The function of Jus Post Bellum in international law

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6. Contemporary Legal Content of *Jus Post Bellum*

A. Introduction

1. Chapter focus

Jus post bellum has a particular function in international law, to organize the application of law and principles in order to successfully guide the transition from armed conflict to a just and sustainable (or "positive") peace.[1] This chapter demonstrates the application of the hybrid functional approach described *supra* in core areas of law Stahn asserts (and the author concurs) are central to achieving the goals of *jus post bellum*.

This work has addressed *jus post bellum* in a variety of ways: its origins, the contemporary debate around its meaning, contrasting it with related concepts and bodies of law (such as transitional justice, *jus ad bellum*, and *jus in bello*), and describing it in both International Armed Conflict and Non-International Armed Conflict. This chapter draws upon and extends what has been discussed earlier, to provide a specific thematic focus on the contemporary legal content of *jus post bellum*. It builds upon and extends the framework earlier laid out by Stahn[2] because, in the author's view and the view of the many scholars who have used

[1] See Part 1 of this work.

[2] Stahn, Carsten. "'Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *European Journal of International Law* 17.5 (2006): 921-943, p. 937.

Stahn's work as a starting point, the legal components identified by Stahn are some of the most crucial for the successful transition from armed conflict to peace (with slight modifications such as the inclusion of odious debt as a potentially regulated subject).

These components are usefully considered together as part of *jus post bellum* because they provide legal substance and applied principles to the hybrid functional approach already described and propounded in Part I of this work. Given the scope of this work, it cannot review the entire scholarship in each of these areas, but rather provide a more concrete guide to the legal foundations and principles of *jus post bellum*, building on the theoretical and definitional structure of Part I.

This chapter provides analysis as to how the hybrid functional approach would apply in eight substantive areas. The eight areas discussed are: 1) Procedural fairness and peace agreements; 2) The Responsibility to Protect; 3) Territorial dispute resolution; 4) Consequences of an act of aggression; 5) International territorial administration and the prohibition of 'trusteeship'; 6) The law applicable in a territory in transition; 7) The scope of individual criminal responsibility; and 8) The nexus of *jus post bellum* and odious debt. Alternative frameworks are also examined. These eight areas are not comprehensive, but they are at the core of *jus post bellum*. By drawing upon analysis used

throughout this work to emphasize the contemporary legal content of *jus post bellum*, the more practical aspects of this work can be brought to the fore.

What follows then in this chapter is primarily a significant expansion of the efforts of one leading scholar, Stahn, to outline the core legal substance of *jus post bellum*, using the hybrid functional approach already described in this work. While Stahn's work is often referenced,[3] expanding his framework in this manner has never been done properly.

2. Responses to critical approaches to *jus post bellum*

It is worth detailing further what this chapter does and what it will not attempt to do. There is a strain of criticism of *jus post bellum* that indicates the term should be avoided because it is a new term that does not represent a new body of laws. This chapter will not convince such critics that *jus post bellum* contains only laws that apply only within the framework of *jus post bellum* and in no other framework. It does not follow, however, that the concept of *jus post bellum* should not be used and developed. *Jus post bellum*, properly conceived, plays a vital function in international law, for the international community, and for survivors of armed conflict—to guide the transition from armed conflict to a

[3] As best as the author can tell, the referenced work (Stahn, Carsten. "'Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *European Journal of International Law* 17.5 (2006): 921-943) is the most frequently cited legal (as opposed to philosophical) article on the subject.

just and sustainable peace. How these laws and principles can be applied in this transition remains worthy of study, regardless of the term applied.

Many critics of *jus post bellum* are very specific in the particular norms and addressees they address. Three notable scholars who have taken a skeptical approach to *jus post bellum* are Eric De Brabandere, Antonia Chayes, and Gelijn Molier. Even an unapologetically pro-*jus post bellum* advocate should recognize the value of their contributions and the salience of some their specific points. Critical to understanding their approaches is how they define *jus post bellum* and their overall approach to *lex lata*. Recognizing certain commonalities in critical approaches these scholars have demonstrated with respect to *jus post bellum* allows for an appreciation for the productive role such scholars can play in the ongoing discussion on *jus post bellum*, while respectfully disagreeing with certain broader conclusions.

De Brabandere has authored a number of works on the theme of *jus post bellum*.[4] In 2010, he argued that "recent cases have shown that there already exists an

[4] De Brabandere, Eric. "The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept"(2010)." *Vanderbilt Journal of Transnational Law* 43: 119; De Brabandere, Eric. "International Territorial Administrations and Post-Conflict Reforms: Reflections on the Need of a Jus Post Bellum as a Legal Framework." *Belgisch Tijdschrift voor Internationaal Recht / Revue Belge de Droit International* 44(1-2): 69-90; Eric De Brabandere, 'The Concept of Jus Post Bellum in International Law: A Normative Critique, in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds.), Jus Post Bellum: Mapping the Normative Foundations (Oxford: Oxford University Press, 2014); De Brabandere, Eric. "Jus Post Bellum and Foreign Direct Investment: Mapping the Debate." *The Journal of World Investment & Trade* 16.4 (2015): 590-603. See more generally, Eric De Brabandere, Post-conflict Administrations in International Law: International Territorial

adequate, flexible, and neutral legal framework to address" the transition from armed conflict to peace, but rejects the label *jus post bellum* for that framework.[5] His later work on the subject, in an area bringing together two areas of his expertise (transitions to peace and foreign direct investment), admits the use of the term *jus post bellum* as the "legal regime governing post-conflict reconstruction, a use of the concept to which no normative implications should be attached."[6] Chayes squarely asks whether there is a freestanding, universally applicable post-conflict obligation to rebuild a vanquished society after war and answers in the negative.[7] Molier[8] addresses *jus post bellum*, primarily through criticism of the contributions of Stahn,[9] Boon,[10] and Orend.[11]

Administration, Transitional Authority and Foreign Occupation in Theory and Practice, Leiden: Martinus Nijhoff, 2009, particularly pp. 289–93.

[5] De Brabandere, Eric. "The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept"(2010)." *Vanderbilt Journal of Transnational Law* 43: 119, 134.

[6] De Brabandere, Eric. "Jus Post Bellum and Foreign Direct Investment: Mapping the Debate." *The Journal of World Investment & Trade* 16.4 (2015): 590-603, 591.

[7] Chayes, Antonia. "Chapter VII½: Is Jus Post Bellum Possible?." *European Journal of International Law* 24.1 (2013): 291-305. For a response, see Verdirame, Guglielmo. "What to Make of Jus Post Bellum: A Response to Antonia Chayes." *European Journal of International Law* 24.1 (2013): 307-313.

[8] Molier, Gelijn. "Rebuilding after Armed Conflict: Towards a Legal Framework of "The Responsibility to Rebuild" or a "Ius post Bellum"?." *Peace, Security and Development in an Era of Globalization: The Integrated Security Approach Viewed from a Multidisciplinary Perspective* (2009): 317-53; in Dutch see also Molier G. (2007), Wederopbouw na gewapend conflict: naar juridificering van 'the responsibility to rebuild' of een 'ius post bellum?'. In: Bomert B., Hoogen T. van den (Eds.) *Jaarboek Vrede en Veiligheid 2007*. Nijmegen: Centrum voor Internationaal Conflict-Analyse & Management 2007. 1-34.

[9] Stahn, Carsten, and Jann K. Kleffner eds. *Jus post bellum: towards a law of transition from conflict to peace*. TMC Asser Press, 2008; Stahn, Carsten. "'Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force."

This subsection will not attempt to defend, point by point, the scholarship criticised by De Brabandere, Chayes, and Molier. Many of their specific criticisms (e.g. Molier's objection to Orend's tearing down the wall between the application of *jus ad bellum* and *jus in bello*[12] or his critique of Orend's assertion that a *jus post bellum* violation is a just cause for the use of force[13]) have merit. De Brabandere's documentation of the varied usage of the term is accurate and worthy of systematic expansion.[14] Other criticism regarding the purported lack of utility of the principles identified by Boon and Stahn is less persuasive. While useful and worthy of further development elsewhere, there is a risk of "missing the forest for the trees" in extending the implications of such arguments too far.

The underlying question is whether a criticism of a specific assertion as to the law and principles of the transition to armed peace has the broader effect of overturning the entire field of *jus post bellum*. A useful, specific disagreement on a particular point or series of points of law does not negate the primary

European Journal of International Law 17.5 (2006): 921-943; Stahn, Carsten. "Jus Post Bellum: Mapping the Discipline (s)." *Am. U. Int'l L. Rev.* 23 (2007): 311.

[10] Boon, Kristen. "Legislative reform in post-conflict zones: Jus post bellum and the contemporary occupant's law-making powers." *McGill LJ* 50 (2005): 285.

[11] Orend, Brian. "Jus post bellum: The perspective of a just-war theorist." *Leiden Journal of International Law* 20.03 (2007): 571-591.

[12] Molier, Gelijn. "Rebuilding after Armed Conflict: Towards a Legal Framework of "The Responsibility to Rebuild" or a "Ius post Bellum"?." *Peace, Security and Development in an Era of Globalization: The Integrated Security Approach Viewed from a Multidisciplinary Perspective* (2009): 317-53, 332.

[13] Ibid. 333.

[14] De Brabandere, Eric. "The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept"(2010)." *Vanderbilt Journal of Transnational Law* 43: 119. For such a systematic expansion, see Annex A of this work.

assertion that *jus post bellum* exists, nor does it (in this author's view) undermine the argument that *jus post bellum* functions to guide the transition from armed conflict to a just and sustainable peace. One might trace a particular argument from, for example, William Martel's assertion that victory "imposes political, economic, human and moral responsibilities — on the victorious state"[15] to Chayes assertion that such responsibilities cannot amount to a general legal requirement,[16] to a further response that victories are regulated by certain laws and principles (e.g. regarding the prohibition of annexation, the right of self-determination, the prohibition of aggression, the requirements of human rights law, the obligations of occupation law, etc.) that may impose legal requirements on the victor in certain particular situations. This ongoing discussion does not disprove *jus post bellum*, it elucidates and amplifies it.

As a review of the chapter below demonstrates, the laws and principles involved in a hybrid functional approach to *jus post bellum*, as well as their addressees, are diverse, ranging from the international community and the United Nations Security Council down to organized armed groups and individuals. A hybrid functional approach to *jus post bellum* allows for a spectrum of law and principles, from global to local, and from the more general to the more specific.

[15] Martel, William C. *Victory in War: Foundations of Modern Strategy*. Cambridge University Press, 2011, 5.

[16] Chayes, Antonia. "Chapter VII½: Is Jus Post Bellum Possible?." *European Journal of International Law* 24.1 (2013): 291-305.

The general stance of many critics is not to deny the existence of law that applies to the transition from armed conflict to peace,[17] but to deny it exists independently of other areas of law, and to further suggest that it serves no purpose to use the term. De Brabandere is particularly articulate on these points in his early scholarship on the subject.[18] Such scepticism has been an important part of the further development of scholarship on the subject, underlining the need for a richer articulation of a *jus post bellum* with a clearer telos: one of establishing a just and sustainable peace. Dieter Fleck's scholarship has been particularly useful in establishing the utility of partially-independent legal frameworks in regulation and norm generation in the transition to peace.[19] James Gallen has pioneered the utility of *jus post bellum* as an interpretive framework.[20] De Brandere consents in his later work to use the term *jus post bellum* to help elucidate the particularities of foreign direct investment in post-

[17] Verdirame, Guglielmo. "What to Make of Jus Post Bellum: A Response to Antonia Chayes." *European Journal of International Law* 24.1 (2013): 307-313.

[18] See particularly De Brabandere, Eric. "The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept"(2010)." *Vanderbilt Journal of Transnational Law* 43: 119, 134.

[19] Fleck, Dieter. "The Responsibility to Rebuild and Its Potential for Law-Creation: Good Governance, Accountability and Judicial Control." *Journal of International Peacekeeping* 16.1-2 (2012): 84-98; Fleck, Dieter "*Jus post bellum* as a partly independent legal framework" in Stahn, Carsten, Jennifer S. Easterday, and Jens Iverson, eds. Jus Post Bellum. Oxford University Press, 2014, 43-57..

[20] Gallen, James "*Jus post bellum*: an interpretive framework" in Stahn, Carsten, Jennifer S. Easterday, and Jens Iverson, eds. Jus Post Bellum. Oxford University Press, 2014, 43-57

conflict rebuilding.[21] While *jus post bellum* is not fully independent as a legal regime, that does not mean it lacks utility as a concept—particularly when conceptualized as having the function to the international community described in this work. Scholars of *jus post bellum* should take note of warranted and particularized criticism, proceed with caution, but nonetheless proceed.

Perhaps many with a skeptical but reasoned approach to aspects of *jus post bellum* scholarship can admit that there is a sense in which "the train has left the station" or “the genie has left the bottle” in terms of *jus post bellum* entering widespread use in scholarship and playing an increasing role in shaping and describing law and practice. One can imagine scholars with a similar critical approach realizing in the early 1900s that-while they may not find the law of occupation, weapons law, targeting law, and the law regarding prisoners of war *new* or (in their view) *worthy* of a specific new term that included those elements but excluded the legality of the use of force overall—it was nonetheless worth analyzing, unifying, and encouraging the expansion of these areas in order to successfully minimize the harm of armed conflict and occupation. The need for a coherent body of laws and principles that guide the transition to peace is enduring, as demonstrated in Chapter 1. If the term is disputed, this need will not disappear. Criticism of particular points is always welcome. That said, at this point in the development of the concept, wholesale critics of *jus post bellum*

[21] De Brabandere, Eric. "Jus Post Bellum and Foreign Direct Investment: Mapping the Debate." *The Journal of World Investment & Trade* 16.4 (2015): 590-603.

would be well-served to also propose alternative unifying frameworks that comprehensively address this need and describe the varied laws and principles that function to guide the transition from armed conflict to peace, or to more fully and persuasively explain why such an effort is not worthwhile.

Some critical insistence on the overweening importance of *lex lata*, as a general matter, is also laudable and a productive part of the overall development of scholars' understanding of the law as it is. That said, extreme skepticism on matters which go beyond clearly settled law can itself pose difficulties. This is particularly true in areas on the frontiers of international law. C. Wilfred Jenks' dictum regarding the need for thoughtfulness in being over-cautious with respect to uncertain *lex lata* is worth repeating here:

> Certainty and predictability in respect of matters governed by well-established precedent are an important element in the rule of law, but to treat as speculation *de lege ferenda*, rather than as speculation concerning an uncertain *lex lata*, everything which goes beyond clearly settled law is to arrest processes of growth without which the law will be atrophied and the rule of law perish.[22]

Jus post bellum has ancient roots, but it is not static. The "processes of growth" praised by Jenks are ongoing. Applying the rule of law to this most difficult area of human conduct, building peace from the ruins of war, remains an enormous challenge. The more limited task of clarifying core areas of the contemporary legal content of *jus post bellum* is the work of the remainder of this chapter.

[22] Jenks, C. Wilfred. "The challenge of universality." Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969). Vol. 53. American Society of International Law, 1959, 85-98, at 95.

B. Procedural fairness and peace agreements

1. Article 52 of the Vienna Convention on the Law of Treaties

As discussed regarding in sections supra (Chapter 4.B.4.d) regarding procedural *jus post bellum*, The Vienna Convention on the Law of Treaties[23] is widely ratified and is generally accepted as customary international law. Article 52 of the Vienna Convention on the Law of Treaties states in full: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[24] A literal reading of this Article applied to any peace treaty indicates that the validity of the peace treaty, the foundation of a transition from international armed conflict to peace, depends on whether there has been an illegal threat or use of force to procure that treaty.

[23] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 (Entry into force: 27 January 1980). See generally, Villiger, M. E. (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden: Nijhoff; Dörr, O., & Schmalenbach, K. (2012). *Vienna Convention on the Law of Treaties: A Commentary*. (Vienna convention on the law of treaties.) Berlin, Heidelberg: Springer-Verlag Berlin Heidelberg; Sinclair, Ian M. T. *The Vienna Convention on the Law of Treaties*. Manchester: Manchester University Press, 1984.

[24] *Vienna Convention on the Law of Treaties*, Art. 52.

For international armed conflict, the legal validity of the foundation of the transition to peace may formally depend on what is typically considered a question of *jus ad bellum*, the legality of the use or threat of force. This connection between *jus ad bellum* and *jus post bellum* emerges not through an analysis of *substantive* rights and restrictions during the transition to peace, but through an analysis of the legitimate procedure for creating a peace treaty. The difficulty arises, of course, in that each side may believe that the other used not merely the threat of force, but actual use of force in violation of the principles of international law in order to achieve whatever negotiating position they have achieved at the peace table. Further, the threat of ongoing or renewed force almost inevitably forms the backdrop of peace negotiations—otherwise peace negotiations would not be required.

The interpretation of Article 52 in the context of peace agreements thus requires special consideration so as not to invalidate peace treaties in general, while retaining a disincentive for states to use force or the threat of force to create grossly unfair treaties. This may be done in part through Article 43 ("Obligations imposed by international law independently of a treaty"), Article 44.5 (disallowing separation of the treaty in cases governed by Article 52), Article 53 ("Treaties conflicting with a peremptory norm of general international law"), Article 71 ("Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law"), Article 73 ("Cases of State succession, State responsibility and outbreak of hostilities"), and Article 75

("Case of an aggressor State").[25] Article 73 and Article 75 in particular limits the application of the Vienna Convention on the Law of Treaties regarding questions arising from the outbreak of hostilities between states or treaty obligations of an aggressor state.[26] These limitations of the Vienna Convention on the Law of Treaties, however, raise more questions as to the effect of the use or threat of force on the validity and effects of peace treaties. To fully understand the general rule making peace treaties valid despite the context of the use of force, it is very helpful to have recourse to the tradition of *jus post bellum avant la lettre*, particularly with respect to Gentili, Wolff, and Vattel.[27] There seems little doubt that state practice and opinio juris dating back to the 16th century indicate peace treaties are binding, despite the fact that the conclusion of most peace treaties are procured by, or at least in the context of, the threat or use of force.

Again, 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

[25] Article 75 states in whole: "The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

[26] For more on the interaction of Article 75 and 52, see e.g. Villiger, M. E. (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden: Nijhoff, p. 915; Dörr, O., & Schmalenbach, K. (2012). *Vienna Convention on the Law of Treaties: A Commentary*. (Vienna convention on the law of treaties.) Berlin, Heidelberg: Springer-Verlag Berlin Heidelberg, p. 1284; Sinclair, Ian M. T. *The Vienna Convention on the Law of Treaties*. Manchester: Manchester University Press, 1984, p. 178.

[27] See Chapter 1 of this work.

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.

One could argue that peace agreements that are not peace treaties (binding non-state actors) are guided by similar considerations of procedural fairness, but only by analogy, as the VCLT and the customary law it represents does not apply directly. In terms of lex lata, this argument by analogy is not terribly persuasive. As a prudential matter, however, the warning for the party to the potential peace agreement not to rely entirely on the threat of future force and demand an entirely one-sided agreement is sensible, lest the peace created be unjust or unsustainable.

2. Other Considerations of procedural fairness

a) Treaty and agreement law

Several other articles in the Vienna Convention on the Law of Treaties are specifically relevant for the formation of peace treaties with respect to procedural fairness. Article 47 reads as follows:

> If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a

> specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent. [28]

This is straightforward as it goes, although there is a long tradition stating that there are limits to what a state representative may alienate (see above), ultimately culminating in the prohibition on annexation (see below).

Article 48 reads as follows:

> 1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
>
> 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.
>
> 3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies. [29]

This presumably is not meant to invalidate peace treaties due to the notoriously difficult to ascertain battlefield facts or strategic position. Use of this Article with respect to peace treaties, or by analogy to peace agreements, should be depreciated. Article 49 covers fraud. Article 50 addresses corruption of a representative of a state. These are likewise unlikely to affect the validity of a

[28] Ibid, Art. 47.

[29] Ibid, Art. 48.

peace treaty or agreement. Of more potential impact is Article 51, which deals with coercion of a representative of a state:

> The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

This mirrors Article 52, but instead of the threat of the use of force against a state, it concerns coercion of a state's representative. While normal diplomatic immunity and IHL protections for those seeking to negotiate a ceasefire or peace treaty (inviolability of parlementaires)[30] should shield representatives from harm, but should those not be respected, and should representatives be coerced into signing a peace treaty, that treaty would be void.

b) Amnesty and *aut dedere aut judicare*

This section amplifies what this work has previously described with respect to amnesty and *aut dedere aut judicare* (Latin for "extradite or prosecute.") This is a modern implementation of the legal principle coined by Grotius, "*aut dedere aut punire*" (either extradite or punish).[31] The section below on individual criminal responsibility also touches on this point. The procedural law applicable

[30] *See e.g.* Article 32 1899 Hague Regulations, Article 32 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, Article 43 of the 1874 Brussels Declaration, International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law* , 2005, Volume I: Rules, Rules 66 and 67.

[31] Grotius, De Jure Belli ac Pacis, Book II, chap. XXI, paras. 3-4.

to substantive criminal law is part of the transition to peace. This is not only with respect to the high profile, highly contested issues such as amnesties for the perpetration of alleged crimes related to the armed conflict. It includes questions of jurisdiction, immunities, statutes of limitation, and other questions of admissibility. How these laws are interpreted can influence the formation of peace agreements, and conversely, peace agreements may mandate procedural law changes to criminal and civil law. This section will focus on amnesty and *aut dedere aut judicare*.

The obligation to prosecute or extradite for prosecution the alleged perpetration of certain crimes is well-established, but can create tensions. 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.[32] 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. The Convention on the Prevention and Punishment of the Crime of Genocide,[33] for example, requires the state on whose territory a

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

[33] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, (Entry into force: 12 January 1951) United Nations Treaty Series, vol. 78, p. 277. Article 6 states:

genocide allegedly occurred to prosecute the genocide. The Geneva Conventions of 1949[34] likewise require prosecution (or extradition for prosecution) of alleged grave breaches. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[35] likewise requires prosecution or extradition, as does the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[36] This set of obligations also extends to issues less central although potentially relevant to *jus post bellum*, such as terrorism,[37]

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

[34] International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31 ("GCI"); International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85 ("GCII"); International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135 ("GCIII"); International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 ("GCIV").

[35] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, (Entry into force 26 June 1987) United Nations Treaty Series, vol. 1465, p. 85.

[36] UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954 (Entry into force: 7 August 1956).

[37] United Nations, *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, (Entry into force: 14 October 1971) UN Treaty Series 1973; UN General Assembly, *International Convention against the Taking of Hostages*, 17 November 1979, (Entry into force: 3 June 1983) No. 21931; UN General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, (Entry into force: 23 May 2001) No. 37517; UN General

apartheid,[38] crimes against internationally protected persons,[39] and corruption.[40] Aside from direct treaty obligations to extradite or prosecute, indirect treaty obligations, such as human rights law obligations, also often create the duty to prosecute or extradite. Particularly in the Inter-American system[41] the duty to respect and ensure rights, as explained in the *Barrios Altos* case.[42] In certain cases, such as with genocide, there also exists a customary international law norm with respect to the duty to prosecute or extradite.[43] All of that said, given actual state practice and demonstrated opinio juris, one cannot generally assert

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Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, (Entry into force: 10 April 2002) No. 38349.

[38] UN General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, (Entry into force: 18 July 1976) A/RES/3068(XXVIII).

[39] UN General Assembly, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, (Entry into force: 20 February 1977) No. 15410.

[40] UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, (Entry into force: 14 December 2005) A/58/422.

[41] See generally Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Entry into force: 18 July 1978.

[42] Barrios Altos Case, Judgment of November 30, 2001, Inter-Am Ct. H.R. (Ser. C) No. 87 (2001). See particularly para. 19, citing Article 63(1) of the American Convention:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated.

[43] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 191.

there is a yet a general customary duty to prosecute or extradite for all alleged international criminal law violations.

C. The Responsibility to Protect

The Responsibility to Protect, including (and perhaps in particular) the Responsibility to Prevent and the Responsibility to Rebuild[44] are at best emerging legal norms rather than hard *lex lata*.[45] That said the norms described by this doctrine are worth noting in the context of *jus post bellum*. Fleck in particular makes a compelling case that the Responsibility to Rebuild, while not *lex lata*, is likely to be productive norm in terms of additional rule generation in the future.[46]

[44] For a particular focus on the Responsibility to Rebuild and *jus post bellum*, arguing that the Responsibility to Rebuild in particular is phrased in terms of policy rather than legal principle, see Molier, Gelijn. "Rebuilding after Armed Conflict: Towards a Legal Framework of "The Responsibility to Rebuild" or a "Ius post Bellum"?." *Peace, Security and Development in an Era of Globalization: The Integrated Security Approach Viewed from a Multidisciplinary Perspective* (Martinus Nijhoff 2009): 317-53. For a highly critical approach, see Robinson, Paul. "Is There an Obligation to Rebuild?." *Justice, Responsibility and Reconciliation in the Wake of Conflict*. Springer Netherlands, 2013. 105-116.

[45] *See* Stahn, Carsten. "Responsibility to protect: political rhetoric or emerging legal norm." *Am. J. Int'l L.* 101 (2007): 99; Jovanović, Miodrag A. "Responsibility to Protect and the International Rule of Law." *Chinese Journal of International Law* 14.4 (2015): 757-776.

[46] Fleck, Dieter. "The Responsibility to Rebuild and Its Potential for Law-Creation: Good Governance, Accountability and Judicial Control." *Journal of International Peacekeeping* 16.1-2 (2012): 84-98.

The Responsibility to Protect doctrine[47] does not require armed conflict of any sort for its application. Rather, as part of the "just cause" it requires either large-scale loss of life or "ethnic cleansing":

> A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
>
> B. large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.[48]

The Responsibility to Protect doctrine includes the Responsibility to Prevent, Responsibility to React, and the Responsibility to Rebuild. Of these three components, the Responsibility to React (particularly the section dealing with military intervention) has the most bearing on questions related to *jus ad bellum* and *jus in bello*, as it seeks to replace the rhetoric and framework of humanitarian intervention with guidelines of responses short of the use of armed force and constraints on the resort to armed force and how it is used. While the Responsibility to React could apply both to international armed conflict and non-

[47] 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; UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, 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.

[48] 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.

international armed conflict, it is more likely to come into play in a non-international armed conflict that becomes internationalized (and thus becomes an international armed conflict), or a situation that did not amount to an armed conflict (either international or non-international) that becomes an international armed conflict once foreign military intervention occurs. Even a cursory reading of this doctrine with someone with a passing familiarity of just war doctrine will recognize the debt the International Commission on Intervention and State Sovereignty owes to the authors referenced in Chapter 1 of this work, requiring just cause, right intention, last resort, proportional means, and reasonable prospects as criteria for military intervention. [49]

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.

The norms contained in The Responsibility to Prevent come into play with respect to *jus post bellum* given the goal of *jus post bellum* to create a sustainable peace, thus one that prevents future armed conflict. As described in *The Responsibility to Protect: Report of the International Commission on*

[49] Ibid 32-7.

Intervention and State Sovereignty,[50] the emphasis of the Responsibility to Prevent is the "[p]revention of deadly conflict and other forms of man-made catastrophe" [51] which is the responsibility of sovereign states[52] but is also within the portfolio of international mechanisms such as the Organization of African Unity's Mechanism for Conflict Prevention, Management, and Settlement and the Organization for Security Cooperation in Europe. [53] Early warning efforts by non-governmental organizations such as the International Crisis Group, Amnesty International, Human Rights Watch, and the Fédération international des ligues des droits de l'homme, as well as the United Nations Secretary-General play an important role. [54] Root cause prevention efforts should be undertaken not only by states but by the United Nations, given that "the creation of conditions of stability and well-being […] are necessary for peaceful and friendly relations among nations."[55] Direct prevention measures from fact-finding missions,

[50] Ibid 19.

[51] Ibid.

[52] Ibid.

[53] Ibid 20.

[54] Ibid 21-2.

[55] United Nations Charter, Article 55. Those conditions are listed in Article 55 as "a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

mediation, arbitration, adjudication, legal sanction, the creation of international criminal law institutions, and even preventative measures of a military nature such as the UN Preventative Deployment Force in Macedonia are all referenced. [56]

With respect to the Responsibility to Rebuild, the International Commission on Intervention and State Sovereignty emphasized first and foremost post-intervention obligations—that is, if military intervention is pursued (under the rubric of Responsibility to React) that necessarily implies the "genuine commitment to helping to build a durable peace."[57] Much of the "Peace Building" subcomponent of post-intervention obligations are squarely in line with *jus post bellum* approaches found elsewhere. [58] This section relies heavily on previous efforts such as the Report of the United Nations Secretary-General to the Security Council, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa.*[59] The Secretary-General's report describes post-conflict peacebuilding as follows:

[56] 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) pp. 23-5.

[57] Ibid 39.

[58] Ibid.

[59] Report of the United Nations Secretary-General to the Security Council, The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, A/52/871 – S/1998/318 (New York: United Nations, 13 April 1998).

> By post-conflict peace-building, I mean actions undertaken at the end of a conflict to consolidate peace and prevent a recurrence of armed confrontation. Experience has shown that the consolidation of peace in the aftermath of conflict requires more than purely diplomatic and military action, and that an integrated peace building effort is needed to address the various factors which have caused or are threatening a conflict. Peace building may involve the creation or strengthening of national institutions, monitoring elections, promoting human rights, providing for reintegration and rehabilitation programmes, as well as creating conditions for resumed development. [60]

The Secretary-General's report continues:

> A smooth and early transition to post-conflict peace-building is critical, and I urge the Security Council to look favourably on the establishment of post-conflict peace-building support structures similar to the one in Liberia. *Even prior to the end of the conflict*, there must be a clear assessment of key post-conflict peace-building needs and of ways to meet them. [61]

As to the priorities of post-conflict peacebuilding, the Secretary-General's report emphasizes the interconnectedness of a diverse set of priorities:

> Societies which have emerged from conflict have special needs. To avoid a return to conflict while laying a solid foundation for development, emphasis must be placed on critical priorities such as encouraging reconciliation and demonstrating respect for human rights; fostering political inclusiveness and promoting national unity; ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons; reintegrating ex-combatants and others into productive society; curtailing the availability of small arms; and mobilizing the domestic and international resources for reconstruction and economic recovery. Each priority is linked to every other, and success will require a concerted and coordinated effort on all fronts. [62]

[60] Ibid, p. 13, para. 63.

[61] Ibid, p. 14, para 65 (emphasis supplied). For more on Liberia, see Chapter 5.D *supra.*

[62] Ibid, p. 14, para 66.

One aspect emphasized by the International Commission on Intervention and State Sovereignty as part of post-conflict peacebuilding after an intervention is the provision of basic security, both in the form of avoiding revenge killings and in disbarment, demobilization and reintegration of former members of armed groups. [63] Criminal justice and administrative reform to ensure non-discrimination, particularly for returning refugees and internally displaced persons is emphasized. [64] The International Commission on Intervention and State Sovereignty concludes by accentuating the limits to occupation and the need for local ownership, both legally (given the underlying norm of sovereignty) and practically (given the treats of dependency and economic distortion).[65]

Ultimately the main impact of the Responsibility to Protect doctrine has been to shift the rhetoric around "humanitarian intervention" to a different vocabulary, but has not fully changed the shared understanding of the norm of sovereignty in the way many hoped,[66] despite being referenced in the 2005 World Summit

[63] 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) pp. 40-41.

[64] Ibid. 41-42.

[65] Ibid. 44-45.

[66] Jovanović, Miodrag A. "Responsibility to Protect and the International Rule of Law." *Chinese Journal of International Law* 14.4 (2015): 757-776.

Outcome Document.[67] In the heat of the discussion over military intervention, some broader pragmatic points regarding the need to prevent and to rebuild have been underemphasized. By including these points as part of a hybrid functional concept of *jus post bellum*, the effort to establish a system of laws and norms that function together to help establish a just and sustainable peace should be strengthened.

D. Territorial dispute resolution

1. Prohibition of annexation

The prohibition on the annexation of territory is central not only in determining the legality of particular post-conflict settlement, but also in underpinning the entire order of stable and pacific interstate relations. The prohibition on transformative occupation takes its ultimate form in the prohibition of annexation—the customary international law norm against any right of annexation by an occupier is reflected in Article 2(4) of the UN Charter and in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970) and the prohibition against aggression.

[67] UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, particularly paras. 138-9.

The prohibition of annexation as the result of armed conflict is tied to the prohibition of acts of aggression, a clear *jus ad bellum* concern. For International Armed Conflicts, the prohibition of annexation as the *res*[68] of armed conflict is tied to the prohibition of acts of aggression, a *jus ad bellum* concern with *jus post bellum* implications. While annexation could be agreed upon in the text of a peace treaty, such an agreement would be void on that point. Were that not the case, little would remain of the prohibition of annexation. Further, the Vienna Convention on the Law of Treaties, reflecting customary international law on this point, clearly states in Article 53:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[69]

A good list of peremptory norms (*jus cogens* norms) can be found in the commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts: "Those peremptory norms that are clearly accepted and

[68] 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.

[69] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, art. 53.

recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination." [70]

Annexation may often be the result of prohibited acts of aggression, and more to the point, will almost always violate the right to self-determination, being the imposition of a new territorial arrangement from the outside. Following the *principle ex injuria jus non oritur* ("law does not arise from injustice"), Meron has put forward the view that unilateral State action can have no legal effect when it is in contravention of *jus cogens*.[71] While the typical remedy for annexation subsequent to aggression is non-recognition,[72] it is unclear how the international community will handle cases of annexation in the truly long term.[73] Forbidding this result as a general matter, however, should provide a disincentive to begin armed conflicts in the first place.

[70] International Law Commission. "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries." Report of the International Law Commission on the Work of its 53rd session (2001), Commentary on Article 26, paragraph 5, p. 85.

[71] T. Meron, 'On a Hierarchy of International Human Rights', 80 *AJIL* 1, 19-21 (1986).

[72] UN General Assembly, Definition of Aggression, 14 December 1974, A/RES/3314, at 123.

[73] Dinstein, Yoram. War, Aggression and Self-Defence. Cambridge University Press, 2011, pp. 182-3.

2. Self-determination

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[.]"[74] International law is not simply mute on the issue of the 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 principle in the Declaration of Independence[75] 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.

[74] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Article 1.

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

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.[76] 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 engaged in armed struggle against colonial and alien domination and racist regimes [77]

[76] 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.

[77] 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.

This was given additional weight by Additional Protocol I, as previously described.[78] 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.[79]

As expressed by many authors, protection of minorities is the necessary corollary of self-determination, two sides of the same coin.[80] While international protection of minorities was an intense focus after the First World War (but even then of limited application), after the second interest in the subject dropped markedly, replaced to some degree by a focus on human rights.[81]

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[78] 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.

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

[80] Kunz, Josef L. "The future of the international law for the protection of national minorities." *American Journal of International Law* (1945): 89-95; Thornberry, Patrick. "Self-determination, minorities, human rights: a review of international instruments." *International and Comparative Law Quarterly* 38.04 (1989): 867-889.

[81] Kunz, Josef L. "The present status of the international law for the protection of minorities." *American Journal of International Law* (1954): 282-287, pp. 282-3.

E. Consequences of an act of aggression

The prohibition of annexation as the result of armed conflict is tied to the prohibition of acts of aggression, a clear *jus ad bellum* concern. Acts of aggression also raise the question of response in the transition to peace, including the question of reparations—an issue that implicates the law of state responsibility. United Nations Security Council resolutions under Chapter VII authority frequently provide specific binding law that applies to particular transitions from armed conflict to peace.[82]

The prohibition on transformative occupation takes its ultimate form in the prohibition of annexation—the customary international law norm against any right of annexation by an occupier is reflected in Article 2(4) of the UN Charter and in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970) and the prohibition

[82] The United Nations Charter does not limit its application to *jus post bellum* to providing for the authority of the Security Council to act under Chapter VI or Chapter VII to restore peace. Article 78 of the United Nations Charter states in full: "The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality." The trusteeship system, like the mandate system before it, was in part an effort to realize the principle of self-determination and to move away from colonialism and empire as a post-war norm. While the United Nations Trusteeship Council is moribund and widely considered obsolete, the history of colonization and decolonization must inform an analysis of the normative and historical foundations of *jus post bellum.*

against aggression. Section III of the Fourth Geneva Convention of 1949[83] imposes substantial restrictions on the conduct of occupations, and Article 47 in particular notes: The prohibition of annexation as the result of armed conflict is tied to the prohibition of acts of aggression, a clear *jus ad bellum* concern.

This section focuses on the consequences of an *act* of aggression, a state act, as opposed to the *crime* of aggression. The general matter of individual criminal responsibility is addressed in Chapter 6.G ("The scope of individual criminal responsibility") and elsewhere in the work.[84]

F. International territorial administration and trusteeship

It is important to distinguish at the outset between the *principle* of trusteeship (as opposed to a formal trusteeship through the UN trusteeship system). This section will first discuss the formal prohibition of trusteeship for UN Members, then turn to the principle of trusteeship as it applies to international territorial administration. Finally, it will turn to the principles of accountability and proportionality as they apply to *jus post bellum* as described by Boon.[85]

[83] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

[84] For more on this definitional issue, see e.g. O'Connell, Mary Ellen, and Mirakmal Niyazmatov. "What is Aggression? Comparing the Jus ad Bellum and the ICC Statute." *Journal of International Criminal Justice* 10.1 (2012): 189-207.

[85] *See* particularly Boon, Kristen. "Legislative reform in post-conflict zones: Jus post bellum and the contemporary occupant's law-making powers." *McGill LJ* 50 (2005): 285.

Article 78 of the UN Charter reads as follows: "The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality."[86] The prohibition of 'trusteeship' (over UN members) under Article 78 of the Charter limits the options in the transition from armed conflict to peace. It has implications for occupation law under the Fourth Geneva Convention, as well as the powers of the Security Council under the Charter. Given near universal membership in the United Nations, trusteeship in its original sense is essentially prohibited. The reincarnation of the United Nations Trusteeship Council to address such issues as failing states does not seem realistic, given the legal and political difficulties surrounding the issue.[87]

The principles of trusteeship may nonetheless be helpful for instances of international territorial administration.[88] As described by Article 76 of the UN Charter:

> The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
>
> a. to further international peace and security;

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

[87] Stahn, Carsten. The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond. Cambridge: Cambridge University Press, (2008), p. 440.

[88] Ibid.. 422.

> b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
>
> c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
>
> d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.[89]

A series of International Court of Justice cases have a direct bearing on the obligations and principles governing an administering authority. These obligations and principles governing administering authority demand that the authority act in the interest of the inhabitants of the administered territory,[90] including self-governance.[91] The authority should bear responsibility for unlawful acts it commits.[92]

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

[90] *See International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, 132.

[91] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) ([1971] ICJ Rep 16, 31.

[92] *See* Northern Cameroons Case [Preliminary Objections] (1963) ICJ Rep 15, 26, 35.

International territorial administration is no longer done through the trusteeship system but through the United Nations Security Council. There are essentially two types, those with the consent of the sovereign or former sovereign pursuant to Chapter VI (operations such as those in El Salvador ("UNOSAL") and Cambodia ("UNTAC")) and those without such consent pursuant to Chapter VII (operations such as the United Nations Mission in Kosovo ("UNMIK") and the United Nations Administration in East Timor ("UNTAET")). One principle emerging from the United Nations Security Council itself it that the authority should provide regular reports to the international community.[93]

Boon emphasizes that trusteeship is implicit in what she calls multilateral interim administrations or functional occupants. [94] While international humanitarian law binds belligerent occupants to an usufructuary or trusteeship role (see *infra*), one must look elsewhere for this principle to be applied to multilateral interim administrations. Boon also finds trusteeship obligations for international financial institutions involved in post-conflict economic reform, although the

[93] *See* UN Security Council, *Security Council resolution 1511 (2003) on authorizing a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq*, 16 October 2003, S/RES/1511 (2003).

[94] Boon, Kristen. "Legislative reform in post-conflict zones: Jus post bellum and the contemporary occupant's law-making powers." *McGill LJ* 50 (2005): 285, 311.

contours of those obligations beyond avoiding self-dealing are could be further developed.[95]

Where then to find the regulations of such administrations? Boon identifies at least three sources. First, there are the limits imposed by the United Nations Charter.[96] , there exist the baseline *jus cogens* restrictions.[97] Again, a good list of peremptory norms (*jus cogens* norms) can be found in the commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts: "Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."[98] Aside from hopefully rare, rogue instances of racial discrimination, attacks on a civilian population, or torture, the main norm at play in such administrations is likely to be self-determination—an area that raises the question of trusteeship. (For more on self-determination, see Chapter 6.D.2 *supra*.) Rather than trusteeship for a

[95] Boon, Kristen E. "Open for Business: International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law." *NYUJ Int'l L. & Pol.* 39 (2006): 513, 572 et seq.

[96] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, particularly the chapters pertaining to the powers of the Security Council (V, VI, VII, VIII, and XII).

[97] Boon, Kristen. "Legislative reform in post-conflict zones: Jus post bellum and the contemporary occupant's law-making powers." *McGill LJ* 50 (2005): 285, 312.

[98] International Law Commission. "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries." Report of the International Law Commission on the Work of its 53rd session (2001), Commentary on Article 26, paragraph 5, p. 85.

displaced sovereign, trusteeship in an instance of these administrations is likely to be for the population within the administered territory, particularly a population engaged in a struggle for self-determination. Third, United Nations missions established by Security Council resolutions are of course regulated by the resolutions themselves.[99]

The *jus post bellum* principles identified by Boon extend beyond trusteeship to also include accountability (to the population of the administered territory) and proportionality. [100] With respect to accountability, both UNMIK and UNTAET included consultative mechanisms with local representatives. [101] This limited practice is not a strong evidentiary basis for this principle, although local-ownership as a prudential mantra has become widespread for any sort of external intervention in post-conflict justice. A stronger theoretical and legal basis for the principle of accountability is likely found in the peremptory norm of self-determination and the aforementioned evidence of a duty towards trusteeship as applied to accountability to the people in the administered territory. If self-determination applies, it limits the degree to which an administration can be unaccountable to the local population. The words of Article 73 of the United

[99] Boon, Kristen. "Legislative reform in post-conflict zones: Jus post bellum and the contemporary occupant's law-making powers." *McGill LJ* 50 (2005): 285, 318.

[100] Ibid. 294-5.

[101] Ibid. 320-1.

Nations Charter, while not directly applicable to such administration, are worthy of note. They read in pertinent part:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
>
> c. to further international peace and security;[102]

As a matter of guiding principle, it would be odd if these obligations bound member states individually but not collectively. The language in Article 73 require not only the trusteeship values (promoting the interests of the inhabitants, respecting their culture, advancing them, treating them justly, and protecting them from abuses), but also to develop self-government. Again, while not a strong argument for a *lex lata* obligation of accountability to the local population for international territorial administrations (let alone a clear determination of the

[102] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 73.

operationalizations of such an obligation), the overall thrust of the obligations inherent in the peremptory norm of self-determination and the trusteeship obligations described in Article 73 are orthogonal with existing practice requiring some accountability mechanisms between the international territorial administration and the populations of the administered territory. As argued by Gordon, there is a strong case to be made that the right of self-determination applies to non-self governing people in general.[103] The shorter the period of administration and the greater the accountability, the less tension there is with the principle of self-determination.

Boon suggests a tension between the obligations of trusteeship (what inhabitants "should" want) and the obligations of accountability (what inhabitants do or do not want in fact) that can be resolved with the principle of proportionality. [104] While helpful, this general term could be further operationalized. In general, there is a potential for paternalism in any exercise of trusteeship—in assuming that the administrators are better placed to determine the obligations of trusteeship (what inhabitants "should want) better than the inhabitants themselves. Ideally, there should be no tension between the two, and the administrator should, unless there is a compelling not to do so, be led by the

[103] Gordon, Ruth E. "Some Legal Problems with Trusteeship." *Cornell Int'l LJ* 28 (1995): 301.

[104] Boon, Kristen. "Legislative reform in post-conflict zones: Jus post bellum and the contemporary occupant's law-making powers." *McGill LJ* 50 (2005): 285, 323-5.

expressed will of the inhabitants of the territory.[105] One notable exception to this general rule would be when the will of the majority of inhabitants is at odds with the rights or interests of a minority. Ethnic Serbs in Kosovo or Ethnic Indonesians in East Timor are pertinent examples. Then, presumably, one way to operationalize the norm of proportionality between trusteeship and accountability as introduced by Boon is to tie it to the overall *telos* of *jus post bellum*: taking the rights and interest of minorities into account not only for their own sake but to serve the overall goals of societal reconciliation and a just, sustainable, positive peace.

G. The law applicable in a territory in transition

1. The law of state succession

State succession is the replacement of one State by another in the responsibility for the international relations of territory.[106] It occurs in situations when

[105] For more on subjective and objective public reasoning on collective goods, the foremost scholar on the subject may be Amartya Sen. *See* e.g. Sen, Amartya Kumar. *Collective choice and social welfare*. Vol. 11. Elsevier, 2014; Sen, Amartya. *The Idea of Justice*. Harvard University Press, 2011 (particularly Part IV); Sen, Amartya. *Development as freedom*. Oxford Paperbacks, 2001. The concept of a "right to development" has faded from scholarly and United Nations discourse, but if given credence would also have bearing on the obligations of an administrator, particularly a long-term administrator or one that radically changed regulations in terms of investment, property, and resource exploitation.

[106] *See* Vienna Convention on Succession of States in Respect of Treaties (United Nations [UN]) 1946 UNTS 3, UN Reg No I-33356, Part I General Provisions, Art.2, (1), (b); Vienna Convention on Succession of States in respect of State Property, Archives and Debts (United Nations [UN]) UN Doc A/CONF.117/14, Part I General Provisions, Art.2, (1), (a); Arbitral Award of 31 July 1989, Guinea-Bissau v Senegal, Judgment,

territorial change occurs, such as decolonization, cession of territory, secession, dismemberment of a state, incorporation of one state into another, or merger of multiple states into a new state. These can all be the result of an armed conflict. It has to be distinguished from situations where no territorial changes occur, such as military occupation, a change in government, or a failed state.

With respect to the law of state succession with respect to treaties, two dichotomous approaches collectively dominate.[107] The first approach uses the principle of universal succession, upholding past treaty obligations. The second *tabula rasa* approach emphasizes sovereignty at the expense of prior obligations. The dominance of these approaches varies with the type of succession.

In decolonization, the newly independent state is not bound to maintain in force a treaty of the predecessor state, but may establish its status as a party to such a treaty through unilateral declaration. [108] Decolonization frequently happened as a result of armed conflict, so this practice is particularly relevant for *jus post bellum* historically, although likely lacks contemporary relevance.

[1991] ICJ Rep 53, ICGJ 90 (ICJ 1991), (1992) 31 ILM 32, 12th November 1991, International Court of Justice [ICJ].

[107] See Craven, Matthew CR. "The problem of state succession and the identity of states under international law." *European Journal of International Law* 9.1 (1998): 142-162.

[108] UN General Assembly, *Vienna Convention on Succession of States in respect of Treaties*, 6 November 1996, (Entry into force 6 November 1996, United Nations, Treaty Series , vol. 1946, p. 3), Article 16.

With cession of territory from one sovereign to another (e.g. Hong Kong) the general rule is the moving treaty frontiers principle:

> When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory to that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States and (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless It appears from the treaty or Is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. [109]

This scenario, however, should be inoperative in an ordinary contemporary post-conflict scenario, as annexation of territory through conquest is prohibited under international law (see e.g. Chapter 6.E "Prohibition of an act of annexation" supra.) That said, contested borders may be resolved during peace treaties, so this law may theoretically be operative.

If one state is voluntarily incorporated into another (e.g. German Democratic Republic into the Federal Republic of Germany), the obligations of the absorbed state would not normally be taken on be the incorporating state unless the parties decide otherwise, while the obligations of the incorporating state would be extended to the territory of the absorbed state, excepting localized treaties.

[109] Ibid, Article 15.

Again, this scenario is problematic in a post-conflict context, as one would question the voluntary nature of the incorporation.

To the degree that the *Vienna Convention on Succession of States in respect of Treaties* is applied, if two or more states merge to form a new state (e.g. Yemen), all treaties continue to be enforced on the previous with their previous territorial scope unless further action is taken: "Any treaty continuing in force […] shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States[.]"[110]

In the case of a complete dissolution of a state into multiple states (Yugoslavia), the treaties of the predecessor state continue in force for each successor state. [111] In contrast, when one of the entities on the territory continues the legal personality of the predecessor state (USSR, Russian Federation) the continuing state continues all treaty relations (excepting localized treaties). [112] These scenarios can come into play in the post-conflict environment, and can thus be important components of *jus post bellum*.

Of course, not all issues in the law of state succession regard treaty law. Some issues include property, archives and debts, for example. The *Vienna Convention*

[110] Ibid, Art. 31.

[111] Ibid, Art. 34.

[112] Ibid, Art. 35.

on Succession of States in respect of State Property, Archives and Debts[113] has not yet entered into force, and currently[114] has only seven state parties. Customary law seems governed mostly by equitable, negotiated settlements (e.g. USSR, Yugoslavia, Czechoslovakia). Again, these examples are not post bellum, so the law in that context is likely unsettled. This area is further explored in the section on odious debt, *infra*.

2. Human rights law and the rights and interests of minorities

Human rights law generally applies in times of war and peace, and so would apply during the transition from armed conflict to peace. The full spectrum of applicable human rights law is beyond the scope of this work. Three aspects of human rights law merit particular attention with respect to the application of human rights law in the context of transition from armed conflict to peace: states of emergency; the simultaneous application of international humanitarian law and human rights law; and the rights and interests of miniorities in the transition to peace.

[113] Vienna Convention on Succession of States in respect of State Property, Archives and Debts (United Nations [UN]) UN Doc A/CONF.117/14, 8 April 1983.

[114] 9 April 2017.

Human rights conventions limit the general doctrine of necessity by proclaiming non-derogable human rights guarantees[115] and allowing measures derogating from their obligations only (e.g.):

> to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. [116]

While the International Covenant on Civil and Political Rights, European Convention on Human Rights, and American Convention on Human Rights have differing non-derogable rights, they all protect the right to life; the right not to be free from torture or other forms of cruel, inhuman or degrading treatment or punishment, the right to be free from slavery and servitude, and the right to be free from retroactive punishment.

Derogation in states of emergency is only potentially applicable in situations of "public emergency which threatens the life of the nation."[117] The Human Rights Committee's General Comment No 29 (Derogations from Provisions of the

[115] E.g. "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 4.2.

[116] E.g. "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." Ibid, Article 4.1.

[117] Ibid

Covenant during a State of Emergency)'[118] makes clear that such states are exceptional. The American Convention on Human Rights phrases the suspension of guarantees:

> In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.[119]

The possibility of a state of emergency may change over the course of the transition from armed conflict to peace, depending on whether conditions exist that meet the required standard. The European Commission of Human Rights described the criteria justifying a declaration of a state of emergency as follows:

a) the emergency must already exist or be imminent;

b) it must affect the whole of the nation;

c) the organized life of the community must be threatened;

[118] Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). *See also* Lawless v Ireland, Admissibility, App No 332/57, B/1, (1958-59) 2 YB Eur Conv HR 324, 30th August 1959, European Commission on Human Rights.

[119] American Convention on Human Rights (Organization of American States [OAS]) OASTS No 36, 1144 UNTS 123, B-32, OEA/Ser.L.V/II.82 doc.6 rev.1, 25, Part I State Obligations and Rights Protected, Chapter IV Suspension of Guarantees, Interpretation and Application, Art.27.

> d) the situation must be such that normal measures permitted under the Convention will not be adequate to address that situation.[120]

With respect to the application of human rights alongside international humanitarian law, a critical case is the recent *Hassan v. United Kingdom*.[121] The particular concern was the application of the right to liberty, enshrined in Article 5 of the ECHR, was violated by the United Kingdom's detention of an individual in accordance with the Third and Fourth Geneva Conventions in an international armed conflict. The European Court of Human Rights rejected the argument that international humanitarian law was *lex specialis* that precluded jurisdiction.[122] Instead, the Court rejected complaints under Articles 2 and 3 of the ECHR (failure to investigate detention, ill-treatment and death) for lack of evidence, and found that deprivation of liberty pursuant to powers under international law could be lawful and not arbitrary. The Court relied on the principle that the ECHR can be modified by a consistent practice by High Contracting Parties.[123] Of particular importance is the application of human rights law extraterritorially,

[120] Greek Case, Denmark v Greece, Report of the Commission, App No 3321/67, (1969) 12 YB Eur Conv Hum Rts 1, (1972) 12 YB Eur Conv Hum Rts 186, 5th November 1969, European Commission on Human Rights.

[121] Hassan v. United Kingdom, 2014 Eur. Ct. H.R., available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i001- 146501 (9 December 2015).

[122] Ibid., para. 77).

[123] Ibid., para. 101. *See* United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(3)(c)

even if read in light of international humanitarian law. This also has implications for the laws of occupation, which this work addresses *infra*.

There is a robust ongoing discussion as to how, for example, international humanitarian law and human rights law operate during periods of armed conflict.[124] William Schabas contrasts the approach taken by the International Court of Justice (in which international humanitarian law is the *lex specialis* through which the human rights concept of "arbitrary deprivation of life" is to be understood during armed conflict) with the approach taken by the Human Rights Committee in which the individual benefits from both bodies of law.[125] For Schabas, the tension between these two approaches to international human rights law and international humanitarian law cannot be understood without understanding the relationship with a third body of law, *jus ad bellum*. International humanitarian law is built on neutrality with respect to the legality of the war itself and human rights law tends to view war itself as a violation of the

[124] See e.g., Schabas, William A. "Lex Specialis-Belt and Suspenders-the Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum." Isr. L. Rev. 40 (2007): 592; Droege, Cordula. "Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, The." Isr. L. Rev. 40 (2007): 310; Orakhelashvili, Alexander. "The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?." European Journal of International Law 19.1 (2008): 161-182; Cassimatis, Anthony E. "International humanitarian law, international human rights law, and fragmentation of international law." International and Comparative Law Quarterly 56.03 (2007): 623-639.

[125] Schabas, William A. "Lex Specialis-Belt and Suspenders-the Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum." Isr. L. Rev. 40 (2007): 592.

human right to peace. This analysis regarding the choice of approach may be useful with respect to *jus post bellum* as well. If one attempts to find a neat and seamless relationship between potentially conflicting areas of law, one is likely to compromise essential aspects of at least one body of law.

It is worth noting that a number of international treaties and instruments since 1989 include both human rights and international humanitarian law provisions. These include the Convention on the Rights of the Child,[126] the Rome Statute of the International Criminal Court,[127] the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,[128] the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[129] and the Convention on the Rights of Persons with Disabilities.[130]

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[126] Convention on the Rights of the Child of 1989, art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3.

[127] Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

[128] UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000 (Entered into force 12 February 2002, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000).

[129] G.A. Res. 60/147, UN Doc. A/RES/60/147 (Dec. 16, 2005).

[130] UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, *see especially* Article 11: States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with

International law and international organizations have long been concerned with the venerable problem of "national minorities." As far back as the Peace of Westphalia, religious minorities were a central concern. The fate of minorities was at issue in the 1814 Congress of Vienna, the 1856 Congress of Paris, and the 1878 Congress of Berlin. The Paris Minority Treaties that emerged after World War I were the result of distrust of municipal law's treatment of minorities.[131] The Paris Minority Treaties were an innovative regulation of a state's treatment of its own citizens based on international law pertaining to minority groups.[132] As expressed by many authors, protection of minorities is the necessary corollary of self-determination, two sides of the same coin.[133] While international protection of minorities was an intense focus after the First World War (but even then of limited application), after the second interest in the subject dropped

disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters. See 40 Isr. L. Rev. 317 (2007) Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, The; Droege, Cordula.

[131] Kunz, Josef L. "The future of the international law for the protection of national minorities." *American Journal of International Law* (1945): 89-95, p. 91.

[132] Kunz, Josef L. "The future of the international law for the protection of national minorities." *American Journal of International Law* (1945): 89-95, p. 91; Kunz, Josef L. "The present status of the international law for the protection of minorities." *American Journal of International Law* (1954): 282-287, pp. 282-3.

[133] Kunz, Josef L. "The future of the international law for the protection of national minorities." *American Journal of International Law* (1945): 89-95; Thornberry, Patrick. "Self-determination, minorities, human rights: a review of international instruments." *International and Comparative Law Quarterly* 38.04 (1989): 867-889.

markedly, replaced to some degree by a focus on human rights.[134] Increasingly, protection of minorities was not seen as a separate area, but a mere subset of human rights.[135] Human rights, with its focus on the individual as its natural unit, can be limited with respect to providing special protection from the majority; limited to general statements such as Article 27 of the ICCPR:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[136]

Again, in the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*,[137] what is protected is the "rights" of "persons" not protecting the broader interests of groups (beyond mere existence). At the United Nations, the body with the primary responsibility for protecting minorities is the Human Rights Council.[138] Similarly, the Lisbon Treaty refers to

[134] Kunz, Josef L. "The present status of the international law for the protection of minorities." *American Journal of International Law* (1954): 282-287, pp. 282-3.

[135] See e.g. Brownlie, Ian. "Rights of Peoples in Modern International Law, The." *Bull. Austl. Soc. Leg. Phil.* 9 (1985): 104.

[136] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. See also e.g. e.g. the International Convention on the Elimination of all Forms of Racial Discrimination, U.K.T.S. 77 (1969), Cmnd.41088; The UNESCO Convention against Discrimination in Education (1960) 156 U.N.T.S. 93.

[137] UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135.

[138] See e.g. UN Human Rights Council, *Rights of persons belonging to national or ethnic, religious and linguistic minorities : report of the United Nations High Commissioner for Human Rights* , 17 December 2012, A/HRC/22/27. The Sub-

the rights of persons belonging to minorities[139] including the right to be free from discrimination.[140] The strongest protection of national minority groups *qua* groups remains in Europe (specifically the Council of Europe), with instruments such as the European Charter for Regional or Minority Languages[141] and the Framework Convention for the Protection of National Minorities.[142] While laudable, these efforts within the Council of Europe lack universality and specific application in the *jus post bellum* context.

One of the most interesting offices with respect to minorities and *jus post bellum* is likely the Organization for Security and Co-operation in Europe's High Commissioner on National Minorities, which gets involved in a situation if, in her judgement, there are tensions involving national minorities which could develop into a conflict. The portfolio of this office is more conflict prevention than peacemaking, peacekeeping, or peacebuilding, however. Human rights can sometimes trump and override arrangements meant to keep a sustainable peace

Commission on Prevention of Discrimination and Protection of Minorities under the United Nations Commission on Human Rights was renamed the Sub-Commission on the Promotion and Protection of Human Rights in 1999 and then ended in 2006.

[139] European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, Art. 2.

[140] Ibid, Art. 21.

[141] Council of Europe: Parliamentary Assembly, *The European Charter for Regional or Minority Languages*, 21 October 2010, Doc. 12422.

[142] Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157.

between various national groups—see for example *Sejdić and Finci v. Bosnia and Herzegovina* in which the human rights of the applicants overrode the power sharing arrangements between national groups in Bosnia and Herzegovina.[143]

When groups are recognized in laws applied during transitions to peace, they are typically rather limited, such as organized armed groups in international humanitarian law as applied to non-international armed conflicts, or a "people" fighting for self-determination. The right of certain groups not to be destroyed under the concept of Genocide is an extremely limited protection, not applicable to all groups and not protective of all of the interests of listed groups. The collective political interests of, for example, women, children, the poor, or indigenous populations are poorly served by the traditional bases of international law (particularly) during the transition to peace, when the urgent demands of ending organized violence may tend to trump all other concerns.

Jus post bellum, as part of a venerable legal and normative tradition, is well placed to fill the gap between states and individuals with respect to the interests of groups during the transition to peace. It could be a useful tool to create or recreate a sense of a social contract necessary for successful counterinsurgency and democracy-building, even in the midst of occupation or in post-occupation.

[143] ECtHR 22 Dec. 2009, Case No. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*. For more on this case, see Milanovic, Marko. "Sejdic and Finci v. Bosnia and Herzegovina." *American Journal of International Law*104 (2010); Bardutzky, Samo. "The Strasbourg Court on the Dayton Constitution: Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009." *European Constitutional Law Review* 6.02 (2010): 309-333.

After all, armed conflicts are often fought due to the political interests of groups being underserved by the pre-war political structure. A case study in how *jus post bellum* principles can be used to structure the transition to peace relates to the question of whether there should be any bias towards a more democratic, equitable distribution of political power in the aftermath of war.

3. The laws of occupation

The modern understanding of occupation is rooted in Article 42 of the 1907 Hague Regulations[144] and the identical text in the 1874 Brussels Declaration.[145] That text simply reads: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." [146]

The test as to whether or not territory is occupied or not is thus factual, with two conditions: the sovereign power has cannot exercise authority and the occupying

[144] Hague Convention (Date signed: 18th October 1907), IV (Convention Relating to the Laws and Customs of War on Land), Annex (Regulations respecting the Laws and Customs of War on Land), Section III (Military Authority over the Territory of the Hostile State), Art. 42.

[145] Project of an International Declaration concerning the Laws and Customs of War ((signed 27 August 1874) (1873-74) 65 BFSP 1005 (1907) 1 AJIL 96)

[146] Hague Convention (Date signed: 18th October 1907), IV (Convention Relating to the Laws and Customs of War on Land), Annex (Regulations respecting the Laws and Customs of War on Land), Section III (Military Authority over the Territory of the Hostile State), Art. 42. The authentic (French) text reads: "Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer."

power can. With respect to the second condition, he International Court of Justice has clarified that the hostile army has actual, not potential control.[147] Belligerent occupation does not require active resistance, and may lead to a sustained peace without shots being fired.[148] Common Article 2 of the Geneva Conventions of 1949 explains their applicability with the following language:

> [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.[149]

This was extended to Additional Protocol I.[150] As described in Article 1, paragraph 3:

> 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.

[147] Armed Activities on the Territory of the Congo, Congo, Democratic Republic of the v Uganda, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), (2006) 45 ILM 271, 19th December 2005, International Court of Justice [ICJ].

[148] See generally, Benvenisti, The International Law of Occupation (2nd ed 2012 OUP); Yoram Dinstein, The International Law of Belligerent Occupation (CUP 2009).

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

[150] 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.

The Hague Regulations, Geneva Convention IV and Additional Protocol I are the main sources for determining the law of armed conflict in a belligerent occupation. Also of note is the Convention for the Protection of Cultural Property in the Event of Armed Conflict.[151].

Traditionally, occupation was treated as a difficult exception under public international law.[152] Occupation was seen as an extraordinary situation, where the identity between the sovereign state and its territory was ruptured, and the occupying force in effect held the territory in trust or at most as a usufructuary, until control would be restored to the sovereign. Radical transformation of the occupied territory and its laws was thus traditionally prohibited. This was eventually reflected in Article 43 of the Hague Convention of 1907.

Human rights law can also apply in occupied territories. This is the case for at least three reasons: the finding that human rights protections continue during international armed conflict,[153] the obligations of governments for areas under

[151] 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

[152] See generally Eyal Benvenisti, *The International Law of Occupation* (2nd ed 2012 OUP).

[153] *See Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996.

their effective control[154], and the obligation for the occupying power to respect the laws in force in the country under Article 43 of the Hague Regulations.[155]

The literature on *jus post bellum* and occupation demonstrates the need for understanding the laws applicable to occupation with an eye towards a successful transition to a just and sustainable peace. Stahn[156] points out the demands for a substantive *jus post bellum* to manage the difficulties of occupation and post-occupation, citing the legal dilemmas posed by interventions in Kuwait and Iraq[157] (and indeed Japan and Germany[158]), specifically referencing the practice of the United Nations Security Council in Resolution 1483, which combined continued application of the law of occupation alongside the principles of state-building.[159] Boon states "Yet with the exception of the law of belligerent

[154] *See Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ)*, 9 July 2004, para. 112.

[155] Convention concerning the Laws and Customs of War on Land between the Argentine Republic, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, the Netherlands, Norway, Panama, Paraguay, Persia, Peru, Portugal, Roumania, Russia, El Salvador, Servia, Siam, Sweden, Switzerland, Turkey, the United States, Uruguay and Venezuela, signed at The Hague, 18 October 1907, Annex Regulations respecting the Laws and Customs of War on Land, Section III Military Authority over the Territory of the Hostile State, Art.43

[156] Stahn, Carsten. "'Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *European Journal of International Law* 17.5 (2006): 921-943.

[157] Ibid 926-29.

[158] Ibid 928-29.

occupation, neither jus ad bellum nor jus in bello provide much guidance on temporary interventions after war and before peace."[160]

For the sake of concision, the analysis on trusteeship, accountability, and proportionality contained in the section on international territorial administration and trusteeship *supra* is not repeated here, although much of it applies with equal or greater force to belligerent occupation. Boon's work on *jus post bellum*, occupation and trusteeship referenced earlier[161] should be read alongside Walzer,[162] Cohen,[163] Benvenisti,[164] and Roberts[165] as well as classics such as von Glahn.[166]

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[159] Ibid 929.

[160] Boon, Kristen E., Obligations of the New Occupier: The Contours of a Jus Post Bellum (June, 29 2009). Loyola of Los Angeles International and Comparative Law Review, Vol. 31, No. 2, 2008, p. 102.

[161] Boon, Kristen E., Obligations of the New Occupier: The Contours of a Jus Post Bellum (June, 29 2009). Loyola of Los Angeles International and Comparative Law Review, Vol. 31, No. 2, 2008, p. 102; Boon, Kristen E. "The Future of the Law of Occupation." *The Canadian Yearbook of International Law* 46 (2008): 107-142; Boon, Kristen. "Legislative reform in post-conflict zones: Jus post bellum and the contemporary occupant's law-making powers." *McGill LJ* 50 (2005): 285.

[162] Walzer, Michael. "The Aftermath of War." in *Ethics beyond war's end. Patterson, Eric. Ed. Georgetown University Press, 2012.*: 35-46 (obligation to create social justice); Walzer, Michael. *Arguing about war*. Yale University Press, 2008.

[163] Cohen, Jean L. "The Role of International Law in Post-Conflict Constitution-Making toward a Jus Post Bellum for Interim Occupations." *NYL Sch. L. Rev.* 51 (2006): 497.

[164] Benvenisti, Eyal. "Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective, The." IDF LR 1 (2003): 19; Benvenisti, Eyal. *The International Law of Occupation*. 2d ed. Oxford: Oxford University Press 2012

[165] Roberts, Adam. "What is a military occupation?." *British Yearbook of International Law* 55.1 (1985): 249-305; Roberts, Adam. "Transformative military occupation:

Why is transformative occupation a problem under occupation law? [167] To briefly review Articles 43 and 46 of the Hague Convention of 1907,[168] Article 43 states:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 46 states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

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applying the laws of war and human rights."*American Journal of International Law* (2006): 580-622.

[166] Von Glahn, Gerhard. *The Occupation of Enemy Territory: A commentary on the law and practice of belligerent occupation*. University of Minnesota Press, 1957, 6.

[167] For more on the heated discussion regarding transformative occupation, see e.g. Österdahl, Inger, and Esther Van Zadel. "What will jus post bellum mean? Of new wine and old bottles." *Journal of Conflict and Security Law* 14.2 (2009): 175-207; Boon, Kristen. "Obligations of the New Occupier: The Contours of a Jus Post Bellum." *Loyola of Los Angeles International and Comparative Law Review* 31.2 (2008); Zahawi, Hamada. "Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom": *California Law Review* (2007): 2295-2352; Roberts, Adam. "Transformative military occupation: applying the laws of war and human rights." *American Journal of International Law* (2006): 580-622; Cohen, Jean L. "Role of International Law in Post-Conflict Constitution-Making toward a Jus Post Bellum for Interim Occupations, The." *NYL Sch. L. Rev.* 51 (2006): 497; 580-622; Bhuta, Nehal. "The antinomies of transformative occupation." *European Journal of International Law* 16.4 (2005): 721-740; Yoo, John. "Iraqi Reconstruction and the Law of Occupation." *UC Davis J. Int'l L. & Pol'y* 11 (2004): 7.

[168] 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.

The prohibition on transformative occupation takes its ultimate form in the prohibition of annexation—the customary international law norm against any right of annexation by an occupier is reflected in Article 2(4) of the UN Charter and in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970) and the prohibition against aggression. Section III of the Fourth Geneva Convention of 1949[169] imposes substantial restrictions on the conduct of occupations, and Article 47 in particular notes:

> Art. 47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Pictet's commentary notes that the traditional concept of occupation puts the occupying Authority to be considered merely as a de facto administrator.[170] The Public Trust Doctrine provided the occupier by analogy with usufructory obligations during occupation.

[169] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

[170] International Committee Of The Red Cross, Commentary On The Geneva Convention (IV) Relative To The Protection Of Civilian Persons In Time Of War 273 (Jean Pictet gen. ed., 1958), Article 47.

The Fourth Geneva Convention[171] continues in Article 64:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

In short, under this article, the Occupying Party may only do what is necessary for order and security, not radical transformation of the penal code—even if, presumably, the penal code is inequitable. With that as the traditional basis for the restriction of transformative occupation, it must be noted that transformative occupation nonetheless has a long history, and has been particularly challenged since World War II, first with the axis powers, with Czechoslovakia after 1968, northern Cyprus after 1974, Cambodia after 1978, Grenada in 1983, and with United States policy in Iraq after 2003.[172] The occupation of Iraq, including the

[171] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

[172] For more on this subject see e.g. Roberts, Adam. "Transformative military occupation: applying the laws of war and human rights."*American Journal of*

import of United Nations Security Council Resolution 1483[173] is primarily responsible for the current heated debate on the subject.

H. The scope of individual criminal responsibility

The section regarding amnesty and *aut dedere aut judicare* (Chapter 6.B.2.b *supra*) has already touched upon the scope of individual criminal responsibility. This section also amplifies the material covered in Chapter 3 ("Present – An Exploration of Contemporary Usage") Of the ten situations before the International Criminal Court as of this writing[174] (Democratic Republic of the Congo, Central African Republic, Uganda, Darfur (Sudan), Kenya, Libya, Cote d'Ivoire, Mali, and Georgia),[175] 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.

International Law (2006): 580-622; Bhuta, Nehal. "The antinomies of transformative occupation." *European Journal of International Law*16.4 (2005): 721-740; Fox, Gregory H. "Transformative occupation and the unilateralist impulse." *International Review of the Red Cross* 94.885 (2012): 237-266.

[173] UN Security Council, *Security Council Resolution 1483 (2003) on the situation between Iraq and Kuwait*, 22 May 2003, S/RES/1483 (2003). For more on this subject, see Benvenisti, Eyal. "Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective, The." *IDF LR* 1 (2003): 19; Orakhelashvili, Alexander. "Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law, The." *J. Conflict & Sec. L.* 8 (2003): 307.

[174] 24 March 2017.

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

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) 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.

In its current usage, International Criminal Law involves the application of international law to determine the individual criminal responsibility of defendants under that law while protecting the rights of the accused against the power of the state, regardless of how that power is institutionalized. The critical aspect of International Criminal Law is not the forum, whether that forum is international, domestic, or hybrid. The central hypothesis of International Criminal Law is the existence of international law that creates individual criminal responsibility for prohibited conduct.

The modern touchstone for the substantive content of International Criminal Law may be the four categories of crimes identified in the Rome Statute of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes, and Aggression. A historical approach might tease out the criminalization of

separate crimes (such as slavery, torture, or forced marriage) now lumped together under general headings such as Crimes against Humanity and War Crimes. The substantive portfolio of International Criminal Law is likely to continue to expand. For example, should the controversial Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights be adopted, pursuant to Article 28A "International Criminal Jurisdiction of the Court," the International Criminal Law Section of the Court would have power to try persons for fourteen crimes, not four.[176] Influences on international criminal law may have influences from unlikely places. The 2013 Arms Trade Treaty[177] 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.

The substance of International Criminal Law continues to change over time. Some developments, like the attempted criminalization as a matter of international law of "The Crime of Unconstitutional Change of Government" may tend to reinforce the status quo, putting it potentially at odds with other

[176] First Meeting of the Specialized Technical Committee on Justice and Legal Affairs, 15-16 May 2014, STC/Legal/Min/7(I) Rev. 1, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 28A.

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

dynamics such as the original conception of Transitional Justice that might tend to oppose any status quo not sufficiently protective of human rights.

I. Odious Debt

The section *supra* regarding the law applicable to state succession with respect to a territory in transition naturally leads to the question as to whether there are laws of state and governmental succession in matters other than territory that relate to *jus post bellum*. In particular, the idea of "odious debt" as a species of "odious finance" may raise important legal and normative questions in the transition from armed conflict to peace. The key work in this area is James Gallen's article *Odious Debt and Jus Post Bellum*,[178] which addresses the issue directly.

The idea of "odious debt" dates primarily from the work of Alexander Sack from the 1920s onwards[179] and has reemerged since the invasion of Iraq in 2003.[180] Sack defines the principle of "odious debt" as follows:

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[178] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694.

[179] Alexander N Sack, *Les effets de transformations des États sur leur dettes publiques et autres obligations financières* (Recueil Sirey 1927); Alexander N Sack, 'The Judicial Nature of the Public Debt of States' (1932) 10 NYU L Q 341; Alexander N Sack, 'Diplomatic Claims Against the Soviets (1918–1938)' (1938) 15 NYU Review of Law 507–35.

[180] Patricia Adams, 'Iraq's Odious Debts' Policy Analysis No 526 (28 September 2004); Justin Alexander and Colin Rowat, 'A Clean Slate in Iraq: From Debt to Development' (2003) 33 Middle East Report No 228, 32–36; Jürgen Kaiser and Antje Queck, 'Odious Debts – Odious Creditors? – International Claims in Iraq' *Friedrich Ebert Stiftung: Occasional Paper No 2* (March 2004) <http://library .fes.de/pdf-files/iez/global/02018.pdf> accessed 2 May 2016; Nehru, Vikram. "The concept of

> The new Government would have to prove and an international tribunal would have to ascertain the following:
>
> a. That the needs which the former Government claimed in order to contract the debt in question, were odious and clearly in contradiction to the interests of the people of the entirety of the former State or a part thereof
>
> b. That the creditors at the moment of paying out the loan were aware of its odious purpose.
>
> 2. Upon establishment of these two points, the creditors must then prove that the funds for this loan were not utilized for odious purposes – harming the people of the entire State or part of it – but for general or specific purposes of the State, which do not have the character of being odious.[181]

The concept of "odious debt" is consistently associated with Sack's definition.[182]

An alternative definition of "odious debt" can be found in the reports of

Mohammed Bedjaoui , UN Special Rapporteur on the succession of States for the

International Law Commission.[183] He proposed the definition:

> (a) All debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or the transferred territory:

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odious debt: some considerations." *World Bank Policy Research Working Paper Series, Vol* (2008).

[181] Alexander N Sack, *Les effets de transformations des États sur leur dettes publiques et autres obligations financières* (Recueil Sirey 1927), p. 163.

[182] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694, 670.

[183] Mohammed Bedjaoui, Special Rapporteur, 'Ninth Report on Succession of States in Respect of Matters other than Treaties' (1977) UN Doc A/CN.4/301 and Add.1, 67.

(b) All debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. [184]

Anupam Chander has usefully and compellingly clarified that the concept of odious debt should not be restricted to traditional forms of indebtedness, but also other "long-term obligations invented by modem finance."[185] For the purposes of this section, "odious debt" should be read to include such long-term obligations more generally, without devolving unnecessarily into a discussion of "odious finance."[186]

Of particular note for the purposes of *jus post bellum*, "war debts" (debts raised for the purpose of war but possibly passed to the successor/victor state) were not passed in a number of cases,[187] while they were in others. [188] Similarly, Bedjaoui in his role as Special Rapporteur identified a number of cases of the non-passing

[184] Mohammed Bedjaoui, Special Rapporteur, 'Ninth Report on Succession of States in Respect of Matters other than Treaties' (1977) UN Doc A/CN.4/301, 66.

[185] Anupam Chander, 'Odious Securitization' (2004) 53 Emory L J 923, 924.

[186] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694, 677..

[187] Mohammed Bedjaoui, Special Rapporteur, 'Ninth Report on Succession of States in Respect of Matters other than Treaties' (1977) UN Doc A/CN.4/301, fn 276.

[188] Mohammed Bedjaoui, Special Rapporteur, 'Ninth Report on Succession of States in Respect of Matters other than Treaties' (1977) UN Doc A/CN.4/301.

to a successor state of "subjugation debts".[189] Despite these reports, the text of the treaty that might have dealt with odious debt, *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*,[190] does not mention odious debt. The idea of odious debt as a blanket exception to the obligation to repay probably does not yet reflect customary international law.[191]

What is more intriguing is the possibility that through the application of principles of *jus post bellum*, the specific contours of odious debt may be made more specific and compelling as law and equitable principles that may form the basis of renegotiation during the transition from armed conflict to peace. Mohammed Bedjaoui, in his role as Special Rapporteur of the International Law Commission, viewed "odious debt" as an umbrella concept covering a range of specific debt categories,[192] including the two classical and most common types of odious debt: "hostile debt" and "war debt."[193] "Hostile debts" are debts incurred to suppress secessionist movements,[194] wars of liberation,[195] (implicating

[189] Ibid, fn 278.

[190] UN General Assembly, *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, 8 April 1983, available at: http://www.refworld.org/docid/3ae6b3961c.html [accessed 2 May 2016]

[191] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694.

[192] *Ninth Report on the Succession of States in Respect of Matters other than Treaties*, 1977 Yearbook of the International Law Commission, Vol. 2 (Part 1): 68 and 70.

[193] Robert Howse, 'The Concept of Odious Debt in Public International Law' UNCTAD Discussion Paper No 185 (2007) UNCTAD/OSG/DP/2007/4, p. 3.

[194] Ibid.

primarily non-international armed conflict) or wars to conquer peoples[196] (implicating in contemporary terms primarily international armed conflicts). Examples include the repudiation of Tsarist debts by the Union of Soviet Socialist Republics, and the refusal of the United States to repay formerly Spanish debt associated with Cuba, the Philippines, Puerto Rico, and other territories.[197] "War debts" are debts contracted by the State for the purpose of funding a war which the State eventually loses and whereby the victor is not obliged to repay the debt.[198] The majority of examples of war debt as odious debt seem to be antiquated from a contemporary perspective where the victor in a war might assume debt from the loser due to annexation of territory in an international armed conflict, but the term may also be applied to a non-international armed conflict that results in a regime overthrow. An example of this is the refusal of the new government in Costa Rica to pay back loans made by the Royal Bank of Canada after the overthrow of a dictator.[199] The application

[195] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694, p. 671.

[196] Robert Howse, 'The Concept of Odious Debt in Public International Law' UNCTAD Discussion Paper No 185 (2007) UNCTAD/OSG/DP/2007/4, p. 3.

[197] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694, p. 672.

[198] Robert Howse, 'The Concept of Odious Debt in Public International Law' UNCTAD Discussion Paper No 185 (2007) UNCTAD/OSG/DP/2007/4, p. 3.

[199] *Great Britain v Costa Rica* (1923) 2 Annual Digest 34, 176; See Odette Lienau, 'Who Is the "Sovereign" in Sovereign Debt?: Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century' (2008) 33(1) Yale J Intl L 63–111; Gallen, James.

of Additional Protocol I, Article 1.4 (defining "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" as international armed conflict)[200] may complicate the division between non-international armed conflict and international armed conflict—should AP 1 apply, the debt would be associated with international armed conflict.

Beyond war debt and hostile debt, Jeff King categorizes illegal occupation debts and fraudulent, illegal and corruption debts as species of odious debt.[201] As Gallen notes, these varieties of odious debt covers most of the scenarios in which a debt may be repudiated after a conflict.[202] Regardless of the type of odious debt, the application of the principles informing *jus post bellum* should assist in the resolution of the issue of repayment of obligations in the transition to peace.

Gallen focuses on equity as a general principle of law that informs the resolution of odious debt in the transition from armed conflict to peace. Other scholars such as Jure Zrilič and Merryl Lawry-White focus on equity in the application of

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"Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694, pp. 672-3.

[200] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

[201] Jeff King, 'Odious Debt: The Terms of the Debate' (2007) 32 NC J Intl L & Comm Reg 605–67.

[202] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694, pp. 673.

investment claims in the transition to peace.[203] While equity is a system rooted in a variety of legal traditions[204] its generality is both a strength and a weakness—flexible but potentially over-flexible. Focusing the principle of equity (or related principles such as *meionexia*[205] and proportionality[206]) on the particular goal of achieving a just and sustainable peace may help guide the application of these principles to make sure that the repudiation is not done to the level that actually degrades the post-conflict government's access to credit, nor cripples them with unsustainable or unjust debt. This may also allow a varied application depending on whether the creditors are private, sovereign, or international financial institutions.[207]

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[203] Jure Zrilič, 'International Investment Law in the Context of *Jus Post Bellum:* Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?' (2015) 16 *The Journal of World Investment & Trade* 604; Merryl Lawry-White, 'A Context Specific and Holistic Approach to Post-Conflict International Investment Claims' (2015) 16 *The Journal of World Investment & Trade* 633.

[204] Akehurst, Michael. "Equity and general principles of law." *International and Comparative Law Quarterly* 25.04 (1976): 801-825; Justice Margaret White, 'Equity – A General Principle of Law Recognised by Civilised Nations?' (2004) 4(1) Queensland University of Technology Law Journal 103, 106–07.

[205] See Larry May, *After War Ends: A Philosophical Perspective* (CUP 2012), 6-10; Larry May, '*Jus Post Bellum,* Grotius and Meionexia' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 15–25, 21.

[206] See Jure Zrilič, 'International Investment Law in the Context of *Jus Post Bellum:* Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?' (2015) 16 *The Journal of World Investment & Trade* 604; Larry May and Michael Newton, *Proportionality in International Law* (OUP 2014); Emiliou, Nicholas. *The principle of proportionality in European law: a comparative study*. Vol. 10. Kluwer Law Intl, 1996.

[207] Gallen, James. "Odious Debt and Jus Post Bellum." *The Journal of World Investment & Trade* 16.4 (2015): 666-694, pp. 686.

J. Alternative structuring of Jus Post Bellum

It is also helpful to look at other leading authors and their approach to the substance of *jus post bellum*. In Carsten Stahn's classic *Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force* [208] points out the demands for a substantive *jus post bellum*, citing the legal dilemmas posed by interventions in Kuwait and Iraq[209] (and indeed Japan and Germany[210]), specifically referencing the practice of the United Nations Security Council in Resolution 1483, which combined continued application of the law of occupation alongside the principles of state-building.[211] He points to the Responsibility to Rebuild pillar of *The Responsibility to Protect*, as reflected not only in the work of the International Commission on Intervention and State Sovereignty[212] but also the High-Level Panel Report on Threats, Challenges and Change,[213] the Report of the Secretary-General entitled 'In Larger Freedom:

[208] Stahn, Carsten. "'Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *European Journal of International Law* 17.5 (2006): 921-943.

[209] Ibid 926-29.

[210] Ibid 928-29.

[211] Ibid 929.

[212] Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect (Dec. 2001), para. 5.1

[213] UN General Assembly, *Note [transmitting report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world : our shared responsibility"]*, 2 December 2004, A/59/565.

Towards Development, Security and Human Rights for All'[214] and in the Outcome Document of the 2005 World Summit.[215] One can also look to the work of the Peacebuilding Commission.[216] He points specifically to requirements that may exist for liberal interventions in order to restore human rights and standards of good governance during the transition to peace.[217] For concrete examples, Stahn notes that the formation of peace agreements is governed by

> Article 52 of the Vienna Convention on the Law of Treaties and considerations of procedural fairness; the limits of territorial dispute resolution are defined by the prohibition of annexation and the law of self-determination; the consequences of an act of aggression are inter alia determined by parameters of the law of state responsibility, Charter-based considerations of proportionality and human rights-based limitations on reparations; the exercise of foreign governance over territory is limited by the principle of territorial sovereignty, the prohibition of 'trusteeship' (over UN members) under Article 78 of the Charter limits occupation law under the Fourth Geneva Convention, as well as the powers of the Security Council under the Charter; the law applicable in a territory in transition is determined by the law of state succession as well as certain provisions of human rights law (for instance, non-derogable human rights guarantees) and the laws of occupation; finally, the scope of individual criminal

[214] The Report of the UN High-level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility (2004), at paras 201–203.

[215] GA Res. 60/1 (2005 World Summit Outcome) of 24 Oct. 2005.

[216] Ibid, paras 97-105.

[217] Stahn, Carsten. "'Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *European Journal of International Law* 17.5 (2006): 921-943, p. 932.

> responsibility is defined by treaty-based and customary law-based prohibitions of international criminal law.[218]

To help organize this substance, Stahn lists six principles of *jus post bellum*, namely Fairness and Inclusiveness of Peace Settlements,[219] The Demise of the Concept of (Territorial) Punishment for Aggression,[220] The Humanization of Reparations and Sanctions,[221] The Move from Collective Responsibility to Individual Responsibility,[222] A Combined Justice and Reconciliation Model,[223] and People-Centred Governance.[224]

Similarly, in the concluding chapter of *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* Stahn lists seven substantive areas of *jus post bellum*, namely 1) Treaty obligations, 2) Institutional frameworks for the management of transition from conflict to peace, 3) Definition of the law applicable in transitions from conflict to peace, 4) Management of individual responsibility, 5) Management of collective responsibility, 6) Structural

[218] Ibid 937 (internal citations omitted).

[219] Ibid 938.

[220] Ibid 939 ("Territorial" added).

[221] Ibid.

[222] Ibid 940.

[223] Ibid ("Towards" omitted).

[224] Ibid 941.

principles for institution-building, and 7) Parameters of economic reconstruction.[225]

Guglielmo Verdirame points out that it is obvious that post-conflict situations are not exempt from the application of international law.[226] There are important law of armed conflict rules which extend to *post bellum*, including the rules applicable to 'protected persons' who remain in the hands of the detaining state,[227] a duty to repatriate prisoners of war after the cessation of active hostilities,[228] duties under the law of occupation that continue after the cessation of hostilities,[229] and in non-international armed conflicts a duty to "endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed

[225] Carsten Stahn, 'The Future of Jus Post Bellum' in Carsten Stahn and Jann K Kleffner (eds), Jus Post Bellum – Towards a Law of Transition from Conflict to Peace (T·M·C·Asser Press 2008) 231-237, p. 236-37.

[226] Verdirame, Guglielmo. "What to Make of Jus Post Bellum: A Response to Antonia Chayes." *European Journal of International Law* 24.1 (2013): 307-313.

[227] I.e. Art. 5 of Geneva Convention (III) relative to the Treatment of Prisoners of War (signed 12 Aug. 1949, entered into force 21 Oct. 1950), 75 UNTS 135, and Art. 6 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (signed 12 Aug. 1949, entered into force 21 Oct. 1950) 75 UNTS 287, Art. 3 of Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3.

[228] Art. 118 of Geneva Convention III.

[229] Art. 6 of Geneva Convention IV.

conflict, whether they are interned or detained."[230] An expanding body of human rights case law in post-conflict situations is also available.[231] He also points to a growing body of state and international institutional practice on post war situations, at least since the 1992 Agenda for Peace.[232] Since that 1992 Agenda for Peace, the four main elements of post-conflict peacebuilding from the perspective of the United Nations are 1) Disarmament, Demobilization, and Reintegration (DDR); Security Sector Reform (SSR), reestablishment of the rule of law, and democratization. Verdirame points out that

> Key aspects of the legal relationship between the victors and the defeated are already governed by rules of international law. On the front of prohibitions, in particular, it is noteworthy that outcomes of war previously treated as lawful are unlawful under modern international law. For example, war can no longer result in the dissolution or annexation of the vanquished state through debellatio or conquest.[233]

Veridame concludes with a delightful modification of the so-called "Pottery Barn rule" that reflects the combination of onus on the intervenor and the need for

[230] Art. 6(5) of Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (signed 12 Dec. 1977, entered into force 7 Dec. 1978) 1125 UNTS 609.

[231] App. No. 27021/08, Al-Jedda v. United Kingdom, ECHR, Judgment (2011); App. Nos. 71412/01 & 78166/01, Behrami and Behrami v. France, Saramati v. France, Germany and Norway, ECHR, Decision on Admissibility (2007).

[232] UN SG Report, 'An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-Keeping', UN Doc A/47/277-S/24111 (June 1992). See also UN SG Report, 'Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations', UN Doc A/50/60 -S/1995/1 (Jan. 1995).

[233] Verdirame, Guglielmo. "What to Make of Jus Post Bellum: A Response to Antonia Chayes." *European Journal of International Law* 24.1 (2013): 307-313, p. 309.

local ownership: "if you break it, you have a duty to help fix it but you still do not own it."[234]

Similarly, as Vincent Chetail has argued, post-conflict peacebuilding alone includes

> [I]nternational humanitarian law; international human rights law; international criminal law; international refugee law; international development law; international economic law; the law of international organizations; the law of international responsibility; the law relating to the peaceful settlement of disputes; treaty law which governs in particular ceasefire agreements; and the law relating to the succession of states in the case of territorial dismemberment due to conflict.[235]

Similarly, Larry May's discussion of *jus post bellum* focuses only on "the moral principles after a transition from war to peace has been achieved,"[236] following David Rodin's definitional lead.[237] Even within that limited definition, May isolates six normative principles of *jus post bellum*: rebuilding, retribution,

[234] Ibid. 312.

[235] Vincent Chetail, "Introduction: Post-conflict Peacebuilding – Ambiguity and Identity" in Vincent Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (OUP 2009) 1-33, 18.

[236] See e.g. May, Larry. "Jus Post Bellum Proportionality and the Fog of War." European Journal of International Law 24.1 (2013): 315-333, p. 317.

[237] Rodin, David. "Two emerging issues of jus post bellum: War termination and the liability of soldiers for crimes of aggression." Jus Post Bellum: Towards a Law of Transition from Conflict to Peace (2008): 123-36.

reconciliation, restitution, reparation, and proportionality.[238] He insists that the addressee of these principles are not only political leaders but average citizens.[239] The ultimate goal of May's *jus post bellum* is the same as the hybrid functional approach outlined in this work, a just and lasting peace.[240] (In the end, May essentially rejects the main thrust of Just War thinking, opting instead for contingent pacifism.)[241]

Dieter Fleck likewise outlines three areas of *jus post bellum* that deviate from *jus in bello* on the one hand and peacetime international law on the other: 1) assistance in performing regime change, 2) robust law enforcement post-conflict, and 3) international territorial administration.[242] Fleck's watchword is cooperation, with *jus post bellum* operating primarily as an enabling framework more than a restrictive series of regulations. Similarly, James Gallen's conception of *jus post bellum* as an interpretive framework more than a series of

[238] See e.g. May, Larry. "Jus Post Bellum Proportionality and the Fog of War." European Journal of International Law 24.1 (2013): 315-333, p. 316.

[239] Ibid 318-9.

[240] Ibid 320.

[241] Ibid 328-31.

[242] Fleck, Dieter "*Jus post bellum* as a partly independent legal framework" in Stahn, Carsten, Jennifer S. Easterday, and Jens Iverson, eds. Jus Post Bellum. Oxford University Press, 2014, 43-57.

restrictions is useful, although a hybrid functional conception of *jus post bellum* clearly extends beyond this limited role.[243]

The substance of *jus post bellum* also includes specialist areas of international law, such as investment law. A special 2015 edition of *The Journal of World Investment and Trade* focuses on *jus post bellum* provides a series of ground-breaking treatments of this issue. Gallen provides an analysis of "odious debt" [244]—an idea with significant potential for clarifying the legitimate expectations of foreign investors in the aftermath of conflict, while at the same time potentially freeing a post-conflict society from an unsustainable post-conflict debt burden. Merryl Lawry-White[245] and Jure Zrilič[246] provide an exploration of bilateral investment treaties and investment arbitration in the context of the transition from armed conflict. These are potentially critical issues not only in terms of resolving claims from foreign investors but for attracting investment critical to a sustainable *post bellum* future. Eric de Brabandere

[243] Gallen, James "*Jus post bellum*: an interpretive framework" in Stahn, Carsten, Jennifer S. Easterday, and Jens Iverson, eds. Jus Post Bellum. Oxford University Press, 2014, 43-57.

[244] Gallen, James. 2015. Odious Debt and Jus Post Bellum. *The Journal Of World Investment And Trade*

[245] Lawry-White Merryl. 2015. International Arbitration in a *Jus Post Bellum* Framework. *The Journal Of World Investment And Trade*

[246] Zrilič Jure. 2015. International Investment Law in the Context of *Jus Post Bellum*: Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace? *The Journal Of World Investment And Trade*

highlights the tension between the potential backlash from protecting foreign investors and the need to attract them.[247]

K. Conclusion

Building on the Stahn's 2006 framework for the substantive content of *jus post bellum*,[248] this chapter drew upon and extends what has been discussed earlier, to provide a specific focus on the contemporary legal content of *jus post bellum*. Seven basic areas were discussed: 1) Procedural fairness and peace agreements; 2) The Responsibility to Protect; 3) Territorial dispute resolution; 4) Consequences of an act of aggression; 5) International territorial administration and trusteeship; 6) The law applicable in a territory in transition; 7) The scope of individual criminal responsibility; and 8) The nexus of *jus post bellum* and odious debt. These areas are not comprehensive, and other frameworks could be used, as described in the alternative structuring section of this work *supra* —but it does highlight some of the major categories of legal content of *jus post bellum*.

[247] De Brabandere, Eric. "Jus Post Bellum and Foreign Direct Investment: Mapping the Debate." *The Journal of World Investment & Trade* 16.4 (2015): 590-603.

[248] Stahn, Carsten. "'Jus ad bellum','jus in bello'...'jus post bellum'?–Rethinking the Conception of the Law of Armed Force." *European Journal of International Law* 17.5 (2006): 921-943, p. 937.