The function of Jus Post Bellum in international law

Iverson, J.M.; Iverson J.M.

5. *Jus Post Bellum* in the context of International and Non-International Armed Conflict

A. Introduction

One important dimension that needs explicit exploration is the differences and commonalities between *jus post bellum* in two types of armed conflict: international armed conflict and non-international armed conflict. "Armed conflict" as a standard replacement for the term "war" originates with the Geneva Conventions of 1949. The Pictet Commentary to the First Geneva Convention of 1949 is clear that substituting "armed conflict" in place of "war" was intentionally done to ensure that States do not attempt to deny the applicability of the law by, for example, claiming that they are engaged only in a police action, rather than a war.

[1]

These two categories, international armed conflict and non-international armed conflict, are the two dominant concepts that structure thinking about armed conflict. The concepts are well-understood in the field of international humanitarian law, but can cause confusion without precise definition. The clearest term used in the Geneva Conventions of 1949 are, for non-international armed conflicts: "armed conflict not of an international

[1] The Geneva Conventions of 12 August 1949: Commentary (Vol.I) - Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field by Pictet, Jean S. (1952), Chapter I General Provisions, p.27 Article 2 - Application of the Convention, p.32.

character."[2] The explanation of armed conflicts of an international character (that is, international armed conflict) is as follows:

> [a]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[3]

The actual wording of above suggests a distinction not normally drawn between international armed conflict ("[a]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them") and occupation ("shall also apply"). It is clear that the Geneva Conventions, and thus International Humanitarian Law, apply to declared war or any other armed conflict as well as occupation. Further, Additional Protocol II explains that what is normally described as "International Armed Conflict" "include[s] armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination[.]"[4] The following sections will first discuss the traditional area of distinguishing International Armed Conflict from Non-International Armed Conflict for *jus in bello*, then for *jus ad bellum*, before turning to *jus post bellum*.

[2] See, e.g., Common Article 3 of each of the Geneva Conventions of 1949.

[3] Common Article 2 of each of the Geneva Conventions of 1949.

[4] APII, Article 1.

B. Jus in bello in IAC and NIAC

This section does not intend to outline international humanitarian law/*jus in bello* in general—this has been done in an introductory manner in Chapter 2.A. The focus of this section is to emphasize that in contemporary law, it is clear that both International Armed Conflicts and Non-International Armed Conflicts are regulated by *jus in bello*.

The purported origins of *jus in bello* purely in International Armed Conflict, as opposed to Non-International Armed Conflict, is based in the early positivist stance that international law regulates only states. The longer Just War Tradition was not so limited. One need merely look at the writings of Francisco de Victoria's *De Indis et De Jure Belli*[5] regarding the law of nations or the trial of King Charles I of England for violations of the law of war during the two civil wars during his reign to complicate the overly-neat picture of progression from *jus in bello* only applying to International Armed Conflict before it was purportedly extended for the first time to Non-International Armed Conflict in Common Article 3 of the Geneva Conventions of 1949. Hugo Grotius discusses the idea of private and mercenary wars. Emer de Vattel argued that a sovereign must observe the laws of war in the case of open rebellion. Francis Lieber's codification of the laws of war occurred during the U.S. Civil War. Nonetheless, given the dominant positivist stance of international law and the primitive state of human rights law, Common Article 3 is rightly celebrated as a turning point in the formalization and universalization of the regulation of the conduct of Non-International Armed Conflict (i.e., NIAC *jus in bello*).

[5] De Vitoria, Francisco. Francisci de Victoria De Indis et De ivre belli relectiones. No. 7. Carnegie Institution of Washington, 1917.

Common Article 3 is often described as a mini-convention, meant to provide a baseline standard for all armed conflict.[6] Literally read, it applies only to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" not all armed conflict, but given the universal ratification of the Geneva Conventions of 1949 there is no real territorial bar and it has been generally recognized as customary international law for all armed conflicts. It protects "Persons taking no active part in the hostilities" and obliges each party to the conflict to treat such persons humanely, specifically prohibiting a short list of inhumane conduct.[7]

In order to establish the existence of an International Armed Conflict, the threshold of violence is thus very low—the first shot fired downrange can suffice, or no shots at all in the case of occupation or declared war.[8] The critical element is that the armed conflict

[6] For more on the history leading to the creation of Common Article 3, see Elder, David A. "Historical Background of Common Article 3 of the Geneva Convention of 1949, The." Case w. Res. J. Int'l L. 11 (1979): 37.

[7] (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[8] But see *Nicaragua v. United States of America* [1986] ICJ Rep 14, [195] regarding "mere frontier incidents": ("The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.")

must be between two or more states. For a Non-International Armed Conflict, differing thresholds apply depending upon whether Common Article 3 or Additional Protocol II applies. Common Article 3 has a lower threshold, requiring a minimum level of intensity, and requiring the non-state armed groups to possess organized armed forces, for example command structure and ability to sustain military operations.[9] The protections of Common Article 3 were substantially extended for a certain set of Non-International Armed Conflicts with Additional Protocol II. Additional Protocol II requires the thresholds of intensity and organization required by Common Article 3, and additionally:

> shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. [10]

Unlike Common Article 3, the threshold for Additional Protocol II also requires that it is not of the character of the armed conflicts described in Article 1 Additional Protocol I, that a state's armed forces are party to the conflict, and that the non-state party's armed group exercise control over territory in a manner than enables them to carry out sustained and concerted military operations and to implement Additional Protocol II.

[9] ICTY, Appeals Chamber, *Tadic*, 2 October 1995

[10] AP I, Art. 1.1.

In addition to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, there are a host of additional treaties, many detailed in Section *Introduction, Exploration of Sister Terms, Jus in bello* above. The two Additional Protocols of 1977 continue not only the Geneva Conventions of 1949 but the Hague Conventions of 1899 and 1907 in restricting the means and methods of warfare, including specific rules that apply to demilitarized zones and non-defended areas.

There are also treaties that restrict weapons that are part of *jus in bello* both with respect to non-international armed conflict and international armed conflict. These treaties have already also been examined to some extent in Section *Introduction, Exploration of Sister Terms, Jus in bello* above. The trend is to make clear or provide means by which these treaties apply to non-international armed conflicts as well as international armed conflicts. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), adopted 10 October 1980, explicitly applied to non-international armed conflicts:

> 2.This Protocol shall apply, in addition to situations referred to in Article I of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.
>
> 3.In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the

> conflict shall be bound to apply the prohibitions and restrictions of this Protocol.[11]

Similarly, under the 1995 Protocol on Blinding Laser Weapons (Protocol IV)[12] non-international armed conflict were covered, and ultimately the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects[13] was amended in 2001 to cover non-international armed conflicts.[14]

In addition, the Convention for the Protection of Cultural Property in the Event of Armed Conflict specifically applies to non-international armed conflict with regards to "respect for cultural property."[15] This means the bulk of the convention on its own terms is applicable in non-international armed conflicts. The Second Protocol to the Hague

[11] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effect (United Nations [UN]) 1342 UNTS 137, UN Reg No I-22495, Protocol II Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.

[12] 1995 Protocol on Blinding Laser Weapons (Protocol IV; adopted 13 October 1995, entered into force 30 July 1998; 2024 UNTS 163).

[13] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effect (United Nations [UN]) 1342 UNTS 137, UN Reg No I-22495, Art.1.

[14] Second Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects - Final Document, Part II Final Declaration.

[15] Convention for the Protection of Cultural Property in the Event of Armed Conflict (United Nations Educational, Scientific and Cultural Organization [UNESCO]) 249 UNTS 240, UN Reg No I-3511, Ch.VI Scope of Application of the Convention, Art.19.

Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict extends the entire Convention to non-international armed conflicts.[16]

International Humanitarian Law has mostly been described in this section with reference to treaty law, but of course it also exists as customary international law. Customary International Humanitarian Law with respect to non-international armed conflict is somewhat controversial, particularly with respect to the role of role and status of combatants. Nonetheless, the jurisprudence of international criminal tribunals, and the efforts of jurists such as Theodor Meron[17] and notably the International Committee of the Red Cross's customary international humanitarian law study[18] have developed the basic argument with respect to application of *jus in bello* in international armed conflicts to *jus in bello* in non-international armed conflicts:

> Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife. [19]

[16] Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (United Nations Educational, Scientific and Cultural Organization [UNESCO]) 2253 UNTS 172, UN Reg No A-3511.

[17] Meron, Theodor. "The continuing role of custom in the formation of international humanitarian law." *American Journal of International Law* (1996): 238-249.

[18] Henckaerts, Jean-Marie, Louise Doswald-Beck, and Carolin Alvermann, eds.*Customary International Humanitarian Law: Volume 1, Rules*. Vol. 1. Cambridge University Press, 2005.

[19] ICTY, *The Prosecutor v. Duško Tadić aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, § 119.

C. Jus ad bellum in IAC and NIAC

"*Jus ad bellum*" is a phrase normally used only with respect to international armed conflict. There is no prohibition of rebellion (nor of putting down rebellion) as such in international law. In contrast, Article 2(4) of the United Nations Charter famously commands:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. [20]

Thus, *jus ad bellum* is sometimes now declared to be *jus contra bellum*, restricting resort to force in international armed conflict to self-defence or United Nations-authorized use of force. That said, a broader view of *jus ad bellum* has implications for the treatment of non-international armed conflict.

International law is not simply mute on the issue of the (*jus ad bellum*) issue of resort to the use of force amounting to an armed conflict when both parties are not states, particularly in the context of decolonization and self-determination. Indeed, the context of decolonization has helped to redraw the boundaries of international armed conflict and non-international armed conflict. The concept of self-determination can be found at least as far back as the late 18th century, with the United States of America proclaiming the

[20] Charter of the United Nations (done at San Francisco, United States, on 26 June 1945) (United Nations [UN]) 1 UNTS XVI, 892 UNTS 119, 59 Stat 1031, TS 993, 3 Bevans 1153, 145 BSP 805, Ch.I Purposes and Principles, Art.2(4).

principle in the Declaration of Independence[21] and was further promoted by the leaders of the (First) French Republic. The concept was further developed after the First World War, and found truly modern expression in the United Nations Charter and subsequent practice. Three chapters of the United Nations Charter are of particular interest: Chapter XI: Declaration regarding Non-Self-Governing Territories; Chapter XII: International Trusteeship System; and Chapter XIII: The Trusteeship Council.

Self-determination is a right enjoyed by, at a minimum, people under colonial rule. There is a legal obligation not to use force to frustrate that right. The keystone for this clarification of this area of law is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, annexed to United Nations General Assembly Resolution 2625, widely known as the "Friendly Relations Declaration" of 1970.[22] Similarly, the 1973 United Nations General Assembly Resolution 3103 on the Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes:

> [t]he armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons

[21] Declaration of Independence of the United States of America (United States) 51 BSP 847.

[22] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (United Nations [UN]) UN Doc A/RES/2625(XXV), Annex.

> engaged in armed struggle against colonial and alien domination and racist regimes [23]

This was given additional weight by Additional Protocol I, as previously described.[24] It says in Article 1, paragraphs 3 and 4:

> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[25]

While Additional Protocol I governs *jus in bello* concerns, its emphasis on the right of self-determination again complicates the *jus ad bellum* concerns regarding the right to enter into armed conflict, and the recharacterization of certain armed conflicts as international armed conflicts rather than non-international armed conflicts.

While this section focuses on the contemporary *jus ad bellum* in international armed conflict and non-international armed conflict, later sections will discuss the long history

[23] United Nations General Assembly Resolution 3103 (XXVIII) on the basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes (United Nations General Assembly [UNGA]) UN Doc A/RES/3103(XXVIII), para. 3.

[24] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

[25] Geneva Conventions Additional Protocol I (1977).

of *jus ad bellum*. There was nothing like the prohibition on the use of force in Article 2 of the United Nations Charter in the time of Hugo Grotius, but there were still clear *jus ad bellum* limits. Grotius wrote that it was not "right to take up arms in order to weaken a power which, if it becomes too great, may be a source of danger" for example.[26]

It is also worth looking at domestic law approaches to armed conflict. In the United States, in theory, native tribes were protected from attack, except when Congress authorized a just and lawful war against them.

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them. [27]

Whether armed conflict with native groups would constitute an international armed conflict or non-international armed conflict is somewhat anachronistic, although the issue of an international legal personality and legitimacy for national liberation movement has 20th century echoes.

This section was not intended to exhaust the issue of *jus ad bellum*, but rather to introduce *jus ad bellum* with respect to international armed conflict and non-international

[26] H Grotius De iure belli ac pacis, vol II, ch l, sec XVII

[27] An Act to provide for the government of the territory northwest of the river Ohio. The Ordinance of July 13, 1787 (1 Stat. 52). Available at http://avalon.law.yale.edu/18th_century/nworder.asp last visited 24 March 2015.

armed conflict and set the stage for a discussion of *jus post bellum* in the context of international armed conflict and non-international armed conflict.

D. Jus post bellum in IAC and NIAC

What *jus post bellum* looks like in an international armed conflict and non-international armed conflict depends on what one means by *jus post bellum*. As described above, there are two major ways to approach *jus post bellum* and its relationship to its sister terms, as well as a hybrid approach. With the temporal approach, jus ad bellum, governs the beginning of an armed conflict, jus in bello governs the armed conflict from beginning to end, and *jus post bellum* governs directly after armed conflict is terminated, in effect restricted to early peace. With the functional approach, *jus post bellum* applies to the entire function of transition from armed conflict to peace, even if some of that function occurs during armed conflict. Taken together, there is also the possibility of a hybrid approach, which is defined both by time and function, rooted temporally in the period of transition from conflict and the achievement of a positive peace, and functionally restricted to the construction of positive peace.

1. Complications

Addressing *jus post bellum* with respect to international and non-international armed conflict is complicated by at least three factors, which will be described before looking at the subject matter placed within a general schematic representation of the subject matter of *jus post bellum*. Each complication will be addressed now in turn.

First, the status of an armed conflict as a non-international armed conflict or international armed conflict is not static. An international armed conflict can be transformed into a non-international armed conflict in practice. The reverse is also true. Afghanistan's recent history provides a good example of this. In Afghanistan, there was arguably a non-international armed conflict between the forces later characterized as the "Northern Alliance" and the Taliban government, although one could argue with requirement of sufficient ongoing intensity. The best understanding is that this then became an "internationalized" international armed conflict between the United States/NATO conflict with Afghanistan until the Taliban were overthrown. Once a new government was established and widely recognized, the armed conflict between the government and the Taliban (as well as other organized armed groups), the armed conflict is best characterized as a non-international armed conflict. One could argue whether Pakistan's alleged support for organized armed groups "internationalizes" the conflict again. Similarly, the long civil war in Sudan was a non-international armed conflict until South Sudan seceded, any further armed conflict between Sudan and those who now constitute the government of South Sudan would then be characterized as an international armed conflict.

Second, non-international armed conflicts and international armed conflicts can co-exist at the same time and place (a "mixed conflict") or in ways that influence each other. Pakistan arguably provides an example of this. The United States asserts it is in a non-international armed conflict with organized armed groups based at least in part in Pakistan. Formally, the repeated use of force by the United States in the territory of

Pakistan may satisfy the requirements for an international armed conflict, if the government of Pakistan has not consented to the use of force. While related, and in fact springing from the same use of force, as a legal matter the (potential) non-international armed conflict and international armed conflict must be analysed separately.

Third, non-international armed conflict may be increasingly less limited to one state territory per conflict, and non-international armed conflicts may be more difficult to separate than previously. Organized armed groups party to non-international armed conflicts may have no inherent need to remain in a single territory, and indeed crossing territories or being based across territories can provide advantages or be necessary for the survival of organized armed groups. The Taliban and the Haqqani Network are examples of organized armed groups straddling the Afghani-Pakistan border. The Islamic State is operating in both Iraqi and Syrian territory. The various armed groups in the Great Lakes region of Africa do not have a great respect for national boundaries.

2. Prohibitions and facilitations

As a general note, while jus ad bellum and jus in bello generally but not exclusively consist of prohibitions, *jus post bellum* has both prohibitions and facilitative functions. Jus ad bellum, jus in bello, and *jus post bellum* will now be briefly examined with respect to prohibitions, obligations, facilitative opportunities.

The general rule of contemporary jus ad bellum is prohibition, with limited exceptions for the use of force in international affairs for self-defence and United Nations Security Council authorized actions. Arguably the inclusion of the option for collective security

mechanisms and Security Council resolutions are facilitative, but the general tendency is prohibition. Those agreements themselves can create specific obligations dependent on the particular situation.

Jus in bello is usually phrased in the form of prohibition regarding the particular uses of force, such as prohibiting attacks against civilians, indiscriminate attacks, disproportionate attacks, attacks that create unnecessary suffering, or prohibited means and methods. Jus in bello/international humanitarian law/law of armed conflict does, however, include affirmative obligations, such as care for those rendered *hors de combat* and for prisoners of war, and obligations on occupiers. Interestingly, while these affirmative obligations are normally squarely placed as part of jus in bello, they often involve obligations that extend beyond active combat—occupations have no inherent time limit, and obligations to prisoners of war can take years to discharge. While not obligatory, the possibility of jus in bello facilitative activity like exchanges of prisoners of war is certainly possible.

3. More procedural aspects

a) Treaty and agreement law

As discussed above, this author finds the hybrid functional approach the better reading of *jus post bellum*, allowing a full incorporation of jus terminatio and lex pacificatoria into the concept and keeping the focus on the function of the law and noting the important but sometimes arbitrary temporal delimitation between the end of an armed conflict and early peace. Using this approach, one formal distinction that can be made is the distinction

between an armed conflict terminating through a peace treaty (or series of peace treaties) in the case of an international armed conflict, and a peace agreement (or series of peace agreements) in the case of a non-international armed conflict. The term "peace treaty" is generally reserved for agreements not signed by non-state organized armed groups, whereas the more general term "peace agreement" can include peace treaties but is used more frequently for agreements that are not technically treaties because they include non-state groups (other than inter-governmental organizations) in the agreement.

In an international armed conflict, during lex pacificatoria or jus terminatio, the application of the Vienna Convention on the Law of Treaties[28] and associated customary international law of treaties is a critical facilitative law that is a key part of *jus post bellum*. The customary international law of state recognition may come into play if there has been an attempted or successful secession or annexation, although secession may be more likely in (what started as) a non-international armed conflict. The customary international law of state recognition is also important if a government has been overthrown or if an occupying power attempts to install a puppet government. The recognition of states and governments applies to states, but can also come into play for intergovernmental organizations as well.

b) Amnesty and *aut dedere aut judicare*

One tension that may come into play in the transition from armed conflict to peace, perhaps particularly in international armed conflict, is the obligation that exists to

[28] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, (Entry into force: 27 January 1980) United Nations Treaty Series, vol. 1155, p. 331

prosecute or extradite for prosecution the alleged perpetration of certain crimes. The fight against impunity that creates this tension, often at the heart of the "peace vs. justice" debate, may complicate the short-term transition to peace but is often helpful to make the transition to peace successful in the long run.[29] This is often described using the Latin term *aut dedere aut judicare*, although it is common now to tamp down the demand to prosecute to merely "submit for prosecution" because of varied responsibilities and procedures at the domestic level and the presumption of innocence in criminal law. Given actual state practice and demonstrated opinio juris, one cannot generally assert there is a yet a general customary duty to prosecute or extradite for all alleged international criminal law violations. This is explored in greater detail in Chapter 6.b.2.b *infra*.

c) The Responsibility to Protect

The Responsibility to Protect doctrine[30] is one of general application as a matter of international law and policy. It does not require armed conflict of any sort for its

[29] *See e.g.* Darehshori, Sara. *Selling justice short: why accountability matters for peace*. Human Rights Watch, 2009.

[30] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 39–45; see also United Nations Secretary General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change* (2004) 65–7; United Nations General Assembly, *2005 World Summit Outcome*, UN Doc. A/60/L.1 (15 September 2005) paras 138–9; United Nations General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677 (12 January 2009) para. 48.

application. Rather, as part of the "just cause" it requires either large-scale loss of life or "ethnic cleansing."[31]

The Responsibility to Protect doctrine includes the Responsibility to Prevent, Responsibility to Respond, and the Responsibility to Rebuild. The Responsibility to Prevent and the Responsibility to Rebuild are more tightly tied to *jus post bellum*. In comparison with the Responsibility to Respond, these aspects of the Responsibility to Protect (Prevent and Rebuild) apply more generally to international armed conflict and non-international armed conflict, but are probably still envisaged to apply more to non-international armed conflict. This subject is treated in more detail in chapter 6.B.2.b *infra*.

4. Mixed procedural and substantive aspects

Reviewing the schematic depiction of examples of law and norms regarding the transition to peace reproduced above, most of the material under the first column, titled "Procedural" has been addressed in this section (*Jus post bellum* in IAC and NIAC). The Vienna Convention on the Law of Treaties and the customary law of treaties has been briefly examined (a very general/global law), as opposed to intrastate/domestic peace negotiations (which can be very specific/local). Both are part of the lex pacificatoria or jus terminatio. Similarly, the general laws and norms regarding the recognition of states and government apply as a general matter, and the specific case-by-case state recognition

[31] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) p. XII.

and government recognition on the local matter also makes law and norms that apply to the transition to peace. Also discussed above—the treaty and customary international law regarding the prosecution or extradition of individuals accused of certain international crimes, in tension with local amnesty laws. Finally on the procedural end of law and norms regarding the transition to peace, the "Responsibility to Protect" doctrine was discussed.

Moving to law and norms that are a mixture of procedural and substance, several issues are worth particular consideration in distinguishing between international armed conflict and non-international armed conflict. These include United Nations Security Council Resolutions, customary international law on post-conflict administration, the existence of global judicial bodies with jurisprudence relating to *jus post bellum*, regional judicial bodies jurisprudence relating to *jus post bellum*, multilateral disarmament treaties, specific disarmament/demobilization reintegration efforts, and domestic judicial bodies jurisprudence relating to *jus post bellum*.

The authority of United Nations Security Council resolutions derives from the United Nations Charter, particularly Chapters VI and VII.[32] The Charter itself derives its legal status not only from the general force of treaty law as an almost universally ratified treaty, but from Article 103 of the Charter, which states "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter

[32] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Chapters that pertain to the powers of the Security Council (V, VI, VII, VIII, and XII), with Chapters VI and VII of the most relevance for resolutions.

and their obligations under any other international agreement, their obligations under the present Charter shall prevail." [33] Article 25 obliges Members of the United Nations to carry out the decisions of the Security Council.[34] While the United Nations Security Council was not intended to function as a legislative body, it has wide powers on matters touching upon peace and security, and the retraints on its acting in a tailored fashion and to avoid *ultra vires* action are more practical and political than through a formal institutional check.

The United Nations Security Council has issued a number of resolutions of relevance regarding the transition from armed conflict to peace, including resolutions that have applicability outside a particular territorial situation.. United Nations Security Council Resolutions 1325[35] and 1889[36] are of particular note. In general terms, United Nations Security Council Resolution 1325 enunciates both procedural norms for the resolution of armed conflict and norms for the substance of peace agreements. With respect to procedural norms, see for example paragraph 1: "1. Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and

[33] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[34] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 25.

[35] UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security] , 31 October 2000, S/RES/1325 (2000).

[36] UN Security Council, Security Council resolution 1889 (2009) [on women and peace and security], 5 October 2009, S/RES/1889 (2009).

international institutions and mechanisms for the prevention, management, and resolution of conflict[.]"[37] With respect to substantive norms, see for example paragraph 8:

> 8. Calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary[.][38]

United Nations Security Council Resolution 1889 also enunciates procedural norms for the resolution of armed conflict as well as substantive requirements in the post-conflict phase. With respect to procedural aspects of United Nations Security Council 1889, see for example, from the preambular language:

> Reiterating the need for the full, equal and effective participation of women at all stages of peace processes given their vital role in the prevention and resolution of conflict and peacebuilding, reaffirming the key role women can play in re-establishing the fabric of recovering society and stressing the need for their involvement in the development and implementation of post-conflict strategies in order to take into account their perspectives and needs, Expressing deep concern about the under-representation of women at all stages of peace processes, particularly the very low numbers of women in formal roles in mediation processes and stressing the need to ensure that women are appropriately appointed at

[37] UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security] , 31 October 2000, S/RES/1325 (2000).

[38] UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security] , 31 October 2000, S/RES/1325 (2000).

> decision-making levels, as high level mediators, and within the composition of the mediators' teams, Remaining deeply concerned about the persistent obstacles to women's full involvement in the prevention and resolution of conflicts and participation in postconflict public life, as a result of violence and intimidation, lack of security and lack of rule of law, cultural discrimination and stigmatization, including the rise of extremist or fanatical views on women, and socio-economic factors including the lack of access to education, and in this respect, recognizing that the marginalization of women can delay or undermine the achievement of durable peace, security and reconciliation[.][39]

Further, United Nations Security Council Resolution 1889 states:

> 1. Urges Member States, international and regional organisations to take further measures to improve women's participation during all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding, including by enhancing their engagement in political and economic decision-making at early stages of recovery processes, through inter alia promoting women's leadership and capacity to engage in aid management and planning, supporting women's organizations, and countering negative societal attitudes about women's capacity to participate equally;
>
> […]
>
> 8. Urges Member States to ensure gender mainstreaming in all post-conflict peacebuilding and recovery processes and sectors[.][40]

With respect to substantive aspects of United Nations Security Council Resolution 1889,

see the language in the preamble and paragraph 10:

> Expresses its intention, when establishing and renewing the mandates of United Nations missions, to include provisions on the promotion of gender equality and the empowerment of women in post-conflict situations, and

[39] UN Security Council, Security Council resolution 1889 (2009) [on women and peace and security], 5 October 2009, S/RES/1889 (2009).

[40] Ibid.

> requests the Secretary-General to continue, as appropriate, to appoint gender advisors and/or women-protection advisors to United Nations missions and asks them, in cooperation with United Nations Country Teams, to render technical assistance and improved coordination efforts to address recovery needs of women and girls in postconflict situations;
>
> […]
>
> 10. Encourages Member States in post-conflict situations, in consultation with civil society, including women's organizations, to specify in detail women and girls' needs and priorities and design concrete strategies, in accordance with their legal systems, to address those needs and priorities, which cover inter alia support for greater physical security and better socio-economic conditions, through education, income generating activities, access to basic services, in particular health services, including sexual and reproductive health and reproductive rights and mental health, gender-responsive law enforcement and access to justice, as well as enhancing capacity to engage in public decision-making at all levels[.][41]

In addition to the United Nations Security Council Resolutions 1325 and 1889, there are international standards for peace agreements emerging from the United Nations.[42] The Secretaries-General of the United Nations have taken particular interest in this subject in recent decades.

Of course, in addition to United Nations Security Council resolutions and United Nations guidelines of general application, United Nations Security Council resolutions also can regulate specific transitions to peace. Rather than simply putting an end to conflict, they

[41] Ibid.

[42] See, e.g., UN Press Release SG/SM/7257, Secretary-General Comments on Guidelines Given to Envoys (10 December 1999) (guidelines on human rights and peace negotiations); The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary General, UN Doc. S/2004/616 (including recommendations for negotiations, peace agreements, and Security Council mandates); Report of the Panel on United Nations Peace Operations [Brahimi Report], UN Doc. A/55/305-S/2000/809, 158 (mandating the UN's capacity to put conditions on peace agreements)

often attempt to establish future good governance—part of the transition to a just and sustainable peace. United Nations Security Council Resolution 1244[43] drew upon the Rambouillet Accords[44] to regulate the transition to peace in Kosovo. One can see similar regulation with the transition to peace in, for example, Cambodia,[45] elsewhere in the former Yugoslavia,[46] Liberia,[47] East Timor,[48] Afghanistan,[49] and Iraq.[50] Most of these examples cannot always be neatly categorized into international armed conflict or non-international armed conflict—Cambodia was largely a non-international armed conflict but had significant foreign involvement that may have internationalized it; the conflicts in the former Yugoslavia included organized armed groups, states, and organized armed conflict under some degree of control of states; Liberia's conflict was a non-international

[43] UN Security Council, *Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo]*, 10 June 1999, S/RES/1244 (1999).

[44] Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, UN Doc. S/1999/648, annex.

[45] E.g. UN Security Council, *Resolution 745 (1992) Adopted by the Security Council at its 3057th meeting, on 28 February 1992*, 28 February 1992, S/RES/745 (1992)

[46] E.g. UN Security Council, *On Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium between the Government of Croatia and the local Serb representatives Resolution 1023 (1995) Adopted by the Security Council at its 3596th meeting, on 22 November 1995*, 22 November 1995, S/RES/1023 (1995).

[47] E.g. UN Security Council, *Resolution 788 (1992) Adopted by the Security Council at its 3138th meeting, on 19 November 1992*, 19 November 1992, S/RES/788 (1992).

[48] E.g. UN Security Council, *Resolution 1277 (1999) Adopted by the Security Council at its 4074th meeting, on 30 November 1999*, 30 November 1999, S/RES/1277 (1999).

[49] E.g. UN Security Council, *Security Council Resolution 1378 (2001) on the situation in Afghanistan*, 14 November 2001, S/RES/1378 (2001).

[50] E.g. UN Security Council, *Security Council Resolution 1483 (2003) on the situation between Iraq and Kuwait*, 22 May 2003, S/RES/1483 (2003).

armed conflict with significant foreign involvement, East Timor may have amounted to a non-international armed conflict before independence, at which point any armed conflict would be an international armed conflict; and Afghanistan's history of conflict (as already detailed) is remarkably baroque.

The Security Council's role in the transition to peace in Liberia exemplifies the emphasis on future-oriented goals of good-governance; not simply focused on the cessation of armed conflict. The Security Council has passed a great number of resolutions on the UN Mission in Liberia (UNMIL) and the situation in Liberia between 2002 and 2016. These included Preliminary matters;[51] establishment of UNMIL;[52] continuing its mandate;[53]

[51] UN Security Council, *Security Council resolution 1408 (2002) [on the situation in Liberia]*, 6 May 2002, S/RES/1408 (2002); UN Security Council, *Security Council resolution 1458 (2003) [on the situation in Liberia]*, 28 January 2003, S/RES/1458 (2003); UN Security Council, *Security Council resolution 1343 (2001) [on the situation in Sierra Leone]*, 7 March 2001, S/RES/1343 (2001); UN Security Council, *Security Council resolution 1478 (2003) [on the situation in Liberia]*, 6 May 2003, S/RES/1478 (2003); UN Security Council, *Security Council resolution 1497 (2003) [on the situation in Liberia]*, 1 August 2003, S/RES/1497 (2003); UN Security Council, *Security Council resolution 1521 (2003) [on dissolution of the Security Council Committee established pursuant to Resolution 1343 (2001) concerning Liberia]*, 22 December 2003, S/RES/1521 (2003).

[52] UN Security Council, *Security Council resolution 1509 (2003) [on establishment of the UN Mission in Liberia (UNMIL)]*, 19 September 2003, S/RES/1509 (2003).

[53] UN Security Council, *Security Council resolution 1836 (2008) [on extension of the mandate of the UN Mission in Liberia (UNMIL)]*, 29 September 2008, S/RES/1836 (2008); UN Security Council, *Security Council resolution 1938 (2010) [on extension of the mandate of the UN Mission in Liberia (UNMIL)]*, 15 September 2010, S/RES/1938 (2010); UN Security Council, *Security Council resolution 1885 (2009) [on extension of the mandate of the UN Mission in Liberia (UNMIL)]*, 15 September 2009, S/RES/1885 (2009); UN Security Council, *Security Council resolution 2008 (2011) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2012]*, 16 September 2011, S/RES/2008(2011); UN Security Council, *Security Council resolution 2066 (2012) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2013]*, 17 September 2012, S/RES/2066 (2012); UN Security Council, *Security Council resolution 2176 (2014) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 31 Dec. 2014]*, 15 September 2014, S/RES/2176 (2014); UN Security Council, *Security Council*

other matters, including targeted sanctions against Liberian President Charles Taylor and others.[54]

---

resolution 2190 (2014) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2015], 15 December 2014, S/RES/2190 (2014); UN Security Council, *Security Council resolution 2215 (2015) [on the drawdown of the UN Mission in Liberia (UNMIL)]*, 2 April 2015, S/RES/2215 (2015); UN Security Council, *Security Council resolution 2239 (2015) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2016]*, 17 September 2015; UN Security Council, *Security Council resolution 2308 (2016) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 31 Dec. 2016]*, 17 September 2015, S/RES/2308 (2016).

[54] UN Security Council, *Security Council resolution 1532 (2004) [on preventing former Liberian President Charles Taylor, his immediate family members and senior officials of the former Taylor regime from using misappropriated funds and property]*, 12 March 2004, S/RES/1532 (2004); UN Security Council, *Security Council resolution 1549 (2004) [on re-establishment of the Panel of Experts to monitor fulfilling the conditions for the lifting of sanctions]*, 17 June 2004, S/RES/1549 (2004); UN Security Council, *Security Council resolution 1561 (2004) [on UNMIL]*, 17 September 2004, S/RES/1561 (2004); UN Security Council, *Security Council resolution 1579 (2004) [on the Situation in Liberia and West Africa]*, 21 December 2004, S/RES/1579 (2004); UN Security Council, *Security Council resolution 1607 (2005) [on the Situation in Liberia and West Africa]*, 21 June 2005, S/RES/1607 (2005); UN Security Council, *Security Council resolution 1626 (2005) [The situation in Liberia]*, 19 September 2005, S/RES/1626 (2005); UN Security Council, *Security Council resolution 1638 (2005) [The situation in Liberia]*, 11 November 2005, S/RES/1638 (2005); UN Security Council, *Security Council resolution 1647 (2005) [Liberia renews the measures on arms and travel imposed by paragraphs 2 and 4 of resolution 1521 (2003) for a further period of 12 months]*, 20 December 2005, S/RES/1647 (2005); UN Security Council, *Security Council resolution 1667 (2006) [The situation in Liberia]*, 31 March 2006, S/RES/1667 (2006); UN Security Council, *Security Council resolution 1683 (2006) [The Situation in Liberia]*, 13 June 2006, S/RES/1683 (2006); UN Security Council, *Security Council resolution 1688 (2006) [Sierra Leone]*, 16 June 2006, S/RES/1688 (2006); UN Security Council, *Resolution 1689 (2006) The Situation in Liberia*, 20 June 2006, S/RES/1689 (2006); UN Security Council, *Resolution 1694 (2006) The Situation in Liberia*, 13 July 2006, S/RES/1694 (2006); UN Security Council, *Security Council resolution 1712 (2006) [Liberia]*, 29 September 2006, S/RES/1712 (2006); UN Security Council, *Resolution 1731 (2006) The Situation in Liberia*, 20 December 2006, S/RES/1731 (2006); UN Security Council, *Security Council resolution 1750 (2007) [Liberia]*, 30 March 2007, S/RES/1750 (2007); UN Security Council, *Resolution 1753 (2007) The Situation in Liberia*, 27 April 2007, S/RES/1753(2007); UN Security Council, *Security Council resolution 1777 (2007) [Liberia]*, 20 September 2007, S/RES/1777 (2007); UN Security Council, *Security Council resolution 1792 (2007) [on renewal of measures on arms and travel imposed by resolution 1521 (2003) and on extension of the mandate of the current Panel of Experts on Liberia]*, 19 December 2007, S/RES/1792 (2007); UN Security Council, *Security Council resolution 1819 (2008) [on extension of the mandate of the Panel of Experts on Liberia]*, 18 January 2008, S/RES/1819 (2008); UN Security Council, *Security Council resolution 1854*

It is worth noting that a strictly temporal approach to *jus post bellum* would necessarily cut off early United Nations Security Council resolutions that occurred during armed conflict.[55] Similarly, a definition of *jus post bellum* that focused on backwards-looking criminal justice measures and not forward-looking establishment of a just and sustainable peace (particularly good governance) would overlook some of the most important regulation in the transition from armed conflict in Liberia.

As Aboagye and Rupiya note in their 2005 work on democratic governance and security sector reform in Liberia, in the previous 15 years more than half of the armed conflicts "ended" by peace agreements restarted.[56] They evaluate the early implementation of the 2003 Comprehensive Peace Agreement[57] by the national transitional government of

(2008) [on extension of the mandate of the Panel of Experts on Liberia], 19 December 2008, S/RES/1854 (2008); UN Security Council, *Security Council resolution 2025 (2011) [Liberia]*, 14 December 2011, S/RES/2025(2011); UN Security Council, *Security Council resolution 2079 (2012) [on the situation in Liberia]*, 12 December 2012, S/RES/2079 (2012); UN Security Council, *Security Council resolution 2116 (2013) [on Liberia]*, 18 September 2013, S/RES/2116 (2013); UN Security Council, *Security Council resolution 2128 (2013) [on the situation in Liberia and West Africa]*, 10 December 2013, S/RES/2128 (2013); UN Security Council, *Security Council resolution 2188 (2014) [on the situation in Liberia]*, 9 December 2014, S/RES/2188 (2014).

[55] UN Security Council, *Security Council resolution 1408 (2002) [on the situation in Liberia]*, 6 May 2002, S/RES/1408 (2002); UN Security Council, *Security Council resolution 1458 (2003) [on the situation in Liberia]*, 28 January 2003, S/RES/1458 (2003); UN Security Council, *Security Council resolution 1343 (2001) [on the situation in Sierra Leone]*, 7 March 2001, S/RES/1343 (2001); UN Security Council, *Security Council resolution 1478 (2003) [on the situation in Liberia]*, 6 May 2003, S/RES/1478 (2003); UN Security Council, *Security Council resolution 1497 (2003) [on the situation in Liberia]*, 1 August 2003, S/RES/1497 (2003).

[56] Aboagye, Festus B., and Martin R. Rupiya. "Enhancing post-conflict democratic governance through effective security sector reform in Liberia." *A tortuous road to peace. The dynamics of regional, UN and international humanitarian interventions in Liberia*, Festus Aboagye and Alhaji M. S. Bah eds (Pretoria: Institute for Security Studies 2005): 249-280, 249.

[57] *Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement of Democracy in Liberia (MODEL) and the Political*

Liberia with the support of UNMIL.[58] They note that United Nations Security Council Resolution 1509 (2003)[59] mandated UNMIL to focus not only on traditional peacekeeping but on supporting the institutionalization of human rights and the rule of law in Liberia, giving UNMIL wide-ranging responsibilities including humanitarian assistance, establishing security conditions, human rights monitoring, restructuring the security sector, legal reform, judicial reform, and correctional reform.[60] UNMIL established a Human Rights and Protection Unit with a role in child protection, rule of law, gender and trafficking advisors, as well as the institutionalisation and operationalisation of the Truth and Reconciliation Commission and an Independent National Commission on Human Rights pursuant to the Comprehensive Peace Agreement.[61] While Aboagye and Rupiya's critiques of the state of democratic governance and security sector reform in 2005 are warranted, the United Nations Security Council and ECOWAS's efforts in combination with local efforts in the subsequent decade are not without merit, providing some indication of the benefits of a

Parties, 18 August 2003, Annexed to Letter dated 27 August 2003 from the Permanent Representative of Ghana to the United Nations addressed to the President of the Security Council, S/2003/850 (2003).

[58] Aboagye, Festus B., and Martin R. Rupiya. "Enhancing post-conflict democratic governance through effective security sector reform in Liberia." *A tortuous road to peace. The dynamics of regional, UN and international humanitarian interventions in Liberia*, Festus Aboagye and Alhaji M. S. Bah eds (Pretoria: Institute for Security Studies 2005): 249-280, 251.

[59] UN Security Council, *Security Council resolution 1509 (2003) [on establishment of the UN Mission in Liberia (UNMIL)]*, 19 September 2003, S/RES/1509 (2003).

[60] Aboagye, Festus B., and Martin R. Rupiya. "Enhancing post-conflict democratic governance through effective security sector reform in Liberia." *A tortuous road to peace. The dynamics of regional, UN and international humanitarian interventions in Liberia*, Festus Aboagye and Alhaji M. S. Bah eds (Pretoria: Institute for Security Studies 2005): 249-280, 256-7.

[61] Ibid 257.

comprehensive, future-oriented approach. United Nations Security Council resolutions regulating the transition to peace are increasingly oriented towards building a positive peace, not merely putting an end to past conflict.

The customary and treaty law as well as regulation coming from the United Nations regarding post-conflict/transitional administration are also part of *jus post bellum*. As pointed out by Carsten Stahn, criminal justice under transitional administration does not neatly fall within domestic, international, or hybrid criminal justice.[62] It is unique for two reasons. First, there is a particular emphasis on restoring public order and safety, not simply safeguarding the interests of victims or the other typical goals of criminal law.[63] Second, there is often an emphasis on justifying any intervention (often post-hoc justified on the basis of human rights) that made the transitional administration possible.[64] It is unclear that the distinction between an international armed conflict and non-international armed conflict makes a great deal of inherent, generalizable difference in terms of the practice of transitional administration. Transitional administrations of course have a much wider role in *jus post bellum*

It is also important to note that courts and tribunals at every level play an important role in developing and effectuating *jus post bellum*. At the global level, institutions such as

[62] Stahn, Carsten. "Justice under transitional administration: contours and critique of a paradigm." *Hous. J. Int'l L.* 27 (2004): 311.

[63] See ibid 315.

[64] See ibid 315-6.

the International Court of Justice, the Permanent Court of Arbitration (and other arbitral bodies), and the International Criminal Court are not specialized *jus post bellum* institutions, but they can play an important role in establishing the general rules for transitions to peace and can perform specific functions in particular transitions to peace. The International Court of Justice's decision on Kosovo,[65] for example, clarified that declaring independence was not itself a violation of international law—a helpful, if limited, general rule that also probably helped to move the situation in Kosovo towards a sustainable peace. Of the ten situations before the International Criminal Court as of this writing[66] (Democratic Republic of the Congo, Central African Republic, Uganda, Darfur (Sudan), Kenya, Libya, Cote d'Ivoire, Mali, Comoros (Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia), and Georgia),[67] all except for perhaps the cases of post-election violence (Kenya and Cote d'Ivoire) involve an armed conflict, generally one that is dormant, although not necessarily truly finished. The International Criminal Court does not have inherent global jurisdiction. That said, with the potential of new accessions, ad hoc Article 12.3 referrals from non-member states, jurisdiction on the basis of nationality of the alleged perpetrator, and referrals by the United Nations Security Council, the International Criminal Court has no inherent territorial limit to its jurisdiction, and can be considered

[65] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Int'l Ct. Justice July 22, 2010).

[66] 3 May 2016

[67] See https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx last visited 3 May 2016

in a certain sense a global court. While its norms and development of law with an impact on the transition to peace are of wide and general application, the development of each investigation, case, and charge can have particular effects on local transitions to peace. The situations before the International Criminal Court are generally non-international armed conflict (with the possible exception of the Comoros referral[68]) although many have international involvement. That said, the norms emerging from the International Criminal Court's jurisprudence are likely to have general application to international armed conflicts and non-international armed conflicts.

Regional judicial bodies also can play an important role in establishing regional norms and influencing local transitions to peace. The Inter-American and European systems of human rights courts are perhaps best known, but other regional courts are also potentially useful sources of jurisprudence and dispute resolution with respect to both transitions out of international armed conflict and non-international armed conflict. In Africa, such regional judicial bodies that are likely to have potential impacts on transitions to peace include the African Court on Human and Peoples' Rights, the Community Court of Justice of the Economic Community of West African States, and the East African Court of Justice. In the Americas, there is not only the Inter-American Court of Human Rights (with its feeder institution the Inter-American Commission on Human Rights) but also the Central American Court of Justice, the Caribbean Court of Justice, and the East

[68] Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-51, 6 November 2015, Appeals Chamber

Caribbean Supreme Court. In Europe, the leading institutions are the European Court of Justice and the European Court of Human Rights.

Multilateral disarmament and weapons control treaties are typically categorized under *jus in bello* if they are categorized under the *jus ad bellum*/*jus in bello*/*jus post bellum* trichotomy (or the *jus ad bellum*/*jus in bello* dichotomy) at all. For treaties that focus on the *use* of weapons, that seems the most appropriate choice. So, for example, the use of exploding projectiles weighing less than 400 grams;[69] bullets that flatten upon entering the human body;[70] poison and poisoned weapons;[71] chemical weapons and bacteriological methods;[72] biological weapons;[73] certain conventional weapons[74]

[69] Short title: Declaration of Saint Petersburg (1868); Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, adopted 11 December 1868, D.Schindler and J.Toman, The Laws of Armed Conflicts, Martinus Nihjoff Publisher, 1988, p.102.

[70] Short title: Hague Declaration (1899); International Peace Conference 1899, Declaration (IV,3) concerning Expanding Bullets. The Hague, adopted 29 July 1899, (entry into force 4 September 1900).

[71] Short title: Hague Regulations (1907); International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

[72] Short title: Geneva Protocol (1925); United Nations, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925 (Entry into force: 8 February 1928); Short title: Convention on the prohibition of chemical weapons (1993); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992 (Entry into force: 29 April 1997); *see also* UN General Assembly, Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction: Resolution adopted by the General Assembly, 17 December 2003, A/RES/58/52.

[73] Short title: 1972 Biological Weapons Convention; 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons

including incendiary weapons,[75] mines,[76] booby traps,[77] blinding laser weapons,[78] explosive remnants of war,[79] and munitions that create fragments not detectable by X-ray;[80] anti-personnel mines;[81] and cluster munitions[82]—are all functionally part of *jus in bello*. Many of these treaties, particularly the more modern treaties, are also potentially

and on their Destruction, 1015 UNTS 163 / [1977] ATS 23 / 11 ILM 309 (1972) , 10 April 1972 (Entry into force: 26 March 1975).

[74] Short title: Convention on Certain Conventional Weapons; United Nations, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137 (Entry into force: 2 December 1983; Registered No. 22495).

[75] Short title: Protocol III (1980) to the Convention on Certain Conventional Weapons; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980 (Entry into force: 2 December 1983).

[76] Short title: Protocol II, as amended (1996), to the Convention on Certain Conventional Weapons; Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Geneva, 10 October 1980 (Entry into force: 2 December 1983).

[77] Short title: Protocol II, as amended (1996), to the Convention on Certain Conventional Weapons; Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Geneva, 10 October 1980 (Entry into force: 2 December 1983).

[78] Short title: Protocol IV (1995) to the Convention on Certain Conventional Weapons; Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995 (Entry into force: 30 July 1998).

[79] Short title: Protocol V (2003) to the Convention on Certain Conventional Weapons; Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention), 28 November 2003 (Entry into force: 12 November.2006).

[80] Short title: Protocol I (1980) to the Convention on Certain Conventional Weapons; Protocol on Non-Detectable Fragments (Protocol I). Geneva, 10 October 1980 (Entry into force: 2 December 1983).

[81] Short title: Convention on the Prohibition of Anti-Personnel Mines (Ottawa Treaty) (1997); The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction (Entry into force: 1 March 1999).

[82] Convention on Cluster Munitions, Dublin Diplomatic Conference on Cluster Munitions, 30 May 2008 (Entry into force: 1 August 2010)

important in the transition from armed conflict to peace. New regimes can be "joiners" and joining well-regarded treaties such as human rights treaties and weapons treaties can signal their status. Many weapons treaties do not only bar use of weapons, but also bar their stockpiling, production and transfer and require their destruction. Examples of such Treaties include the 1972 Biological Weapons Convention,[83] the 1993 Chemical Weapons Convention,[84] the 1980 Convention on Certain Conventional Weapons (CCW)[85] and its Protocols ,the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction[86] and the 2008 Convention on Cluster Munitions.[87] The 2013 Arms Trade Treaty[88]

[83] Short title: 1972 Biological Weapons Convention; 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1015 UNTS 163 / [1977] ATS 23 / 11 ILM 309 (1972) , 10 April 1972 (Entry into force: 26 March 1975).

[84] Short title: Convention on the prohibition of chemical weapons (1993); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992 (Entry into force: 29 April 1997); *see also* UN General Assembly, Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction: Resolution adopted by the General Assembly, 17 December 2003, A/RES/58/52.

[85] Short title: Convention on Certain Conventional Weapons; United Nations, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137 (Entry into force: 2 December 1983; Registered No. 22495).

[86] Short title: Convention on the Prohibition of Anti-Personnel Mines (Ottawa Treaty) (1997); The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction (Entry into force: 1 March 1999).

[87] Convention on Cluster Munitions, Dublin Diplomatic Conference on Cluster Munitions, 30 May 2008 (Entry into force: 1 August 2010)

[88] United Nations, Arms Trade Treaty, 2 April 2013 (Entry into force: 24 December 2014).

regulating the international trade in conventional weapons also may aid in the transition to peace not only by limiting stockpiles but by reinforcing the norm against arming entities engaged in international criminal law violations. Of particular importance is the emphasis on removing the explosive remnants of war in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction[89] and the 2008 Convention on Cluster Munitions.[90] Generally, these treaties are more relevant in international armed conflict than non-international armed conflict, although that may be less true for the Landmine Treaty and the Arms Control Treaty. Destruction of landmines can be an enduring post-conflict concern in non-international armed conflicts such as in Cambodia, Afghanistan, and Colombia, as well as in the technically ongoing international armed conflict between the Democratic Republic of Korea and the Republic of Korea. The Arms Control Treaty helps to address the inflows and outflows of small arms that can determine the outcome of transitions to peace.

Not all law restricting arms in the transition from armed conflict to peace takes the form of multilateral treaties. After international armed conflict, victors or the international community may demand disarmament from defeated states, as happened after the First and Second World War (imposed by victorious states) or during and after the first Gulf

[89] Short title: Convention on the Prohibition of Anti-Personnel Mines (Ottawa Treaty) (1997); The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction (Entry into force: 1 March 1999).

[90] Convention on Cluster Munitions, Dublin Diplomatic Conference on Cluster Munitions, 30 May 2008 (Entry into force: 1 August 2010)

War.[91] These international efforts to impose disarmament may result in enduring domestic law mandating restrictions on armament and militarization, as with the Second World War, or less enduring, as with the First. More widespread is the common domestic law practice after non-international armed conflicts involving programs to mandate and facilitate the disarmament, demobilization and reintegration of members of organized armed groups—so-called "DDR" programs. These disarmament programs are usually framed as part of "transitional justice" and, alongside "security sector reform" are widely considered vital for a successful transition from non-international armed conflict to peace. Disarmament is inherently a process-driven process, not merely a simple prohibition, so it inevitably inhabits a middle ground between purely procedural and purely substantive law.

5. More substantive aspects

Again using the schematic depiction above as a guide, it is possible to examine a variety of more substantive *jus post bellum* law and norms with respect to international armed conflicts and non-international armed conflicts. The substantive elements of *jus post bellum* are more thoroughly examined in Part III, Section B.5 Contrasting the Content of Transitional Justice and *Jus Post Bellum* below, but are briefly explored here with an emphasis on the difference between International Armed Conflict and Non-International Armed Conflict.

[91] See e.g. UN Security Council, *Security Council Resolution S/RES/689 (1991) Resolution 689 (1991) Adopted by the Security Council at its 2983rd meeting on 9 March 1991*, 9 April 1991, S/RES/689 (1991).

Such law and norms include resolving the *res*/just cause in traditional just war thinking, treaty and customary law on occupation and post-occupation, the customary international law of state responsibility (particularly with regards to new states and reparations), peacekeeping norms, down to particular implementations of the above. These are generally issues of international armed conflict, although they may be present by analogy with non-international armed conflict. For example, while successfully transitioning from armed conflict to peace in international armed conflict may require resolving the *res*, in non-international armed conflict the complaints that led to armed conflict may need to be substantively resolved on the domestic level for the successful transition from armed conflict to peace. For International Armed Conflicts, the prohibition of annexation as the *res*[92] of armed conflict is tied to the prohibition of acts of aggression, a *jus ad bellum* concern with *jus post bellum* implications. International armed conflict has implications with respect to occupation and post-occupation obligations and prohibitions.

Regardless of the international or non-international nature of the conflict, there are a variety of substantive prohibitions that take on particular importance in *jus post bellum*. Genocide, expulsion, persecution, slavery are prohibited and are non-derogable in times of armed conflict or national emergency, and are binding on those crafting peace agreements, those who enjoy transitional governmental authority, and new states or

[92] The traditional criteria of *persona*, *res*, *causa*, *animus* and *auctoritas* dates from the *Apparatus glossarum Laurentii Hispanii in Compilationem tertiam* of Laurentius Hispanus (c. 1180-1248). See generally Frederick H. Russell, *The Just War in the Middle Ages*, p. 128. "*Res*" or "thing" was the territory, property, or other object over which the just war was fought, and was intimately connected to the idea of *causa* or *justa causa* which was the characterization of the *res*, that is, that it was just to pursue the *res* in war, for example to lawfully recover territory.

governments. United Nations Security Council Chapter VII resolutions frequently provide specific binding law that applies to particular transitions from armed conflict to peace.

E. Conclusion

This section, *Jus Post Bellum* in the Context of International and Non-International Armed Conflict, has focused on the distinguishing the operation of *jus post bellum* in the two canonical types of armed conflict. It introduces the concept of international armed conflict and non-international armed conflict and how those terms operate with jus in bello and jus ad bellum, before providing exploring the subject matter of *jus post bellum*—locating where the type of armed conflict made a substantial difference, and where it did not.

Fundamentally, resolving non-international armed conflicts is primarily an issue of what sort of state (or in the case of secession, states) will be built in the aftermath of war, whereas international armed conflicts inevitably are not only an issue of the post-war nature of the states involved (particularly if there is a clear-cut losing state) but also the nature of interstate relations afterwards. The issues involved can, of course, be largely bilateral (for instance, a piece of territory such as Alsace-Lorraine can change hands) but there is also inevitably often a question as to the nature of international relations, governed by law more generally. This phenomenon is most powerfully exemplified in The Peace of Westphalia (the peace made after the Thirty Years' War in the Holy Roman Empire and the Eighty Years' War) and the United Nations Charter—both developments

closing terrible armed conflicts and (in different ways) establishing a new foundational reference point for international peace.[93] This struggle to establish the nature of the international order is an old one. A pessimistic approach goes back to for example Niccolo Machiavelli's *The Prince*[94], Thomas Hobbes' *Leviathan*[95]and Baruch Spinoza's *Tractatus theologico-politicus*[96], or even back to Thucydides *History of the*

[93] For a classic work on the importance of the Peace of Westphalia, *see* Gross, Leo. "The Peace of Westphalia 1648-1948." *American Journal of International Law* 42 (1948): 20. The author agrees with Gross that the peace agreements generally collectively referenced as the "Peace of Westphalia" are in some ways comparable to the United Nations Charter (p. 20) and that while in many ways simply followed previous practice and was part of a gradual process (p. 27), that by increasing the possibility of equality and lasting peace between states of "any particular religious background" ("p. 26") the Peace of Westphalia has rightly come to be seen as a cornerstone of a system of sovereign states. Of course, in reality, there are clear differences between the Peace of Westphalia and the (global, multilateral) United Nations Charter. The mythology has been somewhat problematized by e.g. Beaulac, Stéphane. "The Westphalian Legal Orthodoxy-Myth or Reality?." *Journal of the History of International Law* 2.2 (2000): 148-177 (focusing on the continuing multi-layered authority in Europe); but in the author's view the problematization can be overstated and "miss the forest for the trees"—the fundamental drive for a sovereign state system that could be at peace not through a unified Christendom, as symbolized by the Peace of Westphalia, generally justifies the shorthand status "Westphalia" has earned. For additional critical approaches, *see e.g.* Osiander, Andreas. "Sovereignty, international relations, and the Westphalian myth." *International organization* 55.02 (2001): 251-287; Beaulac, Stéphane. "The Westphalian model in defining international law: challenging the myth." *Austl. J. Legal Hist.* 8 (2004): 181; Beaulac, Stéphane. *The power of language in the making of international law: the word sovereignty in Bodin and Vattel and the myth of Westphalia*. Vol. 46. Martinus Nijhoff Publishers, 2004; De Carvalho, Benjamin, Halvard Leira, and John M. Hobson. "The big bangs of IR: The myths that your teachers still tell you about 1648 and 1919." *Millennium* 39.3 (2011): 735-758; Schmidt, Sebastian. "To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature " *International Studies Quarterly* 55.3 (2011): 601-623. These efforts to demythologize "Westphalia" are welcome if they do not cause the reader to understate the importance of the developments generally referenced in shorthand as the "Peace of Westphalia."

[94] Machiavelli, Niccolò, 1515. *The Prince*, trans. Harvey C. Mansfield, Jr., Chicago: Chicago University Press, 1985

[95] Hobbes, Thomas, and Edwin Curley. *Leviathan: with selected variants from the Latin edition of 1668*. Vol. 2. Hackett Publishing, 1994.

[96] See e.g. Israel, Jonathan, and Michael Silverthorne, eds. *Spinoza: Theological-Political Treatise*. Cambridge University Press, 2007, p. 195:

Peloponnesian War[97]—a tradition that sees the nature of international relations as fundamentally and irrevocably lawless. But there is also a long tradition, that a collective effort to construct a peaceful order, as proposed in the various treaties that constituted the Peace of Westphalia, can be successful. Many of these efforts were be detailed in the Chapter "Past – The Deep Roots of Jus Post Bellum." Continuing the analysis of the substance of *jus post bellum*, the current tensions within the use of the term *jus post bellum* should be further examined, a problem to which this work now turns. The next chapter will include analysis of odious debt and *jus post bellum* in the context of international armed conflict and non-international armed conflict, building on the foundation of this chapter.

> By the right and order of nature I merely mean the rules determining the nature of each individual thing by which we conceive it is determined naturally to exist and to behave in a certain way. For example fish are determined by nature to swim and big fish to eat little ones, and therefore it is by sovereign natural right that fish have possession of the water and that big fish eat small fish.

[97] Thucydides. *History of the Peloponnesian War*, trans. Rex Warner, Harmondsworth: Penguin Books, 1972.