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Article

Towards a New Jus Post Bellum: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability*

Liliana Lyra Jubilut**

The creation of the United Nations Peacebuilding Commission and the United Nations Human Rights Council is the main institutional outcome of the United Nations (UN) reforms adopted upon the 60th anniversary of the organization.¹ The need for the Peacebuilding Commission arose due to the evolution in the UN's post-conflict efforts since the Cold War.² Examples of these efforts include the UN missions in Cambodia, Angola, Somalia, Kosovo and East Timor,³ where the activities ranged from monitoring elections⁴ to conducting the complete administration of the territory.⁵

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1. *See generally* 2005 World Summit Outcome, G.A. Res. 60/L.1, U.N. Doc. A/RES/60/L.1, ¶¶ 97-105, 157-160 (Sept. 16, 2005) (describing the need for these bodies, the institutional makeup, and their purpose).

2. *See generally* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 238 (2004).

3. *Id.* at 238-39.

4. *See Id.* at 66 (“The agreement required Indonesia to make arrangements, with the assistance and participation of the UN Representative and his staff, to give the people of the territory the opportunity to exercise freedom of choice in determining their future.”).

5. *See Id.* at 238 (“The fact that [civil administration] operations continue to

Nevertheless, the evolution of international law connected with “peacebuilding” has not kept pace with on-the-ground developments. There are two reasons for this gap: (1) the lack of an institutional framework within the UN to deal with post-conflict efforts, and (2) the lack of a clear normative framework to deal with the justice of conduct after war—both for clarifying the existing rules (i.e. a modern *jus post bellum*) and for reasons of accountability.

The lack of an institutional framework is relevant because the UN is the organization with both a responsibility for international peace and security⁶ and a clear mandate to promote human rights.⁷ The problem created by a lack of a normative framework is twofold. First, given the diversity of recent post-conflict efforts, the norms of both international humanitarian law and the law of occupation are often inapplicable or insufficient. Because the effectiveness and legitimacy of international law are constantly being challenged, especially in light of the changed circumstances brought about by the war on terror,⁸ it is both necessary and timely to establish a clear normative framework.⁹ Second, the normative framework is related to the question of accountability, a pervasive issue in international legal debates. The appearance of a lack of accountability in post-conflict efforts tends to weaken their legitimacy and efficacy. Therefore, enhancing accountability mechanisms is a relevant task. These gaps between theory and practice are inter-related and bridging one of them requires taking actions to bridge the other. This paper suggests that the creation of the Peacebuilding Commission¹⁰ is a starting point in this direction, as the Peacebuilding

be managed by the UN Department of Peacekeeping Operations . . .”).

6. U.N. Charter art. 1, para. 1.

7. Human rights are part of the UN Charter (preamble, para 2) but the central role the organization plays in this area derive from its practice throughout the years, which can be exemplified by the adoption of the Universal Declaration of Human Rights; the sponsorship of several international treaties (such as the International Covenants on Civil and Political and on Economic, Social and Cultural rights) and its field work. See *Id.* pmb1, (espousing the common goals that define members of the U.N.).

8. *E.g.*, Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. May/June 2003, 16, 16 (“[I]t became clear that the grand attempt to subject the use of force to the rule of law had failed.”).

9. *Cf. Id.* at 31 (describing variables that need to be taken into account in a new normative framework for the Security Council).

10. See generally G.A. Res. 60/180, U.N. Doc. A/RES/60/180 (Dec. 30, 2005) (establishing the Peacebuilding Commission).

Commission may play an important role in both of these areas.

In fact, the UN established the Peacebuilding Commission in order to bridge the above-mentioned gaps.¹¹ It can aid in the development of a modern *jus post bellum* by assisting the creation of a framework of principles and rules for post-conflict efforts.¹² Furthermore, it can enhance accountability by both adding transparency to post-conflict efforts and by establishing a principled way of assessing these efforts.¹³ The area of accountability is where the Peacebuilding Commission may be most effective. As posited above, however, because all areas are inter-related, advancing one aspect of post-conflict efforts means advancing the legal treatment of all of them.

In order to develop this thesis, this paper is divided into four sections. The first will briefly describe the history of the Peacebuilding Commission, highlighting the changes in UN involvement in post-conflict efforts, including an assessment of the differences between the proposals made prior to the Commission's creation and the body as it was actually created. The second section will discuss whether the Peacebuilding Commission can realistically carry out its mandate, given the gap between theory and practice in the international law of *jus post bellum*. The third section will explain how the Peacebuilding Commission can play the role of doctrinal and practical gap-filler in the law of *jus post bellum* by creating a normative framework for evaluating post-conflict efforts. The paper will conclude with a brief discussion of the mechanisms of accountability that the Peacebuilding Commission can use to enforce the normative framework that this paper proposes. Above all else, this paper seeks to underline the belief that, given the right support, the Peacebuilding Commission can make a meaningful contribution to a modern *jus post bellum*, both in terms of theory and practice.

11. *See Id.* pmb., para. 2 (outlining the purposes of the Peacebuilding Commission).

12. *See Id.* para. 2(c).

13. *See Id.* para. 13.

I. THE CREATION OF THE UN'S PEACEBUILDING COMMISSION

A. THE EVOLVING CIRCUMSTANCES AND RECENT NATURE OF POST—CONFLICT EFFORTS LED THE UN TO CREATE THE UN PEACEBUILDING COMMISSION

The UN was created with the main purpose of establishing a collective security system that would replace the unilateral use of force by states.¹⁴ It is in order to fulfill this task that the Security Council was vested in the role of guardian of international peace and security.¹⁵ The cornerstone of the system was the limitation on the recourse to force.¹⁶ This approach was based on three underlying factors: (1) respect for the sovereignty of Member States;¹⁷ (2) the idea that the biggest threat to international peace and security derived from inter-state conflicts;¹⁸ and (3) a narrow definition of the concept of peace.¹⁹

With the advent of human rights, globalization, changes in the concept of sovereignty, and the end of the Cold War, these underlying factors evolved and the UN approach to international peace and security was forced to adapt.²⁰ New concerns arose, such as (1) internal conflicts, (2) the lack of capacity of some states to protect their own population and to perform the inherent tasks of governance, and (3) gross and systematic violations of human rights by states.²¹ The UN was

14. See THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 2 (2002) (“[T]he UN Charter . . . is quite clear-eyed about its intent: to initiate a new global era in which *war* is forbidden as an instrument of state policy, but *collective security* becomes the norm.”); David M. Malone & Ramesh Thakur, *UN Peacekeeping: Lessons Learned?*, 7 GLOBAL GOVERNANCE 11, 12 (2001) (discussing the primary responsibility of the UN).

15. UN Charter preamble para 6; art 1. para 1; art. 2 para 6; and art. 24

16. *Id.* art. 2, para. 4, art. 51.

17. See Franck, *supra* note 14, at 7 (discussing the Charter’s treatment of State Sovereignty).

18. *Id.* at 20 (discussing the Charter’s treatment of conflict).

19. *Id.* at 138 (discussing a balance between peace and justice).

20. See RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION 5-8 (2005) (elucidating on the impetus for increased UN intervention for humanitarian crises).

21. Int’l Comm’n on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, at 4-6 (2001) (reporting the findings of the independent Canadian commission regarding new problems involving international security).

forced to broaden not only its concept of peace²² but also its actions on behalf of peace,²³ so as to ensure international peace and security.

On one hand, the UN began to link peace to economic and social development—as well as non-discrimination and protection of fundamental rights and freedoms—thereby addressing not just conflicts themselves but their root causes.²⁴ On the other hand, the UN started to perform some functions that might be characterized as interventions in internal affairs in the reserved domain of the domestic jurisdiction of the Member States.²⁵ These activities ranged from monitoring elections,²⁶ to oversight of trust territories,²⁷ to oversight of peace agreements,²⁸ to the entire reconstruction of societies, as in the state-building missions in Kosovo and East Timor.²⁹

Due to the expansion of their scope, scholars have categorized such activities into three generations of post-conflict efforts. According to Simon Chesterman:

[I]n the heady days of the early 1990s, traditional or 'first generation' peacekeeping, which was non-threatening and impartial, governed by

22. See CAPLAN, *supra* note 20, at 5-6 (pointing out the inclusion of human rights abuses as a measure for peace by states).

23. See *Id.* at 9 ("International intrusiveness, as a consequence, has extended well beyond coercive intervention . . .").

24. *E.g.*, Sonia K. Han, *Building a Peace That Lasts: The United Nations and Post-Civil War PeaceBuilding*, 26 N.Y.U. J. INT'L L. & POL. 837, 838 (1994) (referencing changes in peace-building outlined by UN Secretary-General Boutros Boutros-Ghali).

25. These activities, in fact, are not the domain of domestic jurisdictions, since it is international law that decides which issues are of its own concern and the UN organs responsible for peace and security determine whether intervention is necessary in a given situation following the accepted rule that the UN organs are responsible for interpreting their own competencies. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 294 (5th ed. 1998) ("[T]he rule that a state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law . . .").

26. *E.g.*, Press Release, Security Council, Iraq Special Representative Tells Security Council "We have grounds for optimism" Following Recent Successful Provincial Elections, U.N. Press Release SC/9602 (Feb. 26, 2009) ("[T]he elections have been a flagship of the United Nations Assistance Mission for Iraq . . .").

27. For instance in the cases of what are now Togo and Ghana. CHESTERMAN, *supra* note 2, at 40.

28. *E.g.*, Press Release, Security Council, Security Council Authorizes Deployment of United Nations-African Union 'Hybrid' Peace Operation in Bid to Resolve Darfur Conflict, U.N. Press Release SC/9089 (July 31, 2007) ("The Council, acting under Chapter VII of the United Nations Charter, authorized UNAMID to take the necessary action to support implementation of the Darfur Peace Agreement . . .").

29. Han, *supra* note 24, at 839.

the principles of consent and minimum force, was swiftly succeeded by two further generations. Second generation or 'multidimensional' peacekeeping was used to describe post-cold war operations in Cambodia, El Salvador, Mozambique, and Angola, but, retrospectively, might also have included the Congo operation in 1960–4. Third generation peacekeeping, sometimes called 'peace enforcement', operating under a chapter VII mandate, began with the Somalia operation. The genealogy was curious—the third generation appearing a mere six months after the second—but the terminology also misleadingly suggested a linear development in peacekeeping doctrine.³⁰

This broadening of the organizational mandate and obligations changed the face of post-conflict efforts undertaken by the UN.³¹ As Chesterman points out, these changes were not met with an adequate doctrine or an adequate internal structure within the UN.³² This led to redundant efforts and lack of coordination.

In addition, the fundamental link between peacekeeping and peacebuilding was acknowledged theoretically,³³ and the perception that focusing on prevention could lead to effectively diminishing the number of conflicts arose.³⁴ Both concepts contributed to positive change in UN post-conflict efforts, but also created difficulties for a system already lacking uniformity.

This situation was perceived to be problematic insofar as it became clear that the UN involvement in post-conflict efforts would recur for the foreseeable future and that the organization needed to be prepared to act adequately.³⁵ Moreover, the fact that post-conflict efforts were always undertaken on an ad hoc basis without a holistic approach helped to emphasize the need

30. CHESTERMAN, *supra* note 2, at 238.

31. Jackson Nyamuya Maogoto, *From Congo to East Timor in Forty Years: The UN Finally Crossing the Rubicon Between Peace-Keeping and Peace-Making?*, 4 NEWCASTLE L. REV. 45, 46-47 (1999); Ivan Šimonović, *Post-Conflict Peace Building: The New Trends*, 31 INT'L J. LEGAL INFO., Summer 2003, at 251, 254.

32. CHESTERMAN, *supra* note 2, at 7. ("[W]ith some members of the Council and the wider UN community apparently allergic to the development of doctrine.")

33. See Ademola Abass, Book Review, 7 J. Conflict & Security L. 137 (2002) ("[T]he UN realized that peacekeeping and peace-building is tantamount to merely providing a reprieve for parties to regroup and go back to the battlefield at a future date.")

34. Int'l Comm'n on Intervention and State Sovereignty, *supra* note 21, at XI. See Šimonović, *supra* note 31, at 256 (speaking to the importance of peace-building efforts after conflict to prevent it from occurring again).

35. See CHESTERMAN, *supra* note 2, at 7. See generally Rep. of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004) (detailing an exhaustive study of UN obligations and recommendations on how to meet them).

for change in the UN.³⁶ The UN always seemed to be reacting to crises in a “practice-leading-the-theory approach.”³⁷

Hence, internal actions were necessary to rectify this situation. However, there was opposition to such actions based on the fear that the more the UN prepared to act, the more the organization would be asked to act.³⁸ Absent consensus on whether, when, and how this involvement should take place, it was argued that the organization should refrain from further actions.³⁹ Despite such opposition, the view that the UN would be involved in post-conflict efforts, with or without a clear consensus on the nature of its involvement, prevailed.⁴⁰ The UN began to acknowledge that it had a unique role to play in connection with peacebuilding, and that it needed to undertake actions to rectify its previous failures.⁴¹

Beginning the assessment of the situation, the Report of the Secretary-General's High Level Panel on Threats, Challenges, and Change stated that:

Our analysis has identified a key institutional gap: there is no place in the United Nations system explicitly designed to avoid State collapse and the slide to war or to assist countries in their transition from war to peace The United Nations unique role in this area arises from its international legitimacy; the impartiality of its personnel; its ability to draw on personnel with broad cultural understanding and experience of a wide range of administrative systems, including in the developing world; and its recent experience in organizing⁴² transitional administration and transitional authority operations.

This analysis led to the creation of a Peacebuilding

36. See Malone, *supra* note 14, at 12 (“The Security Council must move beyond its current pattern of reaction and address potential crises holistically and at their origin before violence breaks out.”). See also CHESTERMAN, *supra* note 2, at 45 (indicating underlying reasons for ad hoc efforts).

37. CHESTERMAN, *supra* note 2, at 48.

38. See *Id.*, at 55-56, 238 (“[T]he Secretariat faces an unpleasant dilemma: to assume that transitional administration is a transitory responsibility, not prepare for additional missions and do badly if it is once again flung into the breach, or to prepare well and be asked to undertake them more often because it is well prepared.”).

39. *Id.* at 238 (remarking on the ambivalent stance on post conflict operations within the Secretariat).

40. *Id.* at 55 (“Despite the ‘evident ambivalence’ among member states and within the UN Secretariat, the Report noted that the circumstances that demand such operations were likely to recur . . .”).

41. See, for instance, High-level Panel on Threats, Challenges and Change, *supra* note 35, in which “ways of strengthening the United Nations to provide collective security for the twenty-first century” are proposed..

42. High-level Panel on Threats, Challenges and Change, *supra* note 35, paras. 261-262.

Commission in order to bridge the gap within the UN regarding post-conflict efforts.

The Secretary-General's High Level Panel on Threats, Challenges, and Change first proposed the creation of the Peacebuilding Committee in a report entitled "A More Secure World: Our Shared Responsibility."⁴³ It was formally adopted by the Secretary-General in his report "In Larger Freedom: Towards Development, Security and Human Rights for All,"⁴⁴ approved by the 2005 World Summit Outcome,⁴⁵ and was followed in General Assembly and Security Council resolutions,⁴⁶ thus becoming a reality.

B. THE PEACEBUILDING COMMISSION, AS PROPOSED, DIFFERS SIGNIFICANTLY FROM THE COMMISSION AS ACTUALLY ESTABLISHED

The proposed and the established Peacebuilding Commission are different in several ways,⁴⁷ most notably that the latter seems to be weaker than the former. The proposed organ was to have a small membership, formed by experts, with early warning capacities and with a new line of resources.⁴⁸ The established organ, however, lost these characteristics during the negotiation process, mainly due to the zeal with which Member States guard their sovereignty,⁴⁹ the endemic problem of funds in the UN, and the fact that it was part of a bigger reform proposal, in which negotiations are based on leverage and compromise.⁵⁰

The established Peacebuilding Commission meets in two

43. *Id.*, para. 263.

44. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All: Report of the Secretary General*, ¶ 116, U.N. Doc. A/59/2005 (March 21, 2005).

45. World Summit Outcome, *supra* note 1, para. 97.

46. G.A. Res. 60/180, *supra* note 10, ¶1; S.C. Res. 1645, ¶1, U.N. Doc. S/RES/1645 (Dec. 20, 2005).

47. All the differences stem from the analysis of the organ proposed by the High Level Panel on Threats, Challenges and Change entitled "A More Secure World: Our Shared Responsibility" and the organ established by UN Doc A/RES/60/180. Compare High-level Panel on Threats, Challenges and Change, *supra* note 35, with G.A. Res. 60/180, *supra* note 10.

48. See High-level Panel on Threats, Challenges and Change, *supra* note 35, para. 261.

49. Simon Chesterman, Course at NYU School of Law, Selected Problems in United Nations Law: State-Building, Governance, and Accountability (April 17, 2006).

50. *Id.*

forms: an organizational committee and country-specific committees.⁵¹ The organizational committee is the permanent structure of the Peacebuilding Commission and encompasses members from within and outside the UN.⁵² From within the UN, the Peacebuilding Commission is made up of: 1) the five permanent members of the Security Council—China, France, Russia, United Kingdom and United States; 2) two other annually elected members of the Security Council,⁵³ currently Mexico and Gabon;⁵⁴ 3) seven members of the Economic and Social Council elected by that body, currently Australia, Brazil, Egypt, Guinea-Bissau, Morocco, Poland and Republic of Korea;⁵⁵ 4) five top providers of assessed and voluntary contributions to the UN, currently, Germany, Canada, Japan, the Netherlands and Sweden;⁵⁶ 5) five top providers of military and civilian assistance to UN missions, currently Bangladesh, India, Nepal, Nigeria and Pakistan;⁵⁷ and 6) seven members elected by the General Assembly,⁵⁸ currently Benin, Chile, Czech Republic, Peru, South Africa, Thailand, and Uruguay.⁵⁹ The Peacebuilding

51. G.A. Res. 60/180, *supra* note 10, ¶¶ 3, 4, 7.

52. *Id.* ¶¶ 4, 8.

53. S.C. Res. 1646, ¶ 1, U.N. Doc. S/RES/1646 (Dec. 20, 2005). *Contra Organizational Committee Members*, UNITED NATIONS PEACEBUILDING COMMISSION, <http://www.un.org/peace/peacebuilding/mem-orgcomembers.shtml> (last visit Sep. 24, 2010) (stating that the two rotational members of the Security Council will serve two years instead of one).

54. United Nations Peacebuilding Commission, *supra* note 53. The first two countries that were elected were Denmark, replaced by Panama, and Tanzania, replaced by South Africa. Rep. of the Peacebuilding Comm'n on its first session, UN Peacebuilding Comm'n, 1st Sess., June 23–June 27, 2006, U.N. Doc. A/62/137-S/2007/458 (July 25, 2007).

55. *Organizational Committee Members*, *supra* note 53.

56. *Id.*

57. *Id.*

58. G.A. Res. 60/261, U.N. Doc A/RES/60/261 (May 17, 2006) (showing that the election follows the procedure of the resolution). However, as in the case of the other mandates, an extension from a one-year to a two-year mandate appears to have occurred according to the Commission webpage, *Organizational Committee Members*, U.N. PEACEBUILDING COMM'N (Sept. 16, 2010, 6:56PM), <http://www.un.org/peace/peacebuilding/mem-orgcomembers.shtml>.

59. The first group was formed by Burundi, Chile, Croatia, Egypt, El Salvador, Fiji and Jamaica. Originally, the Peacebuilding Commission had a representative of the UN Secretary-General (Carolyn McAskie – named on May 16th, 2006) but this situation seems to no longer exist according to the membership list on the Commission's webpage. It seems that there are representatives of the UN Secretary-General directly linked to the Commission's work on specific countries. *See Organizational Committee Members*, UNITED NATIONS PEACEBUILDING COMMISSION, <http://www.un.org/peace/peacebuilding/mem-orgcomembers.shtml> (last visited Sept. 16, 2010, 6:56PM); *see also Election of Seven Members of the Organizational*

Commission also has seats for representatives of the World Bank, the International Monetary Fund, and other institutional donors.⁶⁰

Even more members are added when the Peacebuilding Commission sits in its country-specific committees.⁶¹ Each committee will include seats for the country under consideration, countries in the region that are engaged in post-conflict efforts, other countries engaged in relief efforts and political dialogue, the major financial, troop and civilian police contributor, the senior UN official in the field, other relevant UN representatives, and other relevant regional and international financial institutions.⁶²

The justification for the size of the committees is the belief that all the relevant decision-making actors involved in post-conflict efforts—including military and economic facets—should be present.⁶³ This way the Peacebuilding Commission will work as a comprehensive forum in accordance with its mandate.⁶⁴ However, the increase in size may jeopardize the work of the Peacebuilding Commission, which may become slow and inefficient due to the fact that its decisions are made by consensus.⁶⁵

The Peacebuilding Commission was created as an advisory body.⁶⁶ To aid its functioning, a support office (from within the Secretariat and the existing resources of the UN⁶⁷) and a Peacebuilding Fund were established.⁶⁸ The Peacebuilding Fund

Committee of the Peacebuilding Commission, September 2009, COUNCIL ON FOREIGN RELATIONS (Sept. 26, 2010, 6:14PM), http://www.cfr.org/publication/22278/election_of_seven_members_of_the_organizational_committee_of_the_peacebuilding_commission_september_2009.html (describing the initial elections); *Carolyn McAskie of Canada Named to Top-Level Peacebuilding Support Post*, U.N. NEWS CENTRE (Sept. 24, 2010, 10:24PM), <http://www.un.org/apps/news/story.asp?NewsID=18509&Cr=peace&Cr1> (discussing Carolyn McAskie's appointment to the peacebuilding support post)..

60. G.A. Res. 60/180, *supra* note 10, ¶ 9.

61. The Peacebuilding Commission is working on the specific cases of Sierra Leone, Burundi and Guinea-Bissau. Besides these States, the Central African Republic is on the Commission's agenda. See *Peacebuilding Commission Agenda*, U.N. PEACEBUILDING COMM'N (Sept. 24, 2010, 4:21PM), <http://www.un.org/peace/peacebuilding/pbcagenda.shtml>.

62. G.A. Res. 60/180, *supra* note 10, ¶ 7.

63. G.A. Res. 60/1, ¶ 98, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

64. G.A. Res. 60/180, *supra* note 10, ¶ 2.

65. *Id.* ¶ 18.

66. *Id.* ¶ 1.

67. *Id.* ¶ 23.

68. *Id.* ¶ 24..

was established on October 11, 2006, and has a value of more than \$348 million,⁶⁹ surpassing the intended goal of \$250 million.⁷⁰ The Peacebuilding Commission's main goals are:

a) to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding recovery; b) to focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundation for sustainable development; c) to provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, to develop best practices, to help to ensure predictable financing for early recovery activities and to extend the period of attention given by the international community to post-conflict recovery.⁷¹

The Peacebuilding Commission will focus on "reconstruction, institution-building and sustainable development, in countries emerging from conflict"⁷² and therefore "is likely to deal only with countries emerging from conflict, following the establishment of a peace accord and a cessation of violence."⁷³ This may be construed to mean that prevention will not be a major concern of the commission (although its relevance in relation to prevention of conflicts was highlighted above).⁷⁴ The UN justifies this more limited focus stating that:

69. *UN Peacebuilding Fund: Preventing a Relapse Into Violent Conflict*, U.N. PEACEBUILDING FUND (Sept. 16, 2010, 6:45 PM), <http://www.unpbf.org/index.shtml>.

70. Annan Launches Peacebuilding Fund to 'Kick-Start' Efforts to Rebuild After Conflict (Oct. 11, 2006), <http://www.unpbf.org/news-20061011.shtml>. As of February 28, 2010, the Peacebuilding Fund had 46 States, one international organization, and private donors. See *Pledges, Commitments and Deposits*, U.N. PEACEBUILDING FUND (Sept. 16, 2010, 7:24PM), <http://www.unpbf.org/pledges.shtml>. Besides the four States on the agenda of the Peacebuilding Commission, *supra* note 61 and accompanying text, Comoros, Ivory Coast, Guinea, Liberia, Nepal, and the Democratic Republic of Congo are eligible for resources. Moreover, in emergency situations of threats to peace, Burundi, Central African Republic, Ivory Coast, Guinea, Haiti, Liberia, and Kenya may be assisted; *cf.* Rep. of the Peacebuilding Commission on its First Session, *supra* note 53.

71. G.A. Res. 60/180, *supra* note 10, ¶ 2.

72. *Peacebuilding Q&A*, U.N. INFO. SERV. (Sept. 17, 2010, 6:13 PM), http://www.unis.unvienna.org/unis/en/library_2006peacebuildingt.html.

73. *Id.*

74. *E.g.*, International Commission on Intervention and State Sovereignty, *supra* note 14, at 19-27.

The United Nations has played a vital role in mediating peace agreements and assisting in their implementation, helping to reduce the level of conflict in several regions. However, some of those accords have failed to take hold, such as in Angola in 1993 and Rwanda in 1994. Roughly half of all countries that emerge from war lapse back into violence within five years, driving home the message that, to prevent conflict, peace agreements must be implemented in a sustained manner. Yet, to date, no part of the UN system has been directly responsible for helping countries make the transition from war to lasting peace. The Peacebuilding Commission will help fill this gap by facilitating an institutional and systematic connection between peacekeeping and post-conflict operation and the international network⁷⁵ of assistance and donor mobilization including the World Bank.

Despite this limitation on its focus, the Peacebuilding Commission can nevertheless contribute to the enhancement of post-conflict efforts. The following section will describe how it should make these contributions.

II. CAN THE PEACEBUILDING COMMISSION CARRY OUT ITS MANDATE?

A. THE PEACEBUILDING COMMISSION AND THE INSTITUTIONAL GAP OF POST—CONFLICT EFFORTS AT THE UN.

As mentioned, one of the underlying reasons for the creation of the Peacebuilding Commission was the recognition of an institutional gap within the UN in relation to its post-conflict efforts.⁷⁶ The institutional gap is undeniable, but before assessing whether or not the Peacebuilding Commission will be able to bridge it, two background issues should be considered: (1) whether the UN is best suited to oversee jus post bellum issues, and if it is, (2) whether it could have done so with existing resources rather than creating a new commission to do so.

1. *The UN is uniquely suited to governing post-conflict efforts.*

Why must one focus on the UN as opposed to other international actors who are also involved in post-conflict

75. *Peacebuilding Q&A*, *supra* note 72, at no. 11.

76. See *Questions and Answers*, U.N. PEACEBUILDING COMM'N (Sept. 16, 2010, 8:49 PM), <http://www.un.org/peace/peacebuilding/qanda.shtml> (the UN itself recognizes such a gap qualifying it as "huge").

efforts, sometimes through unilateral actions? The answer to this question has both legal and political foundations. Legally speaking, the UN is primarily responsible for the maintenance of international peace and security because it is the only organization that can authorize the use of force.⁷⁷ It is also the only universal organization vested with broad responsibilities in relation to human rights. Given the combination of these two factors and that post-conflict efforts encompass concerns relating to both issues, the UN is the appropriate forum to deal with post-conflict efforts, and should, therefore, be prepared to act coherently in such situations.

Furthermore, there are three political reasons why the UN is the proper actor to address the issues of *jus post bellum*. Firstly, the UN adds its legitimacy to the post-conflict efforts in which it is involved, which is important given that the actions it undertakes may appear to be violations of state sovereignty and, therefore, touch upon national sensitivities.⁷⁸ Even when post-conflict efforts derive from a conflict that may not have been authorized by UN, the actors often rely on the UN to assist them—one prominent example of this being the current situation in Iraq.⁷⁹

Secondly, states are often too willing to involve the UN in post-conflict efforts because such actions are seldom risk-free. That is, the involvement of multinational forces may decrease the death toll of one state's army. At the same time, UN involvement may lend credibility to the action being undertaken, which may provide political justification for the loss of lives.⁸⁰

77. U.N. Charter art. 1, para. 1, 2; art. 2, para. 3, 4; art. 24, art. 51.

78. The UN has to deal with national sensitivities in all aspects of its work. From the type of food that can be handed in humanitarian emergencies to the dress codes in some societies to the situations involved in post-conflict efforts. An example of such situation is described by Simon Chesterman: "A measure of the speed with which the UN Interim Administration Mission in Kosovo was established is the name itself. UN operations typically operate under an acronym, but 'UNIAMIK' was dismissed as too much of a mouthful. 'UNIAK' sounded like a cross between 'eunuch' and 'maniac'—associations judged unlikely to help the mission. 'UNMIK' was the final choice, having the benefits of being short, punchy, and clear: only in English, however. Once the operation was on the ground, it was discovered that *anmik*, in the dialect of Albanian spoken in Kosovo, means 'enemy'. No one within the United Nations was aware of the confusion until it was too late, at which point instructions went out to pronounce the acronym 'oon-mik.'" CHESTERMAN, *supra* note 2, at 236.

79. *The United Nations, International Law, and the War in Iraq*, WORLD PRESS REVIEW ONLINE (Sept. 26, 2010, 4:42 PM), <http://www.worldpress.org/specials/iraq>.

80. More recently this was seen in the attempt of the US to engage the UN in the activities in Iraq, both in the context of administration and of peace-keeping, and

Finally, given its multicultural composition, the UN can be seen as being better suited to undertake such missions because it is perceived to be more culturally and historically sensitive. Such perception is not only an essential element for the success of any mission but is also indispensable in structuring the operation and the actions in the first place.⁸¹ The importance of considering the cultural and historical background of each territory before acting is also one of the reasons why it is impossible to have a one-size-fits-all post-conflict package. Post-conflict efforts must adapt to local practices, customs and traditions.⁸² This flexibility is essential,⁸³ not only to avoid colonialist or imperialist models, but also to apply, in practice, the idea of human rights. Nonetheless, the balance between effectiveness and cultural sensitivity adds to the difficulty of post-conflict efforts and is a reason why the UN, as an organization with experience in post-conflict situations, is politically the best choice to undertake them.

2. Given the complexity of existing agencies, the most efficient option was to create the Peacebuilding Commission to govern post-conflict efforts.

The second issue is whether or not a new organ within the UN was necessary to the goal of bridging the institutional gap connected with post-conflict efforts, or whether a novel approach to existing organs would have sufficed.

Due to the similarities in the post-conflict efforts undertaken by the UN, especially in relation to international administration of territories and the work that the organization has done in pushing decolonization efforts forward (namely the organization acting on behalf and in the interest of the people of a territory with a view to fostering the development of conditions for self-actions), some commentators have argued that the UN Trusteeship Council could be the organ to bridge

even in the face of the debate of whether or not the invasion was legal under international law. *See, e.g.,* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 736 (2004) (discussing the conventional wisdom concerning the legitimacy of the U.S. invasion of Iraq in connection with the UN's power to authorize the use of force).

81. *See* CAPLAN, *supra* note 20, at 12-15; *see also* CHESTERMAN, *supra* note 2, at 4-5.

82. *See, e.g.,* CAPLAN, *supra* note 20; CHESTERMAN, *supra* note 2..

83. It's interesting to note that the concept of flexibility is sometimes seen as malleability, which is seen as a negative approach as it may lead to "justified" violations. CHESTERMAN, *supra* note 2, at 48.

the institutional gap of the organization.⁸⁴ Such a proposal has two positive aspects. Firstly, the Trusteeship Council is an organ that already exists and reactivation would be far less complicated than the process of creating a whole new body. Secondly, because the Trusteeship Council was involved in decolonization efforts,⁸⁵ it already has some expertise of acting in similar situations and could learn from its own mistakes.

However, the negative aspects of re-activating the Trusteeship Council outweigh the positive ones. Firstly, because the organization was once responsible for decolonization efforts, its role in post-conflict efforts might be viewed suspiciously by former colonies for whom the memory of colonization is still too fresh.⁸⁶ Secondly, the UN charter would need to be amended to enable the Trusteeship Council to deal with the current and future post-conflict efforts because this document imposes limitations on which states can be subjected to the Trusteeship Council⁸⁷—excluding any member of the UN.⁸⁸ Given that nearly all countries in the world are members of the UN,⁸⁹ for the Trusteeship Council to be able to function, an amendment would certainly be required. This would be a political nightmare: once the UN Charter is open for amendment, it is impossible to predict the range of the changes it might undergo, as changes are possible in every single article. Thus, the creation of a new organ—the Peacebuilding Commission—was a better choice than adapting and reinitiating the Trusteeship Council.

84. See generally Brian Deiwert, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea be Applied to a Twenty-First Century Iraq?*, 14 IND. INT'L & COMP. L. REV. 771; Saira Mohamed, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 COLUM. L. REV. 809 (2005) (advancing suggestions for how a revived Trusteeship Council could support peacebuilding efforts).

85. See CHESTERMAN, *supra* note 2, at 37-47 (describing the history of the UN from its founding to Timor Leste).

86. This highlights the importance of an international organization like the UN being responsible for post-conflict efforts. See Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632, 633 no. 13 ("A UN 'administering authority' could better dispel the well-justified suspicion that arises whenever an individual state acts in that capacity; such a state is often suspected of using the trusteeship system (and its predecessor, the mandate system of the League of Nations era) as a cloak for the promotion of its selfish colonial interests").

87. U.N. Charter art. 76.

88. CHESTERMAN, *supra* note 2, at 47, 55.

89. See *Member States of the United Nations* (Sept. 15, 2010, 4:16 PM), <http://www.un.org/en/members/index.shtml> (listing the 192 States that are members of the UN).

B. THERE ARE SEVERAL REASONS TO EXPECT THAT THE PEACEBUILDING COMMISSION WILL BE ABLE TO CARRY OUT ITS MANDATE

Though the creation of the Peacebuilding Commission was likely the best choice to promote a new legal framework for jus post bellum, it is not without problems. At the institutional level, the main obstacle to be overcome is the fact that the Peacebuilding Commission only has recommendatory powers, which means that it can only try to persuade relevant actors to act,⁹⁰ which can limit the political force of its acts. Furthermore, the Peacebuilding Commission may only act after a request for advice from the UN Security Council, the Secretary-General, the General Assembly, and the UN Economic and Social Council (when the Security Council is not seized of the matter),⁹¹ or from a Member State regarding the Member State's own situations if the issue is not on the Security Council agenda.⁹² The combination of these two features suggests that the Peacebuilding Commission may have limited room for independent action. Additionally, it could mean that when it acts, its recommendations will lack force.

Nevertheless, there are at least five reasons for optimism regarding the influence of the Peacebuilding Commission. Firstly, the Secretary-General can ask for recommendations by the Peacebuilding Commission independently of whether or not the matter is under consideration by the Security Council.⁹³ This is relevant since the role of the Secretary-General has evolved throughout the years from the position of a chief administrator of the UN to a more active figure in world politics, helping to set global agenda.⁹⁴ This means that if a particular Secretary-General gives considerable weight to post-conflict efforts and relies on the Peacebuilding Commission, there will be room for active work on the part of the Commission.⁹⁵ The inverse would

90. G.A. Res. 60/180, *supra* note 10, ¶ 2(c).

91. Respecting, therefore Article 12 of the UN Charter. U.N. Charter art. 12.

92. G.A. Res. 60/180, *supra* note 10, ¶ 12.

93. General Assembly Resolution 60/180 does not establish limits to the requests of the Secretary General to the Commission. G.A. Res. 60/180, *supra* note 7, ¶ 12.

94. See generally Paul Szasz, *The Role of the UN Secretary-General: Some Legal Aspects*, 24 NYU J. INT'L. L. & POL. 161 (1991); Ian Johnstone, *The Role of the UN Secretary General: The Power of Persuasion Based on Law*, 9 GLOBAL GOVERNANCE 441 (2003).

95. Bruce Jones, N.Y.U. L. Sch., *Lessons from the Field*, Lecture Given for the Selected Problems in United Nations Law: State-Building, Governance, and

also be true, of course, if a particular Secretary-General places less importance on post-conflict efforts. However, given the fact that post conflict operations in general are closely linked to the three basic values of the organization—security, human rights and development—there is reason to believe that the Secretaries-General will remain focused on peacebuilding.⁹⁶

Secondly, all the Permanent Members of the Security Council are part of the Peacebuilding Commission which works on the basis of consensus.⁹⁷ This means that for a recommendation of the Peacebuilding Commission to pass, it must be approved (or at least not opposed) by the Permanent Members of the Security Council. This is relevant not only because of the veto power of the Permanent Members of the Security Council,⁹⁸ but also because the Security Council is the primary organ responsible for the maintenance of international peace and security.⁹⁹ Because post-conflict efforts are an essential element of international peace and security, thus falling under the mandate of the Security Council,¹⁰⁰ if a measure is backed by influential members of the Security Council, and especially by the permanent members, the recommendations of the Peacebuilding Commission will have significant backing.

Thirdly, given that the post-conflict efforts occur throughout various regions in the world, and that States' interests are dynamically intertwined, it is in the interest of all States to have a normative framework established for future actions, especially if they are able to join in the effort of creating such a framework. That is, it is in the best interest of all states to support the Peacebuilding Commission, because post-conflict efforts have the potential to have a significant effect on every State. Even if a State does not feel the aftereffects of a conflict directly, it likely will experience the effects of regional instability if a neighbor is subject to such a conflict.

Fourthly, it has been argued that the United States, not being well-suited for post-conflict efforts itself,¹⁰¹ could benefit

Accountability Course at New York University School of Law (Apr. 20, 2006).

96. See U.N. Secretary-General, *In Larger Freedom*, §B, U.N. Doc. A/59/2005 (Mar. 21, 2005).

97. G.A. Res. 60/180, *supra* note 10, ¶¶ 4(a), 18.

98. U.N. Charter art. 27, para. 3.

99. U.N. Charter art. 24, para. 1.

100. Mathias Ruffert, *The Administration of Kosovo and East-Timor by the International Community*, 50 INT'L & COMP. L.Q. 616- 620 (2001).

101. CHESTERMAN, *supra* note 2, at 253.

from the UN's experience in post-conflict efforts and learn from its successes.¹⁰² After 9/11, the United States was the most adversarial State to a strong UN.¹⁰³ Today, the United States is considered the only remaining national super-power and the majority of post-conflict efforts involve either the UN or the United States.¹⁰⁴ Given these facts and the reality that States are motivated by national interests,¹⁰⁵ one could say that it is in the best interest of the United States to have a strong Peacebuilding Commission to implement the international law of jus post bellum.¹⁰⁶ The support of the United States would enhance the chances of effective recommendations by the

102. Seth G. Jones & James Dobbins, *UN Reform: The UN's Record in Nation Building*, 6 CHI. J. INT'L L. 723 (2006); Jones and Dobbins have drawn the following comparative table, Table 1, which shows that UN led missions are more successful than US led missions. *Id.* at 718.

Table 1. Nation-building outcomes

	Country	Peaceful in 2005	Democratic in 2005
	Congo	No	No
	Namibia	Yes	Yes
	El Salvador	Yes	Yes
UN-Led Missions	Cambodia	Yes	No
	Mozambique	Yes	Yes
	Eastern Slavonia	Yes	Yes
	Sierra Leone*	Yes	Yes
	East Timor*	Yes	Yes
	West Germany	Yes	Yes
	Japan	Yes	Yes
	Somalia (UNITAF)	No	No
US-Led Missions	Haiti	No	No
	Bosnia*	Yes	Yes
	Kosovo*	Yes	Yes
	Afghanistan*	No	?
	Iraq*	No	?

* = Ongoing Operation

Which shows that UN led missions are more successful than US led missions. *Id.* at 718.

103. CAPLAN, *supra* note 20, at 10-11.

104. Jones & Dobbins, *supra* note 102, at 722.

105. *Id.*

106. *Id.*; see generally Chesterman, *supra* note 2, at 253-56 (contending that the United States should implement peace building efforts in order to extend its influence).

Peacebuilding Commission.¹⁰⁷

Finally, even if the optimal scenario does not become a reality, the Peacebuilding Commission could employ techniques used by organs with similar problems, such as the Human Rights Commission and the human rights treaty bodies. For example, naming and shaming tends to produce results—even if limited—in international politics.¹⁰⁸ These strategies rely upon the needs of states to be perceived as legitimate and rule-abiding in the sense that soft power is relevant to international law and international relations.¹⁰⁹ Thus, even if a legal sanction is not possible, the fact that a state is listed as “not playing the game correctly” could lead to a change in its practice and an increased reverence towards the rules.¹¹⁰

Apart from these five reasons for optimism in relation to the Peacebuilding Commission, one could argue that a limitation on the legal status of its actions, for instance the ability to pass recommendations rather than create hard law, is not a problem at all since it may assist in the operation of this organ. This is due to the fact that doctrine has followed practice in this area, meaning that there is no doctrinal consensus on post-conflict efforts on which the Peacebuilding Commission can rely.¹¹¹ Accordingly, the doctrine might have a more flexible approach to evolving circumstances than it would if its proposals were to become more than recommendations.

On the other hand, some countries are still wary of legally binding norms in post-conflict efforts, let alone strong doctrinal concepts themselves.¹¹² Therefore, having an organ such as the Peacebuilding Commission, with persuasive power linked to the “diversity and relevance of all those participating,”¹¹³ might be more palatable to those countries suspicious of legally binding norms generally held by organs with stronger powers.

Another obstacle at the institutional level is that the recommendations of the Peacebuilding Commission have lower priority in international law than the recommendations of other

107. Jones & Dobbins, *supra* note 102, at 722-23.

108. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 93 (1st ed. 2004).

109. *Id.* at 143-46.

110. *Id.*

111. CHESTERMAN, *supra* note 2, at 7.

112. *Id.* at 118-19.

113. See UN Peacebuilding Comm'n, *Questions and Answers*, THE UNITED NATIONS PEACEBUILDING COMMISSION, <http://www.un.org/peace/peacebuilding/qanda.shtml> (last visited Sept. 25, 2010).

organs.¹¹⁴ As a result, the recommendations of the Peacebuilding Commission would have limited legal force,¹¹⁵ diminishing their effectiveness. Since the effectiveness of any recommendations depends on which organ of the UN acts upon them,¹¹⁶ it may turn out that the best application of the Peacebuilding Commission's recommendations may be as a tool for principled evaluation.¹¹⁷ Regardless of whether the Commission's recommendations are undertaken, at the very least they would serve as a way to evaluate and improve accountability.

However, if the Security Council acts on the Peacebuilding Commission's recommendations, the recommendations would have the effect of something more than just a tool for principled evaluation.¹¹⁸ Under those circumstances, the legal force of the proposals comes from one of two sources. The Security Council could pass a resolution under the authority granted to it by Chapter VII of the UN Charter, which establishes the Security Council's authority to maintain international peace and security.¹¹⁹ Furthermore, successive resolutions of the Security Council are often read together to form customary law.¹²⁰ Thus, even if Chapter VII of the UN Charter did not apply to a particular resolution, the recommendations of the Peacebuilding Commission would still have some legal force if the Security Council acted on them. This is especially true given that the primary responsibility of the Security Council is to maintain international peace and security.¹²¹

There are two other potentially meaningful ways that the recommendations of the Peacebuilding Commission would have

114. See, e.g., PETER MALANCZUK, *MODERN INTRODUCTION TO INTERNATIONAL LAW* 52-59 (7th rev. ed. 1997) (providing information on the sources of international law, especially the acts of international organization).

115. See generally *Id.* at 52-53 (finding the limited legal force of the recommendations to be derived from the assumption, that for the time being, the recommendations of the Peacebuilding Commission would not be codified in a treaty sponsored by the UN. Even if the treaty did come into existence it would not have universal acceptance).

116. See *Id.* at 53 (proposing that the decisions of the International Court of Justice and the resolutions of the Security Council on international peace and security, when taken under Chapter VII, have stronger legal force than other acts of the UN).

117. *Id.*

118. U.N. Charter art. 25, art. 103.

119. See generally *Id.* at art. 39-51 (according to art. 25, any resolution made under Chapter VII is binding on all UN members, and therefore, has legal force).

120. This is the idea behind the claim of the existence of a right to humanitarian assistance. ALBERTO DO AMARAL, JR., *O DIREITO DE ASSISTÊNCIA HUMANITÁRIA* (2003)

121. U.N. Charter, *supra* note 4, at art. 39-51.

legal force. If the General Assembly acts on the Peacebuilding Commission's recommendations, the recommendations might be ascribed both moral and political power. This can be attributed to the sheer gravity of the General Assembly's influence, in which all state members of the UN are included and entitled to one vote.¹²² If this occurred, there would likely be a push for compliance based on the international support for the resolution, as evidenced by the resolution's adoption by the General Assembly. International democratic approval would enhance the legal force of the recommendations, at least in the sense that the practice could become international custom if the states were to follow it with a conviction of its mandatory character. To the contrary, if the Secretary-General or the Economic and Social Council act on the recommendation, its effectiveness will likely be limited because of the relative lack of political power vested in these organs.¹²³

Similar to other issues of international law, the outcome of the Peacebuilding Commission's recommendations will depend most on the political will of the states and other international actors. However, the Peacebuilding Commission has all the necessary elements to fulfill the institutional gaps of *jus post bellum* within the UN, and any institutional problems are not insurmountable.

III. THE PEACEBUILDING COMMISSION CAN FILL THE EXISTING NORMATIVE GAPS IN POST-CONFLICT EFFORTS

Though the previous sections establish that the Peacebuilding Commission can bridge the institutional gap in post-conflict efforts by the UN, the question remains whether it can also play a role in closing the normative gap. This normative gap is twofold and encompasses both the need to develop a legal framework—for instance, a modern *jus post bellum*—and the need to enhance accountability mechanisms for post-conflict efforts.

122. *Id.* at art. 9, art. 18.

123. *Id.* at art. 61. However, in the same way as in the case of the General Assembly, moral and political force can exist and make a difference.

A. THE PEACEBUILDING COMMISSION AND JUS POST BELLUM

The regulation of war has been a theme of interest to international law since its beginning.¹²⁴ Initially, the focus was on the justice of war, in which the debate surrounded the issue of whether a war was being fought under just motives.¹²⁵ The idea underpinning just war theories is to limit the occurrence of war by establishing criteria that would limit the circumstances under which a war could be justified.¹²⁶ The belief was that war is inherent to the international scenario, and although total elimination of war is not possible, some limitation is necessary and beneficial.¹²⁷ This theory gave rise to *jus ad bellum*, or the right to go to war.

As time passed and the theories of the law of war developed, an additional standard arose. With the evolution of warfare came the recognition that civilians too were victims of war.¹²⁸ Consequently, a second set of limitations to war arose: *jus in bello*, referring to the restrictions on targets, weapons and types of conduct and imposing obligations on belligerents during war.¹²⁹

These two sets of limitations form the core of international humanitarian law and are codified in the Hague Regulations of 1907,¹³⁰ the four Geneva Conventions,¹³¹ and their Protocols of

124. See generally HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis W. Kelsey trans., vol. 2 1925) (providing various historical perspectives regarding the laws of war).

125. See, e.g., RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 53 (1st ed., 1999) (frowning upon warfare for glory and advancement, but justifying war for the principle of governing inferiors).

126. See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 62 (3d ed. 2000) (limiting the justification of war to circumstances when there is a wrong received); G.F.S. Soares, *Legitimidade de uma Guerra Preventiva em Pleno 2003?* *POLITICA EXTERNA*, Summer 2003, at 8 – 9.

127. See, e.g., TUCK, *supra* note 125, at 11 (limiting war to instances where there is a need for a preemptive strike against an adversary, or acts committed on the basis of fear).

128. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 13-26, Aug. 12, 1949, 6 U.S.T. 3516 (defining and establishing protections for civilians during war).

129. See Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 *UCLA Pac. Basin L.J.* 55 (1984), for a summary of the main international humanitarian law obligations.

130. Hague Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, available at <http://www.icrc.org/ihl.nsf/intro/195?OpenDocument> [hereinafter Hague Regulations].

1949 and 1977, respectively.¹³² With the end of the Cold War, the increase in ethnic conflicts, and the existence of “failed states,” just war theory made a comeback,¹³³ reflecting concerns regarding post-conflict events.¹³⁴ This revival of just war theory,¹³⁵ in connection with post-conflict events,¹³⁶ led to the theory of jus post bellum.¹³⁷

Jus post bellum is relevant because the formal end to a conflict oftentimes does not typify the post-conflict situation in the territories where the war was fought.¹³⁸ For example, the winner of a war rarely exits the territory after the end of the conflict, but, on the contrary, often stays and imposes its authority.¹³⁹ The winner’s seemingly permanent presence and control over the loser’s territory and affairs gives rise to obligations on the part of the former under jus post bellum.¹⁴⁰

131. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 128, 6 U.S.T. 3516 [hereinafter Geneva Conventions].

132. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. It is interesting to note that in 2005 a third protocol was created, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 45 I.L.M. 558.

133. Ruti Teitel, *Transitional Justice: Postwar Legacies*, 27 CARDOZO L. REV. 1615, 1620 (2006).

134. *Recent Publications*, 118 HARV. L. REV. 524 (2004) (reviewing MICHAEL WALZER, ARGUING ABOUT WAR (2004)).

135. Teitel, *supra* note 133, at 1620.

136. HARV. L. REV., *supra* note 134, at 524.

137. See generally Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 132-40 (2005) (defining jus post bellum as the seeking of justice after a war or conflict. It is believed to comprise both the ideas of trials and accountability after a war (and therefore be linked to international criminal tribunals) and with the obligations for a state that stays in an occupied territory).

138. See Inger Osterdahl, *What Will Jus Post Bellum Mean? Of New Wine Bottles and Old*, 14 J. CONFLICT & SECURITY L. 175, 176 (2009) (using the example of the dispute between Israel and the Palestinians, in which each side defends a different legal framework for the territories they dispute).

139. More recently this was seen in Iraq, given that the two main goals—the search for weapons of mass destruction and the overthrow of Saddam Hussein—were achieved early in the conflict, yet the United States stayed on.

140. DiMeglio, *supra* note 139, at 150.

Immanuel Kant was among the earliest proponents of this theory,¹⁴¹ and the views he espoused were later codified in the law of occupation.¹⁴² Although the law of occupation developed significantly beyond its early stages, the law of occupation is still seen as part of the law of war.¹⁴³ Accordingly, the law of occupation is regulated in both the Hague Regulations and the Geneva Conventions, which establish a “bill of rights for the occupied population” by imposing obligations on an occupying power.¹⁴⁴ Notwithstanding these regulations, the law of occupation is insufficient to regulate modern post-conflict efforts. There are three reasons for the law of occupation’s insufficiency.

Firstly, the law of occupation is a fundamental part of the broader regulations of the law of war. This overlap is problematic because the exercise of control over a foreign territory occurs in many situations, and is not isolated to circumstances following a formal war.¹⁴⁵ It is also problematic because the law of war focuses primarily on the conduct of a state.¹⁴⁶ However, some of the post-conflict efforts are undertaken not by states but by international organizations.¹⁴⁷

Secondly, the provisions underlying *jus post bellum* are historically dated. Since the regulations pre-date the emergence of an international system of human rights, they do not reflect the obligations imposed by this branch of international law.¹⁴⁸ Instead the regulations impose very limited obligations on the occupying power.¹⁴⁹ Furthermore, because the role of the state has evolved since the advent of the welfare state,¹⁵⁰ the duties imposed by the existing norms do not match the perceived

141. *Id.* at 133.

142. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 3-5 (1993).

143. *Id.* at 4.

144. *Id.*

145. *Id.* at 3.

146. *See, e.g.*, Hague Regulations, *supra* note 132, art. 42–56 (imposing restrictions on the actions of occupying state forces).

147. As in the cases of Kosovo and Timor Leste, in which the UN was the main actor in post-conflict efforts.

148. For example, the Hague Regulations of 1907 predated the adoption of the Universal Declaration of Human Rights by forty-one years.

149. BENVENISTI, *supra* note 142, at 7 (“Very few words are used to describe both the nature of the occupation regime and the scope of the occupant’s legitimate powers.”).

150. Nina Beatriz Ranieri, *Do Estado Liberal ao Estado Contemporâneo: Notas sobre os processos de exaustão dos modelos políticos e da ordem jurídica*, 36 *REVISTA DE DIREITO CONSTITUCIONAL E INTERNACIONAL*, 135 (2001) (Braz.).

duties of the state. This is because such norms were created in a time when states, following a philosophy of political liberalism, avoided interference in private activity.¹⁵¹ Today, however, the state is more involved in the economic and social life of its citizens.¹⁵² As a result, the modern role and obligation of the state effectively weakens the traditional form of the law of occupation.

The final problem is a practical one. Even though occupation is a fact rather than a legal concept,¹⁵³ most occupying powers do not recognize their status as such. Rather, the occupying power tries to avoid such a label, and thus the application of the law of occupation and any resulting limitation to their conduct.¹⁵⁴ Simply put, the law of occupation does not suffice to adequately regulate modern post-conflict efforts. Regardless of whether one interprets such law teleologically or historically for purposes of providing guidance or establishing minimum requirements for post-conflict obligations,¹⁵⁵ there is still a need for more comprehensive and specific regulations. In response, it seems that the idea of a modern *jus post bellum* has started to gain momentum once more.¹⁵⁶

Although there are controversies about who was the first to propose the re-instatement of *jus post bellum*,¹⁵⁷ the relevant aspect is the recognition that international law should be concerned with the justice of what happens in post-conflict efforts. Though there is no direct mention of the development of a *jus post bellum* in the Peacebuilding Commission's Mandate,¹⁵⁸ there are several reasons why the development of *jus post bellum* could aid the Peacebuilding Commission in reaching its

151. JOHN RAWLS, *POLITICAL LIBERALISM* 476-78 (expanded ed. 2005).

152. BENVENISTI, *supra* note 142, at 209-10.

153. Eyal Benvenisti, *Applicability of the Law of Occupation*, 99 AM. SOC'Y. INT'L L. 29, 29 (2005).

154. *Id.* at 29-30.

155. *Id.* at 30.

156. *Cf.* WALZER, *supra* note 126, at xi ("But there has been one large and momentous shift in both wars and words. The issues that I discussed under the name 'intervention' (chapter 6), which were peripheral to the main concerns of the book, have moved dramatically into the center.").

157. Compare Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 289 (2005) (emphasizing Michael Walzer's book *JUST AND UNJUST WARS*, published in 1977, which addressed questions of post-conflict reconstruction) with DiMeglio, *supra* note 137, at 133 (attributing Michael Schuck as the first to unequivocally reference *jus post bellum*).

158. G.A. Res. 60/180, *supra* note 10.

main purposes.

Firstly, the Peacebuilding Commission is an ideal forum to confront the issue of a uniform normative framework because its centralized authority makes it capable of gathering each of the relevant parties involved in post-conflict efforts.¹⁵⁹ Secondly, the law of jus post bellum can contribute to create common objectives and values,¹⁶⁰ acting as a unifying force within potentially divisive multi-cultural and multi-ethnic international scenarios. Finally, norms will, at the very least, minimize anarchy and, at the most, allow for the co-existence and cooperation of States in the international scenario.¹⁶¹

The need to respond to these concerns became especially clear in the wake of the U.S.-led invasions of Afghanistan and Iraq. In those scenarios the relevant post-conflict efforts were to be undertaken by other international actors in addition to the U.S., sometimes with the direct involvement of the UN,¹⁶² but sometimes with its opposition.¹⁶³ These scenarios highlight the

159. *Mandate of the Peacebuilding Commission*, <http://www.un.org/peace/peacebuilding/mandate.shtml> (last accessed Sept. 22, 2010) (One of the Mandate's goals is, "[t]o bring together all relevant actors to marshal resources and to advise on the proposed integrated strategies for post conflict peacebuilding and recover.").

160. See generally TERRY NARDIN, LAW, MORALITY, AND THE RELATION OF STATES 16 (1983) ("To understand international society as an association of states in terms of common rules is not to deny that states often cooperate to promote shared purposes or that they desire to realize these purposes is an important factor in motivating them to observe existing forms and usages.").

161. AMARAL, JR., *supra* note 120, at 47.

162. See e.g., U.N./World Bank Joint Iraq Needs Assessment, Oct. 2003, available at <http://siteresources.worldbank.org/IRFFI/Resources/Joint+Needs+Assessment.pdf> (discussing the involvement of several international organizations such as the U.N., the World Bank, and the International Monetary Fund in the reconstruction of Iraq).

163. See generally NewsHour Extra, *The Role of the United Nations in a Postwar Iraq* (Apr. 7, 2003), <http://siteresources.worldbank.org/IRFFI/Resources/Joint+Needs+Assessment.pdf> (describing how leaders of other countries criticized the U.S. for not creating a more "international postwar Iraq," particularly that the United Nations did not play a larger role). Here, one can recall the invasion of Iraq in which the US was able to form a coalition with other States – such as the UK and Spain – but failed to obtain a specific authorization of the UN Security Council to act. See generally Anthony Dworkin, *Would War Be Lawful Without Another U.N. Resolution?*, CRIMES OF WAR PROJECT (Mar. 10, 2003), <http://www.crimesofwar.org/special/Iraq/news-iraq2.html> ("In his press conference on March 6, President Bush was asked whether the United States would be seen as defiant of the United Nations if it launched a war against Iraq without explicit authorization from the Security Council. 'As we head into the 21st century, when it comes to our security, we really don't need anybody's

need for a normative framework to minimize even potential violations of international law and underscore the importance of principles of justice and legitimacy in post-conflict efforts. In addition, such changes would also enormously aid in enhancing accountability, which in turn maximizes the perception of legitimacy of the UN and of international law as a system.

Finally, because the Peacebuilding Commission has among its tasks the proposal of integrated strategies and the improvement of coordination,¹⁶⁴ finding a common language of action is not only useful but is indispensable. Furthermore, the fact that there is no consensus on the political or moral grounds for interventions and for post-conflict efforts suggests that a common normative framework is the best way to proceed. Because the existing normative framework for post-conflict efforts is not enough, the Peacebuilding Commission can and should play an important role in developing a new legal structure in this area.

B. THE FRAMEWORK FOR A MODERN JUS POST BELLUM MUST ADDRESS THREE ISSUES

The downsides of the Peacebuilding Commission's mandate have been discussed at length: primarily that it has a narrower mandate than is ideal, and it is too soon to predict its real impact on post-conflict efforts.¹⁶⁵ Nevertheless, if the Peacebuilding Commission is capable of setting a normative framework for post-conflict efforts and can aid the development of a modern jus post bellum, its contribution to international law could be significant. The task of setting this normative framework, however, needs to address the source, the language and the content of a modern jus post bellum.

1. The Source of Jus Post Bellum

The first question related to the creation of a modern normative framework for jus post bellum concerns the source of the obligations for post-conflict actors. It is well established, at

permission,' the President replied.").

164. G.A. Res. 60/180, *supra* note 10, at 2.

165. Accord Gerhard Thallinger, *The UN Peacebuilding Commission and Transitional Justice*, 8 GERMAN L.J. 681, 692 (2007) (declaring the uncertainty of whether the UN Peacebuilding Commission will maintain its "narrow, imprecise framework" in the future).

the very least, that some kind of obligation arises in connection with the efforts of post-conflict actors. In fact, the obligation is recognized both within and without the UN.¹⁶⁶ The Report of the High-level Panel on Threats, Challenges and Change of the United Nations clearly stated the existence of such an obligation when it said, “today, in an era when dozens of States are under stress or recovering from conflict, there is a clear international obligation to assist States in developing their capacity to perform their sovereign functions effectively and responsibly.”¹⁶⁷ The conduct of the United States in both Afghanistan and Iraq supports the claim that some obligation towards the local population exists.¹⁶⁸

It is, therefore, a fairly settled international norm that a post-conflict actor is under obligations as to its behavior after a formal conflict has ceased.¹⁶⁹ But, this raises a further issue as to the nature of these obligations. The first relates to the precise point at which such obligations arise. One could say that there are two possible options: either there is a more fixed criterion, meaning that the obligation arises once a certain objective threshold is met or one works with a more malleable criterion in which the obligations arise based on the exigency of a particular situation. Put another way, should the obligations arise after the existence of effective control of the territory? Or should they arise once an international actor gets involved in a conflict situation that might lead to a post-conflict effort for which obligations already exist and are just subjected to a subsequent condition?

If the threshold approach is chosen, a concomitant issue is whether this threshold should be defined by legal or practical standards. This is relevant because, as discussed above,¹⁷⁰ most occupying powers deny every claim of occupation, so as to avoid

166. Cf. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119, 120 (2010) (describing the increasing involvement of international actors in reconstruction efforts).

167. *Report of the High-level Panel on Threats, Challenges and Change*, *supra* note 35, at 69.

168. See Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 130–32 (Feb. 2, 2005) (exemplifying the U.S.'s commitment to continue seeking peace and freedom for the Iraqi people).

169. See *Report of the High-level Panel on Threats, Challenges and Change*, *supra* note 35, at 69.

170. See discussion *supra* Part III.A

the application of the law of occupation.¹⁷¹ If one focuses on post-conflict efforts undertaken by the UN, this is also relevant. Since the organization is not keen on ascribing any conceptual definition to the actions it is undertaking, as will be seen below,¹⁷² it is unclear which obligations apply in a given situation.

2. *The Language of Jus Post Bellum*

The awkwardness with which the UN conceptualizes its post-conflict efforts leads to another issue that needs to be addressed in the establishment of a modern jus post bellum. In the area of post-conflict efforts, there are several concepts that, although sometimes intertwined, are not used with precision. Post-conflict efforts can encompass peace-making,¹⁷³ peacekeeping,¹⁷⁴ peacebuilding,¹⁷⁵ nation-building,¹⁷⁶ and state-building,¹⁷⁷ and it is important to clarify each of these terms in order to clarify the specific obligations in each of these areas.¹⁷⁸

171. Benvenisti, *supra* note 140, at 189–90.

172. See discussion *infra* Part III.B.2

173. The UN describes peacemaking as, “the peaceful resolution of armed conflict around the word.” *Peacemaking and Conflict Prevention*, <http://www.un.org/wcm/content/site/undpa/main/issues/peacemaking> (last visited Sept. 23, 2010).

174. The UN defines peace-keeping as “a unique and dynamic instrument developed by the Organization as a way to help countries torn by conflict create the conditions for lasting peace.” *United Nations Peacekeeping*, <http://www.un.org/en/peacekeeping/> (last visited Sept. 23, 2010).

175. The UN describes peace-building as “[b]uilding lasting peace in war-torn societies.” *Peacebuilding*, <http://www.un.org/wcm/content/site/undpa/main/issues/peacebuilding> (last visited Sept. 23, 2010).

176. The UN does not use the term nation-building: “Nation-building means different things to different people and is not a term used by the UN. It normally refers to a longer historical process and includes the building up of a national identity.” *Peacebuilding Q&A*, http://www.unis.unvienna.org/unis/en/library_2006peacebuildingt.html (last visited Sept. 23, 2010).

177. Although the UN does not directly define state-building, it pledges to complete actions that “[l]ead states or territories through a transition to stable government, based on democratic principles, good governance and economic development.” *Mission Statement of the Department of Peacekeeping Operations*, <http://www.un.org/en/peacekeeping/info/mission.shtml> (last visited Sept. 23, 2010); See also Maria Blackburn, *Head of State*, *JOHNS HOPKINS MAGAZINE*, <http://www.jhu.edu/jhumag/0904web/fukuyama.html> (last visited Sept. 23, 2010) (defining state-building as “constructing formal institutions that make collective life in a society possible.”).

178. It is interesting to note that even the spelling of the words is not

Moreover, in each of these situations the UN may be involved in a vast array of actions. These actions can range from organizing elections to the international administration of territories, each of which encompass different needs and each of which could be met with varying degrees of suspicion by Member States, depending on how invasive they are judged to be given the prevalence of the concept of sovereignty in state's actions and rhetoric.¹⁷⁹ For instance, a less "intrusive" mandate (such as organizing an election) would likely be welcomed by the occupying country, but would likely require fewer obligations than other actions, such as the administration of one State.¹⁸⁰ If the Peacebuilding Commission could aid in clarifying that there are different types of post-conflict efforts and differing obligations for each, this could be of enormous practical significance in developing a framework of action.

3. *The Content of Jus Post Bellum*

The third, and probably the most difficult, aspect that needs to be addressed is the content of jus post bellum; for although the idea of a jus post bellum has been around since the end of the 18th century, its exact contours have never been determined.¹⁸¹ There are several suggestions in the scholarship of what jus post bellum should encompass. Sonia K. Han includes: 1) free and fair elections; 2) democratization; 3) cease-fire, demobilization, demilitarization and other military aspects; 4) police force; 5) judicial, penal and other constitutional

consensual. For instance, the word peace-building is found both with a hyphen and as one word.

179. Clancy Chassay, *Suspicion of UN Troops Grows in South Lebanon*, THE GUARDIAN (Feb. 23, 2007), <http://www.guardian.co.uk/world/2007/feb/23/syria.unitednations> (exemplifying member-state suspicion of invasive UN peacekeeping action favoring Israel over Lebanon).

180. *See Iraq: Elections Mark Start of New Phase Where National Dialogue Vital, Annan Says*, UN NEWS CENTRE (Dec. 9, 2005), <http://www.un.org/apps/news/story.asp?Cr=iraq&Cr1=&NewsID=16880> ("The fact that the political process has remained on target against an ambitious timetable is a considerable achievement in itself given the difficult conditions in which it has taken place," Secretary-General Kofi Annan says in his report to the Security Council, voicing satisfaction that the UN was able to support the Iraqi people at every step of the process."); *See also* G.A. Res. 54/173, at 1, U.N. Doc. A/RES/54/173 (Feb. 15, 2000) ("*Acknowledging* that the United Nations electoral assistance has facilitated the holding of successful elections in several Member States.").

181. *See* DiMeglio, *supra* note 137, at 133 (declaring that there was virtually no discourse on *jus post bellum* after Kant's works in the 18th century until 1994).

reforms; 6) respect for human rights; 7) repatriation of refugees and other displaced persons; 8) mine clearance; 9) emergency relief and humanitarian assistance; and 10) other aspects of rehabilitation and reconstruction.¹⁸² Michael Schuck has a shorter but broader list encompassing repentance, honorable surrender, and restoration.¹⁸³ Michael Walzer, instead of setting defined specific criteria, sets a more abstract principle to underscore a *jus post bellum*: “better state of peace’ . . . ‘[B]etter, within the confines of the argument for justice, means more secure than the status quo ante bellum, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations.’”¹⁸⁴

Based on these examples, one could say that not only there is not a consensual understanding of the content of a modern *jus post bellum*, but also that there are significant differences in the approaches adopted to tackle the issue. These may be explained by the fact that the choices in relation to what is necessary for justice are driven primarily by subjective concerns. That is, the same issue can be seen as indispensable by some and not relevant by others. The contrasts involved in selecting the content of a *jus post bellum* may be said to reflect deeper contradictions, that (1) often what is needed for immediate relief of problems might put long-term strategies in jeopardy;¹⁸⁵ (2) that peace and justice sometimes may push in different directions;¹⁸⁶ (3) that responding to security threats and protecting human rights sometimes requires contradictory actions;¹⁸⁷ and (4) that the laws can be used either to maintain

182. See Han, *supra* note 24, at 871–75.

183. See DiMeglio, *supra* note 137, at 134–37.

184. *Id.* at 138 (quoting MICHAEL WALZER, *JUST AND UNJUST WARS*, at 121–122 (1977)).

185. See CAPLAN, *supra* note 20, at 43 (“Satisfying these twin imperatives [, immediate needs and long term goals,] is complicated by the fact that each generates its own set of demands and that these demands may not be entirely compatible with one another.”); See also CHESTERMAN, *supra* note 2, at 146 (“[T]he exercise of power by a transitional administration in a manner that contradicts principles intended to bind future local regimes—such as democratic principles, the rule of law, separation of powers, and respect for human rights—may actually harm the prospects of good governance in the longer term.”).

186. See FRANCK, *supra* note 14, at 14–19 (discussing the difficulties of seeking both peace and justice).

187. See CHESTERMAN, *supra* note 2, at 146 (“Of particular interest in this section are two further aspects of accountability that are relevant to these operations. The first concerns the balance that a transitional administration strikes between responding to legitimate security threats and its obligation to protect and promote human rights.”).

the status quo or to propel change.¹⁸⁸

Notwithstanding these difficulties, if one opts for the broader approach to defining a modern jus post bellum instead of a specific set of substantive rules, one may be able to find common ground. Combining the contents expressed above and trying to summarize them, a modern jus post bellum should encompass a broad notion of law and order, and help establish two ideas that are essential for social order: the rule of law and physical and economic security. To fully understand and properly apply the rule of law, the main concerns are the definition of the applicable rule, the respect for minimum standards of human rights and the creation of lasting institutions (including the judiciary and elections). To properly ensure security to citizens of an occupied country, the main concerns are policing, the penal system, public order and economic stability and development.¹⁸⁹

Another way to justify a broader approach is to look at the potential development of a modern jus post bellum through the lens of global administrative law, which would support the idea of creating frameworks instead of detailed substantive rules. Global administrative law is concerned with “all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review.”¹⁹⁰

Because of this, “[t]he focus of the field of global administrative law is not, therefore, the specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules, review mechanisms, and other mechanisms relating to transparency, participation,

188. See Teitel, *supra* note 133, at 1617 (“A core tension emerges in the use of law to advance transformation, as opposed to its role in adherence to conventional legality.”).

189. For more details on the challenges involved in each of these aspects, see CAPLAN *supra* note 20, at 45-67 (discussing the use of policing and penal institutions to maintain public order and internal security); Cf. CHESTERMAN *supra* note 2, at 154 (“One of the most important and difficult challenges confronting a post-conflict society is the re-establishment of faith in the institutions of the state. Respect for the rule of law in particular, implying subjugation to consistent and transparent principles under state institutions exercising a monopoly on the legitimate use of force, may face special obstacles.”).

190. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 28-28 (2005)..

reasoned decisionmaking, and assurance of legality in global governance.¹⁹¹

Following this approach, the Peacebuilding Commission could best aid the development of a normative framework for jus post bellum by establishing such a framework in a broad, principled way, instead of assessing them by their adequacy to specific substantive norms. Further justification for this approach springs from the recognition of the practical differences in post-conflict efforts and in the axiological foundation for the choices being made concerning them. In addition, a broad approach is also justified given the nature and structure of the Peacebuilding Commission, which is, after all, merely an advisory organ, with a broad membership, and whose actions are based on consensus. Needless to say, defining specific substantive norms in this environment would be a Herculean task.

Moreover, having this broad framework would mean that the UN itself would be acting under principles of rule of law, and would be able to “lead by example.” This could minimize the criticisms that often arise in connection with post-conflict efforts regarding principles of liberalism and democracy.¹⁹² A broad framework, therefore, would also increase the legitimacy of UN actions by establishing a principled way in which to conduct these actions, which would be based on a comprehensive foundation, given the membership of the organization.¹⁹³

The lack of specific substantive norms could, however, be seen as problematic, because the status quo—the nonexistence of clear and specific obligations—would remain. This might, of course, allow for violations based on varying interpretations of the broader norms. The existence of specific substantive norms themselves, however, could also be problematic, because past

191. Id. 28–29

192. See Sujit Choudhry, *Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities*, 37 CONN. L. REV. 933, 933 (2005) (“Practiced in this form, nation-building poses a serious dilemma for liberal democrats, because of the deep and irreconcilable tension between the outside imposition of a constitutional order and the right of all peoples to self-determination.”).

193. Furthermore, the idea of a broad framework is also more in keeping with the idea of just war theories insofar as they provide “relevant principles that are intelligible, generalizable, and capable of consistent application,” L. Christian Marlin, *A Lesson Unlearned: The Unjust Revolution in Rwanda, 1959-1961*, 12 EMORY INT'L L. REV. 1271, 1276 (1988) (quoting Ralph B. Potter, *War and Moral Discourse* 62 (1969)), and could add to legitimacy by focusing on principles of justice for post-conflict efforts.

practices have shown that applying the same model of post-conflict efforts to different situations is not a successful strategy.¹⁹⁴

Notwithstanding the problems in defining the content of a modern *jus post bellum*, there is reason to believe that the Peacebuilding Commission can aid in the development of a normative framework for post-conflict efforts through the clarification of the concepts related to *jus post bellum*. It can also, at a minimum, contribute to a broad framework that would serve as a principled way to assess post-conflict efforts. Moreover, the Peacebuilding Commission can assist the creation of a modern normative framework for post-conflict efforts by enhancing accountability mechanisms.

IV. THE PEACEBUILDING COMMISSION CAN BE USED AS A TOOL TO ENHANCE THE ACCOUNTABILITY OF POST- CONFLICT ACTORS

Accountability is a way of constraining power.¹⁹⁵ It “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”¹⁹⁶ In this sense it “presupposes a relationship between power-wielders and those holding them accountable where there is a general recognition of the legitimacy of (1) the operative standards for accountability and (2) the authority of the parties to the relationship (one to exercise particular powers and the other to hold them to account).”¹⁹⁷ Combining these features with current international circumstances and, adding to it the tendency of looking into accountability solely through the lens of legal mechanism, it is difficult to suggest that a strong accountability mechanism exists in international law.

194. Cf. CHESTERMAN, *supra* note 2, at 256 (“Just as generals are sometimes accused of planning to refight their last war, so the United Nations experiments in transitional administration have reflected only gradual learning. Senior UN officials now acknowledge that, to varying degrees, Kosovo got the operation that should have been planned for Bosnia four years earlier, and East Timor got that which should have been sent to Kosovo.”).

195. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 (1) AM. POL. SCI. REV. 29 (2005).

196. *Id.* at 29.

197. *Id.* at 29.

A. THE PEACEBUILDING COMMISSION CAN USE SEVERAL NON-LEGAL MECHANISMS OF ACCOUNTABILITY TO CHECK THE ACTIONS OF POST-CONFLICT ACTORS

This difficulty is exacerbated by the problems in the institutional and normative framework of accountability enforcement, which, as discussed at length above, is the case in post-conflict efforts. If there are no clear rules, legal accountability is almost impossible. When there are rules, but the remedies available are too lax, legal accountability seems to be difficult. Legal accountability, however, is not the only possible form of accountability; and one can argue that depending on the context in which accountability is to be enforced, the forms and mechanisms of accountability may vary.¹⁹⁸

Regarding the forms of accountability, Grant and Keohane suggests that there are two main types: the participation model and the delegation model.¹⁹⁹ In the former, the evaluation of actions is undertaken by those directly affected by them, and in the latter, the evaluation is done by the ones delegating the power to act.²⁰⁰ Generally, these two models do not coincide, but in the case of post-conflict efforts, both forms of accountability are relevant and needed, insofar as both the people in the territory in which the effort is being undertaken and the UN (or the international community at large) have interests in being able to hold actors involved in the efforts accountable.

Within these two models, Grant and Keohane identify seven possible types of accountability: hierarchical, supervisory, fiscal, legal, market, peer and public or reputational. "Hierarchical accountability is a characteristic of bureaucracies and of virtually any large organization."²⁰¹ Supervisory accountability relates to the possibility of an organization to oversee its own agents, that is, it concerns relations between organizations "where one organization acts as principal with respect to specified agents."²⁰² Fiscal accountability refers to the ability of

198. For instance, on the issue of private military companies Laura A. Dickinson sets 4 types of accountability (i.e. legal, democratic, contractual and institutional). See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 Wm. & Mary 135, 135 (2005).

199. Grant & Keohane, *supra* note 195, at 31.

200. *Id.* at 31.

201. *Id.* at 36.

202. *Id.* at 36.

funding agencies to require that the recipient of funds report back to them.²⁰³ “Legal accountability refers to the requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas.”²⁰⁴ “Market accountability” relates to market agents (such as investors and consumers) overseeing actions.²⁰⁵ “Peer accountability arises as the result of mutual evaluation of organizations by their counterparts,”²⁰⁶ and “[p]ublic/reputational accountability is pervasive because reputation is involved in all the other forms of accountability.”²⁰⁷ Under this rubric, even if the Peacebuilding Commission is not able to develop a modern *jus post bellum* which ensures the existence of legal rules that, in turn, ensures legal accountability, it certainly can play a major role in other forms of extra-legal accountability.

In relation to hierarchical and supervisory accountability, the role of a body such as the Peacebuilding Commission is intuitive, given its placement within the UN, and its mandate to coordinate the organization’s post conflict efforts. This is especially true when the Peacebuilding Commission undertakes country-specific missions. The actors on the field in such situations would be subject to the Peacebuilding Commission supervision, and therefore, would be held accountable for their actions.

Regarding fiscal accountability and peer accountability, the Peacebuilding Commission, due to its composition, also has an important role to play. In relation to fiscal accountability, accountability will certainly exist because the Peacebuilding Commission unites each of the major donors and financial institutions involved in post-conflict efforts.²⁰⁸ In relation to peer accountability, because the idea is to have an organ to coordinate strategies, and because all actors involved in post-conflict efforts will be present at the same forum and will, therefore, act as a check upon each other, the Peacebuilding Commission will enhance accountability among them.

Public or reputational accountability seems, however, the most promising area in which the Peacebuilding Commission

203. *Id.* at 36.

204. *Id.* at 36.

205. Grant & Keohane, *supra* note 195, at 37.

206. *Id.* at 37.

207. *Id.* at 37.

208. G.A. Res. 60/180, *supra* note 10, at 3.

can enhance accountability in post-conflict efforts. Firstly, because the Peacebuilding Commission is an institutionalized forum for discussion, adding the element of transparency into the debate of post-conflict efforts will enhance accountability, in the sense that it will present the positions of the involved actors openly, so that they can be objectively assessed and evaluated.²⁰⁹ Secondly, if the Peacebuilding Commission is able to establish the broad normative framework mentioned above, and from that is able to establish a principled way of assessing the standards of post-conflict efforts, this method would enhance accountability because standards of legitimacy are indispensable to holding actors accountable.²¹⁰ Thirdly, as Grant and Keohane suggest, one important problem of international accountability appears when the actors involved are powerful states with constitutional democracies.²¹¹ Because these states are nationally accountable, it is difficult to hold these states legally accountable internationally. "The only forms of external accountability to which they are consistently subject, across a range of issue areas, are peer accountability and reputational accountability."²¹² Furthermore, "[t]hese attempts at accountability, however, depend on efforts, often ad hoc, to establish a basis of legitimacy on which to hold a state accountable."²¹³ The actions of the Peacebuilding Commission can thus be an important step towards establishing these forms of accountability insofar as all the powerful states are in one way or another involved in post-conflict situations. Moreover, because it is an established organ and not an ad hoc effort, perhaps it can be more successful than envisioned by Grant and Keohane.

B. NON-LEGAL MECHANISMS OF ACCOUNTABILITY WILL ENHANCE THE EFFECTIVENESS OF LEGAL MECHANISMS OF ACCOUNTABILITY

If these were the only types of accountability that the Peacebuilding Commission was able to impose, it would already be a positive development in both post-conflict efforts and in international law. Depending on how far the Peacebuilding Commission is able to advance the establishment of a modern

209. Grant & Keohane, *supra* note 195, at 39.

210. *Id.* at 29–30.

211. *Id.* at 39.

212. *Id.*

213. *Id.*

jus post bellum, however, it could also aid in improving legal accountability. This would entail a further step in developing *jus post bellum*: clarifying concepts and obligations alone is not sufficient—it is also necessary to establish remedies for violations. Mechanisms used by the Trusteeship Council, including period reports and *in loco* visits, are one possible solution,²¹⁴ but this alone will not suffice. Harsher sanctions must be imposed both upon individuals and upon the State or organization that undertakes the post-conflict effort. This requires a new reading of immunity rules and the political compromise either to make the existing avenues for remedies (such as the International Criminal Court) more effective or to create new paths to accountability. Since the scholarship on the issue is in its early stages, it is not yet possible to state clearly what types of remedies should be used in such situations. However, the issue of accountability is paramount in the area of post-conflict efforts, and, therefore, in the work of the Peacebuilding Commission.

V. CONCLUSION

From the forgoing, one can see that the Peacebuilding Commission is a long-needed institutional reform of the UN insofar as it aims to enhance activities already being performed by the institution in the area of post-conflict efforts²¹⁵. It seems that the Peacebuilding Commission indicates the existence of a consensus concerning obligations in post-conflict efforts—that is, the existence of a *jus post bellum* in broad terms.²¹⁶ At the same time, this area of international law is just starting,²¹⁷ but it is potentially capable of broadening these obligations to include current situations and to establish a normative framework that would enhance the rights of local populations

214. See CHESTERMAN *supra* note 2, at 39–40 (“The Council’s basic responsibilities were to consider reports from the administering power, to accept petitions from inhabitants, and to provide for periodic visits.”); See also Mohamed *supra* note 84, at 829–30 (“Transferring management to the Trusteeship Council thus provides an avenue for holding UN personnel accountable for their actions and holding the UN to the same standards that it seeks to impose on the territories in which it operates.”).

215. See High-level Panel on Threats, Challenges and Change, *supra*.

216. See generally G.A. Res. 60/180, U.N. Doc. A/RES/60/180, *supra*.

217. See generally Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum* and Inger Osterdahl, *What Will Jus Post Bellum Mean? Of New Wine Bottles and Old*, 14 J. CONFLICT & SECURITY L.

and ensure accountability.²¹⁸

Even though it is not what was initially proposed and desired,²¹⁹ the Peacebuilding Commission seems to be able to contribute to post-conflict efforts. And, like most actors in the international legal scenario, the most successful strategy would be to find the niches in which it can be most effective and contribute the most to international law.

Potentially, and in light of the nature and structure of the Peacebuilding Commission and of the need of post-conflict efforts, the most profitable niche it could fill would include developing a broad framework for post-conflict efforts,²²⁰ which would help to clarify concepts of modern jus post bellum and establish a principled way of assessing the law in this area. This would, in addition, enhance accountability²²¹ through increased transparency,²²² and create a standardized way of evaluating post-conflict actions²²³ being taken.

If the Peacebuilding Commission is able to fill these gaps, it would not only fulfill its mandate—thereby helping the UN meet its goals—it would also contribute significantly to international governance and international law.

218. See Section III.

219. See, for instance, section I, B.

220. See, for instance, section III, B, 3

221. See, for instance, section IV.

222. Grant & Keohane, *supra*

223. See generally G.A. Res. 60/180, U.N. Doc. A/RES/60/180, *supra* Para 13.