

A *JUS POST BELLUM* FOR THE U.S. MILITARY: FACILITATING THE INTERNATIONAL LEGAL DEBATE ON POST-CONFLICT RECONSTRUCTION

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*The law is always lagging behind the logical and moral interpretation of social facts. It therefore tends to complete and improve itself the better to comply with what is required of it.*¹

INTRODUCTION

From the end of the Cold War to the current Iraq war, states have increasingly promoted intervention in failing, post-conflict, or underdeveloped states to attempt democratic reform and reconstruction.² The intent behind this state practice is to ensure full eradication of “the dysfunctional conditions that necessitated intervention in the first place.”³ History has shown that without reconstruction and rule of law efforts in these states, “human rights abuses and violence will recur and continue unchecked, posing ongoing threats not only to residents of post-conflict societies but also to global peace and security.”⁴ States, therefore, rationalize

¹ JEAN PICTET, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 462 (1966).

² For example, Haiti, in 1994, when the Security Council “Reaffirm[ed] that the goal of the international community remains the restoration of democracy . . . and the prompt return of the legitimately elected President” S.C. Res. 940, pmb., ¶ 4, U.N. Doc. S/RES/940, July 31, 1994, authorizing humanitarian intervention in Haiti. And again with Iraq in 2003 when President Bush stated:

The world has a clear interest in the spread of democratic values, because stable and free nations do not breed the ideologies of murder. They encourage the peaceful pursuit of a better life . . . A new regime in Iraq would serve as a dramatic and inspiring example of freedom for other nations in the region.

President George W. Bush, Speech to the American Enterprise Institute, Feb. 26, 2003. *See generally* THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 19-58 (1999) (discussing the rise of U.S. democracy assistance and the “worldwide democratic revolution” after the cold war).

³ JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 7 (2006).

⁴ *Id.*

intervention and post-conflict operations on the grounds of promoting development, democracy, and peace.⁵

As a result of this growing practice, post-conflict reconstruction has become an emerging international norm.⁶ The United States military has joined the global phenomenon of recognizing the significant impact of post-conflict reconstruction and rule of law reform in meeting the challenges and threats of the twenty-first century. In recent years, the military has changed its doctrine to reflect this recognition. Part I of this paper will illustrate an emerging international norm of post-conflict reconstruction, and how the U.S. military has embraced this norm as evidenced by current doctrine and operations.

Military forces play a vital role in the transition from war to peace. Forces on the ground will inevitably be the first actors engaged in reconstruction and rule of law reform after the completion of combat operations. As Iraq demonstrates, military forces must be able to take advantage of the immediate transition period from war to peace so that follow on efforts will not be met with resistance.⁷ In order to do so and promote the rule of law, it becomes imperative that postwar military operations are conducted with regard to the proper legal restrictions.

⁵ Kristi Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*, 1 (Social Development Papers: Conflict Prevention & Reconstruction, Working Paper No. 37, 2006).

⁶ It is best described as an emerging norm because of the tension that exists within its legal framework. *See generally* WAYNE SANDHOLTZ & KENDALL STILES, *INTERNATIONAL NORMS AND CYCLES OF CHANGE* (2009) (distinguishing emerging normative systems as those that still face considerable tension with related international norms, for example, the right to democracy is an emerging norm because it faces considerable tension with related international norms such as state sovereignty).

⁷ After intervention into a collapsed state, “there is likely to be an interim period when the intervention forces are alone in a position on the ground to exercise control and to influence events.” MICHAEL J. KELLY, *RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS: THE SEARCH FOR A LEGAL FRAMEWORK* 109 (1999); *see* STROMSETH ET AL., *supra* note 3, at 188-89 (discussing a “window of opportunity” after military intervention that, if taken advantage of, can alter the status quo and provide for change); John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25 WASH. Q. 85, 91 (2002) (noting that immediate security for the lives of civilians in the aftermath of large-scale violence is a precondition for achieving successful outcomes for post-conflict reconstruction).

But, what does, or should, the law after war look like?⁸ To put it another way, what are the rules that should govern the transition from war to peace and efforts at post-conflict reconstruction?⁹ Many scholars have described this period of transition from war to peace as a “legal vacuum,”¹⁰ or a “grey zone”¹¹ that puts reconstruction efforts into “legal limbo.”¹² Traditionally, there was only the law of war and the law of peace.¹³ There was no separate legal paradigm for the transition period between the two.¹⁴ With the rise of post-conflict reconstruction, however, developing a defined legal framework for this interim period has become an increasing international source of debate and new initiatives.¹⁵

Many problems surround defining a legal framework for post-conflict reconstruction. The

⁸ See generally, Hillary Charlesworth, *Law After War*, 8 MELB. J. INT’L L. 233 (2007) (considering some of the challenges for law after war).

⁹ The concept of this paper was inspired by the current research of the Oxford Institute for Ethics, Law and Armed Conflict, addressing the three dimensions of the just war paradigm. See University of Oxford, Department of Politics and International Relations, Oxford Institute for Ethics, Law and Armed Conflict, Research, <http://www.elac.ox.ac.uk/research/>.

¹⁰ BRIAN OREND, *WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE* 222 (2000).

¹¹ Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 AM. U. INT’L L. REV. 311, 316 (2008).

¹² Carsten Stahn, “‘Jus ad Bellum’, ‘Jus in Bello’ . . . ‘Jus Post Bellum’? – Rethinking the Conception of the Law of Armed Force’, 17 EUR. J. INT’L L. 921, 929 (2006).

¹³ See Stahn, *supra* note 11, at 316. Stahn, Reader in Public International Law and International Criminal Justice at the Swansea University School of Law, describes the causes of scholarly disregard for the period of transition from conflict to peace:

At the beginning of the twentieth century, it was difficult to conceive of the period of transition from war to peace as a separate normative paradigm because international law itself was seen as bipolar system focused on the strict distinction between states of war and peace. International law was composed of two sets of rules: the law of peace and the law of war. Both types of rules were treated as alternative frameworks . . . War and peace were seen as “ying” and “yang,” namely as two aggregates which complemented each other. However, the grey zone between the two poles, namely the transition from war to peace, was not treated as a paradigm in terms of law.”

Id.

¹⁴ *Id.*

¹⁵ See, e.g., The Chairman of the Panel On United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations, delivered to the Presidents of the General Assembly and Security Council*, U.N. DOC. A/55/305 – S/2000/809 (Aug. 21, 2000) [hereinafter *The Brahimi Report*] (making recommendations to enhance the United Nations’ capability of conducting peace operations).

concept of reconstruction itself creates tension within the law by clashing liberal, rights-based norms against norms that support sovereignty and national jurisdiction.¹⁶ This leads to issues addressing the controlling nature of different sources of the law within a post-conflict environment. For instance, whether international humanitarian law¹⁷ and human rights law¹⁸ should apply and if so to what degree? Complicating this further is the assumption that the way in which postwar operations are characterized will affect which source of law to draw upon. However, there is not yet a generally accepted concept of building peace in any post-conflict environment. This leads to an overall lack of consensus concerning accepted measures for “success.”¹⁹ Defining a legal framework for post-conflict reconstruction, therefore, becomes necessary to obtain the stable merger of competing bodies of law, and guide all actors, military or civilian, in successful postwar operations.²⁰

Although this paper does not attempt to specifically address all of the issues identified above, Part II will describe the basic features of the international legal framework for post-conflict reconstruction as it is now viewed in light of the Iraq war.²¹ Part II will also discuss

¹⁶ SANDHOLTZ & STILES, *supra* note 6, at 331.

¹⁷ International humanitarian law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It is often referred to as the law of war or the law of armed conflict. International Committee of the Red Cross, What is International Humanitarian Law? (Jul. 2004), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf).

¹⁸ Human rights is a broad area of concern and the potential subject matter ranges from the questions of torture and fair trial to the so-called third generation of rights, which includes the right to economic development and the right to health. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 529-30 (2003) (noting also that human rights problems occur in a specific legal context, such as in domestic law or within general international law, and that there really is no such entity as “International Human Rights Law”).

¹⁹ CHARLES T. CALL & ELIZABETH M. COUSENS, INT’L PEACE ACAD., ENDING WARS AND BUILDING PEACE 3 (2007), http://www.ipacademy.org/asset/file/151/CWC_Working_Paper_ENDING_WARS_CCEC.pdf.

²⁰ See Charlesworth, *supra* note 8, at 239; See also Stahn, *supra* note 11, at 324-26 (peacemaking is now an “international affair” that must be treated not only as a political process, but also a legal phenomenon).

²¹ See generally, Wolfram Lachner, Iraq: *Exception to, or Epitome of Contemporary Post-Conflict Reconstruction?* 14 INT’L PEACEKEEPING 237 (2007) (arguing that Iraq is the epitome of post-conflict reconstruction rather than the exception to the other peace-building and reconstruction enterprises of the post-Cold War era).

the dramatic doctrinal reforms that the U.S. military underwent within the past few years in an attempt to solidify a legal paradigm that could guide military forces in postwar operations. The U.S. military's efforts will be used as a lens for examining whether the current understanding of the international legal structure for post-conflict reconstruction is effective in providing rules to govern interveners and promote legitimacy of operations.

In a sense, the military has used policy to reinterpret the law and reform the legal framework to meet the challenges of today's post-conflict operational environment. Despite these reforms, however, many gaps still remain within the law. To ease some of the tension within the law, this paper proposes in Part III that the U.S. military must revitalize and incorporate the moral principles of *jus post bellum*²² into its legal framework. This is a vital step for the military's own strategic success in post-conflict operations, as well as, an effective contribution toward building an international legal framework for the law after war.

Re-establishing these legal principles²³ calls for the U.S. military's moral leadership in remedying the predominant understanding of the just war theory today. Moral principles

²² *Jus post bellum* is the third prong of the just war theory that addresses a just peace, or the law after war. See discussion *infra* Part III.A-B.

²³ The concept of using basic legal principles to forge a consensus among international actors and develop specific rules, while grounded in logic, is also the authors synthesis of the presentations of Colette Rausch, Deputy Director of United States Institute of Peace (USIP) Rule of Law program, & Vivienne O'Connor, Irish Centre for Human Rights, Presentation at the College of William & Mary School of Law Post-Conflict Justice Class: The Model Codes Project, Mar. 30, 2009, and Lawrence Alexander, Warren Distinguished Professor of Law at the University of San Diego School of Law, Presentation at the College of William & Mary School of Law: The Rule of Rules: Morality, Rules, and the Dilemmas of Law, Mar. 26, 2009. Colette Rausch & Vivienne O'Connor described their efforts in developing the Model Codes for Post-Conflict Criminal Justice and, in particular, discussed their reliance on "first order legal principles" to develop a consensus among many international actors about the content of the specific rules for the Model Codes. See Presentation from Colette Rausch & Vivienne O'Connor (Mar. 30, 2009). Lawrence Alexander, in his presentation, discussed how moral principles serve a "settlement function of the law," in that moral principles work to settle disagreements within the law that arise due to changing social views. See Presentation from Lawrence Alexander (Mar. 26, 2009). In other words, he proposed that the moral principles themselves never change, but the application of them can change in order to facilitate the settlement of tensions that have emerged within the law. See *id.*

facilitate the settlement of tensions that have emerged within the law.²⁴ Thus, by completing the just war theory with *jus post bellum* principles, states can engage in collective interpretation of the law. A *jus post bellum* will serve as foundational legal principles that international and domestic actors alike can use to forge a consensus on rule development and decision-making in postwar scenarios. Ultimately, this collaborative effort is essential to fostering an international legitimacy for post-conflict reconstruction operations.

While calling for a *jus post bellum* is not a novel concept, the intent of this paper is to look at it from the practical standpoint of the U.S. military. In sum, this paper seeks to help provide some insight into why *jus post bellum* criteria to affect post-conflict reconstruction should be revived and incorporated into the general international legal framework of this emerging normative system.

I. THE EMERGENCE OF POST-CONFLICT RECONSTRUCTION

Post-conflict reconstruction refers to a holistic approach to a wide range of complementary efforts undertaken within a post-conflict state that aim to consolidate peace within the region and prevent the re-ignition of conflict.²⁵ Efforts are directed at addressing: security; justice and reconciliation; social and economic well-being; and governance and participation.²⁶ Globalization, the changing nature of conflicts, and the individualization of

²⁴ See discussion *supra* note 23.

²⁵ STROMSETH ET AL., *supra* note 3, at 77-84 (suggesting a “synergistic approach” to building the rule of law after military intervention); Brahimi Lakhdar, State Building in Crisis and Post-Conflict Countries, Paper Presented at the 7th Global Forum on Reinventing Government: Building Trust in Government 3 (June 26, 2007), *available at* <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN026305.pdf> [hereinafter Brahimi II] (advocating that the international community take a holistic approach in all interventions directed toward the goal of state-building); see also CAROTHERS, *supra* note 2, at 108 (noting that democratization does not follow a simplistic natural sequence). Carothers criticizes a “standard menu” for the multifaceted domain of rule of law assistance and reform. *Id.* at 165, 176.

²⁶ Hamre & Sullivan, *supra* note 7, at 91-92 (four pillars of post-conflict reconstruction).

international law have all led to the vigorous endorsement of post-conflict reconstruction goals - development, democracy, and peace.²⁷ Many different terms, such as nation-building, peace-building, or peacekeeping, have been used to describe actions taken in pursuit of these goals.²⁸ Ultimately, there is no consensus on the definition of such terms and, once implemented, international actors are forced to recognize their complementary and often intertwined nature.²⁹ Therefore, for the purposes of this paper, the term post-conflict reconstruction will be used because it envisions a holistic approach that can best address the complementary nature of actions required to achieve development, democracy and peace in a today's post-conflict environment.³⁰

The international community, even before the catalyst of the Second World War, has been concerned for the world's populations, especially those that are victims of inter-state wars, civil conflict, natural disasters, famine, disease and poverty.³¹ This concern became a significant

²⁷ Samuels, *supra* note 5; *see generally* Anne-Marie Slaughter & William Burke-White, "An International Constitutional Moment", 43 HARV. INT'L L.J. 1 (2002) (discussing challenges faced during this renewed era of globalization, such as "war" becoming "armed conflict," and individualization of international law through the development of human rights law). Professor Gregory Fox of Wayne State University Law School believes that the rise of post-conflict reconstruction was caused by developments of a new institutional capacity to address destructive civil wars through UN mechanisms, changing nature of conflict, and a focus on domestic reforms. GREGORY H. FOX, HUMANITARIAN OCCUPATION 45-46 (2008) (offering a new phenomenon in international law that has its origins in post-conflict reconstruction, entitled "humanitarian occupation").

²⁸ CALL & COUSENS, *supra* note 19, at 3.

²⁹ *Id.* at 7.

³⁰ *See* Hamre & Sullivan, *supra* note 7, at 89-92. Hamre and Sullivan reason that the debate should shift away from using the term nation-building to using the term post-conflict reconstruction because post-conflict reconstruction recognizes the central role of local actors, has an emphasis on overcoming the legacy of conflict, and has less historical baggage. *Id.* at 89-90. Lakhdar Brahimi, former special advisor to the Secretary General of the United Nations, also believes that "nation-building" and "peacebuilding" are misleading terms that specifically reflect the American experience and fail to encompass fully the tasks that must be carried out to reconstruct a viable state. Brahimi II, *supra* note 25, at 5.

³¹ Martin Edmonds, *Global Security, Multinationalism and Peace-Building – Establishing International Rules for Post-Conflict Engagement: The Contributions of IOs and NGOs in Afghanistan*, in RUSI Whitehall Report 2-08, International Peace-Building for the 21st Century: The Tswalu Protocol and Background Papers 125 (John Mackinlay, Terence McNamee and Greg Mills ed., 2008). "After WWII, strong international norms emerged

aspect of the modern globalization phenomenon.³² It was not until the end of the Cold War, however, that the international community was faced with “a historic opportunity” and new institutional capacity through U.N. mechanisms to address conflicts worldwide.³³

Initially, the motivation of states to intervene in conflicts was primarily humanitarian.³⁴ But, in the age of globalization, “humanitarian” concerns and “security” concerns begin to mingle.³⁵ From the 1990s to the present, states have intervened in sovereign states based on humanitarian and security concerns, which has resulted in a variety of related justifications, such as, “strong evidence of genocide, the need to invade pre-emptively in self-defense, or replace failing or fragile states with transparent, liberal democratic systems of government as part of a reconstruction and development process that is aimed at promoting regional stability.”³⁶ Given

favoring self-determination, democracy, and human rights and condemning wars of expansion and aggression.” STROMSETH ET AL., *supra* note 3, at 1; *see generally* John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75* (Maarten ed., 1973) (documenting the rise of human rights law in international law and institutions).

³² Edmonds, *supra* note 31.

³³ FOX, *supra* note 27; ALBERTO CUTILLO, INT’L PEACE INST., INTERNATIONAL ASSISTANCE TO COUNTRIES EMERGING FROM CONFLICT: A REVIEW OF FIFTEEN YEARS OF INTERVENTIONS AND THE FUTURE OF PEACEBUILDING, at i (2006), http://www.ipacademy.org/pdfs/Cutillo_E_RPT.pdf.

³⁴ In 1992 and 1994, the U.N. Security Council authorized the use of force in Somalia and Haiti primarily for human rights purposes rather than self-defense. The U.N. justified its actions in both of these situations by stating that the civil violence and humanitarian concerns constituted a threat to international peace and security. *See* S.C. Res. 794, pmb., U.N. Doc. S/RES/794 (Dec. 3, 1992); S.C. Res. 940, *supra* note 2, at pmb. Brahimi, former special advisor of the Secretary-General, reminds us that the theory behind those interventions continue to drive justifications for intervention today when stating in 2007, “conflict is the antithesis of development . . . in today’s globalized world, an internal conflict will not remain confined within the borders of a single country . . . it will spill over in a variety of ways to contaminate its immediate neighbors and affect the lives of people much further away.” Brahimi II, *supra* note 25, at 2.

³⁵ STROMSETH ET AL., *supra* note 3, at 3. “Repression, poverty, and injustice can fuel terrorism, instability, civil war, and organized crime, and these in turn can lead to still more repression, poverty, and injustice, therefore, many military interventions are likely to arise jointly out of humanitarian concerns and security concerns.” *Id.*; *see also* MICHAEL WALZER, *JUST AND UNJUST WARS*, 101 (2006) (noting that interventions are rarely pure “humanitarian interventions” because humanitarian concerns nearly always mix with other strategic motives and political objectives).

³⁶ Edmonds, *supra* note 31, at 125; *see also* Jacques Forster, Vice President of the International Committee of the Red Cross, “Humanitarian Intervention” and International Humanitarian Law (Dec. 9, 2000),

such justifications for interventions, state action prompted dramatic “norm development cycles” for both humanitarian intervention and a somewhat interconnected emerging right to democracy.³⁷ State consensus has thus begun to shift from a non-intervention norm to norms of intervention permitted to restore democratic regimes and a moral “responsibility to protect”.³⁸ The post-conflict environment has presented itself as the most likely candidate for such interventions, where social systems, economies and political systems are on the verge of collapsing.³⁹ Thus, born out of these rising normative systems is the emerging norm of post-conflict reconstruction.

A. International Practice

<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jqjk?opendocument> (stating that government actors and international organizations support the view that humanitarian intervention can be triggered by grave and large scale violations of international humanitarian law or of human rights); *see generally* Anne Ryniker, *The ICRCs Position on “Humanitarian Intervention”* 83 INT’L REV. RED CROSS 527, 530-31 (2001) (defining the problem of humanitarian intervention and when states may intervene in the affairs of sovereign states). In December 2000, the government of Canada established an International Commission on Intervention and State Sovereignty. *See* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, “THE RESPONSIBILITY TO PROTECT,” (2001) *available at* <http://www.iciss.ca/pdf/Commission-Report.pdf>. [hereinafter INTERNATIONAL COMMISSION] for one of the more thoughtful contemporary approaches to humanitarian intervention.

³⁷ *See* SANDHOLTZ & STILES, *supra* note 6, at 263-97. Wayne Sandholtz, Professor of Political Science at the University of California, Irvine, and Kendall Stiles, Professor of Political Science at Brigham Young University, underwent a collaborative project that maps out the “norm cycles” of humanitarian intervention and the right to democracy as emerging norms within the international system. *See generally id.* (proposing that these norm cycles have developed over the past decade as primarily the product of international reactions to conflicts and disputes).

³⁸ *See id.* at 265; INTERNATIONAL COMMISSION *supra* note 36, at 16-17 (claiming that growing state and regional organization practice as well as Security Council precedent suggest an emerging guiding principle that could be termed “the responsibility to protect”); *see also* Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOBAL STUDIES L. REV. 635, 639 (2007) (referring to a shift in justification for humanitarian intervention over the years, for example, the Kosovo and Bosnia interventions can be justified as “morally necessary”). In 2000, the Kosovo Report concluded that the NATO campaign was “illegal, yet legitimate,” indicating moral approval for humanitarian intervention. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT (2000) *available at* <http://www.reliefweb.int/library/documents/thekosovoreport.htm>. *But see* Michael Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 190-91 (J. Holzgrefe & R. Keohane eds. 2003) (stating that even if there has been some evidence of a shift in views since the end of the cold war, the term “humanitarian intervention” remains particularly controversial in Africa).

³⁹ Edmonds, *supra* note 31, at 125.

Post-World War II occupations of Germany and Japan were the first modern experiences with the use of military force in the aftermath of a conflict to attempt fundamental transformation aimed at major social, political, and economic reconstruction.⁴⁰ After a wave of democratic transitions and often violent decolonization efforts that started in the late 1980's, the first-ever summit of Security Council Heads of State and Government met in 1992 to once again declare support for transformation and democratic reform in post-conflict states.⁴¹ Secretary General Boutros-Ghali announced in his report, *An Agenda for Peace*, that the United Nations would engage in “rebuilding the institutions and infrastructures of nations torn by civil war and strife.”⁴² The report introduced the concept of “post-conflict peace-building” and defined it as “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”⁴³

Peacekeeping and peace-building operations have experienced explosive growth over the past decade, from the steady increase of the 1990s to the present surge.⁴⁴ From 1988 to 2008, the UN launched forty-seven peacekeeping missions, and of these, twenty-six can be classified as

⁴⁰ JAMES DOBBINS ET AL., RAND CORP., *AMERICA'S ROLE IN NATION BUILDING: FROM GERMANY TO IRAQ*, at xiii (2003), available at http://www.rand.org/pubs/monograph_reports/MR1753/.

⁴¹ FOX, *supra* note 27, at 46-47.

⁴² The Secretary-General, *An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping*, ¶ 15, delivered to the Security Council and the General Assembly, U.N. Doc. S/24111, A/47/277 (June 17, 1992).

⁴³ *Id.* at ¶ 21.

⁴⁴ See UNITED NATIONS PEACEKEEPING OPERATIONS LIST (2008), <http://www.un.org/Depts/dpko/list/list.pdf>. From 1948 to 1988 the UN only launched fifteen peacekeeping missions; in 2008 there were 20 ongoing operations. See UNITED NATIONS PEACEKEEPING FACT SHEET 1 (2008), <http://www.un.org/Depts/dpko/factsheet.pdf>. From 2006 to 2008 the U.S. has supported a substantial increase in the size, use, and deployment of U.N. peacekeeping around the globe, including: a new Somalia mission; seven-fold expansion of Lebanon's mission, four-fold expansion of Darfur's mission, reauthorization of missions in Haiti, Liberia and East Timor; and new missions in Chad, Central African Republic, and Nepal. *Peace and Stability Operations: Challenges and Opportunities for the Next U.S. Administration: Hearing Before the Subcomm. on International Operations and Organizations, and Democracy and Human Rights of the S. Comm. on Foreign Relations*, 110th Cong. 3 (2008) (statement of William J. Dursh, Senior Associate, The Henry L. Stimson Center) [hereinafter *Hearing*].

post-conflict reconstruction missions.⁴⁵ Several of the past decade’s interventions include Bosnia, Haiti, Kosovo, East Timor, Liberia, Sierra Leone, Afghanistan, and Iraq – all encompassing significant reconstruction operations – that were “made in the name of human rights, democracy, and a rejection of the use of aggressive war as an instrument of foreign policy.”⁴⁶

Today, post-conflict Iraq exposes more clearly the emerging norm of post-conflict reconstruction.⁴⁷ Under Security Council Resolution 1483, the international community, as manifested by the UN, confirmed their commitment to supporting reconstruction and rule of law reform in a post-conflict environment that mirrored the U.N.-supported peace-building operations of the 1990s.⁴⁸ Jean Cohen, a professor of political theory at Columbia University, states that what we are witnessing is an “epoch of ‘Humanitarian’ and ‘democratic’

⁴⁵ FOX, *supra* note 27, at 47.

⁴⁶ STROMSETH ET AL., *supra* note 3, at 2.

⁴⁷ For a critical analysis showing Iraq to be the epitome of contemporary post-conflict reconstruction rather than the exception, see Wolfram Lachner’s article, *Iraq: Exception to, or Epitome of Contemporary Post-conflict Reconstruction*, *supra* note 21. See also CONRAD C. CRANE & W. ANDREW TERRILL, STRATEGIC STUDIES INST.: U.S. ARMY WAR COLL., RECONSTRUCTING IRAQ: INSIGHTS, CHALLENGES, AND MISSIONS FOR MILITARY FORCES IN A POST-CONFLICT SCENARIO, at v (2003) (suggesting that Iraq reconstruction is similar to the post-conflict reconstruction experiences of the 1990s).

⁴⁸ See S.C. Res. 1483, pmb1., ¶¶ 1-4, 8, U.N. Doc. S/RES/1483 (May 22, 2003); see also Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for “Interim Occupations,”* 51 N.Y.L.SCH. L. REV. 497, 499-500 (2006-2007) (stating that S.C. Res. 1483 “resurrected the law of belligerent occupation from its slumber,” yet went beyond the traditional rules and called for a “transformative occupation”). Professor Cohen rightly claims that the U.N.-supported humanitarian interventions or peace-enforcement operations in the 1990s influenced S.C. Res. 1483, which led to the U.N. calling for the occupying authority to go beyond restoring the *status quo ante* by, for example, empowering the occupant to promote economic reconstruction and provide conditions of sustainable development. *Id.*, at 511-13. Compare S.C. Res. 814, ¶ 4, U.N. Doc. S/RES/814 (Mar. 26 1993) (calling for U.N. assistance in economic rehabilitation, re-establishment of police and national institutions, and creating conditions for political reconciliation and reconstruction programs within Somalia), with S.C. Res. 1483, *supra* note 48, at ¶ 8 (calling on the occupants to promote economic reconstruction, rebuild Iraqi police force, restore and establish national and local institutions, and promote legal and judicial reform in Iraq). *But see* Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195, 261 (2005) (arguing that the resolutions of the 1990s stand in stark contrast to resolution 1483 because prior resolutions were not as ambiguous, and resolution 1483 had a complete lack of details in authorizing wide-ranging reforms).

interventions, the ‘war against terror,’ UN sponsored ‘regime change’ and ‘nation-building’ for ‘failed’ or ‘outlaw’ states, and prolonged and highly transformative foreign occupations.”⁴⁹ Such a state of affairs coupled with the international community’s firm resolve to achieve peace through reconstruction suggests that post-conflict reconstruction will continue to play a leading role in the attainment of global peace and security and, ultimately, shape the future of international relations.⁵⁰ Echoing these sentiments, Lakhdar Brahimi, a highly regarded veteran U.N. envoy and advisor, stated in 2007, “[a]lthough diplomatic attention and large amounts of donor assistance will be necessary to end many conflicts...[t]o foster and ensure peace and stability, there is no substitute for viable and accountable state institutions able to provide services, build the rule of law and support economic development.”⁵¹

B. U.S. Military Practice

The U.S. military has been involved in post-conflict reconstruction from its inception in the post-World War II occupations of Germany, Japan and Italy.⁵² During the latter half of the 20th century, however, U.S. military leaders and planners focused heavily on winning wars and not so much on peacekeeping or nation-building that comes afterwards.⁵³ Panama, Haiti, the Balkans, Somalia and other military operations in the 1990s highlight some of the difficulties and inadequacies in Army training and doctrine to address post-conflict scenarios.⁵⁴

During his presidential campaign in 2000, George W. Bush criticized the Clinton

⁴⁹ Cohen, *supra* note 48, at 498.

⁵⁰ *See generally* Hearing, *supra* note 44 (recommending the new U.S. Administration increase U.S. support for peace operations in the future, and making a case for international cooperation).

⁵¹ Brahimi II, *supra* note 25, at 5.

⁵² JAMES DOBBINS ET AL., *supra* note 40, at xiii.

⁵³ CRANE & TERRILL, *supra* note 47, at v.

⁵⁴ *See generally id.* (providing a historical overview of American occupations and highlighting past inadequacies of Army planning and preparation and other challenges involved in post-conflict operations).

administration for attempting an expansive agenda of nation-building.⁵⁵ Once elected, the Bush administration adopted a modest set of objectives to resist nation-building efforts by the U.S. military, which eventually collapsed in the wake of September 11th.⁵⁶ The resistance to nation-building initially led to little discussion in Washington about the aftermath of military action and resulted in the poor planning effort toward an occupation of Iraq.⁵⁷ Consequently, prior to the deployment of troops and the “war’s end” in 2003, Washington failed to recognize the importance of post-conflict reconstruction.⁵⁸ As a result, the importance of such stability operations was realized too late to make any immediate strategic or operational gains that could have stabilized the security environment.⁵⁹ A stable security environment could have mitigated the overwhelming challenges faced today in forming a permanent government, quelling the insurgency and sectarian violence, providing basic services, and financing future reconstruction efforts through increased international support.⁶⁰

Moreover, the international community demanded nothing less than reconstruction of

⁵⁵ JAMES DOBBINS ET AL., *supra* note 40, at xv.

⁵⁶ STROMSETH ET AL., *supra* note 3, at 63.

⁵⁷ Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 580, 608 (2006). “A U.K. government memorandum had noted: ‘There was little discussion in Washington of the aftermath after military action.’ Some senior officers in the Pentagon with legal expertise were told not to bother themselves with plans for the occupation, and a State Department study preparatory to the occupation was ignored.” *Id.*

⁵⁸ *See id.* at 608-09; *see generally* NO END IN SIGHT: THE AMERICAN OCCUPATION OF IRAQ (Magnolia Pictures 2007) [hereinafter NO END IN SIGHT] (documenting the Bush Administration’s lack of planning for the occupation of Iraq prior to the reconstruction).

⁵⁹ *See* NO END IN SIGHT, *supra* note 53.

⁶⁰ GOVERNMENT ACCOUNTABILITY OFFICE, REBUILDING IRAQ: GOVERNANCE, SECURITY, RECONSTRUCTION, AND FINANCING CHALLENGES 2 (2006) (concluding that while U.S. and coalition partners in Iraq face many challenges in stabilizing and reconstructing Iraq, one main problem remains, the unstable security environment); *see also* Hamre & Sullivan, *supra* note 7, at 92 (noting that all post-conflict tasks are interconnected and a lasting success can only be achieved as part of a single coherent strategy). “Any international presence must address security issues at the very beginning and throughout the course of an intervention. Acceptable security is the sine qua non of post-conflict reconstruction.” *Id.*

Iraq.⁶¹ The international community echoed the mantra of U.S. Secretary of State Colin Powell, who when referring to Iraq, opined to the president - “if we break it, sir, we will own it.”⁶² The perceived legitimacy of American forces in Iraq that could lead to increased international support, therefore, depended on a revival of the U.S. nation-building agenda to help stabilize and rebuild the war-torn country.

Thus, the U.S. military embraced the essential need for “stability operations”⁶³ in this era of persistent conflict. As combat operations of the Iraq war declined in 2003, military leaders and scholars began to turn their attention to understanding what role the military should play in reconstruction, realizing that this would be a mandatory next step following operational victory.⁶⁴ The Iraq intervention and reconstruction experience paved the way forward as the

⁶¹ See *supra* note 48 and accompanying text.

⁶² STROMSETH ET AL., *supra* note 3, at 18.

⁶³ U.S. Joint military doctrine provides a definition for stability operations that captures the role of military forces to support broader governmental efforts: “Stability operations encompass various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.” U.S. DEP’T OF THE ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS, at vi (Oct. 2008) [hereinafter FM 3-07] (citing JOINT PUB. 3-0, JOINT OPERATIONS (13 Feb. 2008)). Field Manual 3-07, Stability operations, is considered the Army’s keystone doctrinal reference on the subject of peace operations. Joint doctrine defines peace operations as “multiagency and multinational operations involving all instruments of national power” and encompasses peacekeeping and peace-enforcement operations. U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, OPERATIONAL LAW HANDBOOK, 2008 [hereinafter OPERATIONAL LAW HANDBOOK]. According to these definitions, “stability operations” and more broadly, “peace operations,” fall under the umbrella of the holistic approach of post-conflict reconstruction. See *supra* Part I.; see also *infra* note 125. It is also important to note that Army doctrine is consistent and compatible with joint doctrine, and will be used interchangeably throughout this paper to express the general position of the “U.S. military.” See *e.g.*, FM 3-07, at iv.

⁶⁴ See, *e.g.*, CRANE & TERRILL, *supra* note 47. This study was initiated in October 2002, when the U.S. Army War College’s Strategic Studies Institute, in coordination with the Office of the Army Deputy Chief of Staff/G-3, organized an interdisciplinary team under the leadership of Dr. Crane and Dr. Terrill to analyze how American and coalition forces can best address the requirements that will necessarily follow operational victory in a war with Iraq. Douglas C. Lovelace, Jr., *Foreward* to CONRAD C. CRANE & W. ANDREW TERRILL, STRATEGIC STUDIES INST.: U.S. ARMY WAR COLLEGE, RECONSTRUCTING IRAQ: INSIGHTS, CHALLENGES, AND MISSIONS FOR MILITARY FORCES IN A POST-CONFLICT SCENARIO, at iii (2003).

epitome of contemporary post-conflict reconstruction.⁶⁵ The introduction to the 2008 U.S. Army Field Manual (FM) 3-07, Stability Operations, summarizes the U.S. military's renewal and reinvigoration of post-conflict reconstruction operations:

Recognizing this shift in focus, the Department of Defense (DOD) implemented DODD 3000.05 in November 2005. The directive emphasized that stability operations were no longer secondary to combat operations, stating: "Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DOD activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning." The directive further stressed that stability operations were likely more important to the lasting success of military operations than traditional combat operations. Thus, the directive elevated stability operations to a status equal to that of the offense and defense.⁶⁶

The 2008 U.S. Department of Defense (DOD) National Defense Strategy stated that the promotion of democracy, working to end tyranny, and extension of prosperity is the best way to provide enduring security for the American people.⁶⁷ Vice President Biden confirmed this strategy at the 45th Munich Conference on Security Policy in 2009 by stating that in order to "meet the challenges of this new century, defense and diplomacy are necessary, [but]...we also need to wield development and democracy, two of the most powerful weapons in our collective arsenals."⁶⁸

In the past couple of years, the U.S. military has devoted much time and energy to

⁶⁵ See Lachner, *supra* note 21.

⁶⁶ FM 3-07, *supra* note 63 at vi (Oct. 2008) (citing U.S. DEPT OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS ¶ 4.1 (Nov. 28, 2005)).

⁶⁷ DEPARTMENT OF DEFENSE, NATIONAL DEFENSE STRATEGY 1 (2008), *available at* <http://www.defenselink.mil/news/2008%20national%20defense%20strategy.pdf>.

⁶⁸ Vice President Joe Biden, Remarks at the 45th Munich Conference on Security Policy (Feb. 7, 2009), *available at* http://www.whitehouse.gov/the_press_office/RemarksbyVicePresidentBidenat45thMunichConferenceonSecurityPolicy/ (focusing development and democracy efforts on "poor societies and dysfunctional states . . . [which] can become breeding grounds for extremism, conflict and disease, [and] non-democratic nations [which] frustrate the rightful aspirations of their citizens and fuel resentment").

developing doctrine to guide military forces in post-conflict scenarios,⁶⁹ which is now being mirrored by civilian counterparts.⁷⁰ With the U.S. military firmly embracing the importance of post-conflict reconstruction, the questions now turns to who should lead these operations and how can all the moving pieces work within a strategic framework.⁷¹ Recognizing that the need for foreign military presence with a transformative political purpose is not going to disappear, it becomes necessary to revisit and understand the legal framework underlying military action.⁷² It is to the legal framework that the international community and the U.S. military must now turn their attention.

II. THE LEGAL FRAMEWORK

There are, at least, two general concepts worth distinguishing when referring to a legal framework within a post-conflict environment. First, the term “legal framework” can refer to the backbone of a civil and criminal justice system within a post-conflict state itself.⁷³ Thus, this

⁶⁹ The U.S. Army, for example, has recently published revised and updated versions of the following manuals and handbooks to incorporate new concepts of stability and peace operations: FM 3-07, *supra* note 63, and U.S. DEP’T OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS, at vii, Feb. 2008 [hereinafter FM 3-0], stating that the new edition reflects Army thinking in a complex period of prolonged conflicts and, therefore, incorporates doctrine that now equally weighs tasks dealing with the population—stability or civil support—with those related to offensive and defensive operations. The U.S. Army Judge Advocate General’s Legal Center and School has also recently published the U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES, 2008 [hereinafter RULE OF LAW HANDBOOK], and revised the OPERATIONAL LAW HANDBOOK, *supra* note 63, and updated the U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, LAW OF WAR DOCUMENTARY SUPPLEMENT, 2008 [hereinafter DOCUMENTARY SUPPLEMENT].

⁷⁰ See Symposium, *When the Fighting Stops: Roles and Responsibilities in Post-Conflict Reconstruction*, 38 SETON HALL L. REV. 1365, 1372 (2008).

⁷¹ See, e.g., *id.* at 1371; Craig Cohen & Garland H. Williams, Council on Foreign Relations, Who Should Lead Post-Conflict Reconstruction? (Fed. 15 2008), http://www.cfr.org/publication/15426/who_should_lead_postconflict_reconstruction.html.

⁷² Adam Roberts, *supra* note 57, at 618.

⁷³ See generally COMBATING SERIOUS CRIMES IN POST-CONFLICT SOCIETIES: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS 39-71 (Colette Rausch eds., 2006) (defining criminal behavior; prescribing the procedures for investigating, prosecuting, and trying criminal offenses; setting out the powers of the police, prosecutors, and judges and the limits on state authority; and prescribing the fair trial and due process rights of the suspect or the accused).

legal framework governs the population of the post-conflict state; it is the establishment or reestablishment of a governing legal system that incorporates the rule of law within a state. In recent years, there has been considerable efforts to fill this gap within the law and define this legal framework to provide states with solutions for transitioning the legal system to incorporate the rule of law.⁷⁴ The second conception of a legal framework, however, envisions the rules governing intervener's actions within a state during post-conflict reconstruction operations.⁷⁵ Although it is recognized that there can be blurring between the two concepts, it is assumed for the purposes of this paper that both frameworks must be clearly defined before any reasonable understanding of cross-over elements can be attained. For that reason, the scope of this paper considers defining the latter.

A. Understanding the Tension within the Law

The period of transition from war to peace has been described as a legal vacuum, or a grey zone that puts reconstruction efforts into legal limbo.⁷⁶ This grey area within the law exists because the idea of military intervention with transformative purpose stands in tension with the existing system of international law as it applies to states.⁷⁷ In other words, the emerging norm of post-conflict reconstruction clashes liberal, rights-based norms against norms that support sovereignty and national jurisdiction.⁷⁸ The question then arises, what is the appropriate regulatory legal regime? Which body law can provide guidelines for conduct and legitimize

⁷⁴ See e.g., U.S. INSTITUTE OF PEACE, MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE (Colette Rausch & Vivienne O'Connor eds., 2007).

⁷⁵ See e.g., *infra* Part II.B.1-2.

⁷⁶ See *supra* notes 10-12 and accompanying text; see also Benvenisti, Eyal, *Applicability of the law of occupation*, 99 A.S.I.L. PROC. 31 (2005) (acknowledging the existence of a serious gap in the Hague and the Geneva laws as applied in the context of post-conflict occupations).

⁷⁷ Adam Roberts, *supra* note 57, at 618.

⁷⁸ SANDHOLTZ & STILES, *supra* note 6, at 331.

military intervener's action in a post-conflict reconstruction operation?

1. The International Experience

Years before the Iraq war, the role of international humanitarian law in post-conflict situations and its link between human rights, collective security and other areas of public international law came to the forefront of debate in an attempt to answer these questions facing interveners.⁷⁹ As a result, occupation law⁸⁰ and human rights law have been the focal points of the international dialogue, primarily due to the humanitarian and security concerns driving post-conflict reconstruction.⁸¹ The principle point of concern, however, has been the apparent inability of the formal conception of occupation law to capture the fluidity of today's post-conflict reality.⁸² It is questionable whether and how the law comports with the rise of human

⁷⁹ See Colm Campbell, *Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment* 839 INT'L REV. RED CROSS 627, 627-28 (2000).

⁸⁰ See the ICRC, *Occupation and International Humanitarian Law: Questions and Answers*, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/634kfc?opendocument>, (last visited Apr. 21, 2009), for an overview of the most important principles governing occupation according to the International Committee of the Red Cross. The law of belligerent occupation is codified in two key treaties: the 1907 Hague Regulations (arts 42-56) and the Fourth Geneva Convention (GC IV, art. 27-34 and 47-78), as well as in certain provisions of Additional Protocol I and customary international humanitarian law. *Id.* Eyal Benvenisti has defined the law of occupation as "the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory." EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 4 (1993). Most notably, the concept of belligerent occupation enshrines the Conservationist Principle by prohibiting major changes in the legal, political, economic, or social institutions of the occupied territory. Cohen, *supra* note 48, at 498.

⁸¹ See e.g., Benvenisti, *supra* note 76, at 29-31 (posing the question of whether occupation law is applicable in post-conflict societies and suggesting that the law of occupation should be applied because of its basic guidelines and limitations); Youngjin Jung *In pursuit of reconstructing Iraq: does self-determination matter?*, 33 DENV. J. INT'L L. & POL'Y 391 (2005) (illustrating the debate concerning the tension created between nation-building and the right to self-determination in occupation law, and arguing that the principle of self-determination has the potential to outlaw belligerent occupation altogether).

⁸² Martti Koskenniemi, *Occupation and Sovereignty – Still a Useful Distinction?*, in *THE LAW AT WAR: THE LAW AS IT WAS AND THE LAW AS IT SHOULD BE* 163 (Ola Engdahl & Pal Wrangé eds., 2008); see generally Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1 (2006) (arguing that traditional occupation law is irrelevant in an era of multilateral occupations such as Iraq and Afghanistan and proposes a new model of occupation); cf. Fox, *supra* note 48, at 262-69 (arguing against reforming the law of occupation and asserting the need to maintain the Conservationist Principle).

rights obligations and the growing norm of humanitarian intervention that has shifted modern day attitudes concerning the ending of conflicts.⁸³

The main critiques of occupation law are that the existing provisions lack determinate content, and are outdated and/or biased.⁸⁴ The traditional law of occupation views occupiers as trustees, preserving the *status quo ante bellum* that is part of the overall Conservationist Principle.⁸⁵ The Conservationist Principle aims at the reestablishment of the state of affairs existing before the war broke out.⁸⁶ Adam Roberts suggests that there are three aspects of the law relating to occupied territories that exemplify this principle: the prohibition on annexation; the rules regarding the occupant's structure of authority; and the rules regarding the maintenance of existing legislation in occupied territories.⁸⁷ For example, Article 43 of the Hague Regulations requires occupiers to respect laws in force "unless absolutely prevented" from doing so, and

⁸³ Stahn, *supra* note 11, at 325; *See also* Kelly, *supra* note 7, at 92-94 (noting the careful considerations that need to be made by occupants in determining what body of law is applicable in dealing with collapsed state emergencies). Kelly states that the laws of occupation are adequate, but "would perhaps benefit from amendments or a new protocol, which would more clearly delineate the relationship between the laws of occupation and international human rights law, and the circumstances where one may override or supplement the other." *Id.* at 228. David Wippman, Associate Dean and Professor of Law at Cornell Law School, claims that the international debate, which has forced a rethinking of the application of existing principles of Humanitarian law to new situations, has been triggered by three trends: 1) the changing nature of war; 2) technology transforming the way wars are fought; and 3) the shifting attitudes of military occupations toward nation-building objectives. David Wippman, *Introduction to NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN THE 21ST CENTURY CONFLICTS 1* (David Wippman & Matthew Evangelista eds., 2005). Although the debate continues among scholars as to the application of IHL and human rights law in these new situations, it is worth noting that the International Court of Justice has suggested in the *Nuclear Weapons* case that in the event of a conflict between these two bodies of law, IHL would govern as the *lex specialis*. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240, ¶ 25 (July 8).

⁸⁴ Daniel Thürer & Malcolm MacLaren, "Ius post bellum" in *Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?* in *WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK 753, 754* (Klaus Dicke et al. eds., 2005) (Switz.).

⁸⁵ FOX *supra* note 27, at 233.

⁸⁶ *Id.*

⁸⁷ Adam Roberts, *supra* note 57, at 582.

Article 64 of the Fourth Geneva Convention focuses on the continuity of penal laws.⁸⁸ “The occupation authorities cannot abrogate or suspend the penal laws for any other reason – and not, in particular, merely to make it accord with their own legal conceptions.”⁸⁹ Daniel Thurer and

Malcolm MacLaren also summarize the positive obligations of Occupying Powers as:

1. protecting and meeting the needs of the local inhabitants by taking measures to restore and ensure public order, safety, health, provision of food and medical supplies as far as possible;
2. respecting public and private property- in particular, the Occupying Power may not confiscate private property or use the assets of the occupied territory for its own benefit;
3. treating all persons deprived of their liberty properly, with judicial guarantees and minimum conditions of detention⁹⁰

Thurer and MacLaren draw heavily upon Articles 27-34 and 47-78 of the Fourth Geneva Convention for the Occupying Power’s positive obligations, which requires occupiers to protect the rights of local inhabitants.⁹¹ For example, Article 27 guarantees respect and humane treatment of protected persons “in all circumstances” and “at all times.”⁹² Additional Protocol I to the Geneva Conventions further obligates the Occupying Power to maintain a certain minimum standard of human rights “at any time” “in any place” “without any adverse distinction.”⁹³ In sum, the provisions display a foundational character that aims to limit the discretion of any state.⁹⁴

⁸⁸ FOX *supra* note 27, at 235.

⁸⁹ Thurer & MacLaren *supra* note 84, at 762.

⁹⁰ *Id.* at 763; *see generally* Kelly, *supra* note 7, at 185-200 (discussing the obligations, rights, and prohibitions that govern an occupant under IHL).

⁹¹ *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 27-34, 47-78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁹² Thurer & MacLaren, *supra* note 84, at 763.

⁹³ *Id.* While the United States has not ratified the Additional Protocols, many of its provisions are considered customary international law and, thus, would bind the United States. *See* ICRC, Customary International Humanitarian Law: Questions & Answers, <http://www.icrc.org/web/eng/siteeng0.nsf/html/customary-law-q-and-a-150805> (last visited Apr. 21, 2009).

⁹⁴ Thurer & MacLaren, *supra* note 84, at 763.

By contrast, post-conflict reconstruction occupiers are envisioned to be agents of political and social change acting to ensure full eradication of the dysfunctional conditions that necessitated intervention in the first place.⁹⁵ If we accept the notion that the “object in war is a better state of peace,” then this must mean more secure than the *status quo ante bellum* – safer for ordinary men and women.⁹⁶ Elaborating on this notion, Michael Walzer, considered the preeminent contemporary authority on the just war theory, notes that we should therefore not aim for literal restoration of the *status quo ante bellum* because that situation was precisely what led to conflict in the first place.⁹⁷ It is, however, this tension between traditional notions of humanitarian law and the goals of post-conflict reconstruction that has led scholars to characterize the legal framework as being in legal limbo.⁹⁸ But how should the normative gap be filled between the fundamental duty in occupation law to maintain the *status quo ante bellum* and the recognized desirability of changes to law and government structures (expressed by long-standing international human rights agreements as well as the newest Security Council Resolutions on Iraq)?⁹⁹

To ease these tensions within the law and develop an organizing framework for transitions from conflict to peace, commentators and scholars have advocated several positions. Some argue for wholesale reform of the law.¹⁰⁰ In opposition, some claim that the conservationist principle

⁹⁵ STROMSETH ET AL., *supra* note 3, at 7.

⁹⁶ WALZER, *supra* note 35, at 121 (quoting B.H. LIDDEL HART, STRATEGY 339 (1974)).

⁹⁷ BRIAN OREND, THE MORALITY OF WAR 163 (2006).

⁹⁸ *See supra* note 12.

⁹⁹ Thürer & MacLaren, *supra* note 84, at 765.

¹⁰⁰ *See Harris, supra* note 82, at 463-64 (suggesting that reform and reinterpretation of the law of occupation, such as returning to the original French text, is needed in an age of small-scale military conflict and long-term post-conflict rebuilding efforts where there is a lack of a coherent international law framework); *see also Kelly, supra* note 7, at 92 (examining possible options, including reform of the law, for an appropriate legal framework dealing with collapsed state emergencies).

must be retained because it serves as an important limitation on occupiers.¹⁰¹ Others have argued for reinterpretation of the existing law to support post-conflict goals.¹⁰² Most recently, the idea of a new *jus post bellum* has been posited as a viable method for addressing the problems within the legal framework, which essentially aims to change the application of the law to ease tensions among competing rules.¹⁰³

2. The U.S. Military Experience

The combination of this unsettled framework and the Iraq experience has forced the U.S. military to confront the legal gaps created by the emerging norm of post-conflict reconstruction. Post-conflict Iraq, especially in connection with U.N. Security Council Resolution 1483, presents itself as a prime example of the tension that exists between different notions of occupation and the uncertain application of the law.¹⁰⁴ The international community had recognized, years before Iraq, the need for defined rules that could guide forces in a post-conflict environment.¹⁰⁵

¹⁰¹ See Fox, *supra* note 48, at 263-69 (arguing against reforming the law of occupation and asserting the need to maintain the Conservationist Principle); see also Benvenisti, *supra* note 76, at 31 (claiming that traditional law of occupation applies to post-conflict situations).

¹⁰² See John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7, 22 (2004) (arguing that IHL supports all of the coalitions actions in Iraq and would just reinterpret occupation law for the modern era).

¹⁰³ See Stahn, *supra* note 11, at 327-29 (calling for more development of *jus post bellum* to reflect the contemporary peacemaking process as a separate paradigm); Cohen, *supra* note 48, at 520-21 (arguing for reform with *jus post bellum* to apply to all occupations); Thürer & MacLaren, *supra* note 84, at 782 (stating that a *jus post bellum* could adequately meet the challenges of military occupation today); Major Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 131-62 (2005) (analyzing and proposing principles for a *jus post bellum* needed to fill the legal vacuum concerning postwar conduct); see also Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law Making Powers*, 50 MCGILL L.J. 285, 293-94 (2005) (contending that a *jus post bellum* would allow for more systematic and comprehensive approach to legal reform in occupied territories); Roberts, *supra* note 57, at 619 (noting that invoking an emerging or future *jus post bellum* may be a better basis for handling transformative occupations).

¹⁰⁴ Thürer & MacLaren, *supra* note 84, at 754; see Fox, *supra* note 48, at 260 ("The resolution [1483] itself echoes this schizophrenia, espousing both a commitment to reform and fidelity to international law within a single paragraph"). For a thorough discussion about many of the issues, some outside the scope of this paper, facing occupation law in today's complex postwar environment see Thürer & MacLaren, *supra* note 84, at 756-69.

¹⁰⁵ The "Brahimi report" recommended that U.N. member states contribute to a compilation of observations and

However, nothing viable had been incorporated into doctrine that could translate into training efforts prior to engagement by coalition forces. This was mostly the case because of the almost uniformly recognized need to avoid “cookie-cutter” approaches in favor of strategies tailored to specific contexts.¹⁰⁶

The United States, from the beginning of the Iraq invasion, denied the applicability of occupation law, uncertain as to its modern application and reluctant to take on long-term obligations.¹⁰⁷ As a consequence, forces were not trained and lacked defined mission guidance for reconstruction efforts. This left many of the U.S. forces and the Iraqi population in a state of uncertainty after the war ended, which led to the creation of an environment rife with violent insurgencies and arguably more destruction than in combat operations.

At the end of combat operations, military units were unexpectedly confronted with demands to act as ad hoc governments and protectors of the local population, a task for many were not prepared, or certain of their authority and obligations.¹⁰⁸ This period of time has been

proposals that would be used to develop U.N. sample rules of engagement because it was identified as a gap in operations – an “issue of special concern.” The Secretary-General, *Report of the Secretary General on the Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations*, ¶ 5, delivered to the General Assembly, U.N. Doc. A/56/732 (Dec. 21, 2001), available at http://www.un.org/peace/reports/peace_operations/docs/a56732e.pdf.

¹⁰⁶ CALL & COUSENS, *supra* note 19, at 13.

¹⁰⁷ In Iraq, the occupants did not explicitly acknowledge their status as occupying powers and were reluctant to use the term “occupant” as applicable to their actions in Iraq. BENVENISTI, *supra* note 81, at xi. Eval Benvenisti, Professor of Law at Tel Aviv University and leading scholar on Occupation law, concludes that “most contemporary occupants ignored their status and their duties under the law of occupation,” after providing modern examples of regular state evasion of the term “occupying power” and states underlying motives, such as, avoiding legal obligations associated with the term. *Id.* at 6; *see generally id.*, at 149-89. Shortly after forces entered into Iraq in 2003, U.S. authorities deliberately sought to distinguish themselves as “liberators” and not “occupiers” to avoid the negative implications that follow from the term “occupying power.” Fox, *supra* note 48, at 197; *see also id.* at n.7. (citing U.S. officials repeating this statement).

¹⁰⁸ *See generally* NO END IN SIGHT, *supra* note 58 (describing the lack of planning that made many ground forces uncertain of their obligations following victory in Iraq). For an example of how some U.S. military forces were unexpectedly faced with the daunting tasks of transition from combat operations to the then emerging concept of “stability operations,” in the wake of Saddam’s defeat in 2003, see Colonel Christopher C. Conlin, *What do you do*

characterized as the coalition force's failure to take advantage of the "window of opportunity" following the end of combat operations.¹⁰⁹ As a result, policy makers and military leaders alike made rash decisions that rested on weak or non-existent legal arguments in last minute attempts to move the nation toward reconstruction.¹¹⁰ For example, Paul Bremer, the head of the coalition provisional authority (CPA) in Iraq, disbanded the Iraq army putting 400,000 former Iraqi soldiers out of work, which has been widely criticized as creating the conditions for the insurgency.¹¹¹ Bremer claimed that the order was critical to eliminating the foundations of the previous Iraqi regime, but the decision seemed to lack any consideration for the potential limitations on an occupying force in changing the laws and government structure.¹¹² The Iraqi

for an Encore?, Marine Corps Gazette, Sept. 2004, remarking how, "in a blinding flash, we had become the local government, the utilities, the banks, the information bureau, the health care provider, the police, the court system, even the dog cathers." *Id.* at 1, available at <http://smallwarsjournal.com/documents/conlin.pdf>.

¹⁰⁹ See *supra* note 7. Daniel Serwer, Vice President of the Center for Post-Conflict Peace and Stability Operations at USIP, in 2008 alluded to the critical time period immediately following victory when noting that all the serious errors in Iraq were made within a month or two after victory, which has caused the U.S. to play catch-up ever since and, yet, "we have not caught up because the situation has largely spiraled out of control." Symposium, *supra* note 70, at 1371.

¹¹⁰ See Roberts, *supra* note 57, at 614-15 (citing CPA policies made in the immediate occupation of Iraq that caused considerable controversy surrounding the policies' legal permissibility, the general prudence and wisdom of the decision-making process, and the lack of consultation with allies or serious internal discussion). Winners, like the U.S. over Iraq in 2003, should engage in serious planning of the post-war phase right from the start, and should never find themselves in a position where they have won the war but they do not know what to do next – that is irresponsible and breeds bad decisions. OREND, *supra* note 97, at 164 (stating that the Americans did not plan for the post-war phase and consequently made up post-war policy on the fly).

¹¹¹ Lacher, *supra* note 21, at 242; see also Roberts, *supra* note 57, at 614; NO END IN SIGHT, *supra* note 58 (citing three grave mistakes, including disbanding the Iraqi Army, made by Paul Bremer, head of the CPA, that caused the rapid deterioration of occupied Iraq); see generally Jane Arraf, *U.S. Dissolves Iraqi army, Defense and Information ministries*, C.N.N.com/World, May 23, 2003, available at <http://www.cnn.com/2003/WORLD/meast/05/23/sprj.nitop.army.dissolve/>. In October 2002, Dr. Crane and Dr. Terrill's study out of the U.S. Army War College's Strategic Studies Institute, had warned of the possible ramifications of disbanding the Iraqi army: "To tear apart the Army in the war's aftermath could lead to the destruction of one of the only forces for unity within the society. Breaking up large elements of the army also raises the possibility that demobilized soldiers could affiliate with ethnic or tribal militias." CRANE & TERRILL, *supra* note 47, at 32. Unfortunately, the study's warnings became reality.

¹¹² See Charlesworth, *supra* note 8, at 240 (claiming that despite the formal acknowledgement of occupation law, its principles had little obvious effect on decisions made by the CPA). "The disestablishment of the Ba'ath Party and

Army was disbanded on May 23, 2003.¹¹³ One day prior, Security Council Resolution 1483, dated May 22, 2003, provided the CPA with vague standards for authority and obligations as occupying powers, such as, calling on the occupying authority to “assist the people of Iraq in their efforts to reform their institutions”.¹¹⁴ Yet, Security Council Resolution 1483 also required that the CPA comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.¹¹⁵ This order of events might suggest that the CPA had not fully considered a proper balance between the powers vaguely asserted in Resolution 1483 and the rights, needs, and interests of the local population addressed in obligations under occupation law.¹¹⁶ In sum, Iraq demonstrates why the legal consequences of an invasion and its aftermath must be carefully considered prior to the reconstruction period itself, or for that matter, prior to the invasion; and that any deficiencies in implementing the law of occupation come ultimately at the expense of the local populations’ well-being.¹¹⁷

B. Attempting to Ease the Tension

Thus far, this paper has mapped out an emerging norm of post-conflict reconstruction. This norm is increasingly recognized by the international community and has been embraced by the U.S. military as evidenced by the Iraq post-war reconstruction efforts. This norm, however, has

the dismantling of the entire Iraqi defense forces and bureaucracy in May 2003 are perhaps the most dramatic examples of changing the political and legal structure without any local consultation.” *Id.* at 240.

¹¹³ Arraf, *supra* note 111.

¹¹⁴ S.C. Res. 1483, *supra* note 48, at ¶ 1.

¹¹⁵ *Id.*, at ¶ 5.

¹¹⁶ See Thürer & MacLaren, *supra* note 84, at 12 (stating that occupation law provisions create a fine balance that must be accounted for at all times between the powers and populations legitimate demands); Fox, *supra* note 48, at 240-60 (arguing that the legal basis for the ambitious CPA reforms in Iraq cannot be found in either arguments for military necessity, Iraqi consent, or Resolution 1483).

¹¹⁷ Thürer & MacLaren, *supra* note 84, at 4.

created a gap in the organizing legal framework. After Iraq, the U.S. military has gone through extensive modification in its doctrine to recognize the important role military operations play throughout the transition period from war to peace.¹¹⁸ Consequently, the U.S. military has had to simultaneously address the gap within the law. The following will briefly describe the military's efforts to provide a more specific legal framework intended to govern the actions of its forces, and identify some of the remaining gaps within that framework.

1. Considering the U.S. Military's Legal Framework

In response to the heightened awareness of the important role reconstruction and stabilization play in a post-conflict environment and the military's increasing involvement in such operations, there has been considerable efforts made over the past few years to provide military decision makers and Judge Advocates (JAGs) with more specific legal guidance within these operations.¹¹⁹ While the 1956 Law of War Manual,¹²⁰ the seminal doctrinal document on law of war compliance for the U.S. military, has not been updated in over 50 years, several military handbooks, supplements, and instructions have been created within the past few years to provide guidance regarding the law of war obligations of the Armed Forces. In 2007, the Chairman of the Joint Chiefs of Staff confirmed that "at all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, [Judge Advocates], will provide advice concerning law of war compliance."¹²¹ As a matter of necessity this paper, therefore, considers all of the tools that Judge Advocates use in their legal analysis

¹¹⁸ See *supra* Part I.B.

¹¹⁹ See *supra* note 69 and accompanying text.

¹²⁰ U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter FM 27-10].

¹²¹ CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, ¶ 4(b) (31 Jan. 2007) [hereinafter CJCSI 5810.01C].

when considering law of war obligations.¹²² For example, the U.S. Army Judge Advocate General's Legal Center and School, in 2008, developed the Rule of Law Handbook for Judge Advocates (ROL handbook) to provide legal guidance on newly emerging rule of law operations undertaken by military forces. As the newly developed ROL handbook succinctly states, "it would be ironic if rule of law operations were conducted without regard to the legal restrictions on military operations."¹²³ Thus, the following considers how the military, in a sense, has used interpretation through policy to reform their legal framework to meet the challenges of today's operational environment.

2. The Framework in Operation

When operating in a post-conflict reconstruction operation, or more generally, a "peace operation," and making legal decisions, Judge Advocates (JAGs) are instructed to look first to any U.N. mandate.¹²⁴ A mandate is to provide guidance for the development of mission statements and rules of engagement.¹²⁵ Yet mandates mostly provide only vague standards.¹²⁶ The 2008 Operational Law Handbook itself states, "the mandate by nature is political and often imprecise," such as in Haiti that had "a mandate of 'maintain a secure and stable environment'."¹²⁷ In Haiti, the attorneys eventually rationalized that any action that made

¹²² To be clear, the author acknowledges that this paper considers more than pure doctrinal sources when describing the legal framework followed by the military. This is in consideration of the fact that, as a practical matter, JAGs use these supplements and handbooks to formulate their legal advice to commanders that then direct operations. Arguably, the Law of War Manual, FM 27-10 itself needs revision so as to affect all military personnel as established doctrine, however, this paper envisions a more immediate and practical change before affecting revision of FM 27-10.

¹²³ RULE OF LAW HANDBOOK, *supra* note 69, at 71.

¹²⁴ OPERATIONAL LAW HANDBOOK, *supra* note 63, at 54.

¹²⁵ *Id.*

¹²⁶ *Id.* at 53 ("The [Judge Advocate] serves an important function in assisting leaders in the translation of vague U.N. mandates into the specified and implied military tasks on the ground.").

¹²⁷ *Id.* at 53-54.

Americans look good lessened security risks and could therefore be approved as mission related.¹²⁸

The U.S. military has since made several attempts to build a defined legal framework and ease tensions within the law governing all peace operations. When defining peace operations, the U.S. military acknowledges a lack of a “universally accepted definition,” which “has resulted in the term being used to describe almost any type of behavior intended to obtain what a particular nation regards as peace.” To combat the definitional ambiguities and provide more concrete legal guidance, military doctrine has created doctrinal categories for certain types of peace operations and tagged them with corresponding legal considerations.¹²⁹ However, the military accepts that this is still an incomplete cure because “there are even slight inconsistencies within U.S. doctrine and other publications that define peacekeeping and related terms.”¹³⁰

Unfortunately, the reality of modern peace operations is that a mission will almost never fit neatly into one doctrinal category.¹³¹ Most often JAGs will face the need for complementary implementation of different concepts, for example, post-conflict reconstruction requires a holistic approach toward peace that implements peace-building and peacekeeping elements.¹³² This fact

¹²⁸ CRANE & TERRILL, *supra* note 47, at 7 (referencing an Interview of LTC Karl Warner by COL Dennis Mroczkowski conducted for the JTF- 190 Operation UPHOLD DEMOCRACY AAR (After Action Review)).

¹²⁹ The Doctrinal categories include: Peace operations, peacekeeping, peace enforcement, peace-making, Preventive Diplomacy, Peace-building. In addition, it is recognized that “[d]octrine is currently evolving in this area, and various other terms may be used to label missions and operations that do not fall neatly into one of the above definition,” such as: Second generation peacekeeping; protective/ humanitarian engagement; Stability operations and/or Support Operations; Stability and Reconstruction operations; Stability, Security, Transition, and Reconstruction operations; and stability operations. *See* OPERATIONAL LAW HANDBOOK, *supra* note 63, at 50-53. However, recognizing the lack of any universal accepted definition for many terms connected with peace operations and the inconsistencies in use, “[t]he JAG should use the doctrinal categories only as a guide to reaching the legal issues that affect each piece of the operation.” *Id.* at 50, 52.

¹³⁰ *Id.* at 50.

¹³¹ *Id.* at 52.

¹³² *See* CALL & COUSENS, *supra* note 19, at 7.

generally presents JAGs with the difficult task of first being able to identify the nature of an operation in a particular situation, so that they can help develop a mission statement. It follows that there will still be significant problems with determining what bodies of law should be relied upon in any particular operation.

To alleviate the ill-defined nature of the law and potential “mission creep,” a default rule was established in 2006, that could guide military decision makers and JAGs in peace operations, when it became the policy of the Department of Defense to comply with the principles of international humanitarian law during all armed conflicts, however such conflicts are characterized, and in all other military operations.”¹³³ For example, the ROL handbook envisions Rule of Law operations to be predominantly guided by occupation law, followed by U.N. Mandates, other considerations of the laws of war, and human rights as a matter of efficacy.¹³⁴

Recognizing still the diversity of operations and their complementary nature, doctrine provides Judge Advocates mechanisms, or a structure for analysis, that they can employ to “provide the command with ‘specific’ legal guidance in the absence of controlling ‘specifics’ .”¹³⁵ Such specific legal guidance is intended to help JAGs and military leaders develop specific rules of engagement that can govern the action of military members. The analysis is also intended to be in addition to the default rule of complying with the law of war and following U.N. mandates.

The analysis begins after first attempting to understand the nature of the operation and the

¹³³ U.S. DEPT OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006) [hereinafter DOD DIR. 2310.01E]; CJCSI 5810.01C, *supra* note 121 (reconfirming DOD DIR. 2310.01E and further clarifying that the policy applies to all of the Armed Services and US civilians, contactors, and subcontractors assigned to or accompanying DOD components, regardless of assignment or attachment).

¹³⁴ See generally RULE OF LAW HANDBOOK, *supra* note 69, at 71-82 (discussing the order of consideration).

¹³⁵ OPERATIONAL LAW HANDBOOK, *supra* note 63, at 65.

mission's objectives through a series of questions and drawing on the operational environment.¹³⁶ JAGs must then determine which bodies of law should be relied upon.¹³⁷ In order to do so, JAGs look to what law establishes legally mandated obligations.¹³⁸ This is done by looking at a baseline of fundamental human rights, host nation law, and conventional law, such as Law of War treaties.¹³⁹ Finally, a JAG must utilize "law by analogy" to craft resolutions to issues during operations where a vacuum has been created.¹⁴⁰ The Operational Law Handbook states that although "the logical start point for this "law by analogy" process is the Law of War," sources extend beyond the law of war to include "tenants and principles from the law of war, United States statutory and regulatory law, and peacetime treaties."¹⁴¹ It is at this juncture in the legal analysis that an articulation of *jus post bellum* is most needed.

III. INCORPORATING A *JUS POST BELLUM*

A. In General: The Just War Theory

The just war theory has developed probably the most comprehensive and universal consideration of the ethics of war and peace.¹⁴² The core premise of just war theory is that "sometimes countries can be morally justified in going to war" and that "the conduct of war is always subject to moral criticism."¹⁴³ Brian Orend, a prominent contemporary just war theorist, describes the just war theory as "a coherent set of concepts and values which enables moral

¹³⁶ *See id.* at 61-62.

¹³⁷ *Id.* at 62.

¹³⁸ *Id.*

¹³⁹ *See id.* at 62-65.

¹⁴⁰ *Id.* at 65.

¹⁴¹ *Id.* at 66.

¹⁴² OREND, *supra* note 97, at 9.

¹⁴³ *Id.* at 4; MICHAEL WALZER, *ARGUING ABOUT WAR*, at ix (2004).

judgment in wartime.”¹⁴⁴ In other words, it is a set of basic legal principles guiding decision makers on the appropriateness of conduct in going to war, during war, and at war’s end.¹⁴⁵

Just war theory takes a middle ground perspective on war’s morality, with realism and pacifism at the extremes.¹⁴⁶ Realism suggests that war has nothing to do with morality whereas pacifism holds the view that war is never morally justified.¹⁴⁷ It is the just war theory, however, that the United States and the international community explicitly recognize for consideration on war’s morality.¹⁴⁸

Traditionally, discussions about the just war theory have focused on the two prongs of *jus ad bellum* and *jus in bello*.¹⁴⁹ The first has to do with the moral reasoning that justifies the resort to war – proper authority, just cause, last resort, right intention, and perhaps other concerns – while the second has to do with the legitimacy of the means used to wage war – concerning the fundamental principles of necessity, proportionality, and humanity.¹⁵⁰ Following the ongoing occupations of Iraq and Afghanistan, just war theorists are increasingly recognizing the

¹⁴⁴ OREND, *supra* note 97, at 10.

¹⁴⁵ DiMeglio, *supra* note 103, at 120 (citing Brian Orend, *War*, in Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2002), available at <http://plato.stanford.edu/entries/war/>).

¹⁴⁶ OREND, *supra* note 97, at 5.

¹⁴⁷ *Id.*

¹⁴⁸ The U.S. military references the just war theory throughout its handbooks on the law of war and the International community has accepted that the just war theory is embedded in the United Nations Charter and incorporated into Geneva law. See e.g., OPERATIONAL LAW HANDBOOK, *supra* note 63, at 1 (“There are a variety of internationally-recognized legal bases for the use of force in relations between States, found in both customary and conventional law. Generally speaking, however, modern *jus ad bellum* (the law of resorting to war) is generally reflected in the United Nations (UN) Charter.”); see also OREND, *supra* note 97, at 22 (“the clearest impact of just war theory resided in the 1948 Convention Banning Genocide, and the landmark Geneva Conventions, which are devoted to *jus in bello*. . .”).

¹⁴⁹ For a general history of the just war theory see OREND, *supra* note 97, at 9-31.

¹⁵⁰ Robert E. Williams, Jr. & Dan Caldwell, *Jus Post Bellum: Just War Theory and the Principles of Just Peace*, 7 INT’L STUDIES PERSPECTIVES 309, 310 (2006).

importance of a *jus post bellum*,¹⁵¹ which Walzer himself has recently called vital for the theory's future.¹⁵²

B. Jus Post Bellum

Conceptually, war has three phases: beginning, middle and end.¹⁵³ The third prong, *jus post bellum*, regarding wars end, has only recently been addressed by prominent just war theorists and scholars. Michael Walzer asserted in his 2003 essay, *Just and Unjust Occupations*, “we need criteria for *jus post bellum* that are distinct from (though not wholly independent of) those that we use to judge the war and its conduct”.¹⁵⁴ Brian Orend claims that a *jus post bellum* must be recognized for both conceptual and concrete historical reasons.¹⁵⁵ Recognizing *jus post bellum* would also acknowledge the different foundational principles of each prong and their corresponding guidance on power and limitations within each phase of war.¹⁵⁶ Arguably, *jus ad bellum*, the right to wage war, might be said to have little bearing on the tasks of post-conflict

¹⁵¹ OREND, *supra* note 97, at 26.

¹⁵² See *infra* note 151 and accompanying text; see also DiMiglio, *supra* note 103, at 131 (“Today, as the United States and her coalition partners are engaged in continuing operations in Iraq and Afghanistan, the need for direction in post-conflict resolution has never been greater.”).

¹⁵³ OREND, *supra* note 97, at 160.

¹⁵⁴ WALZER, *supra* note 143, at 163.

¹⁵⁵ Brian Orend lists the reasons for recognizing a *jus post bellum* in the just war theory:

- 1) Justice must be discussed during the termination phase of war; doing so, completes the just war theory;
- 2) Failure to consider *jus post bellum* fails to consider war in a deep enough, systematic enough kind of way;
- 3) Recent armed conflicts – Bosnia and Kosovo, in central Africa, in Afghanistan and twice in Iraq – demonstrate the difficulty and illustrate the importance and controversy surrounding a just peace settlement and such a state of international affairs demands a look at *jus post bellum*;
- 4) Failure to construct principles of *jus post bellum* is to allow unconstrained war termination; and
- 5) Failure to regulate war termination probably prolongs fighting on the ground.

OREND, *supra* note 97, at 160-61.

¹⁵⁶ See Boon, *supra* note 103, at 290-92; WALZER, *supra* note 143, at 163 (“The American Debate about whether to fight doesn't seem particularly relevant to the critical issues in the debate about the occupation: how long to stay, how much to spend, when to begin the transfer of power – and, finally, who should answer these questions.”).

reconstruction.¹⁵⁷ Similarly, *jus in bello*, which seeks to reduce the consequences of war to non-combatants is much narrower and different from the requirements of post-conflict reconstruction.¹⁵⁸ As a consequence, a distinct *jus post bellum* must be articulated and reincorporated into the just war theory to help alleviate, as Orend notes, the “serious problems of legal vacuum, political insecurity, and profound injustice.”¹⁵⁹

1. Basic Principles

The principles articulated in *jus post bellum* are guided by a general principle – that the just goal of a just war, must be a more secure and more just state of affairs than existed prior to the war.¹⁶⁰ This translates into a more secure possession of those rights whose violation grounded the resort to war in the first place.¹⁶¹ This guiding principle of rights vindication provides a bedrock limit on the goals to be achieved by the settlement of the conflict.¹⁶² As Walzer points out, just wars are limited wars aimed at achieving a better state of peace in which a state is not invulnerable, but less vulnerable; not safe, but safer.¹⁶³ Limitations become paramount where overreaching is common in war and democratic idealism and zeal can sometimes prolong wars, just as aristocratic pride and military hubris.¹⁶⁴

Professor Brian Orend, director of International Studies and Professor of Philosophy at the University of Waterloo, provides the most recent comprehensive articulation of the basic principles of a *jus post bellum*:

¹⁵⁷ Boon, *supra* note 103, at 291.

¹⁵⁸ Boon, *supra* note 103, at 292.

¹⁵⁹ OREND, *supra* note 10, at 222.

¹⁶⁰ OREND, *supra* note 97, at 162-63.

¹⁶¹ *Id.* at 163.

¹⁶² *Id.*

¹⁶³ WALZER, *supra* note 35, at 121-22.

¹⁶⁴ *Id.* at 122.

1. *Rights Vindication*. The settlement should secure those basic rights whose violation triggered the justified war. The main substantive goal . . . [is] ensuring the war will actually have an improving effect. Vindicating rights, not vindicating revenge, is the order of the day.
2. *Proportionality and Publicity*. The peace settlement should be measured and reasonable, as well as publicly proclaimed.
3. *Discrimination*. Distinction needs to be made between the leaders, the soldiers, and the civilians in the defeated country one is negotiating with. Civilians are entitled to reasonable immunity from punitive post-war measures.
4. *Punishment*:
 - a. *Punishment #1*. When the defeated country has been a blatant, rights-violating aggressor, proportionate punishment must be meted out. The leaders of the regime, in particular, should face fair and public international trials for war crimes.
 - b. *Punishment #2*. Soldiers also commit war crimes. Justice after war required that such soldiers, *from all sides to the conflict*, likewise be held accountable to investigation and possible trial.
5. *Compensation*. Financial restitution may be mandated, subject to both proportionality and discrimination. A post-war poll tax on civilians is thus generally impermissible, and there needs to be enough resources left so that the defeated country can begin its own reconstruction. To beggar thy neighbor is to pick future fights.
6. *Rehabilitation*. The post-war environment provides a promising opportunity to reform decrepit institutions in an aggressor regime. Such reforms are permissible, but they must be proportional to the degree of depravity in the regime. They may involve: demilitarization and disarmament; police and judicial re-training; human rights education; and even deep structural transformation towards a minimally just society governed by a legitimate regime.¹⁶⁵

¹⁶⁵ Brian Orend, *Jus Post Bellum: A Just War Theory Perspective*, 20 L.J.I.L. 571 (2007), reprinted in *JUS POST BELLUM: TOWARD A LAW OF TRANSITION FROM CONFLICT TO PEACE*, at 40-41 (Carsten Stahn & Jann K. Kleffner eds.) (2008); OREND, *supra* note 97, at 180-81. Professor Orend notes that rehabilitation is the most controversial principle because it can involve coercive regime change. See *id.* at 190-217 (providing more detailed discussion with historical examples for coercive regime change). The goal of justified regime change, as asserted by Orend, is the timely construction of a minimally just political community that makes every effort to: 1) avoid violating the rights of other minimally just communities; 2) gain recognition as being legitimate in the eyes of the international community and its own people; and 3) realize the human rights of all its individual members. *Id.* at 197. In consideration of these goals, Professor Orend provides a “recipe” for transforming defeated, rights-violating aggressor regimes into stable, peaceful, pro-rights societies. See *id.* at 204-05. Under Orend’s “recipe,” for example, he acknowledges that disarming and demilitarizing the society might be necessary for a just peace, like the American occupation of Iraq, but that something must still be done with the previously armed men, such as developing plans for employing the men or providing other opportunities, quite unlike what happened in Iraq. See *id.* According to Orend, therefore, doing nothing with the disbanded Iraqi army did not attempt to meet the goals of a justified regime. *Id.* at 205.

To be fair, Professor Orend's application of *jus post bellum* is limited to the time period of the war termination phase, as is commensurate with the notion that the law of war ceases to apply after the end of hostilities and the signing of a peace treaty.¹⁶⁶ Since the just war theory only applies to the law of war, this rather short application of the principles would seem to logically follow. Carsten Stahn, Reader in Public International Law and International Criminal Justice at the Swansea University School of Law, challenges this limited scope and highlights the fact that conflict can no longer be temporally defined simply by looking to the conclusion of a peace treaty.¹⁶⁷ Stahn, therefore, proposes that the temporal scope of application of *jus post bellum* should be redefined to embrace the reality of today's complex conflicts.¹⁶⁸ The U.S. military, through its policy, has extended the scope of the law of war to apply in all military operations.¹⁶⁹ From this standpoint, the principles of *jus post bellum* would not be as limited as Professor Orend proposes, and, in fact, would be in line with Stahn's extended approach where the principles would be applied throughout the postwar reconstruction period when military forces are engaged. Looking to Iraq as an example, this could be many years after the official "occupation" has ended.

2. Closing the Legal Gaps with a *Jus Post Bellum*

Despite efforts, gaps within the legal framework governing post-conflict reconstruction or more generally "peace operations" continue to pervade U.S. military doctrine.¹⁷⁰ First, as discussed above, JAGs will undertake "law by analogy" in order to develop specific rules to

¹⁶⁶ OREND, *supra* note 97, at 180; *see also* FM 27-10, *supra* note 120, at ¶ 10 (describing the end of hostilities as the end of war).

¹⁶⁷ Stahn, *supra* note 11, at 334.

¹⁶⁸ *Id.* at 334.

¹⁶⁹ *See supra* note 133 and accompanying text.

¹⁷⁰ *E.g.*, OPERATIONAL LAW HANDBOOK, *supra* note 63, at 65; *see also supra* note 122 and accompanying text.

guide military forces in peace operations that involve complementary implementation of various doctrinal categories. “Law by analogy” will therefore be inevitable in post-conflict reconstruction operations, since by definition these operations truly require a holistic or interrelated approach.¹⁷¹ Tenants and principles from the law of war is a key sources for guiding the law by analogy process.¹⁷² These principles, therefore, are to be drawn from the Just War theory. The U.S. military, however, still only recognizes an incomplete version of these guiding principles.

The U.S. military focuses only on *jus ad bellum* and *jus in bello* – “the before and after considerations separated by the point of entry into war”.¹⁷³ Underlying the military’s sole reliance on these two prongs is a long history of understanding that the military mission encompassed only those efforts involved in the resort to war and waging wars.¹⁷⁴ But today’s reality paints a much different picture. U.S. military stability operations are now explicitly at the same level as defensive and offensive operations. Furthermore, military operations occur all over the conflict spectrum and aim toward the promotion of development, democracy, and peace. Such goals are viewed as necessary for ensuring global peace and security. In short, the U.S. military is now, more than ever before, in the business of establishing justice after war – a *jus post bellum*.

The traditional architecture of the just war theory, however, fails to offer sufficient grounds for judging postwar behavior.¹⁷⁵ The principles of *jus ad bellum* and *jus in bello* stand in tension

¹⁷¹ See *supra* Part I.

¹⁷² See *supra* note 141 and accompanying text.

¹⁷³ Williams & Caldwell, *supra* note 150, at 309.

¹⁷⁴ See *supra* notes 13-14 and accompanying text.

¹⁷⁵ Boon, *supra* note 103, at 290-92 (advocating the need for a tripartite conception of the just war theory); Stahn, *supra* note 11, at 321-22 (stating that re-thinking the existing categories of law gains support from apparent inadequacies in the existing architecture of the law of armed force).

with the transformative purpose that post-conflict reconstruction envisions, and fails to embody the full array of considerations for the transition from war to peace.¹⁷⁶ In order to understand what a just peace should look like, principles must be grounded in the concept of human rights and achieving a more secure and lasting peace.¹⁷⁷ A *jus post bellum* encompasses such concepts. This prong of the just war theory can provide sufficient grounds for judging post war behavior. Hence, recognition of this general principle is required to help complete the “law by analogy” analysis so that JAGs and military leaders alike can understand and reach a consensus on what a just peace should look like when involved in these operations.

This leads to a second, albeit broader, justification for revitalizing a *jus post bellum*. Because these principles can provide sufficient grounds for judging post war behavior, it becomes indispensable to completing our understanding of what constitutes a just war. Along these lines, Carsten Stahn argues that a *jus post bellum* can help close a systematic gap as well as a normative gap:

In contemporary international law, the rules governing recourse to force and the prospects of peacemaking after conflict are widely regarded as different paradigms. Each category is treated as its own distinct universe. This vision is open to challenge in an era in which the very justification for the use of force is tied to the very purpose of restoring or enhancing sustainable peace. One of the advantages of a contemporary *jus post bellum* is that it might establish a closer nexus between the justification and motive of the use of force and the corresponding responsibilities in the aftermath of the intervention. ...[I]t may compel intervening powers to contemplate and provide the necessary institutional frameworks to ensure sustainable peacemaking after recourse to force.¹⁷⁸

¹⁷⁶ Roberts, *supra* note 57, at 619 (citing evidence of this conflict is in two of the most successful transformative occupations of the twentieth century, those of Germany and Japan, which were explicitly conducted outside the framework of the law of the Hague Regulations).

¹⁷⁷ See *supra* text accompanying notes 96-97.

¹⁷⁸ Stahn. *supra* note 11, at 327-28.

Closing a systematic gap envisions a fundamental inseparability of motive and means.¹⁷⁹ How a war is fought is related to its rationale. For example, it is inconsistent to claim to be waging a war for the defense of lives from future terrorist attacks or the restoration of democracy and peace if such a war is likely to increase those attacks or result in less security and political stability.¹⁸⁰ War should be justified only to produce less evil than any other alternative means – a just war seeks to right a wrong.¹⁸¹ Thus, how we intend to fight and what we intend to do after we have fought must be part of the moral calculus in determining whether or not we may justly go to war. World War II, for instance, is called a “good war” because of the postwar order it established; it significantly improved human rights.¹⁸² Ultimately, “what happens after the shooting stops and the surrender is signed is important to the moral justification of warfare, just as the means employed”.¹⁸³ Closing this systematic gap will ultimately serve to increase the legitimacy of post-conflict reconstruction operations by creating a closer nexus between the justification for the intervention in the first place and the postwar order that is being sought.¹⁸⁴

International efforts become almost mandatory to accomplish the somewhat daunting task of reconstruction in a war torn nation when considering the global influence it seeks to establish, and the large amount of time, money, resources, and potential human costs involved in reconstruction efforts.¹⁸⁵ In light of this, legitimacy of operations is paramount to their

¹⁷⁹ Williams & Caldwell, *supra* note 150, at 310.

¹⁸⁰ *Id.*

¹⁸¹ Stahn, *supra* note 11, at 327.

¹⁸² Williams & Caldwell, *supra* note 150, at 310.

¹⁸³ *Id.*

¹⁸⁴ Stahn, *supra* note 11, at 327.

¹⁸⁵ Testifying before Congress, William Durch, senior associate at the Henry L. Stimson Center and co-director of the Future of Peace Operations program, summarized this proposition:

“America can act on its own in many matters of peace and security, but there are times when acting in concert—through coalitions, alliances, regional groupings, or global institutions—is not only useful but necessary, because even a superpower has

success.¹⁸⁶ A *jus post bellum* may help to increase legitimacy within operations by mitigating any diverging views on what a just peace should look like within the international community. This serves to fill the normative gap that exists on an international level where there is no organizing framework for transitions from conflict to peace.¹⁸⁷ This may be especially important in those cases where a transformative purpose arises within an occupation rather than the original reason for the occupation, as some would argue was the case after WWII and Iraq in 2003, since these situations didn't allow for prior planning or diplomatic efforts in agreeing on a defined end state among various nations.¹⁸⁸ Thus, at their most broad, these principles could serve as shared standards of commitment toward the end of war.¹⁸⁹

And yet, more narrowly, these principles may establish guidelines, or a kind of procedure, where occupiers or interveners can communicate to one another or the host nation their intentions for action during the reconstruction period.¹⁹⁰ This may help, for example, in the context of coalition forces working together to achieve a consensus on what success in that post-conflict operation should look like. If there is a more clearly defined end state, or what is agreed upon as obtaining a just peace among all parties, then an ethical "exit strategy" from war may be developed, hence leading to a more orderly withdrawal of troops and civilians.¹⁹¹ Developing a consensus on the type and shape of the state to be built and reaching an agreement between all

finite resources, as the US experience in Iraq and Afghanistan continue to demonstrate."

Hearing, supra note 44.

¹⁸⁶ See Harris, *supra* note 82, at 25 (noting that the U.N. acts as a gatekeeper to legitimacy and often directly affects the willingness of other countries to participate in operations and provide more international assistance).

¹⁸⁷ Stahn, *supra* note 11, at 327.

¹⁸⁸ Roberts, *supra* note 57, at 581.

¹⁸⁹ OREND, *supra* note 10, at 222.

¹⁹⁰ *Id.*

¹⁹¹ OREND, *supra* note 97, at 181.

parties as to the process used to create that state generates legitimacy for the emerging order that makes new institutions acceptable to the majority of the people.¹⁹²

Similarly, a balancing test guided by the principles of *jus post bellum* may be established. Such a balancing test might have led coalition forces in Iraq to take a more limited and inclusive approach in the early reconstruction period. A *jus post bellum* would have highlighted to the CPA the need to re-engage the disbanded men of the Iraqi army in other means of employment, or at the very least, supplement their absence with coalition forces to maintain the protection of the people.¹⁹³ With these considerations in mind, the CPA most likely would have headed toward a more limited approach to reform that could have garnered less resistance and badly needed international support.

Considered most broadly, closing the normative gap with a *jus post bellum* serves the function of establishing a greater international legal order for post-conflict reconstruction. A *jus post bellum* may allow for the continuation of maintaining the necessary and existing provisions of international humanitarian law, such as occupation law, without any wholesale reform that is offered in the wake of contemporary armed conflict.¹⁹⁴ In other words, *jus post bellum* provides the basic legal principles that can foster consensus among the international community when developing rules or interpreting applicable law and its limits for post-conflict reconstruction.¹⁹⁵

¹⁹² Brahimi II, *supra* note 25, at 7 (offering that Peace must be seen as an outcome of a truly inclusive process that rests on the consensus of all parties). Brahimi notes that in Iraq the institutions created by the invaders and the Iraqis drafted to serve under the occupation never acquired any legitimacy or credibility in the eyes of the people of Iraq, which inevitably led to incoherence and increasingly divergent perspectives with, in particular, issues of identity continuing to pull communities apart. *Id.*

¹⁹³ *See supra* note 165.

¹⁹⁴ Thürer & MacLaren *supra* note 84, at 27-28.

¹⁹⁵ *See Thürer & MacLaren supra* note 84, at 27-29; *see also supra* notes 23-24 and accompanying text.

Obligations under *jus post bellum* would also apply in an objective fashion.¹⁹⁶ This “community of interpretation” can then help prevent “interpretive unilateralism” by any one State.¹⁹⁷

3. Thoughts on Incorporation

Prior to its application, some argue that a *jus post bellum* still needs to be further developed.¹⁹⁸ While it may be true that the long-term agenda calls for the codification of international laws for post-conflict reconstruction that envision a longer temporal scope,¹⁹⁹ the future of today’s operations, however, cannot wait on speculations. In fact, the just war theory is an evolving theory that has never been completely defined, where its core function is “to sustain a constant scrutiny and an immanent critique” of war and all its considerations.²⁰⁰ In sum, the first steps toward rectifying the serious problems posed by the gaps within the legal framework of post-conflict reconstruction must be taken immediately, and laying the groundwork with a *jus post bellum* is an important and logical first step.

To start, the concept should enter the realm of handbooks and supplemental documents that guide decisions on the ground, while in the meantime the military makes efforts toward revising the 1959 Law of War manual. Handbooks already incorporate the concepts of the just war theory, and would, thus, lend themselves most easily to initial revision.²⁰¹ To properly acknowledge the rising importance of postwar operations, the just war theory must be completed

¹⁹⁶ Stahn, *supra* note 11, at 344 (“Under *jus post bellum* ... all sides are under an obligation to settle disputes in a fair and just fashion after the conflict, irrespective of the cause and legality of the original use of force.”).

¹⁹⁷ Thürer & MacLaren *supra* note 84, at 29.

¹⁹⁸ Stahn, *supra* note 11, at 333 (arguing that a *jus post bellum* needs to be developed more, in particular, its scope of application needs to be better defined).

¹⁹⁹ See *supra* notes 167-68 and accompanying text.

²⁰⁰ WALZER, *supra* note 143, at 22; See generally OREND, *supra* note 10 (exemplifying how the just war theory has been constantly reinterpreted and scrutinized through the ages). The fact that a *jus post bellum* was once an equally recognized part of the theory demonstrates this point.

²⁰¹ See *supra* note 148 and accompanying text.

within these military guides to provide JAGs and military decision makers with the proper foundational and moral considerations in a postwar period. In the end, the goal must be incorporation that will affect the training of military members prior to operational deployment, and the promulgation of rules in postwar operations that foster legitimacy and are transparent to all parties.

IV. CONCLUSION

Postwar operations are no longer an afterthought. Iraq demonstrates the dangers of maintaining this mentality. These operations are as crucial, or perhaps even more, than the combat operations themselves. As a result, the U.S. military has started to embrace the emerging norm of post-conflict reconstruction and the key role it plays in securing global peace and security. New policy initiatives and revised doctrine represent the military's heightened commitment to post-conflict operations. But, if the U.S. military maintains that, as a matter of policy, the law of war is going to apply in all military operations and now, more than ever, the military is involved in postwar operations that invoke the concept of a *jus post bellum*, then these principles must also be reflected within military doctrine. Maintaining a two-prong approach to the just war theory fails to recognize the focus of 21st century conflicts and the goals of today's interventions.²⁰²

Legal principles supplied by a *jus post bellum* provide a foundation upon which international actors can engage in a collaborative effort to influence the interpretation and application of international law in a post-war environment. These principles, at their most basic level, can also provide military decision makers and JAGs with a more tailored balancing test by which to make controversial decisions, such as, decisions on the reach of reformation,

²⁰² See *supra* notes 175-76 and accompanying text.

governance, human rights, and developing an exit strategy. The U.S. military, as moral leader and defender of freedom, is in the best position to revitalize a *jus post bellum* through incorporation into their own doctrine and, thus, begin the international discussion toward a *jus post bellum* that can facilitate collective interpretation and development of the law.