

## Chapter 4

### Jus Post Bellum: An Interpretive Framework

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#### I. Introduction

At this nascent stage of its development, jus post bellum may most effectively operate as an interpretive framework that can identify and evaluate the moral legitimacy of diverse legal and political practices and actors in transitions. This is a distinctive claim broader than suggesting jus post bellum governs a strict temporal end-of-conflict period in international law alone. This chapter argues that jus post bellum should be concerned with transitions. Transitions can be described as the move from armed conflict to peace, or from dictatorship to democracy, and can be seen as a response to gross violations of human rights and as an attempt to re-constitute a sovereign political community. At the emergence of this present discussion regarding jus post bellum, it remains possible for scholars and practitioners to identify and assess a potential role for this term as a framework relevant to transitions from conflict to peace. International law has not yet fully articulated an explicit jus post bellum in the same manner that international law governs the use of force (jus ad bellum) or the conduct of armed conflict (jus in bello). This would appear to discourage the presentation of jus post bellum as a positive legal framework at this point in time.

One major preliminary challenge is to consider the nature of “post” in any concept of jus post bellum. This issue determines whether jus post bellum is confined to periods at the end of armed conflict, and if so, for how long a period at the end of this conflict. Ruti Teitel has recently argued:

“[P]ost bellum” seems too limited or inappropriate today because of the unstable or undetermined boundaries between conflict and post-conflict situations. Transitional justice is arguably more capacious because it allows for purposes beyond those associated with a war’s beginning, such as transformation, namely purposes going beyond retributive or restorative justice.

Transitional justice does present resources regarding the dynamic nature of “transition” that seem in contrast to a post bellum conception that may be linked closely to an armed conflict and demand swift, revolutionary change of legal orders. For instance, transitional justice has contended with the issue of justice in the context of ongoing conflict, in the cases of Colombia and Afghanistan, but has adapted the concept of “transition” to be a dynamic and flexible process, rather than a set date in history.

However, the advantage of jus post bellum may be to offer a dynamic concept of “post bellum” broader than that concerned with only transitional justice. The policies of international organizations regarding fragile states seek to operate before, during, and after periods of conflict, that may be conceived of as cyclical in fragile environments. Such policies cover areas such as peacebuilding, state-building, security sector reform or development, all beyond the core of transitional justice. Jus post bellum could adopt this broad approach if it is employed as an overarching framework above existing areas of international law and policy relevant to the cessation of conflict and gross violations of human rights. This conception of jus post bellum is dynamic in nature regarding the period of “post,” which perhaps remains a problem for the binary nature of positive law. It has been noted that as it is unclear when night ends and day begins, the period of dawn is a gradual period that is difficult to ascertain. So it is argued that transitions and jus post bellum have an overlapping relationship, with the conflict, post-conflict, and transition periods necessarily overlapping. The alternative seems to be set up transitional justice and jus post bellum in opposition, with a de-

emphasis on additional fields such as peacebuilding, security sector reform and development, that are also relevant to the transitional or post-conflict period. An overarching jus post bellum need not threaten any of these fields, but rather, as it is argued in this chapter, could emphasize their mutually supporting relationship and interdependent goals.

With this conception of a dynamic rather than static jus post bellum, this chapter considers the potential for jus post bellum to operate as an interpretive framework for international law through the various dimensions of complexity that arise in transitions. This interpretive framework operates through the principle and process of integrity as considered by Ronald Dworkin. This chapter argues that the distinctive value of jus post bellum should be in recognizing that the various norms, regulations, and practices relevant to transitions are inter-dependent and mutually re-enforcing and as a result can be evaluated and interpreted in a unified fashion. This chapter first identifies three dimensions of complexity that warrant identification and evaluation for any proposed jus post bellum framework. Second, it identifies the need for a unified framework based on the inter-dependence of areas relevant to transitions through their shared contribution to civic trust and the rule of law. Finally, it considers the application of Dworkin's integrity as a framework and identifies principles that would guide this framework across diverse areas and specific transitions and provide a basis for reform of international law and the policies of international organizations operating in transitions.

## II. The Role of Jus Post Bellum: Three Dimensions of Evaluation

International law has not fully articulated an explicit jus post bellum. Current areas of international law and policies of international organizations relevant to the post bellum period and periods of political transition seem to offer competing priorities and justifications for such transitions, for the affected state, society, and the international community. This complex competitive structure can be seen in the various areas of international law relevant to the post bellum period, in the range of legal actors involved, and in the manner in which the context of each transitional society is treated in international law and policy. Each of these components presents an area to be evaluated in the post bellum period and can be conceived of as dimensions of a single complex problem.

### A. Areas of international legal and policy regulation

First, a wide range of areas of international law and policy exist that are relevant to a post bellum period. The relationship between transitional justice, peacebuilding, security sector reform and economic development in international law warrants close examination. State-building, the status of peace agreements, refugee and migration law, constitutionalism, elections, and democracy all could also be potentially considered relevant to transitions, as argued by Easterday and Boon in this volume. Some of these areas, such as transitional justice, peace agreements, peacebuilding, and state-building are specifically designed to engage with the relatively narrow factual circumstances of transition. Other areas such as refugee and migration law, constitutionalism, and the development of a country's economy and human development can be conceived of as universal in application, applying to consolidated democracies as well as to transitional societies. More broadly still, the application of international human rights in transitions represents a significant point of convergence among these diverse areas. Each of these areas also have specific value goals that they purport to contribute to, such as peace, justice, truth, reconciliation, security, or democracy. If jus post bellum is to make a distinctive contribution to international law, it must engage with this background network of prior goals, regulation, policies, and treaties, and their associated institutional structures. If jus post bellum is ultimately to replace or modify some component of one or more of these existing areas, a distinctive justification is needed. In contrast, if jus post bellum adds no substantive,

interpretive, or practical value to existing areas of law and regulation, the value of the concept and discourse must be called into question.

Moreover, if *jus post bellum* is to be considered an overarching framework for these areas of international law, scholars and practitioners should be mindful of the risk of fragmentation in the international legal regulation between these areas. The fragmentation of international law refers to the proliferation of different legal regimes and institutions governing inter-state relations. Value preferences in different fields may be envisaged as competing spheres of authority, which generate the need for strategic choice between these areas, such as mainstreaming human rights in development or the securitization of peacebuilding or development. If seeking to overarch these areas, *jus post bellum* cannot remain neutral among these competing choices, but make an assessment between them. Such an assessment would be highly complex, but broadly familiar to international lawyers. If *jus post bellum* is to be a specific framework, it must first appreciate the range of configurations of international legal obligations that potentially apply to a given transition as one dimension of complexity.

#### B. Legal status of international actors

A second dimension of a proposed *jus post bellum* framework could consider the range of legal foundations for the engagement of international legal actors in transitions. It may be the case that such legal foundations make a legal or moral difference to their engagements. First, many past international engagements in transitional circumstances have been on the basis of the consent of the affected state, which has acknowledged its own inability to administer the full range of issues relevant to transitions. State consent is a legally sufficient basis for valid international obligations to accrue to that state and a concept that we find throughout the international system. However, if it were possible for fragile states to give effective consent and express this through its political organs, then the certain forms of engagement from the international community, such as international territorial administration, would be unnecessary. The capacity of a state in a post bellum scenario to give consent may thus vary from states with full legal capacity, political legitimacy, and ability and willingness to pursue public goods, to those that lack these attributes. It is therefore possible to evaluate the validity of legitimacy of the obligations and mechanisms consented to during transitions.

Second, international engagement in transitional circumstances can be authorized by United Nations Security Council resolution. The only requirements or limitations on Security Council action are that they must be *intra vires* and act in good faith, respecting *jus cogens* norms. Security Council resolutions have been used to authorize international criminal tribunals, peace-keeping missions, election monitoring, civilian observation missions, or full international territorial administrations, such as in Kosovo and Timor-Leste. Significant literature examines the practice of such missions and has highlighted the lessons learned and ongoing challenges in international territorial administrations. However, their costly and exceptional nature means that this area of regulation cannot be taken to apply to all transitions, though it may share challenges faced by other legal bases of international assistance to transitions. As a result it is an unlikely basis for a comprehensive legal *jus post bellum* framework but may provide distinctive areas that can be evaluated.

Third, the law of occupation governs the situation where one state occupies the territory of another after the cessation of armed conflict. In so doing, the original intention behind this area of law was to enable the occupying state to pursue two objectives. The occupier was to administer territory in a conservative fashion, only enforcing legal changes where necessary to maintain peace and security. In addition, the occupier was to promote local capacity for autonomous self-government.

The original regime was designed to be palliative, such that major issues of change or re-distribution of land or legal rights would take place in a peace agreement that would end the occupation and regularize the situation. This was the situation envisaged under the Hague Regulations of 1907, which remain the principal basis for the international law of occupation. In addition, the Fourth Geneva Convention sought to provide minimum standards for civilians in circumstances of occupation. Nonetheless, these provisions fail to capture the existing reality of practice in this area and have failed to do so for some time. As far back as 1945, Allied occupations of Germany and Japan eschewed the conservationist approach to occupation and can be more accurately characterized as transformative occupations, outside the 1907 Regulations. No provision appears to have been made in these frameworks for the introduction of further legislation designed to deal with a past legacy of gross violations of human rights. There is a tension between the existing obligation in occupation to return to the status quo ante and the broader ambition of human rights law across areas in transitions to use international law as a transformative force. Unless jus post bellum is conceived of to radically alter the priorities and application of areas such as transitional justice, peacebuilding or security sector reform, or somehow remain removed from their sphere of influence, the transformative ambition of human rights law will necessarily extend to jus post bellum as well.

Finally, trusteeship was governed by Chapter XII of the Charter of the United Nations and was drafted with a view to overseeing and administering the process of decolonization from empires that occurred in the mid-twentieth century. Given the political sensitivities that arose during this process and those that remain extant, use of any legal mechanism from the law of trusteeship does not seem viable. Indeed, use of the rhetoric or concepts from this area in transitional circumstances may engender accusations of neo-colonialist attitudes and agendas.

Thus, the legal foundation for the actions of post bellum international actors is also complex. The application of the first dimension of complexity, substantive international rules, norms and principles must therefore cover a variety of factual and legal circumstances, from full occupation by a belligerent state, through a variety of Security Council authorisations, through to the legitimate consent of an affected population to the presence of donor states and INGOs on their territory. It may be useful to think of the strength of these principles as working along a spectrum from occupation and territorial administration at one end to minimal international monitoring and engagement at the other. A challenge for a jus post bellum framework is therefore to evaluate substantive international legal obligations and the nature of international legal actors involved as two dimensions of engagement in transition.

### C. Context of each transitional society

The final complex variable is the transitional society itself. Transitions cover diverse factual circumstances. From the end of the Second World War, to the end of apartheid in South Africa, the aftermath of genocide in Rwanda, the collapse of the Soviet Union, and the toppling of dictatorships in Latin America and recently in the Middle East and North Africa, transitions are radically diverse. The paradigm of a post-war or post-conflict period may remain a classical conception of two armed forces, with a military victory or agreement signalling the end of the conflict. Within internal armed conflicts, the potential for cycles of violence renders modern conflict complex and changing environments that inhibit discrete classification of periods of war and peace. Regardless of the “transitions” versus “post bellum” issue, even paradigmatic post bellum societies remain highly complex. It is difficult to speak meaningfully of such societies in a way that applies across this range of histories, contexts, languages, and cultures. The application of international law to diverse contexts is a general challenge inherent in the international legal system. Nonetheless, it appears

that a common feature present across a number of fields relevant to transitions generates a distinctive challenge.

Transitions display a significant paradox. On the one hand, the areas identified seek to use law, and its expressive or transformative function to pursue activities and values that change the behaviors, attitudes, and perceptions of citizens of a transitional societies. On the other hand, local ownership and context of each transitional society has featured as a significant priority of theory, international law and policy in several of these fields. Respecting local context and ownership is seen as significantly enhancing the legitimacy and efficacy of international engagement in transitional societies. Just war theorists have also identified the need to respect local ownership and context in a jus post bellum. Moreover, local ownership can reflect expressions of self-determination, a right to democratic governance, and the re-constitution of a sovereign political community.

Identification of local owners across divided state and private institutions of a transitional society is complex. In particular, many actors may be resistant to reform in given areas, such as political leaders seeking to avoid individual criminal accountability, civil servants opposed to governance reform or state building, or military and police against SSR. Such resistance to reform may be institutional as well as personal. However, ownership is typically invoked to refer to entire populations. Moreover, it is unclear how local ownership operates when “owners,” however identified, deeply disagree about public goods. Such disagreement reflects the heart of political decision-making and priorities in a transitional society in the fashion Mark Malloch Brown suggested, “choosing, for instance, whether girls’ education should be a bigger budget priority than clean water.” Finally, a concern for local ownership will reflect disagreement about the appropriate time and form of exit of international engagement. In the absence of a clearly defined goal and endpoint, international actors run the risk of accusations that their temporary and benevolent presence is disingenuous amid concerns of neo-colonialism. Concerns for the temporary nature of international engagement can be contrasted with the long-term nature of the goals of fields relevant to transition.

Policies in each field express the desirability of local ownership, but have not generated specific and shared understandings of what that entails. There are no clear guidelines on how to act and on how to operationalise the idea of ownership. Local ownership and context could become more functional if there was some sort of common framework for its understanding in different disciplines that would facilitate particular guidelines from case to case. A jus post bellum framework would therefore benefit from offering an adequate conception of the relationship between international and national actors. This conception should cover these areas and the variety of national circumstances experienced in transition and across fields and acknowledges the other two dimensions of complexity identified above.

### III. Why a Unified Framework? Interdependence in Transitions

These three dimensions of complexity, the areas of international law and regulation, the legal status of international actors, and the context of each transitional society, may suggest an inevitable and inherent fragmentation and incoherence in areas relevant to jus post bellum. It may be that these areas each seek to change the behaviors, attitudes, and perceptions of citizens of transitional societies but must do so independently of one another. A distinct case needs to be made that the practice of each area is in fact dependent on the other areas. To make this case, this chapter claims that certain conditions exist in all transitional societies, notwithstanding the three dimensions of complexity and variables identified above. This interpretation of transitional societies describes these conditions as the circumstances of transition, as where there are:

- intense demands and expectations for the achievement of public goods in political community; but also
- minimal bureaucratic capacity and legitimacy to achieve such goods, due to a breakdown of civic trust and the rule of law, relative to the prior commission of gross violations of human rights.

These circumstances are derived by analogy to the circumstances of politics and justice that describe conditions in consolidated democracies. The demand for public goods is particularly acute in moments of transition due to the recent breakdown of the political community's ability or willingness to deliver such goods. Practitioners and scholars recognize the latter criterion as a necessary but insufficient condition for describing transitions. Several areas relevant to jus post bellum are predicated on responding to gross violations of human rights and pursuing some value goal in response to them (e.g. truth, peace, security, and justice). A focus on gross violations of human rights itself therefore continues substantive diversity across these areas. However, there are two distinct structural consequences to the commission of gross violations of human rights: the breakdown of civic trust and the rule of law.

The areas of transitional justice, peacebuilding, security sector reform and development are significantly diverse substantively, pursuing different goals (such as truth, peace, justice, security, economic growth, and good governance), using different institutions (including truth commissions; demobilization, disarmament, and reintegration (DDR) programs; and government/legislative reform) and often involve different actors and disciplines (such as law, peace studies, and economics). Nonetheless, these fields all seek to make a contribution to civic trust and the rule of law as part of their overall claim to change transitional societies. This shared claim provides a suitable entry point for an overarching framework such as jus post bellum proposed here.

Each goal of transitional justice aims to contribute to the restoration of civic trust. By establishing the truth regarding past gross violations of human rights, truth commissions constitute processes of civic dialogue and deliberation, which in turn contributes to building civic trust. In pursuing reconciliation, a transitional justice organization seeks to establish and maintain coexistence between the various groups and thus seeks to restore minimum conditions of civic trust. The goal of recognition seeks to re-affirm victims as citizens, as persons of significance and value to the state. This process of reparation through renewed state-citizen relations contributes to the restoration of civic trust.

Peacebuilding processes also involve civic trust. Peacebuilding seeks to consolidate the legitimacy of the arrangements concluded at the cessation of gross violations of human rights and to transform social foundations of public legitimacy for the long term. Thus, the initial elite arrangement and distribution of power is then legitimized through peacebuilding processes. This process both depends on and seeks to constitute civic trust and the rule of law as conditions for future deliberation of particular issues in the re-establishment of a political and constitutional order. In security sector reform, the human security paradigm expressly acknowledges the need for civic trust in the achievement and maintenance of human security. Paul Roe describes the value of trust for security, in "routinization" as a response to ontological insecurity: "Routinization 'regularizes social life making it, and the self, knowable.' With a basic trust in others, the individual can go about his/her day-to-day business with a reasonable expectation that many of the dangers in life can simply be put to one side." In the context of fragile states, the absence of civic trust also impacts on the cooperation and coordination necessary for economic activity: "Virtually every transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack

of mutual confidence.” In the context of transitions, the absence of civic trust produces widespread dysfunction: “With actors lacking the means to make credible commitments to reform, societies are unable to break free from the threat of violence. A low-level equilibrium of dysfunctional institutions and recurrent violence is thereby created.”

It may be that these areas mean different things by civic trust and the rule of law and seek to affect these values in different ways. However, the nature of both of these concepts, as social norms, makes it clear that contributions from the areas identified are inter-dependent and thus should be interpreted through a shared framework.

First, efforts to modify civic trust appear to treat trust as a social norm. We can describe civic trust as a shared, reciprocal normative commitment to certain patterns of behavior. For a norm to exist, there must be a collective belief that the behavior dictated by the norm is widespread, as well as a shared belief that one is expected to engage in such behavior when appropriate and that transgressions might be punished. Civic trust may be described as a constitutive social norm or convention. Such social conventions serve numerous functions by constituting means by which citizens interact. Social practices, on this understanding, are partly constituted by the conventional rules of the practice, which regulate the conduct within. Andrei Marmor notes that reasons for following constitutive rules are compliance-dependent, and practice is required to constitute the rules. Thus, constitutive conventions both constitute the practice and regulate conduct with it as a system of rules. The contribution of each area of international law to civic trust thus represents efforts to change this conventional system of rules. As a consequence of these forms of conventionality, efforts to enhance or alter content of civic trust are necessarily systemic and interdependent. Thus, despite substantively diverse functions, each area relevant to transitions seeks to contribute to civic trust in shared circumstances and through shared methods: to evaluate the contribution of these diverse areas to civic trust we need a shared, convention-wide framework for interpretation and evaluation.

Each field relevant to jus post bellum also seeks to use legal institutions to generate civic trust through the rule of law. Transitional justice scholars have claimed that the enterprise contributes to both narrow formalist and to thicker substantive conceptions of the rule of law. Peacebuilding is a process constitutive of the rule of law, seeking to hold all parties to peace accountable under a legal system, rather than allow a return to violence. Security sector reform also seeks to contribute to the rule of law. Conceptions of national security are necessarily constitutive of the rule of law, being formal in nature and seeking to maintain security through the use of formal rules, institutional structures, and procedures. Similarly, a human security paradigm acknowledges the need to restore the rule of law as a necessary condition for ensuring broader human security. Furthermore, the rule of law is claimed to have significant explanatory power for foreign investment and economic growth.

The rule of law acknowledges the risk of the abuse of power under law and the appropriateness of civic distrust caused by this risk. This acknowledgment of legitimate distrust, and the enabling capacities of the rule of law it offers citizens, represents a normative commitment from the legal system, rather than a merely empirical regularity. It is through the values, formalities, and processes of the rule of law that law can hope to foster civic trust. Enhancing the supply of civic trust in a society remains significantly dependent on state and, in particular, legal institutions:

Trusting institutions means knowing and recognising as valid the values and form of life incorporated in an institution and deriving from this recognition the assumption that this idea makes sufficient

sense to a sufficient number of people to motivate their ongoing active support for the institution and the compliance with its rules.

The rule of law thus provides an opportunity to assess the validity of distrust and to enable the trust of state officials, institutions, and citizens that withstand the scrutiny of its mechanisms of distrust. A political system in which distrust is easily articulated and listened to, and its presumed reasons easily and impartially assessed as valid or refuted, deserves to be trusted for the assurance this transparency provides to the citizens. By virtue of using the rule of law and its suite of legal institutions and actors to respond to legitimate civic distrust, these areas relevant to jus post bellum seek to contribute to the restoration of civic trust and the rule of law in a systemic fashion, despite remaining substantively diverse at the level of immediate goals, institutions, and actors.

#### IV. Jus post bellum as the Application of Integrity

What is the role for jus post bellum in this contribution to civic trust and the rule of law as a framework? There remains no overarching mechanism for evaluating the conduct of transitions across the three dimensions of complexity identified above nor for assessing their shared contribution to the inter-dependent conditions of civic trust and the rule of law. We identified above substantive diversity and fragmentation in relevant areas of international law and in the legal status of the actors involved, with risks of tension between their transformative goals and respect for local ownership. A purely substantive jus post bellum can acknowledge this diversity and associated tensions, but, without more, and without new state practice, cannot resolve them. An appropriate role for a jus post bellum may be thus to provide “not only substantive legal rules and principles governing transitions from conflict to peace, but also rules on their interplay and relationship in case of conflict.”

Calls for a further Geneva Convention on jus post bellum issues may represent a suitable end point for the development of this area, but would require considerable political will, interest, and coordination among states, and significant re-orientation in the design and practices of international organizations. Despite some present interest in institutional coordination, it is suggested that this goal is not plausible in the short term. However, the absence of a conventional jus post bellum does not preclude the interpretation of existing international law and policy in an alternative jus post bellum framework. Jus post bellum can therefore be situated as part of the moral framework of just war theory. It could be used to provide an interpretation of areas relevant to transition, actors who seek to pursue the goals in each areas, and the application to specific transitional societies. In so doing, it could use this interpretation to evaluate how these efforts contribute to shared necessary conditions of restoring civic trust and the rule of law in transitional societies.

This problem of complex interpretation and evaluation has been examined before as a matter of general jurisprudence and political philosophy. Ronald Dworkin described checkerboard statutes as those that are incoherent or arbitrary on matters of principle. This seems to fit the substantive diversity and diversity among institutional actors quite well, pursuing a variety of goals through a host of institutions, with little legal consciousness of other such goals and institutions. Overcoming checkerboard statutes can be achieved through their interpretation with reference to the principle of integrity. Integrity operates in non-ideal normative circumstances: ideally, coherence between values in each field expressed in law would be guaranteed because officials would always do what would be perfectly just and fair. If there must be compromise because views are divided, then the compromise must be external, not internal; it must be compromise about a scheme of justice not a compromised scheme of justice. Each transitional society will interpret its own practices, its own “jus post bellum” in re-constituting a sovereign political community. International actors assisting



this transition will also seek to interpret that society and its international legal obligations and practices. In this act of interpretation, Dworkin conceives of the obligation to pursue integrity as the obligation to pursue “fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community’s scheme.” It is on the basis of a legal system founded on integrity that Dworkin argues that claims of political obligation are made legitimate for those made subject to them:

Law as integrity denies that statements of law are either the backward looking factual report of conventionalism or the forward-looking instrumental programs of legal pragmatism [. . .]. It insists that legal claims are interpretive judgments and therefore combine backward and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.

To achieve this legitimation analytically, Dworkin distinguishes between “fit” and “justification.” The former is concerned with providing an interpretation that matches the existing practice and body of law. The latter seeks to identify a justification for this practice that shows it in its best light. The task of *jus post bellum* as integrity is to therefore offer a description of the existing international law, policy, and theory as applied to given transitions and seek to justify this practice by reference to its value goals in a unified or coherent fashion. Fundamentally, therefore, integrity is concerned with interpreting through a coherent set of principles about citizens’ rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community—including therefore the three dimensions of complexity identified above. According to Dworkin, “[l]aw as integrity requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.” Integrity offers guidance to those who have the special responsibility to interpret legal norms on behalf of the polity in question. In Dworkin’s work, these are paradigmatically judges, but can extend to all law creating, applying, or enforcing officials. This could extend to both officials in a transitional society and international actors providing assistance.

Integrity thus seeks to make seemingly substantively diverse areas of law coherent by reference to deeper principles and values inherent in the legal expression of a society’s political community. By developing its coherence and thus its legitimacy, the process of interpretation by integrity seeks to give reason to citizens to share in trusting in the legal expression of political community and view a particular national conception of *jus post bellum* as legitimate. The process of integrity provides the mechanism for justifying the choices and preferences of a given society in the pursuit of the value goals of each field, for example why they choose a truth commission over trials, or peacebuilding over transitional justice, or governance reform over a DDR process. Integrity ensures that these fields are not seen as fragments, but rather as constitutive and inter-dependent components of a broader political project in transition, to re-constitute a coherent sovereign political community, predicated on civic trust and the rule of law. The responsibility of integrity therefore requires the interpretation of the substantive components and practices of each of those fields with reference not only to the shared and interdependent goals of civic trust and the rule of law, but also with reference to the whole network of political structures and decisions of that transitional society. This approach suggests that we can have the tools that would constitute a *jus post bellum* framework across the three dimensions of complexity identified above but also a framework that could go farther and seek to justify as legitimate the nature of their application in a given transition.

#### IV. Principles of Integrity as *Jus Post Bellum*

An interpretive approach to jus post bellum that operates from integrity could manifest itself in tangible ways. A purely substantive framework does not speak to how an official of an international organization or transitional government is to act in transitions, facing the need to pursue public goods in the future. A purely formalistic approach does less to alter the behaviors, attitudes, and perceptions of such individuals than an approach that says that process matters: that the ends and the means are mutually re-enforcing. Acknowledging that integrity is both a principle to be pursued and a process by which its other goals can be reached and reconciled contributes significantly to re-enforcing behaviors, perceptions, and attitudes. Each field purports to contribute to the restoration of civic trust and the rule of law as contributions to the re-constitution of a sovereign political community. The following three principles seek to contribute to that overall goal in transitions.

An approach of jus post bellum that acknowledges organizing principles deeper than the substantive laws and policies reflects a commitment of the framework to the practice of integrity. This interpretive framework acknowledges the three dimensions of complexity, diverse areas of international law and regulation, the legal status of the actors involved, and the context of transitional societies identified above. By using the principles of accountability, stewardship, and proportionality, this framework compels states and international organizations to respond to and justify incoherence evaluated in their practices, between their stated normative commitments in those three dimensions of complexity and the absence of a coherent and consistent approach to those commitments. This process of justifying incoherence by reference to the norms of accountability, stewardship, and proportionality constitutes the practice and process of integrity as jus post bellum.

So conceived, manifesting jus post bellum as a series of interpretive principles is similar to Aurel Sari's approach regarding foreign armed forces in this volume. The difference in the present approach is the acknowledgment that organizing principles can be used to cast a broader net than foreign armed forces, which, while crucial, are only part of the wide array of international actors, such as international organizations, donor states, and international non-governmental organizations (NGOs), that may be present in a given society experiencing a post bellum period. When we seek to offer a coherent account of how these broader principles apply as part of an overall framework that pursues integrity across diverse areas of law and regulation, diverse legal actors, and diverse transitional societies, new areas of concern and reform may be generated for a jus post bellum framework.

#### A. Accountability

The principle of accountability is used to interpret diverse areas that share the desire to enhance civic trust and the rule of law. Though accountability is a malleable term with no legal definition and no settled theoretical meaning, its coherent pursuit can contribute to manifesting integrity in the development of civic trust and the rule of law. We can consider the issue of accountability as working at a domestic level, an international level, involving criminal responsibility, civil, state, and organizational responsibility—yet at present there is little systemic consideration of the relevant differences and discrepancies between these levels of accountability. Accountability is also seen as an important principle in existing jus post bellum proposals.

Concern for accountability arises in each area relevant to transitions. Accountability for gross violations of human rights is of both intrinsic and instrumental importance for transitional justice, in both its potential to provide justice to victims and capacity to contribute to the restoration of the rule of law and the non-recurrence of rights violations. An accountable security sector is acknowledged as a primary goal in SSR. The accountability of individuals for the commission of

international crimes is mirrored by State responsibility for such offences. In turn, consideration of State responsibility for international crimes raises the issue of individual and institutional accountability of donor states and international organizations. In addition, we could also consider that accountability extends to anti-corruption in development and the monitoring of and compliance with peace agreements.

Accountability of donors and international organizations can be considered in three categories: (i) internal accountability; (ii) liability for unlawful acts; and (iii) legal responsibility for breach of international obligations. These forms are limited by the state and institutional immunities, often provided for in Status of Forces/Mission Agreements or memoranda of association between donor states or international organizations and transitional states. Multilateral international organizations enjoy broad immunities. While international staff operate with actual or effective immunity from local laws, there is an ongoing contradiction between how internationals behave and how nationals are told that they must act. The present, largely fragmented, approach to accountability in international law neglects the challenge to reconcile these two positions. An approach predicated on integrity requires this contradiction to be reconciled.

For instance, the primary area of concern for United Nations (UN) accountability has been sexual exploitation and abuse. The UN has attempted to address the issue by adopting both preventive and investigative measures. A UN General Assembly resolution calls for the establishment of a Sexual Exploitation and Abuse Victim Assistance Mechanism (SEA/VAM) in every country in which the UN operates, which seeks to provide victims with access to relevant services. However, as a result of the lack of a direct formal relationship between the UN and military members of national contingents from troop contributing countries in UN missions, the UN does not have the authority to promulgate legally binding and enforceable rules addressed directly applicable to them without the approval and cooperation of their home countries. The primary avenue of redress remains a trial in the troop contributing country. A feeling of impunity can seep into the consciousness of the peacekeeping soldiers concerned to the serious detriment of the local population.

Institutional accountability among international development organizations is exemplified by the World Bank Inspection Panel, designed to address the concerns of people who might be affected by Bank projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of such projects. The International Law Commission's Draft Articles on the Responsibility of International Organisations propose new rules that could greatly expand liability of international organizations. In particular, the proposals include responsibility for omissions, joint, parallel, and indirect liability for states in assisting international organizations, and an "aggravated responsibility" regime, which enables any state or international organization to demand cessation of a violation of a jus cogens norm or erga omnes obligation. A further area of limited accountability is the regulation of NGOs, which varies widely from state to state without any general framework. Initiatives such as codes of conducts and certification schemes are positive developments. However, without a compliance mechanism, the temptation for an NGO to default on the commitments made under a self-regulation initiative is strong. Finally, actions of private military companies in transitions also generate significant concerns of accountability in transitional societies.

Accountability is thus fragmented across a wide range of general institutional structures and areas relevant to transitions, despite a commitment to the norm in several relevant areas. A consequence of this commitment is to suggest systematic avenues for individual and institutional accountability, to get the transitional society in the habit of seeing examples of accountability in action. This

commitment is not coherently reflected in the present concern of international organizations for their own conduct. It is a case of “do as we say, and not as we do.”

A consolidated accountability mechanism for international actors and institutions engaged in transitional societies and fragile states could pursue coherent accountability and reflect an approach based on integrity, where non-coherent conduct requires principled justification. Such a mechanism would depend on high levels of transparency, cooperation, and publicity among international actors. Such a mechanism, agreed among donor states, international organizations, with potential involvement for international non-governmental organizations (INGOs) and private military actors, could identify priority areas of accountability. Areas of concern for individual conduct could include sexual offences, as highlighted by UN efforts, but could also include corruption offences, as international organizations seek to promote accountability for human rights and good governance. Institutional accountability could adopt the approach of the World Bank’s Inspection Panel to a shared forum for bilateral donors. International institutions could join this mechanism by mutual consent, and within the memoranda of understanding signed with the transitional state authorizing their actions in the state or, where relevant, the authorizing Security Council resolution. Such a mechanism could respond to concerns of remoteness of UN and Inspection Panel procedures by being based in the transitional country, offering an opportunity to combine state and international and local institutions. A consolidated approach, based on a consensually agreed framework, eschews the difficulties of diverse institutional frameworks and offers tangible coherence and greater access and participation for members of a transitional society. A coherent consolidated approach to accountability could contribute to greater trust of the involved international organizations and the sense that they are bound by the rule of law by demonstrating a consistent practice of accountability mechanisms for international actors. This sense of trust and rule of law could in turn enable the pursuit of civic trust and the rule of law by these international actors in a transitional society: “do both as we say, and as we do” as international actors lead by their example of how accountability builds trust and the rule of law.

## B. Stewardship

The principle of stewardship responds to the need for a neutral account of the legal content and status international assistance to post bellum states and the need for international actors to effectively respect and engage with local ownership and priorities. As discussed above, a mechanism is needed to evaluate how given societies, international organizations, and fields reflect the combination of transformation and respecting local ownership and context. International actors are engaged in transitions because of the diminished capacity and legitimacy of the state of a transitional society to provide public goods. Nevertheless, the engagement of such international actors seeks to respect the local ownership of that society, whose government has recently proven itself incapable of delivering said public goods. How can international engagement respond to the circumstances of transition and also respect local ownership?

These concerns operate across the range of fields relevant to transition. For jus post bellum to capture this range, it needs a coherent principle for international engagement that acknowledges that local ownership is fundamentally concerned with the actions and interests of local actors, and so places emphasis on their conduct. Past practice of international engagement includes territorial administrations, international financial institutions, donors, private military actors, and NGOs. These institutions reveal a wide and diverse engagement with aspects of a state’s sovereignty, such as taxation, policing, natural resources, provision of aid, security, or the exploitation of natural resources. It is possible therefore to consider this range of activities across a spectrum. To reflect this diversity, any principle must therefore be content neutral. Moreover, the majority of

international actors in transition will operate on diverse legal bases. A majority may operate the consent of the state or territorial authority involved. A further group of international actors may be authorized by Security Council resolution to administer core governance functions of a state or territorial unit. Any evaluation of this diversely founded international engagement must therefore also be origin neutral. To comprehensively evaluate the nature of international engagement in transitions, we need a conception that acknowledges the tension between transformative goals and local ownership, is neutral as to the origin and content of international activities, and reflects the reality that international actors operate with severely incomplete information regarding local political economy.

This chapter proposes stewardship as that concept. Stewardship is predicated on a conception of sovereignty that acknowledges that sovereignty is functional and designed for the equal benefit and protection of the individual citizens of that society. In a sovereign political community, the state is a steward for the ultimate objects of value, individual citizens. International activities in transitions may range from the exercise of full sovereign functions to advisory functions such as monitoring and advocacy. In exercising these functions, international actors profess to contribute to that state's resumption of legitimate sovereign authority based on a stewardship conception of sovereignty. As a consequence, the focus of stewardship need not be on particular substantive outcomes and priorities. Rather, an appropriate focus of stewardship is on the processes by which the transitional societies re-constitute themselves with the assistance of international actors. A commitment to these processes by a transitional society, as expressed in State institutions, reflects the conditions under which the substantive decisions of that society warrant the respect and tolerance of the international community. Processes of international activities can be evaluated for publicity, transparency, use of vires, predictability, and clarity. These are virtues we associate with the rule of law. Processes can also be evaluated by reference to norms of inclusiveness, representativeness, and non-discrimination, cross-cutting norms of international human rights law. The combination of these features provides a basis for evaluating the initialization, operation, and conclusion of international processes.

International actors and transitional states share an overlapping desire to serve the citizens of a transitional society, but may do so in an environment of mutual distrust and lack of information about the motives and interests of the other. Among international actors, a competitive posture may ensue, with limited tangible coordination, especially at a political level. Commitment mechanisms could be designed to overcome these postures and pursue the stated shared goals. One component of this is ensuring the independence of key executing state agencies, through independent third party monitoring, international execution of State functions, etc.

Recent practice of multi-donor trust funds (MDTFs) shows some promise in this regard, but has also generated criticisms of slow procedures and governance and limited use in fragile states. Increasing international acknowledgment of the substantive interdependence of fields relevant to transition could see an increase in the use of such mechanisms to mitigate common risks to international actors engaged in transitions. MDTFs could be used to share fiduciary responsibility for public goods between international and representative national actors in collegial decision-making bodies. Such bodies could provide members with one vote for international and domestic actors, but shift towards greater domestic membership based on service and governance performance. The overall result would be frequent deliberation and negotiation between domestic and international representatives to achieve sufficiently large majorities in support of specific policies. Stefano Recchia gives the example of the Bosnian constitutional court composed of six national judges across the ethnic divide and three international judges. Mechanisms such as these rely on process

conditionality, limiting the distribution of international assistance to the willingness of a transitional government to demonstrate a commitment to inclusive and participatory processes and mitigating mutual distrust between donor and state. The US Millennium Challenge Account embodies this process approach to conditionality. This approach requires the state to identify its own priorities for removing constraints to economic growth and poverty reduction, and to propose specific programs based on those priorities. In establishing such priorities, the Millennium Challenge Corporation (MCC) asks interested States during the compact proposal process to undertake public consultations and to make use of their local institutions, both to talk about national development strategies and to gather the varied local perspectives and information needed to design sustainable programs.

Stewardship enables a differentiated evaluation of institutionally diverse actors. The proposals in this section illustrate the capacity of international actors to acknowledge their distinct role in public goods provision in transitions in building civic trust and the rule of law, and the need to respect local ownership. The role of stewardship as an organizing principle is to enable an evaluation of diverse actors regardless of their legal status in a transitional state and the content of their operations. In so doing, it seeks to respect local ownership, a stated priority of these diverse actors. This principle thus enables a coherent account of a range of international assistance in a given post bellum state and facilitates a shared relationship between all international actors and the state. This coherent account and shared relationship enables the population of a post bellum state to know where they stand with international actors and thus this relationship contributes to civic trust and the rule of law.

### C. Proportionality

The principle of proportionality responds to the need to resolve conflicts and competition between legal orders that co-exist and cooperate in post bellum states. The policy frameworks of international organizations struggle to provide a clear sense of priority among the various goals, such as truth, peace, security, that they seek to assist in individual transitions. This ambiguity leaves the policy frameworks with no metric to evaluate the legitimacy of particular priorities between these goals. Proportionality may provide one option for such a metric. There is little doubt that proportionality can be accepted as a general principle of international law and comparative constitutionalism. Its relevance to jus post bellum arises as it derives from the “just war” doctrine. It is mentioned in passing in jus post bellum proposals. Proportionality performs a balancing or reconciling function between an individual right and a competing right or compelling interest of the public or common good, seeking to balance the infringement of a right against the least restrictive competing alternative.

Proportionality arises in two areas of just war theory: the justified use of force in self-defence, and the nature of the conduct of hostilities. Proportionality has also been used as a criterion for assessing the legitimacy of non-military counter-measures. Proportionality is also central to modern judicial assessment of the infringement of international human rights. Proportionality also features in the jurisprudence of the WTO system and the European Court of Justice. The challenge arises in considering the application of proportionality in international law and international affairs to the case of transitional circumstances. In her jus post bellum framework, Kirsten Boon suggests that proportionality would have a potential role to respond “to the need to create a measure and process regulating the extent and nature of legal interventionism by international actors.” Recchia suggests two consequences of proportionality in jus post bellum:

First, higher degrees of paternalism will be justified over those societies that have been most adversely affected by violent conflict and where the state’s institutional apparatus has all but collapsed. Second, since any obstacles to political order and self-rule in the aftermath of violent

conflict are inherently political, they can be gradually overcome with the help of various confidence-building measures and external assistance aimed at institutional reconstruction [ . . .]. As a postwar society becomes progressively capable of managing its own affairs and protecting basic human rights, international interference should be accordingly reduced.

We can consider the application of proportionality to each field. Kai Ambos considers the principle relevant to the determination of institutions and pursuit of value goals inherent in the practice and exercise of transitional justice, for instance the legitimacy of amnesties in a given transition. This approach could be extended to an evaluation of the priority given to the various goals in transitional justice: justice, reparation, truth, and acknowledgment. By invoking transitional justice's relationship with amnesty, a proportionality approach would also offer a platform for evaluating the goals and claims of transitional justice by comparison to the other fields of transition, such as peacebuilding. This approach would require a coherent articulation of the priorities and principles that international actors seek to bring to bear in supporting each field in transition through the international legal and policy frameworks. Finally, we can consider the application of proportionality to the overall nature of international institutional engagement in a given transition. Kirsten Boon identified that the extent of state collapse in transitions, and extent of human rights violations may suggest a deeper intervention, whereas a modern legal system, a functioning civil society, a history of a democratic, elected governance, and respect for human rights and universal norms suggest a lighter intervention. The 2011 World Development Report identified five factors to be considered in tailoring international engagement to a given transition.

Balancing priorities, values, and challenges in transitions is inherently and intensely political and competitive. Proportionality is a valuable means of assessment of transitions because it provides a common means of evaluating the choices made in balancing competing interests in a wide variety of contingent areas. A common means of evaluation does not resolve these balancing acts, but enables greater comparison between diverse areas and compels principled justification of the choices made. It provides little more than a structure for the assessment of public reasons. In that way, it contributes to the pursuit of a publicly reasoned foundation to transition, and to the pursuit of the use of integrity in decision-making and practices in transitions. By facilitating a comparison of balancing acts made across discrete fields and legal orders, a coherent account of proportionality can be offered that contributes to the restoration of civic trust and the rule of law.

## V. Conclusion

Complexity is necessary and sufficient as a description of post-conflict environments, but insufficient as a theoretical framework. The principle of integrity applied as a *jus post bellum* framework responds to the complexity of transitional societies by pursuing a coherent interpretation and evaluation of the actions of national and international actors. The risks of incoherence and misalignment between areas relevant to transitions are real and significant, not merely a matter of theoretical tidiness. Getting it wrong in transition can risk lives and cause a return to conflict. The development of a *jus post bellum* based on integrity and stated evaluative principles could enable coherent, explicit, and public evaluation of these issues significant in transitional societies and also ensure structural continuity in the contribution of diverse areas to the necessary conditions of civic trust and the rule of law. In so doing, this approach to *jus post bellum* does not seek to raise the already great expectations for international law, policies, and practice in transitions. Rather, it argues for a greater legal and policy consciousness of the need and potential for integrity in the interpretation of these areas. The development of a more coherent *jus post bellum*, based on the principles of accountability, proportionality, and stewardship, would not necessarily resolve the problems of transitions but rather could enable coherent, explicit, and public consideration of the

array of issues significant in transitional circumstances for both individual states and societies. The pursuit of a coherent account of justice after conflict is thus not something we are likely to “complete” in a given transition, but remains a necessary and worthwhile endeavor.