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Jus Post Bellum and the Responsibility to Rebuild – Identifying the Contours of an Ever More Important Aspect of R2P

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Abstract

In the last years, the traditional dichotomy in international law between jus ad bellum and jus in bello has been more and more abandoned in favour of a system comprising also norms designed to create fair and sustainable peace. It has been recognized that post-war societies need help in order to avoid a relapse into conflict and chaos. But what is the essence of this jus post bellum? What are its sources? Did the introduction of a Responsibility to Protect (R2P) change the rather sceptical attitude by most governments towards peace-building activities that were often considered intrusive? Particular attention will be given to two recent post conflict countries, Kosovo and Libya, where the Responsibility to Rebuild was of considerable importance, but the State community only partially considered (Kosovo) or did not consider at all (Libya). In this contribution it will be shown that the contours of the jus post bellum are still rather unclear but that nevertheless it is very likely that this concept is here to stay.

Keywords

jus post bellum – responsibility to protect – responsibility to rebuild – post-conflict situations – Kosovo – Libya

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Introduction

As UN GS Ban Ki-Moon stated in 2009, "the surest predictor of genocide is past genocide."[1] This finding bears out that situations of conflict have to be seen in a dynamic, not a static way. In international law and diplomacy of the pre-UN era it has been common to portray the status of international relations in a binary way: either peace reigned or States were at war, *tertium non datur*.[2] In a largely decentralized international society with States free to go to war and to treat their subjects as they deemed fit, no necessity was felt and no authority seemed to be given to provide for procedures and institutions to preserve peace. As will be seen, only legal philosophers warned that already in peace time preparations had to be taken to avoid future wars. But in an era dominated by thinking in terms of absolute sovereignty few cared about philosophers and their insights were taken up, if at all, with great delay. Even when war was gradually outlawed[3] the simple war and peace dichotomy persisted. It was only when the nature of war changed, with the number of international conflicts diminishing and that of non-international armed conflict augmenting that the State community became fully aware of the fact that something was missing in the international peace architecture. As the former UN Secretary-General Kofi Annan reminded, "roughly half of the countries that emerge from war lapse back into violence within five years."[4] With the end of the cold war it was somewhat surprising to see that conflict prevention had become more challenging. Ideology-propelled civil wars, finding their roots in the East-West confrontation, were nothing compared to conflicts based on

1 UNGA, Implementing the Responsibility to Protect, A/63/677, para. 48, 12 January 2009.

2 This perspective was mirrored also in the way international law manuals were structured. So it was usual to divide manuals in chapters or tomes about "Peace" and "War". See e.g. P. Fauchille, *Traité de Droit International Public*, vol. I, Paix (1922); vol. II, Guerre et Neutralitè, (1921); H. Lauterpacht, *Oppenheim's International Law* (1955), vol. I, Peace; vol. II, Dispute, War and Neutrality; F. Berber, *Lehrbuch des Völkerrechts*, vol. I, Allgemeines Friedensrecht (1960); vol. II, Kriegsrecht (1962); vol. III, Streiterledigung, Kriegsverhütung, Integration (1964). For an extensive examination of the war/peace dichotomy in international law see C. Stahn, ''Jus ad bellum', 'jus in bello'... 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force', 17(5) EJIL 921 (2007). On the historical foundations of the jus post bellum concept see also L. May, 'Jus Post Bellum, Grotius, and Meionexia', in J. Stahn, J.S. Easterday and J. Iverson (eds.), *Just Post Bellum* (2014), at 15.

3 As is well known a major step in this direction was taken by the Kellog-Briand Pact of 1928.

4 UNGA, In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum, Peacebuilding Commission, A/59/2005/Add. 2, para. 1, 23 May 2005.

religious, ethnic and tribal hatred, in particular as they were often associated with merciless fights for economic resources. It became clear that war-torn societies need reconstruction involving the whole societal fabric in order to permanently halt the vicious cycle of violence.

The purpose of this article is to identify the essence of jus post bellum as it stands today and to investigate its sources. It is argued that the introduction of the concept of a Responsibility to Protect (R2P) has made international peacebuilding activities a somewhat easier sell to sovereignty-wary States. While many uncertainties still surround this concept, its main appeal lies in the fact that it may contribute to ensuring lasting peace and overcoming essential causes of conflict and war.

1 The Antecedents – A Short Review

As already stated, political philosophers and legal theorists of the past were, contrary to the governments, well aware of the need to provide for a solid peace infrastructure in order to exclude a relapse into war. While the terminological distinction between jus ad bellum, jus in bello and jus post bellum is of a relatively recent date[5] the idea behind it, the need to take care of all stages of this process that may finally lead to destruction and devastation, is not. Of these three, terminologically relatively young concepts, that of "jus post bellum" is the youngest one, having come to be used widely by academics and practitioners only in recent years, partly in the context of the discussion about the need to provide for "transitional justice" in the aftermath of the breakdown of governmental structure and the ensuing widespread violation of human rights and partly as a consequence of the revival of the search for the conditions of "just war". And it is exactly the just war doctrine that leads us back to the origins of the legal and philosophical reasoning about war, so that it has also been stated that "jus ad bellum" may not be the oldest term of the three, but it is arguably the oldest concept.[6] Many of the theoreticians of just war,

5 As Carsten Stahn writes, the concept of "jus ad bellum" was first used by Giuliano Enriques (G. Enriques, 'Considerazioni sulla Teoria della Guerra nel Diritto Internazionale', 7 *Rivista di Diritto Internazionale* 127 (1928)). The distinction between jus ad bellum and jus in bello came of widespread usage only after the end of WW II. See C. Stahn, *supra* note 2, 2007, note 19, referring to L. Kotzsch, The Concept of War in Contemporary History and International Law (1956), at 86 and 89.

6 Cf. J. Iverson, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics', 7 *International Journal of Transitional Justice* (2013), at 416.

such as St. Augustine, Thomas Aquinas, Francisco de Vitoria and Hugo Grotius at least indirectly refer to the behaviour of the warring entities in the immediate post-war period when analysing whether a war had to be considered as just or not.[7] It was, however, Immanuel Kant, who developed this concept full-circle when he looked for the conditions of "Perpetual Peace". The continuous alternation between war and peace should be stopped and give way to a world society where peace would become a constitutional element. It goes without saying that such an approach required the elimination of all elements that would foster a return to war. The importance, Immanuel Kant attributes to the post bellum period is evidenced by the fact that he refers to it already in Art. 1 of his "Preliminary Articles for Perpetual Peace Among States" of 1795:

> 1. "No Treaty of Peace Shall Be Held Valid in Which There Is Tacitly Reserved Matter for a Future War";
>
> Otherwise a treaty would be only a truce, a suspension of hostilities but not peace, which means the end of all hostilities — so much so that even to attach the word "perpetual" to it is a dubious pleonasm. The causes for making future wars (which are perhaps unknown to the contracting parties) are without exception annihilated by the treaty of peace, even if they should be dug out of dusty documents by acute sleuthing. When one or both parties to a treaty of peace, being too exhausted to continue warring with each other, make a tacit reservation (reservatio mentalis) in regard to old claims to be elaborated only at some more favorable opportunity in the future, the treaty is made in bad faith, and we have an artifice worthy of the casuistry of a Jesuit. Considered by itself, it is beneath the dignity of a sovereign, just as the readiness to indulge in this kind of reasoning is unworthy of the dignity of his minister.

While conducting war, each State should have the subsequent status of peace already in mind, so as to make peace possible, as Kant points out in Art. 6 of his "Preliminary Articles":

7 And this attitude informs also modern just war theory. See, for example, the final sentence of R.E. Williams and D. Caldwell, *'Jus Post Bell*um: Just War Theory and the Principles of Just Peace', 7 *International Studies Perspectives* 309 (2006), at 319: "Because what happens once the fighting stops is also critical to the moral evaluation of war, a concept of *jus post bellum* is important to inform both our postwar policies and the final judgments we make concerning wars."

> No State Shall, during War, Permit Such Acts of Hostility Which Would Make Mutual Confidence in the Subsequent Peace Impossible: Such Are the Employment of Assassins (percussores), Poisoners (venefici), Breach of Capitulation, and Incitement to Treason (perduellio) in the Opposing State.[8]

As we know, however, Immanuel Kant's considerations were highly appreciated in theory but not on the practical level where thinking in terms of absolute sovereignty prevailed with the great powers of the 19th and the first half of the 20th century. Immanuel Kant himself seemed to have foreseen this development when he stated the following in the 2nd paragraph of Art. 1: "But if, in consequence of enlightened concepts of statecraft, the glory of the State is placed in its continual aggrandizement by whatever means, my conclusion will appear merely academic and pedantic." While the coalition of States fighting against Napoleon was prepared to concede peace conditions to France that allowed for a swift reconstruction of this vanquished State, this was no longer the attitude of Prussia when it dictated peace conditions to France in 1871 and even less so the position taken by the Entente in the Treaty of Versailles imposing harsh peace conditions on defeated Germany in 1919. The treatment of Germany after WWII was somewhat different, most probably, however, less out of new insight into the legal and moral imperatives of a just war but rather as a consequence of a totally changed strategic environment in which the two parts of Germany were needed as partners by her former enemies, now separated by a new divide.[9]

Without doubt, after WWII, a whole set of rules were in place or were in the process of being adopted that stood against the continuing application of the ancient tradition of "vae victis".

First of all, the Stimson doctrine of 1932 should make wars of conquest futile as it barred recognition of any situation, treaty or agreement brought about by non–legal means.[10] In principle, neither the aggressor nor the victim should

8 See the English translation at: http://www.constitution.org/kant/perpeace.htm (last accessed 27 May 2014).

9 Already US President F.D. Roosevelt had in mind to provide incentives to Germany, Italy and Japan in order to re-start their economies after the war. See G. Craig and A.L. George, *Zwischen Krieg und Frieden* (1984), at 120 (transl. from *Force and Statecraft* (1983)). After the Cold War had broken out, the primary motivation to provide economic help was less the unselfish intent to build up peaceful nation States than to preserve peace by propping up one´s own allies.

10 See M.N. Shaw, *International Law* (2008), at 468. See also the resolution by the League of Nations Assembly of March 11, 1932: "[I]t is incumbent upon the members of the League

suffer any territorial loss as a consequence of the war and the State community should refrain from any recognition of territorial annexations. Jus post bellum required the restoration of the situation ex-ante.[11] Second, the outlawry of war by the Kellog-Briand Pact of 1928 in combination with the general prohibition of the use of force by Art. 2 para. 4 of the UN Charter should render the whole post bellum issue widely obsolete. Only in the exceptional situations of a war of self-defense or an UN authorized military operation according to Chapter VII of the Charter the jus ad bellum issue should still arise. Third, international humanitarian law had created a series of obligations for the warring parties that applied post bellum, in particular with regard to the treatment of prisoners of war[12] and civilian persons.[13]

It cannot be denied, however, that the jus post bellum provisions in place at the mid of the 20th century had been created primarily for situations arising out of international conflicts.[14] To a certain extent if would perhaps be possible to qualify the Mandate System after WWI and the Trusteeship System after

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of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris." League of Nations, Official Journal, Special Supp. No. 101 (1932) at 87.

11 It cannot be overlooked, however, that the peace arrangements after WW II were in apparent contrast to this rule, in particular with regard to the treatment dealt to Germany and Japan. It might be argued that the territorial losses these two countries had to suffer were sort of a compensation for wartime damage caused to the allies. For references to this position see C. Stahn, 'Jus Post Bellum: Mapping the Discipline(s)', 25(3) *American University International Law Review* (2007), at 319. This stance is, however, problematic as it risks undermining the very substance of the Stimson doctrine. While as to WW II there is no serious discussion about who is to blame as the aggressor in other cases the aggressor might hope that an eventual victory will attribute him the position to deliver the respective verdict. It seems to be commendable (and the wording of the Stimson doctrine seems to leave no other option) that the territory of the vanquished State – whoever is to blame for the war – is to be left out of the compensation bargaining.

12 See, for example, Art. 118 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 1949 (GC III) according to which prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

13 See, for example, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 which contains, i.a., a series of obligations on behalf of the occupying power towards the civilian persons in the occupied territories. See also Art. 46 of the IV. Hague Convention of 1907: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

14 Common Art. 3 of the four Geneva Conventions of 1949 is, as it is well known, applicable to civil war but this provision does not address directly post-conflict issues.

WWII as a post bellum system of rules as they were created in the aftermath of two world conflicts and they reflected the outcome of these wars, but primarily these regimes allowed for a smooth transition from colonial domination to independence.

The jus post bellum with the meaning attributed to it presently is rather the result of the "new international law"[15] and the "new international relations" that resulted from the end of the Cold War. Now the State community could act more boldly in cases of a breakdown of governmental structures and in the face of broad human suffering resulting from previous conflicts. And there was ample necessity to do so in view of a rising number of failed or failing States, of secessionist movements and civil wars prompted by ethnic, racial and religious motives.[16]

2 Creating and Applying Modern Jus Post Bellum

A *Some Preliminary Remarks as to the Norm Quality of Jus Post Bellum Provisions*

For at least two reasons it would not seem appropriate to consider for this category only hard legal norms. First of all, the body of jus post bellum norms would thereby be reduced to a rather small set of rules that only very insufficiently would be suited to deal with this complex and at the same time extremely serious challenge of these days. Second, in view of the "sliding scale" of normativity of international legal norms[17] it would be hard to find a dividing

15 See H. Neuhold and B. Simma (eds.), *Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konflikts?* (1996). The concept of jus post bellum is grounded in concept of solidarity which is also of rather recent origin. See C. Stahn, '*R2P and Jus post Bellum*', in C. Stahn, J.S. Easterday and J. Iverson (eds.), *supra* note 5, 102 at 121. On the concept of solidarity see also P. Hilpold, 'Solidarität als Prinzip des Staatengemeinschaftsrechts', 51 *Archiv des Völkerrechts* 239 (2013).

16 These conflicts were in part not new but the juxtaposition of two great ideological blocs had frozen them down for years. This held in particular true for the conflict of Yugoslavia. See W. Hummer and P. Hilpold, 'Die Jugoslawien-Krise als ethnischer Konflikt', 47 (4) *Europa-Archiv* 87 (1992).

17 As is well known, this concept of a "sliding scale of normativity" is closely associated on the one hand with the introduction of communitarian values and with the broad acceptance of "soft law" on the other. For a strong contrarian position to the concept of "relative normativity" see P. Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* 413 (1983). See also D. Shelton, 'International Law and ´Relative Normativity´', in M. Evans (ed.), *International Law* 137 (2014).

line within all the rules that effectively apply to such transition processes and to distinguish accordingly between legal norms on the one hand and non-legal norms on the other.[18]

The jus post bellum provisions are by their nature future-oriented but this does by no means exclude that they should not redress past injustice as this could be of primary importance for the peace both to be lasting and to be felt as just. With regard to peace-building, pivotal insights can be found already in the 1992 Agenda for Peace[19] whose drafting was also influenced by the experiences made during the Yugoslav conflict. Peace-building is identified as a cornerstone for any effort to create a durable peace order and to prevent further conflicts.

In paragraph 55 and following of this "Agenda" it is made clear that peacemaking and peace-keeping efforts may be valuable instruments to stop an ongoing war and to prevent a renewed break-out of hostilities in specific conflict areas, but to secure a lasting peace much more is required:

- In the immediate aftermath of an international conflict, cooperative projects linking the parties previously at war may contribute to economic and social development in a mutually beneficial way and thereby restore also confidence. Also cultural exchanges and youth educational programmes are mentioned to forestall a re-emergence of tensions that could, in the worst case, spark new hostilities.[20]
- Peace-building is identified as the counterpart of preventive diplomacy and as the necessary step following peacemaking and peace-keeping. In fact, preventive diplomacy, peacemaking and peace-keeping can tackle only the

18 It is debatable whether the corpus of jus post conflict norms should comprise both international and national norms. Österdahl and van Zadel, for example, argue for a broad concept that should encompass legal elements from international humanitarian law, international human rights law, international criminal law, national criminal law, national administrative law, national constitutional law and national military law. See I. Österdahl and E. van Zadel, 'What will Jus Bellum Mean? Of New Wine and Old Bottles', 14(2) *JCSL* 175 (2009), at182. From the viewpoint of practical application this perspective is correct. From a source-oriented sight it seems, however, preferable to include only international norms as the national norms mentioned are merely implementation norms (though usually of a higher precision than the international ones).

19 See B. Boutros Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, UN Doc. A/47/277 – S/241111, 17 June 1992. See also the so-called "Brahimi-Report", Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, 21 August 2000 which extensively deals with "peace-building".

20 *Ibid.*, para. 56.

exterior side of conflicts that usually have far deeper roots and may concern economic, social, cultural and humanitarian issues.[21] "Preventive diplomacy is to avoid a crisis; post- conflict peace-building is to prevent a recurrence."[22]

– The Agenda for Peace further addresses a very specific problem efforts for peace-building are confronted with in many areas of (former) conflict: land mines. Often it is next to impossible to re-construct a functioning economy (in particular as with regard to agriculture) and an orderly life in regions (especially rural ones) that are scattered with hidden land mines.[23] Since 1992 this problem has been taken up forcefully by the international community. While the Anti-Personnel Mine Ban Treaty of 1997[24] had become effective on March, 1, 1999, considerable diplomatic efforts were necessary to larger number of States to ratify this comprehensive ban on antipersonnel landmines. Now 162 States are parties to this convention and so a major contribution in the ongoing efforts to enhance the responsibility to rebuild has been made.[25]

B *Yugoslavia as a Testing Ground*

Yugoslavia became the main, although by far not the only testing ground for the new jus post bellum.[26] While there is still no agreement in theory and practice about the exact contours of this concept, if we try to devise a mainstream definition it will become clear to what extent the international community was confronted with jus post bellum issues in Yugoslavia. In this sense we could define jus post bellum as "the body of provisions, both of a legal and of a soft law nature, of best practices and recommendations, be they binding in a strict sense or not, that regulate the process of the transition from armed conflict to sustainable peace that is felt to be just by the main parties involved."[27]

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21 *Ibid*., para. 57.

22 *Ibid*.

23 *Ibid*., para. 58.

24 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction or Ottawa Convention, 2056 UNTS 241.

25 Unfortunately, important military powers, such as the United States, Russia and China, still remain outside this regime.

26 Other cases are, for example, Iraq, Afghanistan, Bosnia-Herzegovina, Lebanon, Rwanda and East Timor. See for more detail on these cases G.H. Fox, 'Navigating the Unilateral/Multilateral Divide', in Stahn, Easterday and Iverson, *supra* note 5, 229, at 248 and M. Wählisch, 'Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the 'Post'', in Stahn, Easterday and Iverson, *ibid.*, 315, at 324.

27 This definition is based on that provided by J. Iverson, *supra* note 6, at 420 but it has been considerably extended.

The dissolution of Yugoslavia and the ensuing civil strife and broad-scale human rights abuses prompted the State community to devise and to implement a series of jus post bellum concepts and instruments. Of a path-breaking nature were the creation of an International Criminal Tribunal for Ex-Yugoslavia in 1993[28] and the international administration of Bosnia introduced by the Dayton Agreement of 1995. But it was the former Yugoslav (and Serb) province of Kosovo where jus post bellum was most intensively tested and developed. In 1999 widespread human rights abuses perpetrated, first of all, by Serb militia forces, prompted 17 NATO States to intervene. As this intervention, though being necessary from a human rights point of view, stood in blatant contrast to existing international law,[29] the Canadian government created an international study commission that should look for appropriate ways for the International Community to deal with challenges of this kind. The results were presented in 2001[30] and this study gave birth to the concept of the Responsibility to Protect (R2P). Within this concept, the Responsibility to Rebuild is one of the central pillars (together with the Responsibility to Prevent and the Responsibility to React). According to the ICISS Report of December 2001, states that take military action in discharging their "responsibility to protect" should also take a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development.[31] This involves also the commitment of sufficient funds and resource and close cooperation with local people.[32]

In the meantime, by SC Resolution 1244 an administrative regime for the province of Kosovo, with a civil and an administrative presence,[33] had been established. Thereby, the international community had assumed responsibility for this province and this responsibility was both a responsibility to prevent as a responsibility to rebuild. In the years before, the UN had acquired considerable experience with such forms of territorial administration of conflict

28 SC Res. 827, 25 May 1993.

29 See P. Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12(3) *EJIL* 437 (2001).

30 International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, 2001.

31 ICISS Report, 2001, para. 5.1.

32 *Ibid.*, para. 52.

33 See P. Hilpold, 'The Kosovo Opinion of 22 July 2010: Historical, Political and Legal Pre-Requisites', in P. Hilpold (ed.), *Kosovo and International Law* 1 (2012), at 12. The military presence was delegated to KFOR (Kosovo Force) whose troops came to a considerable extent from NATO States.

regions, so for example in Namibia, Cambodia, Bosnia-Herzegovina and Eastern Slavonia.[34]

The pivotal importance of the combined effort both to prevent and to rebuild transpires clearly from the primary functions attributed to the civil presence and the military presence. The civil presence was based on four pillars for which different international organisations were responsible:

- the UNHCR for the area "humanitarian affairs";
- the UN for the "Interim Civil Administration";
- the OSCE for "Institution Building" and
- the EU for "Reconstruction".

According to para. 9 of SC Res. 1244 the military presence exercised by KFOR had the following tasks:

- deterring of renewed hostilities;
- establishment of a secure environment;
- ensuring public safety and order until the international civil presence can take responsibility for this task,
- conducting border monitoring duties.

SC Res. 1244 of 1999 and the UN administration of Kosovo introduced on the basis of this document became an experiment of epochal dimensions as far as the ambition of the international community is concerned to rebuild a war-torn society from scratch. As is well known, these efforts succeeded in their preventive dimension: Kosovo became a comparatively peaceful region.[35] The efforts to rebuild a functioning society with a self-sustaining economy were, on the other hand, more or less a failure. This was analysed very perspicaciously by UN Special Envoy Martti Ahtisaari appointed in 2005.[36] In his Comprehensive Proposal for the Kosovo Status Settlement presented on 15 March 2007 to the UN Secretary-General and forwarded on 26 March 2007 to the Security Council[37] the UN Special Envoy was very outspoken about the fact that the

34 *Ibid.*

35 It is also known, however, that sporadic outbreaks of violence could nonetheless not be impeded. This time, primary victims were Serb Kosovars as well as members of other minorities, in particular the so-called RAE-minorities (Roma, Ashkali, Egyptians).

36 UN Doc. S/PRST/2005/51, 24 October 2005.

37 See UN Security Council, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, UN Doc. S/2007/167/Add.1.

chance to rebuild had been missed. There was the sense that the international society had shown too much commitment, for too long a time, often at the wrong place and offering no vision for the future while the Kosovar society had remained inert vying only for independence:

> Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo's current state of limbo cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and interethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole.[38]

Athisaari's main theses were that Kosovo´s reintegration into Serbia was no viable option, that continued international administration was not sustainable and that independence with international supervision was the only viable option. At first look, these findings might appear puzzling: How can it be that within rebuilding activities carried out by the international community a lesser degree of commitment by the international community is advisable? Apart from the problem of funding which is always pivotal when the international community has to finance rebuilding activities care shall be taken that the assumption of a responsibility to rebuild would not convey the message to the beneficiaries of these activities that they may reduce their own efforts correspondingly. At some point exactly this situation happened in Kosovo: The Kosovar people had become dependent from funding by the international community and had set too little efforts to stay on their own feet again. As is well known, in hindsight the independence of Kosovo has not been brought about exactly according to Athisaari's plan, but the declaration of independence of 18 February 2008, as problematic as it might seem when looked at from the viewpoint of Res. 1244/1999 which required a consensual solution,[39] nonetheless set in motion a new state-building process which returned ownership of this process to the Kosovar people (or at least to the vast majority of it).

In sum, important lessons can be drawn from this episode: Initial efforts by the State Community to appease and rebuild a war-torn region and society

38 *Ibid*., para. 4.

39 For an extensive discussion see the contributions in P. Hilpold (ed.), *Kosovo and International Law* (2012).

might be indispensable as the respective region or society might not find the force on its own to return to the path of peace and stability. This help shall, however, never become patronizing or otherwise de-responsibilize the beneficiary. The responsibility to rebuild comprises also the responsibility to rebuild the capacity of the beneficiary to stand on its own feet and this capacity it not only to be interpreted in a material sense but also intellectually and psychologically. With other words: The beneficiary of help must know from the very beginning that this help is limited in time. No new dependencies shall be created that would anyway not be affordable and not be in the interest of any side.

C *The ICISS Report of 2001 and the Ensuing Development*

As to the Responsibility to Rebuild, the 2001 Report forcefully argued that after military intervention "there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development. Conditions of public safety and order have to be reconstituted by international agents acting in partnership with local authorities, with the goal of progressively transferring to them authority and responsibility to rebuild."[40]

The idea of R2P was simple and revolutionary at the same time.[41] In order to make its way from a simple concept in a study by an independent research group to a universally accepted principle of international law[42] a series of hurdles had to be overcome – and this happened in an astonishingly swift and forceful manner so that already in 2005 at the UN World Summit R2P got universal recognition and support, even though the main thrust of this norm was somewhat altered. It is here not the place to enter into a detailed discussion about the development this concept that has taken place between 2001

40 *Ibid*., para. 5.1.

41 For more details see, i.a., R. Thakur and Th.G. Weiss, 'R2P: From Idea to Norm – and Action?', 1 *GR2P* 22 (2009); A.J. Bellamy, 'The Responsibility to Protect – Five Years On', 24(2) *Ethics & International Affairs* 143 (2010) and P.T. Stoll, 'Responsibility, Sovereignty and Cooperation – Reflections on the "Responsibility to Protect"', in D. König et al. (eds.), *International Law Today: New Challenges and the Need for Reform?* 1 (2007).

42 It shall not be ignored that there are still academics and practitioners that contest the norm quality of R2P. Nonetheless, the prevailing opinion seems to develop in the opposite direction. The High Level Panel of distinguished persons instituted by UN GS Kofi Annan spoke of an "emerging norm" (United Nations, *A more secure world: our shared responsibility*, 2004, 66 para. 203). See also N. Dorr, 'The Responsibility to Protect – an Emerging Norm?', 19 *Irish Studies in International Affairs* 189 (2008) and Thakur and Weiss, *ibid*. For a detailed analysis coming to the result that R2P evidences many elements of a normative concept see P. Hilpold, 'From Humanitarian Intervention to the Responsibility to Protect', in P. Hilpold (ed.), *The Responsibility to Protect* (R2P) 1 (2015), at 26ff.

and 2005. Only to mention the most important aspects, it has to be remembered that this concept has become more focused on the protection against the most serious human rights violations that have been specified in detail. It has been made clear that no form of humanitarian intervention outside the UN Charter system was allowed. The UN Security Council could not be bypassed.[43] But what happened to the Responsibility to Rebuild? While governments reveal in general a high degree of sensibility when the State community sets activities in either of the three pillars, at first look one might be inclined to assume that the Responsibility to Rebuild is the least delicate field. In reality it proved to be quite the opposite. In fact, the Responsibility to Prevent and, even more so, the Responsibility to React, although having considerable impact on sovereignty, apply only in rather exceptional circumstances where the State community has to fear even much worse developments if no action is taken within the short run. The Responsibility to Rebuild has also preventive aspects, but they are less visible. Rebuilding usually takes place in a situation where the immediate danger of conflict, death and destruction has passed. The respective State is in the process of re-instating its sovereignty and in this highly sensible phase states fear intervention most. This seems paradoxical as international support to rebuild is actually intended to re-establish effective and sustainable sovereignty but the fear is, that sovereignty installed with outside help is spurious, that it is contaminated by the ideology and the interests of the intervening powers. A state-building process carried out with strong foreign assistance may run the risk of being qualified as the result of a foreign intervention and therefore be denied recognition. On the other side, no incentive shall be given to favour foreign intervention disguised as help for state-building. As a consequence, the attitude of the most prominent stakeholders involved in the formation process of R2P was divided when talk came about the Responsibility to Rebuild.

Former UN SG Kofi Annan and the High-level Panel on Threats, Challenges and Change (HLP), a study group of eminent persons created by the SG,[44] were most sanguine about the third pillar. The HLP rightly identified the preventive nature of peacebuilding when it stated that "[r]esources spent on implementation of peace agreements and peacebuilding are one of the best investments that can be made for conflict prevention".[45] Kofi Annan took up with great

43 For more details on this development see Hilpold, *ibid.*

44 See P. Hilpold, 'Reforming the United Nations: New Proposals in a long-lasting Endeavour', LII *NILR* 389 (2005).

45 K. Annan, *Report of the High-level Panel on Threats, Challenges and Change, A more secure world: Our shared responsibility*, 2 December 2004, para. 221.

enthusiasm the proposal by the HLP to institute a Peacebuilding Commission[46] although he might have sensed the looming opposition against such an institution when he took a much more limited stance in comparison to the HLP and lobbied for a Commission that should have no preventive and only post-conflict functions.

In the Outcome Document of the World Summit of 2005 which – unexpected by many – adopted the concept of R2P[47] no explicit mention was made of a Responsibility to Rebuild,[48] although an indirect reference to this concept can be found in this document in para. 139[49] and peacebuilding is mentioned in para. 97:

> Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding commission as an intergovernmental advisory body.

By two resolutions of equal content the GA and the SC instituted together this Peacebuilding Commission.[50] This Commission fell, however, short of most expectations: It was not created as an independent international organisation but as an intergovernmental organ with merely consultative functions.[51] Consultations about country-specific measures take place in apposite meetings with

46 See the Report by Kofi Annan, *In larger freedom: towards development, security and human rights for all*, A/59/2005, 21 March 2005.

47 See for one of the first comments on this event P. Hilpold, 'The duty to protect and the Reform of the United Nations – a new step in the development of International Law?', 10 *Max Planck Yearbook of United Nations Law* 35 (2006). For a detailed analysis of R2P, see P. Hilpold (ed.), *Die Schutzverantwortung* (R2P) *– Ein Paradigmenwechsel in der Entwicklung des internationalen Rechts?* (2013).

48 See the famous paras. 138 and 139 of the Outcome Document 2005.

49 "We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity […]."

50 SC Res. 1645, 20 December 2005 and GA Res. 60/180, 20 December 2005.

51 See F. Battaglia, 'La commissione per il consolidamento della pace: l'attività svolta e le prospettive di rilancio', in N. Napoletano and A. Saccucci (eds.), *Gestione internazionale delle emergenze globali: regole e valori* 75 (2013), at 81.

the involvement of a very large number of stakeholders, comprising in particular also regional representatives.[52] In sum, this institution has become a forum for discussing and organizing peacebuilding activities rather than a directly operative instrument. Nonetheless, also this achievement must not be underestimated. Creating more transparency and providing for a clearing forum for peacebuilding activities can be of decisive importance in order to launch effective measures in this field but in particular, to create moral pressure to assist such initiatives.

International institutionalization of peacebuilding activities is of essential importance for their perspectives of success and with the Peacebuilding Commission an important step has been made towards this aim. While the intergovernmental nature of this Commission still makes success of single initiatives largely dependent from the individual contribution of participating States the trend is clearly directed towards the affirmation of a greater responsibility of the State community as a whole in this field. While in some cases specific obligations to rebuild may lay on single parties which bear primary responsibility for the preceding conflict, most often it is not possible to attribute a specific responsibility to individual States in this respect and it is up to the State community to assume this task.[53] *Erga omnes* obligations come to life.[54]

52 *Ibid.*, at 80.

53 See J. Pattison, 'Jus Post Bellum and the Responsibility to Rebuild', *British Journal of Political Science* 1 (2013) who takes a clear stance against what he calls the "Belligerents Rebuild Thesis".

54 See on this concept P. Picone, *Comunità internazionale e "obblighi erga omnes"*(2013). According to Art. 48 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, *Report of the on the Work of its Fifty-third Session*GAOR, 56th Sess, Supp No 10, p 43, Doc A/56/10 (2001) the following rules apply in this field:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
   (*b*) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
   (*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

D *The Case of Libya as a Warning Example*

The military intervention carried out by a coalition of Western States and under NATO command in spring 2011 has long been hailed as a success.[55] And from a military viewpoint it surely was. SC Resolution 1973 of March 17, 2011, after having condemned "the gross and systematic violation of human rights, including arbitrary detention, enforced disappearances, torture and summary executions" had given a clear mandate for intervention. Some controversy exists, however, about the reach of this mandate as the wording of SC Res. 1973/2011 is rather ambivalent.[56] On the one hand, there can be no doubt that the establishment of a no fly zone stood at the centre of this document[57] as this was perceived to be the most efficient way to protect civilians against Gadhafi's troops that in the previous weeks and months had slaughtered thousands rebels and civilians alike. On the other hand, however, Res. 1973/2011 went far beyond when it authorized Member States "to take all necessary measures", excluding only "a foreign occupation force of any form on any part of Libyan territory".[58] A broadly held opinion can be found in literature that this Resolution cannot be interpreted as an authorization for regime change,[59] but regime change was exactly one of the primary goals of the intervening Western alliance. According to others, such a regime change might not have been a legitimate goal in itself but it could be qualified as a necessary means to protect civilians effectively, as with the Gadhafi regime in power this would not have been possible.[60] Be that as it may, there can be no doubt that the intensity of the NATO led intervention, which swept away all governmental structures

55 See, e.g., G. Ulfstein and H. Fosund Christiansen, 'The Legality of the NATO Bombing in Libya', 62 *ICLQ* 159 (2013); P.D. Williams and A.J. Bellamy, 'Principles, Politics, and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force', 18 *Global Governance* 273 (2012); Th.G. Weiss, 'RtoP Alive and Well after Libya', 25 Ethics & International Affairs 1 (2011); and, M. Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya', 52 *Virgina Journal of International Law* 355 (2012).

56 See, e.g. E. Cannizzaro, 'Responsabilità di proteggere e intervento delle Nazioni Unite in Libia', 94 *RDI* 821 (2011).

57 SC Res. 1973, 17 March 2011, para. 6.

58 *Ibid*., para. 7.

59 See, e.g.., N. Ronzitti, 'NATO´s intervention in Libya: A Genuine Action to Protect a Civilian Population in Mortal Danger or an Intervention Aimed at Regime Change?', XXI *Italian Yearbook of International Law 2011* 3 (2012) and G.H. Fox, 'Regime Change', Wayne State University Law School Legal Studies Research paper Series No. 2013–10.

60 See M. Payandeh, 'The United nations, Military Intervention, and Regime Change in Libya', 52 *Virginia Journal of International Law* 355 (2012), at 387ff.

existing in Libya,[61] placed an enormous responsibility on the intervening forces for the rebuilding of the country – a responsibility, the intervening States had probably not anticipated and were in any case not willing to assume. The consequences are known: After a first stabilization as an immediate result of intervention the security situation began to deteriorate steadily, finally ending up in a chaotic situation that left the country in the hands of armed gangs, contracted militias and Islamist militias. The Human Rights Watch Report 2014 on Libya conveys an appalling picture about the human rights situation in this country.[62] The rich weaponry arsenals left behind by the Gadhafi regime which were in many cases looted in the immediate aftermath of the intervention are now destabilizing not only Libya but also neighbouring countries. Efforts to establish a democratically elected government with effective power over the country were undertaken, but they have widely failed. Events in Libya have demonstrated again that the Responsibility to Protect is a comprehensive concept that for good reason has been distinguished from that of humanitarian intervention, a concept that was mainly directed at ending the most serious human rights violations but was not concerned either with comprehensive prevention measures nor with the reconstruction of war-torn societies.[63] It has become evident that there may be situations where military intervention has been successful while, seen from the perspective of R2P, the whole endeavour becomes a failure in its entirety. Obviously, each situation is different, but it seems that Libya, due to the particularities of this country's governmental structure, that under Gadhafi had left no space for any independent administrative capacity to develop, has been a case where the third pillar of R2P, the Responsibility to Rebuild, was of paramount importance. The authority to intervene flowing from SC Res. 1973/2011 has been interpreted by the intervening States in an extremely extensive way and so should they have had to understand their responsibilities resulting from their intervention. The intervening States had, however, no experience with such a rebuilding task and even if they tried more adamantly, due to broad cultural diversities and strong suspicion by

61 This happened also because no governmental structures with some autonomy from the Gadhafi regime existed in Libya. With the ousting of Gadhafi also government disappeared.

62 See http://www.hrw.org/world-report/2014/country-chapters/libya (last accessed 3 September 2014).

63 At least this is the distinction that is usually made in literature. A more nuanced look at the concept of humanitarian intervention reveals, however, that past interventions of this kind often also display some preventive aspects and/or comprised also reconstruction measures. See P. Hilpold, 'R2P and Humanitarian Intervention in a Historical Perspective', in P. Hilpold (ed.), *The Responsibility to Protect* 60 (2015).

the State community wary of any form of neo-colonialism, they would probably have been ill-equipped to engage successfully in such an activity. The Libya case reveals that more research has to be undertaken to better understand the particular responsibilities flowing from an intervention in such a complex situation and to find ways to implement such responsibilities successfully.

Stock-taking

Viewed from the standpoint of the initial proposals the outcome of the endeavours to establish a responsibility to rebuild may appear to be meagre. This impression is, however, deceptive as the proposals tabled at the beginning of the last decade were very far-reaching and probably utopian for the time being. It should not be overlooked that in the meantime much has been achieved. The Jus Post bellum is no longer a mere academic creation but it has been filled with life and substance. Of course, to a large extent, we are not faced here with "hard" treaty norms or with provisions having an uncontested customary law nature. Nonetheless the obligation to rebuild, together with R2P as a whole, has received so much endorsement by the State community that the respective norm can be seen as an expression of a very broad State consent.[64] The State community has become aware of the fact that jus ad bellum, jus in bello and jus post bellum are closely interlinked. The attitude to identify these three concepts with three successive temporal stages leading from war to (definite) peace proves to be mistaken as each and every stage bears in itself elements both for progress and for regress. These three stages rather make full circle. Particular attention has been given here to the post-war period where adequate measures have to be taken to avoid a relapse into war.[65] More and more elements have become identified as part and parcel of a just arrangement that should qualify just post bellum in a positive sense.[66]

64 As is well known, the true source of international law is not what we find in Art. 38 of the ICJ Statute but State consent. See B. Simma, 'Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung', in R. Bernhardt et al. (eds.), *Fünftes deutsch-polnisches Juristen-Kolloquium, vol. 2: Die Bedeutung der Resolutionen der Generalversammlung der Vereinten Nationen* 45 (1981).

65 For an in-depth discussion of the necessary arrangements after wars see B. Orend, 'Justice after War', 16(2) *Ethics & International Affairs* 43 (2002).

66 See, for example, Williams and Caldwell, *supra* note 7 who distinguish the following elements that should characterize a proper jus post bellum settlement: restoration of order, vindication of human rights, restoration of sovereignty, or self-determination and the punishment of human rights violations. See Williams and Caldwell, *supra* note 7, at 318.

Of course, not every detail of this jus post bellum has found uncontested recognition and as a whole jus post bellum remains a category of uncertain contours. Nonetheless, this category has solidified in the meantime to such an extent that it is here to stay as a genuine concept of international law. To a considerable measure it consists of cooperative instruments of an informal nature that are nonetheless widely obeyed by the parties[67] and which are destined, as it seems, to coalesce into obligations of the State community in its entirety. The responsibility to rebuild has already been put to the test of practice and these experiences have revealed many essential elements of this concept that have to be obeyed if reconstruction of a peaceful society has to succeed. As evidenced, rebuilding activities regularly imply the commitment of considerable funds and resources. These resources have to be employed not only for rebuilding activities in a stricter, material sense but also to create a legal infrastructure that ensures respect for the rule of law, good governance and sustainable development.[68] Care should also be taken to build a democratic, inclusive constitution that draws on the lessons from the past.[69] All these activities have to be carried out in close cooperation with the local people[70] and civil society. Rebuilding activities cannot be imposed but must be based on consensus and finally prompt the local community to carry out these activities on their own account. The rebuilding activity must furnish the necessary expertise and motivate the recipients of this help to continue with the rebuilding efforts after foreign assistance comes to an end. Thereby any patronizing attitude has to be avoided.

With regard to two recent cases, Kosovo and Libya, it can be shown to what extent the responsibility to rebuild has been taken seriously As to the regard of the first case, the international community has undertaken extraordinary efforts to reconstruct an economy and a society that previously had been suffering under oppression, discrimination and civil unrest. To a certain extent the rebuilding activities were successful but the final success was missed as it

67 See D. Fleck, 'Jus post bellum: eine neue Disziplin des Völkerrechts? ', 25(4) *Humanitäres Völkerrecht* 176 (2012). According to Maus, it is through the consistent practice of the UN that a rule has evolved according to which peacebuilding activities can be expected to be carried out by the UN. 'The Responsibility to Rebuild – Some Remarks on a UN Obligation to Conduct Peacebuilding Activities', (2) *HuV* 52 (2010), at 60. If these thoughts are carried further one might say, that here sort of "estoppel principle" applies. *Ibid*., at 60.

68 ICISS Report 2001, para. 5.1.

69 See J. Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era? – How its Third Pillar Ought to be Applied', 1 *Groningen Journal of International Law* 11 (2012), at 15.

70 ICISS Report 2001, para. 5.2.

was not possible to actively involve the beneficiaries of this help. Only after the declaration of independence the Kosovar society was prepared (and compelled) to take their lot in their own hands. These events demonstrated how important it is to see in the responsibility to rebuild a cooperative task and not a unilateral one. As to Libya, after the military intervention, which was successful in technical terms, the international community has widely failed to engage in rebuilding activities in this country and, as a consequence, Libya is now at the brink of becoming a failed State. This case underscores therefore again that the Responsibility to Protect is a holistic concept: Military intervention without subsequent rebuilding activities can in sum and under a humanitarian perspective even be counterproductive, the main result being the replacement of a despotic regime by a failed State.

The responsibility to rebuild as a concept no longer needs to be related to a just war concept, which in any case remains hardly reconcilable with the prohibition of the use of force and which is ill-suited to apply to civil war. All the attempts to restrict it to specific instruments, be it rebuilding activities in the stricter sense, supporting the rule of law in post-conflict societies,[71] the obligation to give compensation for losses caused by an intervention or to international criminal justice as an instrument to overcome past injustice,[72] have to be rejected. Jus post bellum remains a highly complex subject[73] which cannot be defined in all detail due to the singularity of any peacebuilding process and also due to the rapidly changing universal framework that surrounds such

71 This is, though, surely a very important element of jus post bellum. See D. Tolbert and A. Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies', 19 *Harvard Human Rights Journal* 29 (2006).

72 Without doubt, an uncompromising persecution of the most outrageous crimes committed during past conflicts (i.e. the crimes falling into the competence of the ICC) is of fundamental importance for overcoming the conflict itself. In this, criminal justice makes part of the attempts to preserve "memory" of past injustice with the aim to make sure that it does not happen again. Nonetheless, care must be taken not to exaggerate in cultivating "memory". In particular it has to be avoided that past injustice perpetrated by former generations instils the desire for revenge in the present – against people that have nothing to do with these historical events if not for descent from the original culprits. Criminal justice should best be suited to avoid just this problem as it is by its very nature of a personal, subjective nature. On the importance to preserve "memory" and the concomitant dangers see E. Marko-Stöckl, 'My truth, your truth?: the role of history teaching and truth commissions for reconciliation in the former Yugoslavia', 7 *European Yearbook of Minority Issues* 327 (2007/2008).

73 As to the need to further clarify this concept see also V. Epping, 'Ius post bellum – Völkerrechtliche Grauzone und Flickenteppich', in A. Fischer-Lescano et al. (eds.), *Festschrift Michael Bothe* 65 (2008).

processes. But, on the other hand, over the last years the essence of peacebuilding has developed distinguished traits: A war-torn country has to be reconstructed not only materially but also with regard to its legal infrastructure and its societal fabric. Not only the debris of destructed buildings have to be removed but also violations of human rights have to be addressed. To this end international law has developed a rich panoply of proceedings and instruments that operate in addition and in parallel to traditional, retributive justice: truth, reparations, reconciliation and the institution of guarantees of non – repetition,[74] only to mention a few. It is now the time to go on in this clarifying process and to give further transparency and authority to a set of rules that have proved to be so crucial for overcoming otherwise devastating conflict situations, be they of an international or an internal nature.

74 See J. Sarkin, *supra* note 87, at 35. On the meaning of "justice" in the postwar context see also M. Evans, 'At War´s End: time to Turn to *Jus Post Bellum*?', in Stahn, Easterday and Iverson 26, *supra* note 5.