armed conflict. These situations are governed by special norms which provide the occupying power with the authority to exercise certain rights on the territory of the occupied state.

Establishing a post-conflict order after the illegal use of force

Most problematic are peacebuilding operations immediately following a military intervention which was in clear violation of international law. Of fundamental importance in this context is the question of whether and how violations of the prohibition on the use of force affect the legality and legitimacy of the subsequent post-conflict order. In general, considerations of just peace should be deemed to apply equally to all parties to an armed conflict – irrespective of the cause of the resort to force. This means that a modern "jus post bellum" should apply without prejudice to any prior violations of the use of force or international humanitarian law. Such violations even increase the need for building a fair and just peace. The application of a modern "jus post bellum", however, includes that the parties to the conflict as well as individuals are held responsible for such violations. Therefore, it is essential to establish under the rule of law specific mechanisms for the fair assessment of reparation and compensation claims as well as combined justice and reconciliation models, including criminal tribunals and truth commissions.[46]

If the legal basis of the preceding military intervention appears questionable, it is all the more important that the intervening parties and the international community endeavour, as quickly as possible, to place subsequent peacebuilding efforts on a clear and separate legal basis thereby virtually "neutralising" the process. This is of paramount importance in order to avoid a state of legal uncertainty. In cases in which the affected target state is not yet itself capable of taking the relevant decisions, the Security Council should step in – even if it did not approve the preceding intervention – and authorise external actors to take all necessary measures to help rebuild the affected state and to facilitate a swift transition from war to peace.

Nevertheless, even if the Security Council gives its express approval and support to a peacebuilding process, there is no guarantee that this process will be perceived as legitimate. Of particular concern in this context is the question as to what extent the intervening parties may retain influence on the newly created structures in the long term. Especially if an interim or transitional government is appointed by the intervening parties immediately after an enforced regime

46 See Mark Freeman and Drazan Djukić, "Jus Post Bellum and Transitional Justice", in: Stahn and Kleffner (eds.), *Jus Post Bellum* [note 2], pp. 213–227.

change, the new government always faces a high risk of its independence and legitimacy being called into question, both by its own population as well as by other governments. This is particularly true if the new administration acts as a puppet government under the de facto control of the intervening parties. Although it is vital for a war-torn state to be preserved from sliding into a state of anarchy after its former government has been abolished, the intervening parties and the international community should proceed with utmost caution and restraint when shaping the future of that state. In particular, it must be ensured that the people are not deprived of their right to freely chose their own political system and to reorganise the economic, social and cultural fabric of their polity.

A “Responsibility to Rebuild”

A specific “Responsibility to Rebuild” was spelled out by the International Commission on Intervention and State Sovereignty (ICISS) in its report “The Responsibility to Protect” of 2001.[47] The Commission emphasised that if a military intervention was undertaken in order to prevent or stop genocide, war crimes, crimes against humanity, or ethnic cleansing, there should also be a genuine commitment to provide full assistance with recovery, reconstruction, and reconciliation. The aim should be to address the causes of the harm the intervention was designed to halt or avert. Thus, the responsibility included an active follow-up engagement to cope with the consequences of the military intervention, to avoid a relapse into hostilities, and to establish the conditions for a durable peace and sustainable development.

In 2005 the “Responsibility to Protect” was reaffirmed by UN member states in the outcome document of the World Summit.[48] The cautious wording, however, reflects the lasting controversy among member states about the scope and nature of the concept. Many ideas promoted by the ICISS in 2001, including the formulation of a “Responsibility to Rebuild”, have not made their way into the final outcome document. Criticism and opposition came from all parts of the world. Most attention so far has been paid to the military dimension of the “Responsibility to Protect”. China and various states of the Non-aligned Movement opposed the concept arguing that it would further interventionist ambitions. The United States, on the other side, claimed that in contrast to the obligation of each individual state to protect its population from genocide, war crimes, crimes against humanity, and ethnic cleansing, the responsibility of the international community to act in these situations was merely of a moral and not of a legal nature.

After more than three years of discussion following the World Summit efforts to operationalise and implement the concept of the “Responsibility to Protect” have now become visible at the UN level. In January 2009 UN Secretary-General Ban Ki-moon issued his first report on the topic dealing with the protection responsibilities of each state (“pillar one”), international assistance and capacity-building (“pillar two”), and approaches to facilitate a timely and decisive response in emergency situations (“pillar three”).[49] The remarks and recommendations made with respect to “pillar two” are particularly instructive from the perspective of post-conflict reconstruction, namely when it comes to building the capacities of war-torn states to prevent genocide and other serious crimes on their territory. Thus, the “Responsibility to Protect”, irrespective of whether it already has become an emerging norm, may at least serve as another yardstick for peacebuilding. It may help the international community to determine what kind of assistance is necessary in cases where there is a certain risk that a state slides into a situation of unfolding violence directed against its civil population. In such cases, taking recourse to the “Responsibility to Protect” offers plausible arguments to justify even more intrusive peacebuilding measures.

Peacebuilding under the law of belligerent occupation

The law of belligerent occupation – as codified in the Hague Regulations Respecting the Laws and Customs of War on Land of 1907, the Fourth Geneva Convention of 1949 (GC IV) and the First Additional Protocol of 1977 (AP I) – entitles states, which actually exercise control over foreign territory during an international armed conflict, to interfere extensively with the

47 The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty [note 9]. The Commission was appointed in September 2000 on the initiative of the Canadian government.

48 2005 World Summit Outcome (GA Res. 60/1, 16 September 2005, paras. 138, 139).

49 *Implementing the Responsibility to Protect.* Report of the Secretary-General (UN Doc. A/63/677, 12 January 2009).

sovereign sphere of the occupied state even without Security Council authorisation.[50] Although this body of law may have a considerable impact on the design of the post-conflict order in its early stages, it does not provide a suitable legal basis for wide-ranging and long-term transformative measures. The occupied state must not be deprived of its sovereign rights. In particular, the occupant is not allowed to take any action which would cause irreversible changes in the constitutional order of the occupied state or a radical alteration of its population structure.[51] Neither can forcible regime-change be justified with reference to the law of occupation.[52] But even interventions in the legal system or in the economic and social sector are only permissible within strict limits.

Article 43 of the Hague Regulations expressly stipulates that the occupant shall take all the measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. Thus, in principle the local laws shall continue to apply and the local administrative and judicial authorities shall continue to be operative and to exercise their jurisdiction. An important exception to this principle follows from Article 64 of GC IV. Pursuant to paragraph 1 of this regulation, the occupying power may repeal or suspend the penal laws of the occupied territory in cases where these laws constitute a threat to its security or an obstacle to the application of the relevant Convention. Paragraph 2 even permits the occupying power to subject the population of the occupied territory to provisions which are essential to enable the occupying power to fulfil its obligations under the Convention, to maintain the orderly government of the territory, and to ensure its own security. The wording of this paragraph, unlike paragraph 1, contains no explicit reference to criminal law and, therefore, seems to cover also the enactment of administrative, civil law and other legal regulations. Thus, Article 64 of GC IV grants the occupant legislative powers that are far more extensive than those envisaged by Article 43 of the Hague Regulations which obliges the occupying power to respect, "unless absolutely prevented", the laws in force in the country. However, due to the different wording of Articles 43 and 64, there is no universal and consistent state practise. Even among scholars there seems to be a fundamental controversy over the interplay between the two provisions and the question remains as to what a extent an occupying power might interfere with the legal system of the occupied state.[53]

50 See, in particular, Articles 42–56 of the Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907; Articles 27 ff and 47–78 of Geneva Convention (IV) Relative to the Protection of Civilians in Times of War of 1949.

51 On the limits of the law of occupation see Hans-Peter Gasser, "Belligerent Occupation", in: Dieter Fleck (ed.), *Th Handbook of International Humanitarian Law*, Second Edition, Oxford and New York: Oxford University Press, 2008, pp. 270–311 (paras. 529 ff); Nehal Bhuta, "The Antinomies of Transformative Occupation", in: *European Journal of International Law*, Vol. 16, NO. 4, 2005, pp. 721–740.

52 Simon Chesterman, "Occupation as Liberation: International Humanitarian Law and Regime Change", in: *Ethics & International Affairs*, Vol. 18, No. 3, 2004, pp. 51–64 (56).

53 On these issues see: Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", in: *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 661–694 (686); Yoram Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, HPCR Occasional Paper Series, Fall 2004.

Conclusion

It is evident that post-conflict peacebuilding not only poses considerable political, strategic, and operational challenges but that it also has important legal implications. Although there is no specific instrument in international law dealing in a consistent way with all the major issues of how to build peace after an armed conflict, it is possible to identify certain norms and principles from different areas of law which are essential components of a modern "jus post bellum". While the concept of "jus post bellum" has traditionally been dealt with under the philosophical and moral perspective of just war theory,[54] efforts to explore the legal dimension of this concept have just begun.[55]

This study can only provide a rough orientation of the kind of legal issues that may become relevant during a peacebuilding process. In order to devise an elaborate legal framework for peacebuilding, it is necessary to further specify these issues and to develop a more coherent understanding of the applicable law and possible conflicts of law. A closer look should also be taken at the relevant practise of states and international institutions, in particular with respect to the negotiation of modern peace agreements. Such agreements often contain numerous provisions on the constitution and exercise of public authority and the promotion of individual rights.

It would be unrealistic to expect that the norms and principles applying to post-conflict situations and the reconstruction of states will be formally codified in a single treaty. Nevertheless, any attempt by states and international organisations to reaffirm and restate these norms and principles in their policy papers, doctrines, or resolutions would contribute to the promotion of the international rule of law. The UN Peacebuilding Commission in particular could be used as a forum to initiate discussions about the legal dimension of peacebuilding. A next step would be for the General Assembly to take up this topic. Over time such constant reaffirmation and systematic application of certain norms and principles may also lead to the emergence of new customary international law. Nevertheless, as the customary process is slow and cumbersome, expectations should be toned down. As far as both the principle of non-intervention and peoples' right to self-determination are concerned, there continues to be considerable political resistance from all sides among UN member states which makes it rather unlikely that the General Assembly will adopt a substantial declaration on these issues by consensus. Another option would be that the UN Security Council holds a thematic discussion on peacebuilding and international law. On the other hand it is perfectly clear that the permanent members would resist any push towards the development of formal criteria which could raise the political and moral pressure on the Council. These realities, however, should not frustrate scholarly and practical efforts to draw a clearer picture of the legal framework governing post-conflict peacebuilding.

54 Traces of a "jus post bellum" can be found already in the works of St. Augustine, Francisco de Vitoria, Francisco Suárez, Hugo Grotius, Emer der Vattel, and Immanuel Kant. For detailed references see Stahn, "Jus Post Bellum: Mapping the Discipline(s)" [note 18], pp. 94–95. Recent contributions have been made by, inter alia, Michael Walzer, "Just and Unjust Occupations", in: *Dissent Magazine*, 2004; Louis V. Iasiello, "Jus Post Bellum. The Moral Responsibilities of Victors in War", in: *Naval War College Review*, Vol. 57, No. 3/4, 2004, pp. 33–52; Brian Orend, "Justice after War", in: *Ethics & International Affairs*, Vol. 16, No. 1, 2002, pp. 43–56; id., "Jus Post Bellum", in: *Journal of Social Philosophy*, Vol. 31, No. 1, 2000, S. 117–137.

55 See notes 2 and 10.