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JUS POST BELLUM – TERMINATION OF ARMED CONFLICT AND ITS LEGAL CONSEQUENCES UNDER INTERNATIONAL LAW

Master thesis

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INTRODUCTION

The end of the cold war brought many changes in conflict resolutions around the world. The shift of global powers allowed solutions for many prolonged internal conflicts, thus contributing to the rise of negotiated settlements[1]. At the same time, newly risen and complex intrastate armed conflicts in weak or fragile states prompted UN peacekeeping practice to evolve into multidimensional peacekeeping operations[2]. These developments became a complex issue from the point of effectiveness and law. First of all, the large portion of peace agreements and peacekeeping efforts have failed to prevent the violence[3]. From the legal point of view, the increase of peace agreements, heavy involvement of third parties and 'robust', multidimensional peacekeeping missions have raised multiple questions. It became clear that old notions of international law are difficult to apply to current realities which have significantly changed. The 'blurry' line between peace and war, the increased role of non-state actors are just a few of examples of this change. As a result, in some cases, the norms of international law could be called an obstacle to the peace process. In other cases, the lack of necessary regulation has been observed. Moreover, there is a legal uncertainty because of lack of coordination between different branches of international law in post-conflict context. For this reason, scholars and practitioners began to explore the possible ways on how to apply international law in post-conflict context and what aspects could be improved. One of such attempts was to group the applicable norms and principles of international law into specific discipline or category of international law called '*jus post bellum'*.

Jus post bellum, which literarily means 'law after the war', generally refers to the process of transition from the armed conflict to peace. It is the concept that has long established tradition in just war theory, being researched in the writings of St. Augustine (354-430), who linked war to the post-war goal of peace[4], also Hugo Grotius (1583-1645), who defined practical principles on just war termination, such as rules on surrender, good faith, and interpretation of peace treaties. Immanuel Kant (1724-1804) defined Right to War (*Recht zum Krieg*), Right in War (*Recht im Krieg*), and Right after War (*Recht nach dem Krieg*)[5]. Kant associated the "law after war" with substantive principles of justice, such as the fairness of peace settlements, respect of the

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[1] Christine Bell, *On The Law Of Peace*, 1st ed. (Oxford: Oxford University Press, 2007): 28.
[2] Bertel Teilfeldt Hansen, "Ballots and Blue Helmets," 2014, http://dpsa.dk/papers/Teilfeldt%20Hansen_Ballots%20and%20Blue%20Helmets_manuscript_plus_online%20appendix.pdf: 7
[3] Peter T. Coleman, "Crisis and Opportunities: Six Contemporary Challenges for Increasing Probabilities for Sustainable Peace," International Journal of Conflict Engagement and Resolution 1, 1 (2013): 96.
[4] Carsten Stahn, Jennifer S. Easterday, and Jens Iverson, eds., Jus Post Bellum: Mapping the Normative Foundations (Oxford, United Kingdom: Oxford University Press, 2014): 313.
[5] Kant, Immanuel. The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, trans. William Hastie, (New Jersey: The Lawbook Exchange, 2002): 214.

sovereignty of the vanquished state, and limits on the punishment of people, for example, through excessive reparation[6]. Afterwards, *Jus post bellum* did not receive much attention in the conceptualization of the laws of war in the nineteenth and twentieth centuries, when *jus in bello* and *jus ad bellum* were codified[7]. However as a result of post-cold war developments, jus post bellum again gained its relevance. The new theories of jus post bellum are explored from philosophical point of view by just war theorists, and international law experts who generally do not link the new concept of jus post bellum to just war theory. Having identified the goal of jus post bellum as sustainable peace, they seek to establish a legal framework regulating transition from conflict to peace, which will bring the law into closer conformity with the challenges presented by the peace-making and peace building practices of today[8]. However, no consolidated approach have been offered yet. There is still a lack of consensus on many critical issues[9], ranging from definition to the contents of this legal category. Other scholars take a critical view on this concept, questioning its necessity itself.

Research problem. Despite gaining increasing support, the usefulness and appropriateness of the concept are criticised, noting that 'legal void' in the law regulating the 'transition' from war to peace is overstated, because existing legal framework sufficiently regulate post-conflict reconstruction[10]. It is argued that 'gaps' in the law are not the result of the absence of rules, but rather the failure effectively to implement the existing rules. Therefore, the necessity and analysis of different theories of *jus post bellum,* the scope and obligations must be analysed.

Secondly, the specific issues of *jus post bellum* must be examined in the context of current realities, where often there is no formal commencement or termination of armed conflict. Defining the temporal scope of jus post bellum is critically important for its application. The vague terminology, such as 'general close of military operations'[11] used in Geneva Conventions makes it difficult to define when the armed conflict terminates, especially in cases of situations of overlapping hostilities and transitions to peace, for example, the wars in Iraq and Afghanistan continued long after the actual combat operations had ended.

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[6] Immanual Kant, supra note 5, p. 214.
[7] Brian Orend. War and International Justice. (Waterloo: Wilfrid Laurier University Press, 2000):219.

[8] Kristine Boon, "Obligations Of The New Occupier: The Contours Of Jus Post Bellum", *The Loyola Of Los Angeles International And Comparative Law Review* 31, no. 57 (2009):4.
[9] Carsten Stahn, Jennifer S Easterday and Jens Iverson, *Jus Post Bellum: Mapping The Normative Foundations*, 1st ed. (Oxford: Oxford University Press, 2014):546
[10] Eric De Brabandere, "The Concept Of Jus Post Bellum In International Law", *Jus Post Bellum*, 2014, 124-141, doi:10.1093/acprof:oso/9780199685899.003.0008.
[11] Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html [accessed 28 December 2016]:3

Thirdly, it has been suggested that peace agreements form a basis of jus post bellum, although admitting their weaknesses is necessary. The main issue is the unclear status of peace agreements, which poses legal challenges in post-conflict situations. The modern peace agreement, in many cases, resembles a constitution[12], especially when it has power-sharing elements and establishes institutions. On the other hand, it resembles a treaty and is commonly posed as such[13]. However, it is obvious that peace agreements do not really fit in any of these categories. It differs to the constitution by the inclusion of foreign actors, different legislative procedure and its negotiated nature. On the other hand, the non-state signatories make it difficult to call it a treaty. Therefore the question remains whether it is a 'special' kind of constitution or treaty, or neither; whether its provisions are obligatory. In addition to this, statistics show that the half of concluded peace agreement fail to stop the violence. It is important to research the causes of failures and analyse the possibilities of the improvement. To establish this, it requires the analysis of negotiations and conclusion, as well as implementation. It is necessary to evaluate whether and how jus post bellum could clarify the status of peace agreements and what role they could have in a new framework.

Fourth, jus post bellum implies the involvement of third parties into state affairs. This makes question its legitimacy and how it could be reconciled with a principle of sovereignty, which is still a one of main principles and basis of public international law.

Lastly, the rule of law, which jus post bellum seek to promote in a post-conflict setting, requires accountability, including conflict parties and third party actors. However, the forms of accountability vary and is complicated by amnesties, immunities and general reluctance. It is thus necessary to research what and to what extend could be done from the point of international law.

The relevance of the topic. *Jus post bellum* is a *lex ferenda* concept which is a subject of broad discussions. While most scholars agree that existing legal framework is either insufficient or cannot be applied effectively, there is no common agreement on the approaches, scope and obligations of *jus post bellum.* The disappearance of formal declarations of war and variety of conflict settings erased sharp lines between armed conflict and peace. As a result, there is a lack of objective definitions, which means that there is no clear approach to solving post-conflict situations. The issues and results of existing practice indicate the need to clarify the international law and explore how it could contribute to effectively ending the armed conflicts and prevent the

[12] Christine Bell, supra note 1, p.,150
[13] Ibid. 145

loss of lives.

The novelty of the topic and overview of the previous research. The subject is being studied by scholars in the field of just war theory, such as Michael Waltzer or Brian Orend who examine it from the moral and ethical point of view. However, *jus post bellum* has also gained prominence in the legal doctrine, where it is seen not as a moral principle, but a concept which regulates conflicts of norms and the relationship between different actors in conflict-related situations of transition[14]. The first category of *jus post bellum* theories focuses on the legal holder of obligations in the post-conflict phase and focuses on the inherent link between post-conflict obligations and the use of force and aims at a redistribution of the obligations of states and international organisations towards the states or territory in which the reconstruction process takes place. The second category of scholars, such as Carsten Stahn and Jens Iverson, understands *jus post bellum* as a legal framework applicable in the transition from war to peace. Thus, *jus post bellum* would be a corpus of legal rules and principles as a complement to *jus ad bellum* and *jus in bello*[15]. Other scholars have also significantly contributed to separate aspects of post-conflict situations. Christine Bell's work 'on the law of peace' is one of most notable analysis of peace agreements. Matthew Saul has done extensive research on the legitimacy of post-conflict reconstruction.

The significance of the research. The thesis is examining the legal uncertainty existing in the current legal framework in areas of peacemaking, post-conflict reconstruction, the interplay between international human rights law and humanitarian law. The research will possibly be useful in contribution to finding the most balanced approach to achieving sustainable peace after armed conflict.

The aim of the research. It is necessary to evaluate the existing issues in the field of post-conflict phase and examine the most balanced way of achieving sustainable peace by applying the principles of *jus post bellum.*

Objectives. In order to reach the aim the following tasks are set:

1) To analyse the existing concept of jus post bellum and to evaluate its necessity.

[14] Carsten Stahn, Jennifer S Easterday and Jens Iverson, supra note 9, p. 321.

[15] Eric Brabandere, "The Responsibility For Post Conflict Reforms: A Critical Assessment Of Jus Post Bellum As A Legal Concept", *Vanderbilt Journal Of Transnational Law* 43, no. 119 (2010):133.

2) To assess whether the existing legal framework is sufficient for achieving the sustainable peace after the armed conflict.
3) To define the temporal applicability of *jus post bellum*.
4) To examine and evaluate the status of peace agreements.
5) To examine the legitimacy of post-conflict involvement
6) To explore the legal accountability issues in the post-conflict context.

Research methods. The following methods were used to achieve the aim of the research:

1) The comparative method is applied to examine the difference between various cases of post-conflict phases.
2) The teleological method is used by explaining purposes and essence of normative and customary rules and principles of international humanitarian law.
3) The critical analysis method is used to evaluate current legal framework and legal gaps in cases of post-conflict phase.
4) The analytical method is invoked by assessing the content of treaties, customary law and principles and their application in practice.

Structure of the thesis. The thesis is divided into an introduction, four main parts and summary. First main part deals with a general understanding post-conflict situations by stressing possible problems and ambiguities, examining the necessity for achieving sustainable peace and searching the most balanced scope. The second part examines the notion of *jus post bellum*, and its theories, what triggers the application of it and when does it end. It analyzes the peace agreements and explores their strengths and weaknesses, the issues in case law. It then explores the issues of legitimacy and accountability.

Defending statements.

1) The issue of existing legal gaps in post-conflict situation management could be improved with comprehensive concept of jus post bellum.
2) The issue of temporal application should be solved by defining *jus post bellum* as a part of broader legal framework managing problems related to armed conflicts, where different rules can be applied simultaneously.

3) Peace agreements are sui generis international law development, having the status of neither treaty nor constitution and are obligatory if the parties intend so.
4) State sovereignty remains central concept of jus post bellum, thus implying the consensual nature of this concept. Yet, the consent of population remains as complementary, in cases of fragile or failed states and is further necessary to supplement by adherence to principles
5) The principle of rule of law is one of the central principles of jus post bellum and it implicates the necessity of accountability.

1. APPLICABLE LAW IN POST-CONFLICT SITUATIONS

This chapter will seek to overview the post-conflict situations and explore their specific nature. It will identify the factors relevant to international regulation. Furthermore, the existing legal framework will be critically evaluated. Specifically, it will note the fragmentation and lack of coordination as the main issue of the current legal framework. It thus serves as a preceding background for the second chapter, which will explore how and to what extent jus post bellum could apply to specific issues in post-conflict context.

1.1. The nature of post-conflict situations

The broad term 'post-conflict' refers to a variety of situations that occur after the end of armed conflict. The conflict itself might be either international or non-international, thus leading to completely different setting after it ends. Further, post-conflict situations might vary in the level of social differentiation amongst a community (for instance, ethnic, religious, or tribal), the level of ongoing hostility, the extent to which state and civil infrastructure has been shattered by the conflict, the levels of economic activity, the strength of security, the position of neighbouring states and so on[16]. The international involvement varies, beginning from the international administration, sometimes taking a fairly direct role in rebuilding the political, legal, and economic structure of the post-war state. At other times the international footprint is light. Some situations might involve occupation. In such cases, the proceeding setting of post-occupation itself might vary by the dependence of former occupant, when the new entity has a high level of dependency (i.e. Gaza strip and Israel), or low dependency when the new entity is cut off from a former occupant. Adding the cultural and traditional factors contribute to myriads of possible situations. Such situations are not static, but dynamic, with various issues constantly arising and overlapping.

Still, there has been attempts of categorising the post-conflict peace by the form of their environments. Astri Suhrke, stating that generally there is no such thing as 'post-war situation', identifies four types of peace, first is, 'divided peace' which mean a society which is highly fragmented; second is called 'pacified peace', which is fragmented, but has an international presence and is a result of political bargains; fourth is 'loser's peace', meaning a divided society

[16] Matthew Saul, "Creating Popular Governments In Post-Conflict Situations", *Jus Post Bellum*, 2014, 447-466, doi:10.1093/acprof:oso/9780199685899.003.0024: 450

where the one losing partyer mains capable of inflicting violence on winning party, but through the use of informal structures; or lastly, the winning party may seize control of the state and use it effectively to create a new social order that entails a regime of violence or fear against particular population groups that were on the losing side of the war – such situation he calls 'victor's peace'[17].

Such diversity of situations naturally raises a concern, that attempts of uniform regulation for post-conflict phase may hinder the process of peace because of lack of sensitiveness to context. Nevertheless, existing status quo, as research show, is not satisfying and overly complicated. Therefore acknowledging these challenges posed by diversity, to proceed further we need to identify what is usually common in post-conflict situations. First of all, many of post-conflict situations tend to be highly volatile and have a high risk of relapse to armed conflict. This especially prevails in civil war situations. Statistics show that out of the 105 countries that suffered a civil war between 1945 and 2013, more than half (59 countries) experienced a relapse into violent conflict—in some cases more than once—after peace had been established[18]. Volatility also means the sense of insecurity, thus the psychological factor has to be taken into account when analysing the post-conflict decisions of local actors.

Second, there is always a certain level of international involvement. Varying from full-on international administration, such as in Bosnia or Kosovo, to ad hoc involvement of 'international figures' for one-off implementation tasks. International involvement generally, and especially the presence of foreign troops may raise legitimacy under international law question. Even in the cases where explicit consent has been given, questions are raised whether such consent represents the society[19]. There are also the other forms of international involvement, such as investment that might constitute high foreign influence and dependence, which possibly clash with the principle of sovereignty. Issues of legitimacy and the risk of abuse are therefore pointing again towards the need of clarifying the applicable law.

Third, there is usually a certain legal agreement between conflict parties that serves as a basis for the further peace process. The legal status of the peace agreement is generally an issue of debates and will be discussed in further sections. Some commentators have expressed that even in situations where peace arise when armed clashed simply stopped without any agreement, it is argued that such is implied peace agreement and this way is a basis for jus post bellum application.

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[17] Astri Suhrke, "Post-War States", *Jus Post Bellum*, 2014, 269-284, doi:10.1093/acprof:oso/9780199685899.003.0015 :275

[18] Uppsala Conflict Data Program (UCDP), International Peace Research Institute, Oslo (PRIO), UCDP/PRIO Armed Conflict Dataset v.4-2014a, 1946-2013.

[19] Matthew Saul, *Popular Governance Of Post-Conflict Reconstruction*, 1st ed. (Cambridge: Cambridge University Press, 2014):78

On the other hand, the role of the agreement might vary. For instance, if the agreement was 'imposed' by foreign parties, it might be ignored altogether.

Lastly, there are general needs of every post-conflict society. Security, justice, political accountability, employment, and economic reconstructions[20] are noted as the most important ones. Reconciliation in some cases is also critically important. In some cases, the lack of balance between these needs have been observed and this way is possibly contributing to failures.

1.2. Post-conflict situations: applicable law

This section will discuss on legal regulations which apply during the post-conflict phase, namely International Humanitarian Law, International Human Rights Law and International Criminal Law (ICL).

1.2.1. International Humanitarian Law

International Humanitarian Law is the branch of international law that limits the use of violence in armed conflicts[21]. The very definition of IHL makes it obvious that it is designed for situations armed conflict. In the case of Tadić, the Appeals Chamber of the ICTY held that: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities [...], in the case of internal conflicts, [until] a peaceful settlement is achieved[22]". As opposed to this, post-conflict situations could be described as 'no-war, no-peace' landscape[23], thus complicating the issue of application.

There are several ways how humanitarian law applies during the post-conflict phase. First are UN peace enforcement operations, which actively engage in military combat. The second relates to the accountability of the conflict parties.

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[20] Astri Suhrke, supra note 17, p.283
[21] Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect In War?*, 3rd ed. (Geneva: International Committee of the Red Cross, 2011): 2
[22] ICTY, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para.70
[23] KRISTINE HÖGLUND and MIMMI SÖDERBERG KOVACS, "Beyond The Absence Of War: The Diversity Of Peace In Post-Settlement Societies", *Review Of International Studies* 36, no. 02 (2010): 369

Regarding the first, there is the broad support that the UN, the main actor in post-conflict phase, is bound by customary humanitarian law, despite not being a party to international humanitarian law treaties[24]. The question may arise which norms of IHL applies: those of international armed conflict or non-international armed conflict. Since the UN troops are an international force, the conflict between troops who have UN command and domestic forces should be understood as international[25]. 1994 UN Convention on the Safety of the United Nations and Associated Personnel seem to imply the application of IHL but does not specify any details[26]. Eventually, the bulletin was issued by the UN Secretary-General on 6 August 1999 and entitled "Observance by United Nations forces of international humanitarian law". It sets out "fundamental principles and rules of international humanitarian law" that are "applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement"[27].

Secretary-General in 2001 has confirmed, that the Bulletin is a formal recognition of the applicability of the international humanitarian law to United Nations peace operations[28]. Although the Bulletin has been criticised by commentators because of rules it includes or does not include[29], it is still a significant development. The legal status of the Bulletin, arguably, could be compared to unilateral acts of states, which would imply the clear source of legal obligation[30]. On the other hand, there is the issue of the enforcement. UN itself cannot enforce IHL, and as it has been noted, the UN, in its operations does not have a jurisdiction over the members of military contingents.[31] Status of forces agreements concluded between the United Nations and the host State of an operation normally provide that the troop-contributing States retain exclusive criminal jurisdiction over members of military contingents.[32] For this reason Sec. 4 Bulletin states that in case of violations of international humanitarian law, members of the military

[24]Marten Zwanenburg "United Nations And International Humanitarian Law", *Opil.Ouplaw.Com*, 2016, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1675.
[25]Peter F. Chapman, "Ensuring Respect: United Nations Compliance with International Humanitarian Law," Human Rights Brief 17, no. 1 (2009): 5
[26] "Convention on the Safety of United Nations and Associated Personnel." International Instruments Related to the Prevention and Suppression of International Terrorism (November 20, 2008): 419–430. doi:10.18356/7573576d-en. Art 20
[27] Observance by United Nations forces of international humanitarian law, United Nations, Secretary-General's Bulletin, ST/SGB/1999/13, 6 August 1999, para. 1.1.. Cited from: http://www.geneva-academy.ch/docs/projets/CTR_application_du_DIH.pdf
[28] Marten Zwanenburg, supra note 24
[29] Ibid
[30] Víctor Rodríguez Cedeño and Maria Isabel Torres Cazorla, "Unilateral Acts Of States In International Law", Max Planck Encyclopedia Of Public International Law, 2007:1496
[31] Marten Zwanenburg, supra note 24
[32] Ibid.

personnel of a United Nations force are subject to prosecution in their national courts[33] .This is, arguably, an accountability gap, which will be analysed in the second chapter of this thesis.

The existence of unequal application of the standards of IHL has been observed. For instance, some of the troops deployed as part of the same UN mission in the same region have higher obligations, if the troop-donating country has ratified AP I or AP II.[34] This issue potentially complicates the integrity of UN forces and thus requires further clarification.

There are opinions that Chapter VII enforcement operations are exempt from the application of international law, including international humanitarian law.[35] This view, however, seems to be against the current developments, and particularly, the view of ICJ, which has held that the UN is “a subject of international law and capable of possessing international rights and duties”[36].

Regarding the accountability of conflict parties, there is a positive development that individual criminal accountability for violations of humanitarian law in non-international armed conflict became broadly accepted in state practice and the judgments of international courts and tribunals. International humanitarian law, as opposed to international human rights law, has provisions to deal with non-state actors, making it more suitable for post-conflict setting. On the other hand, certain norms of humanitarian law are potentially challenging the peace process. In particular, the Article 6(5) of AP II to the Geneva Conventions appears to require amnesty, providing that ‘[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.’[37] This provision has been used to justify the amnesties[38] for those responsible for international crimes committed during the armed conflict. ICRC commentary has clarified this norm, stating that ‘Article 6(5) attempts to encourage a release at the end of hostilities for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law.’[39] The current situation is that

[33] Ibid
[34] Yutaka Arai, The Law Of Occupation, 1st ed. (Leiden: Martinus Nijhoff Publishers, 2009):583
[35] Marten Zwanenburg, supra note 24
[36] ICJ in Reparation case [1949] ICJ Rep p 174 -178
[37] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 28 December 2016]
[38] Christine Bell, "Post-Conflict Accountability And The Reshaping Of Human Rights And Humanitarian Law", International Humanitarian Law And International Human Rights Law, 2011:339
[39] Ibid.

'some' amnesties are allowed, while blanket amnesties are prohibited.[40] This issue will also be discussed in detail in the second chapter.

Occupation law, which is a part of IHL and whose framework has been set in Geneva fourth Convention, arguably, also applies to post-conflict situations, creating additional complications. Obviously, the direct application is not possible since the UN is not a party to this Convention. It has to be noted that the Bulletin did not include any reference to occupation law. ICRC has pointed out that occupation law "may appear to be a kind of taboo for the international organisations involved as well as for some troops contributing States, occupation law must not be discarded outright and the rights, obligations and protections derived from it must be applied when the conditions for their applicability are met."[41] However the conservation principle of occupation law arguably limits the ability of Security Council's to carry out broad reforms during the missions to post-conflict states, thus potentially complicating the process. Knoll, on the other hand, emphasising 'the benevolent nature of an international administration, its specific mandate and its possible open-ended presence' implies the non-application of conservation principle to UN international administrations. There are proposals that the application of the law of occupation should be confined only to the situations where an international territorial administration "is run or de facto controlled by military forces". In practice, most cases UN forces act with the consent of government or parties concerned. Therefore the law of occupation has not been applied to any operation yet[42]. Despite this, it serves as inspiration for rules and procedures in transitional administrations.[43] Therefore, it can be concluded that, despite its inapplicability, occupation law still matters and influence the practice.

1.2.2. International Human Rights Law

Human rights law plays a major role in post-conflict context in many ways. Most peace agreements contain some human right norms. Adherence to human right norms of involving third parties and accountability for breaches of human rights of all actors is essential. Yet, both theoretical and practical application of human rights law in the post-conflict setting is very complex and challenging issue.

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[40] Ibid. 341
[41] "Multinational Forces - ICRC", Icrc.Org, accessed 28 December 2016, https://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/multinational-forces/overview-multinational-forces.htm.
[42] Marten Zwanenburg, supra note 24
[43] Ibid.

Peace agreements often provide human rights frameworks, for instance, ratification of international instruments and domestic bills of rights, they might include human rights principles to ensure the rule of law during the reforms.[44] On the other hand, some common provisions of power-sharing and amnesties might be considered as a violating human rights law. Such was a case with Dayton Peace agreement, whose power-sharing practise was considered as violating human rights law by ECtHR.[45]

Unlike IHL, which is triggered by the existence of an armed conflict, human rights law is applicable to the territories of states that have ratified relevant treaties. It is thus could be called state-centric, since it mainly regulates relationships between a state and the people within its jurisdiction.[46] This way the non-state actors, such as opposition groups and international organisations are essentially out of scope, therefore making the applicability to post-conflict complicated.

Application of IHRL to UN peacekeeping operations is debatable and complicated subject. There is also a growing consensus that human rights obligations apply abroad wherever a state exercises "effective control" over territory or individuals outside its borders, thus allowing its application in a post-conflict setting. It has been observed that, the International Court of Justice (ICJ), the Inter-American Commission on Human Rights (IACHR), the European Commission on Human Rights (ECHR), the European Court of Human Rights (ECtHR), and the United Nations Human Rights Committee (HRC) have all acknowledged the application of IHRL to belligerent occupiers.[47] The House of Lords in England has recognised IHRL in extraterritorial occupations.[48] It is, therefore, a valid suggestion that IHRL applies to actions of the intervening state in the post-conflict phase. On the other hand, regarding the UN forces, the conduct of individual personnel is attributable to the UN, not the troop contributing state.

Regarding the UN interim administrations established by UNSC, they are obliged to respect the purposes and principles of the UN Charter as provided in Art. 24(2)[49], thus leaving a wide margin of appreciation regarding human rights. While the international administration may

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[44] Christine Bell, "Peacebuilding, Law And Human Rights", Routledge Handbook Of Peacebuilding: 8
[45] Sejdic´ and Finci v. Bosnia & Herzegovina, ECtHR Application Nos. 27996/06 and 34836/06 (22 December 2009)
[46] Christine Bell, "Post-Conflict Accountability And The Reshaping Of Human Rights And Humanitarian Law", International Humanitarian Law And International Human Rights Law, 2011:350
[47] Kristine Boon, supra note 8, p. 114
[48] Ibid.
[49] Bernhard Knoll, The Legal Status Of Territories Subject To Administration By International Organisations, 1st ed. (Cambridge: Cambridge University Press, 2008):410

want to tie itself to certain human rights mechanisms, they are not obligated to do so. Such human rights vacuum[50] potentially undermines the legitimacy of such administration.

Very generally, Article. 1 (3) UN Charter provides that one of the purposes of the organisation is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. This arguably suggests that UNSC resolutions may not violate IHRL[51] and implies that UN should adhere to IHRL in its peacekeeping operations as well. The Capstone Doctrine International human rights law is an integral part of the normative framework for United Nations peacekeeping operations.[52] However, it is not clear to whether this is a legal obligation or merely political guidance,[53] thus leaving the IHRL applicability question unanswered.

In conclusion, despite the rhetorical commitments to human rights law, its practical realisation remains unclear. The accountability gaps of third parties in post-conflict phase are particularly worrying.

1.2.3. International Criminal Law

International criminal law serves as a mean to hold accountable those responsible for international crimes during the armed conflict. One of its particularities is it is relation to humanitarian and human rights law. The Rome Statute provides a set of merged humanitarian and human rights standards applying over a range of conflict scales and both international and internal armed conflict[54], creating a suitable regime of post-conflict accountability. Despite this significant achievement, in practice accountability is limited by targeting only those most responsible[55]

In practice, critics note that while ICC has had a positive effect of bringing to justice some powerful people who would otherwise enjoy impunity, it denied viable alternative approaches and possible made some situations worse.[56] It could be seen as solving the post-conflict dilemma of

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[50] Ibid. P. 360

[51] Marten Zwanenburg, supra note 24.

[52] "United Nations Peacekeeping Operations: Principles and Guidelines." International Peacekeeping 15, no. 5 (November 2008): 742–799.

[53] Kjetil Mujezinović Larsen, The Human Rights Treaty Obligations Of Peacekeepers, 1st ed. (Cambridge: Cambridge University Press, 2012):5

[54] Christine Bell, supra note 43, p.11

[55] Ibid.

[56] O. C. Okafor and U. Ngwaba, "The International Criminal Court As A 'Transitional Justice' Mechanism In Africa: Some Critical Reflections", International Journal Of Transitional Justice 9, no. 1 (2014): 90-108, doi:10.1093/ijtj/iju025. :108

peace versus justice, by giving way to a 'justice over peace' approach.[57] This would be a questionable choice, potentially undermining the efforts of making post-conflict justice mechanisms context sensitive.

As regards the reparations, which arguably form a critical part of accountability, the Statutes and Rules of Procedure of the ad hoc Tribunals, the ICTY and the ICTR, merely had a brief mention of restitution, which deferred compensation claims to national courts.[58] The issue of reparations remains complicated, although significant developments have been made with the adoption of Rome Statute. Article 75 of the Statute provides that: 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation […] 2. The Court may make an order directly against a convicted person specifying reparations […] Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79[59]. Despite the progress, some challenges remain, such as dilemma of interests of victims versus the need for expediency in the process.[60]

As some scholars note, "International Criminal Law at present seems to have a secure future as a concept but may have difficulty in practice if critical institutions lose state support." [61] Recent decisions of various African states to leave ICC indicates the existence of this issue.[62] Despite this, the principles that have already developed will continue to have importance, and possibly will be used to clarify the jus post bellum framework.

1.2.4. Other branches of international law.

There is a variety of legal regimes that may apply during the post-conflict situations. The principles of public international law such as sovereignty and self-determination may have a critical importance, as it will be discussed in further sections. UN Charter provides the basis for any UNSC authorisations for peacekeeping and general guiding principles. Draft articles on the responsibility of international organisations, as well as Draft Articles on Responsibility of States

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[57] Christine Bell, supra note 43, p.13
[58] Christine Evans, The Right To Reparation In International Law For Victims Of Armed Conflict, 1st ed. (Cambridge: Cambridge University Press, 2012):122
[59] "Rome Statute of 1998." SpringerReference (n.d.). doi:10.1007/springerreference_301706.
[60] Christine Evans, supra note 57, p. 123
[61] J. Iverson, "Transitional Justice, Jus Post Bellum And International Criminal Law: Differentiating The Usages, History And Dynamics", International Journal Of Transitional Justice 7, no. 3 (2013):6
[62] Hannah Woolaver, "International And Domestic Implications Of South Africa'S Withdrawal From The ICC", EJIL: Talk!, 2016, http://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/.

for Internationally Wrongful Acts, both adopted by the International Law Commission have significant relevance for responsibility as a codified customary law. UNGA Convention on the Privileges and Immunities of the United Nations and Model Status of Forces agreements (SOFAs) provide basis and guidance on the status of UN peacekeepers.

The complex nature of post-conflict phase involves regulations of various other branches of international law, such as international refugee law. There is increasing attention to the international environmental law, which in some cases may have a critical value to the peace process, for instance, regarding the legal access to natural resources and regulating the toxic remnants of war.[63] It potentially can ensure the respect to rights and obligations of repairing and rebuilding the environmental damage from the conflict, also resolving the disputes of resources that are related to the conflict.[64]

1.3. Conclusion.

War-peace hybridity and general diverse nature of post-conflict situations pose significant difficulties for the application of international law. Many 'traditional' notions of international law have to be either rendered non-applicable or interpreted in such way as to not disregard the different nature of the post-conflict setting. The tendencies of regime-merge have shown some positive developments, such as the adoption of Rome Statute, yet the problem of fragmentation and effectiveness remains. The gaps of accountability undermine the principle of the rule of law and legitimacy of post-conflict reconstruction. This leads to the conclusion that existing legal framework is not sufficiently effective and requires improvements.

[63] Jens Iverson, "Contrasting The Normative And Historical Foundations Of Transitional Justice And Jus Post Bellum", Jus Post Bellum, 2014:86
[64] Ibid.

2. JUS POST BELLUM AS A PROPOSED LEGAL FRAMEWORK.

This chapter will examine the notion of *jus post bellum* in detail. First, it will overview the different approaches and theories, recognising their weaknesses and possible obstacles. The critical issue of temporal applicability will be addressed, and possible solutions will be examined. Then it will address specific issues to peace agreements and their implementation, as well as the feasibility of legal regulation. Furthermore, the issues of legitimacy will be addressed again through the lenses of the sovereignty principle. It will then examine how *jus post bellum* framework could improve issues of accountability and application of human rights.

2.1. Overview of jus post bellum theories.

Post-conflict issues are being addressed by multiple disciplines: political science, international relations, sociology and philosophy. The term 'jus post bellum' originated in moral philosophy and eventually has been picked up by international law scholars. There is no general agreement among scholars on the definition of jus post bellum. The definition varies from the rigid law of jus post bellum with proposals of new Geneva Convention to a mere description of what laws apply during early peace.[65] As it relates international law scholars, the main stimulus for jus post bellum seems to be the issue of fragmentation of existing legal regime. However, such lack of consensus indicates a significant weakness of this project.[66]

It has to be noted, that *jus post bellum* is also widely discussed from the philosophical point of view by just war theorists. Indeed, the legal *jus post bellum* has drawn its inspiration from its philosophical predecessor. However this thesis will largely leave aside the just war theory and moral considerations, despite existing attempts to merge these different disciplines. Eric de Brabandere has warned that the proposed link between the jus ad bellum and the "post" stages of a conflict leads to a revival of a "just war" type assessment of military interventions,[67] and thus potentially opening the doors to abuse.

2.1.1. Jus post bellum as a distinct branch of international law

[65] Carsten Stahn, Jennifer S. Easterday, and Jens Iverson, supra note 4, p. 546
[66] Ibid.
[67] Eric De Brabandere, "The Concept Of Jus Post Bellum In International Law", Jus Post Bellum, 2014:134

First of all, some scholars, such as Brian Orend, argue for a new Geneva Convention dealing solely with post-conflict issues, which would include clear standards, guidelines and benchmarks for behaviour in post-conflict scenarios. [68] While some would say it is not a realistic expectation, given the apparent lack of political interest for the conclusion of such treaty, he responds to such criticism saying that the same was said about other treaties which eventually did happen, for example, human rights treaties.[69]

Such idea of "self-contained regime of international law in a strong sense that is an interrelated set of primary and secondary rules that form a clearly distinguishable system or branch of international law"[70] with a rigid top-down jus post bellum rules itself is widely criticised. As it was discussed in the first chapter, the post-conflict situations are complex, containing many different overlapping issues. Matthew Saul, speaking of accountability issues in post-conflict situations, observes that "to try to address this concern through the creation of more detailed provisions or stringent compliance mechanisms, or to develop a more rigid interpretative practice for the post-conflict setting, could impinge on the discretion of an interim government to tailor the approach to suit the context."[71] Christine Bell, further clarifying arguments against a new legal regime, emphasises the important role of international law to hold open the middle space of political compromise.[72] She therefore argues for "resisting projects of legal clarification and development, in favour of living with law's partial application because we view uncertain legal formulations as able to articulate the importance of normative concepts such as accountability or even democratic participation, while also recognizing that in practice such concepts can only come into being by agreement between people and groups of people who hold widely differing views as to what they entail"[73]. Additionally, it may be an overburdening issue of temporal application. Knowing the complicated nature of post-conflict situations, defining the triggers of *jus post bellum* law would be a challenging issue. This seems to be convincing that 'hard law' jus post bellum might create more issues than we already have.

On the other hand, the discretion naturally leaves room for possible abuse. Jens Iverson notes that, "[a]n abhorrence of regulation and insistence on the "freedom" from law of those involved in the transition to a sustainable peace is effectively an application of the rationale of

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[68] Carsten Stahn and Jann K. Kleffner, eds., Jus Post Bellum: Towards a Law of Transition from Conflict to Peace (The Hague : West Nyack , NY: T.M.C. Asser Press ;Cambridge University Press, 2008):52
[69] Ibid.
[70] Aurel Sari, "The Status Of Foreign Armed Forces Deployed In Post-Conflict Environments", Jus Post Bellum, 2014:482
[71] Matthew Saul, supra note 16, p. 465.
[72] Christine Bell, "Of Jus Post Bellum And Lex Pacificatoria", Jus Post Bellum, 2014:205
[73] Ibid.

Raison d'état to the ending of conflict and the reestablishment of peace—to assert that a dispute regarding the legality of actions taken in the transition to a sustainable peace would be met with a judicial *non-lique*t."[74] It thus can be concluded that while 'hard law' might create more issues than we already have, it is still necessary to search for a possible solution for existing problems. The next sections will, therefore, overview other approaches of jus post bellum.

2.1.2. Jus post bellum as an interpretive framework.

It has been suggested that jus post bellum could operate most effectively as an interpretive framework that can identify and evaluate the legitimacy of diverse legal and political practices and actors in transitions.[75]

It is noted that generally, static 'post bellum' is too limited and inappropriate approach for today because of "the unstable or undetermined boundaries between conflict and post-conflict situations"[76]. Therefore a dynamic concept which uses the existing legal system instead of adding new rules and interpreting existing rules according to identified principles is proposed[77]. This concept, as it is suggested, would provide a new perspectives by facilitating a better differentiation and distinction of international law regimes in peacetime, conflict and post-conflict settings, allowing a context-related understanding of them.[78] The principles identified are the principle of proportionality, the accountability of foreign actors, and the principle that post-conflict reconstruction efforts should be for the benefit of the population (trusteeship or fiduciary type of authority or stewardship).[79]

Critics, questioning the usefulness of this concept, state that "these principles are not truly "new" principles or standards of international law, nor are they newly applicable to post-conflict situations. [They]… are either directly or indirectly already part of the applicable norms in post-conflict settings."[80] Indeed, such approach, as it is currently described, seems to be limited in the sense of effectiveness, and, even as its proponents admit[81], might not have power to resolve post-

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[74] Jens Iverson, supra note 62, p. 84
[75] James Gallen, "Jus Post Bellum", Jus Post Bellum, 2014:58.
[76] R. Teitel, "Rethinking Jus Post Bellum In An Age Of Global Transitional Justice: Engaging With Michael Walzer And Larry May", European Journal Of International Law 24, no. 1 (2013): 338
[77] James Gallen, supra note 74, p.87
[78] Carsten Stahn, Jennifer Easterday and Jens Iverson, "Special Issue: Jus Post Bellum And Foreign Investment", The Journal Of World Investment & Trade 16, no. 4 (2015): 583-589.
[79] Eric De Brabandere, supra note 66, p. 138
[80] Ibid.
[81] James Gallen, supra note 74, p. 79

conflict issues. Additionally, there is a need for a mechanism that would allow reviewing acts according to suggested principles. Indeed, although the idea of unified interpretation of existing law itself is valuable, the range of issues require a more specific attention and question remains how jus post bellum could be constructed in a way that would truly improve post-conflict situations as much as it is possible from the point of international law and remain realistic at the same time.

2.1.3. A comprehensive concept of jus post bellum.

Another suggested approach is to take a comprehensive concept of jus post bellum, which would be comprised of both normative and interpretive framework, and also would serve as a site of coordination and a site of discourse[82]. The norms, as it is emphasised, should be fluid, as opposed to rigid top-down rules. Emphasising the influential transformational role of international law in the broad sense on post-conflict societies, Jennifer Easterday submits that such "broad, multi-faceted concept of jus post bellum can better capture the complicated relationships between law, practice, and society that permeate post-conflict transitions."[83] It is not clear how the development of this concept would realise in practice. However it seems to be most effective and potentially context-sensitive approach. It does not deny its possibility to eventually become a distinct branch of international law, yet most importantly it requires research and theoretical development.

Still, there is no authoritative and fully defined concept of jus post bellum yet. It shows the early stage of development, and at this point it is not clear how it will develop or whether it will develop at all, leaving the post-conflict legal framework fragmented as it is now. Further development will depend on the continued research of scholars, the attitude of states and developing practice on the field. This thesis, further analysing the post-conflict issues will base on existing proposed concepts and will seek to elaborate how and which concept would be most effective in solving post-conflict issues.

2.1.4. Relation to similar concepts

Before beginning the discussion of jus post bellum, it is necessary to clarify its relation to other concepts that also address the post-conflict issues. First, and most notable, is the concept

[82] Jennifer S. Easterday, "Peace Agreements As A Framework For Jus Post Bellum", Jus Post Bellum, 2014, 380
[83] Ibid. P. 386

of transitional justice. It has been defined as "the full set of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation"[84] .It has four processes that constitute the core of transitional justice, namely justice process, reparation process, truth process and institutional reform process[85]. So-called 'toolbox' of transitional justice contains criminal prosecutions, truth commissions, reparations programs, gender justice programs, security sector reform, memorialization, vetting and education[86]. It is, therefore, clear that this project includes broad, both legal and non-legal measures to address the past injustice. That is the first difference to jus post bellum, which is essentially a field of international law. Despite this, some scholars seem to assume transitional justice as a part of jus post bellum. It has to be noted that there is no requirement of armed conflict for transitional justice, thus unlike jus post bellum, it may be applied in cases other than post-conflict. Nevertheless, there is a clear overlap between these two projects. Thus the research and practice of transitional justice contribute to the development of jus post bellum.

Some abuse of choice between the elements from the 'toolbox' have been observed. For instance, South Sudanese leaders, call for only a truth commission that would allow them to achieve amnesty for their crimes, opposing for any war crimes tribunal.[87] In some ways, it could be argued that this concept is more political, while jus post bellum aims to become a legal framework. It also has to be noted that, although the transitional justice is widely known and has gained both institutional and scholarly support, it is still not sufficiently developed to address the post-conflict issues adequately. Therefore there is a space and need for cooperation between these two disciplines.

2.2. Temporal applicability of jus post bellum

One of the main and critical issues when constructing a legal framework is establishing its temporal application. In modern times, war – peace line is blurred and thus it is particularly difficult to establish when the post-conflict law begins to apply. Another, and not less important issue, is when it should cease to apply. It will be argued here that approaches to temporal applicability issue depend on the understanding of jus post bellum. 'Top-down' rigid law would

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[84] Sandoval, C., Transitional Justice: Key Concepts, Processes and Challenges, IDCR Briefing paper, 2010:2
[85] Ibid. P. 3
[86] Jens Iverson, supra note 62, p. 89
[87] Steven C. Roach, "South Sudan: A Volatile Dynamic Of Accountability And Peace", International Affairs 92, no. 6 (2016):1359

require a strictly defined triggers, while the 'fluid' type of jus post bellum will need a flexible approach. It will further explain the importance of the beginning of applicability in relation to peace versus justice dilemma. Furthermore, the relation between the ending of applicability and accountability of third parties will be explored.

It has to be noted that temporal issue is problematic in many other areas of international law, especially International Humanitarian law. It is therefore not realistic to expect the definite triggers of the beginning and the end: most likely there could be a guidance that will have to apply case by case basis, depending on the context.

2.2.1. The beginning of application

There are several ways of identifying the triggers of jus post bellum. First, and theoretically, easiest way would be to begin application of jus post bellum when the application international humanitarian law ceases to apply. As Kleffner notes, "[s]uch an approach would suggest a neat temporal continuum between jus in bello and jus post bellum, fully in line with the legal fiction that armed conflicts—whether international or non-international in character—and belligerent occupations have a clearly identifiable start and end date"[88].

Applying this approach would require the determination of the end of armed conflict in each given situation. However, armed conflicts often terminate in complicated ways and cannot be determined easily. Fourth Geneva Convention provides some guidance: "[...] the application of the present Convention shall cease on the general close of military operations." art 6. The Art 3 (b) of AP I repeats the same notion.[89] This notion of 'general close of military operations' has been discussed in the ICRC commentaries of conventions: "When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on 'debellatio'."[90] It continues that "when there are several States on one or both of the sides, the question is harder to settle [and]… [i]t must be agreed that in most cases the general close of military operations will be the final end of all fighting between

[88] Jann K. Kleffner, "Towards A Functional Conceptualization Of The Temporal Scope Of Jus Post Bellum", Jus Post Bellum, 2014:289
[89] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at: http://www.refworld.org/docid/3ae6b36d2.html [accessed 28 December 2016]
[90] "Treaties, States Parties, And Commentaries - Geneva Convention (IV) On Civilians, 1949 - 6 - - Commentary Of 1958", Ihl-Databases.Icrc.Org, 1958, https://ihl-databases.icrc.org/ihl/0/030537c0a8ee01dfc12563cd0042a6be?OpenDocument.

all those concerned."[91] The explanation here is ambiguous and unclear for modern context, as it admits it applies to 'most cases', referring to past cases not relevant anymore.

Another explanation is more specific, noting that 'general close of military operations "may be deemed in principle to be at the lime of a general armistice, capitulation or just when the occupation of the whole territory of a Party is completed, accompanied by the effective cessation of all hostilities, without the necessity of a legal instrument of any kind"[92]. Also adding: "[w]hen there are several States on one side or the other, the general close of military operations could mean the complete cessation of hostilities between all belligerents, at least in a particular theatre of war"[93], it also clarified that 'military operations" means "the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat"[94]. Therefore it supposes continuity of IHL application even in the absence of active hostilities, for example in cases of redeployment of the military. Additionally, the term here is "effective cessation of all hostilities" which reflects the importance of de facto cessation of hostilities as opposed to armistice agreement that does not guarantee the cessation.

The new commentary of Geneva Conventions emphasises, that '[h]ostilities must end with a degree of stability and permanence for the international armed conflict to be considered terminated.' Further continuing it elaborates that 'it cannot be concluded that there has been a general close of military operations when belligerent States are no longer involved in hostilities but, for instance, maintain troops on alert, mobilize reservists or undertake military movements on their borders'[95] The moment of effective cessation of hostilities may be difficult to define, for example in cases like Iraq, where hostilities continued on small scale after hostilities have generally closed[96], yet the IHL continued to be applied[97]

Regarding the role of peace agreements, the commentary argues that '[r]ather, an agreement is only a piece of evidence that, coupled with other elements, might reveal a certain intention of the belligerents to end the armed conflict definitively."[98] However it "must be determined on the basis of factual and objective criteria."[99]

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[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Robert Kolb and Richard Hyde, An Introduction To The International Law Of Armed Conflicts, 1st ed. (Oxford: Hart Pub., 2008):102
[97] Ibid.
[98] Ibid.
[99] Ibid.

As regards non-international armed conflicts, Geneva Conventions does not seem to give any guidance except simply "end of the armed conflict". ICTY has expressed its view in Tadic case, that international humanitarian law applies in the case of internal conflicts, "[until] a peaceful settlement is achieved"[100]. Many scholars seem to disagree with this view, noting that "a peaceful settlement", as a standard, is too rigid to be applicable to NIAC for determining it as ended, and also noting, that IHL does not support this view.[101] Instead, basing on ICTY practice, it is submitted that NIAC end when the level of violence and organisation drops below a certain lower threshold[102]. However, the factors and indicators are to be applied on a case-by-case basis as not all of them are adaptable to the specific circumstances in which some conflicts take place.[103] It admits that there are cases where that it is neither possible, nor desirable, to identify a specific point in time when international humanitarian law ceases to apply[104]

Despite possible theoretical guidance, scholars note the it is unclear, for instance, what degree of stability is required before one can reasonably conclude from an absence of military operations or fighting, or from the (local) withdrawal of troops of an occupying power, that the law of armed conflict ceases to apply[105] and warns of possibility that "jus post bellum would again be replaced by the law of armed conflict if fighting resumed after a period of relative calm that had suggested that the crisis situation in question had reached the post-conflict phase."[106]

For these reasons, the scepticism is expressed to the suggestion that jus post bellum starts to apply when the law of armed conflict ceases to apply.[107] Instead it is proposed to take a flexible approach when certain elements of jus post bellum, depending on circumstances, may begin to apply simultaneously with international humanitarian law. Such jus post bellum would have its different components having their own respective temporal scopes and apply as soon and for as long as the transitional process calls for."[108]

The view of a flexible approach of temporal applicability is also in line with a context-sensitive approach of jus post bellum. The ending of armed conflict is too ambiguous to be defined in a legal way. It is important to determine the end of the application of IHL in the context of ICL, since some international crimes require a nexus to armed conflict, however, it should remain being

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[100] ICTY, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para.70
[101] Rogier Bartels, supra note 101, p. 301
[102] Ibid. p. 299
[103] Ibid. p. 314
[104] Ibid.
[105] Jann Kleffner, supra note 87, p. 291
[106] Ibid.
[107] Ibid.
[108] Ibid. p. 296

analysed on a case-by-case basis. Except for this issue, the end of the application of IHL does not have relevance for jus post bellum. If the approach that different areas of jus post bellum have different timelines is taken, such timelines could be clarified only in a flexible and context-sensitive way. As the practice shows, the timing issue remains critically important during the post-conflict phase, for instance, it has been observed that elections in fragile states are likely to generate violence[109]. Despite the importance of democratic elections, in some cases, they should be delayed for the sake of stabilisation of the state. Another example could be the measures of accountability, which could undermine the fragile peace if applied too early.

Aforementioned issue of elections relates to the broader question of timing of democratisation. As Francis Fukuyama notes, 'To the extent that the international community insists that state-building be accomplished under liberal and democratic rule, rather than permitting the sequencing of state-building prior to the promotion of rule of law and democracy, it may simply freeze conflicts that will eventually emerge'[110]. It follows that the imposed democracy and rule of law should not be viewed as 'quick fix' to post-conflict states. Rather, it should be understood that any 'quick fix' approach undermines the local context and should be avoided.

2.2.2. The end of application

Defining the end of the application of jus post bellum is as important as its beginning. End of application logically would imply that the goals are achieved, and therefore foreign involvement may cease, transitional justice mechanism close and so on. Most proponents agree that the main goal of jus post bellum is a sustainable peace, others definite it as „just and sustainable peace'. It is thus necessary clarify these terms as it has implications to application of jus post bellum. The notion of peace is widely discussed in transitional justice and peace building literature. Peace researcher Galting divided two kinds of peace: negative, which is simply the absence of violence, and positive, that means the absence of indirect or structural violence, or in other words, the presence of conditions that eliminate the causes of violence and establish enduring peace.[111] As for 'just peace', it has been described as 'one that vindicates the human rights of all parties to the conflict'[112]. Naturally, question arises, whether it is possible to measure these

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[109] Astri Suhrke, supra note 17, p.272
[110] Francis Fukuyama, "Liberalism Versus State-Building", Journal Of Democracy 18, no. 3 (2016): 11
[111] Jurgen Brauer and Raul Caruso, "Economists and peacebuilding" In Roger Mac Ginty, Routledge Handbook Of Peacebuilding, 1st ed. (New York, NY: Routledge, 2013
[112] Manuela Melandri, "The State, Human Rights And The Ethics Of War Termination: What Should A Just Peace Look Like? A Critical Appraisal", Journal Of Global Ethics 7, no. 3 (2011): 241-249.

elements, and what grade would constitute the ending of jus post bellum. One of possible way would be to make use of gradation parameters such as Global Peace Index[113] which measure the index of peace by various criteria. However, it is still not clear what level of peace should mark the end of jus post bellum application. Moreover, the distinction between different post-conflict elements complicates the matter. Some of them might have clearly defined end-term, for example, DDR reforms; others might take a long time. If we take the broadest approach of jus post bellum, some scholars warn that some post-conflict countries may be caught in a 'state capability trap' a long cyclical process that can take many generations before they can achieve superior levels of state capacity.[114]

In practice, the exit strategy of UN missions seems to be varying. The reliance on post-conflict elections has been observed[115]. Such practice is strongly criticised for ignoring the dangers of early post-conflict elections[116] and thus contributing to common occurrences of relapse to armed conflict. The exit can also be triggered by the withdrawal or reconfiguration of host consent, renewed violence, pressure from donors or troop contributors, pressure from regional powers, as the consequence of mandate fulfilment, or pressures by Security Council members to reduce or end a peacekeeping presence, because of concerns of cost, overstretch, or sovereignty[117]. Some of these triggers, such as pressure from donors, may not consider its effect on post-conflict state and could potentially undermine the peace process.

While it has to be admitted, that it is difficult to agree when the 'sustainable peace' is achieved, jus post bellum could potentially clarify some related aspects. First of all, the principle of sovereignty and considerations of effectiveness implies a temporal nature of any third party intervention. It thus could be argued for the principle of temporality. On the other hand, the early exit may contribute to relapse of violence. If the assumed commitment of the third party is breached, a question of accountability should be explored.

2.2.3. Concluding remarks

This section argued for the flexible approach of temporal applicability. Although such view seems to lessen the importance of beginning and end of this legal framework, the timing issue

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[113] Jann Kleffner, supra note 87, p.294
[114] Léonce Ndikumana, "The Role Of Foreign Aid In Post-Conflict Countries", Building Sustainable Peace, 2016:150
[115] Bertel Teilfeldt Hansen, supra note 2, p. 35
[116] Ibid. 37
[117] Dominik Zaum, "Jus Post Bellum And The Politics Of Exit", Jus Post Bellum, 2014:342

remains critically important during the post-conflict phase. The questions when certain processes such as democratisation and the rule of law should begin must be addressed carefully as not to undermine the process of peace. International law thus cannot clarify or dictate such processes, except for soft-law guidance that could discourage the temptation of quick-fix approach. On the other hand, there is more space for debate regarding the accountability of third parties that undermine the peace process by breaching their commitments.

2.3. Peace agreements as a basis of jus post bellum

The post-cold war era has been marked by the rise in peace agreements. Peacemaker database contains almost 800 documents that can be understood broadly as peace agreements.[118] There are several reasons for this increase. First of all, it is the geopolitical shifts that enabled solutions to some long-standing conflicts, and also created new conflicts[119] Secondly, these peace agreements are rarely final, they are commonly renewed, revised and renegotiated[120] It has to be noted that this analysis mostly relates to intrastate peace agreements, while the peace agreements in interstate wars have been noted to be declined.

Despite the apparent positive development, the signing of peace agreement does not automatically bring peace. History of negotiated settlements shows that only 50 percent of all negotiated settlements survive past five years[121]. Research show that conflicts ending in peace agreements fail more often than conflicts terminating in clear victories, moreover peace agreements increase the risk of splintering[122], causing smaller factions to continue to fighting, although the violence is usually reduced. In legal literature, various reasons have been identified for the failures, such as lack of inclusion of all actors, lack of sensitivity to local context. The issue also emphasises the necessity of research on peace agreements and seeking of ways of improvement from the viewpoint of international law. Therefore this section will seek to clarify the status of peace agreements, the issues of negotiations and the implementation.

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[118] "UN Peacemaker", Peacemaker.Un.Org, accessed 24 December 2016, http://peacemaker.un.org/.
[119] Christine Bell, supra note 1, p.28
[120] Ibid.
[121] Dorina A. Bekoe, Implementing Peace Agreements, 1st ed. (Palgrave Macmillan, 2016):14
[122] Ibid.

2.3.1. Legal status of peace agreements

There is no authoritative definition of a peace agreement. It is rather a more descriptive term, which most basically could be defined as a ‘formalised legal agreement between two or more hostile parties — either between two States or a State and an armed belligerent group (sub-state or nonstate) — that formally ends a war or armed conflict and sets forth terms that all parties are obliged to obey in the future’[123]. Other authors provide even more broad definition: ‘a peace agreement is a formal agreement that addresses and settles all or parts of the disputed incompatibility between at least two warring parties in a civil armed conflict’[124]. There is a difference from an armistice, which is an agreement to stop hostilities, or a ceasefire, in which parties agree to temporarily stop fighting[125].

There are different types of peace agreements, such as pre-negotiation agreements, interim agreements, framework or substantive agreements, and implementation agreements. Pre-negotiation agreements could be called ‘talks about talks’.[126] They typically deal with issues such as agenda for talks, who is going to negotiate, and with what status. ‘Interim agreements’, are those that do not constitute a permanent settlement, but that provide an interim solution until a permanent settlement has been reached. Such agreements might be concluded, for instance, when divisions on substantive issues are too wide to directly arrive at a final settlement.

In practice, intrastate peace agreements are framed in various ways: as international treaties, constitutions or domestic legislation. Nevertheless, it will be argued here that they do not fit these categories.

Vienna Convention defines treaty as ‘an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation‘. It has to be noted that peace agreements in ‘pure’ interstate conflicts do constitute treaties, although, in the last fifteen years, these have been in the minority. Different are intrastate peace agreements, which are

[123] Christine Bell, supra note 1, p 47
[124] Sema Hande Ogutcu, "Effect Of Unilateral Third-Party Interventions On Durability Of Civil Peace Agreements: Facilitators Or Spoilers Of Post-Settlement Peace?", SSRN Electronic Journal, 2014:22
[125] Alexia Solomou, "Comparing The Impact Of The Interpretation Of Peace Agreements By International Courts And Tribunals On Legal Accountability And Legal Certainty In Post-Conflict Societies", Leiden Journal Of International Law 27, no. 02 (2014): 497
[126] Christine Bell, supra note 1, p. 55

concluded between a government and armed opposition groups or other non-state actors. Such agreements thus cannot be regarded as a treaty in the sense of Vienna Convention.

On the other hand, there is some relevance in Article 3 of Vienna Convention, which states: 'The fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, or to international agreements not in written form shall not affect: (a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.'[127]. This indicates that agreements between the state and non-state subjects of international law are legally binding international agreements. However, this poses a question whether armed opposition groups have a status of international law subject.

Authors identify three main groups who sign peace agreements with states and have some basis for claiming a status as subjects of international law, namely armed opposition groups, indigenous people, sub-state regions and minorities[128]. While all these in one or another way have the recognition as subjects of international law, the criteria are ambiguous. It has been argued, that a range of factors needs to be carefully examined before it can be determined whether an entity has international personality and, if so, what right, duties and competences apply in the particular case. As Malcolm N. Shaw observes: "[p]ersonality is a relative phenomenon varying with the circumstances"[129]. For an armed group to become a subject of international law, there is a requirement of passing the threshold of the applicability of humanitarian law and be recognised as belligerents by the conflict party state[130]. This is likely a rare case. While possibility exists to argue for more loose requirements for a non-state party to become a subject of international law, it would not have a sufficient basis as of now. Therefore the status of such groups remains unclear, making the legal status and of peace agreements unclear as well.

On the other hand, it is suggested that this transitional nature makes it inopportune to categorise peace agreements signed by non-state actors as treaties, even if they contain legally binding obligations[131]. Such agreements may contain non-binding provisions. Moreover, they

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[127] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html [accessed 28 December 2016]
[128] Christine Bell, supra note 1, p.132
[129] Malcolm Nathan Shaw, International Law, (Cambridge: Cambridge University Press, 2014):143
[130] Arist Von Hehn, The Internal Implementation Of Peace Agreements After Violent Intrastate Conflict, 1st ed. (Leiden [u.a.]: Nijhoff, 2011): 51
[131] Alexia Solomou, supra note 124, p. 498

might be reviewed, amended or renegotiated. Provisions of International Treaty Law could arguably undermine the transitional nature of peace agreements.

As regards the classification of peace agreements as a constitution, it is indeed often the case that peace agreement contains the provisions that are classically ‘constitutional’, for instance, long-term provisions for how power will be held and exercised. Despite this, there are significant obstacles to render such agreements as constitutions. Christine Bell argues that, first of all, peace agreements tend to have hybrid subject matters, dealing both with matters between states, providing for an enforcement role by third parties, as well as dealing with matters within the state, namely constitutional issues. Constitutions traditionally only deal with relations between the state and its citizens, but peace agreements often include provisions concerning the relationship between different groups within the state. They also contain a level of detail in relation to short-term processes, and of reciprocal obligations, they have a somewhat a contractual nature, as opposed to constitutions. Peace agreements are of a transitional nature, while constitutions aim for permanence. Moreover, peace agreements usually do not follow the established procedure for constitutional revision.[132]

These considerations illustrate the difficulties of legal categorization of peace agreements. They could be described as a combination of international treaty and interim constitution[133]. The uncertainty remains whether peace agreements constitute legally binding documents. It has been observed that some provisions are very precise thus indicating the binding nature, yet the use of abstract language is also common as a result of compromise[134].

The way international courts approach peace agreements varies. Lusaka ceasefire agreement was signed by a series of states, it was also signed by a non-state actor, the Congolese Rally for Democracy and the Movement for the Liberation of the Congo. In the Armed Activities case, the ICJ treated the Lusaka Ceasefire Agreement as a ‘modus operandi’, which did not amount to consent to the presence of Ugandan groups on Congolese territory.[135] It did not analyse the status of this agreement, but by considering the Lusaka Agreement as a modus operandi, the ICJ effectively considered it as falling outside its competence, because it is not part of international law, which it is mandated to apply by its own Statute.[136]It could be implied that ICJ understood

[132]Arist Von Hehn, supra note 129, P.52
[133] Ibid. p.56
[134] Ibid. P. 71
[135] Armed Activities on the Territory of the Congo(Democratic Republic of the Congo v.Uganda), Judgment, I.C.J. Reports 2005. Para. 99.
[136] Ibid.

the agreement as a domestic legal document, a view which could be considered as debatable because of its disregard to the international influence.

Of particular interest is a decision on Challenge to Jurisdiction: Lomé Accord Amnesty of 13 March 2004, the Appeals Chamber of the Special Court for Sierra Leone it considered the legal nature and significance of the Lomé Agreement of 7 July 1999 between the Government of Sierra Leone and the rebels grouped in the Revolutionary United Front (RUF)[137]. In this case, the defendants challenged the Special Court's jurisdiction on the basis that it contravened the amnesty provision of the Lomé Peace Agreement, and that it would constitute an abuse of process to allow the prosecution of pre-Lomé crimes.[138] The Appeals Chamber had to consider the legal status of the agreement signed by the government and the RUF to determine the validity of the amnesty. It noted that the agreement ". . created neither rights nor obligations capable of being regulated by international law… A peace agreement which settles an internal armed conflict cannot be ascribed the same status as one which settles an international armed conflict which, essentially, must be between two or more warring states. The Lomé Agreement cannot be characterised as an international instrument."[139] Moreover, it also noted that "there is nothing to show that any other State had granted the RUF recognition as an entity with which it could enter into legal relations or that the Government of Sierra Leone regarded it as an entity other than a faction within Sierra Leone."[140] It, therefore, concluded that "[i]nternational law does not seem to have vested them with such capacity. The RUF had no treaty-making capacity so as to make the Lomé Agreement an international agreement."[141]

This decision has been criticised by many scholars, such as Antonio Cassese. Recognising this peace agreement as a treaty, he states that insurgents in a civil war may acquire international standing and the capacity to enter into international agreements if they show effective control over some part of the territory and the armed conflict is large-scale and protracted.[142] He argues that state has a possibility to decide to make agreements with rebels in the same way as they do with other state or international organisations[143]. He emphasises the importance of intention of the parties: "[i]f they intend to confer on a set of mutual undertakings the nature of an internationally

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[137] RUF Trial, Prosecutor v Kallon (Morris) and Kamara (Brima Bazzy), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No SCSL-2004-15-AR72(E), SCSL-04-15-PT-060-I, ICL 24 (SCSL 2004), 13th March 2004, Appeals Chamber (SCSL)
[138] Ibid. Para.1
[139] Ibid. Para. 42
[140] Ibid. Para. 47
[141] Ibid. para. 48
[142] A. Cassese, "The Special Court And International Law: The Decision Concerning The Lome Agreement Amnesty", Journal Of International Criminal Justice 2, no. 4 (2004): 1134
[143] Ibid.

legal binding agreement, then that set of undertakings will have such character; if not, it will have the nature of a political commitment."[144] The understanding, that this peace agreement is a treaty, however is questionable, and in the sense in Vienna Convention is not valid. On the other hand, the right emphasis on the will of the parties is in line with proposition that peace agreements have a unique nature.

Another case which is worth mentioning is Bosnia v. Sejdic and Finci ECtHR case, which found discrimination in power-sharing mechanism established by Dayton Peace Agreement[145]. Scholars suggest that this decision disregarded the unique nature of peace agreement[146] since it did not consider the implications of it as a mediated deal.

Some conclusions and suggestions could be derived from this legal practice and considerations of scholars. International law does not provide clear guidance on the legal status of intrastate peace agreements. The lack of attention or disregard by international Courts and Tribunals to the agreements could potentially challenge the peace process. If the negotiated provisions of a peace agreement are challenged in domestic or international courts, the decision should pay attention to the context and the potential effects to the peace process. The fact, that the agreement has been concluded with the goal of achieving peace implies a specific nature which should not be disregarded. Peace agreements, therefore, are *sui generis* element of international law, neither an actual treaty nor a constitution, despite having a resemblance to both. Indeed, some provisions might be a political and not having a legal status. Following the suggestions of Antonio Cassese, the wording of the agreement should be decisive in understanding whether a provision has a legal or political obligation.

2.3.2. Negotiations and the principle of inclusion

The issues addressed in peace negotiations may include a ceasefire, disarmament, territory allocation, resource distribution, institutional reforms, transitional justice mechanisms, and more. Peace negotiations often implicate the most fundamental security, economic, cultural, and religious interests of domestic stakeholders.[147] It has been observed that all peace agreements

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[144] Ibid. p. 1135
[145] Sejdic and Finci v. Bosnia and Herzegovina , Application nos. 27996/06 and 34836/06, Council of Europe: European Court of Human Rights, 22 December 2009, available at: http://www.refworld.org/docid/4b44a28a2.html [accessed 28 December 2016]
[146] Christine Bell, supra note 173, p 228
[147] Michal Saliternik, "Perpetuating Democratic Peace: Procedural Justice In Peace Negotiations", European Journal Of International Law 27, no. 3 (2016): 623

are flawed, to varying degrees, mainly because of pressure to the parties to end the violence as quickly as possible, while still not trusting each other. Frequently there is even fear that armed groups will use the negotiation or cease-fire period to rearm.[148] It is thus has been said that „peace agreements are susceptible to […] representation deficit, when vulnerable domestic groups sacrifice their essential interests in the name of peace because their government has deferred to the demands of more powerful domestic groups, or because it yielded to pressures exerted by its counterpart or by third-party facilitators“[149] Such representation deficits may seriously undermine the democratic legitimacy of peace agreements. Moreover, because of sensitivity, it has become a common practice to conduct them under a veil of secrecy, which makes it particularly hard for affected stakeholders to ensure adequate representation of their interests.

For this issue, it has been suggested incorporating Procedural Justice standards into peace negotiations, so that such standards could promote adequate representation of affected interests. The most notable international document that applies procedural justice standards to peace negotiations UN Security Council Resolution 1325 on Women, Peace, and Security. Adopted in October 2000, this resolution stresses “the importance of [women’s] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.”[150] It urges member States to ensure increased representation of women in conflict resolution processes at all decision-making levels[151]. It has been observed that according to recent reports, the representation of women in both negotiating and mediation teams is on the rise. Arguably, similar way broad procedural regulations could be applied to negotiation phase, introducing standards such as participation, transparency, and reason-giving.[152] The goal of such procedural regulation should be ‘to ensure that the views and preferences of all those who might be adversely affected by the terms of the peace agreement are adequately represented in the negotiation process.’[153]

In practice, while the importance of the principle of inclusion is broadly accepted, its realisation is often complicated. For instance, if the government simply refuse to include some faction of society, any strict regulation might undermine the peace process altogether. The

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[148] Chandra Lekha Sriram, Peace As Governance, 1st ed. (Basingstoke [England]: Palgrave Macmillan, 2008): 184
[149] Michal Saliternik, supra note 146, p. 619
[150] UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000), available at: http://www.refworld.org/docid/3b00f4672e.html [accessed 28 December 2016]
[151] Ibid.
[152] Michal Saliternik, supra note 146, p. 618
[153] Michal Saliternik, "Reducing The Price Of Peace: The Human Rights Responsibilities Of Third-Party Facilitators", Vanderbilt Journal Of Transnational Law 48, no. 179 (2015):229

negotiations, therefore, should be left as a political compromise between parties with international law merely providing a guidance instead of strict rules.

The push for inclusion of all actors to the process of negotiations has been criticised by some scholars. David Cunningham identifies what he calls ‘veto’ players, meaning those actors who have the capacity to veto peace and continue the war on their own[154]. In other words, veto players are those who potentially can become spoilers. He argues for the exclusion of non-veto players, providing that inclusion of them create additional veto players, thus making the conflict even more complicated[155]. Moreover, their inclusion guarantees that some concessions will have to be made to them, thus potentially lessening the options of peace negotiations[156]. This view differs to opinions of most other experts, who argue for broadest possible inclusion. Broader inclusion has been argued for producing more accountability for parties to the conflict to the process. Moreover such approach has potential to address root causes of the conflict, instead of taking a “quick-fix” solutions.[157] Depending on the context, careful choice of participants in negotiations might be necessary. On the other hand, the issue of exclusion contributes to potential relapse to armed conflict, since the excluded parties are likely to become ‘spoilers’. This dilemma relates to the broader discussion of ‘any kind of peace’ versus ‘sustainable peace’. Indeed, to what extent a compromise can be made for the sake of peace and the risk of such compromise can only be assessed case-by-case basis. Therefore the negotiations phase, despite its critical importance for the future, should have a wide margin of appreciation, allowing the parties and mediators to reach a compromise by themselves. Nevertheless, the non-obligatory guidance, such as given by aforementioned UNSC Resolution 1325 has a potential to positively influence the process.

Inclusion issue aside, negotiations have certain nuances that potentially has significance for the subsequent implementation phase. For instance, while usually, the negotiation team consists of accredited representatives, in some cases the leaders pursue the negotiations by themselves. Arguably, this is more effective way of reaching a peace deal. However, as a result of this, the agreement might become too dependent on the personal relation between two leaders, as it happened with Comprehensive Peace Agreement of Sudan[158]. Another issue is the lack of political experience of negotiating representatives of the armed group. Naturally, such individuals

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[154] David E. Cunningham, "Who Should Be At The Table?: Veto Players And. Peace Processes In Civil War", Penn State Journal Of Law And International Affairs 2, no. 1 (2013): 38
[155] David E. Cunningham, supra note 154, p. 45
[156] Ibid.
[157] Jennifer S. Easterday, supra note 81, p. 399
[158] Øystein H. Rolandsen, "A Quick Fix? A Retrospective Analysis Of The Sudan Comprehensive Peace Agreement", Review Of African Political Economy 38, no. 130 (2011): 559

may not have a necessary understanding of negotiations and thus have a fear of being cheated. Mediators, therefore, serve an important role in increasing the trust between parties.

Another issue of negotiations phase is its dependence on donors. For instance, as it happened during the negotiations of Darfur Peace Agreement, the process was complicated by a 'deadline diplomacy'[159], which means imposing the strict time limits to negotiation procedures. Such strategy was pushed by donors to whom, the mediators had to adhere. This agreement has failed to bring peace. Instead, it had made the situation worse.[160] This is again the illustration of a quick fix approach to solving a conflict and example how it complicates the matters.

2.3.3. Compromise nature of provisions and power-sharing

There is no doubt that the provisions of peace agreements are the negotiated compromise that, in many cases, is reached with urgency. This implicates the serious risks that must be taken into account. First of all, it may neglect certain issues, such as rights of indigenous groups and minorities. Under pressure, issues requiring longer deliberations might be solved by making difficult trade-offs. One of the problematic issues is power-sharing provisions, which often, arguably, are against the principles of international law, and thus undermining the legitimacy of the peace agreement.[161] This section will explore the notion of power-sharing, its risks and benefits.

The term 'power-sharing' in this context means transitional political power sharing between non-state groups, and democratically constituted governments until the elections take place.[162] In literature, four types of cases have been observed. First is most obvious power-sharing, where a government permits a group to function as a political party, in some cases guaranteeing political posts for their members.[163] Second, the inclusion of former combatants in state security forces, thus alleviating the group's concern about security.[164] The third is resource sharing, when the group is offered either economic benefits, or a certain governance of resources.[165] Lastly, the prospect of territorial autonomy may be offered, which means the group is given the power to rule directly over the agreed territory.[166] The peace agreement might include one or several of these

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[159] Laurie Nathan, "No Ownership, No Peace: The Darfur Peace Agreement", Crisis States Research Centre, 2006:3
[160] Ibid. 16
[161] Jeremy I Levitt, Illegal Peace In Africa, 1st ed. (Cambridge: Cambridge University Press, 2014):167
[162] David Chandler and Timothy D Sisk, Routledge Handbook Of International Statebuilding, 1st ed. (Routledge, 2013):249
[163] Chandra Lekha Sriram , supra note 147, p.182
[164] Ibid.
[165] Ibid.
[166] Ibid.

forms of power-sharing. Thinking generally, this appears to be a good way of ending the conflict by giving the ruling power to combatants and continuing to achieve the sustainable peace on the political and institutional level, instead of fighting on the ground. Power-sharing has been called 'school of democracy',[167] because allowing the armed groups to function as political party 'socialises' them and motivates them to seek political compromise instead of resorting to violent actions. However, the practice shows that statistical evidence is not in favour of idealisation of power-sharing as a solution to ending the conflicts.[168] It has been observed that half of peace agreements fail, despite the power-sharing provisions.[169] Many issues relating to legitimacy and human rights law has been observed. First, some experts consider that "sharing power […] with those persons responsible for committing war crimes and for undermining democracy undercuts the core human rights, democracy, and governance norms that form the bedrock of the international system – norms that reject impunity for heinous crimes and mandate their investigation, prosecution, and punishment."[170] This especially refers to Accra, Lome, and Abuja peace agreements, which could be seen as illegal under both domestic and international law.[171] On the other hand, other experts note that being a signatory to such agreement does not mean exclusion from criminal accountability.[172] The issue also appears to be levied by emerging prohibition of blanket amnesties. However, the complicity with human rights law remains complicated in many ways. The Sejdic and Finci Case is an example of a situation where such power-sharing mechanism of Dayton agreement was under judicial review of ECtHR. Constitution, which is the annex to the agreement, described Bosniacs, Croats and Serbs as "constituent peoples" and made it impossible to adopt State level decisions against the will of the representatives of any such "constituent peoples"[173] Although the Court admitted that "there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule"[174] it ruled that these are provisions are discriminatory under ECHR.[175] The argument for this conclusion was that "the Opinions of the Venice Commission clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities … [and in] this connection, it is noted that the possibility

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[167] Ibid.
[168] David Chandler and Timothy D Sisk, supra note 161, p. 249
[169] Ibid
[170] Jeremy I Levitt, supra note 160, p. 166
[171] Ibid.
[172] Christine Bell, "Power-Sharing And Human Rights Law", The International Journal Of Human Rights 17, no. 2 (2013): 220
[173] Sejdic´ and Finci v. Bosnia & Herzegovina, supra note 44, para. 7
[174] Ibid. para. 48
[175] Ibid

of alternative means achieving the same end is an important factor in this sphere."[176] This decision was criticised by various scholars, observing, that the mentioned suggestions of Venice Commission offered a constitutional structure change which did not have a support among local elites, yet it was used as justification for the decision.[177] Generally, this decision failed to take into account the historic context of this peace agreement, as Judge Bonello notes in his dissenting opinion[178]. Relevantly to this case, Christine Bell observes that "[t]he human rights difficulty is that the failure to recognise that the exercise of constituent power is at issue means that human rights bodies neither give sufficient credit to internationally mediated deals as simultaneous exercises in constitutional development, nor recognise and speak to the controversy and lack of legitimacy that attends their own attempts to rearrange those deals."[179] Even though this particular power-sharing mechanism is indeed excluding certain groups, the way Court addressed is concerning, since it disregarded its specific nature.

Power-sharing mechanisms are commonly used in peace agreements and it appears that often there is no other viable options. The risk that they carry within, in particular, their effect on society and future developments, requires more scrutiny and possible guidance. Soft-law again seems to be the only way the international law could influence this process.

There are discussions regarding the inclusion of other provisions, such as an anti-corruption mechanism or minority rights. It has been observed that the realisation of human rights is significantly influenced by the level of internationalisation.[180] The tendency that, "the more internal the deal, the greater its human rights sophistication; the more international, the less human rights friendly it is"[181] likely confirms the push of third parties to agree on peace as quickly as possible, without required considerations. This issue further confirms the necessity of well-researched guidelines and discussions on possible accountability of third parties.

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[176] Ibid
[177] Christine Bell, "Power-Sharing And Human Rights Law", The International Journal Of Human Rights 17, no. 2 (2013): 228
[178]
[179] Christine Bell, supra note 176, p. 228
[180] Tina Kempin Reuter, "Including Minority Rights In Peace Agreements: A Benefit Or Obstacle To Peace Processes After Ethnic Conflicts?", International Journal On Minority And Group Rights 19, no. 4 (2012): 395
[181] Ibid.

2.3.4. Implementation and reducing the risk of spoilers

Peace implementation phase is marked by uncertainty, mistrust, risks and dilemmas. It would be not realistic to expect that parties trust each other after the inter-state conflict, which might have long historical, ethnic or cultural roots.

In theory, there are two models of peace implementation. First one emphasises the specific content of the peace agreement, international guarantees and the implementation of the schedules, meeting the criteria specified in the agreement. The second model instead focuses on peace implementation itself, highlighting the flexibility and the transformations that might occur during the transition. In the case of the first model, the third parties have a high importance and serve as a guarantee, while in the second, their role is less important[182].

Some scholars observe, that the strict adherence to initially negotiated blueprints have a risk of freezing the peace implementation process[183]. If the third parties, that are monitoring the implementation process, do take into the changing situations and do not provide a space for renegotiations this indeed poses a challenge. Such form of involvement likely will alienate the local actors who will see the third parties as an issue rather than a guarantee of peace. Generally, it could be argued that both models are necessary, depending on the context. Without the emphasis on adherence to provisions of the negotiated peace agreement, the situation might rapidly deteriorate. This especially might be the case if the parties are not sincerely willing to compromise and prefer to solve the conflict with violence. On the other hand, there might appear a basis for renegotiating the deal, for instance, if there is a dissent from the local population.

The role of third parties during the implementation phase deserves further attention. First of all, post-conflict states are often forced to depend on foreign aid. This is problematic from both sides. The local actors might potentially misuse the aid since commonly there is no well-establishes anti-corruption mechanism. On the other hand, the donors and other intervening parties might have different interests and pursue their own agenda instead of seeking to contribute to the peace process. This emphasises the need for mutual accountability, which could improve the trust and effectiveness of peace implementation.

Mark Kersten observes that the International Criminal Court now became a permanent actor in resolving the conflicts, often being a first responder[184]. Referring to previously mentioned

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[182] Terrence Lyons, "Successful Peace Implementation: Plans And Processes", Peacebuilding 4, no. 1 (2015): 74
[183] Terrence Lyons,supra note 181, p. 76
[184] Mark Kersten, Justice In Conflict, 1st ed. (Oxford: Oxford University Press, 2016):201.

peace versus justice dilemma, he emphasises the existing lack of understanding of the effects of ICC interventions[185] Some of them were positive, while others were negative[186]. As it was discussed previously, the ICC interventions is an interesting and debatable issue, and as it follows, still very under-researched.

2.3.5. Concluding remarks

This section illustrated a unique status of intra-state peace agreements, suggesting that they should be understood as sui generis legal documents, being neither a treaty, nor a constitution, but having some elements of both. The important factor is their transitional nature, which also implies the possibilities of renegotiation. It explored the way negotiations are conducted and the possibilities of their regulation to avoid the issue of exclusion incompatibility with human rights law. It concluded that soft-law approach is the only viable way or regulation during the negotiation phase. Power-sharing provisions have been discussed and evaluated, concluding that while they pose risks, often there is no other option for a conclusion of a peace deal. Lastly, the different approaches to peace implementation have been explored, concluding that each of them might have their use.

2.4. State sovereignty and legitimacy of international involvement

International involvement in a post-conflict environment of modern times is undoubtedly significant. Involving actors may range from UN, foreign occupying powers, regional organisations, groups of states, or even individual actors,[187] who perform functions such as policing demobilisation and demilitarisation, guaranteeing and implementing an internal constitutional settlement, mediating its development, and administering the transitional period[188]. International involvement may begin since arranging and mediating the negotiations of peace treaties and continue for an indefinite period. Three forms of involvement have been observed according to the level of influence to the domestic affairs, namely, the "total" influence, when local actors are essentially excluded from the process, "marginal", when local actors voluntarily ask for help and "partial", when international actors heavily influence the process, but the actual drafting

[185] Ibid
[186] Ibid.
[187] Jennifer S. Easterday, supra note 81, p. 394
[188] Christine Bell, supra note 71, p. 188

power remains for local actors[189]. It is obvious that situations of 'total' influence require a significant justifications to be legal under international law. On the other hand, the 'partial' influence, as it will be argued here, potentially undermines the sovereignty while avoiding the burden of justifications and accountability.

The presence of international involvement generally is a positive phenomenon, in a way it has the power to change situations where the change would not be achievable otherwise, bring experts who would assist in various stages of peace process, serve as mediator and 'external guarantee'[190] for commitments between local parties and thus increase trust between them, and so on. On the other hand, in many cases it raises a question of legitimacy and the existence of such question itself may cause opposition from the local population. At times, involving actors even face accusations of neo-colonisation, as overview of various authors show. Legitimacy is important for any form of intervention since it increases the trust and chances for successful peace implementation. Therefore this section will explore how the notion of sovereignty could be approached from the point of jus post bellum, analyse the concepts of consent and local ownership. It will also explore how the rule of law legitimises foreign interventions.

2.4.1. Notion of sovereignty and possible derogations

The principle of state sovereignty is central when talking about the legitimacy of international intervention. This principle is entrenched in UN Charter, the Article 2 paragraph 1 states that "the Organization is based on the principle of the sovereign equality of all its Members."[191] While there is no agreed definition of sovereignty, generally it means the exclusive the exclusive authority over the territory, it is related to principles are non-intervention, which is essential for international relations, as it contributes to stability.[192] International law, therefore, prohibits, as noted in ICJ Nicaragua case, the intervention where it bears upon matters such as "the choice of political, economic, social and cultural systems and the formulation of foreign policy"[193]

UN Charter provides two ways of legitimizing international involvement, first is the explicit consent given by a host state, second is 'the threat to international peace and security', as

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[189] Jennifer S. Easterday, supra note 81, p. 395
[190] Christine Bell, supra note 1, p. 179
[191] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 28 December 2016]
[192] Malcolm Nathan Shaw, supra note 128, p. 155
[193] Ibid

established in the UN Charter. While both justifications appear to be valid derogations of sovereignty principle under international law, the issue is that the Charter assumes a clear sovereign independent states, that are capable of giving or withholding consent and clear distinctions between peace and conflict[194]. Such clarity rarely exists in post-conflict periods[195], for example, certain situations may arise when it is not clear who can give the consent. It may also be not easy to establish whether a threat to peace and security exist, especially when the conflict is only internal. Thus using these justifications becomes complicated.

Several ways theoretically exist to justify the international intervention in such cases. One of them is a flexible understanding of sovereignty; the other is arguing for the broader notion of consent. Several theories of sovereignty exist, such as the concept of ‘popular sovereignty’, which means “that sovereignty belongs to the people rather than to the government and that government authority is, therefore, conditional upon its ability to promote the well-being of the people.”[196] It arguably does not provide enough justification for intervention, since it does not really prove any answer why internal mistreatment of citizens should have implication to its foreign relations[197]. Another theory is so called ‘human sovereignty’, which that “governments bear a primary duty to promote the well-being of their citizens and, at the same time, also a secondary duty to promote the well-being of non-citizens if the non-citizens' own governments are unable or unwilling to do so”[198] This theory, therefore, can sufficiently justify the foreign intervention to states, where the citizens are in danger, including the post-conflict states. The question remains whether this theory could realistically be adapted to current realities. Moreover, such approach poses certain dangers, for instance, opening doors for potential abuse. Instead of making the international intervention an exception to state sovereignty, changing the understanding of this principle might lead to disorder in international relations. It is thus argued that jus post bellum project should not undertake such approach. Additionally, by not openly challenging the traditional concept of sovereignty, it may also increase the chance of its acceptance. On the other hand, sovereignty unavoidably is challenged by the peace agreements, especially those containing power-sharing provisions. This would be the separate case of so-called ‘earned sovereignty’[199] and is beyond the scope of this section.

[194] Christine Bell, supra note 71, p. 188
[195] Ibid.
[196] Michal Saliternik, supra note 152, p. 213
[197] Ibid.
[198] Ibid. p. 183
[199] Paul R. Williams, "Earned Sovereignty: The Future Of Sovereignty-Based Conflict Resolution", Denver Journal Of International Law And Policy 40, no. 128 (2012):143

Having established the importance of the principle of sovereignty, we are left with the remaining option to explore the justifications for the breaches of sovereignty. It may appear that the approach to a search of justifications for interventions instead of changing the concept of sovereignty is hypocritical, since it challenges the sovereignty in any way. Such accusation, however, would not be correct. This approach implies the highly exceptional nature of the foreign intervention, while the former implies the duty to intervene, depending on circumstances.

In current practice, there are two possible justifications for foreign intervention. First is consent; the second is the threat to international peace and security. The following section will explore the first justification and its relevant issues.

2.4.2. The issue of consent

Traditional peacekeeping, which involved mainly observing and keeping cease-fire, relied on principle of the consent of the parties. Thus, peacekeepers were only able to be present in a conflict with the consent of the relevant parties. Consent served as the basis for the legitimacy of the mission, as well had a pragmatic function, because missions could not operate without cooperation with local parties. However, as the concept of peacekeeping has evolved and enforcement-like activities have been imposed, the original principles have been increasingly eroded.[200] In the case of local resistance and failure to obtain the consent, the UN Security Council began authorising mandates for coercive action under Chapter VII of UN Charter.

However, it is important to note that Chapter VII did not replace consent-based deployments and, even if formally not required, so-called 'fictional consent' was sought, which meant seeking the authority from extra-governmental bodies, establishing "national councils"[201]. Such bodies were seemed as having sovereign power for state decisions, as in the case of Transitional National Council in Somalia or Supreme National Council in Cambodia. The overview of peace enforcement practice illustrates that despite the change of nature of conflicts after the cold war, the consent of local parties remains important and is avoided in exceptional cases only.

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[200] Devon Whittle, "Peacekeeping In Conflict: The Intervention Brigade, Monusco, And The Application Of International Humanitarian Law To United Nations Forces", Georgetown Journal Of International Law 46 (2014): 839

[201] Gregory H Fox, Humanitarian Occupation, 1st ed. (New York: Cambridge University Press, 2008):83

While peace enforcement operations are most critical and undoubtedly challenging to the state sovereignty, all international involvement should be based on local consent. Peace agreement thus serves as the main way of giving such consent, although such basis for intervention is questionable, for the unclear status and issues discussed in previous sections. It is argued that jus post bellum could contribute and establish ways on how the consent could be 'extracted'[202]. Indeed, although the situations may vary, and there might be diverse ways of providing consent, certain principles should be used case by case basis, to establish whether a given consent is sufficient. For instance, in the case when the government loses most of its territorial control and arguably does not represent its population anymore, it would be questionable to rely on the consent given by such government. Circumstances like this may justify the 'implied consent', a notion that potentially could be clarified by jus post bellum. One of suggestion could be the accumulatively gathered consent of local actors thru the independent bodies of international law. Nevertheless, this approach would enter a 'dangerous zone' with risks of potential abuse or misuse. To minimise such dangers, there is a necessity of supplementary legitimizations.

The principle of rule of law, if taken as a principle of jus post bellum, could potentially serve as legitimizing factor, especially in cases when the consent is not clear or explicit. First of all, the principle of the rule of law implies the mutual accountability. The framework, providing a way for intervening third parties to tie themselves to the certain mechanism of accountability, could potentially increase the acceptance and subsequently, the effectiveness of the mission. Moreover, the adherence to the UN Charter also means respect for sovereignty and implicates the temporal nature of the intervention.

This approach could also complement the legitimacy of UNSC authorised missions that are based on Chapter VII. UNSC is a political institution, and its mandates are commonly unclear and ambiguous. This requires more commitments for enhancing the legitimacy and effectiveness of such missions.

2.4.3. Strength and weaknesses of local ownership as a legitimising factor

The notion of 'local ownership' is another way of respecting the principle of sovereignty. It has been argued that local ownership: "(1) increase the legitimacy of UN peacebuilding efforts; (2) increases the sustainability of peacebuilding activities after the departure of the UN; and (3)

increases democratic governance in post-conflict states”[203]. However the overview of scholarly literature indicates the lack of consent on what it means. It has been accused as mainly rhetorical concept, which does not have a realisation in practice.

From the point of jus post bellum, the principle of local ownership means that post-conflict reforms and other peacebuilding activities should be done by local actors themselves, while a foreign could play only a supporting role. It implies that even in highly complex situations, certain individuals should be selected by intervening parties as partners. The practice, unfortunately, shows that counterparts are commonly chosen basing solely on English language skills, instead of the competence and capabilities[204]. Elections seem to be a good way to indicate who can be a local counterpart, yet, as it was previously showed, in the early stages of post-conflict phase they tend to do more harm than good. Selection of the counterparts is indeed a critical issue that can shape a future of the state. It is therefore suggested that the jus post bellum could provide guiding principles on this issue, representation of local population being one of them.

2.4.4. Concluding remarks

Understanding the importance of principle of sovereignty, which remain a basis for international law, this thesis suggest a consensual nature of jus post bellum, which ‘overlaps’ sovereignty only on exceptional basis with sufficient justifications. It suggests the rule of law as a principle for this framework, emphasising the necessity of mutual accountability as a legitimizing factor. It further explored the notion of local ownership, emphasising its necessity, yet criticising the current practice.

2.5. Forms of post-conflict accountability

There are two forms of post-conflict accountability, namely the accountability of the conflict parties and the accountability of third parties. It could be argued that the first form is mainly dealt with transitional justice, which explores "how societies should and do address the legacy of past human rights abuses resulting from internal conflict or other forms of severe human

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[203] Sarah B. K. von Billerbeck, Whose Peace? Local Ownership And United Nations Peacekeeping, 1st ed. (Oxford: Oxford University Press (GBP), 2016):

[204] Pietz, T von Carlowitz, Ownership In Practice. Lessons From Liberia And Kosovo, 1st ed. (Osnabrück: German Foundation for Peace Research, 2011):14

rights trauma [...]".[205] In other words, it mainly deals with past crimes of conflict parties, with respect to systematic violations of human rights and humanitarian law, war crimes, and crimes against humanity.[206] Third party accountability aims to address the 'errors' of third-party enforcers, for instance, international organisations, peacekeepers. [207] These forms of post-conflict accountability, therefore, has different addressees and timeframe. Such difference between these forms seemingly renders them as separate fields. Overview of literature confirms this assertion, since the transitional justice is a distinct field of legal inquiry, while third party accountability is discussed in literature dealing with peacekeeping and peacebuilding.[208] Indeed, both forms involve different issues which will be discussed in this section. However despite the difference, as Bell importantly notes, there is a common dynamic in the application of international legal regimes[209]. Most importantly both forms of accountability comes from the principle of rule of law.

Therefore, accountability is certainly one of the main elements in post-conflict phase, yet it is complicated by the underlying dilemma of justice versus peace. In practice, as Christine bell notes, "peace often seems to require amnesty as the price of moving from conflict."[210] Parties of conflict are not likely to accept the peace agreement that contains provisions for the investigation, prosecution and punishment.
The UN Secretary-General has in recent years affirmed that the UN cannot support peace agreements that the amnesties for actions, which are considered crimes under the Rome Statute[211] Admitting the difficulties of complying the needs of peace and justice, this section will explore the issues and elements of post-conflict accountability.

2.5.1. Accountability of the conflict parties

Accountability of conflict parties is a critical for a peace process and required by the rule of law principle, which, as it was argued before should be a part of jus post bellum framework. Victims of armed conflict might not see the war as finished unless the perpetrators are held accountable for their crimes. On the other hand, the peace process is not simple as that. The perpetrator, who possibly committed various international crimes might be also a key figure

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205 Arist Von Hehn, supra note 129, P. 146
206 Christine Bell, supra note 37, p. 333
207 Ibid
208 Ibid
209 Ibid. p 334
210 devol
211

to peace negotiations, and without them, the situations might deteriorate again. This illustrates how difficult is still unresolved dilemma of peace versus justice.

Transitional Justice, arguable is of solutions to this dilemma. Indeed, accountability may not be only legal and Transitional Justice makes use of these non-legal tools to address the post-conflict society. Question remains if it really fits into notion of 'justice', since some would call it a useful way of avoiding legal accountability. Nevertheless, in practice it might be the only way to lay a path for reconciliation.

So it can be concluded, as it relates the accountability of parties, that in many cases there is no choice, but address the peacebuilding first and then move on to accountability issues. The gradual approach of justice might be the only one viable options, despite the risks that such justice is a mere hypocrisy.

While it suggested that jus post bellum should allow some compromise regarding the accountability of conflict parties, there is another aspect of accountability – reparations for victims. Despite the complications, the development of ICC Trust Fund is a significant step forward in recognizing the needs of victims. On the other hand, reparations for victims remains under-researched topic. Jus post bellum, arguably, should take into account its critical importance and thus possibly improve the addressing of victims.

2.5.2. Accountability of peacekeepers and other third party actors

The term 'peacekeeping', which originally meant exclusively ceasefire enforcement by international military missions, now has a broad definition and includes preparation of national elections, verification of disarmament, demobilization and reintegration of ex-combatants, training of police forces, and human rights monitoring. Peacekeeping as well can encompass the establishment and operation of adjudication or arbitration tribunals and commissions dealing with conflict-related reparation claims or with alleged violations of the peace agreement. [212] Some phases of the UN peace operations were in substance very similar to belligerent occupations, including foreign military presence, combat operations, and a lesser or greater degree of direct involvement in governmental activities.[213] However, multilateral actors such as UN missions are

[212] Saliternik, M. (2015) "Reducing the Price of Peace: The Human Rights Responsibilities of Third-Party Facilitators," *Vand. J. Transnat'l L.* 48: 179. P.188
[213] Bhuta, N. (2010) "New Modes and orders: the difficulties of a jus post bellum of constitutional transformation," *University of Toronto Law Journal* 60(3): 799–854. P.822

not belligerent occupants as defined in international law. [214] One of recent example of broad mandate for peacekeeping is the creation of the Intervention Brigade in the Democratic Republic of the Congo, which, despite being operated as a U.N. peacekeeping mission, is authorized to "neutralize" certain armed forces and to undertake offensive operations cooperating with Congolese state military.[215] Nevertheless, The U.N. has also maintained its position that as "UN forces act on behalf of the international community, they can be considered neither a 'party' to the conflict, nor a 'power' within the meaning of the Geneva Conventions."

The complexity of such missions where peacekeeping and enforcement is mixed, has a range of legal challenges related to accountability of UN forces. Traditionally accountability of international actors was through the framework of the international organization's institutions. However the application of it is controversial, depending on various factors, such as relationship between organisation and its member states, and the acts attributable to organisation. Current trend is that the longer international actors remain, the more there is pressure to hold them directly to account, with international actors often creating new mechanisms, partly because to fail to do so reduces their legitimacy and effectiveness with respect to the local actors they are trying to influence. Still, there is no consistent legal framework or clear practice applicable to accountability of peacekeeping forces cases, so most of them are being solved relying on ad hoc solutions. A quite recent relevant decision by the Dutch Supreme Court confirmed the responsibility of Netherlands for the deaths of three Bosnian Muslim men in the 1995 Srebrenica massacre, because it had "effective control" during the period that the acts in question occurred. This decision is important because it establishes that peacekeepers do not act in a legal vacuum and that immunity does not necessarily extend to all UN or peacekeeping activities, but only to those acts legitimately performed in the mission's official capacity. Despite this, it is not likely that many national cases will follow this example in near future, because the immunities of international organisations and state troops are difficult to circumvent, and many states do not have necessary legal means for extraterritorial application of their criminal laws. The UN's denial of responsibility for the cholera outbreak in Haiti and failure to hold it accountable also illustrates the strength of immunities granted to international organizations.[216]

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[214] Boon, K. (2005) "Legislative reform in post-conflict zones: jus post bellum and the contemporary occupant's law-making powers," *McGill Law Journal* 50.p.17

[215] Whittle, D. (2014) "Peacekeeping in Conflict: The Intervention Brigade, Monusco, and the Application of International Humanitarian Law to United Nations Forces," *Geo. J. Int'l L.* 46: 837. P. 839

[216] Wilson, R. J. and Hurvitz, E. S. (2014) "Human Rights Violations by Peacekeeping Forces in Somalia," *Hum. Rts. Brief* 21: 2. p.6

Several ways have been suggested to address this accountability gap. In response, commentators have posited a range of legal routes to finding the UN accountable.[82] Some commentators have contended that human rights apply directly to the UN by virtue of the constitutional standing of the UN Charter in combination with the International Covenants on Civil, Political and Economic, Social and Cultural Rights of 1966.[83] This argument views UN administrators as bound by human rights standards as part of its own constitution. Others have found *jus cogens* and customary law obligations to be directly applicable to UN administrators given the UN's status as a subject of international law. On the other hand, although the immunity in this context is understood as negative phenomenon, it is essential for functioning of international organisation.

Accountability of third party actors should be analysed in three different ways, according to the subject. First is the accountability of UN as a whole. Unfortunate events of Srebenica and Haiti show the necessity of improvement of accountability. Although the immunities protect from legal prosecutions in domestic courts, arguably a specially established mechanism for this purpose would be a suitable approach. Second, the individual accountability of UN peacekeepers is different issue. The existing impunity of peacekeepers who commit criminal acts during the mission undermines the legitimacy and local acceptance. On the other hand, the UN approach is criticised, since SOFA agreements usually provide that only troop contributing state may prosecute its troops. This approach and could be improved by taking NATO model, which allows the prosecution in host state if such crime cannot be prosecuted by troop sending state.

2.5.3. Concluding remarks

Accountability remains an important part of jus post bellum, since, as it was argued here, it has most possibilities to be addressed from the point of international law. Regarding the accountability of conflict parties, the more victim-centered approach is preferred. Prosecutions of perpetrators may have to be delayed for the sake of peace. As regards the accountability of third parties in post –conflict states, there is a necessity to clarify the responsibility of international organisations. The immunities pose a challenge, yet the special mechanism could be established to address this. Another unexplored issue is the accountability of donors, such as World Bank, even individuals, for instance mediators. The negligence or aggressive pursuance of self-interests of these actors in

post-conflict states may have a detrimental effects. Arguably, the established framework could improve the accountability in case of breach of commitments.

CONCLUSIONS

1. Post-conflict situations are in need of legal regulation, which could improve the achievement of sustainable peace. Yet the application of international law to such situations has particular demands and implications, and is limited by general international law and sovereignty relationship. *Jus post bellum* as concept which both clarifies and coordinates the applicable could be uself to address despite the limitations. This thesis suggest a consensual type of jus post bellum, with only justified exceptions. It has potential to improve the post-conflict issues, yet it cannot neglect the local context. Which issues are best to be regulated through legal norms, and which require only a soft law approach is a critical question for this project.
2. Defining the temporal applicability of *jus post bellum* is best by taking a flexible approach, otherwise it might potentially undermine the peace process. Different components might have each own time frames, which could begin and end depending on local context.
3. Peace agreements are best to be taken as sui generis element, which could serve as a basis for jus post bellum. Yet the compromise nature of peace agreements requires that they should be supplemented by principles of jus post bellum.
4. Legitimacy of post-conflict involvement depends on consent and the adherence to the principle of rule of law. Any exceptions of principle of sovereignty, which is necessary for the stability in international order, must be sufficiently justified.
5. The principle of rule of law implies mutual accountability. Certain level of political compromise should be allowed by international law for the sake of achieving the peace. On the other hand, reparations for victims is an essential element of accountability and requires more attention.

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ANNOTATION

This thesis analyses the project of Jus Post Bellum, which has emerged as a response to various legal challenges during the post-conflict phase. It evaluates the existing theories in the terms of their feasibility and explores how they could be applied. In particular, it explores the role and unique status of intrastate peace agreements, legitimacy of third party interventions and forms of post-conflict accountability.

ANOTACIJA

Šis darbas analizuoja Jus Post Bellum projektą, kuris gimė kaip atsakas į įvairias teisines problemas kylančias po ginkluoto konflikto. Darbe įvertinamos įvairios teorijos ir tiriamas jų pritaikomumas. Tiriamas taikos susitarimų statusas tarptautinės teisės požiūriu, trečiųjų šalių įsikišimo legitimimumas ir atsakomybės po ginkluoto konflikto formos.

SUMMARY

This thesis has noted a highly diverse nature of post-conflict situations, thus highlighting the importance of local context in any attempts of legal regulation. It identified common factors of post-conflict situations, which are risk of relapse, certain international involvement, agreement between parties with varying role and general needs of society. It argued that both existing legal framework and the approach of international community does not contribute to peace process in post –conflict setting. It has analysed the issues of applicable law during the post-conflict period and concluded that neither IHL nor IHRL are designed for post-conflict context. Many 'traditional' notions of international law have to be either rendered non-applicable or interpreted in such way as to not disregard the different nature of the post-conflict setting. It has noted the difficulty to apply and commonly cause the issues in practice. The tendencies of regime-merge have shown some positive developments, such as the adoption of Rome Statute, yet the problem of fragmentation and lack of effectiveness remains. Admitting that the adoption of Rome Statute was a significant development, it observed several challenges and potential dangers that could potentially challenge the peace process. It argued for the flexible approach of temporal applicability of jus post bellum, however it emphasised, that timing issue remains critically important during the post-conflict phase. It emphasised the negative effects of 'quick-fix' approach, which is commonly undertaken by international community. International law thus cannot clarify or dictate such processes, except for soft-law guidance that could discourage the temptation of quick-fix approach. Peace agreements could potentially become a basis for jus post bellum, yet their compromise nature requires the additional principles. Similarly, for any intervention of third parties, consent of local parties should be a basis, yet its nature requires the adherence to additional principles. Rule of law is suggested as a central principle, from which emerges the respect for sovereignty and mutual accountability.

SANTRAUKA

Šiuolaikinės situacijos po ginkluoto konflikto pasižymi didele įvairove, tačiau turi bendrus faktorius: konflikto pasikartojimo grėsmė, užsienio šalių dalyvavimas, tam tikras susitarimas tarp konflikto šalių ir bendri visuomenės poreikiai. Šis darbas teigia, kad tiek esantis teisinis reguliavimas, tiek tarptautinės bendruomenės pastangos nėra efektyvus ir tinkami taikos procesams. Tarptautinė Humanitarinė teisė, taip pat ir Žmogaus teisių apsaugos teisė nėra pritaikytos situacijoms po ginkluoto konflikto, todėl yra sunkiai pritaikomos ir sukuria kliūčių praktikoje. Nors šių disciplinų vienijimosi tendencijos yra teigiamas reiškinys, fragmentacijos ir efektyvumo nebuvimo problema išlieka. Jus post bellum yra sudaryta iš daug komponentų, tokių kaip taikos susitarimų sudarymas, saugumo sektoriaus reformos ir kt. Laiko klausimas yra itin svarbus situacijose po konflikto. Praktika rodo, kad per anksti surengti rinkimai ir pradėta demokratizacija turi įtaką konflikto pasikartojimui. Visa tai rodo, kad nepakankama reikšmė yra skiriama vietos kontekstui taikant 'viskam tinkančius' metodus. Jus post bellum siekia teisiškai reguliuoti tik tam tikrus faktorius, tačiau paliekant erdvę kompromisams. Taikos susitarimai gali būti pagrindas jus post bellum, tačiau jų kompromisinė prigimtis reikalauja papildomų principų. Pirmiausia tai yra teisės viršenybės principas, iš kurio seka pagarba suverenitetui ir abipusei atsakomybei.

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