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Just Peace after Conflict: Jus Post Bellum and the Justice of Peace

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JUST PEACE AFTER CONFLICT

Jus Post Bellum and the Justice of Peace

Edited by
Carsten Stahn and Jens Iverson

Just Peace After Conflict

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Jus Post Bellum and the Justice of Peace

Edited by

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Preface

Jus post bellum scholarship has seen an incredible renaissance over the past decades. The term is rarely used in official discourse. But many of dimensions of *jus post bellum* have gained fresh attention in peace processes (e.g. Colombia) and critical inquiries into the failures of intervention, such as in the Balkans, Afghanistan, Iraq, or Libya. This makes it, as Brian Orend put it, some of the 'best of times', and some of the 'worst of times' to reflect on *just post bellum*.

Jus post bellum as a field is situated at the crossroads of different disciplines, including moral philosophy, peace and conflict studies, international relations, and law. In our Jus Post Bellum Project, funded by a VIDI grant of the Netherlands Organization for Scientific Research (NWO), we have sought to develop the contours of the concept and its role in facilitating fair and sustainable peace.

In the first volume of our project, we have tried to clarify contemporary meanings and critiques of the concept. We have found that *jus post bellum* can be understood in at least three different ways in a legal perspective: It can, first of all, be understood as an interpretative device. The concept might, for instance, inform a contextual interpretation of certain normative concepts, such as 'military necessity' or the principle of proportionality. Second, it can be construed as an 'ordering framework'. It serves as an instrument to co-ordinate the application of laws, solve conflicts of norms, and balance conflicting interests. Finally, *jus post bellum* may contain certain substantive norms and principles applicable to transitions from conflict to peace.

In the second work, we have analysed the role of environmental protection in transition from conflicts to peace. The International Law Commission has taken pioneering steps in this area, by identifying draft principles that apply before, during, and after an armed conflict. They include not only clauses on peace operations, corporate due diligence or general protection of the environment during armed conflict, but also provisions on peace processes, the obligations of occupying powers or post-conflict environmental assessments, and remedial measures. The ILC specified that parties to an armed conflict should, 'as part of the peace process … address matters relating to the restoration and protection of the environment damaged by the conflict' (Draft Principle 23). The work of the ILC serves as an important starting point for emerging principles and practices in this field. One of the major achievements of past decades is that the environment is not only protected indirectly, namely as civilian object or resource, but directly as a system. Our book has shown that there at least five *jus post bellum* principles that may guide future debates: Responsible planning, pragmatic limitation, conciliation, burden-sharing and a care-based approach towards responsibility.

This work is the third volume of our project. It engages with the important of theme of just peace after conflict. *Jus post bellum* navigates between different concepts of peace, that is, stable, fair, or sustainable peace. The idea that peace is a desirable goal and necessary to preserve social order after conflict is by no means new. Greek philosophers have regarded peace as the 'greatest good'. Cicero defended a cosmopolitan conception of warfare, noting

that war 'should always be undertaken in such a way that one is seen to be aiming at peace only'. In the just war tradition, peace was defined in broader terms than just the opposite of violence. Classical scholars such as Gentili, Vattel, or Grotius stressed need for a fair peace settlement after conflict, in order to avoid a return to warfare. Contemporary studies recognize the complexity of peace, which goes beyond ideal types, such negative, positive, liberal, or democratic peace.

This book seeks to clarify the meaning and contours of just peace, its nexus to *jus post bellum*, and some of the ways in which it is produced. It is based on discussions of our final Jus Post Bellum Conference, held at the Peace Palace in 2016. It builds on macro-principles identified by Larry May and analyses contemporary practices in specific fields. It argues in the widest sense that just peace requires only not negotiation, agreement, and compromise (e.g. moderation), but contextual understandings of law, multiple dimensions of justice, and strategies of prevention.

Acknowledgements

We are indebted to members of our project steering committee and all contributors for their strong commitment to this project and their time and efforts to turn their ideas into chapters. The book has benefited greatly from their input and discussions with our colleagues at the Grotius Centre for International Legal Studies. It is part of our research programme on 'Exploring the Frontiers of International Law'.

This work would not have been possible without the valuable insights and contributions of Jennifer Easterday, our third project member; the tireless work and keen eye of our assistant editor, Rafael Braga da Silva, who put the manuscript together; the help of our guest researchers (Jordan Hawthorne and Carlos Fonseca; and the continuing support of our Leiden colleagues (Ioana Moraru, Lieneke Louman, Jacqueline Jongenelen), who made this project a success.

We are extremely grateful to the wonderful colleagues at Oxford University Press (Merel Alstein, Jack McNichol), who have shown great enthusiasm for this project since its start, ensured a speedy production, and turned the book into a reality.

Like our two previous volumes, this work is available open access, through the generous support provided by NWO.

We hope that this work will stimulate future discourse, re-think practices, and help to build bridges between different traditions of thought.

Carsten Stahn and Jens Iverson
The Hague, January 2020

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List of Abbreviations

AP I	1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
AP II	1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609.
BiH	Bosnia and Herzegovina
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of Discrimination Against Women
CIHL	Customary International Humanitarian Law
DDR	Disarmament, Demobilization and Reintegration programmes
EBRD	European Bank for Reconstruction and Development
ECJ	European Court of Justice
ECOSOC	UN Economic and Social Council
ECOWAS	Economic Community of West African States
ELN	Ejército de Liberación Nacional
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
EU	European Union
EULEX	European Union Rule of Law Mission (in Kosovo)
FARC	Fuerzas Armadas Revolucionarias de Colombia
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Persons
ILC	International Law Commission
ILO	International Labour Organisation
ISF	Integrated Strategic Frameworks
JPL	Colombian Justice and Peace Law
LOAC	Laws of Armed Conflict
LRTF	Libya Recovery Trust Fund
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MINURSO	United Nations Mission for the Referendum in Western Sahara
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO),
NATO	North Atlantic Treaty Organization's
OHCR	UN Office of the High Commissioner
ONUC	United Nations Operation in the Congo
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor

PRSP	Poverty Reduction Strategy Papers
ROE	Rules of Engagement
SADR	Sahrawi Arab Democratic Republic
SC	United Nations Security Council
SDG	Sustainable Development Goals
TFV	ICC Trust Fund for Victims
UDHR	Universal Declaration of Human Rights
UN HIPPO	UN High-Level Independent Panel on Peace Operations
UNCC	United Nations Compensation Commission
UNCCD	UN Convention to Combat Desertification
UNCLOS	United Nations Convention on the Law of the Sea
UNDAF	United Nations Development Assistance Framework
UNDP	UN Development Programme
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNEF	United Nations Emergency Force
UNEP	UN Environmental Programme
UNESCO	United Nations Education, Science and Cultural Organisation
UNFCCC	UN Framework Convention on Climate Change
UNHRC	UN Human Rights Council
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMISS	United Nations Mission in South Sudan
UNSMIL	United Nations Support Mission in Libya
WPS	Women Peace and Security

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1

Jus Post Bellum and Just Peace

An Introduction

*Carsten Stahn**

I. Introduction

Many contemporary conflicts are grounded in claims or perceptions of injustice. As David Welch has shown, many of the world's major crises over the past two centuries have been driven by claims of injustice, that is, a 'perceived discrepancy between entitlements and benefits'.[1] Immanuel Kant, one of the pioneers of liberal peace theory, cautioned in his propositions on Perpetual Peace that peace agreements should avoid clauses that carry the seeds for the outbreak of further wars.[2] Contemporary peacebuilding strategies seek to accommodate underlying causes of violence. However, the link between justice and peace is often overshadowed by more immediate concerns (e.g. security, stability), pragmatism or reliance on narrow or formal conceptions of justice.

The idea of peace has remained a loose end in traditional just war theory. Just war criteria are frequently linked to the right ending of war or the aim of establishing peace.[3] Aristotle famously portrayed peace as the only legitimate war aim.[4] St Augustine and St Thomas Aquinas postulated that attaining peace must be a central aim of war.[5] There is a reluctance to recognize war as a form of punishment.[6] Most modern discourse on intervention is grounded in ideas of protecting rights, peace, or humanity. Narrative and semantics of armed force contain ample references to rationales of peace. UN actions are formally branded as peace operations. Even unilateral uses of forces often rely on notions of peace in order to make armed force more human or downplay its violent nature. For instance, Turkey recently used the notion of 'Peace Spring' in order to justify its alleged

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[1] David Welch, *Justice and the Genesis of War* (Cambridge University Press 1993) 19.

[2] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), Preliminary Article 1.

[3] Mona Fixdal, *Just Peace: How Wars Should End* (Palgrave Macmillan, 2012).

[4] Aristotle, *Politics*, Book VII, section 1333a, trans. Ernest Barker (Oxford University Press, 1958) ('War… must be for the aim of peace'); Gerardo Zampaglion, *The Idea of Peace in Antiquity* (University of Notre Dame Press, 1973) 61–2.

[5] St Thomas Aquinas, *Summa Theologica*, vol. 3 (part II, second section), Question 40, art. 2 (Cosimo Classicals, 2007) 1354, drawing on Augustine ('We do not seek peace in order to be at war, but we go to war that we may have peace. Be peaceful, therefore, in warring, so that you may vanquish those whom you war against, and bring them to the prosperity of peace'); John Langan, 'The Elements of St. Augustine's Just War Theory' (1984) 12 *Journal of Religious Ethics* 19–38.

[6] David Luban, 'War as Punishment' (2011) 39 *Philosophy & Public Affairs* 299.

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counterterrorist operations in Syria.[7] These examples illustrate the uneasy relationship between the ends of warfare and the establishment of peace.

Morally, a war should not end with any type of peace, but rather a specific form of peace. Just peace theory relies on the premise that peace is not a natural or normal state, but something that needs to be constructed. Some theorists have claimed that a war 'should end in a "better state of peace" ', that is, 'a peace that is more just and more stable than the situation that led to the war in the first place'.[8] However, the concept of just peace lacks a broader intellectual tradition.[9] It remains ill-defined. What elements make a peace just? Is a just peace a peace that is established by consent, a peace that vindicates rights or a peace that prevents future violence?

Some scholars link the notion of just peace to the nature of warfare. They argue that an unjust war can never result in a just peace.[10] Others look at the idea of just peace independently of the cause or justification of warfare. They claim that a peace can be 'just' even it follows an unjust use of force or that a just peace should be evaluated according to parameters that are independent of just war theory altogether.[11] According to this view, just peace theory may have a different focus than just war theory. It is not so much concerned with questions of justification, but rather with issues of prevention. For instance, some scholars have suggested that 'norms of just peacemaking' are not necessarily to be found in abstract 'ideals or principles', but rather grounded in 'realistic, historically situated practices that are empirically demonstrating their effectiveness in preventing war'.[12]

The notion of just peace links peace to certain normative ideas, such as justice, rights, and equity. But the term almost seems to stem from a different era. Other concepts have gained prominence. Kant promoted the idea of a sustainable peace in his concept of justice after war.[13] The liberal peace idea has become a dominant frame for practices. Modern peace studies use different notions of peace. They speak of positive peace, aimed at societal transformation, rather than just peace.[14] Critical transitional justice studies have challenged the 'liberal' foundations of peace. They seek to ground peace in 'everyday practices', rather than abstract notions of justice or rights.[15]

[7] Claus Kress, 'A Collective Failure to Prevent Turkey's Operation "Peace Spring" and NATO's Silence on International Law' (2019) EJIL Talk, 14 October.

[8] Fixdahl (n 3) 51. See also Eric D. Patterson, *Ending Wars Well: Order, Justice, and Conciliation in Contemporary Post-Conflict* (Yale University Press 2012).

[9] Major works on just peace include Pierre Allan and Alexis Keller (eds), *What is a Just Peace?* (Oxford University Press, 2008); Fixdahl (n 3); Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford University Press, 2012); Cécile Fabre, *Cosmopolitan Peace* (Oxford University Press, 2016); Karin Aggestam and Annika Björkdahl, 'Introduction: The Study of Just and Durable Peace', in Karin Aggestam and Annika Björkdahl (eds), *Rethinking Peacebuilding: The quest for just peace in the Middle East and the Western Balkans* (Routledge, 2013) 1–16; Anders Persson, *The EU and the Israeli-Palestinian Conflict, 1971–2013: In Pursuit of a Just Peace* (Lexington Books, 2015); Yaacov Bar-Siman-Tov, *Justice and Peace in the Israeli-Palestinian Conflict* (Routledge, 2014).

[10] Robert Williams and Dan Caldwell, 'Jus Post Bellum: Just War Theory and the Principles of Just Peace' (2006) 7 *International Studies Perspectives* 309, 316.

[11] Pierre Allan, 'Measuring International Ethics: A Moral Scale of War, Peace, Justice and Global Care', in Pierre Allan and Alexis Keller (eds), *What is a Just Peace?* (Oxford University Press, 2008) 90, 116.

[12] See Glen H. Stassen, 'The Unity, Realism, and Obligatoriness of Just Peacemaking Theory' (2003) 23 *Journal of the Society of Christian Ethics* 171, 171.

[13] See Chapter 2 (Orend).

[14] The concept goes back to Johan Galtung, 'Violence, Peace and Peace Research' (1969) 6 *Journal of Peace Research* 167.

[15] On bottom-up approaches, see Catherine Baker and Jelena Obradovic-Wochnik, 'Mapping the Nexus of Transitional Justice and Peacebuilding' (2016) *10 Journal of Intervention and Statebuilding* 281.

Other discourses relate peace to specific types of social transformations, such as promotion of greater social equality, removal of gender biases, or reduction of socio-economic divides. For example, environment and development studies rely on certain ideas of justice (e.g. distributive justice, intergenerational justice) to promote 'sustainable peace'. The UN Declaration on the Right to Peace reaffirmed that 'peace is not only the absence of conflict but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation, and socio-economic development is ensured'.[16] The notion of just peace is thus both old, that is, almost antiquated and 'postmodern' at the time.

II. The Concept of Just Peace

Conceptually, the notion of just peace faces several challenges. The term appears to suggest that a 'just peace' requires both peace and some form of justice.[17] Both terms are highly contested and value-laden.[18]

A. Challenges of Conceptualization

A fundamental problem is the interplay between them. The concept of just peace reflects the dilemmas of the peace v. justice debate.[19]

The idea of just peace implies that peace is an overarching condition, but must carry the promise of justice. The idea to link justice and peace has ancient roots. It was developed in peacebuilding approaches and transitional justice. Examples like the Latin American dictatorships have shown that some form of negative peace, without justice, is unsustainable. Today, it is widely recognized that peace and justice are considered to be interrelated.[20] The dualism between peace and justice is part and parcel of UN practice,[21] and firmly established in the jurisprudence of the Inter-American Court of Human Rights. Judge García-Sayán stressed this dialectical relationship in the El Mozote case:

[16] See Human Rights Council, Res. 32/28 (Declaration on the Right to Peace), A/HRC/RES/32/28, 18 July 2016, 3. See also Art. 1 ('Everyone has the right to enjoy peace such that all human rights are promoted and protected and development is fully realized').

[17] Anders Persson, *Defining, Securing and Building a Just Peace: The EU and the Israeli-Palestinian conflict* (Lund University, 2013) 52 ('The use of the term just peace implies a clear recognition that both peace and justice are important in peace processes and that both should be striven for').

[18] On peace and international law, see Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen, *Promoting Peace Through International Law* (Oxford University Press, 2015).

[19] See generally Chandra Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' in Roger MacGinty and Oliver Richmond (eds), *The Liberal Peace and the Post-War Reconstruction* (Routledge, 2009), 89; Priscilla Hayner, *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict* (Routledge, 2018).

[20] See Yaacov Bar-Siman-Tov, *Justice and Peace* (n 9) 7.

[21] Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, DPA/UNSG/2010-00904 (10 March 2010), 4 ('Peace and justice should be promoted as mutually reinforcing imperatives and the perception that they are at odds should be countered. The question for the UN is never whether to pursue accountability and justice, but rather when and how').

> States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal.[22]

This approach has been confirmed by the Constitutional Court of Colombia. It held in its judgment on the constitutionality of the Special jurisdiction for Peace that peace exists on the basis of justice, while the realization of justice requires peace.[23] Peace requires both ending of hostilities and guarantees of justice.[24] Where justice is neglected, peace remains unstable. If peace is lost, injustice may prevail.

However, historically, the two concepts have been in tension. They have been pitted against each other. Seeking justice may prolong armed conflict or impede peace efforts. Proponents of accountability have argued that the rights of victims to justice may trump peace. Treating both as equal conditions requires context-specific adaptation and balancing.[25] The choice is not binary (peace v. justice), but a complex mix of the two. If peace is considered as a fundamental basis for other rights, the realization of justice becomes a matter of timing and degree. It provides a basis to accept compromises in the type, nature, and degree of justice. Justice becomes relative, that is, adjusted to the legitimate claims and interests of parties and the situational context. For instance, less punitive visions of justice may become more compelling.

A second problem is the evolution of the nature of the conflict. Traditional elements of just peace have been developed in relation to interstate wars. In this context, just peace was associated with factors such as the cessation of hostilities, the conclusion of peace treaties, the provision of reparation for damages or structures of accountability. Peace was inherently linked to the idea of vindicating rights and restoring order. Today's conflicts are mostly non-international or mixed. They include classical civil wars, that is, internal armed conflicts between states and non-state actors, as well as conflicts between non-state actors. A just peace theory must accommodate the dynamics and particular difficulties of intra-state conflicts. In such contexts, many of the normative assumptions underlying classical just war theory (e.g. just v. unjust causes of conflict, aggressor v. victim. obligation v. rights vindication) are more difficult to determine. States are reluctant to define parameters, since armed groups may use just peace criteria to justify rebellion or armed force, that is, struggles to secure a return to a 'just peace'. Non-state actors may have incentives to keep up hostilities until a peace settlement consolidates a just order.

A third challenge is the wide typology of violence. Enduring just peace may not be possible between certain types of actors. For instance, it is questionable to what extent the Western world and ISIS would be able to establish a just peace. In some circumstances, the

[22] IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador, Preliminary Exceptions, Merits, Reparations and Costs*, Judgment, Inter-Am. Ct HR (ser. C) No. 292, 25 October 2012, Concurring Opinion of Judge Diego Garcia-Sayan, para. 17.

[23] Constitutional Court of Colombia, Sentencia C-080/18, 15 August 2018, 189 ('la paz se construye sobre la base de la justicia, pero que, al mismo tiempo, la realización de la justicia requiere de la convivencia pacífica').

[24] Ibid. 190 ('La construcción de paz, en consecuencia, exige tanto el cese de hostilidades como la garantía de la justicia').

[25] See Lisa J. Laplante, 'A Balancing Act: The Right to Peace and Justice' (2019) *Harvard International Law Journal Online*, 30 September, available at <https://harvardilj.org/2019/09/a-balancing-act-the-right-to-peace-and-justice/> accessed 14 January 2020.

continuation of conflict may ensure a better guarantee of justice than the establishment of peace.

There is thus some reluctance in scholarship to determine formal or objective just peace criteria, that is, 'akin to just war criteria'. For example, Edward Said has cautioned against the formulation of just peace elements, because it is 'nearly impossible' to use the concept 'with any kind of universal consistency'.[26] Adam Roberts has highlighted the risks of ideal types of just peace:

> [t]he worst possible way to approach the whole subject of just peace would be to develop an 'ideal type' of such a peace, and then seek to impose it. Since there is not now, and is not going to be, one single and agreed concept of just peace, the attempt to impose one is likely itself to become a source of conflict.[27]

Instead, process-related criteria and intersubjective considerations have gained broader consideration. Just peace is seen as a process. The law has a facilitating and enabling function. It is deemed to guide determinations as to what is just in the respective context.

B. Contemporary Approaches

In current scholarship, there are at least four different approaches towards just peace: (i) approaches grounded in the just war tradition, (ii) the peacebuilding tradition, (iii) transitional justice, and (iv) intersubjective approaches.

B.i. *Just Peace and the Just War Tradition*

In the just war tradition, just peace is a corollary of just war.[28] The term just is used as an adjective, that is, a means to evaluate peace. Peace is approached from consequentialist logic. The idea of just peace is derived from arguments relating to the justification of warfare. Some just war theorists claim that the tradition 'contains within itself *a jus ad pacem*', a theory of peace.[29] For instance, Michael Walzer has argued that a theory of 'just peace' is 'implicit in the theory of just war'.[30] Just war is a means, just peace the end. Just peace is a way of ending war rightly.[31]

Just peace considerations are inherent in the just cause, legitimate authority, and right intention requirements. Threats to peace and order are viewed as 'just cause' for war. The duty of legitimate authority is to restore peace. Right intention requires strategies to end war in a just way. The right intention must 'aim at a peace that meets certain moral standards: peace

[26] Edward W Said, 'A Method for Thinking about Just Peace', in Pierre Allan and Alexis Keller (eds), *What is a Just Peace?* (Oxford University Press 2008) 176, 177.

[27] Adam Roberts, 'Just Peace: A Cause Worth Fighting?', in Pierre Allan and Alexis Keller (eds), *What is a Just Peace?* (Oxford University Press 2008) 52, 57.

[28] Williams and Caldwell (n 10) 309–20; Mark J. Allman and Tobias L. Winright, *After the Smoke Clears: The Just War Tradition and Post War Justice* (Orbis Books, 2010).

[29] George Weigel, *Tranquillitas ordinis: the present failure and future promise of American Catholic thought on war and peace* (Oxford University Press 1987).

[30] See Michael Walzer, 'Terrorism and Just War' (2006) 34 *Philosophia* 3, 4.

[31] Doug McCready, 'Ending the War Right: Jus Post Bellum and the Just War Tradition' (2009) 8 *Journal of Military Ethics* 66.

with justice or peace with a sufficiently just international order'.[32] Just peace arguments devote attention to the 'longitudinal' aspects of conflict. After winning war, it is necessary to win peace.

Just war theory itself does not offer much guidance on how to build a just and sustainable peace. The argument of just peace is approached predominantly from an agent-based conception. Peace is determined by the dispute between the parties to a conflict and geared at establishing peaceful relations. The objective of peace imposes constraints on the role of victory,[33] and defines responsibilities of warring factions in the aftermath of conflict. Criteria have focused on termination of hostilities, exit from war, constraints on conquest, parameters of peace settlements, limits of occupying powers and justice after war.[34] For example, Brian Orend has established specific criteria for justice after war, including moderation in the termination the war (e.g. exclusion of revenge), publicity of the terms of peace or proportionality of rights vindication.[35] They serve as constraints on the infliction of an unjust peace.

However, this traditional focus on conflicting parties fails to take into account the complexities of modern practice. The establishment of peace involves many actors that are not themselves parties in the conflict, such as international institutions or peace operations. A comprehensive theory of just peace must draw on elements that go beyond traditional just war theory. This is recognized in modern scholarship. For instance, Larry May has recognized that the responsibility for achieving a just peace goes beyond the concerned parties.[36] James Pattison has made the point that reconstruction should be effected by those who are in the best position to rebuild effectively, and not necessarily by belligerents.[37] Recent voices in military ethics suggest that just peace requires not only respect for rights of persons (e.g. self-determination, human rights protection, and reintegration) and justice, but also 'ecological responsibility',[38] and engagement of 'multinational commitment and support'.[39]

One of the objections to the theorization of just peace under just war theory is that the latter is backwards-looking and centred on wrongs of war. This prism limits the utility of the theory. For example, just war theory has been criticized by the pacifist movement (from the Latin *pacificare*, 'to make peace') for failing to articulate a vision on how to create a better world. It does not per se provide clarity on the type of peace that should be promoted. It has navigated between minimalist and maximalist conceptions of peace.[40] From a just war perspective, the immediate aim of ending hostilities between certain types of actors may take

[32] James G. Murphy, 'Just War Thought and the Notion of Peace', in Florian Demont-Biaggi (ed.), *The Nature of Peace and the Morality of Armed* Conflict (Palgrave Macmillan, 2017) 105, 109.

[33] Alex Bellamy, 'The responsibilities of victory: Jus post bellum and the Just War' (2008) 34 *Review of International Studies* 601.

[34] On criteria developed in theological scholarship, see Michael Schuck, 'When the Shooting Stops: Missing Elements in Just War Theory' (1994) 101 *The Christian Century* 982–4.

[35] Brian Orend, 'Jus Post Bellum' (2000) 16 *Journal of Social Philosophy* 117, 128–9.

[36] See Larry May and Elizabeth Edenberg, 'Introduction', in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2013) 1–6.

[37] James Pattison, 'Jus Post Bellum and the Responsibility to Rebuild' (2015) 45 *British Journal of Political Science* 635.

[38] For a full account, see Carsten Stahn, Jens Iverson, and Jennifer Easterday, *Environmental Protection and Transitions from Conflict to Peace* (Oxford University Press 2017).

[39] George M Clifford III (2012) Jus Post Bellum: Foundational Principles and a Proposed Model (2012) 11 *Journal of Military Ethics* 42–57, 50–4.

[40] Lonneke Peperkamp, 'Jus Post Bellum: A Case of Minimalism versus Maximalism?' (2014) 2 *Ethical Perspectives* 255.

precedence over longer-term or structural considerations. From this point of view, a decent peace which is practically achievable and able to constrain violence may be acceptable.

Just war theory has been exposed to just peace critiques.[41] Just peace theorists have claimed that just war theory fails to deliver a credible theory for peace after conflict since it downplays the detrimental effects of war and its implications on individuals, constructs peace strategies through an adversarial lens, applies top-down moral reasoning, and places the emphasis on rights and principles of justice, rather than needs and interests of specific persons.[42]

Modern scholars have argued that just peace theory is not merely a part of just war theory, but a more comprehensive category of its own. It is 'relationship-centered, holistic, proactive, and long term'.[43] Just war theory is meant to supplement, rather than replace just peace theory.[44] It 'contributes to limiting violence' while 'just peace principles bear the larger load of building just social relations to extend peace in space, time, participation, and quality'.[45] For instance, Maryann Cusimano Love has formulated a comprehensive vision of just peace that complements just war theory:

> Just peace is animated by the just cause of protecting, defending, and restoring human life and dignity and the common good; right intention (aiming to create a positive peace); participation (respecting human dignity means including societal stakeholders—state and non-state actors, women, youth, victims, as well as previous parties to the conflict); restoration (trauma healing and repair of the human as well as the physical infrastructure); right relationship (creating or restoring just social relationships both vertically and horizontally); reconciliation (healing the communal and individual wounds of war); and sustainability (developing structures that can help peace endure over time).[46]

B.ii. *Peacebuilding*

The peacebuilding tradition takes a different starting point than just war theory.[47] It has origins in the context of peacekeeping operations, UN enforcement action, and the dilemmas of humanitarian interventions, as well as peace ethics more broadly.[48] It approaches just peace independently from the justification of violence. It does not seek to evaluate right or wrong but rather treats armed violence as an undesirable social condition, that is, a tragedy or disaster that needs to be remedied. The aim is to create the conditions necessary for a sustainable peace in war-torn societies.[49] This requires a more comprehensive conception of peace.

[41] Valerie Morkevičius, 'Changing the Rules of the Game: A Just Peace Critique of Just War Thought' (2012) 10 *Nova et Vetera* 1115. On a virtue-based approach to peace, see Eli S. McCarthy, 'A Virtue-Based Just Peace Ethic' (2018) 7 *Journal of Moral Theology* 92, 100–1.

[42] Lucinda J. Peach, 'An Alternative to Pacifism? Feminism and Just-War Theory' (1994) 9 *Hypatia* 152–72.

[43] Maryann Cusimano Love, 'Just Peace and Just War' (2018) 12 *Expositions* 60, 61.

[44] See Helmut David Baer and Joseph E. Capizzi, 'Just War Theory and the Problem of International Politics: On the Central Role of Just Intention' (2006) 26 *Journal of the Society of Christian Ethics* 163.

[45] Cusimano Love (n 43) 61.

[46] Ibid. 62.

[47] John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (US Institute of Peace Press 1997).

[48] Jarem Sawatsky, *Justpeace Ethics: A Guide to Restorative Justice and Peacebuilding* (Lutterworth Press 2009).

[49] See generally Martin Wählisch, *Peacemaking, Power-Sharing and International Law: Imperfect Peace* (Hart 2019).

Peacebuilding advocates have imagined much richer visions of peace. Christian ethicist scholars developed the idea of 'just peacemaking' in 1990 as part of the ethics of war and peace, following debates about the proper response to the invasion of Kuwait by Iraq. US theologian Glen Stassen proposed ten policies for 'just peacemaking' that go beyond just war theory. He grounded them in three theological principles: peacemaking, justice, and community. They include: (i) support for nonviolent direct action; (ii) independent initiatives to reduce threat; (iii) cooperative conflict resolution; (iv) acknowledgement of responsibility for conflict and injustice and seeking of repentance and forgiveness; (v) advancement of democracy, human rights, and religious liberty; (vi) fostering just and sustainable economic development; (vii) work with emerging cooperative forces in the international system; (viii) strengthening the UN and international efforts for cooperation and human rights; (ix) reducing offensive weapons and weapons trade; and (x) encouraging grassroots peacemaking groups and voluntary associations).[50]

In international institutional practices, peacebuilding has linked just peace to rationales of change and conflict transformation. Early strategies focused on the absence of violence, that is, emergency relief and the control of violence. Contemporary approaches recognize that sustaining peace requires a thicker social context, including development, conflict transformation, and social change.[51] They associated just peace with certain outcomes, such as institutional reform, the re-establishment of the rule of law, accountability and punishment, or socio-economic reform. Unlike just war theory, the peacebuilding tradition extends peace far beyond party-driven interests. It treats peace more as a form of 'shared responsibility' which includes international organizations and third actors.[52]

The hallmark of imagination in international institutional politics is the 'liberal peacebuilding' paradigm.[53] It may be traced back to the UN Agenda for Peace, established in 1992. It connected peacebuilding to the democratic peace theory (importance of elections, representative self-government), rule of law, economic liberalization, human rights, and accountability. This approach goes much further than merely postulating a just peace. It embraces a clear commitment to a positive conception of peace. It treated elements of liberal transformation almost like a checklist or recipe. It has faced multiple critiques: the top-down orientation of peace strategies,[54] the tension of liberal peace ideals with communitarian Islamic setting and non-Western cultures, discrepancies between international and local conceptions of violence and peace,[55] and contradictions between liberalism and other peacebuilding rationales.[56] Critical peace theory emerged as an alternative

[50] Glen H. Stassen, 'The Unity, Realism, and Obligatoriness of Just Peacemaking Theory' (2003) 23 *Journal of the Society of Christian Ethics* 171; Glen H. Stassen, *Just Peacemaking: Transforming Initiatives for Justice and Peace* (Westminster/John Knox Press 1992). See also Martin L. Cook, 'Just Peacemaking: Challenges of Humanitarian Intervention' (2003) 23 *Journal of the Society of Christian Ethics* 241.

[51] United Nations Secretary-General, 'Peacebuilding in the Aftermath of Conflict: Report of the Secretary-General' (8 October 2012) UN Doc. A/67/499–S/2012/746.

[52] Han Dorussen and Hugh Ward, 'Intergovernmental Organizations and the Kantian Peace' (2008) 52 *The Journal of Conflict Resolution* 189; John R. Oneal and Bruce Russett, 'The Kantian peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885–1992' (1999) 52 *World Politics* 1.

[53] Oliver Richmond, 'The Problem of Peace: Understanding the "Liberal Peace" ' (2006) 6 *Conflict, Security and Development* 291.

[54] David Chandler, 'Back to the Future? The Limits of Neo-Wilsonian Ideals of Exporting Democracy' (2006) 32 *Review of International Studies* 475.

[55] Gearoid Millar, *An Ethnographic Approach to Peacebuilding: Understanding Local Experiences in Transitional States* (Routledge 2014).

[56] Oliver Richmond, *The Transformation of Peace* (Palgrave 2005).

narrative.[57] It stressed the need for a greater degree of self-reflexivity and contextualization in peacebuilding practices.

Peacebuilding accommodates both short-term and long-term considerations of peace. It is less normative and more pragmatic than just war theory. It is guided by the assumption that a just peace requires a social context which promotes respect and trust in social, political, and economic institutions.[58] It encompasses 'hybrid' forms of peace that enable local agency. It goes at the same time further than just peace strategies, by relying heavily on theories of change and societal transformation.

B.iii. *Transitional Justice*

Transitional justice approaches have shed yet another light on just peace. Broadly defined, the field introduces a strategy, that is, 'a way of thinking about justice after atrocity'.[59] It relates to justice 'associated with periods of political change',[60] including 'legal responses to confront the wrongdoing of repressive predecessor regimes'.[61] It is part of the UN peacebuilding structure.[62] The UN advocates for the 'inclusion of human rights and transitional justice considerations in peace agreements'[63] and close coordination of 'disarmament, demobilization, and reintegration (DDR) initiatives' with 'transitional justice processes'.[64] According to UN policies, transitional encompasses 'both judicial and non-judicial processes and mechanisms', including 'prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations'.[65] These different elements correspond to certain rights of victims recognized in UN instruments,[66] such as the right to know (truth-seeking), the right of access to justice, the right to reparation and guarantees of non-recurrence of violations (duty of prevention).

The rise of transitional justice has helped to demystify the supposed peace–justice divide and clarified the justice dimensions of peace processes. It has advocated a holistic approach to justice and emphasized the centrality of victim's interests in the quest for a just peace. According to transitional justice perspectives, the justice within just peace should not be motivated by considerations of victor's justice or driven by elites and combatants, but encompass considerations of restorative justice which recognize the dignity of victims.[67] For instance, many victims and affected communities can access justice only through informal,

[57] Nicos Trimikliniotis, 'Sociology: A Sociological Critique of Liberal Peace', in Oliver P. Richmond, Sandra Pogodda, and Jasmin Ramović (eds), *The Palgrave Handbook of Disciplinary and Regional Approaches to Peace* (Palgrave McMillan 2016) 95–109, 105; Oliver Richmond, *A Post-Liberal Peace* (Routledge 2011).

[58] World Bank, *World Development Report 2011: Conflict, Security, and Development* (World Bank 2011).

[59] Kirsten J. Fisher, 'Defining a Relationship Between Transitional Justice and Jus Post Bellum: A Call and an Opportunity for Post-Conflict Justice' (2018) *Journal of International Political Theory* 1, 4.

[60] Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 3.

[61] Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, 69.

[62] On the relationship to *jus post bellum*, see Jens Iverson, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) 7 *International Journal of Transitional Justice* 413–33; May and Edenberg (n 36).

[63] Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, DPA/UNSG/2010-00904 (n 21) 3.

[64] Ibid. 11.

[65] Ibid. 2.

[66] See e.g. 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, adopted and proclaimed by General Assembly Res. 60/147 of 16 December 2005.

[67] Kieran McEvoy and Korna McGregor, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008).

local, or traditional institutions. The broadened approaches towards justice, advocated by transitional justice, are not very detached from positive conceptions of peace.[68]

Transitional justice scholarship has argued that restoring justice after conflict requires a re-linking of peace and justice after conflict.[69] It has identified alternatives to the classical liberal trial model, based on experiences in transitions. They include techniques of memorialization rituals of truth-telling and reparation to victims. 'Customs, symbols, ceremonials and rituals' have been part of transitional justice 'alongside formal procedures of global institutions'.[70]

The growth of transitional justice as a field, and possibly even as an industry, has led to a certain judicialization of peace.[71] The human-rights based orientation of peacebuilding and the mission to combat impunity has made the legal context of peace agreements more complex. The very process of negotiating peace is subject to increasing legal constraints. The UN has set strict 'normative boundaries' for its own engagement in peace processes. It specified that it 'will neither establish nor provide assistance to any tribunal that allows for capital punishment, nor endorse provisions in peace agreements that include amnesties for genocide, war crimes, crimes against humanity, and gross violations of human rights'.[72] However, many transitional justice measures go beyond a backwards-looking or rights-based perspective and illustrate the limits of law in the pursuit of justice.

Discourses on transitional justice have in particular stressed the importance of reconciliation in peace processes. The aim of promoting social reconciliation has only received limited attention in just war theory or peacebuilding per se.[73] It has partially gained ground in peace theory through transitional justice experiences. A striking example is Daniel Philpott's work on just and unjust peace. He has argued that reconciliation is fundamental to the establishment of a just peace. He has identified six core elements of reconciliation that are essential to combine peace and justice in transitional processes: building socially just institutions and relations between states,[74] political acknowledgement of wrong,[75] reparations, including consideration of historical injustices,[76] judicial punishment[77], apology,[78] and forgiveness.[79]

[68] See Graeme Simpson, ' "From the Normative to the Transformative": Defining and Promoting Justice and Human Rights as Part of Violent Conflict Prevention and Peacebuilding' (2017) 9 *Journal of Human Rights Practice* 379–400, 383–4.

[69] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press 2002) 5.

[70] Geneviève Souillac and Douglas P. Fry, 'Anthropology: Implications for Peace', in Oliver P. Richmond, Sandra Pogodda, and Jasmin Ramović (eds), *The Palgrave Handbook of Disciplinary and Regional Approaches to Peace* (Palgrave 2016) 69–81, 76.

[71] Courtney Hillebrecht, Alexandra Huneeus, with Sandra Borda, 'The Judicialization of Peace' (2018) 59 *Harvard International Law Journal* 279–330.

[72] Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (n 21) 4.

[73] See Matthew J. Gaudet and William R. O'Neill, 'Restoring Peace: Toward a Conversation Between the Just War and Reconciliation Traditions' (2011) 31 *Journal of the Society of Christian Ethics* 37.

[74] Philpott (n 9) 175–6 ('Since 1974, some ninety societies … have sought to replace dictatorships with democracies … A similarly intense global wave of peace operations sponsored by the United Nations … has sought to foster human rights and democratic institutions in states that have seen civil war').

[75] Ibid. 188 ('Human rights are the standard that gives truth commissions and other public forms of acknowledgment form and direction')

[76] Ibid. 195 and 201.

[77] Ibid. 237 ('In practicing judicial punishment, a state redresses the violation of the victim's rights insofar as it expresses, reaffirms, and thereby strengthens human rights as the legally valid values of its realm or of relations between it and another state').

[78] Ibid. 198 ('Like all of the other practices, apologies performed in political contexts have grown in frequency').

[79] Ibid. 266–8 ('Political injustices harm victims by robbing them of their agency and of their ability to pursue their own and others' flourishing … Forgiveness … re-empowers the victim as agent … [and liberates] from

Colleen Murphy has developed a political theory of reconciliation, which views the promotion of the rule of law, generation of reasonable political trust, and restoration of support for fundamental capabilities as essential elements of reciprocity and respect for agency.[80] She has argued that war damages social relationships and that just pursuit of transformation can only be effected through relational changes.[81] Just peace is thus about repairing relationships. According to her, broken political relations and mistrust should be remedied through the promotion of adherence to the rule of law and respect for the moral agency of others. This type of change creates hope and acknowledgement.

The recognition of the importance of the relational dimensions in peace processes (i.e. truth-telling, acknowledgement, mutual respect, and repair of harm) has strong synergies with sociological and psychological theories of just peace which emphasize the intersubjective dimensions of peace.

B.iv. *Intersubjective Approaches*

Peace is strongly context-dependent. It requires negotiation, common engagement and compromise. One of the factors that make a peace just is the degree to which stakeholders have a say in the process and may shape the outcome. In contemporary scholarship, these process-based features are recognized by intersubjective approaches.[82] They recognize that mutual recognition is necessary to order overcome impasse, break divides, or even come to accept conflicting narratives which are crucial for transformation. For example, long-standing disputes and histories of injustice are often closely connected to identity struggles, contradictory narratives, or perceptions of victimhood. Intersubjective notions of 'just peace' seek to address the psychological and social dynamics of peace processes. They stand in contrast to normative approaches, which seek to determine the just peace based on universal norms. They acknowledge the subjective and affective dimensions of fairness, justice, and reciprocity in peace efforts, including the benefits of personal investment in the final negotiated product.

Karin Aggestam and Annika Björkdahl have proposed a reflexive peacebuilding model which challenges some of the tenets of liberal peacebuilding. They are sceptical whether 'just peace 'can be determined 'with any kind of universal consistency'.[83] According to their view, just peace may be related to four elements: the idea of 'order', which is a 'minimum condition of co-existence',[84] and prerequisite for the quest for justice, retribution (i.e. accountability for wrongdoing),[85] collective restoration (i.e. 'reparation and restoration of relationships'),[86] and 'distribution' (i.e. 'resolving deep grievances of redistribution').[87] However, just peace relies essentially on 'negotiated and agreed inter-subjectivity' in order to be sustainable.[88] It needs to 'generate intersubjective understandings among the parties,

anger and resentment' and can also lead to recognition of the victim's suffering, and to mutual respect for human rights'.

[80] See Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge University Press 2010).
[81] See Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge University Press 2017).
[82] See also Persson, *The EU and the Israeli–Palestinian Conflict* (n 9) 24 et seq.
[83] Aggestam and Björkdahl, 'Introduction' (n 9) 5.
[84] Ibid. 3.
[85] Ibid. 4.
[86] Ibid.
[87] Ibid. 5.
[88] Ibid.

rather than to rest upon objective justice principles'.[89] It should be facilitated from outside, rather than imposed. This understanding coincides with voices that stress the importance of dialogue and idea of just peace as a 'kind of trusting relationship' between political communities.[90]

The intersubjective character of just peace has been defended most forcefully by Pierre Allan and Alexis Keller. They have defined just peace as a

> process whereby peace and justice are reached together by two or more parties recognizing each others' identities, each renouncing some central demands, and each accepting to abide by common rules jointly developed.[91]

They view just peace as a process which relies on four conditions: (i) 'thin recognition' (i.e. the acceptance of the other side as autonomous agent with a particular identity),[92] (ii) 'thick recognition' (i.e. acceptance of the other as the key party for solving the conflict),[93] (iii) 'renunciation' (i.e. concessions, compromises and sacrifices from all parties to reach a peace),[94] and (iv) 'rule' (i.e. agreement on the terms in an objective text which defines rights and obligations and allows outsiders to observer or guarantee the peace).[95]

This understanding recognizes the pragmatism of peace processes. For instance, some cultures value compromise and negotiation, because of their social recognition and communication. Intersubjective approaches see merit in negotiation and bargaining to reach an agreement. They accept that just peace is not only about ideals, but also about managing expectations, abandoning dreams, and accepting painful compromise.

These theories are more flexible than liberal peace theories which promote ideal types of institutional design and structures. They leave more leeway for psychological underpinnings of peace. They are able to explain that peace is often hybrid, that is, shaped by a 'complex mix of local and international forces',[96] and 'in constant flux, as different actors and processes cooperate and compete on different issue agendas'.[97]

C. Justice in Just Peace Theories

Justice is an important aspect of just peace. Just peace theory suggests that social order is only peaceful if it is just. Justice has a strongly forward-looking dimension in this context: it

[89] Karin Aggestam and Annika Bjorkdahl, 'Introduction', in Karin Aggestam and Annika Bjorkdahl (eds), *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Routledge, 2013) 5.

[90] Morkevičius (n 41) 1118 ('if there is no conversation, then issues cannot be aired and common solutions cannot be discovered').

[91] Pierre Allan and Alexis Keller, 'The Concept of a Just Peace, or Achieving Peace Through Recognition, Renouncement, and Rule', in Pierre Allan and Alexis Keller (eds), *What is a Just Peace?* (Oxford University Press, 2008) 195–215.

[92] Ibid. 197.

[93] Ibid. 199.

[94] Ibid. 200–2.

[95] Ibid. 203–4.

[96] Roger MacGinty, 'Hybrid Peace: The Interaction Between Top-Down and Bottom-Up Peace' (2010) 41 *Security Dialogue* 301–412, 392.

[97] Ibid. 397.

is deemed to enable a social, non-violent context in which peace can emerge. It is concerned with ending of conflict or prevention.

The existence of a peace process influences the type of justice that is possible. Meanings of justice are highly contextualized.[98] They are shaped by social dynamics at different levels: interpersonal relations, group relations, and community factors. Macro-goals relating to societal change are closely interrelated with processes of negotiation and bargaining. Justice becomes an argument. It may be related to utilitarian considerations (e.g. long-term peace), fairness, historical or legal entitlements (e.g. rights), or moral considerations.

Empirical research in social and organizational psychology suggests that justice principles may influence the stability of negotiated agreements.[99] Just peace encompasses not one, but a spectrum of different forms of justice: retributive, procedural, restorative, or even distributive justice. Emphases vary among protagonists and just peace traditions. For instance, just war traditions and transitional justice approaches tend to define aspirations for retributive or restorative approaches based on objective moral or legal norms, while intersubjective approaches devote greater attention to procedural elements.

A useful general framework has been identified by Herbert Kelman. He has argued that the definition of justice in peace processes requires a common basis for peace that has to be negotiated by the parties. Such negotiations might involve 'different kinds of justice', namely (i) 'substantive justice, achieved through an agreement that meets the fundamental needs of both sides', (ii) 'procedural justice, achieved through a fair and reciprocal process of negotiating the agreement', (iii) 'future justice, achieved through the establishment of just institutions, arrangements' and 'emotional justice, achieved through the sense that the negotiations have seriously sought and to a significant degree shaped a just outcome'.[100] Existing justice conceptions found in classical peacetime or domestic law might have to be adjusted to context.

C.i. *Retribution*

Demands for retribution (e.g. payback for wrong) need to be balanced against conflicting aims and the realities of transitional processes. Retributive concepts such as punishment must be viewed in a holistic sense. They may respond to particular social aims, such as repudiation of wrong or vindication of rights. But they must also take into account the cultural contexts in which violations occurred in order to have a transformative function.

Punitive ideas require moderation. Historical experiences from World War I to the Balkan Wars have shown that humiliating peace conditions, vengeance, or collective punishment of an entire nation or social group may yield a sense of injustice or stand in direct conflict with longer-term goals of peace.[101] Political rehabilitation or measures to help people rebuild their lives after conflict may more beneficial from a just peace perspective than mere infliction of punishment for wrongdoing.

[98] On the ambivalent nature of justice for social relations, see Harald Müller, 'Justice from an Interdisciplinary Perspective: The Impact of the Revolution in Human Sciences on Peace Research and International Relations', in Caroline Fehl, Dirk Peters, Simone Wisotzki, and Jonas Wolff (eds), *Justice and Peace* (Springer 2019) 29–64.

[99] Daniel Druckman and Lynn Wagner, 'Justice Matters: Peace Negotiations, Stable Agreements, and Durable Peace' (2019) 63 *Journal of Conflict Resolution* 287–316.

[100] Herbert C. Kelman, 'Reconciliation as Identity Change: A Social-Psychological Perspective', in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation* (Oxford University Press, 2004), 111–24, 122–3.

[101] See generally Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000).

Criminal accountability of individuals should not be regarded solely as a 'good' or 'an end in and of itself', that is, a means to remedy violations of the law or as appropriate 'reaction of a society to a criminal offence or an ethical response to the crimes'.[102] Rather, what is desirable needs to be defined in the respective context. Punishment is closely connected to 'broader social goals', such as incapacitation, acknowledgement of wrong, prevention of future wrongdoing, social peace, or a step towards clarification or societal healing. For instance, criminal trials may have an important historical or communicative function. They involve an expression of censure, condemnation or the pursuit of accountability. The infliction of criminal punishment is subject to multiple constraints, including culpability, fairness, due process, and proportionality

C.ii. *Procedural Justice*

Procedural elements play a stronger role than in classical peacetime situations.[103] The legal order under which peace occurs is often contested. For instance, violence by non-state actors is frequently a form of protest against the political order of the state. States may share conflicting understandings of their international obligations. Bringing them to agree on a common framework or to admit, recognize, or accept responsibility requires open discursive structures that may accommodate compromise and conflicting narratives.

Procedural justice is key to the relational dimensions of justice.[104] Agents must feel that they are being taken seriously and listened to. Procedural justice involves inter alia agency, voice, transparency, and fair representation. It may provide meaning to certain values and principles, including dignity, participation, inclusion, protection of marginalised or minority voices, and accountability'.[105] It may be conducive to respect and trust, even in case of substantive disagreement.

C.iii. *Restorative Justice*

Restorative elements of justice are an important element of just peace theory. Justice can only promote relational change if it repairs social harm created through conflict. Restorative approaches to justice broaden the focus beyond punishment and offenders. They have been influenced by the human rights and feminist movement. They view war, violence, or crimes as indicators of broken social relationships. They argue that justice may contribute to societal healing.

Defenders of restorative justice claim that the connection between procedural and restorative justice may not only reduce crime but also contribute to the reduction of war. For instance, criminologist John Braithwaite has made the case that restorative justice and shame management is important for crime prevention and war prevention. He has argued that restorative justice deserves a prominent space in diplomacy and peace ethics, because 'late modern war is a criminal matter much more than modern and early modern war was'.[106] It involves the 'criminalization of the state'.[107] In this context,

[102] Lily Rueda Guzman and Barbora Holá, 'Punishment in Negotiated Transitions: The Case of the Colombian Peace Agreement with the FARC-EP' (2019) 19 *International Criminal Law Review* 127–59, 135.

[103] On procedural justice, see John Thibaut and Laurens Walker, *Procedural justice: A psychological analysis* (Lawrence Erlbaum 1975); Tom Tyler, *Why people obey the law* (Yale University Press 1990).

[104] See Michal Saliternik, 'Perpetuating Democratic Peace: Procedural Justice in Peace Negotiations' (2016) 27 *European Journal of International Law* 617.

[105] See Michelle Parlevliet, 'Rethinking Conflict Transformation from a Human Rights Perspective', in Berghof Foundation (ed.), *Handbook Dialogue No. 9* (Berghof Foundation 2010) 1, 23.

[106] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 207.

[107] Ibid.

> peace is unlikely unless the people can come to terms with their anger and hatred over those crimes. Rituals are needed to heal the damaged souls of the people, to help them find ways to transform hatred into sorrow or forgiveness, to be able to move forward with hope rather than wallow in the evil of the past.[108]

A central claim of restorative justice theory is that justice may help to counter domination created by crime and violence through means of dialogue, acknowledgement of wrongdoing, recognition, and repair of harm. Restorative approaches seek to repair social connections and relationships, by stressing the humanity and dignity of victims and offenders and promoting a participatory, inclusive, collaborative justice process involving victims, offenders, and relevant community members. Punishment gains thus a different meaning. It is not inflicted to educate the perpetrator or deter future crimes, but to repair social relationships, remedy harm caused to victims, build trust in institutions, or contribute to societal prevention.

Restorative justice also recognizes the importance of reparation. According to restorative theories, the value of reparation lies not only in their compensatory nature but also in their ability to express accountability for wrong and commitment a better future. Even non-state actors, such as armed groups, may provide reparation by taking ownership of past actions, issuing apologies, carrying out community work, or agreeing to guarantees of non-repetition.[109]

C.iv. *Distributive Justice*

Distributive justice is one of the most delicate and neglected dimensions of peace processes.[110] It involves correction of historical injustices or structural inequalities, such as distributions of goods and resources (e.g. equitable land distribution) and access to political power or opportunities in society (e.g. discrimination in employment, access to education). These social, political, economic, or cultural dimensions are frequently the source of grievances that trigger violence in the first place. However, they are often blended out in peace negotiations or left for future consideration and settlement as part of a long-term trajectory.[111]

It is more convenient to treat injustice as a consequence of conflict, rather than a symptom or a cause of the latter. Some distributive claims may be in tension with acute needs.[112] For instance, ensuring social welfare for survivors of conflict may be a more pressing need than

[108] Ibid.

[109] Luke Moffett, Cheryl Lawther, Sunneva Gilmore, and Ebba Lekvall, 'The Limits of the Law: Putting Reparations into Practice' (2019) *European Journal of International Law*, 2 July.

[110] See Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz, and Maria Paula Saffon (eds), *Distributive Justice in Transitions* (Torkel Opsahl Academic EPublisher 2010).

[111] Louisa Lombard and Enrica Picco, 'Distributive Justice at War: Displacement and Its Afterlives in the Central African Republic' (2019) *Journal of Refugee Studies* 1; Lisa Laplante, 'Transitional Justice and Peacebuilding: Diagnosing and Addressing the Socio-economic Roots of Violence through a Human Rights Framework' (2008) 2 *International Journal of Transitional Justice* 331; Louise Arbour, 'Economic and Social Justice for Societies in Transition (2007) 40 *New York University Journal of International Law and Politics* 1.

[112] See Seth Lazar, 'Skepticism about Jus Post Bellum', in Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 204–22, 207 ('Appeals to corrective justice might make sense in peacetime, when the harms are of limited magnitude and the liable party can—with the aid of a careful judicial process—be ascertained. But in the aftermath of wars, when the suffering and wrongdoing are so widespread and general, a focus on compensation should be at best a subordinate goal to the overriding imperatives of reconstruction and peace building').

compensation for past losses. Restitution and redistribution of land may create novel secondary conflicts. External actors are more inclined to frame structural issues as humanitarian or development questions, that is, as matters of material need, rather than as matters of justice.[113] For example, traditional transitional justice policies have been marked by 'a trade-off of sorts between justice or development, rather than promoting development with justice'.[114] As Rama Mani has noted, the notion of justice that has been pursued in transitions is often a narrow one:

> the task of development in transitional societies has not been viewed by development economists and peace builders as an issue of justice. This is clear from the way in which post-conflict economic reconstruction packages are drawn up, with concerns of social justice and inequity being almost nonexistent. Their overriding priority is rapid economic growth and integration into global markets.[115]

Distributive justice is thus more typically viewed as an element of sustainable peace, rather than just peace.

However, it would be wrong to exclude distributive elements from a just peace theory. Even in situations of transition, corrective justice is often inherently connected to transformative rationales which share redistributive features. For instance, gender justice is an important element of just peace.[116] As Naomi Malone has argued, from a feminist perspective, just peace theory should be understood as

> an active theory that promotes practices leading to the reduction of violence in all arenas and at all levels, from fights in the schoolyard to ethnic conflicts and beyond, offering concrete examples that can strengthen the last resort criteria of just war theory.[117]

As seminal UN resolutions have clarified, peace processes provide an important opportunity to address the gendered consequences of violence and to improve gender dynamics.[118] Justice mechanisms need to address structural issues of importance to women, such as understandings of the conflict, concerns relating to women's status and equality in society, or continuity of gender-based violence as part of transitional justice measures.[119]

Reparations often involve elements of distributive justice. They are not only an instrument to remedy past harm, that is, to restore the conditions before a violation occurred, but a means to correct injustices. Such transformative reparations must be sensitive to

[113] On transitional justice and development, see Roger Duthie, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2 *International Journal of Transitional Justice* 292.

[114] Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development (2008) *2 International Journal of Transitional Justice* 253–65, 253.

[115] Ibid. 264.

[116] See generally Fionnuala Ní Aoláin and Dina Haynes, 'Compatibility of Justice for Women with Jus Post Bellum Analysis', in Carsten Stahn, Jennifer Easterday, and Jens Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 161–76.

[117] Naomi Malone, 'From Just War To Just Peace: Re-Visioning Just War Theory From A Feminist Perspective', University of South Florida, Graduate School Thesis and Dissertation (2004), 50, at <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=2145&context=etd>.

[118] See e.g. UN Security Council Resolution 1325 (2000), Women, Peace and Security, 31 October 2000, UN Doc. S/RES/1325 (2000).

[119] Astrid Jamar and Christine Bell, *Transitional Justice and Peace Negotiations With a Gender Lens* (UN Women 2018).

distributive justice. For instance, rehabilitation, reintegration, or award of collective reparation for victims may alter conditions of access to economic and social benefits (e.g. education, health). Reparation for forced displacement may require redistributive measures, such as changes in social status (e.g. creation of citizenship).[120] Specific groups of society (e.g. children) require special consideration. Reparations have important signalling effects in relation to the future role of children in society.[121] The Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation specifies that reparations should 'aim to address the political and structural inequalities that negatively shape women's … lives'.[122] Such structural issues cannot be treated as mere afterthoughts of just peace. They are a part of it.

D. Just Peace and the Negative–Positive Peace Conundrum

In peace theory, just peace has a hybrid status. It is a bridge between pacifism and the just war tradition.[123] Just peace goes beyond stable peace.[124] It is stable peace with justice. It is geared at sustainability. It lies at the intersection of negative and positive peace, which are connected to each other. It captures 'many real-world situations' that exist 'between the ideal-typical negative and positive peace categories'.[125]

Just peace is more than 'just a peace'. It involves more process-related elements than negative peace. It replaces the 'extraordinary justice of war' with a fuller kind of justice.[126] It is 'locally constructed'.[127] A just peace needs to reconcile conflicting obligations that relate to the affiliations, identities, and priorities of the actors within a peace process. It requires a process through which it is reached, and it must be recognized as just. Just peace is deemed to create a novel shared reality or a new common language.

Just peace has overlaps with positive peace. It needs to engage with social context and underlying causes of violent conflict. However, it is, at the same time, less outcome determined than extensive conceptions of positive peace.[128] For instance, it may be less demanding than positive peace in relation to redistributive justice.[129] It moves beyond the idea that peace is ideally founded on norms with universal application. It cannot be defined according to abstract criteria, such as a checklist approach. It is an approximation. This may not entail a

[120] See James Souter, 'Durable Solutions as Reparation for the Unjust Harms of Displacement: Who Owes What to Refugees?' (2013) 27 *Journal of Refugee Studies* 171.

[121] Cécile Aptel and Virginie Ladisch, *Through a News Lens: A Child-Sensitive Approach to Transitional Justice* (International Center for Transitional Justice 2011) 26–7.

[122] Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation (International Meeting on Women's and Girl's Right to a Remedy and Reparation, Nairobi, 2007).

[123] Jean-Daniel Strub and Stefan Grotefeld (eds), *Der gerechte Friede zwischen Pazifismus und gerechtem Krieg* (Kohlhammer 2007).

[124] Persson, *The EU and the Israeli–Palestinian Conflict* (n 9) 11–43.

[125] Anna Jarstad, Niklas Eklund, Patrik Johansson, Elisabeth Olivius, Abrak Saati, Dzenan Sahovic, Veronica Strandh, Johanna Söderström, Malin E. Wimelius, and Malin Åkebo, 'Three Approaches to Peace: A framework for describing and exploring varieties of peace', Umeå Working Papers in Peace and Conflict Studies, No 12 (2019), 1

[126] See Williams and Caldwell (n 10) 319 ('During the war, justice requires respect for the human rights of noncombatants, even to the point of imposing limits on the conduct of warfare that may be inconvenient or worse. After the war, justice requires the vindication of human rights, vindication in the sense of defense, restoration, and, at times, punishment of past violations').

[127] Allan, 'Measuring International Ethics' (n 11) 118.

[128] Some voices qualify 'justice' as the main element of positive peace. Others defend much broader conceptions (e.g. democratic peace theory).

[129] Allan, 'Measuring International Ethics' (n 11) 118; Aggestam and Björkdahl 'Introduction' (n 9) 1.

'win-win' for each side but certain sacrifices. As illustrated by the Colombian peace process, this often happens step by step and requires negotiation of what is 'just' in a specific context.

A just peace is not only related to form and process but different dimensions of justice. Justice goes beyond the 'vindication of the rights' which are at the origin of the conflict. It is about the transformation of relationships. Justice itself may be a means to enable peaceful coexistence, stimulate critical engagement about observational standpoints, or foster acceptance of conflicting narratives.

Just peace is to some extent a relative peace. Perceptions are key to determine as to whether or not a peace is just. Needs, expectations and priorities develop over time. What is considered just may evolve over time.

III. Just Peace and *Jus Post Bellum*

The relationship between just peace and *jus post bellum* is contested. *Jus post bellum* has its origins in just war theory. According to many just war theorists, a just war requires the realization of a certain form of (just) peace after conflict. However, there is disagreement on the elements of peace required.

There is a wide spectrum of positions on the link between just peace and *jus post bellum*. Minimalists seek to constrain *jus post bellum* to the more immediate goal of ending of conflict. According to this understanding, the process of building and consolidating peace should be assessed by different parameters (e.g. the general law of peace). Maximalists argue that the right ending of conflict requires not only moderation, but positive measures towards a just, or even sustainable peace.[130] This understanding has been shaped by the experiences of World War II. Some voices have argued that victory triggers obligations and that 'jus post bellum places additional burdens on combatants irrespective of the justness of their cause'.[131] Following this understanding, *jus post bellum* requires that

> war crimes trials be held to punish those guilty of war crimes (formalizing the quasi-judicial function of war), that the victors take responsibility for governing the vanquished in cases where the latter's government collapses as a result of war … and that they take active measures to avoid sowing the seeds of future war by, for instance, assisting in the long-term economic reconstruction of the vanquished.[132]

In modern discourse, there is a trend to dissociate *jus post bellum* from traditional just war doctrine and to recognize the need for independence. As Alex Bellamy has stressed, a modern *jus post bellum* requires the incorporations of many elements that fall outside the just war tradition. *Jus post bellum* is thus not simply 'a third element of Just War thinking',[133] but a partly autonomous concept. This means that the 'justice of the peace should be evaluated independently of the justice of the war'.[134] For instance, even an unjust conflict may be settled by a just peace.

[130] Alex Bellamy, 'The Responsibilities of Victory: Jus Post Bellum and the Just War' (2008) 34 *Review of International Studies* 601.
[131] Ibid. 612.
[132] Ibid.
[133] Ibid. 622.
[134] Ibid.

One problem of just war theory is that it treats just peace as a parameter to assess the morality of war. Just peace becomes a means of evaluation. It is both, an ideal and a side constraint, according to which the morality of human conduct is assessed. This poses an arbiter dilemma: it is difficult to judge what is just in the absence of commonly agreed criteria (e.g. democratic, republican, liberal peace). Some authorities, therefore, rely more on subjective criteria or perceptions. For instance, Andrew Rigby has argued that a peace is just under *jus post bellum* if 'key publics, communities and opinion leaders believe that the peace is sufficiently 'just' as to merit their commitment'.[135] This involves affective dimensions, namely that

> the socio-cultural scars left by the war are addressed in a manner such that the pains of the past cease to dominate the present and open up the possibility of future co-existence between former enemies.[136]

Colleen Murphy has argued that just peace is essentially relational. She has defended an expressive conception of just peace under *jus post bellum*. She has argued that 'processes for ending conflict must express and that inform the regulative ideal of just peace at the core of *jus post bellum*'.[137] According to her, the main goal of *jus post bellum* is to 'contribute to the repair of the relationships damaged prior to and during the course of war such that political interaction is based to a minimally acceptable threshold level on reciprocal agency'.[138]

George Clifford has argued that the level of 'multinational support and commitment' may be an indicator for the assessment of just peace under *jus post bellum*:

> unwillingness of other nations to commit to the jus post bellum process may indicate that the war was unjust or that the victor(s) is not making a good faith, reasonable effort to build a just peace.[139]

In legal scholarship, the notion of just peace lacks a tradition. *Jus post bellum* is connected to different areas of engagement: peacebuilding, protection of the environment, investment, or accountability. Just peace is more a condition or an aspiration and understood differently in distinct fields. It is linked to different forms and conceptions of justice (e.g. fairness, equity, respect of rights and obligations) or rule of law more generally.

It is necessary to understand peace through a variety of lenses. Some guidance may be derived from contemporary peace research, which defines peace beyond traditional adjectives or dichotomies (e.g. positive v. negative peace). Peace may be viewed in at least three different ways: (i) as 'a situation or condition', which can be described through different attributes; (ii) as a relation, i.e. 'a web of relationships'; and (iii) as a 'discourse', i.e. 'ideas or discourses about what peace is or should be'.[140]

[135] Andrew Rigby, 'Forgiveness and Reconciliation in Jus Post Bellum', in Mark Evans, *Just War Theory: A Reappraisal* (Edinburgh University Press 2005) 177.
[136] Ibid.
[137] Colleen Murphy, 'Political Reconciliation, Jus Post Bellum, and Asymmetric Conflict' (2015) 62 *Theoria* 43, 43.
[138] Ibid. 52.
[139] George M. Clifford III (n 39) 42, 52.
[140] Jarstad (n 125) 2.

This triad offers a new prism for the understanding of just peace under *jus post bellum*. Just peace may not only be determined in terms of situational parameters (e.g. order, existence of just norms or institutions), but also in a relational sense, that is, through relationships and interactions (e.g. mutual cooperation, deliberation, compromise, respect, trust), and in a discursive way, that is, through analysis of different strategies and rhetoric techniques that are used to legitimize peace and reshape existing relations of power.

This book investigates elements of just peace through this broader lens. It examines situational elements, relational aspects, and discourses of just peace, drawing on insights from multiple fields and disciplines.

A. *Jus Post Bellum* and Conceptions of Peace

Part I of the book sets the concept of just peace into context in relation to different conceptions of peace: cosmopolitan peace, decent peace, and sustainable peace. It highlights the existing tensions between extensive and restrictive conceptions of peace under *jus post bellum*.

In Chapter 2, Brian Orend examines Kant's legacy for the contemporary conception of *jus post bellum*. Kant related the just war tradition to ideas of cosmopolitan peace. The chapter shows that Kant viewed peace through entitlements, rather than moderation. This approach contains certain traces of modernity (e.g. hospitality, free movement of people). But it also inspired certain controversial elements of 'liberal peace' doctrine, such as practices of regime change.

In Chapter 3, Lonneke Peperkamp pleads for a limited conception of peace under *jus post bellum*. She cautions against an overstretching of the limits of just war doctrine. She uses the concept of decent peace as reference point. *Jus post bellum* serves as a framework for transition. It should end whenever a peace is sufficiently just peace. This view takes into account that *jus post bellum* requires pragmatism and limitation.

In Chapter 4, Martin Wählisch explores the connection between *jus post bellum* and peacebuilding, which has promoted more extensive conceptions of peace. He argues that an 'imperfect' peace is better than 'just war'. The UN Charter left the 'how' of peace undetermined. The contribution traces the practices developed by the UN to foster just and sustainable peace. It argues that *jus post bellum* may take inspiration from Sustainable Development Goal 16, which encourages 'peaceful and inclusive societies', 'access to justice', and 'effective, accountable and inclusive institutions'.[141] It shows that the UN peacebuilding architecture contains six 'process principles': national ownership, inclusivity, rule of law, effective leadership, co-ordination, and accountability. One risk of this approach is that that peacemaking and peacebuilding may become 'a box-ticking exercise', where 'real transformative post-conflict change as the base for just and sustainable peace is absent'.

[141] See UNGA Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015) UN Doc. A/RES/70/1.

B. Macro-Principles

Part II of the book turns to macro-principles that may guide transitions from conflict to peace. A helpful reference is Larry May's work *After War Ends*.[142] May identified six post bellum principles: (i) rebuilding, (ii) retribution, (iii) restitution, (iv) reparation, (v) reconciliation, and (vi) proportionality.[143] Approaches in these areas have shifted considerably over the past decades.

Just war theory implies that efforts to rebuild may be part of the responsibility after conflict. However, the principle 'you broke it, you own it' is an unsatisfactory answer. It is increasingly recognized that post-conflict peacebuilding requires a communitarian effort that goes beyond the society affected.[144] Rebuilding must be linked to a broader conception of international assistance and solidarity. International and regional organizations are needed to support parties to a conflict to meet such responsibilities.

The understanding of retribution has evolved. Retribution cannot be understood as 'vengeance'. For instance, the ad hoc tribunals have made it clear that individual criminal responsibility involves a fair and balanced approach to the punishment of wrongdoing, including a 'principle of restraint'. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) put it in *Nikolić*, 'retribution requires the imposition of a just and appropriate punishment, and nothing more'.[145]

The chapters in Part II engage with four different elements related to just peace: proportionality, reconciliation, reparation, and inclusivity.

In Chapter 5, Michael Newton claims that proportionality as a concept links *jus ad bellum*, *jus in bello*, and *jus post bellum* 'into interdependent strands of a larger whole'. He makes a case for distinguishing proportionality in the respective contexts. He argues that proportionality under *jus ad bellum* and *jus in bello* is in principle restrictive in nature, that is, limiting behaviour, while *jus post bellum* proportionality has certain permissive features.

In Chapter 6, James Gallen re-examines reconciliation, which is frequently invoked as an objective of *jus post bellum*.[146] Reconciliation is often understood as an aspirational goal, namely as a means to re-establish trust in norms, institutions, and civic community. Drawing on Dworkin's theory of integrity, Gallen argues that reconciliation should be primarily understood as a civic discourse in a *post bellum* context, namely as an instrument to empower affected victim-survivors and to identify legitimate areas of disagreement.

Reparations are instrumental for peacebuilding. In contemporary practices, they are no longer solely mediated through the state or confined to claims by individuals against states. Experiences of UN claims mechanisms and international criminal tribunals show that duties may also arise in the relationship between individuals. In Chapter 7, Cymie Payne examines reparation practices, including lessons learned from the UN Compensation Commission. A remaining problem is how to deal with injuries that are caused by acts that are not prohibited by international law.

[142] Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) 19–23.
[143] Ibid.
[144] Pattison (n 37).
[145] ICTY, *Prosecutor v. Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para. 140.
[146] Rigby (n 135) 177–200; Colleen Murphy and Linda Radzik, 'Jus Post Bellum and Political Reconciliation' in Elizabeth Edenberg and Larry May (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2014) 305–25.

In Chapter 8, Catherine Turner argues in favour of inclusivity as a principle of *jus post bellum*. She claims that international law contains more than a piecemeal selection of soft law statements to improve participation in peace negotiations. Inclusion as a norm emerges from within existing shared principles embodied in the UN Charter, the Universal Declaration of Human Rights, and existing international human rights treaty law.

C. Link to Security and Stability

Peace as a situation or condition is closely related to security and stability. Part III of the book examines several aspects of this connection.

In Chapter 9, Dieter Fleck explores the connection between armed conflict and environmental protection in post-conflict settings. This nexus has recently been addressed by the International Law Commission (ILC).[147] The chapter shows that liability for ecological disruption is an essential element of peacebuilding after conflict. It argues that the standards applicable in international armed conflict are more and more recognized as being applicable also for the behaviour of states and non-state actors in non-international armed conflicts. It demonstrates that *jus post bellum* requires due diligence during military operations, including responsible planning and precautions, and pragmatic limitation, conciliation, and participation in post-conflict peacebuilding.

The following two chapters treat different aspects of external party involvement. In Chapter 10, Marco Longobardo examines the connection between robust mandates and *jus post bellum*, based on mandates in the cases of MOUNSCO (DRC), MINUSMA (Mali), and UNMISS (South Sudan). He argues that the use of robust mandates may have some immediate positive effects (e.g. protection of civilians), but often involves difficult trade-offs in relation to just peace in the long term. He concludes that existing operations largely failed to achieve a just peace in the areas in which they have been deployed.

In Chapter 11, Patrick Wall deals with some of the relational aspects of peace processes, namely the role of mediation as a tool of conflict resolution. He explores to what extent the presence and identity of third-party mediators may enhance commitment to crucial aspects of the law of peace on peace agreements, based on the study of peace agreements signed between 2000 and 2010. He concludes that elements such as self-determination or transitional justice are more likely to be observed when independent mediators are present.

D. Protection of Persons and Public Goods

Part IV of the book examines the protection of persons and public goods as an essential element of peace. There is broad agreement that the interests of specific groups require special attention in transitions from conflict to peace. Various UN instruments, including the 2016 Declaration on the Right to Peace adopted by the Human Rights Council, recognize the link between peace and protection of the right of peoples.[148]

[147] See ILC, 'Protection of the environment in relation to armed conflicts. Text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading' (6 June 2019) UN. Doc. A/CN.4/L.937.

[148] Declaration on the Right to Peace, preamble.

In Chapter 12, Britta Sjöstedt analyses of the relationship between indigenous peoples and the protection of the environment in post-conflict settings. She claims that indigenous rights and environmental law can be paired to ensure environmental protection. The chapter explores how the link between biodiversity and human cultural diversity may be a future path to protect the land of indigenous peoples. It discusses at the same time the ICL Principles on the Protection of the Environment in Relation to Armed Conflicts, which specify that rights of indigenous peoples apply in times of armed conflict alongside international humanitarian law.

In Chapter 13, Eugene Kontorovich examines the transitional and post-conflict treatment of settlers. He inquires to what extent *jus post bellum* may require removal of settlements as part of a just peace. The chapter examines state practice in contemporary occupations, including East Timor, Western Sahara, Northern Cyprus, Vietnam/Cambodia, Russia/Georgia, and Ukraine (Crimea). It argues that settlement has been the rule rather than the exception in most occupations. It concludes that (except in the Israeli-Arab context) peace efforts have not insisted on the removal of civilian populations but rather sought for alternative solutions, including citizenship or permanent residence. Just peace may favour peaceful coexistence over dislocation in order to avoid destabilizing effects or population-wide coercive measures

In Chapter 14, Elisenda Calvet Martinez and Aitor Diaz Anabitarte analyse the treatment of land, housing, and property issues of displaced persons in post-conflict settings—a topic addressed in the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles).[149] They claim that only 18.3% of peace agreements specifically include economic, social, and cultural rights, and among them only 10% include land issues. The chapter argues that a combination of restitution and compensation may be the best option to deal with this challenge. It shows that a number of peace agreements have created ad hoc committees to resolve disputes on the return of land and property to refugees and displaced persons.

E. Rule of Law and Economic Reform

Rule of law approaches remain a subject of ongoing controversy in post-conflict settings and these are examined in Part V. Legal regimes in some areas, such as governance, justice, or human rights may require adjustment in order to accommodate the collective nature of violence or the specific tensions of transition.

In Chapter 15, Maj Lervad Grasten discusses the diverse discursive underpinnings of the rule of law and its connection to just peace. She illustrates the politics of justice, in particular discrepancies between 'village justice' and victor's justice, based on field research on the United Nations Interim Administration Mission in Kosovo (UNMIK) and the European Union Rule of Law Mission (EULEX) in Kosovo. The chapter traces professional and organizational battles between various professional groups about different understandings of the rule of law: law as a technicality, rule of law as political stability, and rule of law as a principle

[149] See UN Economic and Social Council, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons ('Pinheiro Principles') (28 June 2005) UN Doc. E/CN.4/Sub.2/2005/17, endorsed by the United Nations Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005.

of legality. It concludes that just peace is 'political and never objective', and must be able to accommodate differences.

Institutional reform may be necessary to affirm basic norms and generate trust in public institutions.[150] In Chapter 16, Alexander Mayer-Rieckh examines the place of vetting in transitions—an area in which the Office of the United Nations High Commissioner for Human Rights has formulated operating guidelines. The contribution argues that vetting may not only promote punitive aim but produce positive effects and prevent recurrence of violence. It may contribute to just peace under conditions, that is, if it is respectful of human rights, part of a fair human resources management system, adjusted to context, realizable in a reasonable timeframe, and connected to a broader prevention strategy.

In Chapter 17, Michael Pugh analyses lessons in another neglected area, namely economic policy and the protection of labour rights. Economic recovery and labour rights are key to distributive justice. The chapter analyses economic regulation of post-conflict transitions, including Kosovo and Bosnia and Herzegovina. It argues that existing practices have tended to replicate the norms on which economic globalization is based and that some of the approaches run counter to the idea of 'peace from below'. Post-war development policies of international financial institutions, such as the International Monetary Fund, are largely a continuation of pre-war conditionalities. A carefully calibrated political peace may remain fragile or prolong instability if it is unjust in economic processes and content.

F. Accountability

Accountability, is one of the most controversial areas of the justice of peace, is examined in Part VI. Approaches towards accountability vary from context to context. It is often disputed how the right of a society to pursue peace may be reconciled best with the demands for justice, and what approaches are most suitable for a specific process of transition.

Criminal adjudication is frequently in the spotlight. Its impact lies partly in its relational features, that is, the messages that it sends about accountability, law, and history.[151] In Chapter 18, Timothy Webster examines a less known site of accountability: namely post-war compensation lawsuits. He moves beyond 'the West', examining civil litigation for reparation after World War II in Japan. He argues that civil litigation has helped write, rewrite, and reinforce the legacies of the war. It may have an important discursive role, by helping plaintiffs to work through their experiences, and by addressing certain historical, legal, and moral blind spots.

In Chapter 19, Jennifer Easterday discusses the interplay between inclusion and accountability in the Colombian peace process. She argues that the process reflects an unprecedented level of inclusion, through victim inclusion in the negotiations, gender participation, and the referendum on the final agreement with the Revolutionary Armed Forces of Colombia. Women were included in the negotiations. Concerns of victims played a central role. The

[150] Pablo De Greiff, 'Vetting and Transitional Justice', in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 522–44.

[151] See Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?' (2016) 30 *Ethics & International Affairs* (2016) 429; Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020).

process led to peace with concessions and compromise: criminal accountability was a site of 'renunciation'. Each of the two sides 'had to settle for less than what they thought they were owed', in particular in relation to sentences and modalities of punishment.

IV. Some Tentative Conclusions

The volume as a whole demonstrates it is simplistic to view just peace simply through the lens of just war theory. The concept has a much richer meaning. It is at the intersection of different traditions: just war theory, peacebuilding, and transitional justice. Just war theory mainly looks at justification. Other fields regard just peace in a multidimensional way: as a state or condition which is in flux, a set of relationships, or as a site of competing discourses.

Just peace involves different elements in transitions from conflict to peace: (i) negotiation, (ii) agreement, and (iii) implementation. Actors in peace processes are not only passive recipients of legal rules and norms, but active agents that contribute to regulation and norm formation through negotiated arrangements, norm brokering, and discursive practices. In general, there is a strong trend to place human interests at the centre. However, ecological considerations are gradually gaining greater attention.

The pacifying effect is closely interrelated with the psychology of negotiation. The terms of a just peace may have to leave room for different intersubjective understandings or leave each protagonist with their own sense of utopia, in order to attract commitment. Just peace may emerge where self-interest gives way to a shared interest.

International law has a facilitating role. It guides decision-making processes and provides institutions, procedures, and arrangements to secure and maintain peace. Just peace may take inspiration from universal principles but remains at the same time deeply contextual. Classical peacetime standards may require a degree of moderation, in terms of its normative ambition, content, and operation. Justice and peace are part of a continuum.[152] Legal frameworks must leave some flexibility to prioritize specific prerogatives, balance conflicting rights and obligations, or sequence response mechanisms. For instance, if accountability issues are addressed too early, the parties may not yet have built sufficient trust, in order to reach agreement on controversial issues. Just peace is an ongoing discourse about the balance between peace and justice.

Some classical dichotomies of the law (e.g. adversarial v. cooperative, principled v. pragmatic, prescriptive v. facilitative) become open to scrutiny. Just peace does not exist in the abstract but is socially constructed. The underlying context influences the conceptions of 'rights' and spaces of justice. For example, rights need to be understood in a multidimensional sense, which goes beyond narrow, legalistic understanding: rights are no only about rules and norms, or institutions and structures, but also about processes and relationships.[153] Justice is partly a means to temper domination. Just peace requires multiple dimensions of justice, not only 'procedural justice'. In some cases, judicialization or legalism may turn into obstacles to peace.

[152] Simpson (n 68) 386 (Rather than a static relationship between peace and justice, we should recognize a 'peacebuilding and justice continuum' that offers a range of different engagements in different societies, timed and sequenced by reference to the contextual analysis of what is possible, appropriate, and optimal at any given time).

[153] Human rights need to be considered in a holistic way, i.e. as 'rules', 'structures and institutions', 'relationships', and processes. See Parlevliet (n 105) 22.

Just peace is realized through everyday practices.[154] Relational change may be a positive indication. Implementation often depends on compliance networks. Preservation of peace may require measures to preserve partial gains or minimize losses, including control of spoilers of peace, follow-up action aimed at the stabilization of political and economic conditions, ex-post monitoring of peace arrangements, and the continued protection of witnesses and victims. Endorsement by international actors (e.g. the Security Council) or the international legal nature of agreements may have important practical implications for compliance. They may cause reputational damage in case of violation or facilitate an ongoing review, such as human rights monitoring or Universal Periodic Review.

Prevention is the common bond between just war theory, transitional justice, and peacebuilding. It treats peace as a continuum. It cuts across all three areas: *ad bellum*, *in bello*, and *post bellum*. It turns just peace into sustainable peace.

[154] Oliver Richmond, 'A Post-Liberal Peace: Eirenism and the Everyday' (2009) 35 *Review of International Studies* 557.

PART I

JUS POST BELLUM AND CONCEPTIONS OF PEACE

2

Roots and Branches

The Past and Future of *Jus Post Bellum*

*Brian Orend**

I. Introduction

Jus post bellum ('justice after war') is commonly considered a new concept. It is certainly true that interest in, and development of, the notion has grown enormously in the past two decades, emphatically in light of recent problems with such war termination processes as those in Iraq and Afghanistan, as well as such institutional innovations as the International Criminal Court (ICC). But *jus post bellum* does have a deeper historical pedigree; and this past is of relevance for its future, both as a concept and as practice.

Indeed, we might say that *jus post bellum* has as deep a historical pedigree as it is possible to get within the just war tradition. The very coiner of the term 'just war', so far as we know, is the ancient Greek philosopher, Aristotle (384–322 BCE), who in *The Politics* was concerned to reflect (briefly) on warfare from the perspective of secular ethics and political morality, as opposed to such older concepts as that of 'holy war'.[1] Aristotle suggested that the logical aim of a just war can only be a justified peace, and that this is what good war-fighters, and those leaders with the war power, must aim at from the start. A war, to be justified, must have been caused by a problem so severe that the application of armed force is the best (or only) way to deal with it, such as defending one's community from a prior armed attack. The resolution of the severe problem, like the defeat of the aggressor, is thus what should be achieved by war's end. Very similar remarks get echoed by such formative just war giants as Augustine (354–430) and Aquinas (1225–1274), practically word-for-word.[2]

But, as historians like James Turner Johnson have noted,[3] such quick references seem only the barest mention of *jus post bellum*; and indeed seem to conceptualize it *not* as the third and final way for considering the overall justice of an armed conflict (after considering the justice of its beginning with the *jus ad bellum*, and then the justice of how it was fought with the *jus in bello*),[4] but rather as a mere adjunct to the one just cause condition within the *jus ad bellum*, with perhaps some side implications for moderation-in-fighting within the

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[1] Brian Orend, *The Morality of War* (Broadview Press 2013) 10–13. On the claim of Aristotle's first-ness, see Paul Christopher, *The Ethics of War and Peace* (Prentice Hall 1994), 10–11, citing Aristotle's *The Politics* [Bekker/Berlin: 1256 b, (25)], e.g. as trans. Carnes Lord (Chicago: UCP, 1985).

[2] Augustine, *The City of God*, trans. R. Dyson (Cambridge University Press 1998), 1:21; Aquinas, *Summa Theologica* 2:2, Qs 40 and 64; Orend, *Morality* (n 1) 10–13.

[3] James T. Johnson, *The Just War Tradition and The Restraint of War* (Princeton University Press 1981).

[4] Michael Walzer, *Just and Unjust Wars* (Basic Books 1977). For the *jus ad bellum*, chs 2 and 4–6; for the *jus in bello*, chs 3 and 8–13. For how they interrelate, chs 14–17. Finally, for Walzer's own *jus post bellum* thoughts, see chs 7 and 18–19.

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jus in bello. We should try to achieve the just cause; and direct our actions and intentions accordingly. Not exactly a robust, sophisticated theory of 'justice in the aftermath of war' of the kind we think today, for instance in the important work of Larry May.[5]

It is an interesting question, then, as to when *jus post bellum* in the more robust sense actually begins, and exciting development in recent scholarship has featured experts delving into the history of just war theory and international law, looking for such origins. May, among such others as Jens Iverson, has made excellent efforts showing how important is the work of the Dutch jurist Hugo Grotius (1583–1645).[6] There is reason to believe that a number of the 'early modern' just war thinkers—Grotius, Francisco Vitoria (1492–1546) and Francisco Suarez (1548–1617) especially—all advanced substantive thoughts regarding justice after war. (The issue of what to do in the aftermath of European conquest and colonization of the 'New World', no doubt, spurred their attention and concern.) May has even noticed relevant *jus post bellum* contributions in Thomas Hobbes (1588–1679), as has Richard Tuck in John Locke (1632–1704).[7] It is invigorating to see all such efforts; it is a hallmark of the growth of any discipline when it begins to research and reflect on its own origins. Johnson, long the dean of the historians of the just war tradition, has himself begun to offer suggestive syntheses in connection with *jus post bellum*.[8]

Grotius may well deserve the chronological credit, and his work is, of course, important and impressive. But international law experts like Eric De Brabandere have contended that, even in Grotius, the *jus post bellum* is still seen as an adjunct or implication of the *jus ad bellum*. It is, at the least, very much under-developed relative to the *jus ad bellum* and *jus in bello*.[9] Whereas—importantly—the reverse is true in the war-related work of the great German philosopher Immanuel Kant (1724–1804). As a result, and for reasons to be explored, I argue that the most plausible contender for 'inventor of *jus post bellum*' in its unique, substantive, recognizable, and forward-looking form, is Kant.

The main aim of this chapter is not to defend such a purely historical claim, though I leave it here sincerely asserted, after long reflection and on the evidence as we now have it.[10] It is, rather, to show in detail all that Kant had to offer regarding the *jus post bellum*: how

[5] Larry May, *After War Ends* (Cambridge University Press 2012); Larry May and Elizabeth Edenburgh (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2013); Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum and International Law* (Cambridge University Press 2014).

[6] Larry May, 'Jus Post Bellum, Grotius, and Meionexia', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014); Jens Iverson, 'Contrasting the Normative and Historical Foundations of Transitional Justice and *Jus Post Bellum*', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014). See also Larry May and Emily McGill (eds), *Grotius and Law* (Routledge 2014); and Grotius' original work *The Law of War and Peace*, trans. L. Loomis (W. J. Black, 1949).

[7] James T. Johnson, *Ideology, Reason and The Limitation of War* (Princeton University Press 1975); Francisco de Vitoria, *Political Writings*, Anthony Pagden, and Jeremy Lawrence (eds and trans.) (Cambridge University Press 1991); Larry May, *Limiting Leviathan: Hobbes on Law and International Affairs* (Oxford University Press 2013); Richard Tuck, *The Rights of War and Peace* (Oxford University Press 1999).

[8] James T. Johnson, 'Moral Responsibility After Conflict', in Eric Patterson (ed.), *Ethics Beyond War's End* (Georgetown University Press 2012) 17–34.

[9] Eric De Brabandere, 'The Concept of *Jus Post Bellum* in International Law', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 123–41.

[10] I made this claim as early as my *War and International Justice: A Kantian Perspective* (Wilfrid Laurier University Press 2000). I say, 'the evidence as we now have it,' as it would not surprise me if at some point we discovered that some Greco-Roman, such as Cicero, had many important things to say about *jus post bellum*, spurred (e.g.) by thoughts about what to do in the aftermath of Rome's many conquests. Such is long before the early modern era of colonization, after all, and thus would beat Vitoria and Grotius (and certainly Kant) very

he develops it in both a short-term and long-term sense, ranging from immediate ceasefires and public peace treaties all the way to the worldwide spread of a cosmopolitan federation devoted to peace and the realization of everyone's human rights. Here we can clearly recognize the seeds of so much that is now suggested by *jus post bellum*, and what the wonderful variety of *jus post bellum* scholars and experts—ethicists, international lawyers, political scientists, policy practitioners (both governmental and non-governmental), military and civilians—work on and think about.

Moreover, in his *post bellum* reflections, Kant integrates the insights of at least two major disciplines: the just war tradition; and the perpetual peace tradition. He also, though a philosopher in the first instance, pays heavy homage to the law and all it stands for in his social and political thinking. Kant is thus truly interdisciplinary in a way immediately recognizable by all of us working in the burgeoning field of *jus post bellum*. He is also one of political philosophy's great optimists, and no one working in post-war justice does so without a strong desire to see things improved for the future. In so many ways, then, Kant seems the fountainhead of this field and, as contemporary thinkers wrestle with many important issues and difficult dilemmas, and move to cultivate and develop future branches of *jus post bellum*, we can gain substantial nourishment from exploring in detail its (Kantian) roots.

II. Four Crucial Contexts

Many factors external to his thinking impacted Kant's philosophy of armed conflict. Perhaps the four most relevant for our purposes are: the American and French Revolutions; the Enlightenment; European imperialism; and Christianity.

A. A Tale of Two Revolutions

When Kant wrote about war and peace, Western society was being convulsed by two world-historic revolutions: the American (1775–1783); and the French (1789–1799). These revolutions signalled the end of absolute monarchy as a legitimate form of governance, and heralded the first pro-rights republican societies. These events had a massive impact on Kant's political thinking, and there is no doubt that—though he personally preferred gradual reform over sudden violence—in his heart of hearts, he was a profound supporter of the liberal ideals ('*Liberté! Egalité! Fraternité!*') of both these revolutions. Such support also reveals Kant's reformist instincts and his forward-looking impulses, both of import for his thoughts on justice after war.[11]

handily. But what may be missing in any earlier accounts by such Romans could be a robust sense of the morality/justice of the actions and policies.

[11] David Armitage and Sanjay Subrahmanyam (eds), *The Age of Revolutions in Global Context* (Palgrave Macmillan 2010).

B. The Enlightenment, inspiring the Perpetual Peace Tradition

At the very least, Kant was convinced that the conservative structures of *ancien régime* society in Europe needed to be transformed utterly. Kant was an ardent supporter of the Enlightenment, that is, the broad cultural shift in European intellectual life *away* from religion, tradition, and authority *towards* science, reform, and an individual's human rights and capacity for critical thinking. Kant hoped that the American and French Revolutions would extend Enlightenment attitudes into political and social domains. (He even penned a spirited short essay entitled 'What is Enlightenment?' His answer: 'Man's emergence from his own self-imposed immaturity'. The related slogan which Kant believed to best capture the ethos of the Enlightenment? '*Sapere Aude*!' or 'Dare to Know!')[12]

Perhaps the single most successful piece of Enlightenment thinking was Isaac Newton's *Principia* (1687).[13] Here, Newton famously shows how the universe runs according to regular rules and forces—such as gravity and entropy—which can be both empirically observed and mathematically codified. Newton's picture of a 'clock-work universe'—rationally and objectively knowable, predictable, operating on principles of coherence and consistency—struck the world like an intellectual thunder-bolt, and seemed living testimony to the sheer power of human reason and to the beauty and utility of evidence-based science. No sooner had Newton published this work than smart people all across the world began to wonder whether other problems could not be solved through a diligent and enlightened application of rationality.[14]

And so, well-meaning reformers crafted detailed instructions, or 'recipes', for trying to construct a Newtonian machine of international relations (as it was): setting up nation-states in such a way, according to such principles, that—when left to run—this global mechanism would come to function peacefully, prosperously, perfectly. And the old problems of ignorance, poverty, oppression, and even war itself would become things of the primitive past. These reformers, who have come to be labelled members of 'the perpetual peace tradition', included: William Penn (in 1690); Abbé de Saint-Pierre (1712); Leibniz (1714); Jean-Jacques Rousseau (1756); and even Kant's contemporary, Jeremy Bentham (in the late 1780s).[15] (We should note that Rousseau is a member of this tradition in an indirect sense: he criticizes Saint-Pierre at length for being too naïve on a range of fronts, but his remarks are so detailed, historically informed, and full of institutional caution and correction, that scholars point out that, for all his tough verbal criticism, what is present in Rousseau is actually a much better constructed proposal than Saint-Pierre's.)[16]

Kant is without doubt a member of this tradition: indeed, his most famous essay on international politics is titled 'On Perpetual Peace'. Published in 1795, it is actually one of the

[12] Anthony Pagden, *The Enlightenment, and Why It Still Matters* (Random House 2013); Immanuel Kant, 'An Answer to the Question: "What is Enlightenment?"', in Immanuel Kant, *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Hackett 1983) 41–7.

[13] Isaac Newton, *The Principia*, trans. A. Motte (Prometheus 1995).

[14] Edward Dolnick, *The Clockwork Universe: Isaac Newton, The Royal Society, and The Birth of The Modern World* (Harper 2012).

[15] Immanuel Kant, *On Perpetual Peace*, ed. Brian Orend and trans. Ian Johnston (Broadview Press 2015). This volume includes the famous essay (pp. 51–102) as well the perpetual peace plans of St Pierre, Leibniz, Rousseau, and such unexpected others as William Penn and Jeremy Bentham, 103–17.

[16] Daniele Archibugi, 'Models of International Organization in Perpetual Peace Projects', (1992) *Review of International Studies* 295–317; Jean Jacques Rousseau, *A Lasting Peace Through the Federation of Europe,* ed. and trans. C. E. Vaughan (Constable & Co. 1917).

last exemplars of this tradition, though perhaps the best known. It is a document dripping with Enlightenment optimism and reformist, liberal hope; and is, moreover, his fullest consideration of what we would now call *jus post bellum*, in both short-term and long-term senses. We will consider it in detail below. For now, we note not merely the title and the shared spirit, but the concrete connection to card-carrying members of the perpetual peace tradition. In this essay, and elsewhere, Kant several times approvingly mentions both Saint-Pierre and Rousseau. We know Kant thought very highly of Rousseau, who of course was so influential to the French revolutionaries: references, for example, to Rousseau's famous concept of 'the general will' abound throughout Kant's political writings. Legend has it that the only artwork Kant hung in his home was a portrait of Rousseau, whom Kant credited for making him see that the Enlightenment, to be of true value, had not merely to advance knowledge but to further the moral growth of, and relations of justice between, human beings. What could more clearly and importantly count, in this regard, than the resolution of warfare itself?[17]

C. Anti-Imperialism: Tying Down the Global Hegemon

A common denominator of many of the earliest contributors to *jus post bellum* (Vitoria and Suarez especially) seems to be a rejection of European imperialism and colonization. Kant is no exception, strongly arguing against having colonies, the subjection of fellow human beings (violating their republican freedom), and especially all the wars and violence which appeared part-and-parcel of the whole sordid process. Kant goes out of his way, in his political writings, to take special critical aim at the United Kingdom in this regard. For him, and his time, the UK was the world's most powerful country—'the global hegemon', as we would now say—which needed very much to be controlled and kept in check, not celebrated. England, Kant thought, was actually a well-funded threat to international peace and freedom, with an enormous military (especially its Royal Navy), lots of greedy drive to secure natural resources, and enormous ambition to spread its way of life around the world. All these characteristics made the UK then, and perhaps other countries since, of particular concern for the justice of, and after, war. Moreover, Kant agreed with the American revolutionaries that the British mode of governance was actually rights-violating, because it was an anti-republican, imperial monarchy, and because (in his eyes) there was no real separation of powers between the legislative (law-making) and executive (law-enforcing) branches of government (since, in a majority government anyways, the prime minister holds *de facto* control of both branches). Kant is very concerned, as we'll see in his post-war reflections, both to undermine and delegitimize any imperial approaches and claims, as well as to argue passionately for the long-term spread of pro-rights republicanism. We'll consider whether there might be tension between those twin commitments.[18]

[17] Kant, *Perpetual* (n 15) 51–102; I Kant, *Political Writings*, trans. H. B. Nisbett and ed. with 'Introduction' (pp. 1–40) by Hans Reiss (Cambridge University Press 1991).

[18] Philippa Levine, *The British Empire: Sunrise to Sunset* (Routledge 2013).

D. Christianity: Peace on Earth

Quite a few of the most formative just war theorists, of course, were committed Christians: Augustine and Aquinas most notably. What about Kant? His family was Pietist, a branch of Lutheran Protestant Christianity. Kant's mother Regina was intensely religious and, when he was eight, Kant was packed off to study at the *Collegium Fridericanium*, a school renowned both for its academic quality and its strict religious observances. In many ways, Kant rebelled against these earliest exposures to religion, and perhaps this partly explains his fascination with empirical science and his stress on the importance of the Enlightenment. At the same time, Kant retained a lifelong belief in the existence of God, and wrote extensively about religion. In fact, Kant was formally censored by the King of Prussia for his writings on the subject. The King's edict prevented Kant from publishing anything on religion for several years. This stung Kant, and his emotions come out in his writings. For instance, 'On Perpetual Peace' was published in 1795, the year after the King censored Kant. In it, we see numerous instances where Kant practically sings the virtues of freedom of speech, and how political authorities are wrong to try to shut down the expression of informed opinion, and how heads of state would profit enormously from consulting the research and writings of academic experts. In fact, in the brief section titled 'The Secret Article for Perpetual Peace', Kant intones that heads of state *must consult* the theories of philosophers concerning how best to pursue an enduring peace. Indeed, the implication is that such is a vital ingredient for any kind of political progress, domestic or international.[19]

And what about his very concern for peace to begin with? Though Kant was not a pacifist, as we'll see below, his concern for instituting more peaceful relations between societies is completely consistent with Christian values of love and non-violence. Jesus himself, after all, is often referred to as 'The Prince of Peace'. Finally, we'll see that Kant posits perpetual peace as a kind of end-state to a long-lasting process of progressive institutional reform—reform in the direction of ever-larger respect for the human rights of everyone. If one was inclined to interpret Kant in a heavily religious way, one might even discern in the structure of his political vision a clear analogy to the biblical process of a long, ongoing struggle between the forces of good and the forces of evil, culminating in the final victory for good, and the permanent installation of the forces of God and goodness both in Heaven and on Earth. One might even say, on such an interpretation, that Kant's Perpetual Peace is actually the Enlightenment equivalent of Heaven-on-Earth. It provides, and is structured to provide, the same kind of closure, and comforting narrative, regarding the ultimate triumph of peace and justice in the world.

III. Connecting to the Just War Tradition

Having connected Kant's thoughts robustly to the perpetual peace tradition, we cannot leave it there, as *jus post bellum* is conceptually categorized as part of just war thinking, and then both of them together feed into the philosophy of international law and theories of

[19] Manfred Kuehn, *Kant: A Biography* (Cambridge University Press 2001); Kant, *Perpetual* (n 15) 82–3 {'*Akademie*' *paragraph*s, 368–9; henceforth '*Ak.*, 368–9'}.

global governance. To count truly as a crucial progenitor of *jus post bellum*, we require evidence of Kant's connection to the just war tradition.[20]

And this might seem difficult to do, for at least two reasons. The first is that Kant explicitly distances himself from some members of the tradition, labelling Grotius, Pufendorf, Vattel ('and the rest') as 'merely tiresome comforters'.[21] But I contend that such distancing precisely revolves around the lack of *jus post bellum* in the other, older accounts of just war theory: Kant views the traditional construction of the theory, involving only *jus ad bellum* and *jus in bello*, as a mere sticking-plaster over the deeper problem of there being an international system wherein war repeatedly breaks out. Ending wars, and ending war, must be the ultimate ambition, as per the perpetual peace tradition. But, as regards *jus in bello* and emphatically *jus ad bellum*, we'll see below that Kant actually endorses many of the basic propositions of just war theory.

The second barrier to linking Kant with just war theory is that Kant is commonly considered a pacifist. This is probably because people tend only to have heard of, and read, 'On Perpetual Peace'. It is also owing to some 'purple prose' in that idealistic manifesto and elsewhere, such as the 1797 work, *The Doctrine of Right* (or '*Rechtslehre*') when Kant practically shouts in italics that: '*There shall be no war*'.[22] But the crucial word there is '*shall*', and it does *not* refer to an absolute prohibition in the present time. It refers, rather, to Kant's understanding of a long-term process of both domestic and international reform, whose end-state, *at some point in the future*, will be a world without war. But, until we arrive at such an end-state, Kant explicitly allows countries moral permission to resort to armed force under certain conditions, such as when he (also) declares in the *Rechtslehre*: '[T]he right to make war … is the permitted means by which one state prosecutes its rights against another'.[23]

Such a clear statement allows us to label Kant meaningfully as *some kind* of just war theorist, as the three basic logical options, on the ethics of war and peace, are: i) *pacifism*, which says that no war can ever be morally justified (there is always some superior, hopefully non-violent, alternative); ii) *realism,* which asserts that war and morality have nothing to do with each other, and countries should only tend to their own prudential self-interests in warfare; and iii) *just war theory*, whose core notion is precisely that, sometimes, it can be morally permissible for states to go to war.[24]

On top of this core, crucial proposition, Kant adds further explanation. A state may resort to armed force if and only if its rights have been violated. Which rights do states have? Kant's very standard reply, showing his connection to the fundamental currents of international law, is political sovereignty and territorial integrity: that is, the right of a people to live on a piece of land and govern themselves in a manner of their own choosing (provided they violate no other people's rights in doing so).[25] But states have these rights, morally, because such are needed to realize the human rights of their individual citizens. The key principle here, in Kant's just cause principle, is *the defence, protection, and vindication of the*

[20] I first articulated the detailed case for this controversial thesis in Brian Orend, 'Kant's Just War Theory' (1999) *Journal of the History of Philosophy* (April) 323–47.

[21] Kant, *Perpetual* (n 15) 67 {*Ak.* 355}.

[22] Immanuel Kant, 'The Metaphysics of Morals (Part One: The Doctrine of Right)', in Hans Reiss (ed.) *Kant: Political Writings*. Trans. H. B. Nisbet (Cambridge University Press 1995) 174.

[23] Ibid. 167.

[24] Orend, *Morality of War* (n 1) 1–6; Walzer, *Just and Unjust Wars* (n 4) 1–31.

[25] Kant, *Doctrine* (n 22) 165–82; Hannah Arendt, *Lectures on Kant's Political Philosophy* (University of Chicago Press 1982).

fundamental rights of political communities and their citizens. Kant says that a state can resort to war either in response to 'actively inflicted injury' (particularly an invasion or attack) or to 'threats' (presumably the credible and imminent threat of such an invasion or attack). So, the right to go to war is, for Kant, not purely or literally defensive; provided there is a serious enough threat, 'the right of anticipatory attack' can also be legitimate.[26] (Note that this is quite far, indeed, from pacifism.) Like earlier just war thinkers, Kant is not insistent that just wars be purely defensive, as so many thinkers of our time have been, at least until the 9/11 attacks and the resurgence of severe terrorist threats and the attending desire to thwart them pre-emptively. Much controversy attaches to this, of course; and it is yet another indication of the relevance of, and connection between, Kant's thoughts about warfare and the concerns of our own time.[27]

A. Jus ad Bellum

That said, the main thrust of Kant's justification for armed conflict remains defensive. What exactly, for Kant, grounds the right of armed self-defence on the part of a state? His main argument is perhaps best understood as the following chain of propositions:

1. All states have moral rights (to political sovereignty and territorial integrity) and moral duties (not to violate other states' rights). The function of these rights and duties is to enable state governments to help secure the human rights of their individual citizens. (The very essence of political legitimacy, for Kant as for John Locke and the American and French revolutionaries, is the realization of individual rights to life, liberty, equality, property, and the pursuit of happiness.)[28] State rights and duties are the bedrock, and most fundamental priority, of international justice.
2. These rights entitle states to employ reliable measures necessary to secure the objects of these rights and protect them from violation.
3. There is no reliable or effective international authority which can currently assure states in possession of the objects of their rights. Thus, states *are on their own* with regard to such assurance.
4. Currently, the most effective and reliable form of such self-help assurance with regard to rights protection, at least in the last resort, is the use of armed force.
5. Thus, faced with serious violation of their rights, such as armed aggression, states are entitled to employ armed force and war in order to repeal the aggression of the rights violator, to vindicate their rights, and to re-secure their objects and those of their citizens' human rights.[29]

[26] Kant, *Doctrine* (n 22) 167; Philippa Riley, *Kant's Political Philosophy* (Rowman Littlefield 1983).

[27] Orend, *Morality of War* (n 1) 9–32; 78–86. Walzer defends the right of anticipatory attack in *Just and Unjust Wars* (n 4) 74–85, as does 'The Bush Doctrine' in The National Security Strategy of the United States of America, September 2002, available at www.whitehouse.gov/nsc/nss.pdf accessed 15 December 2019, p. 15. Vitoria, by contrast, asserts that pre-emptive or preventive wars amount to 'punishing a man for a sin he has yet to commit': see his *Writings* (n 7) 315–16.

[28] Orend, *Morality of War* (n 1) 19–21; T. Pogge, 'Kant's Theory of Justice' (1988) *79 Kant-Studien* 408–33.

[29] Orend, *War and International Justice* (n 10) 46–73; Kant, *Doctrine* (n 22) 165–72.

It is important to understand that, on Kant's reasoning, states *do no wrong* in responding to rights-violating aggression with armed force. A war in such a case, for Kant, is not merely one of evil compounding evil (as many a pacifist might say). It is, rather, a matter of repealing the wrong of aggression and of asserting and defending, in an effective fashion, one's own status as a rights-bearer. The pith and substance of Kant's justification, then, is two-fold and intertwined: a state may resort to war both *to defend itself* and *to repeal the aggression* which made the defence imperative. 'Thus', Kant says, 'if a state believes that it has been injured by another state, *it is entitled to resort to violence*, for it cannot in the state of nature gain satisfaction through legal proceedings … [emphasis mine]'. In the international arena, 'the right to make war … *is the permitted means* by which one state prosecutes its rights against another [emphasis mine]'.[30]

Another way of making this important point, at the most fundamental level of Kant's influential moral philosophy, is to show how wars of self-defence against aggression do *not* violate the categorical imperative. The categorical imperative—the foremost command of morality for Kant—mandates that all rational agents act in such a way that: i) all rational agents could (also) act on the exact same principle of action; and ii) in acting, full respect is paid to the rational agency which is the hallmark of our humanity.[31]

It is clear we can universalize the following maxim or policy: 'When faced with rights-violating aggression, I reserve the right to employ those measures, including armed force, necessary for self-defence'. Every rational agent, whether individual or collective, can endorse such a maxim of permissible self-protection: no contradiction is involved in doing so. A system of international law allowing all states to defend themselves from aggression, with force if need be, is thus entirely consistent and universal: the course of action in question is open to all who fulfil its conditions. Secondly, we do not disrespect rational agency when we respond with armed force to aggression because: i) we hold the aggressor state responsible for its actions (and thus treat it as a fully deliberative agent); and ii) we are, in doing so, actually vindicating the system of rules and laws designed to secure for everyone the elements of their rational agency, notably law and order and human rights. *We are thus resisting and punishing a rogue state which has violated the fundamental ground-rules needed for a just and well-functioning international system.* We are, so to speak, hindering a hindrance to our freedom as rational agents. And, in his domestic theory of justice, Kant precisely defines a just use of force as one which 'hinders a hindrance to freedom'.[32]

B. *Jus in Bello*

Drawing upon, and interconnecting with, this understanding of *jus ad bellum*—so similar to today's international law, 'the laws of armed conflict' (LOAC), and standard just war theory[33]—Kant frames a small series of rules regarding just conduct in war. First, and

[30] Both quotes at Kant, *Doctrine* (n 22) 167. See also Orend, 'Kant's Just War Theory' (n 20) 323–47.

[31] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, trans. J. Ellington (Hackett, 1983); Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press 1989).

[32] Kant, *Doctrine* (n 22) 134. See also: Orend, *War and International Justice* (n 10) 15–88; Howard Williams, *Kant's Political Philosophy* (Oxford University Press 1983).

[33] For standard just war theory, consult Walzer, *Just and Unjust Wars* (n 4) or Orend, *Morality of War* (n 1). For the LOAC, see: Gary D. Solis, *The Law of Armed Conflict* (Cambridge University Press 2010); Adam Roberts and Richard Guelff (eds), *Documents on The Laws of War* (Oxford University Press 2000); and Michael W Reisman and Chris Antoniou (eds), *The Laws of War* (Vintage 1994).

crucially, he makes mention of the major *jus in bello* principle of discrimination/non-combatant immunity: '[T]o force individual persons [in a conquered state] to part with their belongings … would be robbery, since it was not the conquered people who waged the war, but the state of which they were subjects which waged it through them'.[34] Unfortunately, this is not a terribly precise, or suggestively robust, account of the familiar rule of discrimination in targeting, as developed throughout the just war tradition. This is disappointing, given the importance of the principle,[35] but it seems that we can safely infer that Kant must have *some* such rule in mind because: i) the quote just mentioned *does* enumerate an immunity of a kind on the non-combatant civilian population; and ii) if such people have rights of property which ought not to be violated in war, it stands to reason that they must have other rights—especially more basic, related rights, such as to life (without which, entitlements to property fail to make much sense).[36] Nowhere does Kant mention a right to deliberately kill innocent people, which non-combatant civilians are presumed by just war thinking to be. It is only rational actors (whether states or individuals) who either actually attack, or are imminently about to attack, who may be responded to with lethal armed force.

Kant also endorses restrictions on means '*mala in se*' (or 'evil-in-themselves').[37] For Kant, this rather vague and sweeping criterion rules out any wars of 'extermination', 'subjugation', and 'annihilation'. Civilian populations cannot be massacred or enslaved. It also means that states cannot employ 'assassins or poisoners', or even spies.[38] In sum, he declares: 'The attacked state is allowed to use any means of defence except those whose use would render its subjects unfit to be citizens. For if it did not observe this condition, it would render itself unfit in the eyes of international right to function as a person in relation to other states and to share equal rights with them'.[39] Such a state would, in effect, be an outlaw and unjust state. So, it is clear that, for Kant, the end does *not* justify the use of any unjust means to attain it. Kant asserts this quite clearly when he says: 'The rights of a state against an unjust enemy are unlimited in quantity or degree, although they do have limits in relation to quality. In other words, while the threatened state may not employ *every* means to assert its own rights, it may employ any intrinsically permissible means to whatever degree its own strength allows [his italics]'.[40]

Kant scholar Arthur Ripstein has impressed upon me the difference and significance of what he calls 'the inward-looking nature' of Kant's *jus in bello*.[41] Most just war theorists seem to frame *jus in bello* in outward-looking terms: what do you owe the enemy in wartime? Which restraints on your dealings with the enemy ought you to accept? Hence, such rules as non-combatant immunity and no means *mala in se*.[42] But we have just seen that, while Kant *does* endorse such rules, his development of them seems diffuse, disappointing, half-hearted and, in any event, nowhere near as detailed and action-guiding as

[34] Kant, *Doctrine* (n 22) 168–9.
[35] Walzer, *Just and Unjust Wars* (n 4) 127–233.
[36] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press 1980) which, for the logic of inferring some rights from others, itself draws on H. L. A. Hart's classic, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175–91. Thanks to Jens Iverson for pushing me on this point.
[37] Orend, *Morality of War* (n 1) 130.
[38] Kant, *Perpetual* (n 15) 57 {*Ak*. 346}.
[39] Kant, *Doctrine* (n 22) 168–9.
[40] Ibid. 170–1.
[41] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 123–67.
[42] Orend, *Morality of War* (n 1) 111–52.

other accounts of *jus in bello*, including those—such as Grotius'—prominently on offer in Kant's time. Ripstein has persuaded me, and Dan Zupan concurs,[43] that Kant is less interested in the standard, outward-looking rules—resulting in such things as literally hundreds of legal restrictions on prohibited kinds of weapon[44]—and more concerned with developing an inward-looking conception of *jus in bello*: *how should I restrain my own conduct in war, so that I can avoid moral corruption and maintain my fitness as a decent individual, or political community, moving forward into the future?* If everyone observed this rule—as clearly inspired by the categorical imperative—then the outward-looking rules might even be unnecessary: soldiers, generals, and belligerents would restrain their own conduct in the appropriate way. The result of this would be the absence of atrocity, the avoidance of searing shame, and the maintenance of a non-poisoned atmosphere, in which negotiations about the peace can succeed.

This is a profound insight. It rings true as an account of what Kant probably most wished for, in terms of the conduct of actors in wartime. We also note how it's suggestive of Augustine, one of the seminal just war theorists and, while perhaps not the inventor of the whole tradition, certainly seems the inventor of the *jus ad bellum* rule of right intention, according to which it's not enough merely to act externally in accord with the crucial rule of just cause: one must also do so with the proper internal attitude. As Augustine famously says, one might be permitted as a ruler to resort to war in defence of one's own people, but one must do so *only* out of a spirit of love and desire to protect them, and *not at all allow any ulterior motives* like rage, cruelty, or greed to pollute one's thinking, for then they will corrupt one's actions, and thus the world moving forward.[45]

Ripstein's 'internal', Augustinian interpretation—how external adherence to a universal rule must be properly motivated by internal intention and self-discipline—also has the happy consequence that Kant's account of *jus in bello* starts to look much more rich and practical than his very quick, sweeping, and highly theoretical remarks above. On this reading, what we actually have on offer is *a rule directly applicable to every war-time action, regardless of circumstance*. In particular, something like: 'Act always in such a way to avoid the kind of rights-violating moral corruption which would not only render oneself unfit to be an upstanding citizen in a just community but would render the securing of a just and enduring peace impossible afterwards'.

Truly, this command is something like what we might call 'Kant's Categorical Imperative, or Golden Rule, of War-Planning and War-Fighting'.[46] The further happy consequence, of deep import for present-day concerns, is that *such a rule helps to cover the complex transition from jus in bello situations to those of jus post bellum*. It has recently become an issue as to where we locate the termination phase of war;[47] and then noting that, depending on where we do, there is an issue of where and when the norms of *jus in bello* apply, versus those

[43] Daniel Zupan, *War, Morality and Autonomy* (Ashgate Press 2004) 43–85.

[44] William Boothby, *Weapons and The Laws of Armed Conflict* (Oxford University Press 2009).

[45] Augustine, *City* (n 2) 1:21; Teresa Delgado, John Doody, and Kim Paffenroth (eds), *Augustine and Social Justice* (Lexington, 2016). Jens Iverson has helpfully stressed the potential parallel between Augustine's *jus ad bellum* with Kant's *jus in bello*, or Ripstein's reading of such.

[46] Brian Orend, 'Framing the Moral Issues, II: The Kantian Perspective on *Jus in Bello*', in James T. Johnson & Eric D. Patterson (eds), *The Ashgate Research Companion to Military Ethics* (Ashgate 2015), 131–43.

[47] Michael Walzer, 'The Aftermath of War: reflections on Jus Post Bellum', in Eric Patterson (ed.) *Ethics Beyond War's End* (Georgetown University Press 2012) 35–46.; George Lucas, 'Jus Ante- and Post Bellum: Completing the Circle, Breaking the Cycle', in Eric Patterson (ed.) *Ethics Beyond War's End* (Georgetown University Press 2012) 47–64.

of *jus post bellum*.[48] While not pretending that Kant has answered the many excellent and important queries in this regard, his Golden Rule of War-Fighting at least draws connections between war conduct and post-war, and may at the most provide a principle which is always relevant across war's many phases, providing some of the sought-after seamlessness, or plugging of any gaps, across such phases. Occupation law, of course, is another systematic attempt to straddle the gap between, and/or combine the norms of, *jus in bello* and *jus post bellum*. (The main point here is that Kant, far ahead of his era, at least anticipates some of these complex concerns, and proposes to deal with them in law-like ways.)[49]

IV. *Jus Post Bellum*

We have, thus far, seen how Kant substantially integrates both traditions of perpetual peace and just war into his complex philosophy of armed conflict. He does so, moreover, from a perspective not merely respectful of international law but, in fact, inspiring to infuse the structure of such. What remains, in this effort to show how much of Kant anticipates and informs current thinking about *jus post bellum*, is to turn directly to Kant's efforts on the subject. Kant reflects on both short-term, and long-term, *jus post bellum*: but it is fair to say that most of his attention is on the latter, and we can think of such things almost as being on a continuum in, and moving out of, just war theory (so to speak) and then increasingly into the tradition of perpetual peace.

A. Short-Term, and Procedural: Immediate Endings of Particular Wars

Kant articulates several principles here. First, there is the complex, yet very useful and suggestive, 'Golden Rule' (as just discussed) which attempts to cover the transition between *jus in bello* and *jus post bellum*. Second, Kant is adamant that every war must end: a) with a formal peace treaty; and that b) the terms of such a treaty be completely public and transparent. His very first 'preliminary article of perpetual peace', after all, intones that: 'No peace treaty that is drawn up with a secret reservation of some matter for a future war will be considered valid'.[50]

I will make two comments on this point. First, the quotation shows Kant's commitment to a core notion that everyone working today in *jus post bellum* shares: that how wars end can determine whether future wars break out; and that, generally, when wars are wrapped up badly, they sow the seeds for future wars.[51] Second, it was not uncommon for the monarchs of medieval and early modern Europe, when drafting a peace treaty, to craft it into two parts: one for public release and then the other (more important) part, which they kept

[48] Jann Klefner, 'Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 287–96; and Rogier Bartels, 'From *Jus in Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 297–310.

[49] Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 2004); Aeyal Gross, The *Writing on The Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017).

[50] Kant, *Perpetual* (n 15) 54 {*Ak*. 343}.

[51] Brian Orend, 'Justice After War' (2002) 16 *Ethics and International Affairs* 43–57.

private and known only to themselves and their most senior ministers. In such a secret part, they would often deal with the most controversial parts of the treaty, which were—condescendingly—thought to be too complex and controversial for ordinary people. These secrets items often included, for example, such vital matters as the fates of entire minority groups, and by which kingdom they would be governed.[52] Kant rejects such 'statecraft', for two related reasons: i) clearly, people who are going to have their lives substantially affected by the outcome of a war deserve to know what is going to happen to them; and ii) it is part-and-parcel of Kant's overall vision that the moral, legal, and political rules which are to guide us all must be completely transparent and public. *We are all bound together by such rules*; we should think of ourselves, as Kant says elsewhere, as co-citizens in an imaginary 'kingdom of ends' where we are all free and equal rational beings who treat each other with total respect.[53]

On the other side of the ledger, it must be said that nowhere does Kant talk about war crimes trials, or any kind of post-conflict tribunal, or reconciliation procedure. Thus, even though we can see that Kant *does* have numerous things to say about *jus post bellum*, the fact that he lacks something that today we would consider so fundamental and rudimentary to a conception of post-war justice *does* reveal clear limits to his account: nowhere here are we suggesting that Kant's understanding is fully satisfying, much less completely correct. Perhaps he thought that everything vital would be contained within that 'Golden Rule' principle mentioned above in Section II.B: no one, as we move from war back into peace, ought to behave in such a way as to draw searing shame upon themselves, or to jeopardize the justice and stability of the move back into peace. This is reiterated in his sixth and final 'preliminary article of perpetual peace', where he also stipulates that any 'breaching the terms of surrender' should not be permitted.[54]

He mentions further things in the other 'preliminary articles for perpetual peace', but they are not all apposite to our concerns in this section. He rails against wars of royal succession (Article 2), as well as the use of mercenaries (Article 3): more *ad bello* and *in bello*, respectively. There is his interesting stipulation (Article 4) of how countries should be banned from going into debt in connection with warfare, but that does not cash out into a clear *post bellum* norm, either: though it does reveal an added dimension, of economic awareness, to his thinking about war. Kant does have a strong statement (Article 5) regarding non-interference in another country's internal affairs—standard state sovereignty stuff, as above in Section II.B—but, as we'll see in his long-term reflections, there is an important exception to this, precisely related to some post-war situations.

Transitioning into the long-term material, we see that, beyond the short-term/long-term distinction here, *there is a distinction between process and substance,* with the shorter term post-conflict norms just described being mainly procedural (formal peace treaty, public and transparent terms, no breaking of the terms afterwards, do not do anything which will ruin the peace deal, or make it impossible to begin with), whereas the longer-term understanding, as we'll see, is very heavily substantive, and rooted in a robust conception of political justice.

[52] Randall Lesaffer (ed.) *Peace Treaties and International Law in European History* (Cambridge University Press 2004); Edward Grosek, *The secret treaties of history* (W. S. Hein 2007).

[53] Christine Korsgaard, *Creating the Kingdom of Ends* (Harvard University Press 1996); Kant, *Groundwork* (n 31) {*Ak*. 439}.

[54] Kant, *Perpetual* (n 15) 57–8 {*Ak*. 346–7}.

B. Long-Term and Substantive: From *Jus Post Bellum* to Perpetual Peace

By 'long-term *jus post bellum*' we mean Kant's own recipe for perpetual peace, as contained especially within his three famous 'definitive articles of perpetual peace'. Let us quote them exactly, and then explain and critically comment on them.

1. 'The civil constitution in each state shall be republican'.[55]

We've already mentioned Kant's republicanism; what it means, and how he uses it (among other things) to blast away repeatedly at the then-imperialism of Great Britain. The ideal state for Kant would be one wherein there is no monarchy but, rather, a government representative of the people and split into different legislative and executive branches. Yet the focus of these different branches would be one and the same: *securing the human rights of all the citizens equally, through public and effective laws*. The watchwords of ideal Kantian governance are: law and order; equal human rights to personal freedom and private property; freedom of socio-economic opportunity; free trade and commerce; and self-driven personal effort, industry, enlightenment, and moral improvement. Nowadays, political philosophers would label such a nation a 'classical liberal' society, with a minimal (so-called 'nightwatchman') state government, whose only job is to keep the peace, protect from attack, and preserve everyone's rights—but then otherwise let people 'tend their own garden' and allow everyone to lead their own diverse lives.[56]

But what exactly is the connection between this liberal republicanism and international peace? Here we have some profound insight, especially for his time and place. Kant breaks radically with tradition by asserting robust connections between merely national, and truly international, justice. Until his time, the vast majority of political philosophy consisted of thinker after thinker—starting with Plato's *Republic* and going down the line to Hobbes' *Leviathan*—being concerned exclusively with concocting their own version of the ideal national community. And then leaving it there: as if the rest of the world never existed, or as if domestic societies floated in an isolated vacuum. Kant, by contrast, notes how the achievement of any kind of national justice *is entirely contingent upon* international peace and security, as any such nation could be invaded and overthrown by malign foreigners. And so even 'exclusive' concern with national or domestic justice must in the end, of causal necessity, concern itself with the international arena. More sharply, Kant suggests that certain kinds of nations—that is, ones which violate human rights—are much more likely to get involved in wars, and cause severe problems internationally. And it makes sense: if a government is willing to do terrible things to its own people, then it stands to reason that it is not going to hesitate to do the same, or worse, to foreigners. So—and here is the sum of Kant's crucial insight for his time—*it goes both ways; there are deep interconnections between nation and world*: bad nations are going to disrupt world peace; and there needs to be world peace so that good nations can stay that way securely.

[55] Kant, *Perpetual* (n 15) 61 {*Ak.* 349–50}.

[56] Allen Rosen, *Kant's Theory of Justice* (Cornell University Press 1993); Paul Guyer, *Kant on Freedom, Law and Happiness* (Cambridge University Press 2000). For an alternative reading of Kant, see Harry Van der Linden, *Kantian Ethics and Socialism* (Cambridge University Press 1988).

Domestic justice is thus 'a definitive article' of perpetual peace because, so long as there are bad nations—that is, non-republics which violate human rights—there is always going to be this deep insecurity that other countries confront. Internal reform, in the direction of respect for everyone's human rights, is thus the first step on the road to securing an enduringly peaceful world.[57]

2. 'The law of nations shall be based on a federation of free states'.[58]

This passage contains reference to Kant's most creative, and forward-thinking, political proposal. It is based on an important speculative thesis, namely, that *republics will never go to war against each other*.[59] Why not? Well, we know that a Kantian republic respects and realizes the rights of its individual citizens. It is a limited government with no tyrannical designs, either against its own citizens' freedoms, or against the territory or authority of any other foreign government. It has a free economy, urges its citizens to excel culturally and economically, and it shows foreign visitors warm hospitality. Kant reasons that *a country like this would never start a war against another, similarly-structured, country*. It would not be domineering and tyrannical, and thus not a conquering force; and—since its people would have freedom and control—they would never authorize such wars in the first place. Kant thinks that people are basically rational, and they do not want to start wars, as such are so destructive and do not seem to forward anyone's self-interest. Moreover, people living in a free and open society have all kinds of ways to spend their time, to seek satisfaction, and to quench any competitive striving they may have: arts; business; culture; education; the professions; personal romance; sports; you name it. These things would occupy their time and thoughts, as opposed to political conquest and territorial expansion.

Here is how Kant sees this step-by-step dynamic, moving forward:

- Several countries, themselves peaceful, prosperous, free, and rights-respecting, ought to form a club or 'cosmopolitan federation'. This club is totally voluntary and has, as its main terms, the following: i) you have to agree to these values to join; ii) you agree to defend anyone in the club if and when it gets attacked by countries from outside of the club; and iii) you allow for free trade, science, and technology, and the free movement of peoples within the borders of the club.
- Kant predicted that such a club, or federation, would be a spectacular success. So much so that other countries would experience envy. The envy, or jealousy, would produce one of two responses: i) irritation and attack; or ii) the desire to join. Kant said the club should freely allow other countries to join, so long as they keep to the terms of the deal. They might have to reform their own societies, so that they could be 'fit' to join the club. So be it, and only then would they get in. But if the envy provoked attack, the republican federation would have the right to defend itself, and war would be on. Kant said that, if and when the federation beats back such an aggressor and defeats it in war (which he apparently assumed would always be the happy ending), *the federation*

[57] Kant, *Perpetual* (n 15) 61–6 {Ak. 349–53}.
[58] Ibid. 66 {Ak. 354}.
[59] Ibid. 63 {Ak. 351}. He had thought of this as early as his 1784 essay, 'Universal History,' and further developed it in his 1797 *Doctrine of Right* (a.k.a. *The Metaphysics of Morals*, Part One). Both can be found in Orend *Perpetual* (n 15).

could and should forcibly transform the institutions in the aggressor state to republican, rights-respecting ones. The federation may essentially create, by force, a new member for the club—but only if first attacked.[60] (This is, of course, a quite controversial proposition, and ties into and inspires contemporary *post bellum* views in favour of forcible rehabilitation in the aftermath of war.[61] As to whether such forcible pro-republicanism is at odds with Kant's own anti-imperialism, as mentioned above in Section 1, Kant himself would say no, as he views human rights as genuinely universal values and not as 'merely Western' ones, or as 'conceptual imperialism', or anything like that; and the regime defeated in war, since it was a rights-violating aggressor, has no right to continued existence after the war. The creation of a rights-respecting republic, for him, is the very opposite of imperialism: liberation, not subjugation.)[62]

- Over time—like, *centuries, not merely decades*—Kant predicted that the republican club would grow and grow, until a truly *global* cosmopolitan federation developed. Not a binding, institutionalized world government (see the third article below), but a voluntary club of decent, rights-respecting countries who could and would offer their people security and justice; peace and prosperity; and the freedom to pursue their own skills, interests, and happiness.

Many people see this as the beating heart of Kant's forward-thinking international philosophy. They have seen in his proposal of the 1790s the philosophical seeds of what became, 200 years later, the European Union (EU) in Western Europe. (The EU is indeed a voluntary club of rights-respecting societies which is committed to mutual defence and free trade, and has grown remarkably since its creation in 1950, to the point where it now includes over twenty-seven countries and 500 million people, and is understood to be one of the three biggest economic units in the world, alongside the United States and China).[63]

Another impressive contemporary impact of Kant's thinking here is this: American political scientist Michael Doyle, very recently, has taken over Kant's early conjectures and put out a so-called 'democratic peace thesis', suggesting that *democracies have never gone to war against each other, nor will they ever do so*, for reasons very similar to what Kant suggests. (Note that Doyle's, and Kant's, thesis is *only* that republics/democracies will not go to war *against each other*—and *not* that they will not go to war at all. In fact, Doyle notes that democracies can actually be quite belligerent when confronting non-democratic regime types, especially dictatorships, perhaps as they are convinced of their own moral superiority.) Looking at the facts, Doyle seems correct. Counting all major wars of the modern era—since 1750 (when Kant was 26)—the three countries most frequently involved in armed conflict have been America, the UK, and France. But, these countries—since becoming true democracies after World War I (once slavery ended, and women got the vote)—*have never*

[60] Kant, *Doctrine* (n 22) 165–82; Kant, *Perpetual* (n 15) 66–70 {*Ak*. 354–7}; Orend, *War and International Justice* (n 10) 41–64.

[61] As was done rather well in West Germany and Japan, from 1945 to 1955, but done rather less well more recently in Iraq and Afghanistan. See Orend, *Morality of War* (n 1) 185–250, with many further sources both pro and con, and historically.

[62] Orend, *Morality of War* (n 1) 185–250, teases out the tensions. See also Brian Orend, *Human Rights: Concept and Context* (Broadview 2002), especially ch. 6, regarding whether human rights are universal and can overcome objections that they are merely Western values.

[63] Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* (Lynne Rienner 2010); Jonathan Olsen and John MacCormick, *The European Union: Politics and Policies* (Westview 2016).

gone to war against each other. This also holds for all other democracies! Doyle's democratic peace thesis has received much careful scrutiny. It has attracted support, and further theoretical deepening, from such scholars as Bruce Russett and Rudolph Rummel.[64] Others have tried to prove him wrong, offering up possible counter-examples. But these have all been shot down, and there is now widespread consensus that the democratic peace thesis is correct.[65] If so, it points one substantial way towards Kant's dream of perpetual peace: *if democracies never go to war against each other, we need to increase the number of democracies, and then we will have more and more peace.* Theoretically, if every country were to become a democracy, we would then have a true and enduring solution to the problem of war. This illustrates, yet again, the profound connection between internal domestic reform and the achievement of external, international peace. In fact, we may well view today's 'democratic peace thesis' as being something of a revival of the old perpetual peace tradition.[66]

> *3.'The rights of human beings as citizens of the world shall be restricted to the conditions of universal hospitality'*.[67]

The third definitive article is really an anti-climax after the visionary proposal of the cosmopolitan federation. Essentially, what this article does is stipulate that the federation should *not* attempt to become a world state with actual enforcement powers but, rather, rest content with its status as a voluntary club. Kant believed that, for a world state even to try to become effective over such a huge territory as the whole world, it would need to become tyrannical and absolutist, admitting no disobedience. But such would violate rights of republican freedom. Indeed, Kant believes that even such an extreme move would be doomed to fail anyway—as the Earth is too huge and its peoples simply too different in custom, language, religion, and so on, for a world state ever to be effective—and so even a tyrannical world state would soon collapse into chaos. We must therefore remain satisfied with the 'negative solution' of a voluntary federation committed to: everyone's human rights and united by shared values; links of trade, education, and commerce; and allowing for the free movement of peoples ('hospitality') within its borders. (This might, perhaps, be considered Kant's unique version of today's *post bellum* theme of moderation, or being willing to accept

[64] Bruce Russett, *Grasping The Democratic Peace* (Princeton University Press 1993); Rudolph Rummel, *Power Kills: Democracy as a Method of Nonviolence* (Transaction 2002).

[65] No less than John Rawls called it something 'as close to an observed law as we've got within international social science': (John Rawls, *The Law of Peoples* (Harvard University Press 1999) 113–14.) A sophisticated realist might argue not so much with the observations of the liberal peace as with the explanation behind it. They might suggest that American dominance and hegemony among the liberal democracies accounts for the peaceful relations between them in the time period in question (Great Depression, World War II, Cold War, 'unipolar' moment in the 1990s, War on Terror post-9/11), as opposed to the sameness of values, which would be what Kant, Doyle et al. prefer to stress. Essentially, such a realist would ask: 'what democracy would've dared defy the US, to the point of armed conflict, during this time period? It'd only have been a losing proposition, and so THAT is what cemented the peace, not anything magical about liberal democracy'. Consult, e.g: Kenneth Waltz, *Realism and International Politics* (Routledge 2008); Piki Ish-Shalom, *Democratic Peace: A Political Biography* (University of Michigan Press 2013), and Michael E. Brown, Sean M. Lynn-Jone, and Steven E. Miller (eds), *Debating the Democratic Peace* (MIT Press, 1996).

[66] Michael Doyle, *Liberal Peace* (Routledge 2011); Daniele Archibrugi, *The Global Commonwealth of Citizens: Towards Cosmopolitan Democracy* (Princeton University Press 2008).

[67] Kant, *Perpetual* (n 15) 70–3 {*Ak.* 357–60}.

less in order to make peace work. He is otherwise not a general advocate for moderation in these matters, generally preferring to see entitlements rather strictly, and fully, realized.)[68]

V. Conclusion: Kant's Legacy for Today's *Jus Post Bellum*

Here we end our consideration of Kant's thoughts,[69] and how much they anticipate and infuse at least the outlines of today's debates of *jus post bellum*. Contention was made that Kant may well be the first genuine expositor of *jus post bellum*, as distinct from what we might call 'the mere adjunct thesis', interpreting *post bellum* as little more than 'realizing the just cause within *jus ad bellum*'. Kant also puts most of his emphasis on the third category of *jus post bellum*, as opposed to other candidate creators who instead devote most of their attention to *ad bello* and *in bello*. In any event, it is fair to say that Kant at the least represents one large, complex, and very nourishing root for our *post bellum* reflections, and efforts, today.

Kant also seems to offer a very helpful principle designed to cover the transition between *in bello* and *post bellum*—something of manifest concern right now—yet, at the same time, does not even mention something as basic as war crimes trials. So, for all his forward-thinking, his account cannot be considered fully satisfying for our time. Another potential omission is how his account is entirely impersonal and institutional; any personal or psychological approaches to post-war reconciliation (such as confessional dialogues between, or trust-building exercises among, former belligerent enemies) are beyond the scope of his efforts.

Kant articulates norms of both process and substance in connection with *jus post bellum*, and puts heavy emphasis on the latter. Within that substantive conception, there is a bold blending of the just war tradition with that of perpetual peace, something which has motivated and inspired today's doctrines of 'liberal democratic peace theory' as well as accounts of post-war justice which permit, or encourage, coercive pro-rights regime change in the aftermath of war. Kant's account provides an early illustration of some potential tensions between such post-war permissions and his other insistences on anti-imperialism, though we explained how he himself would not view it as any kind of contradiction: it is simply what has to be done to rehabilitate the defeated aggressor regime in the direction of greater justice for all. Even if one disagrees, or is sceptical of Kant's confidence, it is hard to deny that

[68] Kant, *Perpetual* (n 15) 70–3 {*Ak*. 357–60}. Whereas May not only endorses such a moderation principle himself (persuasively, in his *After War Ends*, n 5) but argues that Grotius offers reasons in favour of this too, in his *Jus Post Bellum* (n 6) 15–26.

[69] I did leave out Kant's extended, and enthusiastic, discussion regarding how the unfolding of history will occur in such a way as to—in fact—realize his entire theory of international justice. That belongs in the category of metaphysics or, as Kant scholars like to say, 'Kant's optimistic philosophy of history'. It is beyond our concern here, as it involves a range of thorny issues, involving not just prediction and the flow of history but even things like determinism versus free will and God's/Nature's intervention in human affairs. I view such descriptive claims as being separate from his prescriptive claims, and have focused here throughout on the latter as a theory of international justice that we can look at on its own merits (apart from Kant's further, very bold claims that such justice is 'guaranteed' to be realized by how history will unfold). Such a 'philosophy of history' does save him from some problems—that is, it allows him quickly to assume that the cosmopolitan federation is always going to win its wars—but it does so at a cost of such others as those listed above. For those interested, see: Orend, 'Introduction', in Immanuel Kant, *On Perpetual Peace*, ed. Brian Orend and trans. Ian Johnston (Broadview Press 2015) 11–44, as well as Yirmiyahu Yovel, *Kant and The Philosophy of History* (Princeton University Press 1981).

his account is remarkably relevant for our time. Finally, in so many ways, Kant anticipates and exemplifies some of the core approaches and issues we now take to be central to *jus post bellum*: not just 'process versus/and substance' but also interdisciplinarity; future-focus; reformist optimism; and the blending of law with morality and policy, all in the name of a successful peace agreement which can endure and will result in people living under much better institutions, and thus being treated much better as human beings, than they were before.

3

A Just and Lasting Peace After War

*Lonneke Peperkamp**

I. Introduction

Wars are waged for the sake of peace. It is generally assumed that war has a teleological character; it not valued in itself but seen as an instrument to achieve a certain end.[1] This instrumental conception of war is not only firmly entrenched in history, but is also one of the pillars of just war theory. Just war theory is premised upon the idea that war, given the scale of overall destruction and death it causes, is a great evil. In an ideal world, there would never be war. However, just war theory is pre-eminently a non-ideal theory which recognizes that in the real world, war might be necessary and justified in exceptional circumstances. And although some essential moral principles are set aside in times of war, morality *does* apply. This way, just war theory occupies the middle ground between political realism and moral idealism, and is a balance between the desiderata of feasibility and desirability. It sets a moral standard for war, in order to limit its negative consequences as much as possible. More specifically, *jus ad bellum* restricts the number of wars; *jus in bello* restricts the sort and scale of the violence, and *jus post bellum* is the relatively new branch that regulates the transition from war back to peace. The axiomatic goal of just war theory is a 'just and lasting peace'.

Strangely enough, however, it is far from clear what a 'just and lasting peace' actually is. Peace is a complex and multifaceted concept, which cannot be defined in a straightforward way.[2] Even so, just war theorists rarely explore the goal of peace and its implications.[3] Consequently, as Mark Evans points out, they might readily 'disagree once they begin to spell the specifics of what they understand by it'.[4] This is a fundamental problem: peace is central to just war theory, but is not explored in depth and remains therefore implicit

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[1] Exceptions who justify war for values such as honour, courage, and chivalry set aside.

[2] And contrary to the issue of war, relatively little conceptual thinking has gone into the issue of peace: Pierre Alan and Aalexis Keller (eds), *What is a Just Peace* (Oxford University Press 2008) 1. Richmond states: 'Peace is rarely conceptualized, even by those who often allude to it': Oliver Richmond, *The Transformation of Peace* (Palgrave MacMillan 2007) 2. Charles Weber and Johan Galtung similarly argue that 'a philosophy of peace is still in its infancy', Nigel Dower that 'the ethics of peace takes second place', and Alex Bellamy 'we lack a shared understanding of peace'. Charles Weber and Johan Galtung (eds), *Handbook of Peace and Conflict Studies* (Routledge 2007). Nigel Dower, *The Ethics of War and Peace: Cosmopolitan and Other Perspectives* (Polity Press 2009) 3, Alex Bellamy, *World Peace and How We can Achieve It* (Oxford University Press 2019) 13. For an interesting recent discussion of the related concept of 'victory', see: Cian O'Driscoll, 'Nobody Wins the Victory Taboo in Just War Theory', *Journal of Strategic Studies* (2019) 42.

[3] Robert Williams and Dan Caldwell, 'Jus Post Bellum: Just War Theory and the Principles of Just Peace' (2006) 7 *International Studies Perspectives* 309, 312.

[4] Mark Evans, 'At War's End: Time to Turn to Jus Post Bellum?' in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 28.

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and vague. What makes this problem even more pressing, is that developments in just war theorizing result in a shift towards a more comprehensive and demanding positive understanding of peace, along with maximalist *jus post bellum*, which encompasses positive values such as a realization of human rights, reconciliation, and economic equity.[5] But while that sounds attractive at first glimpse, it might be asked whether endorsing such comprehensive positive peace as a normative goal is indeed a good idea. The central question of this chapter is: How should a just war theorist understand peace, insofar that peace is the goal of just war theory, taking into account the theory's middle position between political realism and moral idealism?

This chapter consists of two main parts. In the first part, the contemporary debate is mapped and various positions on peace are made explicit. It appears that although most theorists declare that a 'just and lasting peace' is the goal of just war theory, they in fact fundamentally disagree on what constitutes such a just peace. Three main types of peace can be distinguished, and as they differ gradually, they can be best viewed as a continuum: on one end negative peace, mainly characterized by the absence of war, on the other end positive peace characterized by comprehensive values, and in between decent peace. The analysis in the first part shows that there is a shift in just war theorizing towards a more positive concept of peace. The question is, how far should this shift go? This question and the related central question—How should a just war theorist understand peace?—are answered in the second part of this chapter. Based on just war theory's role as practical guidance for real-world problems, its limited nature as applicable to a specific domain of war, and the risk for moral imperialism, it is argued that a 'just and lasting peace' must be understood as a decent peace that is 'just enough'. Hence, this chapter warns for a too radical shift in just war theory

II. Part 1: Peace Continuum

A. Negative Peace

The negative conception of peace is mainly characterized by an absence of war. Avishai Margalit's theory of peace, justice, and compromises is helpful in outlining a negative peace concept which sets a low threshold regarding the realization of human rights and the nature of the political regime. Margalit argues that realism compels us to seek 'just a peace' instead of 'a just peace'.[6] The urgency to establish peace prevails over the pursuit of justice, from which he draws that peace can be justified also if it is unjust. Primarily for the sake of stability—a somewhat stable peace as opposed to a mere ceasefire—it is justified to accept some injustices, Margalit argues.[7] However, not just any peace is justified: the exception for Margalit is peace based on a rotten compromise. A post-war compromise which results in a situation where the political system is characterized by cruelty and humiliation is unacceptable. After war, the regime in place must—at least—treat people as human beings.

[5] Lonneke Peperkamp, 'Jus Post Bellum: A Case of Minimalism versus Maximalism?' (2014) 21 *Ethical Perspectives* 255.

[6] Avishai Margalit, 'Obama and the Rotten Compromise' (2009) New York Review of Books, 17 December. <http://www.nybooks.com/daily/2009/12/17/obama-and-the-rotten-compromise/> accessed 1 June 2020.

[7] Margalit, 'Decent Peace' (The Tanner Lectures on Human Values delivered May 4–5 2005) 217.

Another defence of negative peace as normative principle comes from Israeli politician Yossi Beilin. Based on the horrific consequences of war in terms of human suffering, he argues that the first priority is to end war. Given feasibility constraints in the world today, aiming for a negative peace is more realistic, and has a better chance of success than aiming for a high ideal that can be accepted by all those involved as a 'just peace'.[8] Beilin points to the danger inherent in setting a high standard. To push for more than just any peace is dangerous, he argues, as this can be a reason to resist a peace that is perceived as unjust.[9] By aiming high—for a positive peace—it is likely that the war continues as this sort of peace cannot be achieved, and that consequently more injustice is done to precisely those innocent people.[10] In this way, the desire for perfect ideal justice stands in the way of halting the violence. The general motivation behind a negative peace as a normative goal of just war theory is that given the harsh political reality, such a goal is most effective in limiting the negative effects of war, which proves to be difficult enough to achieve.

This is recognized by Michael Walzer, one of the main representatives of conventional just war theory. Arguments of prudence and realism have an important place in his theory: 'Just wars are limited wars; there are moral reasons for statesmen and soldiers who fight to be prudent and realistic'.[11] This counts for a theory of ends in war as well; concessions are made to feasibility constraints since excessive idealism could result, for example, in the unnecessarily prolonging of wars.[12] Furthermore, in order to be effective in limiting war, just war theory's norms must be able to be generally accepted. Therefore, these norms must be 'morally plausible to large numbers of men and women; it must correspond to our sense of what is right'.[13] Clearly, Walzer sets a morally desirable standard which explains, supports, and appeals to our 'commonsense morality'. The foundation of his just war theory (and hence on which we could agree) are principles of political independence, communal liberty, and human life.[14] Given these values, Walzer emphasizes the right to collective self-determination and he sees sovereignty of states as an expression of these values.[15] Nevertheless, his theory is grounded ultimately in the human rights of individuals: it is 'in its philosophical form a doctrine of human rights'.[16] This means that state sovereignty is conditional; derivative of protection of the population's individual rights.[17]

[8] A similar argument was made by Jan Gruiters, director of Pax, who stated on his blog on the situation in Syria in 2012 that because of the lack of realistic options to end the violence, we should aim for a 'dirty peace', because this would at least end the humanitarian catastrophe. Such 'dirty peace' would include a safe getaway for President Assad, securing Russia's interests, and forcing the opposition to accept compromises. See: <https://jangruiters.wordpress.com/2012/10/17/smerige-vrede/> accessed 1 June 2020.

[9] Yossi Beilin, 'Just Peace: A Dangerous Objective', in Pierre Alan and Aalexis Keller (eds), *What is a Just Peace?* (Oxford University Press 2008) 130.

[10] As a matter of definition and terminology, it must be noted that Beilin considers only a mutual agreement between the former warring parties as an actual peace, and not an enforced peace such as the *Pax Romana*. This might still be desirable compared to a continuation of the war, but rather is a 'different solution' which at least provides stability.

[11] Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (Basic Books 2000) 122.

[12] Ibid. 116, 122–3.

[13] Ibid. 133.

[14] Ibid. 110.

[15] Ibid. 108.

[16] Ibid. xxii.

[17] Ibid. xxi, xxii. Classic just war theory was grounded in natural law and natural rights. Throughout history, the norms of just war theory rested on various foundations. Today, most theorists ground just war theory in a doctrine of rights, as Walzer does. As we will see, however, whereas Walzer emphasizes collective rights of peoples, many recent theorists emphasize individual rights and reject any inherent value of states and state sovereignty. Various theorists have pointed out that there is a tension between Walzer's state-centred theory and emphasis on sovereignty on the one hand, and this foundation in individual human rights on the other hand. See e.g. David

Despite that foundation, it appears as if his concern is more with national security than with human security.[18] Additionally, Walzer's just war theory is restrictive; the paradigmatic just war is self-defence against aggression, and humanitarian interventions are allowed only in very exceptional circumstances, that is, in response to acts 'that shock the moral conscience of mankind'.[19]

Walzer states that: 'Implicit in the theory of just war is a theory of just peace'.[20] When we make this theory of just peace explicit, it appears that he endorses a negative conception of peace. However, the peace that Walzer considers to be the goal of just war theory is not a purely negative peace as the mere absence of fighting. The goal of war is not 'just any peace'.[21] Conquest and unconditional surrender are in principle unjustified after war.[22] There *is* a relation between peace and justice, but this must be understood in a minimal way. The goal of just war theory remains a largely negative peace, understood as 'peace-with-rights, a condition of liberty and security'.[23] What is the minimum level of justice in peace for Walzer? Brian Orend further develops Walzer's theory on post-war justice, and explains that this is essentially determined by the just cause for war: after the violation of rights that was the cause for war is stopped, and those rights are vindicated, post-war obligations end despite the added value.[24] In principle, political reconstruction after war is therefore prohibited.[25] This means that the object of war is therefore not a return to the *status quo ante bellum*, since that situation led to war in the first place, but a 'better state of peace': 'more secure, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations'.[26] Since the paradigmatic just cause is a self-defence against external aggression, post-war behaviour is restricted to 'resistance, restoration, reasonable prevention'.[27] After that, the sovereignty of the defeated state should be restored as soon as possible.

B. Decent Peace

Today, this concept of negative peace is no longer widely endorsed among just war theorists, and this has to do with a shift in just war theorizing. Steven Lee states that Walzer represents the 'national defence paradigm'.[28] This paradigm is reflected in just war theory

Luban, 'The Romance of the Nation State' (1980/1) 9 *Philosophy and Public Affairs* 392; David Luban, 'Just War and Human Rights' (1980/2) 9 *Philosophy and Public Affairs* 160; Cécile Fabre, *Cosmopolitan War* (Oxford University Press 2012).

[18] Williams and Caldwell (n 3) 314.

[19] This exception is based on his commitment to human rights. See Walzer, *Just and Unjust Wars* (n 11) 108.

[20] Michael Walzer, 'Terrorism and Just War' (2006/2) 34 *Philosophia* 3, 4.

[21] Michael Walzer 'The Aftermath of War: Reflections on Jus Post Bellum' in E. Patterson (ed.), *Ethics Beyond War's End* (Georgetown University Press 2012) 37.

[22] The exception is an extremely evil regime such as the Nazi regime. Walzer, *Just and Unjust Wars* (n 11) 112–13.

[23] Ibid. 51.

[24] Brian Orend, *Michael Walzer on War and Justice* (University of Wales Press 2000) 136–7. Walzer, *Just and Unjust Wars* (n 11) 120. Walzer later states that indeed 'ad bellum anticipated post bellum'. Walzer, 'The Aftermath of War' (n 21) 35. For a similar position on peace as a minimum normative goal grounded in the collective right to self-determination and individual human rights, see Williams and Caldwell (n 3). Gary Bass also points to this connection between *jus ad bellum* and *jus post bellum*: Garry Bass, 'Jus Post Bellum' (2004) 32 *Philosophy & Public Affairs* 384, 386.

[25] The exception are extremely evil regimes such as the Nazi regime. Walzer, Just and Unjust Wars (n 11) 112–13.

[26] Ibid. 121–2.

[27] Ibid. 121.

[28] Steven Lee, *Ethics and War: An Introduction* (Cambridge University Press 2012) 292.

as it developed since the two world wars and which largely coincides with international law: there is a prohibition on aggression—the non-intervention principle—with the exception of a war of self-defence (or other-defence) against aggression. Hence, only a defensive war as a response against an unjust offensive war can be justified. Inis Claude states that under this paradigm, the preservation of (negative) peace takes precedence over the promotion of justice.[29] In past decades, however, just war theory has become somewhat more broad and permissive, and a humanitarian catastrophe has become an established just cause for war. In general, there is a firmer emphasis on individual human rights at the expense of the value of sovereignty and state rights. According to Steven Lee, just war theory moves from the 'national defense paradigm' to a new 'human rights paradigm'.[30] Under this new paradigm, there is more concern for human security than for national security. This shift is clear as well in political practice; for example, UN peace building efforts, the development of the so-called 'responsibility to protect', which includes the 'responsibility to rebuild', and emphasis on human rights in foreign policy.[31]

This shift has affected Walzer himself also. As he states: 'Ongoing disagreements, together with the rapid pace of political change, sometimes require revisions of a theory'. For Walzer, this means that he has become willing to allow humanitarian intervention, long-term military occupation, and that he recognizes the need for including *jus post bellum* in just war theory.[32] The just cause limits what can be done in the subsequent peace, and hence a more permissive humanitarian just cause influences the goal of peace. Vindicating violated rights means that the peace after a humanitarian intervention involves securing these rights for the affected population, which probably requires regime change and reconstruction abroad. As a result, after a humanitarian intervention (or a defence against inherently aggressive and murderous regimes), a new regime must be created in order to protect the right to life, liberty, and prevent future aggression.[33] That does not mean that Walzer now endorses a positive peace as the goal of just war theory, but rather a concept that can be called decent peace. This is a stable peace, in which the grievances that gave rise to the war are solved to a large extent, so that renewed wars are prevented for the near future. The (new) regime respects the most fundamental human rights of the citizens—the right to life, freedom, and safety. It also means that if the right to life is jeopardized by a lack of means of subsistence due to the war, providing these basic necessities of life is an obligation after war. *Jus post bellum* is aimed at the reconstruction of a sovereign state which is a safe and decent society, determined by a minimal conception of human rights.

In the same line, Anthony Coady seeks a middle position when it comes to the normative goal of peace and the scope of *jus post bellum*.[34] The peace he endorses as the goal of just war theory is more robust than a negative peace, but it does not equate peace with justice. A positive ideal of peace is too morally loaded, and Coady argues that we must aim for a more practically relevant peace,[35] which reflects that balance between feasibility and

[29] Inis Claude, 'Just Wars: Doctrines and Institutions' (1980) 95 *Political Science Quarterly* 83, 94.
[30] Lee (n 28) 292–5.
[31] See also Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)', in Carsten Stahn and Jan Kleffners (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 100.
[32] Michael Walzer, *Arguing about War* (Yale University Press 2004) xiii.
[33] Walzer, 'The Aftermath of War' (n 21) 39.
[34] And his take on just war theory might be even more restrictive. On aggression, see C. A. J. Coady, *Morality and Political Violence* (Cambridge University Press 2008) 69–72, and on humanitarian intervention 73–7.
[35] Ibid. 267.

desirability.[36] Coady agrees with Walzer that there is a strong connection between the just cause and what can be aimed at after war. In other words, the legitimate war aims limit and determine the subsequent peace, and there is a presumption against the political reconstruction of the defeated state.[37] In general, Coady argues, it would be best to leave the political regime intact—despite the inherent risks. Nevertheless, the central aim is to ensure that the population can again realize 'an independent political life for themselves after the war', and Coady seems to acknowledge that sometimes this might require regime change.[38] The peace that Coady has in mind is stable for the medium term; the disposition to violence and hostility is quieted, but need not be completely eliminated. It is sufficient that a resumption of war is no longer imminent.

Hence, Coady too remains modest with regard to the normative goal of peace. He warns that moralism can be not only imprudent but also morally questionable. As he argues: 'Consciousness of one's being justified in war combined with zeal for a particular political outlook or ideology can lead to illicit or imprudent imposition of reconstruction policies that not only work against peace but deny people a legitimate autonomy'.[39] Imposing democracy or a certain religion after war would amount to ideological imperialism. Coady criticizes theorists that endorse a positive just peace for being naïve. Given the difficulties encountered today, it would be better, according to Coady, to be 'less utopian, less lofty, and less consumed by our own righteousness, in prescriptions and principles for reconstructing conquered nations'.[40]

Brian Orend is influenced by Michael Walzer, but is overall more idealistic, more permissive regarding the just causes for war, and places more emphasis on individual human rights.[41] As a result, the concept of peace he holds to be central moves more towards the positive side of the continuum. Peace is not only defined by an absence of collective violence, and the most basic human rights, but also by a certain political structure and a full(er) range of human rights. The balance between feasibility and desirability is evident when Orend argues that: 'I view just war theory as a set of rules designed to protect human rights as best they can be, amid the rough-and-tumble circumstances of war'.[42] Nevertheless, he is more idealistic—even naïve according to Coady[43]—than Walzer. Orend claims that there are cosmopolitan duties owed to foreign populations to realize minimal justice.[44] As

[36] While realism is essential in the settlement of a war, that does not mean that any end should be accepted. Negotiations are constrained by ideas of desirable outcomes. Ibid. 275.

[37] Ibid. 275, 277.

[38] Ibid. 276, and C. A. J. Coady, 'The Jus Post Bellum', in Paolo Tripodi and Jessica Wolfendale (eds), *New Wars and New Soldiers: Military Ethics in the Contemporary World* (Ashgate 2011) 56.

[39] Coady, 'The Jus Post Bellum' (n 38) 53. For a similar warning, see: Mark Evans, 'At War's End: Time to Turn to Jus Post Bellum?', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014) 41–2.

[40] Coady refers to Brian Orend here. Coady, 'The Jus Post Bellum' (n 38) 54–5.

[41] Orend's position on *jus post bellum* changed throughout the years that he worked on this subject, in line with the general shift in just war theory here described. Today, Orend defends the 'rehabilitation model' after war, which aims to realize a far more comprehensive and positive peace than in his earlier years. See e.g. Brian Orend, 'Justice after War' (2002) 16 *Ethics & International Affairs* 43–56; Brian Orend, 'Justice after War', in Eric Patterson (ed.), *Ethics beyond War's End* (Georgetown University Press 2012). This also means that some theorists targeting Orend's position are no longer correct in doing so (on these grounds). See e.g. Evans, 'At War's End' (n 39) 34, still labelling Orend's position on *jus post bellum* as 'restricted' (minimalist).

[42] Brian Orend, *The Morality of War* (Broadview Press 2013) 5.

[43] Coady, 'The Jus Post Bellum' (n 38) 54–5.

[44] Minimal justice is the threshold level for cosmopolitanism according to Orend, which means that above this threshold, states are permitted to give greater weight to the interests of the national population.

a result, the creation of a minimally just state is an important part of the peace after war. A state is minimally just when it makes 'every reasonable effort to: (i) avoid violating the rights of other minimally just communities; (ii) gain recognition as being legitimate in the eyes of the international community and its own people; and (iii) realize the human rights of all its individual members'.[45] The human rights that are most essential are the rights to security, subsistence, liberty, equality, and recognition.[46] Realism makes Orend acknowledge that we cannot require perfection when it comes to the realization of human rights; but serious efforts and sincere intentions are required.[47]

Obviously, Orend places more emphasis on individual rights. Sovereignty is conditional and can be easily overridden: whenever a state does not make a genuine effort to realize the human rights of its citizens, sovereignty is forfeited. After war, there is a presumption in favour of forcible regime change by the just victor in the defeated aggressor. While this might be difficult and costly, this is what a just war theory that factors in cosmopolitan duties should aim at.[48] Orend clearly endorses a more comprehensive and positive peace as compared to Walzer and Coady, that we could call a comprehensive decent peace.

C. Positive Peace

The positive conception of peace is characterized by a robust connection between peace and justice.[49] It entails the realization of a comprehensive set of human rights, with a strong emphasis on the national political structure of the former enemies. Historically, this concept of peace comes from a theological perspective. Regularly quoted among just war theorists, such positive peace is Augustine's *tranquillitas ordinis*; peace characterized by order and justice.[50] It has the form of a well-ordered concord; which reflects the idea of peace being a compromise between the various interests of the people.[51] The earthly city seeks an earthly peace, 'and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men's wills to attain the things which are helpful to this life'.[52] This is the highest attainable goal in the early realm, and must be distinguished from the perfect eternal peace in the spiritual realm.[53] More specifically, the compromise between individual interests that constitutes the tranquillity of order means: 'that a man, in the first place, injure no one, and, in the second, do good to everyone he can reach'.[54] As is clear, the relations between individuals are important for this concept of peace.

[45] Brian Orend, 'Jus Post Bellum: A Just War Theory Perspective', in Carsten Stahn and Jan Kleffner (eds), Jus *Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 43.

[46] Orend, *The Morality of War* (n 42) 35–6, 189.

[47] Ibid. 38.

[48] Ibid. 216.

[49] Or in the terminology of Evans, this concept of positive peace means that justice is secured both at the society-wide macro level but also at the micro level of the society in individual relationships. Ibid. 29–30.

[50] James Turner Johnson, 'Moral Responsibility After Conflict. The Idea of Just Post Bellum for the Twenty-First Century', in Eric Patterson (ed.), *Ethics beyond War's End* (Georgetown University Pres, 2012) 17–34.

[51] See also Coady, *Morality and Political Violence* (n 34) 268.

[52] Saint Augustine, *The City of God* (trans. M Dods and intro. M Merton, first published 426, The Modern Library 1950) 940.

[53] Ibid. 933, and Johnson (n 50) 21.

[54] Augustine (n 52) 935.

The perception of peace as tranquillity of order was brought up to date by the encyclical of Pope John XXII, *Pacem in Terris*, which is called the 'magna charta of the Catholic Church's position on human rights and natural law'.[55] Peace is understood as a rich positive concept, based on the values of truth, justice, love for one's neighbour, and freedom, and which supports the universal common good.[56] Unlike Margalit, who argues that peace and justice are not complementary as fish and chips but rather competing like tea and coffee,[57] the Catholic tradition holds that 'the harvest of justice is sown in peace'.[58] Peace and justice are strongly connected, and the realization of human rights is central to this conception of peace. Human rights are founded in human nature and the dignity of individual persons.[59] All individuals are interdependent and part of the global human community.[60] Furthermore, regarding social justice and stability, instead of remaining hostilities or a balance of power, the just peace involves mutual respect and collaboration between former enemies.[61] The underlying causes for the war are solved, and former enemies are reconciled. This means that this peace is a 'peace by satisfaction'; instead of hostility, there is consent and mutual confidence, and former enemies are satisfied with the *status quo*.[62] Therefore, a largely positive peace is likely to be a lasting peace.

In contemporary just war theory, the concept of peace underlying Mark Evans' account of *jus post bellum* can be called a positive peace. It has more positive characteristics than the comprehensive decent peace that Orend endorses. Indeed economic reconstruction is part of building a just peace (the distribution of material resources), but also the reconstruction of the physical infrastructure and reestablishment of socio-cultural institutions, practices, and relationships.[63] The latter means that Evans presses on forgiveness and reconciliation as an essential part of the peace after war.[64] There is an obligation to: 'take full and proactive part in the ethical and socio-cultural processes of forgiveness and reconciliation that are central to the construction of a just and stable peace'.[65] As Evans indeed points out, while this positive concept of peace as a normative goal of just war theory is part of a non-ideal theory, it is clearly oriented towards achieving an ideal concept of a just peace.[66] Nevertheless, just war 'theory itself does not shoulder an entire morality of peace building'.[67]

[55] Russell Hittinger, 'Quinquagesimo Ante: Reflections on Pacem in Terris Fifty Years Later', in Mary Ann Glendon, Russel Hittinger, and Marcelo S. Sorondo (eds), *The Global Quest for Tranquilitas Ordinis* (The Pontifical Academy of Social Sciences, Acta, 2013) 39.

[56] 'The Harvest of Justice is Sown in Peace, A Reflection of the National Conference of Catholic Bishops on the Tenth Anniversary of The Challenge of Peace', 1993, para. 2. Available at: < http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-harvest-of-justice-is-sown-in-peace.cfm> accessed 1 June 2020.

[57] Margalit 'Decent Peace' (n 7) 8.

[58] 'Harvest of Peace' (n 56).

[59] The Challenge of Peace: God's Promise and Our Response. A Pastoral Letter on War and Peace by the National Conference of Catholic Bishops, 1983, para. 15. See further on the dual foundation—human dignity or personhood and natural law—of human rights in Hittinger (n 55) and Rollan Minnerath, 'Pacem in Terris. Quid Novi?' in Mary Ann Glendon, Russel Hittinger, and Marcelo S. Sorondo (eds), *The Global Quest for Tranquillitas Ordinis* (The Pontifical Academy of Social Sciences 2013).

[60] National Conference of Catholic Bishops, 'The Challenge of Peace: God's Promise and Our Response. A Pastoral Letter on War and Peace by the National Conference of Catholic Bishops' (1983) para. 240.

[61] Ibid. paras 200, 234.

[62] Raymond Aron, *Peace and War: A Theory of International Relations* (Transaction Publishers 2003) 161.

[63] Mark Evans, '"Just Peace": An Elusive Ideal', in E. Patterson (ed.), *Ethics Beyond War's End* (Georgetown University Press 2012) 207–8.

[64] While not strictly necessary for reconciliation, forgiveness regards the emotional inner life of individuals and requires a certain feeling of 'being at peace' with what might have happened before or during the war. This means that in this respect, Evans moves to a fully positive peace that connects the outer and inner dimensions of peace.

[65] Evans, 'Just Peace' (n 63) 208–10.

[66] Evans, 'At War's End' (n 39) 35.

[67] Ibid. 36.

Moving even further on the peace continuum is the concept of peace endorsed by Mark Allman and Tobias Winright. They defend an aspirational Christian just war theory based on 'love for one's neighbour', which includes respect for the enemy's dignity.[68] Hence, they reject a negative concept of peace as merely the cessation of violence and imposition of abstract principles. They declare to aim higher: as they state, there is a strong connection between peace and justice: 'peace is an enterprise of justice'.[69] And justice is understood as inclusive and substantive, negating self-interest, and envisaging an equitable peace in which reconstruction delivers systematic transformation and not merely regime change.[70] The goal of just war theory is a just peace, explained as Augustine's *tranquillitas ordinis*, which is restorative and reconciling in nature for both the victim and the aggressor nation.[71] Restoration after war is more comprehensive than merely realizing a minimally just state as Orend proposes.[72] A just peace requires a certain political system which protects and guarantees human rights *and* pursues the common good. Consequently, they state that their Christian background leads them to endorse a just and lasting peace inclusive of robust human rights and 'social, political, economic, religious, and cultural conditions that allow citizens to flourish, to pursue lives that are meaningful and worthy of creatures made in the image and likeness of God'.[73]

A just peace is also reconciling in nature, which means that Allman and Winright require something more than relative stability and a satisfactory *status quo*. They emphasize reconciliation after war; and relations of respect, trust, and friendship are part of the just peace they endorse: 'The reconciliation phase seeks to turn enemies into friends and to bring emotional healing to the victims of war'.[74] This results in long-term stability. Although Allman and Winright state that the establishment of a just and lasting peace cannot be a cause for war, the just cause does not limit the subsequent peace as we have seen earlier. Their concept of peace encompasses many more positive characteristics than the vindication of the violated rights.

And lastly, we should consider a cosmopolitan revisionist just war theorist. Taking serious the foundation of just war theory in individual human rights means, for various contemporary theorists under the name of 'revisionism', that just war theory should be seriously revised.[75] Revisionist just war theory is individual-centred instead of state-centred. On that basis, revisionists propose different norms of *jus ad bellum* and *jus in bello*, which often means that the *jus ad bellum* becomes more permissive.[76]

As revisionists have mainly considered the *jus ad bellum* and *jus in bello*, Cécile Fabre is one of the most eloquent revisionists, and also the first to give a systematic account of the

[68] Mark Allman and Tobias Winright, *After the Smoke Clears. The Just War Tradition and Post War Justice* (Orbis Books 2010) 13.

[69] Ibid. 6.

[70] Allman and Winright here quote Adrian Pabst, whom they say to agree with on his vision on justice after war. Ibid. 75.

[71] Ibid. 8–9.

[72] Ibid. 152–60.

[73] Ibid. 159.

[74] Mark Allman and Tobias Winright, 'Growing Edges of Just War Theory: *Jus Ante Bellum, Jus Post Bellum,* and Imperfect Justice' (2012) 32 *Journal of the Society of Christian Ethics* 173.

[75] See e.g. Jeff McMahan, *Killing in War* (Oxford University Press 2009); David Rodin, *War and Self-Defense* (Clarendon Press 2003); Fabre, Cosmopolitan War (n 17). See further e.g. the Stanford entry on War by Seth Lazar: <http://plato.stanford.edu/entries/war/> accessed 1 June 2020.

[76] Whereas it can also mean that the *jus ad bellum* becomes more restrictive, e.g. by rejecting a self-defence against a so-called 'bloodless invasion', as David Rodin does. Rodin (n 75).

character of the peace and *jus post bellum* after war.[77] Her account is founded on cosmopolitanism in which individuals are the primary units for moral analysis and concern.[78] Fabre distinguishes between basic human rights (following Henry Shue) which protect goods and freedoms needed for individuals to lead a humane life (worthy of a human being) and non-basic human rights which protect goods and freedoms needed to lead a flourishing life.[79] Placing the threshold higher than Orend, Fabre holds that 'cosmopolitan justice requires that individuals are capable of leading not only a minimally decent life (or minimal justice for Orend) but a flourishing life.[80] As a result, peace for Fabre is: 'a state of affairs where all individuals actually enjoy their human rights to the freedoms and resources they need to lead a flourishing life'.[81] The capability to flourish means that individuals are autonomous—able to pursue their own conception of the good—and includes bodily integrity, basic health, emotional and intellectual flourishing, and control over material resources and political environment.[82] An example of a non-flourishing life is having to take on repetitive, uncreative work, or being unable to enjoy the 'cultural fabric of their society'.[83]

Compared to Walzer and Coady, who emphasize sovereignty and hold that collective rights as the self-determination of a political community have intrinsic value, Fabre states that these are completely reducible to the individual rights of the members of such political community.[84] Hence, state sovereignty is only instrumentally valuable, for example, for the discharge of cosmopolitan duties and for the promotion of human rights. Because of Fabre's emphasis on individual human rights and well-being, her just war theory is far more permissive than 'Walzerian' just war theory.[85] It opens the door for additional just causes, as she allows, for example, for the possibility of 'subsistence wars': wars in defence of subsistence rights in cases of severe deprivation of the global poor against the global affluent.[86] Finally, Fabre also argues that there must be long-term stability and reconciliation between former enemies; it is not enough that former belligerents 'no longer have a justified grievance against each other'.[87] As expected, Fabre endorses a positive peace as the goal of just war theory.[88]

[77] Cécile Fabre, *Cosmopolitan Peace* (Oxford University Press 2016). In this chapter I cannot do justice to Fabre's complex and well-constructed argument.

[78] Ibid. 2.

[79] Ibid. 3. Fabre adjusted her position in *Cosmopolitan War*: instead of seeing a just world as one in which individuals enjoy opportunities for a minimally decent life, she now states that this is not demanding enough; there is a duty to ensure that all individuals can lead a flourishing life. Fabre, *Cosmopolitan War* (n 17) and C. Fabre, 'Rights, Justice, and War: A Reply' (2014) 33 *Law and Philosophy* 391, 402.

[80] 'Once all have the resources required for a flourishing life … the well-off have as a matter of right the personal prerogative to confer greater weight to their own goals and life-projects at the expense of the less well-off'. Fabre, *Cosmopolitan Peace* (n 77) 4.

[81] Ibid. 12.

[82] Fabre, *Cosmopolitan War* (n 17) 19.

[83] Fabre, 'Rights, Justice, and War' (n 79) 404.

[84] For a critique on this argument, see: Anna Stilz, 'Authority, Self-Determination, and Community in Cosmopolitan War' (2014) 33 *Law and Philosophy* 309.

[85] Statman forcefully objects to Fabre's conception of just war theory, arguing that it is too demanding in some respects (not allowing self-defence to protect national sovereignty), and too permissive in other respects, notably the wide range of just causes for war and the justification for targeting non-combatants in war. D. Statman, 'Fabre's Crusade for Justice. Why We Should not Join' (2014) 33 *Law and Philosophy* 337.

[86] Fabre, *Cosmopolitan War* (n 17).

[87] Fabre, *Cosmopolitan Peace* (n 77) 12.

[88] Alex Bellamy in his recent book (which appeared after this chapter was finalized) argues for the possibility of achieving world peace, which he conceptualizes in a pluralistic way. He proposes practical steps to strengthen peace in the line of Immanuel Kant's Perpetual Peace. Bellamy, *World Peace* (n 2). Another interesting contribution to the jus post bellum literature is: Patrick Mileham (ed.) *Jus Post Bellum: Restraint, Stabilisation and Peace* (Brill 2020).

III. Part 2: Peace as the Goal of Just War Theory

A. Comparative Assessment

The first part of this chapter mapped three main concepts of peace along a continuum. The analysis showed that just war theorists indeed disagree on what constitutes a 'just and lasting peace'. There *is* agreement on the fact that the peace that is aimed for is *not* a restoration of the situation *quo ante bellum*, but a better state of peace. Developments in just war theory result in a shift towards a more positive understanding of peace. But it is not quite clear how far this shift should go. How much better must peace be? What conception of peace is the appropriate normative goal of just war theory? To answer that question, this section places the peace continuum in a lively debate in political philosophy on the role of feasibility constraints in normative theory.[89] A systematization of the main positions in this debate made by David Estlund enables us to make a comparative assessment of the concepts of peace as a potential goal of just war theory. It is demonstrated that a negative peace coincides with a concessive approach to normative theory that leans towards political realism, and a positive peace coincides with an aspirational approach to normative theory that leans towards moral idealism.

Should political philosophy be able to offer practical guidance for the here and now? And to what extent do real world facts constrain normative theory? These questions are central to the idea of feasibility and the debate on non-ideal or realistic theory and ideal or utopian theory.[90] Many contributors to this debate take Rawls' idea of a 'realistic utopia' as their starting point. As Rawls argues, there are two desiderata that must be satisfied by a normative political theory: it must demand desirable 'arrangements' which can help to critically examine the *status quo* but must at the same time be feasible.[91] Feasibility takes the practical possibilities into consideration, and thus questions whether the implementation of 'arrangements' or the compliance with norms is realistically possible.[92] Specific feasibility constraints that influence the realization of normative theory are, for example, logical, biological (human nature), institutional, cultural, and psychological, including motivational constraints.[93] These constraints can be subdivided into strong and weak constraints,

[89] See e.g. Joseph Carens, 'Realistic and Idealistic Approaches to the Ethics of Migration' (1996) 30 *The International Migration Review* 156; Pablo Gilabert and Holly Lawford-Smith, 'Political Feasibility: A Conceptual Exploration' (2012) 60 *Political Studies* 809; Laura Valentini, 'Ideal vs. Non-ideal Theory: A Conceptual Map' (2012) *7 Philosophy Compass* 654; Juha Raikka, 'The Feasibility Condition in Political Theory' (1998) 6 *The Journal of Political Philosophy* 27; Zofia Stemplowska, 'What's Ideal about Ideal Theory?' (2008) 34 *Social Theory and Practice*; Zofia Stemplowska and Adam Swift, 'Ideal and Nonideal Theory', in David Estlund (ed.), *Oxford Handbook of Political Philosophy* (Oxford University Press 2012).

[90] In her very insightful article, Laura Valentini (n 89) argues that the debate on ideal and non-ideal theory should in fact be separated into three distinct meanings: (i) full-compliance versus partial compliance theory, (ii) utopian/ idealistic versus realistic theory, and (iii) end-state theory versus transitional theory. My concern here is primarily with the second and third meanings.

[91] John Rawls, *Justice as Fairness: A restatement* (Harvard University Press 2001) 4–5.

[92] John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1, 24. Gilabert and Lawford Smith distinguish three stages in which combinations of feasibility and desirability yield different overall judgments of what to do in political contexts: the stage of formulation of core principles, the stage of the implementation of these principle through an institutional scheme, and the stage of political reforms to realize these institutional schemes. Pablo Gilabert and Holly Lawford-Smith, 'Political Feasibility: A Conceptual Exploration' (2012) 60 *Political Studies* 809, 819–21.

[93] Ibid. 813.

the former making the implementation of a certain arrangement impossible, the second making the implementation more difficult or costly but not impossible.

Seeking a middle position in this debate, Rawls has attracted criticism from both sides: Some theorists have criticized Rawls' theory for giving in too much to political realism and being uncritical, while others have argued that Rawls is not realistic and fact-sensitive enough, accusing him of naïve moralism.[94] Estlund offers a helpful systematization of the positions in this debate, and he places these on a continuum: the two extreme positions are strict (political) realism and moral idealism (as utopianism), and in between are non-ideal theories that make moral demands that are possible to meet in theory, which are called concessive or aspirational.[95] These positions gradually differ on the basis of the concessions made regarding feasibility constraints, which makes them either more or less realistic or more or less idealistic.

This debate sheds light on our peace continuum. While the continua cannot be simply taken together, a parallel can be drawn.[96] As pointed out in the introduction, just war theory is an action-guiding, non-ideal theory that occupies the middle ground between the extremes of political realism and moral idealism. Just war theory, in other words, reflects this balance between feasibility and desirability. All three concepts of peace are idealistic to the extent that they set a moral standard, but they take feasibility constraints into account: they do not demand the impossible. The balance between the two desiderata of feasibility and desirability, and hence the level of idealization, explain the gradual differences between them. A negative peace as a normative principle coincides with a concessive approach since a relatively large concession is made to the desideratum of feasibility. Various feasibly constraints are taken into account, including weak constraints that have to do with the psychological motivation to realize peace. For example, the fact that many states are (at least in part) concerned with their national interests is taken into account when setting the moral standard. When a normative principle poses a large obstacle to the state's pursuit of its national interests, it is likely to be ignored. This can be a reason to state that the divergence between what is morally required and what is feasible must not be too big. This is what Steven Lee calls the 'principle of tolerable divergence'.[97] In order for just war theory to have a practical impact, it needs to take the way that states are likely to behave into account.

Whereas the concept of negative peace is a concessive goal, a positive peace is an aspirational goal that goes less far in making concessions to feasibility constraints. Here, it is assumed that the fact that a normative principle is unlikely to be followed does not influence its validity. Since the realization of a positive peace is possible in theory, it can be required as a goal of just war theory; despite the fact that given, for example, empirical circumstances or motivation, it is unlikely that it will be realized. In other words, the strong feasibility constraints are taken into account, but not the weak constraints. The concept of decent peace in

[94] Rex Martin and David Reidy (eds), *Rawls's Law of Peoples: A realistic Utopia?* (Blackwell Publishing 2006) 7–8.

[95] I do not strictly follow Estlund's terminology. Estlund's term for moral utopian is moral idealism, and in between are non-ideal theories. I think it makes more sense to refer to moral utopianism as the extreme position that does not factor in feasibility constraints, as the theories in between all propose a certain level of idealization, i.e. are not non-ideal. See further David Estlund, *Democratic Authority* (Princeton University Press 2008) and David Estlund, 'Utopophobia' (2014) 42 *Philosophy and Public Affairs* 113.

[96] A pacifist idealist accepts an unjust peace because that is always better as war (Erasmus), however not as a normative principle, and a political realist could propose e.g. a decent peace if that is the best way to create stability and secure national interests.

[97] Lee (n 28) 21–2.

between those two concepts is an evener balance between the two desiderata of feasibility and desirability.

B. Peace as Goal or Normative Ideal?

The previous assessment indicates that concessive (i.e. realistic) just war theorists endorse a negative peace in which the balance inclines towards feasibility, and aspirational (i.e. idealistic) just war theorists will endorse a positive peace in which the balance inclines towards desirability. Realistic theorists such as Walzer balance ideal principles of perfect justice and prudential considerations in order to generate the best practical effects.[98] This means that concessions are made to feasibility constraints, for example, with regard to (im)possibilities of existing institutions, cultural and regional differences, and motivation.[99] By incorporating these feasibility constraints into just war theory, there is a relatively small gap between 'ought' and 'can'. What is considered to be 'just' is a combination of different concerns such as these ideal principles, peace as the absence of war, individual well-being, and feasibility and prudence. This approach reflects what Evans calls an understanding of 'justice as a rectificatory concept', applicable to problems that arise in our flawed world.[100] Aspirational just war theorists such as Fabre set the standard higher and press for ideal principles (distinguished from strict moral idealism as utopianism, since the non-ideal occurrence of war *is* acknowledged).[101] These ideal principles reflect what Evans calls 'justice as a pristine concept',[102] and they are also called 'first best principles for war', the 'deep morality of war', or in the case of peace, a 'just peace *simpliciter*'.[103] This concept of peace begins by 'ought' and as a consequence, the gap between 'ought' and 'can' is much larger. This means that our moral ideals are less compromised and that a positive peace as a normative goal sets a more critical standard to assess current practice.

These different understandings of 'justice' in just war theory clarify the difference between these main positions on peace. Upon closer inspection, however, that difference is

[98] Compare Larry May's concept of *meionexia*. Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) 6–10.

[99] Likewise, Valentini (n 89) 659.

[100] Evans, 'At War's End' (n 29) 31.

[101] Lazar and Valentini pointed out that the disagreement on the discrimination principle is a proxy battle for a deeper disagreement between traditionalists and revisionists about the nature and purpose of political philosophy. One of these deeper disagreements is precisely that balance between feasibility and desirability. As they demonstrate, traditional theorists defend the discrimination principle on concessive grounds. There are feasibility constraints that render it highly unlikely that a norm prohibiting the killing of just combatants would be followed: it is very difficult for combatants to determine whether they fight a just war and whether their enemies are liable to be killed. As a feature of human nature, it is psychologically impossible for combatants to adhere to strict moral norms in the extreme circumstances of war in terms of dire peril, deaths, psychological trauma that they face; and combatants will nonetheless convince themselves that they are fighting a just war, which is often stimulated by propaganda and selective information of their political leaders. Revisionists acknowledge these constraints, but argue that the fact that it is unlikely that combatants would comply with revised *jus in bello* norms does not render the norms invalid. Furthermore, they are much more optimistic with regard to the possibilities: it might be difficult for combatants to make this distinction, but it is certainly possible if they make enough effort. Seth Lazar and Laura Valentini, 'Proxy battles in just war theory: Jus in Bello, the site of justice, and feasibility constraints' in David Sobel, Peter Vallentyne, and Steven Wall (eds), *Oxford Studies in Political Philosophy* (vol 3, Oxford University Press 2017).

[102] These remarks are part of a very interesting exploration of the meaning of justice in just war theory. See further: Evans, 'At War's End' (n 39) 28–32.

[103] Fabre, *Cosmopolitan Peace* (n 77) 12.

much smaller than it appears. While aspirational just war theorists set a higher standard, they ultimately correct these demanding moral norms. Although they appear aspirational, they are so primarily in theory, but not (necessarily) in practice. Feasibility constraints slip in through the backdoor as a corrective strategy. For Walzer, pragmatic considerations are part of the justice test, which is why he endorses the type of peace that is not perfectly just but reasonably just and achievable in practice. But these pragmatic considerations are important for Fabre as well. Fabre distinguishes between a 'just peace *simpliciter*' and a 'justified peace all things considered'. It is not always possible to realize a just peace in reality due to epistemic uncertainty, scarcity of resources, and psychological constraints. Therefore, this ideal can justifiably be traded off in practice: 'A justified all things considered peace is a compromise between ensuring that individuals' human rights are secure and acknowledging that realizing a just and peaceful world is simply not possible'.[104] Here, pragmatic considerations work as an *ex post* justice test. This brings us back to our concept of a decent peace. Namely, a justified peace is a peace in which individuals cannot lead a flourishing life, but in which nevertheless their basic rights are secured and they can lead a minimally just life. A post-war situation that falls below this threshold would amount to injustice. Regarding restitution after war for example, Fabre holds that reparations for wrongdoings of war are a component of a just peace, but resources and epistemic constraints mean that they must be replaced by non-reparative reconstruction efforts (economic redistribution) in a justified peace. Hence for Fabre, there are different gradations of justice: a peace can be unjust (negative peace), justified (decent peace), or just *tout court* (positive peace).[105]

This corrective strategy is followed by other aspirational just war theorists as well. While they *do* set a higher standard, they ultimately correct these demanding moral norms. Feasibility constraints constitute for Evans an additional test separate from this theory of the justice of the aftermath of war. If a just peace cannot be achieved in practice, then we must be prepared to settle for a 'suboptimal acceptable peace'.[106] Evans is very clear that this 'compromise' is not a part of justice in the aftermath of war; it is rather a subsidiary principle that, in the case of the practical impossibility to secure justice, determines what actions are then justified (but not just) all things considered.[107] Even Allman and Winright, the most idealist of the bunch, admit that in rare cases, we might have to settle for a tolerably just, or 'suboptimal acceptable peace'. But aside from this very small concession to feasibility constraints, they argue that 'any stepping back from this rigorous interpretation of the criteria (a just and lasting peace) makes for a less honest just war theory'.[108] As such, they primarily warn against entering this 'slippery slope' of allowing political realism into just war theory.[109]

This shows that just war theorists disagree less than initially appeared. Whereas some consider a decent peace to be a just peace, and others consider a decent peace an acceptable justified peace, they largely agree on its substance—basic human rights are secured—and that this is likely to be the goal of just war theory in practice. The main difference, however, is not merely one of terminology. While a positive peace might (often) be unachievable in

[104] Ibid. 13.
[105] Ibid. 19–20.
[106] Evans, 'Just Peace' (n 49) 160.
[107] Evans, 'At War's End' (n 29) 39.
[108] Allman and Winright (n 68) 74.
[109] Ibid. 95–6.

practice, the importance of setting this normative goal for just war theory cannot be dismissed that easily. Walzer will not aim for a positive peace because he considers that undesirable, while Fabre will not aim for a less than positive peace when that is not necessary. In other words, theorists such as Fabre hold onto this concept of peace as the regulative ideal of just war theory, guiding the aftermath of war in a certain direction. We should assess whether that is desirable.

C. Defence of Decent Peace

Now let us turn to the central question: How *should* a just war theorist understand peace? This chapter suggests we should not seek a (largely) positive peace after war while being prepared—all things considered—to settle for justified decent peace. Rather, a decent peace after war *is* a just peace. Three arguments are presented for this claim.

First, a decent peace is the appropriate normative goal given the specific character of just war theory. Just war theory recognizes that war is a great evil in terms of overall death, suffering, and destruction, but it also recognizes that war is a part of real-world politics. It is premised upon this recognition of the evil of war, and just war theory's main and most important task is to limit the horrors that are inherent to it. It is an action guiding theory, applicable to the flawed non-ideal world that we live in 'here and now'. A balance between feasibility and desirability is therefore essential. In order to be effective, just war theory needs to offer norms which are both achievable in the real world, as well as desirable—explained often, but not necessarily in terms of human rights.

This means that circumstances and psychological motivations must be incorporated in just war theory insofar as they constrain the practical feasibility of limiting war and achieving peace in the real world. It must make concessions to constraints regarding, for example, politics, institutions, and culture (e.g. that imposing democracy has proved difficult in the absence of certain social structures) as well as to psychological constraints, and prescribe norms that are neither overly demanding to the extent that they intolerably diverge from what national interests require, nor are at odds with our common-sense morality.[110] One can, of course, disagree on the proper balance between feasibility and desirability. Nevertheless, Joseph Carens' comments in this respect might be helpful: 'the assumptions (a realistic or idealistic approach) we adopt should depend in part on the purposes of our inquiry'.[111] Given the theory's role as action guiding normative theory, feasibility constraints are not only a part of just war theory but are part and parcel of it. Hence, the balance between feasibility and desirability in the concept of decent peace seems the most appropriate.

Second, we do not need a positive peace as regulative ideal—based on a 'pristine' conception of an ideal just world[112]—to guide just war theory and shape *jus post bellum*, since that would exceed the limited nature of just war theory. The shift in just war theory means that a just peace is not only backward looking but also forward looking. Nevertheless, its limited nature suggests that we should not look forward too far. Just war theory is not a vector for the realization of human rights broadly perceived but instead is there to protect

[110] Likewise Valentini (n 89) 659.
[111] Carens (n 89) 169.
[112] Evans, 'At War's End' (n 39) 31.

the most fundamental values in the messy and complex reality of war and its aftermath. It is a problem-centred theory, designed to regulate the specific (and extremely non-ideal) occurrence of war. As a result, its branches offer norms and impose obligations that are far more narrow and limited than any general ideal or aspirational normative theory. Setting such a high standard over-promises what victors after war could and should achieve. As Steven Lee points out, the idea that war can serve morally lofty goals increases the danger that it will be used without the sort of restraints that are central to just war theory. A positive peace will not be achieved in the foreseeable future, and this makes *jus post bellum* an ongoing process with no clear end in sight, guided by some ideal of a just world in the distant future. Given the specific domain that just war theory applies to, this greatly overstretches the theory's boundaries. *Jus post bellum* could easily become a 'never ending story' instead of being applicable to the temporary transition in the aftermath of war.

And third, an additional problem that is noted also by Coady is the questionable universality of the comprehensive ideology that could be entailed in a positive peace. There is nowadays a fairly large agreement on the interdependence and universality of human rights.[113] However, the implementation of the full range of rights after war, especially if there is an emphasis on 'liberal rights', increases the risk for the well-known critique of moral imperialism, ethnocentrism, and imposition of 'Western' values.[114] This risk is particularly high when victors after war are considered to be obligated, as part of *jus post bellum*, to realize these human rights so that people in the war-affected area can lead a 'flourishing life'. *If* steps towards a positive peace are taken, this takes place outside the specific domain of just war theory; it cannot and should not be part of *justum bellum*. Seeking a just peace after war is a transitional process that ends whenever a sufficiently just peace, that is, a decent peace is achieved. After the aftermath of war, just war theory seizes to be applicable and is substituted by a general theory of global justice.

IV. Conclusion

As Walzer eloquently states, in the exceptional domain of war, 'justice is always under a cloud'.[115] There *is* a relation between just war theory and a general theory of justice (such as global justice), but this is no mirroring relation. Just war theory's domain is limited and protects only the most important values. Hence, although there is a shared core, the general theory and its regulative ideal should not be fully incorporated. In other words, we should not misappropriate the goal of a theory of global justice and try to realize it as part of just

[113] See the Vienna Declaration A/CONF.157/23 1993; World Summit Outcome Document 2005; and see further e.g. Christian Tomuschat, *Human Rights* (Oxford University Press 2014) 47–72. Although the Vienna World Conference on Human rights and the World Summit Outcome stress the universality of human rights, they also acknowledge the 'regional particularities'. Human rights 'must be considered in the context of a dynamic and evolving process of international norm-setting', and 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'.

[114] I cannot begin to cover this debate here, for the purpose of this chapter it suffices to point to the danger of imposing duties to realize certain human rights abroad as part of just war theory. See e.g. Henry Shue, *Basic Rights* (Princeton University Press 1996); James Nickel, *Making Sense of Human Rights* (Blackwell Publishing 2007); William Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005); James Griffin, *On Human Rights* (Oxford University Press 2008).

[115] Walzer, *Arguing About War* (n 32) x.

war theory. Just war theory is designed to prevent the worst excesses, not to realize or take steps towards an ideal just world, which is what a positive peace would amount to.

More specifically, this chapter has argued that endorsing a positive peace as a normative goal for just war theory is a bad idea for three reasons: (i) It is ineffective since it sets a moral standard so high that it is demotivating and therefore less likely to be achieved in practice. This reduces the chance that just war theory indeed helps to limit human suffering and the destructive effects of war. It is an action guiding theory that needs to be able to be action guiding; (ii) a positive peace is not appropriate for a theory that is applicable to the specific problem of war but is rather part of a general theory of global justice. Integrating a positive peace in just war theory is undesirable since it allows ongoing (even never ending) peace building with no clear end in sight, which goes well beyond the limited nature of just war theory; and (iii) it is potentially immoral, since it nearly conflates peace with a 'pristine' concept of justice, explained in terms of human rights broadly perceived, accompanied by a certain political structure and economic system, of which the universality might be contested. In the messy reality of war and war's aftermath, it is wise to be modest. Therefore, this chapter warns against a too radical shift in just war theory.

What *should* be realized at war's end is a 'just and lasting peace' understood as a decent peace which is stable for a substantial period of time, in which basic human rights are secured, and which includes forward-looking provisions to relieve the post-war deprivation, such as food and shelter in the immediate aftermath of war. And while it might be difficult to precisely determine when a decent peace is reached, this goal makes just war theory most effective in limiting the awfulness of war. It provides a standard critical enough to assess the current practice and *can* be realized in the aftermath of war.

4

Parameters of Sustainable Peace

UN Frameworks and Practice

*Martin Wählisch**

I. Introduction

The search for parameters of sustainable peace is ongoing. Most peace processes relapse into conflict. Nearly half of all civil war countries are prone to setbacks.[1] This 'conflict trap' shows that the true challenge is, apart from preventing new conflicts, to permanently end those that have already occurred.[2] In the spirit of saving 'succeeding generations from the scourge of war', as declared in the Preamble of the UN Charter, the United Nations has been at the forefront of identifying elements that could make peace durable, and its approach has evolved over time. In 1992, the Agenda for Peace suggested ways to improve the organization's capacity to pursue and preserve peace after the end of the Cold War, followed by a multitude of subsequent efforts trying to fine-tune the delivery of sustainable peace. Over twenty years later in 2015, an advisory group of experts reviewed the UN's peacebuilding architecture with a 'fresh look' to improve performance, while noting that 'the key Charter task of sustaining peace remains critically under-recognized, under-prioritized, and under-resourced globally and within the United Nations system'.[3] The expert group's report introduced a contemporary understanding of the concept of 'sustaining peace' and recommended to unite the peace and security, human rights, and development pillars of the UN, arguing that efforts to sustain peace will otherwise continue to fail. The report was endorsed by the Security Council and General Assembly in 2016, followed by continuing consultations on the nexus between the 2030 Agenda for Sustainable Development and Sustaining Peace Agenda.[4]

In this context, this chapter looks at parameters for sustaining peace and principles that aim at making peace agreements and peace processes last. Complementing the analysis of macro-principles of the *jus post bellum*, the paper focuses on the practice of the United Nations as the key international organization engaged in peacemaking, peacebuilding,

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[1] Paul Collier, Anke Hoeffler, and Mons Söderbom, 'On the Duration of Civil War' (2004) *41 Journal of Peace Research* 253.

[2] Barbara F. Walter, Conflict Relapse and the Sustainability of Post-conflict Peace, World Development Report Background Paper 2010, 2.

[3] 'The Challenge of Sustaining Peace', Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture, 29 June 2015.

[4] See Report of the Secretary-General on Peacebuilding and Sustaining Peace, A/72/707–S/2018/43, 18 January 2018. See also High-Level Meeting on Peacebuilding and Sustaining Peace, 24–25 April 2018, United Nations, New York, available at <https://www.un.org/pga/72/event-latest/sustaining-peace/> accessed 10 May 2018.

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peacekeeping, and preventive diplomacy. The chapter extracts micro principles that guide the programmatic efforts of the organization, framed by internal guidance and instructions for officials, and driven by the overarching aspiration to foster just and sustainable peace as part of post-conflict state-building and transition processes. The chapter argues that peace continues to heavily depend on political compromises that are contingent to the specific conflict context. However, practice shows that there has been a growing set of emerged peacemaking and peacebuilding considerations, which shape post-conflict transitions and calibrate programme deliveries of international support actors as part of a potential *jus post bellum* framework.

The chapter unpacks the issue by, first, giving an overview of the historical and systemic view in the UN on sustaining peace. Second, it takes stock of UN guidance and rules on peacemaking and peacebuilding in the context of post-conflict transitions. Third, the chapter looks at recent developments on sustaining peace and the current programmatic engagement of the United Nations system in the peace consolidation field from the *jus post bellum* perspective.

II. Post-Conflict Transitions and Sustainable Peace

The commitment to create and maintain peace through economic, social, or political agreements between states has been the very foundation of the United Nations. However, the UN Charter remains relatively quiet about how to attain just and sustainable peace in its Member States. The Charter calls for 'effective collective measures for the prevention and removal of threats to the peace' and upholds 'principles of justice and international law', but provides limited guidance on how to maintain peace after conflict or solidify the justice of peace.[5] The Preamble highlights the need to uphold fundamental human rights and calls for the promotion of 'social progress and better standards of life in larger freedom', but contains little instructions or prescriptions for the parameters of durable peace in a state of transition.[6]

Since the creation of the United Nations, repeated efforts were made to discern what peace means and how best to sustain it. With the rapid increase of intra-state conflicts and the high number of responding UN-led peacekeeping operations after the end of the Cold War, the question of how to seize and maintain stability became even more pressing. Both the Security Council and General Assembly started to raise more prominently the issue from this angle, seeing the erosion of regional stability caused by uncertain aftermaths of the conflicts in Rwanda, Somalia, and Bosnia and Herzegovina. The basic objectives of peace, development, and human rights and justice were progressively recognized as indissolubly bound up with each other, acknowledging that there is no sustainable peace without development, and no development without peace; as well as no sustainable peace without human rights and justice, and no human rights and justice without peace.[7] In the spirit of international solidarity, Member States have underlined that it is the international community

[5] UN Charter, Article 1, para. 1
[6] UN Charter, Preamble.
[7] UNGA Comprehensive Review of the Whole Question of Peace-Keeping Operations in All their Aspects (16 November 1994) UN Doc. A/C.4/49/SR.23.

at large that can jointly best provide the guaranteed peace as 'mankind's dream'.[8] Effective and determined support from the international community, including through its contributions of long-term assistance for development and trade, has been emphasized as a parameter by the Security Council to 'guarantee the achievement of sustainable peace' in the context of post-conflict transitions.[9]

The promotion of 'durable peace' and 'sustainable development' have been understood as complementary elements, especially in transition processes.[10] Rehabilitation, reconstruction, and recovery are seen as conditions for durable peace in the aftermath of conflict, apart from long-term development objectives and in parallel to the completion of the political peace process.[11] Good governance, effective and accountable public institutions, the rule of law, inclusive, free, credible and peaceful elections, and security enabled by inclusive and sustained socio-economic development were acknowledged as important conditions for durable peace.[12] In 2015, the adopted Sustainable Development Goals (SDGs) included as Goal 16 the aim to 'promote for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels', which constitutes the standing framework for strengthening 'universal peace in larger freedom' in the next fifteen years.[13] The General Assembly particularly recognized the 'major challenge to the achievement of durable peace and sustainable development in countries in conflict and post-conflict situations', making the SDGs an important baseline for the *jus post bellum*.[14]

III. UN Guidance on Peacemaking and Peacebuilding

Normative guidance on peacemaking and peacebuilding as part of the *jus post bellum* corpus is rather weak. Peacemaking is an especially flexible domain. Internal guidance for UN peacemaking provides only instructions on the conditions for just and sustainable peace.[15] In 1999, the secretary-general released 'Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution', which were updated in 2006, that outline legal barriers that UN peace mediators should not cross when they broker agreements.[16] The UN acknowledged that their representatives face normative dilemmas when they are trying 'to grapple with the urgency of stopping the fighting' and they are at the same time obliged to uphold the 'deep roots in the United Nations Charter and the Universal Declaration of Human Rights and other sources of international law'.[17] As a normative

[8] UNGA Plenary Meeting (5 October1995) UN Doc. A/50/PV.21.

[9] UNSC Statement by the President of the Security Council (8 July 1999) UN Doc. S/PRST/1999/21.

[10] UNGA Report of the Secretary-General on the causes of conflict and the promotion of durable peace and sustainable development in Africa (13 April 1999) UN Doc. A/52/871-S/1998/318.

[11] Ibid.

[12] UNGA Report of the Secretary-General on the causes of conflict and the promotion of durable peace and sustainable development in Africa (24 July 2014) UN Doc. A/69/162-S/2014/542.

[13] UNGA Res. 70/1 Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015) UN Doc. A/RES/70/1.

[14] Ibid. para. 42.

[15] See for details Martin Wählisch, 'Normative Limits of Peace Negotiations: Questions, Guidance and Prospects' (2016) 7 *Global Policy* 261.

[16] 'Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution', United Nations, Department of Political Affairs, 1999 (updated 2006), (UNJY 2006) 496.

[17] Introduction to the Guidelines for United Nations Representatives in Certain Aspects of Negotiations for Conflict Resolution (UNJY 2006) 495.

barrier regarding amnesties, the guidelines clarified that the UN 'cannot condone amnesties regarding war crimes, crimes against humanity and genocide or foster those that violate relevant treaty obligations of the parties in this field'.[18] UN officials are encouraged to assist conflict parties in 'incorporating into agreements provisions and arrangements for the promotion and protection of human rights, inspired by international and regional standards'.[19] In 2012, the secretary-general issued the 'Guidance for Effective Mediation' that addressed a number of key fundamentals that should be considered in mediation efforts: preparedness; consent; impartiality; inclusivity; national ownership; coherence, coordination and complementarity of the mediation effort; the quality peace agreements, and also the international law and normative frameworks.[20]

In comparison to peacemaking, peacebuilding has seen an increasing set of principles and rules that have been acknowledged by the Security Council and the General Assembly. Post-conflict periods struggle with significant uncertainty and peace processes often suffer periods of regression. Building sustainable peace in countries emerging from conflict is a complex undertaking that involves security, political, economic, social, and human rights aspects. The understanding of the UN is that peacebuilding involves a range of measures targeted to reduce the risk of relapsing into conflict by strengthening national capacity at all levels for conflict management in order to lay the foundations for sustainable peace and development.[21] In this context, peacebuilding is a continuum of strategy, processes, and activities aimed at sustaining peace over the long term.[22] There is no clear-cut definition of peacebuilding that overlaps with other elements of a broader policy framework that strengthens the synergy among conflict prevention, peacemaking, peacekeeping, recovery, and development, as part of a collective and sustained efforts to build lasting peace.

In 1992, the Agenda for Peace of UN Secretary-General Boutros Boutros-Ghali elaborated on the concept of peacebuilding, calling for 'comprehensive efforts to identify and support structures which will tend to consolidate peace'.[23] The Agenda for Peace spelled out in order to achieve lasting peace, peace agreements may include provisions for disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions, and promoting formal and informal processes of political participation.[24] The Agenda for Peace also highlighted the issue of demining and stressed that the achievement of true peace and security needs democratic practices such as the rule of law and transparency in decision-making.[25] Both the Security Council and the

[18] Ibid.
[19] Ibid.
[20] UNGA Guidance for Effective Mediation, in Report of the Secretary-General on Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution (25 June 2012) UN Doc. A/66/811
[21] UN Peacebuilding: An Orientation, United Nations Peacebuilding Support Office, September 2010, 5, available at < https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/peacebuilding_orientation.pdf > accessed 2 June 2020.
[22] Ibid.
[23] UNGA An Agenda for Peace (17 June 1992) UN Doc. A/47/277, para. 55.
[24] Ibid.
[25] Ibid. paras 56–7.

General Assembly dealt with the report in several sessions and welcomed the usefulness of the made observations.[26]

In 2000, the Report of the Panel on United Nations Peace Operations, also known as the Brahimi Report, reiterated the importance of peacebuilding as integral to the success of peacekeeping operations, as acknowledged by the Security Council and the General Assembly.[27] The report stressed that 'effective peacebuilding' requires active engagement with the local parties, and that engagement should be multidimensional in nature.[28] The report also highlighted the need to hold 'free and fair' elections as part of broader efforts to strengthen governance institutions.[29] It also underlined that local police forces might need to be reformed, trained, and restructured according to international standards for democratic policing and human rights, in order to have the capacity to respond effectively to civil disorder in post-conflict settings.[30] On the justice side, it was emphasized that the strengthening of the rule of law institutions is crucial to enable justice, reconciliation, and the fight against impunity.[31] As the Agenda for Peace, the Brahimi Report related to the disarmament, demobilization, and reintegration of former combatants, being 'key to immediate post-conflict stability and reduced likelihood of conflict recurrence'.[32] The Security Council unanimously welcomed the Brahimi Report and based further action on it.[33]

Nearly a decade later in 2009, following the request of the Security Council to provide advice on how to support national efforts to secure sustainable peace more rapidly and effectively, the secretary-general presented his first Report on Peacebuilding in the Immediate Aftermath of Conflict.[34] The report looks at the first two years after the main conflict in a country has ended, underscoring the imperative of national ownership and emphasizes that peacebuilding solutions need to be context-specific. The report stresses that the immediate post-conflict period offers a window of opportunity to provide basic security, deliver peace dividends, shore up and build confidence in the political process, and strengthen core national capacity to reduce the risk of relapse into conflict.[35] As recurring peacebuilding priorities, the report highlights that peacebuilding needs to address security issues, the political process, basic public services, restore governance functions, and recover the economy.[36] The report concludes that maintaining 'flexibility and adaptability are essential' while at the same time 'respecting fundamental principles of international law and human rights' are also seen as essential.[37]

The Security Council welcomed the report of the secretary-general as an 'important contribution towards a more effective and coherent international response to post-conflict

[26] UNSC Statement by the President of the Security Council (30 June 1992) UN Doc. S/24210; UNGA Res. 47/120 (18 December 1992) UN Doc. A/RES/47/120.
[27] UNGA Report of the Panel on United Nations Peace Operations (21 August 2000) UN Doc. A/55/305- S/2000/809, para. 35.
[28] Ibid. para. 37.
[29] Ibid. para. 38.
[30] Ibid. para. 39.
[31] Ibid.
[32] Ibid. para. 42.
[33] UN Security Council Res. 1318 (2000) UN Doc. S/RES/1318; UN Security Council (2000) UN Doc. S/RES/1327 (2000).
[34] UNGA Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict (11 June 2009) UN Doc. A/63/881-S/2009/304.
[35] Ibid. para. 3.
[36] Ibid. para. 17.
[37] Ibid. para. 22.

peacebuilding', endorsing the mentioned principles.[38] The subsequent follow-up reports in 2010, 2012, and 2014 fine-tuned the UN's peacebuilding agenda. The second report emphasized the issue of effective leadership, coordination, and accountability of those involved in peacebuilding, including the issue of national capacity development, and the role of women and peacebuilding, as previously emphasized in the landmark Security Council Resolution 1325 (2000) on Women, Peace and Security.[39] The third report outlined additional actions to better assist conflict-affected countries in building lasting peace, identifying inclusivity and institution-building as critical in preventing relapse into violent conflict and producing more resilient states and societies.[40] The report underlined that exclusion is one of the most important factors that trigger a relapse into conflict and that inclusive political settlements, achieved either through a peace agreement and subsequent processes or because of inclusive behaviour by the party that prevailed in the conflict, tend to result in more sustainable peace.[41] Inclusivity and institution-building are seen as critical, also with regard to the restoration of the social contract and the state's engagement with the international community.[42] Inclusivity requires that the parties to the conflict and other stakeholders are represented, heard, and integrated into a peace process without necessarily participating directly in formal peace negotiation.[43] Institution-building focuses on functioning government, and political, market, and social institutions as prerequisites for establishing popular confidence in the state.[44] The fourth report underlined that peace agreements present a critical opportunity for achieving consensus about the key principles on which institution-building should rest.[45] The report also noted that the Security Council had recognized the centrality of advancing the extension of state authority and rebuilding state institutions in the aftermath of conflict for sustaining peace, including the issues as priority tasks in the mandates of numerous peacekeeping and special political missions.[46]

IV. Recent Developments and Practice

In 2015, Member States undertook a comprehensive review of the UN's peacebuilding architecture, culminating in the adoption of resolutions by the General Assembly and the Security Council on efforts to sustain peace in April 2016.[47] Both resolutions underlined that the purposes and principles of the Charter of the United Nations aim at establishing just and lasting peace. It was recognized that 'sustaining peace' should be broadly understood as a 'goal and a process to build a common vision of a society, ensuring that the needs of all segments of the population are taken into account, which encompasses activities aimed at preventing the outbreak, escalation, continuation and recurrence of conflict,

[38] UNSC Statement by the President of the Security Council (22 July 2009) UN Doc. S/PRST/2009/23.
[39] UNGA Progress report of the Secretary-General on peacebuilding in the immediate aftermath of conflict (16 July 2010) UN Doc. A/64/866–S/2010/386.
[40] UNGA Peacebuilding in the aftermath of conflict (8 October 2012) UN Doc. Rep. A/67/499-S/2012/746.
[41] Ibid. para. 4.
[42] Ibid.
[43] Ibid. para. 35.
[44] Ibid. para. 43.
[45] UNGA Peacebuilding in the aftermath of conflict (23 September 2014) UN Doc. A/69/399-S/2014/694.
[46] Ibid. para. 6.
[47] UN Security Council Res. 2282 (27 April 2016) UN Doc. S/RES/2282 (2016); UN General Assembly Res. 70/262 (12 May 2016) UN Doc. A/RES/70/262.

addressing root causes, assisting parties to conflict to end hostilities, ensuring national reconciliation, and moving towards recovery, reconstruction and development', and emphasized that sustaining peace is a 'shared task and responsibility that needs to be fulfilled by the government and all other national stakeholders, and should flow through all three pillars of the United Nations' engagement at all stages of conflict, and in all its dimensions, and needs sustained international attention and assistance'.[48] It was reaffirmed that it is the primary responsibility of national governments and authorities in 'identifying, driving and directing priorities, strategies and activities for sustaining peace', and in this regard, reiterated that 'inclusivity is key to advancing national peacebuilding processes and objectives in order to ensure that the needs of all segments of society are taken into account'.[49] It was also emphasized that civil society could play an important role in advancing efforts to sustain peace.[50] The Security Council stressed the importance of a comprehensive approach to sustaining peace, particularly through the prevention of conflict and addressing its root causes, strengthening the rule of law at the international and national levels, and promoting sustained and sustainable economic growth, poverty eradication, social development, sustainable development, national reconciliation and unity including through inclusive dialogue and mediation, access to justice and transitional justice, accountability, good governance, democracy, accountable institutions, gender equality and respect for, and protection of, human rights and fundamental freedoms.[51] It recognized the importance of strategic partnerships, pooled funding and blended finance between the United Nations, bilateral and international donors, multilateral financial institutions, and the private sector in order to share risks and maximize the impact of peacebuilding efforts. The resolutions also instruct the United Nations to look beyond post-conflict peacebuilding towards a shared understanding of peacebuilding and prevention before, during, and after conflict.

On the practice side, a variety of planning instruments is used to guide peacebuilding activities in countries emerging from conflicts, such as the UN Peacebuilding Commission's Strategic Frameworks for Peacebuilding, the United Nations Development Assistance Frameworks (UNDAFs), Poverty Reduction Strategy Papers (PRSPs) and Integrated Strategic Frameworks (ISFs). Member States and other international donors have subscribed to those instruments as frameworks for international collaboration in post-conflict settings. Although there are numerous bilateral and other institutional-specific frameworks for assistance in the aftermath of conflict, the guidance provided by the UN has become a reference point. The SDGs have become an additional aspect of consideration since their adoption in September 2015.[52]

An example in practice for the application and interplay of the outlined principles of peacemaking, post-conflict recovery, and peacebuilding in the *jus post bellum* context is the case of Libya. In March 2011, the United Nations Security Council adopted Resolution 1973, acting under VII UN Charter, that formed the legal basis for military intervention in the Libyan Civil War.[53] In October 2011, Security Council Resolution 2016 lifted the

[48] UN Security Council Res. 2282 (n 47).
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Interim United Nations Development Assistance Framework Guidance, 23 May 2016, available at < https://unsdg.un.org/resources/united-nations-development-assistance-framework-guidance > accessed 2 June 2020.
[53] UN Security Council Res. 2011 (17 March 2011) UN Doc. S/RES/1973 (2011).

established no-fly zone and reaffirmed the sovereignty, independence, territorial integrity, and national unity of Libya.[54] The Security Council reiterated that the future of Libya needs to be based on national reconciliation, justice, respect for human rights, and the rule of law. The Security Council highlighted the need for the transitional period to be underpinned by a commitment to democracy, good governance, the rule of law, national reconciliation, and respect for human rights and fundamental freedoms of all people in Libya. Upholding the principle of inclusivity, the resolution looked forward to the swift establishment of an inclusive, representative transitional government of Libya, underlining the importance of promoting the full and effective participation of members of all social and ethnic groups, including the equal participation of women and minority communities in the discussions related to the post-conflict phase. The resolution also recalled its earlier decision to refer the situation in Libya to the Prosecutor of the International Criminal Court, and the importance of co-operation for ensuring that those responsible for violations of human rights and international humanitarian law, or complicit in attacks targeting the civilian population, are held accountable. The resolution expressed concern at the proliferation of arms in Libya and its potential impact on regional peace and security. The Security Council underscored that the voluntary and sustainable return of refugees and internally displaced persons would be an 'important factor for the consolidation of peace' in Libya.[55] Subsequently, the Security Council established the United Nations Support Mission in Libya (UNSMIL) with six objectives: (i) to restore public security and order and promote the rule of law; (ii) undertake inclusive political dialogue, promote national reconciliation, and embark upon the constitution-making and electoral process; (iii) extend state authority, including through strengthening emerging accountable institutions and the restoration of public services; (iv) promote and protect human rights, particularly for those belonging to vulnerable groups, and support transitional justice; (v) take the immediate steps required to initiate economic recovery; and (vi) coordinate support that may be requested from other multilateral and bilateral actors as appropriate.[56] In the following, the Libya Recovery Trust Fund (LRTF) was created based on the principles of national ownership, speedy response and rapid delivery, and effective coordination of international assistance.[57] After a period of political divisions and internal conflict, Libya restarted its political transition with the Libyan Political Agreement in December 2015, which the Security Council endorsed as it stipulated 'continue inclusivity' by establishing of a unity government.[58] The Security Council recognized the need for assistance in planning and for security arrangements, and encouraged Member States to respond generously to the Libyan Humanitarian Response Plan for 2016. The plan had three main objectives: (i) saving lives by improving access to the most crucial goods and services including health, nutrition, shelter, water, and sanitation; (ii) providing protection from violence and abuse with a focus on the most vulnerable, including women, children, youth, people with disabilities, and people with low economic

[54] UN Security Council Res. 2016 (27 October 2011) UN Doc. S/RES/2016 (2011).
[55] Ibid.
[56] UN Security Council Res. 2009 (16 September 2011) UN Doc. S/RES/2009 (2011).
[57] Memorandum of Understanding between Participating UN Organizations and the United Nations Development Programme regarding the Libya Recovery Trust Fund, October 2011, <http://mdtf.undp.org/document/download/8025> accessed 2 June 2020.
[58] UN Security Council Res. 2259 (23 December 2015) UN Doc. S/RES/2259 (2015); Libyan Political Agreement, signed on 17 December 2015, available at <https://unsmil.unmissions.org/LinkClick.aspx?fileticket=miXuJYkQAQg%3D&tabid=3559&mid=6187&language=fr> accessed 18 May 2018.

means; and (iii) improving resilience of affected communities by developing the resilience and capacity of affected communities to cope with the ongoing crisis, including restoring livelihoods, strengthening infrastructure and promoting wellbeing across the population, and harnessing capacities for recovery.[59] The Security Council also welcomed the Libyan Political Dialogue and other tracks of the peace process, including the contributions of civil society, tribal leaders, local-level ceasefires, prisoner exchanges and the return of internally displaced persons. Its resolution confirmed that those individuals and entities engaging in or providing support for acts that threaten the peace, stability, or security of Libya, or that obstruct or undermine the successful completion of the political transition to a 'stable, secure and prosperous Libya' under a government of national accord, must be held strictly accountable, recalling the travel ban and asset freeze measures of earlier resolutions.[60] The Security Council emphasized the need to promote and protect human rights and called upon the government to hold to account those responsible for violations of international humanitarian law and human rights abuses.[61]

V. Conclusion

There is no ultimate recipe for just and sustainable peace. In the meantime, the evolution of elements of a potential 'law of peacemaking' and 'law of peacebuilding' has been slowly but steadily progressing.[62] Indeed, a clear normative framework about how to best establish sustainable peace and how to deal with the justice of conduct after war is still lacking, but there is a growing understanding of programmatic principles that go beyond the general human rights and development narrative.[63] Whether there is a coherent body of norms or law establishing an international peacemaking and peacebuilding regime specifically for post-war situations, equivalent to the *jus ad bellum* and *jus in bello* framework, can be disputed, but the endorsement of peacebuilding and peacemaking principles both by the Security Council and the General Assembly cannot be ignored.

The UN has come a long way concerning conflict aftercare. In 2004, Report of the High-level Panel on Threats, Challenges and Change on 'A More secure world: Our shared responsibility' observed that in both the period before the outbreak of civil war and in the transition out of war, neither the UN nor the broader international community, including the international financial institutions, are well organized to assist countries attempting to build peace.[64] The High-level Panel called for a single intergovernmental organ dedicated to peacebuilding, empowered to monitor and pay close attention to countries at risk. Since 2005, the UN Peacebuilding Commission performs this function to focus attention on the

[59] Humanitarian Response Plan 2016, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/libya_hrp_final_19_11_2015.pdf> accessed 18 May 2018.

[60] UN Security Council Res. 2259 (n 58) para. 10.

[61] Ibid. para. 14.

[62] See also Philipp Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict* (Cambridge University Press 2015); Ray Murphy (ed.), *Post-Conflict Rebuilding and International Law* (Routledge 2012).

[63] Liliana Lyra Jubilut, Towards a New Jus Post Bellum: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability (2011) *20 Minnesota Journal of International Law* 26, 58.

[64] A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change 2004, para. 225.

reconstruction and institution-building efforts necessary for recovery from conflict.[65] The United Nations has significantly improved its support to countries emerging from conflict over the last ten years, as acknowledged by many Member States.[66] The lines between peacemaking and peacebuilding are gradually fading, as the UN is increasingly supporting political processes and build institutions in the midst of ongoing violence and conflict.[67] At the same time, it has been acknowledged that peacebuilding activities need to be linked to a broader political strategy, which also requires being realistic about the limits of national ownership in situations of state collapse and where political legitimacy remains contested.[68] Eventually, the recent developments in this field give reason for the call of a 'new Agenda for Peace'.[69]

As the *jus post bellum* and the Justice of Peace debates re-emphasize, the role of law in war-to-peace transitions is critical as it provides orientation and reference points. The endorsed secretary-general's reports on peacebuilding have highlighted key themes such as inclusivity, institution-building, mutual accountability, and the vital role of women in all peacebuilding efforts. As the secretary-general stressed in April 2016 in his remarks regarding the UN Peace Operations Review, the number of civil wars has tripled in the past ten years, more people are displaced around the world since the founding of the UN, and humanitarian needs conflict have reached $20 billion.[70] As the Global Humanitarian Appeal 2016 shows, there is a funding gap that stands symbol for limited international solidarity.[71] On the critical side, an open question is how much the achieved principles are worth if their translation into programmatic action only finds limited support. Another point for further critical reflection is whether it is enough to have a set of principles that can be politically loaded or blurred in practice, dependant on the political interests of those involved in the implementation of them, foremost by the concerned Member States. There is the real risk that peacemaking and peacebuilding becomes a box-ticking exercise, where real transformative post-conflict change as the base for just and sustainable peace is absent.

Finally, peace is perhaps inherently imperfect as it requires continued dialogue while striving for justice and sustainability.[72] Perfect peace might tend to be totalitarian, with everything under control and nothing to aspire for. Appreciating imperfection allows valuing the possible, instead of insisting on the seemingly flawless. All this makes peacemaking and peacebuilding in post-conflict realities the 'art of the possible', guided by normative expectations and shepherded by the emerging *jus post bellum*.

[65] UN Security Council Res. 1645 (20 December 2005) UN Doc. S/RES/1645 (2005); UN General Assembly Res. 60/180 (30 December 2005) UN Doc. A/RES/60/180.

[66] (General Assembly Adopts Resolution on Improving United Nations Peacebuilding Architecture Ahead of Day-long Debate, GA/11780, 27 April 2016, available at <http://www.un.org/press/en/2016/ga11780.doc.htm> accessed on 18 May 2019.

[67] Statement by Ambassador Mark Lyall Grant of the UK Mission to the UN, to the Security Council Debate on Peacebuilding in the aftermath of conflict, 14 January 2015, available at <https://www.gov.uk/government/speeches/peacebuilding-requires-sustained-political-attention-and-financial-support> accessed 18 May 2019.

[68] Ibid.

[69] Adam Lupel, Barbara Gibson, and Youssef Mahmoud, 'Toward a New "Agenda for Peace"', IPI Global Observatory, 23 September 2016, available at <https://theglobalobservatory.org/2016/09/mutilateralism-united-nations-agenda-for-peace/> accessed 19 May 2019.

[70] Secretary-general's remarks at event on 'United Nations Peace Operations Review: Taking stock, leveraging opportunities and charting the way forward', 11 April 2016, available at <https://www.un.org/sg/en/content/sg/statement/2016-04-11/secretary-generals-remarks-event-%E2%80%9Cunited-nations-peace-operations> accessed 19 May 2019.

[71] Global Humanitarian Overview 2016, Office for the Coordination of Humanitarian Affairs (OCHA), available at <https://docs.unocha.org/sites/dms/Documents/GHO-2016.pdf> accessed 19 May 2019.

[72] See also Martin Wählisch, *Peacemaking, Power-sharing and International Law: Imperfect Peace* (Hart/Bloomsbury 2018).

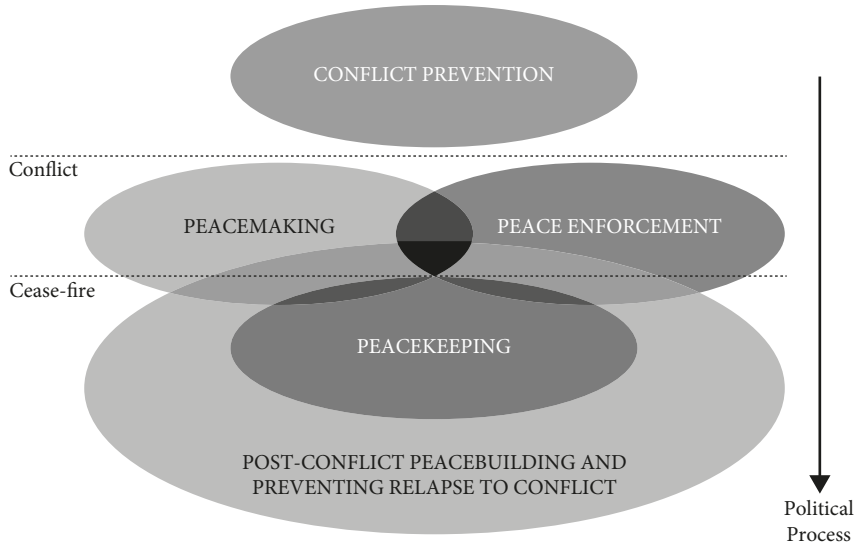

Figure 4.1 Linkages of peacemaking and peacebuilding[73]

Box 4.1: Recurring peacebuilding priorities[74]

- Support to basic safety and security, including mine action, protection of civilians, disarmament, demobilization and reintegration, strengthening the rule of law, and initiation of security sector reform
- Support to political processes, including electoral processes, promoting inclusive dialogue and reconciliation, and developing conflict-management capacity at national and subnational levels
- Support to the provision of basic services, such as water and sanitation, health and primary education, and support to the safe and sustainable return and reintegration of internally displaced persons and refugees
- Support to restoring core government functions, in particular basic public administration and public finance, at the national and subnational levels
- Support to economic revitalization, including employment generation and livelihoods (in agriculture and public works) particularly for youth and demobilized former combatants, as well as rehabilitation of basic infrastructure.

[73] United Nations Peacekeeping Operations Principles and Guidelines (Capstone Doctrine), 2008, available at < https://www.unocha.org/sites/dms/Documents/DPKO%20Capstone%20doctrine%20(2008).pdf> accessed 2 June 2020.

[74] UNGA Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict (n 34).

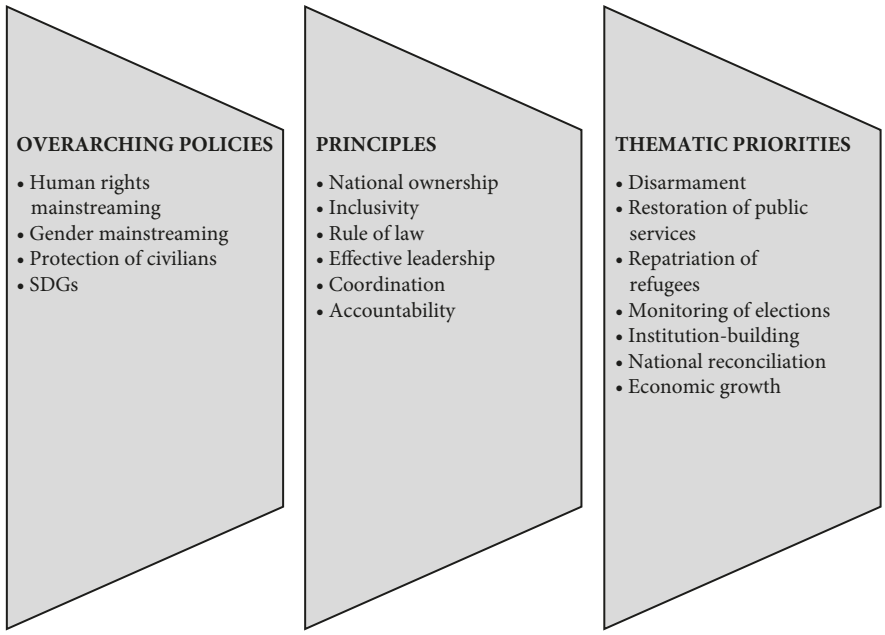

Figure 4.2 Post-conflict just and sustainable peace parameters
Source: Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict, A/63/881-S/2009/304, 11 June 2009, <http://www.un.org/en/peacebuilding/pbso/pdf/s2009304.pdf>.

PART II
MACRO-PRINCIPLES

5

Jus Post Bellum and Proportionality

*Michael A. Newton**

I. Introduction

This chapter proceeds from the premise that the proportionality principle as applied in its respective legal usages before the onset of armed conflict (embedded within the *jus ad bellum* framework) and during armed conflict (*jus in bello*), cannot and should not be disaggregated from the larger question of the desirability of justice following conflict (*jus post bellum*). Ours is the 'era of proportionality' in the sense that the proportionality principle is a 'legal construction' that is an integral aspect of legal and moral discourse in every effective legal system.[1] The proportionality principle as classically formulated in both *jus ad bellum* and *jus in bello* proceeds from the normative baseline that its value as a methodological tool is grounded on the cornerstone of a 'proper purpose'.[2] Combatants have affirmative rights under interconnected *jus in bello* principles, yet these rights carry correlative duties requiring that the loss of lives must be offset by equally serious matters if the conduct of war is to be justified. Military commanders see *jus in bello* proportionality as an essential element of professional ethos, providing the necessary latitude to accomplish their strategic and tactical mandates. As a necessary legal predicate, the overarching objective driven by the *jus ad bellum* analysis provides the evaluative template for assessing the legality of the strategic, operational, and tactical decisions necessarily undertaken during the armed conflict.

Lawyers, philosophers, and just war scholars have long debated the proper relationship between *jus ad bellum* principles warranting the resort to force and the *jus in bello* utility of the proportionality principle. Nevertheless, the *lex lata* remains firm for the moment that each legal context functions as a distinct and independent body of law.[3] Proportionality simultaneously empowers war-fighters and imposes concrete restraints over the conduct of armed conflicts when properly applied. The demonstrable gap between internationally accepted articulations of proportionality and its perceived application is not inevitable. However, the mere invocation of proportionality cannot become an effective extension of asymmetric combat power by artificially crippling combatant capabilities.

The purpose of this chapter is to describe the subtle but undeniable role of *jus post bellum* considerations in linking otherwise disparate invocations of the proportionality principle.

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[1] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (translated from Hebrew by Doron Kalir, Cambridge University Press 2012) 131.

[2] Ibid.

[3] Serena K. Sharma, 'Reconsidering the Jus ad Bellum/Jus in Bello Distinction', in Carsten Stahn and Jan Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser 2008) 9–31.

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Concepts of proportionality are amongst the most controversial imperatives in waging modern conflicts from the legal, moral, and political perspectives. Their very terminological familiarity may result in overly formulaic applications in practice. *Jus post bellum* provides useful analytical continuity that can become a load-bearing pillar for affirmative articulations of the proportionality principle in a variety of usages.

The difficulty in practice is that its parameters remain bounded by contextual challenges in every instance. Aharon Barak, of the Israeli Supreme Court, summarized this aspect of proportionality and its interrelationship with appropriate oversight as follows:

> The court will ask itself only if a reasonable military commander could have made the decision which was made. If the answer is yes, the court will not exchange the military commander's security discretion with the security discretion of the court. Judicial review regarding military means to be taken is within the regular review of reasonableness … [T]he question is not what I would decide in a given circumstance, but rather whether the decision that the military commander made is a decision that a reasonable military commander was permitted to make. In that subject, special weight is to be granted to the military opinion of the officials who bear responsibility for security … Who decides about proportionality? Is it a military decision to be left to the reasonable application of the military, or a legal decision within the discretion of the judges? Our answer is that the proportionality of military means used in the fight against terror is a legal question left to the judges … Proportionality is not a standard of precision; at times there are a number of ways to fulfill its conditions … a zone of proportionality is created; it is the borders of that zone that the court guards.[4]

As noted above, *jus post bellum* considerations provide an important connecting premise. The precise parameters of this zone of proportionality remain very much in dispute amidst the complexity of modern armed conflicts and the rise of a globalized media. An adversary's ability to broadcast (or fabricate) allegations of inappropriate conduct also adds an unprecedented level of difficulty to modern proportionality determinations. Proportionality serves as one of the tendons linking otherwise distinct bodies of law into an interdependent whole. This intertwined relationship between various invocations of proportionality preserves the utility of the principle while ensuring its appropriate role within larger debates over the role for military force and the responsibilities of ethical war-fighters.

This chapter addresses recurring confusions that cloud the application of proportionality. Section II addresses the oft-repeated misunderstanding of the relationship between the rule of law and the onset of armed conflict as a condition of human conduct. Because peace is the proper object of warfare, Section III describes commonalities of the proportionality principle as applied across varying fields of usage, while Section IV details the evolution of its modern normative content. Section V concludes by reviewing the role of *jus post bellum* as an embedded component connecting the invocation of proportionality as an aspect of military practices across domains and usages.

[4] Aharon Barak, President (ret'd) Supreme Court of Isr., Address at the Jim Shasha Center of Strategic Studies of the Federmann School for Public Policy and Government of the Hebrew University of Jerusalem (18 Dec. 2007).

II. 'Correcting' Cicero

Embodying the classical conception of hostilities, Hugo Grotius quoted the Roman philosopher Cicero for the proposition that *Inter bellum ac pacis nihil est medium* ('there is no medium between war and peace').[5] This archaic conception of conflict led to sharp intellectual cleavages drawn between the law of war and the law of peace.[6] The conception of a legal firewall by which the prevailing body of law is automatically displaced by a wilder and impliedly non-legal set of norms is often said to originate some two thousand years ago from the mind of the famed orator and litigator Cicero. The philosophical and legal notion that antagonists may properly discount legal constraints when facing *in extremis* situations is captured in the oft-repeated sentiment from Cicero that '*silent enim leges inter armes*'.[7] The quote is often incorrectly attributed to saying that 'in times of war, the law falls silent'.[8]

Cicero's maxim has been invoked to argue that otherwise unlawful conduct may be permissible in furtherance of a public good (presumably defined in utilitarian terms).[9] Other advocates have invoked it to delineate peace (the courts are open and available for recourse) versus war (the courts are closed).[10] Early British cases often quoted Cicero as embracing the idea that military matters fall outside the jurisdiction of common law courts.[11] Courts in different jurisdictions repeatedly relied upon this same notion during the American Civil War and Reconstruction era cases, most famously in the Union arguments supportive of the suspension of the right to *habeas corpus* in *Ex parte Milligan*. In modern times, the phrase is more often used in discourse related to civil liberties during the investigation and prosecution of terrorists.

Heated debates over the rejection of civil liberties during recent armed conflicts rest on the fullest implications of the misquoted phrase. Justice Scalia's dissent in the US Supreme

[5] Hugo Grotius, *De Jure Belli Ac Pacis [The Law of War and Peace]* (first published 1625, trans. Francis W. Kelsey, Oxford Clarendon Press 1925) 832. Modern translation available online at <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-vol-3-book-iii>; [<https://perma.cc/ZK8X-EGU8>]

[6] The very title of Hugo Grotius' classic work framed the issue in precisely this manner because that was the intellectual and philosophical fissure that he sought to explicate.

[7] Cicero, *Pro Milone*, IV, xi. See Cicero, Marcus Tullius. M. Tulli Ciceronis pro T. Annio Milone ad iudices oratio (Clarendon Press, 1895). Text available online at <http://www.thelatinlibrary.com/cicero/milo.shtml> accessed 15 December 2019.

[8] See e.g. William H. Rehnquist, 'Dwight D. Opperman Lecture: Remarks of the Chief Justice of the United States' (1999) 47 *Drake Law Review* 201, 205–8 ('Here we have an illustration of an old maxim of Roman law—Inter Arma Silent Leges—which loosely translated means that in time of war the laws are silent … The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim Inter Arma Silent Leges—in time of war the laws are silent … perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice').

[9] See e.g. *Smith v. Shaw* (NY 1815) 12 Johns. 257, 261 (arguing, in a case challenging the detention of a Scottish individual, that in times of war necessity and the public good may justify certain acts in accordance with Cicero's maxim); see also *York & Fenderson v. Z. M. L. Jeffreys & Sons* (NC 1921) 109 SE 80, 82 ('It is the inexorable law that regard be had to the public welfare, and, in times of war and peril, to the public safety').

[10] *Griffin v. Wilcox* (1963) 21 Ind. 370, 378–9 (also quoting Lord Coke's idea of Cicero's maxim that 'When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, et silent inter leges arma, then it is said to be time of war'. Coke upon Littleton, as quoted in Wheaton's *Elements of International Law*, p. 525).

[11] See *Sir G. E. Hodgkinson, Knt. v. Fernie and Another* (1857) 2 Common Bench Reports (New Series) 415, 140 ER 479; *Barwis v. Keppel* (1766) 95 ER 831, 833, 2 Wilson, K. B. 314 (an action by a serjeant against his commanding officer for wrongfully, unlawfully, and maliciously, and without reasonable cause, under the false pretence of misbehaviour on his part, reducing him to the ranks, whilst serving abroad,—the court say: 'Flagrante bello, the common law has never interfered with the army: Inter arma, silent leges').

Court decision *Hamdi v. Rumsfeld* represents one of the most widely known recent incantations:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision. I respectfully dissent.[12]

When applied to the law of war domain, Clausewitz famously drew upon the mindset generally, and erroneously, attributed to Cicero's famous maxim to postulate that:

> war is an act of force, and there is no logical limit in the application of force … Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.[13]

United Nations Secretary-General Kofi Annan channelled this Clausewitzian misapprehension during the closing ceremony of the Rome Conference on 18 July 1998, when he spoke from the hilltop piazza overlooking the Roman Forum:

> Two millennia ago, one of this city's most famous sons, Marcus Tullius Cicero, declared that "in the midst of arms, law stands mute". As a result of what we are doing here today, there is real hope that that bleak statement will be less true in the future than it has been in the past.[14]

Ironically enough, the US Department of Defense Law of War Manual implicitly echoes suspicion arising from the frequent misunderstanding of Cicero's maxim that armed conflict provides a convenient rationale to undermine rights that would otherwise be sacrosanct. From the perspective of normally applicable human rights norms, the notion that proportionality affirmatively countenances the deaths of civilians or others not participating in conflict seems heretical.

The Manual's formulation that *lex specialis* law of war requires other bodies of law to remain fully subordinated to *jus in bello* norms or alternatively be interpreted to retain consistency with accepted law of war principles does not fully accord with accepted international law.[15] Proportionality serves an important function as a bridging principle to preserve human dignity and the right to life within the context of both *jus ad bellum* and *jus in bello*, all the while under the shadow of *jus post bellum* conceptions.

[12] *Hamdi v Rumsfeld* 542 US 507, 579 (2004) (Scalia, J., dissenting).

[13] Carl von Clausewitz, *On War* (1833) (trans. Michael Howard and Peter Paret, Princeton University Press 1976) 75, 77.

[14] Grant M. Dawson, 'Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?' (2000) 19 *New York Law School Journal of International and Comparative Law* 413, 449.

[15] Michael A. Newton, 'The DoD Law of War Manual as Applied to Coalition Command and Control', in Michael A. Newton, *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge University Press 2019) 360.

Indeed, this was precisely Cicero's intent. Despite its repeated incantations, the argument that Cicero advocated suspension of applicable law in times of warfare is unfounded. Cicero's understanding of the role of law before, during, and after warfare is surprisingly well aligned with the contours of modern *jus post bellum*.

Scholars have infrequently distinguished the popular mischaracterization of his sentiment from what Cicero actually said in its context. Cicero was arguing in defence of his close friend, Milo, who had been set upon by armed brigands under the leadership of a political foe while travelling. On trial for the killing of Clodius, Cicero argued (not unlike defence attorneys through the centuries and across cultures) that a limited right of self-defence displaces other norms that might otherwise prohibit killing.[16] Relying on this theory of self-defence under circumstances that rendered the killing understandable and perhaps even laudable, the relevant portion of Cicero's oration follows:

> There is then, judges, a law of this kind—not written, but inborn—which we have apprehended, drank in and extracted from nature herself; in conformity to which we have not been taught, but made; in which we have not been educated, but ingrained; and this law is, that if our life fall under peril from any ambush, violence, or weapon, whether of robbers or of personal enemies, recourse should be had to every honorable means to safety. For the laws are silent in the midst of arms.[17]

With respect to *jus in bello*, the takeaway is plain. Of course the law applies, but it does so in modified form and with an entirely different set of normative benchmarks. Grotius implicitly recognized this truism in the Prolegomena to his classic work by noting that '[i]f "laws are silent among arms", this is true only of civil laws and of laws relating to the judiciary and the practices of peacetime, and not of the other laws which are perpetual and appropriate to all circumstances'.

When applied in good faith, the complex normative structures embodied by the *jus in bello* and *jus ad bellum* frameworks rebut those who would inappropriately advocate that the very nature of war negates the utility of a carefully constructed legal regime. As properly understood and applied, *jus in bello* proportionality does not faintly resemble a lawless invocation of convenience. Phrased with slightly more precision, the *jus in bello* concept of proportionality balances military expediency and larger military interests (such as ensuring strategic or tactical victory, preserving the lives of friendly forces, and bringing the conflict to its optimal and swiftest conclusion) against countervailing humanitarian interests.

Intuiting the modern structure of *jus post bellum*, Cicero distinguished the lawfulness of various tactics during warfare as being dependent upon the motivations and necessity for resort to war in the first place.[18] In fairness, Cicero's motivations proceeded from a far different logic than permissible under the modern *jus ad bellum* framework. Cicero qualified

[16] See Mark Edward Clark and James S. Ruebel, 'Philosophy and Rhetoric in Cicero's "Pro Milone"' (1985) 128 *Rheinisches Museum für Philologie*, Neue Folge 57, 65 ('The notion of justifiable self-defense was of course thoroughly accepted at Rome long before the advent of Stoicism, but the two ideologies converge conveniently here; somewhat later on, Cicero appeals again to this doctrine, in terms which ring increasingly Stoic').

[17] *Fremont Contract Cases* (1866) 2 Ct Cl. 1, 25 n.1.

[18] Ibid. 38. See also Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order From Kant to Grotius* (Oxford University Press 1999) 20–1 (describing the inherent limitations of a war conducted for what Cicero termed 'glory' as opposed to wars fought for national survival against existential threats or based on pre-emptive military action).

the treatment of the vanquished enemy to varying degrees because he knew that 'a liberal peace was a sound basis for the building of an empire'.[19] His words never advocated cessation of prevailing and applicable legal principles during the conduct of war.

Cicero understood that 'the only excuse for going to war is that we may live in peace unharmed'.[20] Of course modern *jus ad bellum* echoes this premise by virtue of the truism that law cannot favour the aggressor in form or application if it is to remain viable in a healthy international system. He accordingly argued that just and generous peace terms represented a worthy goal in the sense that they would provide the foundations for the longer-term rights of the adversary populace (which was commonly incorporated into the Roman Empire and given the rights of citizens). Rapidly soothing the sting of hostilities simultaneously made the resumption of warfare less likely while securing an immediate cessation of conflicts.

Ulysses S. Grant intuited precisely the same premise on 9 April 1865 during the surrender of the Army of Northern Virginia, when he permitted vanquished Confederates to retain their horses and personal sidearms to prevent 'unnecessary humiliation' and forbade cannon fire to celebrate the Union victory because 'we did not want to exult in their downfall'.[21] This is the actualization of *jus post bellum*. From that perspective, the object of warfare should be the achievement of a just and lasting peace. Section III below will examine the subtle role of the proportionality principle as a key lynchpin between overarching *jus post bellum* sensibilities and the implementation of both *jus ad bellum* and *jus in bello* tenets.

III. Peace as the Proper Object of War

Proportionality is an imperfect tool, but nonetheless an essential element spanning legal and philosophical disciplines.[22] Despite its linguistic consistency, the principle of proportionality does not provide a homogenous terminological template across different disciplines. Proportionality provides non-arbitrary standards for assessment of compelling operational, legal, or moral imperatives. However, its tenets always operate against the backdrop of other applicable norms. Proportionality as applied must remain practicable because 'rules that are incompatible with the survival of sovereign nations and by extension all effective military action risk being ignored and, thereby, not preventing any harm from occurring'.[23]

Larry May has been perhaps the most vocal proponent advocating for a sophisticated understanding of the modern salience of *jus post bellum*. He articulates six distinct *post bellum* principles: (i) rebuilding, (ii) retribution, (iii) restitution, (iv) reparation,

[19] Roland H. Bainton, *Christian Attitudes Toward War and Peace: A Historical Survey and Critical Re-evaluation* (Abingdon 1960) 41.

[20] Cicero, *De Officiis,* I, 35.

[21] Ulysses S. Grant, *Memoirs and Selected Letters* 1839–1865 (Library of America 1990) 739–44.

[22] Michael A. Newton and Larry May, *Proportionality in International Law* (Oxford University Press 2014) 28–61 (discussing the multiplicity of applications for the term 'proportionality' in, inter alia, trade, bioethics, countermeasures, *jus ad bellum*, *jus in bello*, maritime delineation, and criminal sentencing).

[23] On the need to construct enforceable rules of international human law, see Janina Dill and Henry Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption' (2012) 26 *Ethics & International Affairs* 311.

(v) reconciliation, and (vi) proportionality.[24] *Jus post bellum* proportionality for May functions as a sort of meta-principle in two senses. Firstly, as a matter internal to his theory, *jus post bellum* proportionality is defined solely in relation to the other five tenets in such a manner that the accumulation of normatively desirable policies 'must not impose more harm on the population of a party to a war than the harm that is alleviated by application of the post war principles'.[25] The summation of policies must strive for balance and synergy, and proportionality provides the rubric for that consideration.

Secondly, though, he does not develop the premise, May postulates that *jus post bellum* precepts 'can be used to shed light on how best to understand' both *jus ad bellum* and *jus in bello* proportionality.[26] This sensibility seems to reflect Vattel's notion that because unlawful warfare is a 'flagrant injustice that merits the indignation of all mankind', the overarching objectives for waging war should be grounded in the truism that 'nothing less than manifest justice, joined to a kind of necessity, can authorize it, render it commendable, or at least exempt it from reproach'.[27] Because the ultimate goal of just and lasting peace cannot *a priori* be deemed of infinite value absent contextual application, the envisioned end-state embodied in *jus post bellum* thinking could not be achieved absent contextual application of the means used to accomplish that purpose (i.e. the proportionality determinations inherent within both *jus ad bellum* and *jus in bello*).

Cicero was correct in the intuition that we must strive to apply the correct law based on the appropriate context in a good faith manner untainted by result oriented biases. Section IV develops those themes in greater detail. Before doing so, this section summarizes the common traits that proportionality shares across disciplines. Identification of such traits helps eliminate errors in the application and is akin to the process of identifying specific comparators during fingerprint analysis. It might well be said that any invocation of proportionality that wholly departs from these shared features is presumptively suspect.

A. The Pervasive Use of Negative Phraseology

Because proportionality provides an indispensable balancing function, yet defies precise and overarching description, it is most frequently expressed as a rule of decision in the negative form. There is no area in which the law of proportionality is defined with clarity on an abstract basis due to its inherently contextual nature. Proportionality always involves competing factors and shifting relationships amongst relative values. The actual *modus operandi* required by proportionality in any given context is irreducible to an easily extrapolated judicial test. Jurists accordingly describe its operative terms in the negative.

In human rights parlance, governments may restrict the rights conveyed by the European Convention for the Protection of Human Rights and Fundamental Freedoms only when 'the means employed are not disproportionate'.[28] The International Court of Justice (ICJ) relied

[24] Larry May and Elizabeth Edenson, 'Introduction', in Larry May and Elizabeth Edenson (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2013) 2–9.

[25] Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) 227.

[26] Ibid. 226.

[27] Emer de Vattel, *The Law of Nations* (first published 1758, Béla Kapossy and Richard Whatmore [eds] Liberty Fund Inc. 2008) 487.

[28] *Mathieu-Mohin and Clerfayt v. Belgium* [1987], App. No. 9267, 10 Eur. HR Rep. 20 (1987) para. 52.

upon proportionality as the rule of decision in the environmental context ruling in the *Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)*[29] over the construction and operation of dams on the river Danube. The majority held that Slovakia's countermeasure to Hungary's breach of a prior treaty 'failed to respect the proportionality which is required by international law' and was consequently unlawful.[30] Slovakia's counter-measure to Hungary's treaty breach was 'not proportionate'.[31] Writing separately, Judge Vereschetin more clearly described proportionality as a 'basic condition for the lawfulness of a countermeasure', which is to be determined 'in the circumstances of the case'.[32] As a result,

> reference to equivalence or proportionality in the narrow sense … is unusual in State practice … [which] is why in the literature and arbitral awards it is suggested that the lawfulness of countermeasures must be assessed by the application of such *negative criteria* as 'not [being] manifestly disproportionate', or 'clearly disproportionate', '*pas hors de toute proportion*' [quoting the original French text].[33]

Practice within *jus ad bellum* and the *jus in bello* framework mirrors this design. Within the *jus ad bellum* context, the ICJ has frequently invoked proportionality, but refrained in majority opinions from providing detailed assessments of its precise metrics. Indeterminacy of application is baked into the very design of the proportionality principle. Thus, the discretion given to decision makers by the widespread use of the negative form 'not disproportionate' reflects the inability of drafters to define the term 'proportionate' as a rigid template. Resort to underlying *jus post bellum* goals helps alleviate the danger of inchoate or inconsistent determinations. This is unsurprisingly a prominent strand of *jus ad bellum* analysis.

Within *jus in bello* usage, Geoffrey Best noted that although textual incarnations of proportionality came after more than a century of treaty developments, that gap should not be attributed to unfamiliarity with the precautions expected to be taken by attackers and defenders alike. In his words, the developmentally delayed formulation of the treaty language was 'because it was thought to be too slippery and in its potential implications embarrassing to commit to a set form of words'.[34] The International Committee of the Red Cross (ICRC) Commentary on Additional Protocol I notes with some understatement that the language 'gave rise to lengthy discussions and negotiations among delegations'.[35] The 1973 ICRC working draft of what became the proportionality provisions in the 1977 Protocol (i.e. Articles 51(5)(b), 57(2) and 85(3)) cautioned that lawful attacks were those deemed 'not disproportionate to the direct and substantial military advantage anticipated'.[36]

[29] Press Release, International Court of Justice, Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment, Press Release 1997/10 (25 Sept. 1997) [<https://perma.cc/6M3W-Z5LW>].

[30] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep. 7, para. 85 (25 Sept.).

[31] Ibid. paras 85, 87.

[32] Ibid. (Vereschetin, J., dissenting).

[33] Ibid.

[34] Geoffrey Best, *War and Law Since 1945* (Oxford University Press 1994) 323.

[35] ICRC, *Commentary on the Additional Protocols of 8 June 1977* (Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann eds, 1987) para. 2204 [hereinafter ICRC Commentary on Protocol I].

[36] Ibid.

B. Breadth of Permissible Discretion

Proportionality assessments are necessarily a comparative exercise involving dissimilar values. As Professor Michael Schmitt points out, 'How does one, for instance, compare tanks destroyed to the number of serious civilian injuries or deaths caused by attacks upon them?'[37] The use of markedly strong modifiers is a recurrent feature in virtually every contextual application. Judicial decisions around the world and in a variety of usages evaluate the actions of litigants by considering whether the conduct 'grossly',[38] 'markedly', 'strikingly', or 'plainly' lacked proportionality. This elevated threshold simultaneously empowers actors by recognizing the rightful boundaries of their discretion, even as it places the burden of proof onto the party attempting to overturn or discredit the decision.

Judge Vereschetin's observation that international practice requires a finding that a particular countermeasure is 'manifestly' or 'clearly' out of balance is completely accurate. Using analogous reasoning, the European Court of Justice (ECJ) upheld a series of EU agricultural directives in July 2012, reasoning that 'notwithstanding the fact that they may involve adverse economic consequences for some traders, [the Directives] do not appear, in the light of the economic interests of those traders, to be *manifestly disproportionate* in relation to the aim pursued'.[39] Likewise, in *Afton Chemical Limited v. Secretary of State for Transport*, the disputed EU action was upheld because a 'measure adopted in the exercise of that discretion, breaches the principle of proportionality only if it is manifestly unsuitable for achieving the objective pursued by the competent body, if there are clearly less onerous measures which are equally effective or if the measures taken are *clearly out of proportion* to the objectives pursued'.[40]

Within the *jus in bello* realm, the United Kingdom included an express reservation to the grave breaches provisions of Protocol I, Articles 85(3)(c) and 56.[41] The reservation rejected an absolute standard of protection for 'works or installations containing dangerous forces' because states merely must 'avoid severe collateral losses among the civilian population'.[42] The International Criminal Tribunal for the Former Yugoslavia (ICTY) indirectly reinforced this higher threshold by repeatedly declining to convict perpetrators on the basis of *post hoc* evaluations of their proportionality analysis. Appeals judges also overturned the conviction of Croatian generals Ante Gotovina and Mladen Markač by holding that the Trial Chamber created an inappropriate evidentiary standard, which then became the basis for inferring disproportionality during artillery attacks using its own judicial construct as the dispositive principle.[43] Though the majority decision generated vigorous dissents that are 'perhaps unprecedented in international tribunal history decision[s],' the Appeals Chamber unanimously found that the judicially fabricated standard was improper because it inappropriately undervalued the permissible discretion accorded to war-fighting

[37] Michael N. Schmitt, 'Fault Lines in the Law of Attack', in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the boundaries of International Humanitarian Law* (BIICL 2006) 277, 293.

[38] *R. v. Khawaja*, [2012] 3 SCR 555, 584 (Can.).

[39] *Ass'n Kokopelli v. Graines Baumaux SAS*, Case C-59/11 [2012] paras 68–9 (emphasis added).

[40] *Afton Chemical Ltd. v. Sec'y of State for Transp.*, Case C-343/09 [2010] ECR I-07027, para. 57 (emphasis added).

[41] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of June 1977, 12 Dec. 1977, 1125 UNTS 3 [hereinafter Protocol I].

[42] Ibid.

[43] *Prosecutor v. Gotovina et al.* (Appeal Judgement) Case No. IT-06-90-A, (16 November 2012), paras 49–67.

commanders in the field.[44] Of course, there is nothing in international law or practice to support the premise that *jus in bello* proportionality permits an unbounded or infinitely elastic discretion.

On this score, the authoritative ICRC Commentary on Protocol I recognizes that in these subjective evaluations 'the interpretation must above all be a question of common sense and good faith for military commanders. In every attack they must carefully weigh the humanitarian and military interests at stake'.[45] Reinforcing the need for respecting the zone of permissible discretion, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign in Kosovo observed that 'the determination of relative values must be that of the "reasonable military commander"'.[46] In their classic treatise, Myres McDougal and Florentino Feliciano commented on this same aspect of *jus ad bellum* by observing that

> Requirements of necessity and proportionality … can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in a particular context. What remains to be stressed is that reasonableness in a particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operation and functional significance for community goals in given instances of coercion[47].

Lastly, proportionality cannot be encapsulated without reference to a larger totality of the circumstances in examination. The proportionality principle unquestionably forms an essential component of the backbone of the law of armed conflict (*lex lata*). The standard for imposing criminal sanctions for violations of *jus in bello* proportionality is 'clearly excessive' when assessed against the broader 'concrete and direct overall military advantage anticipated'.[48] Yoram Dinstein is surely correct that '[m]any people confuse excessive with extensive'.[49] Thus, damage to civilians or their property can be severe enough that media or laypersons may foreseeably accuse commanders of war crimes, notwithstanding the good faith determination that the military advantage anticipated is of paramount importance.[50] The key point is that when proportionality is viewed through the prism of *jus post bellum*, the metric for analysis directly or indirectly relates to the larger goals of the conflict.

In this vein, Michael Walzer intuitively acknowledged the overarching shadow of *jus post bellum* with his classic observation that the 'object of war is a better state of peace'.[51] Walzer

[44] Julian Elderfield, 'Introductory Note to the International Criminal Tribunal for the Former Yugoslavia: The Prosecutor v. Gotovina et al.' (2013) 52 *International Legal Materials* 72, 73.

[45] *ICRC Commentary on Protocol I* (n 35) 683–4.

[46] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000), reprinted in 39 *International Legal Materials* (2000) 1258, 1271.

[47] Myres S. Mcdougal and Florentino Feliciano, *Law And Minimum World Public Order: The Legal Regulation Of International Coercion* (Yale University Press 1961) 242.

[48] Rome Statute of the International Criminal Court, Art. 8(2)(b)(iv), opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

[49] 'Targeting,' in *Legal and Ethical Lessons of Nato's Kosovo Campaign, Part III,* 78 *International Legal Studies* 135, 215 (Andru Wall ed., US Naval War College 2002) 135, 215.

[50] *See also Military and Paramilitary Activities in and against Nicaragua, Nicar. v. US*, Dissenting Opinion of Judge Schwebel, 1986 ICJ 14, para. 9 (June 27) ('To the extent that proportionality of defensive measures is required—a question examined below—in their nature, far from being disproportionate to the acts against which they are a defence, the actions of the United States are *strikingly proportionate*') (emphasis added).

[51] Michael Walzer, *Just and Unjust Wars* (Basic Books 1977) 121.

assumed that *jus in bello* calculations of proportionality would necessarily be determined by the *jus post bellum* criteria for waging war. He accordingly clarified that the goal of a 'better' peace, means 'more secure than the status quo ante bellum, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations'.[52] Walzer, perhaps unintentionally, echoed Cicero's determination that warfare be conducted for the right reasons in the right manner and for the right ends. The logical imperative is that the actual conduct of warfare must be evaluated in light of the larger *jus post bellum* quest for authentic justice. Section IV will further detail this nexus between *jus post bellum* and proportionality norms.

IV. Normative Content of the Proportionality Principle

Jus post bellum thinking within the conventional bounds of international law is built upon an authentic quest for a just and sustainable peace. This obliges states to use force as a last resort, and only after reflection on the foreseeable goals and consideration of the most desirable end-state. Formalistic articulations of the proportionality principle within the bounds of treaty law represent the pinnacle of the developmental arc as nations sought to balance sovereign rights to use military force to pursue lawful goals while simultaneously extending appropriate protections to civilians and other protected persons. In fact, the laws and customs of war originated from the unyielding demands of military discipline under the authority of the commander or king whose orders must be obeyed. Writing in 1625, Hugo Grotius documented the Roman practice that 'it is not right for one who is not a soldier to fight with an enemy' because 'one who had fought an enemy outside the ranks: and without the command of the general was understood to have disobeyed orders', an offence that 'should be punished with death'.[53] By extension, humanitarian imperatives that the 'right of belligerents to adopt means of injuring the enemy is not unlimited'[54] forms unifying principles of *jus in bello*, just as it is reflected in *jus ad bellum* doctrines.

International law correspondingly restricts the class of persons against whom violence may be applied during armed conflicts, even as it bestows affirmative rights to wage war in accordance with accepted legal restraints. For Grotius, the realization that justice is best described as a pursuit of 'the common good' anticipated an interconnected but legally independent set of corollary doctrines.[55] The principle of proportionality seeks to protect noncombatants from the onset of unlawful conflicts (*jus ad bellum*) and from the effects of all armed conflicts irrespective of their legality (*jus in bello*). Understood in another way, proportionality becomes the load-bearing pillar to minimize the 'scourge of war' (to recall the preambular language of the UN Charter).

Historically and legally, the very conception of military structures around the world is premised on order and the achievement of organized authority orchestrated to accomplish

[52] Ibid. 121–3.

[53] Grotius, *De Jure Belli Ac Pacis [The Law of War and Peace]* (n 5), vol. 3, ch. 18. Grotius explained the necessity for such rigid discipline as follows: 'The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned or, with increase of lawlessness, the army or a part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided'.

[54] Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, Annex Art. 22, 26 Jan. 1910.

[55] Grotius, *De Jure Belli Ac Pacis [The Law of War and Peace]* (n 5), vol. 1, ch. 1, section VIII.

the goals of conflict. Armed conflict as an act of state is, by definition, designed to achieve the purposes of the state. This explains why the principle of objective emerged the first of the universally recognized principles of war.[56] This precept provides the intellectual underpinnings of *jus post bellum*, and the parallel applications of the proportionality principle within *jus ad bellum* and *jus in bello*. Overarching 'objectives' of any war provide the template for evaluating military and political efficacy, as well as the very modalities for justifying and waging the conflict.

The desideratum of restricting armed conflict to those contexts when it advances larger needs of sustainable peace built on moderation has reincarnated otherwise antiquated philosophical underpinnings of just war theorists into modern *jus post bellum* doctrines. In fact, the pre-existing strands of proportionality as articulated within both *jus ad bellum* and *jus in bello* instantiate the same thread of thinking towards the same functional ends. *Jus post bellum* goals are interconnected with otherwise distinctive legal and policy doctrines. As a consequence, though the word 'proportionality' does not appear as such in any treaty text, its essence is suffused throughout a number of interrelated provisions.

A. *Jus ad Bellum* in the Shadow of *Jus Post Bellum*

The goals of *jus post bellum* are defined by function rather than *a priori* temporal or tactical limitations. War should be conducted as a last resort (i.e. when necessary) and consciously calibrated to achieve desirable community goals. This is at the core of the *jus ad bellum* prohibition on aggressive war. *Jus ad bellum* is a restrictive body of law in that any use of force must be affirmatively justified and accord with widely accepted goals. The paradox is that a better and more sustainable peace should be the goal of going to war in the first place.

Within classic *jus ad bellum* doctrine, the proponent for resort to force must articulate goals that demonstrate both 'necessity' and 'proportionality'. Quests for short-term security at the expense of longer-term community or regional security are inherently suspect. *Jus ad bellum* proportionality mandates articulation of a lawful goal for the use of force, which in turn is limited in intensity, scope, and magnitude calibrated to accomplish the legitimate goals. John Norton Moore has noted that *jus ad bellum* permits the use of force to protect 'major values' and therefore may not be artificially restricted to a minimalist or tit-for-tat straitjacket.[57] Lawful war may well be waged towards an end-state that is far more complex than mere restoration of the *status quo bellum*.

Michael Walzer brilliantly observed the nexus between *jus post bellum* and *jus ad bellum* proportionality, even as he avoided usage of the doctrinal terminology. In his classic work, he noted that proportionality

> is a matter of adjusting means to ends, but as the Israeli philosopher Yehuda Melzer has pointed out, there is an overwhelming tendency in wartime to adjust ends to means

[56] The principles of war crystallized as military doctrine around the world around 1800. The accepted principles are: objective, offensive, mass, economy of forces, manoeuvre, unity of command, security, surprise, and simplicity. John Whiteclay Chambers II (ed.), *The Oxford Companion to American Military History* (Oxford University Press 1999) 557.

[57] John Norton Moore, 'Jus Ad Bellum Before the International Court of Justice' (2012) 52 *Virginia Journal of International Law* 903, 915.

> instead, that is to redefine initially narrow goals in order to fit the available military forces and technologies … It is necessary in such arguments to hold ends constant, but how does one do that? In practice, the inflation of ends is probably inevitable unless it is barred by considerations of justice itself.[58]

Larger *jus post bellum* goals become the template to craft legitimate goals for waging war within *jus ad bellum* doctrine at the outset of hostilities. This synergy accords with Vattel's premise that a flimsy pretext for waging war is an 'homage which unjust men pay to justice. He who screens himself with them shews that he still retains some sense of shame. He does not openly trample on what is most sacred in human society: he tacitly acknowledges that a flagrant injustice merits the indignation of all mankind'.[59]

The quest for sustainable justice that achieves affirmative community good also anchors *jus ad bellum* by providing a fixed vision of the desired end-state. This helps prevent inappropriate extensions of the purported goals for waging war as the conflict itself matures. In this manner, *jus post bellum* creates legitimate *jus ad bellum* rationales for resort to warfare and constrains those causes during the conduct of conflicts.

B. Modern *Jus in Bello* Proportionality Formulations

In similar fashion, *jus post bellum* provides a connecting premise that guides the pursuit of *jus in bello* proportionality. The idea of proportionality operates in the shadow of Article 51 of Protocol I, which in its initial clause implements the categorical admonition that:

> [T]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

The negotiating text that became Article 51 in the final adoption of Protocol I was adopted by a vote of seventy-seven votes in favour, one against (France), and sixteen abstentions. French opposition was premised on the position that the complexity of the proportionality metric would impede military operations against an invader and thereby impair the exercise of the sovereign and inherent right of defence as recognized by Article 51 of the UN Charter. Embedded in its origins, *jus in bello* proportionality was designed to facilitate sovereign *jus ad bellum* prerogatives and the pursuit of justice which accords with the wellspring of *jus post bellum* formulations.

The overarching prohibition is followed by the more specific and pointed application in Article 51(4) that 'indiscriminate attacks are prohibited'. Article 51(5)(b) then defines indiscriminate attacks, using the non-exhaustive caveat that 'among others the following types of attacks are to be considered as indiscriminate':

[58] *Just and Unjust Wars* (n 51) 119–20.
[59] Emer de Vattel, *The Law of Nations* (n 27) 486–7.

> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

This balancing test is the core of the modern *jus in bello* proportionality conversation. Article 57(2)(a)(iii) echoes the proportionality limitation by obligating an attacker to 'refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.

These provisions must be understood in light of state practice. The governments of the United Kingdom, the Netherlands, Spain, Italy, Australia, Belgium, New Zealand, Germany, and Canada each published a virtually identical reservation with respect to Articles 51 and 57 as they acceded to Protocol I.[60] The overwhelming weight of the reservations makes plain that ratifying states do not intend for proportionality to put war-fighters into a straitjacket of narrowly conceived limitations absent contextual application. The New Zealand reservation for example (virtually identical to those of other states listed above) reads as follows:

> In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57, the Government of New Zealand understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and that the term 'military advantage' involves a variety of considerations, including the security of attacking forces. It is further the understanding of the Government of New Zealand that the term 'concrete and direct military advantage anticipated', used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

Modern incantations that would make proportionality into a binding straitjacket deduced from *post hoc* assessments are erroneous. *Jus post bellum* 'objectives' goals are clearly relevant as well to the considerations of the anticipated 'contributions to the objective of the military attack involved'. In the language of Protocol I, the textual limitation is that the desired benefit to *jus post bellum* ends must be 'concrete and direct'.

With respect to determining the contours of criminal violations related to *jus in bello* proportionality, the language of Protocol I has been superseded by the adoption of the 1998 Rome Statute of the International Criminal Court (ICC). At the time of this writing, 123 States Party[61] have adopted the statute as a binding treaty. However, the Elements of Crimes required by Article 9 were adopted by the consensus of all states, to include the United States, China, and other major non-States Party. Article 8(2)(b)(iv) describes proportionality in a manner consistent with modern state practice following the adoption of Protocol I as:

[60] The numerous texts of state declarations expressing similar views using almost identical language are available at Treaties, State Parties and Commentaries, Int'l Comm. of the Red Cross, available at <https://perma.cc/X6YE-4AM6> accessed 28 July 2018.

[61] As of this writing, the 123 ICC States Party include 33 African nations, 19 from the Asia-Pacific realm, 18 from Eastern Europe, 28 from Latin American and the Caribbean, and 25 from Western Europe.

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.[62] (emphasis added to show contrast to Protocol I text)

Careful readers will note that the inclusion of environmental considerations within *jus in bello* proportionality serves to embed *jus post bellum* considerations within the purview of obligatory war-making proportionality assessments. In addition, the Elements of Crimes (adopted by consensus of all states as mentioned above) included a key footnote that reads as follows:

> The expression 'concrete and direct overall military advantage' refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.[63]

In light of the linkage to *jus post bellum*, the inclusion of a proportionality requirement to mark off a specific war crime under the Rome Statute is significant for two reasons. In the first place, the consequence required for conviction of a grave breach under Protocol I is omitted. Unlike the grave breach formulation found in Protocol I, the criminal offence in the Rome Statute is completed based on the intentional initiation of an unlawful attack. The crime is committed by deliberate initiation of an attack, provided that the prosecutor can produce evidence sufficient for the finder of fact to infer that the perpetrator believed that the attack would cause an anticipated disproportionate result. The *actual* result is not necessarily relevant. This means the 'Objectives' derived from *jus post bellum* as embodied in the 'concrete and direct military advantage anticipated' can become more consequential than any actual results from the use of military force during a particular attack.

In addition, the Elements explicitly stipulate that the perpetrator must launch the attack as a volitional choice and do so in the knowledge that the attack would be expected to cause disproportionate damage. Footnote 37 of the Elements of Crimes makes plain that the perpetrator's knowledge of the foreseeably disproportionate effects of an attack requires an explicit value judgment. The standard for any *post hoc* assessment of the action taken by an alleged perpetrator is clear: 'As opposed to the general rule set forth in Paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement described herein. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time'. This means that the *jus post bellum* analysis is not static at the strategic, operational, or even tactical levels of war.

[62] Rome Statute (n 48) Art. 8(2)(b)(iv).
[63] See ICC, *Assembly of States Parties First Session September 2002* at 256 n. 36 (26 Sept. 2002).

The Rome Statute offence thus widens the scope of the military advantage that can be considered in the proportionality analysis (through the inclusion of the word overall) and narrows what level of collateral damage is considered excessive (by specifying that the damage needs to be *clearly* excessive to generate criminal liability). These textual improvements comfortably accommodate *jus post bellum* imperatives.

Furthermore, revisions to the treaty terminology employed by the drafters of Protocol I reflect the broadly accepted view of state practice. The language of the United Kingdom Law of War Manual summarizes the state of the law that was captured in the prohibition of Article 8(2)(b)(iv) as it should be understood in light of the Elements of Crimes:[64]

> The military advantage anticipated from the attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The point of this is that an attack may involve a number of coordinated actions, some of which might cause more incidental damage than others. In assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered. That does not, however, mean that an entirely gratuitous and unnecessary action within the attack as a whole would be condoned. Generally speaking, when considering the responsibility of a commander at any level, it is necessary to look at the part of the attack for which he was responsible in the context of the attack as a whole and in the light of the circumstances prevailing at the time the decision to attack was made.

Considering the three distinctive proportionality principles as a synergistic whole means that policymakers and war-fighters must be aware that their actions affect the larger quest for just and sustainable peace. Certain tactics or weaponry that unnecessarily antagonize the enemy may not be employed because of the foreseeably adverse effects on the achievement of longer term reconciliation. Within the *jus in bello* context, grounded by definition in anticipated military advantage, various tactics that pose risks of civilian casualties and might be ordinarily permissible in light of short-term military objectives, might be restricted based on longer-term objectives.

The shifting role of airpower over Afghanistan represents precisely this kind of values-based adjustment. In the first week of the war to drive the Taliban from power in the fall of 2001, US Navy Commander Layne McDowell dropped some 6,000 pounds of ordnance from his carrier-based plane. Reflecting on his previous experiences in the First Gulf War and in Kosovo, he says, 'Our culture is a fangs-out, kill-kill-kill culture … That's how we train. And back then, the mindset was: maximum number of enemy killed, maximum number of bombs on deck, to achieve a maximum psychological effect'.[65]

After a decade of coalition warfare in Afghanistan, Cdr McDowell's usual mission became to 'overwatch', which consists of scanning the ground via infrared sensors and radioing guidance to ground forces. Considerations of how the use of various tactics will be perceived after a war is over, or of how they may affect the cessation of hostilities, are now prominent in military strategy. According to press reports, in 953 close-air support sorties by the 44 F/A-18 Super Hornets aboard the aircraft carrier John C Stennis, aircraft attacked only seventeen times, and flew low- or mid-elevation passes only 115 times. This

[64] United Kingdom, *The Joint Service Manual of the Law of Armed Conflict* (2004) para. 5.33.5.
[65] *International Herald Tribune* (17 Jan. 2012), p. 1.

shift in missions and tactics partly reflects adaptations by the Taliban, but also the evolving Rules of Engagement (ROE) that emphasize proportionality and restraint. Commenting on the need to be precise in target selection and minimize civilian casualties, Cdr McDowell admitted that, 'So much has changed from when I was here the first time. Now I prefer not dropping— if I can accomplish the mission in other ways'.

He might well have never heard the term *jus post bellum*, but the changing mission profiles and professional perspectives for compliance with *jus in bello proportionality* derive in part from its normative power.

V. Conclusion

Proportionality serves as one of the tendons linking otherwise distinct bodies of law into interdependent strands of a larger whole. When composite snippets drawn from international law and philosophy are consolidated, the tenets of proportionality change from discordant pieces into a clear road map that can help policymakers and military commanders judge the lawfulness of their conduct and effectively protect civilians. Modern articulations of the proportionality principle deliberately leave a wide margin of discretion to belligerents as described above. Yet, the textual proportionality provisions of the applicable treaties (to include the elevated comparative threshold) 'do not appear to be contested by any state, including those that have not ratified' Protocol I.[66]

The justice of war's end becomes relevant for the justice of war's initiation, as well as the conduct of war. As Suarez noted:

> in order that a war may be justly waged, a number of conditions must be observed, which may be grouped under three heads. First the war must be waged by a legitimate power; secondly, the cause itself and the reason must be just; thirdly, the method of its conduct must be proper, and due proportion must be observed at its beginning, during its prosecution and after victory. The underlying principle of this general conclusion, indeed, is that, while war is not in itself evil, nevertheless, on account of the many misfortunes which it brings in its train, it is one of those undertakings that are often carried on in an evil fashion; and that therefore it requires many [justifying] circumstances to make it righteous.[67]

The first and second of his conditions are normally seen as *jus ad bellum* conditions; the third is a *jus in bello* condition; and the fourth is a mixture of *jus ad bellum*, *jus in bello*, and *jus post bellum* proportionality conditions. This intertwined relationship between various invocations of proportionality preserves the utility of the principle within larger debates over the role for military force and the responsibilities of ethical warfighters. At a minimum, conscious awareness of the linkage between the three fields helps avoid formulaic incantations of proportionality that are disconnected from the larger objectives for waging war or the *post bellum* end-state envisioned.

[66] Knut Dörmann, *Elements of War Crimes Under The Rome Statute of the International Criminal Court* (Cambridge University Press 2003) 168.

[67] Francisco Suarez, 'On War' (first published 1610, Disputation XIII, De Triplici Virtue Theologica: Charitate), in *Selections from Three Works Disputation XIII, Section I.1* (trans. Gladys L. Williams, Ammi Brown, and John Waldron, Clarendon Press 1944) 805.

Implications that modern applications of the proportionality principle are divorced from meaningful constraints on the conduct of hostilities are empirically erroneous. The proportionality principle is not self-justifying and infinitely malleable in any of the three interconnected legal disciplines. The idea that the proportionality principle provides *sub rosa* excuse to justify political or military convenience runs counter to the very construction of the law. Cicero was prescient in noting that our appreciation of justice is 'extracted from nature herself; in conformity to which we have not been taught, but made; in which we have not been educated, but ingrained'. Applications of the proportionality principle are accordingly guided by common sense and shared experiences shaped by common aspirations in pursuit of just and sustainable peace.

6
Reconciliation and a Just Peace

*James Gallen**

I. Introduction

This chapter argues that assessing how *jus post bellum* contributes to reconciliation is a necessary component of any emergent *jus post bellum* framework. If *jus post bellum* is to add any value to existing practice regarding post-conflict states, assessing its contribution to reconciliation should be seen as a technique to inform and evaluate the decisions of national and international actors in contributing to a just and sustainable peace. In addition, the language of reconciliation should be used as a legitimate means of critique of *jus post bellum* initiatives by victim-survivors and citizens of post-conflict societies.

Expanding on the use of reconciliation in transitional justice, this chapter first argues that reconciliation is already engaged in several relevant post-conflict legal questions, including the legitimacy of amnesties; disarmament, demobilization and reintegration (DDR) programmes; and the field of security sector reform. Second, the chapter will examine the existing limited discussion of reconciliation in *jus post bellum* discourse and disaggregate conceptions of reconciliation, forgiveness, and coexistence in existing, cross-disciplinary literature. Third, it will argue that despite the complexities of reconciliation in post-conflict states, the concept should usefully be used as a critical lens for individual citizens of post-conflict societies to evaluate the extent of legitimate distrust of *jus post bellum* initiatives. It is only after these components have been addressed that questions of intra-personal reconciliation can legitimately be evaluated. It will also argue that *jus post bellum* can play a further role in evaluating the structure of post-conflict assistance as providing opportunities or impediments to reconciliation in specific post-conflict contexts. In particular, the need for meaningful interdisciplinarity and the role of donor states in designing explicit reconciliation policies are considered. The chapter concludes by identifying an appropriate expectation for reconciliation as a goal in post-conflict societies: to evaluate how post-conflict societies make political decisions, pursue public goods, reckon with their past, and secure and a just and sustainable future.

II. Law and Reconciliation in Post-Conflict States

It is otiose to state that reconciliation is an elusive subject that defies easy description and definition,[1] and that there is disagreement about whether it is attainable or desirable.[2] Johan

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[1] David Bloomfield 'On Good Terms: Clarifying Reconciliation', Berghof Report 14 (Berlin: Berhof Research Centre for Constructive Conflict Management 2006).

[2] Lorna McGregor, 'Reconciliation: I Know It When I See It' (2006) 9 *Contemporary Justice Review* 155.

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Galtung stated that reconciliation is a 'theme with deep psychological, sociological, theological, philosophical, and profoundly human roots—and nobody really knows how to successfully achieve it'.[3] While the definitional debate remains largely unresolved, the term gains steadily in usage and importance,[4] despite ongoing questions about in its interaction with other post-conflict initiatives.[5]

In particular, the interaction of reconciliation with international law suggests it is necessary to consider whether it is appropriate to attempt a legal definition of the term: if we do not, we risk seeing the phrase used in a fashion destructive of a just and sustainable peace or as a byword for impunity. For instance, Article 53 of the Rome Statute of the International Criminal Court obliges the Office of the Prosecutor (OTP) to consider whether taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. The OTP may consider questions of transitional justice, including questions of reconciliation, but in the absence of express guidance, affected states and communities are left to guess what factors might or might not be determinative.[6] In addition, reconciliation informs the legality of post-conflict amnesties, especially for gross violations of human rights. In *Azapo,* the South African Constitutional Court assessed the legality of the amnesty attached to the national Truth and Reconciliation Commission process and sought to reflect the interim constitution's attempts to turn a necessity of amnesty into a virtue through reconciliation.[7] More recently, international law and policy reflect a growing trend towards the necessary prosecution and punishment of gross violations of human rights.[8] The UN secretary-general has stated that the UN will no longer endorse amnesty for genocide, war crimes, or crimes against humanity.[9] While invocations of reconciliation in order to justify amnesties are becoming more difficult to legitimate, it is possible for more limited amnesties, which interact with the provision of truth, accountability, reparation, and guarantees of non-repetition to comply with international law.[10] States continue to employ national amnesties in their drafting and implementation of peace agreements.[11] There have been significant discussions arising from these issues, often framed as a 'peace v. justice' debate.[12] However, a non-dualistic approach here, seeking to craft a just peace rather than framing the two values as opposing, should be preferred. Reconciliation also arises in further post-conflict

[3] Johan Galtung, 'After Violence Reconstruction, Reconciliation and Restitution', in Mohammed Abu-Nimer (ed.), *Reconciliation, Justice, and Coexistence: Theory and Practice* (Lexington 2001) 3–25, 4.

[4] Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2002) 12 *International Legal Perspective* 73.

[5] Jeremy Sarkin and Erin Daly 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 101.

[6] Michael Newton, 'A Synthesis of Community-Based Justice and Complementarity', in Christian De Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press: 2015) 122–44, 131.

[7] *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

[8] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton 2011).

[9] UNGA The rule of law and transitional justice in conflict and post-conflict societies (23 August 2004) UN Doc. S/2004/616.

[10] Transitional Justice Institute, *Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013).

[11] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart 2008).

[12] Rachel Kerr and Eirin Mobekk, *Peace and Justice: Accountability after War* (Polity Press 2007); Richard Goldstone, 'Peace Versus Justice' (2005/6) 6 *Nevada Law Journal* 421–5.

initiatives and contexts, such as for returning refugees and internally displaced persons (IDPs), in the context of disputed property ownership, or in DDR programmes.[13]

The increasing interaction of reconciliation with international law relevant to the termination and aftermath of armed conflict suggests a necessary role for reconciliation in the emergent field of *jus post bellum*. The temptation may be to provide a positive and perhaps legally operational definition and/or to incorporate reconciliation at the level of a principle or value of an emergent moral theory of *jus post bellum*. While framing reconciliation as a principle of *jus post bellum*, this chapter suggests an alternative may be possible that employs reconciliation as a critical device, not to be employed primarily by international law and policymakers as a discrete policy tool, but used responsively by victim-survivors and citizens of post-conflict states to strengthen the inclusive nature of the post-conflict processes, augmenting their voice and moral and political resources. In this way, reconciliation serves as an indicator not merely of its normative content, but also as a marker of the acceptance of other values pursued in the development of a just peace.

III. Reconciliation in *Jus Post Bellum*

Existing uses of reconciliation in *jus post bellum* discourse identify its potential in contributing to a sustainable just peace, but demonstrate ambiguities in its proposed application to the specificities and complexities of post-conflict societies. For Larry May, the pursuit of reconciliation is predicated on an attitude that preferences and privileges the desire for peacemaking rather than nationalistic or antagonistic attitudes.[14] The need for post-war reconciliation goes to the core of May's conception: that a just war is one that eventually leads to peace, which is better enabled by pursuit and knowledge of *jus post bellum* principles. May contends that reconciliation concerns the shifting of social attitudes and understandings to enable one side to a conflict to view the other as worthy of trust and equal status before the law.[15]Drawing on references from Vitoria and Grotius suggesting the need for clemency or humility, reconciliation fits well with May's undergirding principle of *meionexia* or moderation, in fostering a set of cooperative attitudes across parties in the *jus post bellum*. On this approach, reconciliation may not be possible if all sides to a conflict insist on terminating the conflict by demanding what is their due, though May makes an exception that victims of gross violations of human rights should not be encouraged to compromise on their rights and standing.[16] The question of reconciliation should be applied contextually to modern asymmetric armed conflict or negotiated conclusion to conflict, not exclusively to classical conflict between the armed forces of two states. It is one thing to ask a victorious army to exercise mercy over a vanquished one, it is quite another to burden victim-survivors with the duty to reconcile or show mercy to those who perpetrated gross violations of human rights against them.[17]

[13] Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf (eds), *Disarming the Past: Transitional Justice and Ex-Combatants* (New York: Social Science Research Council 2010).

[14] Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012).

[15] Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge University Press 2005) ch. 13.

[16] May, After War Ends (n 14) 88.

[17] Colleen Murphy 'Political Reconciliation, Jus Post Bellum and Asymmetric Conflict' (2015) 62 *Theoria* 43*;* Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge University Press 2010).

In contrast, Coleen Murphy argues the overarching aim of *jus post bellum* is to contribute to the repair of the relationships damaged during conflict to develop political interaction until it is based on a minimally acceptable threshold level on reciprocal agency. On this account, the goal of reconciliation suggests that just reconstruction in *jus post bellum* should be broader than a mere cessation of violence and restoring the *status quo ante*, as more transformative approaches are necessary to move beyond the material social and political conditions that led to armed conflict and human rights violations.[18] For Murphy, the just reconstruction of a community torn apart by warfare requires rebuilding (i) the rule of law and (ii) the conditions needed for relational capabilities, including a minimally functioning economy.[19] May distinguishes this approach, suggesting: 'Murphy focuses on overcoming a climate of corruption and oppression, whereas I am concerned with healing the wounds inflicted by war and mass atrocity where there may not have been the kind of institutionalised oppression that Murphy addresses'.[20] It may be profitable for a comprehensive account of *jus post bellum* to consider not merely reconciliation between two warring factors as social groups, but also to incorporate the role of institutions as objects of reconciliation. Legal, political, and social institutions can play a significant role in either facilitating or inhibiting the pursuit of reconciliation in post-conflict or post-authoritarian states.[21]

For Daniel Philpott, 'reconciliation, both as a process and an end state, is itself a concept of justice. Its animating virtue is mercy and its goal is peace'.[22] On this approach, reconciliation is achieved through a set of six political practices (socially just governance, acknowledgement, reparations, punishment, apology, and forgiveness) that seek to restore a measure of human flourishing and increases the legitimacy that citizens bequeath to their governing institutions or to their state's relationship with other states.[23] Philpott views reconciliation as a holistic process: 'a *process* of restoration as well as a *state* of restoration, addresses the wide range of harms that crimes cause, and enlists the wide range of persons affected by these crimes'.[24] These practices and the deeper goals they seek to establish add up to an ethic that is both an ideal of justice as well as a process of promoting justice.[25] On this account reconciliation takes on a maximalist meaning, incorporating features of transitional justice and being equated with one conception of a just peace.[26]

Finally, Andrew Rigby argues that a necessary feature of any just peace, particularly in post-civil war situations, is that it is a durable one that warrants the commitment of all relevant stakeholders. As a result post-conflict policy initiatives should address the pains of the past so that such experiences cease to dominate the present and enable all citizens to construct and reproduce new memories shorn of the desires for revenge and retribution that can destroy a fragile peace.[27] On Rigby's account, for people to become reconciled to

[18] Murphy 'Political Reconciliation' (n 17) 58.
[19] Ibid.
[20] May (n 14) 89.
[21] Ioana Cismas, 'Reflections on the Presence and Absence of Religious Actors in Transitional Justice Processes: On Legitimacy and Accountability', in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 302–43.
[22] Daniel Philpott, 'An Ethic of Political Reconciliation' (2009) 23 *Ethics and International Affairs* 389, 390.
[23] Ibid.
[24] Ibid. 392. Emphasis in original.
[25] Ibid. 399.
[26] Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford University Press 2012).
[27] Andrew Rigby, 'Forgiveness and Reconciliation in *Jus Post Bellum*', in Malcom Evans (ed.), *Just War Theory: A Reappraisal* (Edinburgh University Press 2005) 177–202, 183.

loss as a way of dealing with the pain of the past it is necessary for them to reinterpret that past, to reconstruct their memories in a manner that eases the intensity of feelings of hatred and bitterness and open up the possibility for new relationships with those once deemed responsible for their suffering.[28]

Beyond these accounts references to reconciliation in *jus post bellum* literature broadly adopt the posture taken to the concept in transitional justice, despite the potential for divergence or adaptation between *jus post bellum* and that field.[29] What remains absent in the literature to date is how the goals of *jus post bellum* impact on the reasons for action of individual decision makers, especially individual legal officials, attempting to use *jus post bellum* to guide their conduct. Conceiving of reconciliation as a substantive end-point will not help guide individual behaviour. In addition, reconciliation as one end-goal among others may continue a narrative that values must be compromised and traded off in *jus post bellum*, rather than viewed as a coherent network of value.[30] In the alternative, it constitutes the entirety of a just peace, and thus does not help guide individuals in cases of apparent value conflicts or trade-offs in which they may be engaged. In addition, the question of how reconciliation might work as a principle of *jus post bellum* in guiding the behaviours and attitudes of an individual victim-survivor or citizen in a post-conflict state remains unaddressed.

While consideration of reconciliation in *jus post bellum* in this context will benefit from the experiences of transitional justice practice, and individual experiences before truth commissions or traditional forms of local-level reconciliation, our approach should not be bounded by the experience of that field. Previous discussions of *jus post bellum* have noted the potential for it to overlap but extend beyond the field of transitional justice, to consider issues of socio-economic rights and economic reconstruction, environmental protection, and property rights, with which transitional justice is not primarily concerned. Moreover, while it is possible to frame reconciliation as the process and end-point of all processes concerned with the pursuit of a just peace, it is unclear how such a technique does distinctive work as part of a *jus post bellum* approach. The conception of reconciliation offered must therefore seek to be relevant to the full range of activities that may operate under a *jus post bellum* framework but also provide normative guidance for law-applying officials, victim-survivors, and citizens engaging with such a framework.

IV. Disaggregating the Elements of Reconciliation

Any review of the diverse literature on reconciliation suggests that it cannot be narrowed down into a one-size-fits-all definition. Ongoing ambiguity in definition may enable governments to claim they pursue reconciliation, while fostering impunity or ignoring victims and the causes of conflict or violence.[31] As a result there remains value in disaggregating

[28] Ibid.

[29] Jens Iverson, 'Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) 7 *International Journal of Transitional Justice* 413.

[30] For a view of values as competitive, see Larry May, 'Integrity and Value Plurality' (1996) 27 *Journal of Social Philosophy* 123.

[31] Lorna McGregor, 'Reconciliation' (n 2) 158.

the elements of reconciliation discourse,[32] to see how they interact with emergent *jus post bellum* ideas.

First, we need to set appropriate expectations regarding value goals in post-conflict societies. In particular, we can expect victim-survivors and members of a post-conflict society to disagree about reconciliation, among other value goals, mirroring scholarly or theoretical disagreement. Paul van Zyl notes 'there can be no blueprint that satisfies a wide spectrum of citizens'.[33] Members of post-conflict societies legitimately disagree about how to address the past and how to achieve public goods for the future.[34] The risk is that disagreement around reconciliation may thus cause individuals or groups to disengage with post-conflict processes if they believe their conception of reconciliation is not understood and accommodated. Christine Bell asserts: 'Expecting victims to give up retributive desires in favour of reconciling narratives may not contribute to their "healing" at all'.[35] Second, to mitigate this risk, reconciliation should not be understood as impunity or a substitute for justice. A key risk with international interveners is that the actual goal is not a just peace but 'just a peace'—without regard to its substantive justice.[36] International legal obligations and moral commitments to accountability suggest the necessity of offering an account of reconciliation that acknowledges a necessary element of criminal prosecutions and individual accountability in post-conflict societies. Indeed, it may be profitable to consider whether reconciliation is an essentially contested concept, that is, the type of idea that benefits from contestation and discussion about its meaning.[37]

Third, conceptions of reconciliation will necessarily be informed by social context and national/local but should not depend exclusively on a religious or culturally specific conception.[38] Reconciliation has a significant basis in religious and traditional thought.[39] In some post-conflict environments, religious and traditional conceptions of reconciliation and forgiveness have been used and can present genuine opportunities for reconciliation.[40] However, several limitations undermine the applicability of religious or traditional approaches to reconciliation. As culture-specific tools, they are necessarily limited to the ethnic, religious, and regional communities in which they are applied. In addition, some traditional or religious approaches may marginalize the role of women or young people or be subject to political manipulation.[41] Moreover, conflict can damage the capacities of

[32] Bloomfield, 'On Good Terms' (n 1) 3–35.

[33] Paul van Zyl, 'Dilemmas of Transitional Justice: The Cause of South Africa's Truth and Reconciliation Commission' (1999) 52 *Journal of International Affairs* 647.

[34] James Gallen, 'Jus Post Bellum: An Interpretive Framework', in Jens Iverson, Jennifer Easterday, and Carsten Stahn (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 65.

[35] Christine Bell, 'Dealing with the Past in Northern Ireland' (2003) 26 *Fordham International Law Journal* 1095, 1095.

[36] See Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton University Press 2011).

[37] Walter Bryce Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167.

[38] Pablo de Greiff, 'The role of apologies in national reconciliation processes: On making trustworthy institutions trusted', in Mark Gibney (ed.), *The Age of Apology: Facing up to the Past* (University of Pennsylvania Press 2007) 121–2

[39] Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (Rowman & Littlefield 2000); Jeffrey Haynes, 'Conflict, Conflict Resolution and Peacebuilding: The Role of Religion in Mozambique, Nigeria and Cambodia' (2009) 47 *Commonwealth & Comparative Politics* 52; Jerald D. Gort, Henry Jansen, and Hendrik M. Vroom (eds), *Religion, Conflict and Reconciliation: Multifaith Ideals and Realities* (Rodolphi 2010).

[40] Erin Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *International Journal of Transitional Justice* 91.

[41] Susanne Alden, 'Internalising the Culture of Human Rights: Securing Women's Rights in Post-Conflict East Timor' (2007) 1 *Asia-Pacific Journal of Human Rights and the Law* 1.

traditional leaders to perform justice and reconciliation rituals and challenges the appropriateness of peacetime conceptions of reconciliation or justice in addressing mass human rights violations.[42] Finally, religious or traditional leaders may have been involved in the perpetration of violence or conflict, which could delegitimate them as facilitators of reconciliation. As a result, while national, regional, and local level approaches to reconciliation will necessarily be culturally and perhaps religiously informed, a distinctive post-conflict conception will likely emerge with the interaction of secular and/or foreign conceptions of reconciliation and should be encouraged.

Fourth, reconciliation should not be equated with forgiveness or the mere absence of violence. Theorists of reconciliation generally recognize that reconciliation is a 'scalar' concept, which allows for minimal and maximal versions of improved relationships,[43] but the post-conflict context suggests these two extremes of blanket forgiveness or non-violence should be avoided. Victim-survivors of gross violations of human rights across several post-conflict societies legitimately object to coerced or centrally organized forgiveness.[44] Martha Minow writes '[t]o forgive without a good reason is to accept the violation and devaluation of the self'.[45] David Bloomfield argues that victims often conclude reconciliation means they must give up some claims, or accept imperfect justice, or be forced unilaterally to forgive those who made them suffer.[46] Amy Gutmann and Dennis Thompson argue that societal forgiveness 'is not desirable from a democratic perspective independently of forgiveness by the victims themselves'[47] and David Crocker states that it is 'morally objectionable … for a truth commission or any other governmental body to force people to agree about the past, forgive the sins committed against them, or love one another'.[48] Susan Dwyer thus argues that 'reconciliation … is conceptually independent of forgiveness. This is a good thing, for it means that reconciliation might be psychologically possible where forgiveness is not'.[49] It is therefore preferable to separate forgiveness and reconciliation. In particular, placing the burden of forgiveness on victim-survivors to personally forgive their perpetrators seems ethically intolerable.[50]

Similarly, we must avoid the alternative temptation to equate reconciliation with mere coexistence. Coexistence is a more mundane term, with none of the religious overtones or ease of use as a pejorative term. Louis Kreisberg has argued that coexistence better suits the basic premise of compromise that underpins democratic politics—coexistence as accommodation—without the interpersonal, subjective overtones of emotion and

[42] International Idea, Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences, 185.

[43] David Crocker, 'Reckoning with Past Wrongs: A Normative Framework' (1999) 13 *Ethics and International Affairs* 43. Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge University Press 2007).

[44] Rebecca Saunders, 'Questionable Associations: The Role of Forgiveness in Transitional Justice' (2011) 5 *International Journal of Transitional Justice* 119.

[45] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 2009) 17.

[46] Bloomfield, 'On Good Terms' (n 1) 7.

[47] Amy Gutmann and Dennis Thompson, 'The Morality of Truth Commissions', in Robert I. Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 31

[48] David A. Crocker, 'Truth Commissions, Transitional Justice, and Civil Society', in Robert I. Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 108.

[49] Susan Dwyer, 'Reconciliation for Realists', in Carol Prager and Trudy Govier (eds), *Dilemmas of Reconciliation: Cases and Concepts* (Wilfred Laurier University Press 2003) 95, 106

[50] Karen Brounéus, *Reconciliation: Theory and Practice for Development Cooperation* (SIDA 2003) 3

emotional change of reconciliation.[51] Kreisberg identified a range of coexistence based on the degree to which groups are integrated together in terms of interaction and interdependence, and the extent to which the relationship is mutually constructed or unilaterally imposed and sustained. David Crocker has similarly suggested two levels of coexistence,[52] suggesting a thin conception of non-lethal coexistence and a thicker conception of democratic reciprocity in which former perpetrators, victims, and bystanders are reconciled insofar as they respect each other as fellow citizens and participate in democratic decision-making. However, if we adopt a thin concept of reconciliation as mere coexistence or non-violence, we have not addressed social relationships in a sustainable fashion, nor examined the underlying causes of conflict. Coexistence also seems, in its thinner conception, to be a pragmatic idea, suitable as a state of affairs, but hard to justify to citizens of a post-conflict state: 'hate each other, but don't harm each other' does not seem particularly persuasive. Moreover, a thin conception of coexistence as non-violence, without addressing legitimate grievances, may disable co-operation between divided groups in a post-conflict society. Whatever our theoretical conception of a just peace, it should necessarily be a sustainable and principled one. A thicker more positive conception of coexistence merges into civic accounts of reconciliation, discussed below.

Fifth, national and personal reconciliation are different. Both must be pursued. Priscilla Hayner distinguishes between individual and national/political reconciliation.[53] Hayner suggests: 'there are certainly examples of truth commission processes leading directly to healing and forgiveness for some individuals, but knowing the global truth or even knowing the specific truth of one's own case will not necessarily lead to a victim's reconciliation with his or her perpetrators'.[54] The literature recognizes the value in political and national reconciliation, and its scope suggests it provides an appropriate goal for the fields of law and practice that populate *jus post bellum*. Bloomfield argues that national reconciliation extends beyond those who have directly suffered and those who perpetrated violence to incorporate a community and society-wide dimension 'that demands a questioning of the attitudes, prejudices and negative stereotypes that we all develop about "the enemy"'.[55] Charles Lerche asserts that national reconciliation requires a process extending 'beyond coming to terms with the past to seeking out and implementing more broadly equitable models of governance … to build a society that is truly participatory and fulfilling to all of its groups'.[56] These conceptions of reconciliation suggest national reconciliation should inform an overarching approach in *jus post bellum* across fields of economic reconstruction or the (re)development of good governance, among others. Political reconciliation also has an important symbolic and communicative role. Michael Ignatieff has remarked, 'Leaders give their societies permission to say the unsayable, to think the unthinkable, to rise to gestures of reconciliation that people, individually, cannot imagine'.[57]

[51] Louis Kreisberg, 'Changing forms of coexistence', in M. Abu-Nimer (ed.) *Reconciliation, Justice and Coexistence* (Lexington Books 2001) 47–64.

[52] David Crocker, 'Punishment, Reconciliation, and Democratic Deliberation' (2002) 5 *Buffalo Criminal Law Review* 504.

[53] Priscilla Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions* (Routledge 2011) 155.

[54] Ibid.

[55] David Bloomfield 'Reconciliation: An Introduction', in David Bloomfield, Teresa Barnes, and Luc Huyse (eds), *Reconciliation After Violent Conflict: A Handbook* (IDEA 2003) 10–18, 13.

[56] Charles Lerche, Truth Commissions & National Reconciliation: Some Reflections on Theory and Practice' (2000) 7 *Peace and Conflict Studies* 1.

[57] Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (Holt 1998) 188.

However, the risk with an exclusively elite-led political reconciliation is that it may appear distant and irrelevant to victim-survivors of conflict or citizens disconnected from political power more generally. Empirical evidence from truth commissions demonstrates that some victim-survivors view the experience as primarily for political benefits, disconnected from their real priorities, or worse that those who gave evidence and bore witness were (re-) traumatized by the experience.[58] Moreover, we risk conflating individual and political reconciliation. Bloomfield notes that individual or interpersonal psychological ingredients (concerning hurt, pain, trauma, acknowledgement, reparation, punishment, revenge, healing, forgiveness, apology, and so on) are often used to discuss the very different context that applies to national or group reconciliation in a post-conflict society.[59] The differences between political and individual reconciliation must be respected. Michael Ignatieff asserts, '[n]ations, properly speaking, cannot be reconciled to other nations, only individuals to individuals'.[60] Donna Pankhurst suggests 'what is required psychologically for an individual to recover from trauma and be reconciled with the past … need bear no resemblance to what might be required for a society to do so'.[61] Similarly Rosalind Shaw concluded 'Nations … do not have psyches that can be healed. Nor can it be assumed that truth telling is healing on a personal level: truth commissions do not constitute therapy'.[62] To be effective, reconciliation must be considered as *both* national reconciliation *and* individual reconciliation. Both forms of reconciliation depend upon the social circumstances in which individuals exist, which can enable social cooperation and reconciliation or provide legitimate reasons for mistrust and perpetuate a non-reconciled society.[63] An increasingly popular justification for national-level reconciliation practices is that principles and values will filter down and diffuse across the wider community.[64] While this may be the case in limited contexts, it cannot be assumed and it would seem inappropriate for political elites alone to determine the timing, nature, and consequences of political *and* individual forms of reconciliation.[65] In particular, an elite-led reconciliation policy that fails to fully address the structural causes underpinning conflict can entrench existing structural imbalances and power relationships and thus gives the disempowered nothing new to which to reconcile.[66] National reconciliation, or politically led reconciliation, can be hugely damaging to victim-survivors and do more harm than good in the pursuit of sustainable and just peace. The remainder of this chapter will therefore seek to construct a conception of how national and political reconciliation may be pursued as elements of *jus post bellum* based on the limitations identified in this section. In particular, the role of reconciliation in contexts beyond those considered in transitional justice should be borne in mind.

[58] Alfred Allan, 'Truth and Reconciliation: A Psycho-Legal Perspective' (2000) 5 *Ethnicity and Health* 191, 197.
[59] Bloomfield, 'On Good Terms' (n 1) 10.
[60] Michael Ignatieff, 'Articles of Faith' (1996) 25 *Index on Censorship* 110.
[61] Donna Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace' (1999) 20 *Third World Quarterly* 239.
[62] Rosalind Shaw, Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone, Washington, DC: United States Institute of Peace Special Report 130, 2005.
[63] Jodi Halpern and Harvey M. Weinstein, 'Rehumanizing the Other: Empathy and Reconciliation' (2004) 26 *Human Rights Quarterly* 561, 582.
[64] Lorna McGregor, 'Reconciliation' (n 2) 166.
[65] Ibid.
[66] Ibid. 169.

V. Setting Expectations: A Holistic, Critically Engaged Conception of Reconciliation

Above, we have established that reconciliation is contested and operates at least at political and individual levels. We have also noted the risks are that it is equated with forgiveness and is too demanding of victim-survivors, or that it is equated with impunity or the mere absence of violence. If *jus post bellum* is to position reconciliation as an organizing goal or principle, it needs to examine how it applies in practice. To consider the application of reconciliation as part of *jus post bellum,* this chapter suggests that reconciliation should primarily be understood not merely as an end-goal, but also as an evaluative technique for the individuals, both victim-survivors and post-conflict citizens more generally, of their experience of the practice of *jus post bellum.* The success of a post-conflict regime and its approach to transition is often judged, both by locals and by the international community, by its treatment of the past—how victims and perpetrators are treated as viewed by these groups, each other, and the society in general.[67] Reconciliation can play a role in providing an evaluation of this success.

National experiences of armed conflict are highly diverse, but can be minimally understood as being destructive of social and civic trust and the rule of law.[68] The restoration of these social conditions is recognized as structural conditions necessary for the operation of a range of fields relevant to *jus post bellum*, such as peacebuilding, economic development, transitional justice, or security sector reform.[69] The present suggestion is that citizens have a basis not to reconcile with the state or with one another where legitimate grievances are not met or where apparent incoherences and contradictions in *jus post bellum* policy are not justified. For Pablo de Greiff, an 'unreconciled' society is one in which resentment characterizes the relations between citizens and between citizens and their institutions. It is one in which people experience anger because their norm-based expectations have been threatened or defeated.[70] Equally, unreconciled societies are characterized by massive and systematic failures to recognize individuals as subjects of fundamental value and dignity, which entitles them both to basic protections and to raise claims. This failure of recognition leads to a legitimate breakdown of social trust among citizens. Reconciliation then can be seen as the process of response to these failures:

> Reconciliation, minimally, is the condition under which citizens can trust one another *as citizens* again (or anew). That means that they are sufficiently committed to the norms and values that motivate their ruling institutions, sufficiently confident that those who operate those institutions do so also on the basis of those norms and values, and sufficiently secure about their fellow citizens' commitment to abide by and uphold these basic norms and values.[71]

[67] M. Gellman, 'No Justice, No Peace? National Reconciliation and Local Conflict Resolution in Cambodia' (2008) 32 *Asian Perspective* 37, 47.

[68] Pablo de Greiff, Articulating the Links between Transitional Justice and Development', in Roger Duthie and Pablo de Greiff (eds), *Transitional Justice and Development: Making Connections* (SSRC 2009) 58.

[69] Gallen (n 34) 65–8.

[70] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50 *Politorbis* 17, 25; Margaret Urban Walker, *Moral Repair* (Cambridge University Press 2006) 146.

[71] De Greiff, 'A Normative Conception of Transitional Justice' (n 70) 26

On this account, the process of establishing reconciliation and interrogating whether it is legitimate in a given context, operates as a form of civic discourse. Susan Dwyer conceptualized reconciliation as 'bringing apparently incompatible descriptions of events into narrative equilibrium', a process involving the articulation of a range of interpretations of those events and the attempt by the parties 'to choose from this range of interpretations some subset that allows them each to accommodate the disruptive event into their ongoing narratives'.[72]

Applied to *jus post bellum* the role of reconciliation would enable victim-survivors and citizens to contest the justice and legitimacy of the practice of particular initiatives, such as a truth commission, or the settlement of property disputes, or the distribution of wealth through taxation or reparations. Building on my own previous work, we can conceive of reconciliation as offering a user-centred, rather than legal official centred, evaluation of *jus post bellum* as a coherent account of a just and sustainable peace. Previously I have employed Ronald Dworkin's principle of integrity to account for the need to present a coherent moral justification of the whole project of *jus post bellum* and to use *jus post bellum* as a moral evaluative tool to critique apparent inconsistencies or hypocrisies in relevant international law and practice.[73] The principle of integrity was primarily addressed to a law-creating or law-applying official. Addressing the principle of integrity from another angle, we could ask how an individual citizen of a post-conflict state can reconcile their own specific moral commitments, values, and experiences with the armed conflict and with steps the post-conflict state has taken to address the harm and division individuals and communities have experienced. Are there still good and legitimate reasons neither to trust the state, nor to reconcile with the other? On this account, reconciliation offers an interface between the views of individual citizens and the law and policy creating and applying official, offering the latter feedback as to whether their approach has been legitimately accepted.

Second, as a form of civic discourse, reconciliation can play a role in countering narratives that the post-conflict society continues the conflict by other means.[74] While it is inevitable everyone will not get everything they want in a post-conflict settlement or society, viewing reconciliation as aimed at rebuilding trust between citizens and state and citizens themselves offers the justification that a post-conflict settlement stands for a principled compromise, part of a larger project and practice of recognizing individual citizens and victim-survivors as objects of fundamental value and equal concern and importance. It suggests the potential to view *jus post bellum* activities hopefully, that an appropriate combination of actions and attitudes may lead to a virtuous circle, rather than to view them in zero sum terms.

Third, reconciliation as a form of civic discourse and evaluative tool counters the risk that elite-level practitioners focus on objective social conditions and neglect the subjective emotional experience of individuals and their attitudes towards one another regarding reconciliation.[75] As a second order form of analysis of post-conflict law and policy, presently the purview of academics and theorists, the risk is that *jus post bellum* remains totally disconnected from the views and preferences of victim-survivors and individual

[72] Susan Dwyer, 'Reconciliation for realists', in Carol A. L. Prager and Trudy Govier (eds), *Dilemmas of reconciliation: Cases and concepts* (Wilfred Laurier University Press 2003) 100.

[73] Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87.

[74] Claus Von Clausewitz, *On War* ([1873] Princeton University Press 1976) 75.

[75] De Greiff, 'The role of apologies' (n 38) 123.

citizens in post-conflict states. Andrew Rigby has argued that policymakers overly privilege institution-building and infrastructural reconstruction, and neglect the 'subjective' and lived experience of individuals subject to their policies at community and individual levels. In particular they fail to take account of the emotional challenges faced by those seeking to come to terms with loss in the context of post-conflict life.[76] De Greiff argues that if reconciliation is to mean anything at all it must refer to something individuals either experience or not.[77]

Fourth, while there is a role for discrete and intentional reconciliation activities where culturally and contextually appropriate, reconciliation can also be pursued indirectly through other activities in *jus post bellum*. Reconciliation on de Greiff's account is epiphenomenal, that is, it results from pursuing life, or in this case, law and policy, in a certain way, rather than being a goal to seek directly.[78] As a result, there are very few things that can be done to promote reconciliation independently of other *jus post bellum* goals or initiatives.[79] Reconciliation is therefore not one merely instrument or field among several that constitute *jus post bellum*, including transitional justice, peacebuilding, or economic reconstruction. Rather, as Bloomfield and Philpott agree, it is the overall relationship-oriented process within which these diverse instruments are the constitutive parts.[80] Viewing reconciliation as a civic discourse enables it to operate as a principle across the fields relevant to *jus post bellum* in a dynamic fashion. In addition, however, recognizing its dynamic role should prompt us to consider how *jus post bellum* as a discourse and emergent practice can itself facilitate reconciliation through the (re)structuring of post-conflict processes of legal, political, and social change.

VI. The Structural Role of *Jus Post Bellum* and the Need for Interdisciplinarity

The role of reconciliation as a process in *jus post bellum* therefore can enable and empower victim-survivors to legitimately critique post-conflict activities that do not warrant legitimate trust nor contribute to individual understandings of national or individual reconciliation. *Jus post bellum* can also take a constructive role by interrogating the structure of responses to armed conflict to enable an international, national and local climate to be conducive to organic reconciliation processes.[81] Planning policy for reconciliation should therefore begin with conflict analysis assessing the context of the conflict, root causes including conflict actors and the role of the international community, the nature of victimization, consequences including psychological trauma, and the existence of any initiatives for reconciliation at different levels in society, among other issues.[82] Questions about the transition itself, whether imposed or negotiated, and the content of any peace agreement, are

[76] Jeff Goodwin, James Jasper, and Francesca Polletta (eds), *Passionate politics: Emotions and social movements* (University of Chicago Press 2001); Martha Nussbaum, *Political Emotions: Why Love Matters for Justice* (Belknap 2013).
[77] De Greiff, 'A Normative Conception of Transitional Justice' (n 70) 26.
[78] De Greiff, 'The role of apologies' (n 38) 122.
[79] Ibid. 126.
[80] Bloomfield, 'On Good Terms' (n 1) 11; Philpott, 'An Ethic of Political Reconciliation' (n 22).
[81] Lorna McGregor, 'Reconciliation' (n 2) 171.
[82] Brounéus (n 50) 6.

also relevant to the development of reconciliation. The condition of the society including its power dynamics and stakeholders is also relevant to how legitimate forms of reconciliation can be pursued.[83] Analysis of the causes of conflict are already relevant considerations in several fields relevant to *jus post bellum* such as transitional justice, peacebuilding, or security sector reform.

A number of authors argue that minimum preconditions should exist before it is legitimate to consider questions of reconciliation. Andrew Rigby suggests that any durable peace settlement should be inclusive, offer meaningful human security, including DDR, the development of a working state, the pursuit of economic reconstruction, and socio-cultural repair work.[84] David Becker suggests that security, the pursuit of truth about the violent past, and some form of post-conflict justice are necessary conditions, which will inevitably take time to result in changes to behaviours and attitudes, while mediated by cultural expectations and understandings of reconciliation and forgiveness.[85] The risk of such approaches is that they offer a laundry list of conditions before which reconciliation can be pursued, which may be disabling to individual policymakers seeking to prioritize and sequence limited resources.

A key opportunity for *jus post bellum* in this process is to enable effective sequencing of activities to ensure that seemingly discrete disciplines and fields of practice can offer complementary rather than competitive contributions to a post-conflict society, such that they meaningfully offer a coherent form of building civic trust and legitimating processes of reconciliation. We have above identified that while reconciliation intrudes into the legal realm, it also has a rich discourse and practice in theology and can often find both genuine expression and manipulation among political elites. Carsten Stahn, Jennifer Easterday, and Jens Iverson express concern that the discourse, interpretive and practice communities of *jus post bellum* that have been built around overlapping and pre-existing post-conflict fields and areas will interact in ways that will cause confusion: 'there is a risk that the multi-disciplinary study of jus post bellum will lack inter-disciplinary dialogue—with each field taking siloed approaches—which could confuse or fragment the concept'.[86] The issue of disciplinary conflict is particularly acute in post-conflict societies and humanitarian contexts. As David Kennedy puts it, 'When violence breaks out, it makes a difference whether one sends lawyers, doctors, soldiers, priests, therapists, or aid specialists to respond'.[87] The obvious risk is that 'Humanitarian policy makers can become committed to a school of thought—in economics, in law, in political science—and resolve choices among policy alternatives by defaulting to the option which seems to exemplify their methodological commitment—to positivism, naturalism, neo-classicalism, institutionalism, formalism or anti-formalism'.[88] Diverse methodological starting points across disciplines run the risk of actors from different disciplines talking past one another and risk inhibiting shared or

[83] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2003) 35 *Columbia Human Rights Law Review* 661, 726–8.

[84] Andrew Rigby, 'Forgiveness and Reconciliation in Jus Post Bellum' in Mark Evans (ed.) *Just war theory: A Reappraisal* (Edinburgh University Press 2005) 181.

[85] David Becker, 'Reconciliation: The Wrong Track to Peace?' (2005) 3 *Intervention* 167, 176.

[86] Jens Iverson, Jennifer Easterday, and Carsten Stahn, 'Epilogue: *Jus Post Bellum*: Strategic Analysis and Future Directions', in Jens Iverson, Jennifer Easterday, and Carsten Stahn (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 542–53, 544, 549.

[87] David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004) 124.

[88] Ibid. 122.

common understanding of concepts shared across *jus post bellum* related disciplines and fields such as reconciliation.

This challenge means that *jus post bellum* discourse may need to consciously provide genuinely trans-disciplinary dialogue on cross-cutting themes that impact on each area relevant to *jus post bellum,* including reconciliation, rather than hoping it happens organically. Such an approach should not merely include acceptance of the legitimacy of other disciplinary perspectives and eschewing disciplinary competition, but should extend to active steps for interdisciplinary learning, through knowledge sharing, skills training and greater interdisciplinary analysis, research and institutional research structures such as interdisciplinary centres on transitions and post-conflict issues. The complex and multidimensional nature of transitional societies warrants an appropriately detailed and rich analysis which may be of added value to practitioners.

For instance, for those coming from an international law or human rights background, the focus of the individuality of the gross violations of human rights, and the requisite need for reconciliation and complex forms of redress, must be placed in the context of a complicated web of violations to understand the systematic nature of violations committed during conflict and the structural conditions in which such violations occur. We already see a growing awareness of this in transitional justice, with moves to examine violations of socio-economic rights. Recent events on the environment and property rights in *jus post bellum* demonstrate awareness of the need to consider a response to conflict in a holistic framework.

However, features that have been comparatively neglected to date, which warrant consideration in the context of reconciliation, are the emotional and psychological conditions that surround conflict and mass atrocity and their impact on related fields. Neta Crawford observed, 'postconflict peacebuilding efforts too frequently fail … because peace settlements and peacebuilding policies play with emotional fire that practitioners scarcely understand but nevertheless seek to manipulate'.[89] Similarly, Daniel Bar-Tal suggests that 'a psychological infra-structure' develops in a society's or group's shared beliefs: around selfhood, collective memory, ideologies, or views of victimization or legitimation.[90] Bar-Tal argues that this leads to a conflictive ethos in society, created by these societal beliefs regarding one's own group, the adversary and the relationship between them, which can fuel or perpetuate conflict. Similarly John Darby and Roger MacGinty refer to a 'custom of violence' that is created in protracted conflict which 'alters fundamentally the entire society's norms of acceptable behaviour'. Darby and MacGinty conclude by stating that the 'central task [of the peace process] is to alter human behaviour from a helpless acceptance of fell deeds to the civilised conduct of human relationships'.[91] A further perspective is offered from a rational choice background, as Barbara Walter argues that incentives are key to understanding social or cultural change such that post-conflict should seek to ensure that no individual feels that continuing life in the current condition is worse than the possibility of death in war,

[89] Neta Crawford, 'The Passion of World Politics: Propositions of Emotion and Emotional Relationships' (2000) 24 *International Security* 116.

[90] Daniel Bar-Tal, 'From Intractable Conflict Through Conflict Resolution to Reconciliation: Psychological Analysis' (2000) 21 *Political Psychology* 351. Daniel Bar-Tal, 'Societal Beliefs in Times of Intractable Conflict: The Israeli Case' (1998) 9 *International Journal of Conflict Management* 22.

[91] John Darby and Roger MacGinty, 'Conclusion: The Management of Peace', in John Darby and Roger MacGinty (eds), *The Management of Peace Processes* (Macmillan Press 2000).

or that there is a closed political system that does not recognize their interests or permit change except by use of violence.[92] An understanding of these types of emotional dynamics of post-conflict societies will allow theorists and practitioners to comprehend more clearly the challenges of meaningful application of *jus post bellum* principles and initiatives in real-world contexts, and enable greater facilitation of reconciliation.

VII. Role of International Community in Reconciliation

Finally, mindful of these complex challenges for the practice of *jus post bellum* in contributing to reconciliation, it is appropriate to interrogate the role of the international community, particularly in the explicit promotion of reconciliation in policy design. Luc Huyse argues that '[l]asting reconciliation must be home-grown because in the end it is the survivors who assign meaning to term and the process'.[93] Brandon Hamber asserts 'the notion of 'reconciliation' [is] a complex modern foil used to market unfavourable compromises made during political negotiations'.[94] Such comments are used traditionally regarding politically powerful perpetrators but I think should also be considered to apply to donors who can drive a post-conflict agenda, in particular where such states fail to acknowledge any structural role in creating, facilitating, or profiting from the relevant armed conflict. For instance, one could frame the international community's development and reconstruction financing to Timor-Leste as constituting a form of reparation and reconciliation for their inaction during Timor-Leste's occupation by Indonesia. However, such aid fails to capture the crucial element of *acknowledgement* of responsibility for a wrong committed, a point strongly resisted by the international community.[95] While the UN secretary-general recommended that the international community provide funding for a solidarity fund for a reparations scheme for Timor-Leste, which could serve for this purpose, this proposal was not acted upon.[96] If international actors want to model reconciliation for post-conflict societies, they would benefit from practising what they preach rather than instrumentally using post-conflict states to further their own commercial or foreign policy objectives alone.

Secondly, international actors must be aware of the moral hazard they create with a loose use of reconciliation as part of their financial support. Erin Daly has argued that civil society organization may value the objective of reconciliation, because 'they truly believe in it or because they truly believe that reconciliation has cash value insofar as donor nations insist on a conciliatory component of the transitional agenda'.[97] Donor funding is typically granted on short cycles of up to five years and as a result, tangible outputs are expected, which suggests the need to distinguish one's own organization from its 'competitors'.[98]

[92] Barbara Walter, 'Does Conflict Beget Conflict? Explaining Recurring Civil War' (2004) 41 *Journal of Peace Research* 371.

[93] Luc Huyse, 'The Process of Reconciliation', in D. Bloomfield, T. Barnes, and L. Huyse (eds), *Reconciliation after Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance 2003) 23.

[94] Brandon Hamber, 'Flying Flags of Fear' (2004) 6 *Bulletin of the Royal Institute for Inter-Faith Studies* 113, 130.

[95] Leigh-Ashley Lipscomb, 'Beyond the Truth: Can Reparations Move Peace and Justice Forward in Timor-Leste?' (2010) 93 *Asia Pacific Issues* 5.

[96] UNSC Secretary-General, Report of the Secretary-General on justice and reconciliation for Timor-Leste (26 July 2006) UN Doc. S/2006/580.

[97] Daly (n 4) 84.

[98] Elena Baylis, 'Function and Dysfunction in Post-Conflict Justice Networks and Communities' (2014) 47 *Vanderbilt Journal of Transnational Law* 625, 667.

Bidders seek to keep their risks low to improve their chances of success.[99] As a result, bidders will not challenge or contradict any significant assumptions incorporated into the request for proposal or espoused by those involved in awarding the contract. The bidding process does not therefore encourage any serious discussion of lessons learned, especially from the mistakes of the past. This competitive bidding structure also does not encourage the sharing of lessons learned, as identifying lessons learned in prior projects may be used as a unique selling point in subsequent bids.[100] Aid agencies do not devote significant resources to promoting lessons learned. They are by their nature forward-looking institutions. As a result, the industries involved in areas relevant to *jus post bellum* may expect expertise, not learning or preparation: 'much learning is done through mistakes that could have been avoided through preparation based on the wealth of published knowledge'.[101] The absence of institutional learning for knowledge regarding shared norms—for instance, the rule of law—encourages reliance on personal and informal forms of knowledge transfer: 'there is no significant system of structured learning in which such information is actively analysed, critiqued and presented to those whose task is to apply the lessons'.[102]

None of this structure is suitable to the long term, personal, and epiphenomenal nature of reconciliation that has been discussed above. If international actors and donor states are to be explicitly involved in the business of reconciliation, they need to better foster the sharing of comparative experiences and lessons learned *and also* incorporate such learning into subsequent practice and policy. There is thus the potential for *jus post bellum* to serve a function in enabling academic and practitioner sharing of lessons learned, best practices, or policies in a framework that connects the dots between disparate existing groups of fields, scholars, and practitioners. The recent initiative from Academics Stand Against Poverty illustrates the potential for attempts to overcome some of these difficulties in a related area of mainstream economic development,[103] and demonstrate the value of academic research to practice.

Key therefore among the evaluative considerations for a specific action in a field relevant to *jus post bellum* is the consideration of second order questions. In addition to asking what a specific initiative will do, for example to reform the security sector or enable the settlement of property disputes, it is appropriate to ask whether a given initiative will enable individual citizens of a post-conflict society to legitimately have greater trust with one another or with state institutions. Can and how does such an initiative form part of an overall narrative that would legitimately enable individual citizens to reconcile to the shared future that the overall project of *jus post bellum* pursues? If *jus post bellum* discourse and emergent literature is to ask itself these questions, effective efforts for disciplines and practitioners to learn from one another must be consciously pursued.

[99] Wade Channell, 'Lessons Not Learned About Legal Reform', in Thomas Carothers (ed.), *Rule of Law Abroad* (Carnegie 2006) 152.
[100] Ibid. 153–4.
[101] Ibid. 150.
[102] Ibid. 151.
[103] Thomas Pogge and Luis Cabrera, 'Outreach, Impact, Collaboration: Why Academics Should Join to Stand Against Poverty' (2012) 26 *Ethics & International Affairs* 163.

VIII. Conclusion

Unreconciled relationships, 'those built on distrust, suspicion, fear, accusation … will effectively and eventually destroy any political system based on respect for human rights and democratic structures'.[104] Yet, as Timothy Garton Ash argues, 'the reconciliation of all with all is a deeply illiberal idea'.[105] It is in this apparent tension that reconciliation must play a role in *jus post bellum*. This chapter has sought to shape a conception of reconciliation that seeks to empower victim-survivors and citizens of post-conflict states, as the end-users of the process of *jus post bellum.* The desire in this chapter is that reconciliation can be used as a critical device, to identify legitimate areas of disagreement and unreconciled relationships and structures in post-conflict societies, and to enable affected victim-survivors and citizens to seek justification of these unreconciled conditions from their state and from relevant international organizations, donors, and civil society actors. This approach has the potential to engender meaningful hope among victim-survivors and citizens: that they are being heard, acknowledged, and responded to. This experience of citizens being understood as fundamental objects of concern may in turn enable such citizens to 'hope well' is to experience ourselves as agents of potential, confronting our limitations and seeking to move beyond them.[106] However, hope cannot survive without the conditions to sustain it. As a result, the chapter has gone on to consider the structural role *jus post bellum* can play in fostering better approaches to reconciliation. At this early stage, enabling law- and policymakers to benefit from consciously pursued interdisciplinary analysis, especially from social psychology, would strength our understanding of the actual reality of reconciliation in post-conflict states, rather than operating from mere constructions or theorizations. Finally, viewing reconciliation as a critical component of *jus post bellum* should humble us about the ability and appropriateness of the law, expertise, power, privilege to affect change in individual social attitudes and behaviours. Pablo de Greiff cautions that the relationship between law and policy efforts and reconciliation is complex: 'while transitional justice measures can contribute to making institutions trustworthy, actually trusting institutions is something that requires an attitudinal transformation that the implementation of transitional justice measures can only ground but not produce'.[107]

As the *jus post bellum* discourse continues to emerge and shifts towards a more practical focus, scholars and practitioners would benefit from mindfulness and consciousness about these large structural issues. In particular, the potential for *jus post bellum* to operate actively, not only as a top down academic framework for large areas of international law, but also as a bottom up space for advocacy regarding the coherent implementation of international law and policy relevant to the post-conflict arena should be strongly considered. Academic and policy spaces for interdisciplinary and inter-institutional collaboration may provide important first steps to more effectively advance the norms, laws, and policies relevant to *jus post bellum*.

[104] David Bloomfield 'Conclusion', in David Bloomfield, Teresa Barnes, and Luc Huyse (eds), *Reconciliation After Violent Conflict: A Handbook* (IDEA 2003) 168.
[105] Timothy Garton-Ash, 'True Confessions', *The New York Review of Books*, 17 July 1997, 37
[106] V. McGeer, 'The Art of Good Hope', *Annals, AAPSS*, 592, March 2004, 100–27.
[107] De Greiff, 'A Normative Conception of Transitional Justice' (n 70) 26.

7

Jus Post Bellum and the Evolution of Reparations

Reframing Reparations as Peacebuilding

*Cymie R. Payne**

I. Introduction

The obligation to provide reparations in relation to armed conflict at the present time is intended to implement principles of *jus post bellum* and to provide practical aid to assist the transition of war-torn societies to peace.[1] A just peace may require reparations, according to both ethical and consequentialist views. These different goals reflect the development of reparations in the last century. One of the evolutionary moves in this field of international law is towards recognizing individual rights to compensation. Another key move in the practice of reparations is the recognition that the environment is more than just the setting in which a war is fought; rather, it is an essential element to reconstructing society and building a just and sustainable peace, and it may have its own claims to reparations. Both of these are evidence of trends away from merely war-ending and towards peacebuilding. Reframing reparations goals as peacebuilding tools also has consequences for legal practice, specifically in the expectations of due process, scope of claims, valuation techniques, and distribution of funds to real claimants in interest (which can include individuals and the environment itself).

This evolution in reparations has occurred in parallel with the emergence of *jus post bellum* as an increasingly coherent body of norms and practices.[2] The norms that are identified by other authors—and the growing recognition of environmental integrity as an independent principle or norm that Koppe and I have noted and encouraged[3]—have shifted the roles of actors and broadened the scope of reparations. Retribution and accountability may retain some potency as motivations for reparations, but *jus post bellum* scholars suggest that increasing weight is now given to reconstruction.

The United Nations Compensation Commission (UNCC) is well-known for its extensive practice in individual mass claims and for making awards for recovery of damaged terrestrial and marine resources caused by Iraq's invasion and occupation of Kuwait in

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[1] As Jens Iverson reminds us, transitional justice and *jus post bellum* are distinct concepts. Jens Iverson, 'Contrasting the Normative and Historical Foundations of Transitional Justice and *Jus Post Bellum*: Outlining the Matrix of Definitions in Comparative Perspective', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Discipline(s)* (Oxford University Press 2014).

[2] Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Discipline(s)* (Oxford University Press 2014).

[3] Erik V. Koppe, 'The Principle of Ambituity', in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Brill Nijhoff 2014) 67; Cymie R. Payne, 'The Norm of Environmental Integrity in Post-Conflict Legal Regimes', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum* (Oxford University Press 2014) 1.

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1990–1991. This reflected the shift to the concept of peacebuilding, replacing score-settling between former adversaries: attention was refocused on using reparations to restore individuals and the environment so that society could rebuild, recognizing that environmental infrastructure—including hydrology, biodiversity, and soil—are important to the economy, culture, and the future. The grim fact that environmental damage is often irreversible makes the preventive function of reparations crucial, and this is where the accountability principle retains a meaningful role. Adding criminal sanctions ratchets up the disincentives for environmentally destructive conduct. The International Criminal Court's (ICC) new criteria for case selection and prioritization elevated the role of the environment by expressing the intent to consider the environmental damage inflicted on affected communities as a factor in weighing the gravity of a crime and prioritizing cases that result in destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land.[4]

In this chapter, I first review the definition of reparation and its role in *jus post bellum*, with reference to just war theory and state practice. Then I examine why an enhanced role for individuals and claims on behalf of the environment emerged in the late twentieth century, and I argue that this development is the result of historical events and is in line with concepts of peacebuilding. Here I also discuss the public nature of environmental damage claims that, as interpreted by the UNCC, the International Court of Justice (ICJ), and domestic law, imposes a natural constraint on the amount and use of the claim, refuting overblown valuations and self-interested or retributive claims. The environment itself benefits because the award is directed at actual remediation and restoration; thereby contributing to peacebuilding—of course, in the long term, humankind and future generations also benefit. I conclude with reflections on the consequences of framing reparations as elements of building peace.

II. The Practice of Reparations

Precedents for reparations extend back centuries.[5] Reparations are a remedy for a legal injury, owed when a state has breached an obligation under a treaty or customary international law.[6] Under the customary doctrine of state responsibility, which determines the legal consequences of such a breach, reparations include 'restitution, compensation and

[4] ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (15 September 2016). The Office will also seek to co-operate and provide assistance to states, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing, or the destruction of the environment (para. 7).

[5] E. de Vattel, *The Law of Nations or Principles of the Law of Nature* (4th ed. Clark and Sons London 1811) 155, para. 51; David J. Bederman, 'Historic Analogues of the UNCC', in Richard B. Lillich (ed.) *The United Nations Compensation Commission* (Transnational Publishers, Inc. 1995); see generally Pierre d'Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des États à l'épreuve de la guerre* (LGDJ 2002). For a brief history and nice appreciation of claims commissions, including the UNCC, see Marc Henzelin, Veijo Heiskanen, and Antoine Romanetti, 'Reparations for Historical Wrongs: From Ad Hoc Mass Claims Programs to an International Framework Program?' (2006) *Uluslararasi Suçlar ve Tarih* 91–118.

[6] Draft Articles on State Responsibility for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), arts 31, 34–6; *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Permanent Court of Int'l Justice Series A (No. 17) 47 (1928); Ian Brownlie, *System of the Law of Nations: State Responsibility, Part 1* (Oxford University Press 1983).

satisfaction, either singly or in combination'.[7] Sometimes treaties specify reparations, as with the compensation required by the Hague Convention, article 3, for violations of its annexed regulations ('A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation'); or the nearly identical requirement found in Additional Protocol I to the Geneva Conventions, article 91.

The usual scope of reparations includes loss of or damage to public and private property, and personal injury. Some, like human rights expert De Greiff, have focused on reparations as material compensation provided to individual and community victims of human rights abuses; his collection of in-depth case studies sheds light on the complexities and scope of this category, raising issues such as psychological impacts, which are not addressed here.[8] Philosophers and political scientists may give interpretations to the basic vocabulary—reparations, restitution, compensation—and draw conclusions that do not always align with international law instruments and decisions.[9] It is worth noting that discussions within one specialty (whether theoretical or practice-oriented) frequently ignore significant developments in another. For example, Van Boven describes a debate over whether 'the Articles on State Responsibility were drawn up with inter-State relations in mind and would not per se apply to relations between States and individuals' or whether this argument 'ignored the historic evolution since the Second World War of human rights having become an integral and dynamic part of international law' in the context of the United Nations 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.[10] If one holds to the former argument, rulings of the ICJ and awards of the UNCC would seem irrelevant despite the fact that they resulted in actual payment of reparations. Thus care in recognizing disciplinary siloes is called for in studying the topic.

The purpose of reparations varies significantly from remedial justice to 'victor's justice'. Traditionally, reparations were provided by the defeated state to the victorious state and might include reimbursement of the victor's cost to fight the war. Aspirational remedial goals of reparations programmes today are many. Remedial purposes, according to Shelton, are,

[7] ILC, Draft Article 34. An example of satisfaction as a remedy is the Eritrea–Ethiopia Claims Commission's ruling that, because no damage was caused when Ethiopia bombed a civilian water reservoir in violation of customary international law, the finding that Ethiopia's bombardments were in violation of applicable international humanitarian law would be satisfaction. Eritrea's Western Front/Aerial Bombardment Claims, Partial Award (Permanent Court of Arbitration [PCA] 2005) para. 105. Following the 1990–1991 Gulf War, Iraq returned property it had taken from Kuwait, including gold bullion, art treasures, and other goods, under United Nations oversight. See Paul Lewis, 'U.N. Helps Kuwait Recover Iraqi Loot', *New York Times* (30 July 1991). In Buxbaum's account of post-World War II settlements, the choice between remedies of restitution or compensation caused serious conflict between the Allies, to the extent that it may have launched the Cold War between the West and the Soviet Union. Professor Buxbaum was the US member of the Property Commission of the German Foundation for Remembrance, Responsibility, and the Future, and consultant to counsel representing defendants for related litigation in US courts. Richard Buxbaum, 'A Legal History of International Reparation' (2005) 23 *Berkeley J. Intl L.* 314 324–8.

[8] Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press 2006).

[9] Larry May, *After War Ends* (Cambridge University Press 2012) ch. 11.

[10] Theo van Boven, 'The United Nations 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' (2012) 2, available at <http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> accessed 15 December 2019.

> to rectify the wrong done to an injured party and correct injustice by restoring the status quo ante … Reparation is thus designed to place an aggrieved party in the same position as if no wrongful act had occurred, *without respect to the cost or consequences for the wrongdoer*.[11] (emphasis added)

Reparation can also punish and deter wrongdoing (combating impunity), create an economic incentive to prevent harm by imposing costs, and shape norms by warning of the limits to what society tolerates. Reparation proceedings can make a record of what happened. Financial compensation provides the means to rebuild after conflict. The restorative justice aspect of reparations is demonstrated when the process builds trust between traumatized societies. Punishing a wrongdoer, providing recompense, and stating the fact that injury was done can reduce the motivation to retaliate. In these ways, the purpose of modern reparations overlaps significantly with the goals of peacebuilding.

The law of post-conflict reparations does not distinguish between unjustified commencement of war (*jus ad bellum*) and breaches of law during the conflict (*jus in bello*). Either will engage a state's international responsibility, and its consequent reparations obligation. Breach of either obligation, if sufficiently grave, may also rise to the level of a war crime, and subject those responsible to international criminal law's penalties and reparations requirements.[12]

Reparations are at the intersection of peacetime law and the law of war, where jurisprudence and state practice that developed in one context can inform the other.[13] Temporally, they are located at the end of conflict—usually included as part of a ceasefire or peace treaty. Analytically, formal reparations refer back to the conflict's commencement and its prosecution, where the fault that requires reparations must lie.[14] Informal reparations, such as the United States' well-documented practice in Iraq of pay-as-you-go, no-fault-admitted compensation for property damage, may occur in the course of armed conflict.[15] How reparations are adjudicated differs—whether by a standing court like the ICC or the ICJ,[16] an ad hoc commission (like the UNCC),[17] an arbitral tribunal (like the Eritrea-Ethiopia Claims

[11] Dinah Shelton, *'Reparations', Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2015) para. 3.

[12] Rome Statute of the International Criminal Court, Articles 8, 75 and 77–80, Adopted 17 July 1998, entered into force 1 July 2002, UN Doc. A/ Conf.183/ 9 as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999 in PCNICC/ 1999/ INF/ 3.

[13] For example, the *Factory at Chorzów* case of the PCA, a peacetime dispute, is a benchmark for reparation of damage caused during armed conflict, for example, in the Eritrea–Ethiopia proceedings. Eritrea–Ethiopia Claims Commission, Final Award: Ethiopia's Damages Claims (2009) 24 (citing Factory at Chorzów, Merits, 1928 PCIJ (Ser. A.) No. 17, p. 47).

[14] Thus, Iraq owed reparations for losses that occurred 'as a result of Iraq's unlawful invasion and occupation of Kuwait', *jus ad bellum* and *jus in bello*. UN Security Council Resolution 687 (3 April 1991), ILM 30 (1991) 846. Eritrea and Ethiopia agreed to arbitration of damage claims 'from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law', *jus in bello*. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (2000) Article 5.1.

[15] Payne, 'The Norm of Environmental Integrity' (n 3) 512, 514–5.

[16] Litigation between the United Kingdom and Albania, and between Nicaragua and the US are examples. *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits [1949] ICJ Rep. 4, 23; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits* [1986] ICJ Rep. 14, 283. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment,* ICJ Rep. 2005; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Rep. 2004, para. 152.

[17] UN Security Council Resolution 687 (3 April 1991), ILM 30 (1991) 846.

Commission),[18] or less formally.[19] The amount and form of reparations will be defined by the constitutive instrument for the forum and by relevant conventions or customary law. International reparations programmes may have domestic counterparts responsible for either distributing awards to individuals or providing a forum to make claims against enemy assets in foreign countries.

Historically, reparations were an exaction from the defeated to offset the losses suffered by the side that triumphed—true 'victor's justice'.[20] While the nature of armed conflict leads naturally to unequal treaties, that term became a negative epithet after the heavy reparations imposed on Germany by the Versailles Treaty at the close of World War I.[21] From a realist standpoint, the social and economic burdens of Germany's World War I reparation obligations, and the political consequences of their unilateralism, are held by many to have led to the disaster of World War II. And so another distinct shift took place in the decades after World War II, from victorious states acting to crush their enemies at the end of conflict to seeking to resurrect the society that had just been the adversary.[22]

It is not surprising, therefore, to find some theorists decry loading a defeated enemy with financial and restitutive burdens as inhibiting to the establishment of peace. Bass, for example, claims that proportionality—a core principle of international humanitarian law during conflict—also applies in this situation.[23] Reparations based on state responsibility for a breach of a state's international obligations are repeatedly said to not be punitive; this insistence seems to reflect the increased importance of proportionality in post-conflict measures.

While human rights law did not traditionally require post-conflict reparations, it is increasingly integrated into *jus post bellum* through notions of rehabilitation and redress.[24] The human rights lens reveals an individual's or community's view of reparations, rather than the state's perspective. Human rights-based claims may expand remedies available to individual victims to physical, mental, and moral rehabilitation. Restitution can take on an individual colour: for example, restoration of employment or lost possessions. This framing may include atonement as another obligation owed by a perpetrator of human rights abuses during armed conflict.[25] Moral reparations can play a unique role in this context. Roht-Arriaza observes that reparations are:

[18] Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, 2138 UNTS 94, 40 ILM 26.

[19] For example, the *ex gratia* payment from the US to China for death and injury caused by bombing in Kosovo. Thomas Pickering, Under Secretary of State Oral Presentation to the Chinese Government Regarding the Accidental Bombing of The PRC Embassy in Belgrade (17 June 1999). Available at: https://www.state.gov/documents/organization/6524.doc> accessed 15 December 2019.

[20] John R. Crook, 'Is Iraq Entitled to Judicial Due Process?', in Richard Lillich (ed.), *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (Transnational Publishers, 1995) 83–4; Hugo Grotius, *Commentary on the Law of Prize and Booty* (Martine Julia van Ittersum ed. 2006), ch. IV ('Yet any person who justly takes up arms has a right to collect indemnity for all losses and expenses, regarding them as debts due to him'), available at http://oll.libertyfund.org/titles/1718> accessed 24 October 2018.

[21] Bederman (n 5) 261–4.

[22] Crook (n 20) 85–7. Christine Bell observes that after World War II, individual criminal justice was the preferred alternative, while state responsibility again became the dominant paradigm over the remainder of the twentieth century. Christine Bell, 'Peace settlements and international law: from *lex pacificatoria* to *jus post bellum*', in Christian Henderson and Nigel White (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar Publishing 2012).

[23] Gary J. Bass, 'Jus Post Bellum' (2004) *32 Philosophy & Public Affairs* 384, 412.

[24] Iverson (n 1) 1; Carolin Schleker, 'Reparations', in David P. Forsythe (ed.), *Encyclopedia of Human Rights* (Oxford University Press 2009).

[25] Naomi Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004) 27 *Hastings Int'l & Comp. L. Rev.* 157, 158.

> both material and moral: reparations for the body to enable survival, reparations for the spirit and the sense of justice, and some sense of decorous and secure future for future generations. Reparations are the embodiment of a society's recognition, remorse and atonement for harms inflicted. This atonement quality separates reparations from mere post-conflict settlements.[26]

Modern conceptions of justice demand equal treatment of all parties, victor and defeated alike. A failure to sanction violations of *jus ad bellum* and *jus in bello* by either side is condemned by some as hypocrisy of the worst sort. Yet rarely do victors subject themselves to third-party determinations of fault. Bederman, in his comprehensive historical review of compensation, identified only nine claims tribunals that actually issued awards in favour of both belligerents, although many more allowed both parties to make claims.[27] In some conflicts the losing party really did commit serious breaches of the law of war—Germany in World War I and Iraq in the 1990–1991 Gulf War violated both *jus ad bellum* and *jus in bello*. But of course this is not always the case: sometimes the party at fault triumphs. The usual outcome in such cases is that might makes right and no further adjudication of fault is made.

III. Expansions of Reparations: Individuals and the Environment

Two previously obscured subjects have begun to emerge from the background of traditional reparations practice—the individual and the environment. In the past, the individual did not have 'any title, legal or equitable, in an award or diplomatic settlement made in his behalf'.[28] Nor were environmental losses, other than those that were treated as property, identified as subjects of reparations. Both the individual and the environment came to be seen quite differently in the twentieth century.

A. Criminal Reparations

With the creation of the ICC, the emergence of the individual as a subject of reparations was consolidated. International criminal law can require reparations from individuals found guilty of crimes against humanity, war crimes, genocide, and crimes of aggression (which may include acts that result in extremely severe environmental damage).[29] The ICC Prosecutor brings charges against individuals (not states or legal entities such as corporations); individuals may provide communications of evidence to the Prosecutor; and 'at the reparations stage victims and convicted person are cast in the position of parties to the proceedings'.[30] The ICC identifies the purpose of reparations as help for victims—individuals or

[26] Ibid. 158–9.

[27] Bederman (n 5) 258. The US was one of the parties in eight of those; Great Britain was a party in three of them; Mexico in two of them.

[28] Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad: Or, The Law of International Claims* (Banks Law Publishing Co. 1915) 382.

[29] Rome Statute, article VIII. The relevant activities must have occurred after 1 July 2002, when the Rome Statute came into force. The ICC has jurisdiction only as to parties to the Rome Statute.

[30] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga*, (Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07 (24 March 2017) (original in French), para. 15.

communities—to rebuild their lives, accountability for the perpetrator, and public acknowledgement of the victims' suffering.[31] Reparations may include 'monetary compensation, return of property, rehabilitation or symbolic measures such as apologies or memorials';[32] the ICC has not to date considered environmental reconstruction in this context. ICC judges can order reparations for the benefit of individuals and communities, as seen in the *Katanga* reparations order.[33] In the future, restoration of environmental damage and cultural heritage for the benefit of communities could be a subject of reparations as well.[34]

The ICC's 2016 Policy on Case Selection was a limited move toward addressing environmental damage. It spoke of an integrated legal effort between the ICC and national courts, and 'fully endorses the role that can be played by truth seeking mechanisms, reparations programmes, institutional reform and traditional justice mechanisms as part of a broader comprehensive strategy'.[35] The Prosecutor's Office would consider 'crimes committed by means of, or resulting in, the destruction of the environment or of protected objects' as a factor in weighing the gravity of a crime, as well as the impact of the crime, assessed in light of, inter alia, 'the social, economic and environmental damage inflicted on the affected communities'.[36] The Office would give priority to 'Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land'.[37]

When the Office of the Prosecutor applies these guidelines to situations of truly devastating environmental harm, the case development will bring facts to public light that may lead to reparations orders for environmental restoration. When that happens, the ICC could adapt the procedures, substantive law, and valuation measures already developed in international courts, tribunals, and commissions operating under civil law.

B. Civil Reparations

War reparations practice in some countries, including the United States, had been to distribute international awards to individual claimants, often through domestic commissions. This was not, however, the norm. Buxbaum, analysing the question historically and from his perspective as a participant in a modern World War 2-related reparations programme, attributed the shift 'from state-centered to societal- and individual-centered rights and obligations' to two sources: international human rights, and direct individual claims for compensation and restitution, both arising in the context of German reparations.[38] He argued that the 'unprecedented level of suffering' experienced by the victims of Nazi persecution forced states to address direct compensation claims of individuals.[39]

[31] Ibid. See May (n 9) 55 ('I am generally skeptical of mixing retribution with compensation, so I would be happier if the victim compensation fund were not administered by criminal courts … I have argued elsewhere that criminal justice is quite different from civil remedies—in criminal law it is not the victim but society that should be the focus').

[32] ICC website, available at <https://www.icc-cpi.int/Pages/ReparationCompensation.aspx> accessed 19 May 2019.

[33] *Katanga Reparations Order* (n 30).

[34] Rules of Procedure and Evidence, rules 85 and 86 and ICC website section on Reparations.

[35] ICC, Office of the Prosecutor (n 4) para. 7.

[36] Ibid. paras 40–1.

[37] Ibid.

[38] Buxbaum (n 7) 314.

[39] Ibid. 322.

In the past, the traditional practice of diplomatic protection allowed a state to espouse an individual's claims and present them to an international tribunal.[40] But the decision whether to seek compensation and how much was a political decision made by the government.[41] The amount of compensation claimed and provided to the individual who suffered the loss could be arbitrary and entirely up to the state to which the award was made.

The UNCC was the first multilateral claims process established by the United Nations, and Crook maintained that by providing 'redress for the individual consequences of illegal state action' the UNCC may have made its 'most significant contribution in the development of international law'.[42] The 1990–1991 Gulf War was precipitated by Iraq's invasion of Kuwait. The Security Council characterized this as an illegal act.[43] The UNCC was created through the UN Security Council ceasefire resolution that ended the conflict in the Gulf.[44] Mensah has characterized the motivations for its creation as 'intended to reflect the sense of outrage felt by the international community against the clear act of aggression by Iraq … to provide a mechanism for compensating governments and other entities that had suffered damage as a result [and] to contribute to the strengthening of the international law for the protection of the environment from the consequences of war and warlike activities'.[45]

The UNCC did not allow direct presentation of claims by individuals or commercial entities, but it did require the states and intergovernmental organizations to act as the agent of the real party in interest. That is, by 1994, the UN Compensation Commission required all claimant governments to furnish evidence that awards for harm to individuals had in fact been paid to those people; if not, the awards were returned to the Compensation Fund.[46] The UNCC reported that 'a net amount of $49.7 million [was] no longer payable to the claimant Governments and other submitting entities mainly because the claimants were not located by the deadline of 30 September 2006 set by the Governing Council for the location of claimants and the submission of requests for the payments'.[47] The UNCC awarded approximately:

[40] Pierre d'Argent, *Les reparations de guerre en droit international public: la responsabilité international des États à l'épreuve de la guerre* (Bruylant, LGDJ 2002) 136.

[41] Crook (n 20).

[42] Ibid. 87; See also Buxbaum (n 7) 314, who argued that 'German reparations [for World War Two and the Holocaust] have also been at the center of the single most critical and controversial evolution of public international law in the past century; namely the movement from state-centered to societal- and individual-centered rights and obligations'. Professor Buxbaum makes an important identification of two influential factors: Germany's reunification in 1990 and a 1980's change in the relationship between governments and their constituent individual and social groups. Indeed, the historical tapestry that he weaves is important background to understanding the practice and perception of reparations today.

[43] UNSC Res. 660 (1990) UN Doc. S/RES/660.

[44] UNSC Res. 687 (1991) UN Doc. S/RES/687. For a detailed description of the UNCC and its environmental claims programme, see Cymie R. Payne, 'Developments in the Law of Environmental Reparations: A Case Study of the UN Compensation Commission', in Carsten Stahn, Jens Iverson, and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (Oxford University Press 2017).

[45] Thomas A. Mensah, 'Foreword', in Cymie R. Payne and Peter H. Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011) xvii.

[46] UNCC Governing Council Decision 18, Distribution of payments and transparency, S/AC.26/18 (March 24 1994); Cymie R. Payne, 'Oversight of Environmental Awards and Regional Environmental Cooperation', in Cymie R. Payne and Peter H. Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011); Marco Frigessi di Rattalma and Tullio Treves (eds), *The United Nations Compensation Commission: A Handbook* (Kluwer Law International 1999) 8. ('A first relevant departure [by the UNCC] from the traditional regime of diplomatic protection consists in the duty of the State to distribute the specified funds to named claimants'.)

[47] Status of Processing and Payment of Claims, http://www2.unog.ch/uncc/status.htm> (table dated 26 July 2012, accessed 10 August 2012; this table is no longer available on the UNCC website; a pdf is on file with author); UNCC, Press Release, PR/2006/10 (3 Nov. 2006) ('Approximately 16,500 claimants from 55 Governments and

- US$ 12 billion to individuals;
- US$ 27 billion to corporations, private legal entities and public sector enterprises;
- US$ 9 billion to governments and international organizations (excluding environmental damage);
- US$ 5 billion to governments for environmental damage (of which about US$ 4.3 billion for environmental remediation and restoration).[48]

Moreover, faced with over 2 million claims, many of them small but of immense importance to the individual victims of the conflict, the UNCC developed innovative techniques to rapidly review and make awards for these so-called 'humanitarian' claims.[49] After successfully addressing the needs of this claimant community and moving steadily through its docket, the UNCC was able to withstand criticism of its 'rough justice' approach,[50] and in subsequent years, the UNCC secretariat, commissioners, and Governing Council maintained their groundbreaking approach to take on claims for damage to non-commercial environmental damage.

C. The Emergence of the Environment

Peacetime environmental reparations programmes in the US and the EU, as well as a number of treaties, provided a foundation for the UNCC environmental programme.[51] The UNCC, in turn, was followed to a limited extent by the arbitration to end the conflict between Ethiopia and Eritrea.[52]

By the late twentieth century, pollution and resource over-exploitation had emerged as problems to be addressed by domestic law, and it was not surprising that the Western

submitting entities with approved awards have not been located by the set deadline and as a result, an estimated amount of $50 million reverts to the Compensation Fund'), https://www.uncc.ch/sites/default/files/attachments/documents/61%20close.pdf>accessed 16 March 2018.

[48] UNCC, Press Release (n 47). Award figures reported by the UNCC in categories A-D and E4 vary over time due to corrections to awards pursuant to article 41 of the Provisional rules for claims procedure.

[49] Francis E. McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 171.

[50] Ibid.

[51] EU Council Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L143/56 (2004), as amended by Council Directive 2006/21/EC, OJ L102, Council Directive 2009/31/EC, OJ L140, and Council Directive 2013/30/EU, OJ L170; European Commission, Report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (2016) 2; US Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC Sec. 9601 et seq.; US Oil Pollution Act of 1990, 33 USC 2701 et seq.; Federal Register: The Daily Journal of the United States, Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels, Deepwater Ports and Onshore Facilities, 80 Fed. Reg. 72342 (2015); see also, Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972. See also, Rio Declaration, Principle 13, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I: Resolutions adopted by the Conference, Resolution 1, annex I; International Convention on Civil Liability for Oil Pollution Damage, 1992; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992; 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Oil Convention), IMO document LEG/CONF.12/DC/1; 1963 Vienna Convention on Civil Liability for Nuclear Damage, 2 ILM (1963) 727 and its Protocol.

[52] Sean D. Murphy, Won Kidane, and Thomas R. Snider (eds), *Litigating War: Arbitration of Civil Injury by the Eritrea–Ethiopia Claims Commission* (Oxford University Press 2013) 131–2.

democracies included environmental concerns in the disarmament conferences tasked with negotiating new international humanitarian law instruments at the time. During the 1970's rounds of the Geneva Convention negotiations, Additional Protocol I was drafted, incorporating articles 35 and 55, which explicitly limited intentional harm to the environment.[53] At the same time, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was agreed.[54] By establishing these new rules to protect the environment *during* armed conflict, states were creating new obligations that could bind them *after* the conflict ended. If a state breached its obligations to observe military necessity, proportionality, and distinction, and caused environmental damage, it could be liable for reparations.[55] Yet in fact, no state has been held liable for breaches of Additional Protocol I, article 35 and 55 obligations.

The level of intentional environmental damage caused by Iraq in 1990–1991, as unprecedented as the human suffering of the Holocaust, had a similar result: it forced environmental damage onto the legal agenda in the post-war period. The failure of states to recognize the seriousness of the threat of environmental damage during armed conflict and to address it through enforceable legal measures did not mean that one of the most dramatic environmental damages due to war of the twentieth century—oil wells aflame across Kuwait and oil spills coating the coasts of the Gulf—would not be dealt with. Highly visible, well-publicized destruction had its effect. Choosing to base legal repercussions against Iraq on its breach of the UN Charter in invading Kuwait and the consequent obligation to pay compensation, the UN Security Council, in SC Res. 687 (1991), para. 16, declared Iraq's liability 'under international law for any direct loss, damage, including environmental damage and the depletion of natural resources … as a result of Iraq's unlawful invasion and occupation of Kuwait'.

The UNCC's Governing Council stated that the purpose of its environmental claim awards was to restore the environment. Elias characterized the UNCC goals for the environmental claims as 'restoration in the public interest, rather than the mere settling of a dispute or series of disputes in a bilateral/adversarial context', suggesting that this might be an interest *erga omnes*.[56] Caron analysed the role of government 'as an agent for the environment, for a community's interest in that environment'.[57] This embodied what Sand calls a form of 'legal accountability of all states involved for the safeguarding of common concerns

[53] Off. Rec. of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva (1974–1977) vol. 14, 142, at <https://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html> accessed 15 December 2019.

[54] Adopted 10 December 1976, entered into force 5 October 1978, 1108 UNTS 151.

[55] Cimie R. Payne, 'Protection of the Natural Environment', in Dapo Akande and B. Saul (eds), *Oxford Guide to International Humanitarian Law* (Oxford University Press, forthcoming.

[56] Olufemi Elias, 'The UN Compensation Commission and Liability for the Costs of Monitoring and Assessment of Environmental Damage', in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 219, 235.

[57] David D. Caron, 'The Profound Significance of the UNCC for the Environment', in Cymie R. Payne and Peter H. Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011) 268. Caron tied this shift in perspective to an equivalent change from a government owning the claims of its citizens (and residents) to the UNCC approach where the government acted as an agent for the individual claimants. Reflecting the earlier practice, a British court found that the British government properly declined to pay a citizen money that it had received from the Chinese government 'on account of debts due to British subjects', stating that the relationship was not 'the duty of an agent to a principal, or of a trustee to a cestui que trust'. *Rustomjee v. The Queen*, II QBD 74 quoted in Marjorie M. Whiteman, *Damages in International Law*, *vol. III* (1943) 2051–2.

to protect and conserve the Earth's natural heritage'.[58] With the recognition of the common concerns of the international community for the environment came the need to ensure that the public interest in environmental integrity was respected in the use of award funds.

The UNCC furthered these public interest goals in several ways that offer a model. Perhaps the most significant legal point was to recognize non-commercial, or 'pure' environmental damage as a valid claim. The ICJ confirmed that damage to the environment, including 'the consequent impairment or loss of the ability of the environment to provide goods and services', specifically the loss of biodiversity and carbon sequestration, is compensable under international law, in its 2018 judgment valuing compensation that Nicaragua owed to Costa Rica for removal of trees, other vegetation and soil in a wetland of international significance.[59] The ICJ noted that both parties to the case in question had referenced the UNCC environmental panel's approach.[60]

The UNCC developed other specialized procedures for environmental damage claims. From the outset in 1991, when different types of damage were allocated to claim-filing categories, pure environmental damage, as distinct from damage to real property, could be claimed only by public entities and not by the private sector;[61] this is also the practice in domestic environmental reparations programmes. Each environmental claim in category 'F4', whatever the compensation amount sought, was individually reviewed, unlike some of the other categories. Legal rules were applied that favoured functional ecological recovery by requiring mitigation[62] and setting a remediation standard of 'restoring the environment

[58] Peter H. Sand, 'Compensation for Environmental Damage from the 1991 Gulf War' (2005) 35 *Envtl. Pol'y & L.* 244, 248. See also Sand, 'Environmental principles applied', in Cymie R. Payne and Peter H. Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011) at footnotes 5 to 10, and section VI; Jean-Christophe Martin, 'La pratique de la Commission d'indemnisation des Nations Unies en matière de réclamations environnementales', in Yann Kerbrat, Sandrine Maljean-Dubois, and Rostane Mehdi (eds), *Le droit international face aux enjeux environnementaux: Colloque d'Aix-en-Provence 2009 de la Société française pour le droit international* (Pedone 2010) 257, 272.

[59] ICJ, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, General List No. 150, at paras 41–2 (Int'l Ct. Just. 2 Feb. 2018).

[60] Ibid. para. 42.

[61] Sand, 'Environmental Principles Applied' (n 58) 173–90; UNCC Governing Council decision 7, S/AC.26/1991/7/Rev.1 (1992) (environmental damage claims to be reviewed as government claims); UNCC F4 third instalment, para. 42; Report and recommendations made by the Panel of Commissioners concerning the second instalment of 'F4' claims, UN Doc. S/AC.26/2004/17 (2004) para. 38; and UNCC F4 fifth instalment, para. 40 (the environment is a common concern that 'entails obligations towards the international community and future generations'); David D. Caron, 'The Place of the Environment in International Tribunals', in Jay E. Austin and Carl E. Bruch (eds), *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives* (Cambridge University Press 2000) 253, 256; David D. Caron, 'Finding Out What the Oceans Claim: The 1991 Gulf War, the Marine Environment, and the United Nations Compensation Commission', in David D. Caron and Harry N. Scheiber (eds), *Bringing New Law to Ocean Waters* (Nijhoff 2004) 393, 394; UN Register of Damage, Rules and Regulations Governing the Registration of Claims, Article 11(1) (19 June 2009) (The UN Register of Damage, established in 2009, can receive claims in its public claims category for environmental damage resulting from the construction by Israel of its security wall); Agreement, Eri.–Eth., 12 Dec. 2000, 2138 UNTS. 94, 40 ILM. 260 (Ethiopia claimed compensation for losses of gum Arabic and resin plants, and damage to terraces in the Tigray region for a value of approximately US$1 billion and for loss of wildlife); Cymie R. Payne, 'Developments in the Law of Environmental Reparations: A Case Study of the UN Compensation Commission', in Carsten Stahn, Jens Iverson, and Jennifer Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices* (Oxford University Press 2017); EU ELD, Annex II (1)(d) (interim losses do 'not consist of financial compensation to members of the public').

[62] UNCC, Report and recommendations made by the Panel of Commissioners concerning the third instalment of 'F4' claims, UN Doc. S/AC.26/2003/31 (2003) para. 42; UNCC, Report and recommendations made by the Panel of Commissioners concerning part one of the fourth instalment of 'F4' claims, UN Doc. S/AC.26/2004/16 (2004) paras 206 and 216 (Kuwait sought US$653.8 million for the two claims, no award was made because 'the failure of Kuwait to take the necessary measures in the face of a clear risk of damage [from improperly stored ordnance] was the direct cause of the resulting damage, and this broke the chain of causation so as to relieve Iraq of

to preinvasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition'.[63] Experts in relevant scientific fields were engaged by the UNCC to assist in the review of issues that included: verification of baseline, damage, and current condition; causal mechanisms; cost-effective remediation and restoration techniques; and valuation of the cost of applying such techniques.

After all award recommendations were made, the UNCC developed a programme that required recipients to use the funds to carry out the proposed remediation and restoration.[64] This so-called 'Follow-up Programme' was a true innovation in international law, built on the UNCC practice described above of requiring governments to return award funds that had not been disbursed to the real party in interest, and put in place by agreement with the claimants and Iraq.[65] It is a normal feature of domestic environmental reparations; and jurists have expressed sympathy with this requiring expenditure of environmental reparations on ecological restoration.[66]

IV. Source of Compensation Funds

Post-World War II Germany and post-1991 Iraq paid the cost of reparations. Yet other respondents might be indigent.[67] What should be the result: should victims bear the cost, should it be shifted to the international community? And if the responsible party does not pay the cost of the damage it has done, does that vitiate reparations?

The first three ICC reparations orders turned to the ICC's Trust Fund for Victims (TFV) to provide financial compensation owed by indigent convicts. This raises the question, does this prioritize the restorative norm interest in providing a remedy to victims and if so, how does that affect the accountability and culpability norms that a criminal sentence is expected to provide? The courts ordered reparations in the *Lubanga* and *Katanga* cases with the observation that the reparations value was set irrespective of the defendants' financial situation.[68]

The ICC reparations, where financial reparations may be provided by a fund, not by the (indigent) perpetrator/criminal, illustrate the challenge of providing justice and pragmatic reasons to prefer providing reconstruction from a neutral source instead. As Wählisch suggests, in his exploration of alternatives to compensation, the costs of transitioning to peace

liability for the loss'). See also, UNCC Governing Council Decision 15, S/AC.26/1992/15 (1992) para. 9(d); Sand, 'Environmental Principles Applied' (n 58); Caron, 'The Profound Significance' (n 57), 271–2.

[63] UNCC F4 third instalment, para. 48. Examples of this approach applied, UNCC F4 third instalment, paras 126–9, 179–82.

[64] UNCC Governing Council Decision 132 (2001) UN Doc. S/AC.26/Dec.132 (2001); UNCC Governing Council Decision 258 (2005) UN Doc. S/AC.26/Dec.258 (2005).

[65] Payne, 'Oversight of Environmental Awards' (n 46); See e.g. Governing Council Decision 212, S/AC.26/212 (18 Dec. 2003), para. 6.

[66] ICJ, *Certain Activities* (n 59), Declaration of Judge Guillaume, para. 14; Separate Opinion of Judge Donoghue, para. 35.

[67] For example, neither Eritrea nor Ethiopia had access to the financial resources that Iraq's oil sector generated. Murphy et al. (n 52).

[68] *Situation en République Démocratique du Congo Affaire Le Procureur c. Thomas Lubanga Dyilo* (Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu) ICC-01/04-01/06 (15 Dec. 2017) para. 269; *Katanga* (n 30) para. 335.

are high, requiring everything from restoration of public services to the repatriation of refugees to institution building.[69]

Funds can also provide more timely aid. War damage is often irreversible, and this is one of the grievous limitations of reparations. Lives, ecosystems, and cultural treasures can be destroyed and no amount of money will bring them back.[70] Legal rules that encourage immediate humanitarian relief and environmental damage assessment and mitigation provide some protection from irreversible harm. Standing funds and incentives for solidarity responses are regularly proposed because by the time a formal reparations programme is in place, the window for action will have closed and irreversible losses are more likely. Nonetheless, funds should be seen as necessary supplements, not alternatives, to reparations.

Rebuilding is a principle of *jus post bellum*. Natural resource damage compensation regimes emphasize returning the environment to a functional condition, which is a feature of both reparations (the *Factory at Chorzów* standard)[71] and peacebuilding regimes. They generally compensate the costs of damage assessment, measures already taken or future measures reasonably necessary to clean and restore the environment, and compensatory remediation for losses until the environment has recovered to its baseline condition.[72]

V. Victors and Defeated: Reconstructing Society and Building a Just and Sustainable Peace

The emergence of individuals and the environment as participants in reparations reinforces the trend toward proportionality by tying the amount of compensation to real injuries.

Instead of a lump sum payment assessed by a political calculation, compensation is limited to the value of the actual injury. By valuing claims according to the cost of remediation, restoration, and replacement, the UNCC also avoided punitively high awards: of about US$85 billion sought for environmental damage, about US$5 billion was awarded. This is in contrast to valuation based on economic techniques such as contingent valuation and benefits transfer, methods that also lack any linkage between a compensation award

[69] See Martin Wählisch, 'Conflict Transformation from a Human Rights Perspective: State Transitions, Power Sharing, and the Definition of the "Post"', in Carsten Stahn, Jennifer Easterday, and Jens Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 315–33.

[70] The reasons for this are explained, in the marine context, in Holly J. Niner, Jeff A. Ardron, Elva G. Escobar, Matthew Gianni, Aline Jaeckel, Daniel O.B. Jones, Lisa A. Levin, Craig R. Smith, Torsten Thiele, Phillip J. Turner, Cindy L. Van Dover, Les Watling, and Kristina M. Gjerde, 'Deep-Sea Mining with No Net Loss of Biodiversity: An Impossible Aim', Frontiers in Marine Science (1 March 2018), available at <https://www.frontiersin.org/articles/10.3389/fmars.2018.00053/full> accessed 16 March 2018; Samira Omar, N. R. Bhat, S. A. Shahid, and A. Asem, 'Land and Vegetation Degradation Caused by Military Activities: A Case Study of the Sabah Al-Ahmad Nature Reserve of Kuwait' (2006) 14 *European Journal of Scientific Research* 146.

[71] *Factory at Chorzów [Germany v Poland] [Claim for Indemnity] [Merits]* 29.

[72] UNCC, Governing Council decision 7, para. 35; EU Council Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L143/56 (2004), as amended by Council Directive 2006/21/EC, OJ L102, Council Directive 2009/31/EC, OJ L140, and Council Directive 2013/30/EU, OJ L170, Article 2(16), Annex II(1); US Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC Sec. 9601 et seq; US Oil Pollution Act of 1990, 33 USC 2701 et seq; Federal Register: The Daily Journal of the United States, Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels, Deepwater Ports and Onshore Facilities, 80 Fed. Reg. 72342 (2015) (US Oil Pollution Act is intended to deter incidents and breaches of law under the 'polluter pays' principle); Ministry of the Environment, Finland, Remediation of Significant Environmental Damage Manual on Procedures (Helsinki, 2012) 55, hereinafter, Manual on Procedures, Finland.

and actual environmental rehabilitation.[73] Where transnational environmental services, like carbon sequestration or biodiversity, are injured, the harm is to the international community and in such cases it is particularly important that reparations provide real benefits to all—which might even be called restitution[74]—and not merely financial benefits that accrue solely to the treasury of a single nation.

Also, where, as with the UNCC, compensation awards must be passed on to the real party in interest, the cost to the respondent may be mitigated by the possibility of indirect benefits. Thus, Iraq was not indifferent to the UNCC Follow-up Programme: it expected to benefit from improvements in regional water systems, air pollution, land contamination, and biodiversity, and perhaps to also obtain assistance and capacity building in its own post-war remediation efforts.

Finally, the potential for individuals to make direct claims vindicating their rights to reparations has implications for environmental reparations where the state at fault breached an obligation *erga omnes*. This is a particularly important concern where the injury is to areas beyond national jurisdiction (such as the high seas, Antarctica, or outer space). Sands and others have pointed to the reluctance of states to enforce environmental obligations unless they themselves are particularly injured, and to the difficulties for non-state parties to bring enforcement actions in international forums.[75] While the future for enforcement of *erga omnes* obligations is still unclear, as the human right to environmental integrity is upheld with increasing frequency in national constitutions and courts, the *locus standi* barriers to environmental defenders are steadily reduced.

VI. Reparations and Rebuilding

It could be said that reconstruction and reparations are two sides to the same coin—a victorious belligerent party might not only find it in its interest to undertake reconstruction, but according to Bass, just war theory might require it;[76] on the flip side, a belligerent that loses would be obligated to provide reparations for reconstruction.

The International Law Commission (ILC), in its 2019 *Draft Principles on Protection of the environment in relation to armed conflicts*, proposes six legal principles applicable after armed conflict and related to rebuilding.[77] The first, draft principle 23, calls on parties to 'address matters relating to the restoration and protection of the environment damaged by the conflict' during the peace process. Draft principle 24 requires states to share relevant information. Draft principle 25 encourages cooperation 'with respect to post-armed conflict environmental assessments and remedial measures'. Draft principle 26 encourages states to establish compensation funds or other means to repair and compensate environmental damage. Draft principle 27 requires parties to the conflict to 'seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are

[73] The UNCC rejected these approaches, as did the ICJ in its valuation decision for damage done by Nicaragua to a Ramsar-listed wetland in Costa Rica.

[74] The ILC Draft Articles on State Responsibility, articles 34, 35, 36, and 37, indicate that, in order of preference, restitution, compensation, and satisfaction are required for full reparation.

[75] Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press 2003) 184–95.

[76] Bass (n 23) 401.

[77] ILC (2019) UN Doc. A/CN.4/L.937 (2016).

causing or risk causing damage to the environment'; it also encourages the former belligerents to cooperate on technical and material assistance to deal with these materials. Draft principle 28 calls for cooperation 'to ensure that remnants of war at sea do not constitute a danger to the environment'. These principles, *in toto*, could be implemented through a judicial reparations process, but they could equally well be applied to a rebuilding program that did not involve formal adjudication.

Nonetheless, important legal differences exist between reparations and rebuilding. Reconstruction may be a moral obligation, as suggested by just war theorists Bass and Shuck,[78] but that is not the same thing as a legal obligation or an entitlement. Therefore, the scope, extent, and method of rebuilding are not subject to the same controls that apply to reparations. There are likely to be overlaps, such as clearing mines and unexploded ordnance that are a concern for economic actors and local communities alike.[79] But while the victor may intend rebuilding to serve some of the same ends as reparations, it also intends to avoid others. In particular, victors are likely to avoid admitting culpability, providing accountability, and creating a historical record of their own wrongdoing. Where reparations are managed through a judicial process, rebuilding will be defined by the claimants' interests. At the point when reconstruction is manipulated to favour a victor—as when the US president announced that only countries that had fought in the 2003 war with Iraq should be able to have access to contracts with Iraq—Bass argued it amounts to a war of 'conquest and acquisition, which by definition is an unjust war'.[80]

VII. Conclusion

We have seen an increased demand for international law to reflect the norms and principles of just and sustainable peace. International law is proving to be flexible in response. The mix of rationales for the *jus post bellum* practice of reparations blends consequentialist arguments (restore clean water and other attributes of environmental integrity so that a peaceful society may pursue its aims and not fall back into conflict) with deontological claims (states that breach their obligations have a duty of reparation) and virtue ethics (fulfilling the demands of justice and humanity).[81] Another framing contrasts reparations as punishment and revenge with reparations as rehabilitation.[82] Yet, with all these reasons to choose reparations as a *jus post bellum* tool, more than a decade after the UNCC environmental claims programme issued its last award, few formal *jus post bellum* reparations proceedings have occurred and fewer still have been presented with environmental damage claims.

Will the future see the emergence of an even wider view of reparations? Post-conflict processes like Rwanda's Gacaca and South Africa's Ubuntu recognize the obligation to heal injury to communities as necessary measures for transitional justice but little has been done to address obligations toward the largest community, humanity, or to include injury to the

[78] Bass (n 23) 407.
[79] Cf. Michael Shuck's claim that a principle of restoration calls for cleaning up battlefields at the minimum in Bass (n 23) 407.
[80] Bass (n 23) 390–1.
[81] This interpretation owes something to Brian Orend, 'The Rules of War' (2007) 21 *Ethics and International Affairs* 471–6.
[82] Again reflecting on Orend (ibid.).

environment in the scope of these processes. For example, the theory of obligation could extend past states and individuals to the international community itself. Conflict that damages areas beyond national jurisdiction such as the high seas or outer space could be subject to *erga omnes* obligations.[83]

Although reference is frequently made to reparations in the list of tools or principles of *jus post bellum*, there is little empirical work to show what reparations actually do well and what the practice cannot achieve. The case study of the UNCC demonstrates that reparations procedures can get financial compensation to individual and corporate victims, can provide funding to restore damaged environment, and can create a historical record. The detailed accounting of financial compensation awards can be a dry but valuable text that itemizes the costs of war. Yet the UNCC and ICC proceedings also demonstrate that the legal process takes years; that it can enable reliving trauma as well as resolving it; and that in so many cases, losses are permanent and prevention should be paramount.

[83] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on its 53rd Session (2001) UN Doc. A/56/10 33 (2001) ('Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible State and the injured State inter se. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole').

8

Mapping a Norm of Inclusion in the *Jus Post Bellum*

*Catherine Turner**

I. Introduction

In recent years much greater attention has been paid to peace agreements and the way in which justice and accountability are secured in the aftermath of conflict. This has resulted in greater interest in the historical concept of *jus post bellum* and the idea that law might effectively regulate the post-conflict environment. The rapid evolution of the related fields of international criminal law and transitional justice have led to a considerable body of academic and policy literature assessing the requirements of justice in the aftermath of conflict. This debate has inevitably included the question of whether or not international law should regulate post-conflict policy, and how to balance competing international and local priorities.[1] While international law does provide guidance on the negotiation of peace agreements,[2] and on the substance of what is being negotiated,[3] it cannot fully address the specificity of individual conflicts. Indeed, too great an emphasis on international norms in such processes can undermine local ownership and provoke political backlash against international actors.[4] This is part of a trend that Bell describes as the 'global re-negotiation of international norms',[5] where what had been promoted as common values and norms of post-conflict justice are now challenged and in some cases rejected. It is increasingly clear that the normativity of international law must be balanced against the political process of negotiation in post-conflict contexts. As a result, attention must be paid not only to the substantive outcome of peace negotiations but also to the process by which agreement is reached. While international law should not necessarily dictate the outcome of the process, what it does provide is a *normative* basis for inclusion. It is increasingly recognized that sustainable peace requires the inclusion of a much broader range of actors than had

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[1] Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014); Matthew Saul and James Sweeney (eds), *International Law and Post-Conflict Reconstruction Policy* (Routledge 2015).

[2] United Nations Guidance on Effective Mediation (2012); For commentary, see Martin Wählisch, 'Normative Limits of Peace Negotiations: Questions, Guidance and Prospects' (2016) 7 *Global Policy* 261.

[3] Secretary General of the United Nations, 'Guidance Note on the United Nations Approach to Transitional Justice' UNSG 2010 Guidance Note 5.

[4] Catherine Turner and Ruth Houghton, 'Constitution Making and Post Conflict Reconstruction Policy', in Matthew Saul and James Sweeney (eds), *International Law and Post Conflict Reconstruction Policy* (Routledge 2015) 119.

[5] Christine Bell, *Navigating Inclusion in Peace Settlements: Human Rights and the Creation of the Common Good* (British Academy 2017) 5.

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traditionally been the case.[6] By requiring the inclusion of a wide range of civil society actors in negotiations international law acts as a normative framework for participation, helping to bridge the divide between international law and the political process of negotiation.

This chapter maps the existence in international law and policy of provisions requiring the inclusion of traditionally excluded groups in peace negotiations. Section I outlines the definition of 'inclusion' and locates it within the broader framework of international law. Section II then examines institutional moves towards inclusion in international law and policy, looking particularly at the shifting language of the United Nations. Section III examines thematic instances where inclusion has been integrated into normative frameworks and the ways in which this helps to shape a broader norm of inclusion. Finally, Section IV discusses the evidence of an emerging norm of inclusion and emphasizes the importance of inclusion for broader *jus post bellum* debates. Ultimately the chapter argues that international law requires inclusion not only as an aspiration of thematic regimes or an optional political gesture but as a general principle of the *jus post bellum*. It proposes that understanding inclusion as an underpinning norm of *jus post bellum* ensures the sustainability of peace by ensuring that those most affected by post-conflict initiatives have a role in shaping them.

II. Framing the Debate: Why Inclusion?

Jus post bellum has been described as 'the laws and norms of justice that apply to the process of ending war and building peace'.[7] It is one among a number of normative regimes to have emerged in recent decades that purport if not to regulate the post-conflict environment, at least to present a normative framework for moving from the state of war to that of peace.[8] In the context of *jus post bellum* a number of key principles have been identified as being core to this transition. These include retribution, rebuilding, restitution, and proportionality.[9] However, most notable for the purposes of this chapter are the principles of *reconciliation*, or the idea that 'parties can come to a lasting peace where mutual respect for rights is the hallmark'[10], and *reparation* as a means of re-establishing trust among the parties.[11] While debate has centred on more or less agreed principles of what a regime of *jus post bellum* should seek to achieve, disagreement persists over how this is to be delivered. Should *jus post bellum* be a legally normative or codified regime that dictates justice outcomes?[12] Does

[6] Seth Kaplan and Mark Freeman, *Inclusive Transitions Framework* (Barcelona, Institute For Inclusive Transitions 2015).

[7] Jennifer Easterday, Jens Iverson, and Carsten Stahn, 'Exploring the Normative Foundations of *Jus Post Bellum*: An Introduction', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 1.

[8] See also Ruti Teitel, *Transitional Justice* (Oxford University Press 2000); Christine Bell, *On the Law of Peace: Peace Agreements and the* Lex Pacificatoria (Oxford University Press 2008).

[9] Larry May, '*Jus Post Bellum*, Grotius and *Meionexia*', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 15, 16–18.

[10] Ibid. 16.

[11] Ibid. 18.

[12] Christine Bell, 'Of Jus Post Bellum and *Lex Pacificatoria*: What's in a Name?', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 181.

it provide a framework for operationalization of key justice principles, through hard law, soft law, or in policy and practice? Or is it no more than a moral framework for action?

This chapter suggests that these tensions can be addressed through a focus on inclusion. There are a number of reasons for focusing on inclusion as a general principle of *jus post bellum*. They relate both to the process of negotiating a just peace as well as to the outcome sought. Questions about the justice of peace most often arise at the point at which violent conflict is brought to an end. It is tempting to regard the signing of a peace agreement as the end of conflict. However in reality this is rarely the case. Conflict continues in a different form as the details of how an agreement is to be implemented are negotiated. As Bell notes, 'peace settlements are seldom based on a clear pre-commitment to the common good; rather they require this commitment to be constructed in an ongoing way'.[13] What this means is that the peace agreement is not the end of the conflict, but rather the beginning of a new phase in which the modalities of the new social order are to be worked out. The justice of the peace therefore depends on the way in which questions of justice and accountability are addressed as part of the new order. This is where inclusion becomes important. Negotiating a settlement between elites and armed actors perpetuates the marginalization of vulnerable groups who may have suffered the most as the result of conflict. This exclusion can fuel violence and undermine justice efforts.[14] An inclusive process extends the parameters of who should be given a seat at the negotiating table and gives all groups in society the opportunity to be heard. It can 'knit together a frayed social fabric and give all groups a stake in transforming their country'.[15] This in turn increases the chances of a sustainable peace.

Inclusion as a general principle therefore speaks both to normative outcomes of *jus post bellum*, such as the need for justice institutions which acknowledge the harm committed on all groups in society, but also more holistically to the principle that those most affected by war and violence should be involved in the design of these institutions. In other words, inclusion addresses the *means* and the *ends* of *jus post bellum*. It encompasses both legal and relational aspects of justice by encouraging broad ownership of post-conflict justice and an inclusive discussion of what justice requires. In so doing, it avoids emphasis on strongly normative outcomes which may be difficult to agree and which may not enjoy the support of affected populations, while still providing a normative basis as an entry point for marginalized groups into post-conflict processes. The question that needs to be addressed, however, is whether it can be said that a norm of inclusion already exists as a matter of *lex lata* drawn from existing legal obligations in this area, or whether it is simply an emerging principle of *lex ferenda*? In this way, the question of whether there is a norm of inclusion in *jus post bellum* mirrors some of the core questions of the field itself.

The following sections map the existence of a norm of inclusion within existing international law and policy. What is demonstrated is the emergence of principles of inclusion across both the peacebuilding architecture of the Security Council and the sustainable development agenda of the United Nations Development Programme (UNDP). By demonstrating the way in which inclusion is mainstreamed into both development and diplomacy

[13] Christine Bell, *Navigating Inclusion in Peace Settlements: Human Rights and the Creation of the Common Good* (British Academy 2017) 2.

[14] Colette Rausch and Tina Luu, 'Inclusive Processes are Key to Ending Violent Conflict' USIP Peace Brief, 2017 available at www.usip.org/publications/2017/05/inclusive-peace-processes-are-key-ending-violent-conflict accessed 19 May 2019.

[15] Ibid.

policy frameworks internationally, the sections map the existence of a norm across institutional and thematic frameworks, building a picture of an institution-wide norm. Having demonstrated the interlinkages in policy and practice in this area, the chapter then explores whether such a norm could be said to be legal rather than moral in nature and how it might underpin an overarching framework of *jus post bellum*.

III. Institutional Frameworks

The first place to begin a discussion of a norm of inclusion is to define what is understood in international law and policy by the term 'inclusivity'. In his 2012 report on peacebuilding (hereinafter the '2012 Report'), the Secretary-General defined inclusivity as 'the extent and manner in which the views and needs of parties to the conflict and other stakeholders are represented, heard and integrated into a peace process'.[16] This definition is used throughout the chapter as the basis of an assessment of whether or not a norm of inclusion has emerged or is emerging in international law. The discussion begins by considering the shifting nature of UN promotion of inclusive peace processes. There is evidence of the emergence of a norm of inclusion across distinct institutional mandates at the UN. Of most interest, and the two that will be discussed in more detail, are the Security Council and the UNDP.

A. The Security Council and the Peacebuilding Architecture

Since 2012, there has been a clearly discernible trend in UN policy towards inclusion. This emphasis has evolved from the more narrowly focused Women, Peace and Security Agenda (WPS), discussed in Section 3, but can be traced more specifically to the 2012 Report of the Secretary-General on Peacebuilding in the Aftermath of Conflict.[17] The 2012 report identified inclusivity as the first of three strategic priority areas for UN support for peacebuilding, recognizing the need for broad based participation.[18] An early emphasis on inclusion, the report stated, was essential.[19] The reason given for this prioritization of inclusion was that states with inclusive political settlements were less likely to relapse into conflict. The emphasis on inclusion is therefore instrumental. Inclusion, beyond being a worthy ambition, is the means by which peace is secured in the medium to long term.

Following the publication of the report, the language of inclusion began to be used more systematically. In 2012, the Statement of the President of the Security Council on post-conflict peacebuilding referenced inclusivity for the first time, highlighting the need for inclusivity to ensure that the needs of all segments of society are taken into account.[20] Prior to the 2012 Report, the language of inclusion had been absent from the statements on peacebuilding by the president of the Security Council.[21] In 2010, reference was made to

[16] UNSC Report of the Secretary General, Peacebuilding in the Aftermath of Conflict (2012) UN Doc. A/67/499 – S/2012/746.

[17] Ibid.

[18] Ibid. para. 4. The other two priorities were institution building and international support.

[19] Ibid.

[20] UNSC Statement by the President of the Security Council (20 December 2012) UN Doc. S/PRST/2012/29.

[21] UNSC Statements by the President of the Security Council (2009) UN Doc. S/PRST/2009/23; UNSC Statement by the President of the Security Council (21 January 2011) UN Doc. S/PRST/2011/2; UNSC Statement by the President of the Security Council (11 February 2011) UN Doc. S/PRST/2011/4.

women's participation,[22] and the need to ensure national ownership of post-conflict processes was clearly referenced, but it was not until 2012 that the specific term 'inclusivity' appeared.[23] More recently, the 2015 Expert Report 'The Challenge of Sustaining Peace' recognized the politics of exclusion as a driver of conflict. The report highlighted exclusion as a threat to sustainable peace because of the way that one group can dominate power to the exclusion of others.[24] The report further defined the scope of inclusivity to include groups such as youth, labour organizations, civil society, religious leaders, and other underrepresented groups.[25] In response, the report reaffirms commitment to 'inclusive national ownership' and prioritizing support to broaden inclusion within peacebuilding. The UN aims to support, in operational terms, processes that help governments to broaden ownership and to enable maximum participation in all stages of peacebuilding.[26] To this end, a specific recommendation of the report is that the UN should consider a new emphasis on national ownership and mechanisms for broadening peace deals in to inclusive processes.[27] Indeed this emphasis on inclusion can be found not only as an aspect of the peacebuilding architecture, but it has also managed to cross the divide between peacebuilding and peacemaking.[28] Whereas inclusion would seem to fit naturally in grass roots and civic initiatives to build peace, it can be more difficult to negotiate in high-level political or diplomatic initiatives. The significance attached to the concept of inclusion is therefore reflected in that it is included not only in UN reports on peacebuilding but also appears as a central aspiration within the Report of the UN High-level Independent Panel on Peace Operations (hereinafter UN HIPPO),[29] giving it (in theory at least) a prominent place within the design of high-level processes, not just within national processes supported by the UN.[30] The UN HIPPO highlights the long-term nature of peace processes and the need to ensure high-level support for national efforts to increase inclusion.[31] The report highlights the link between political exclusion and conflict and on this basis recommends that UN Peace Support operations should provide political and operational support to processes of inclusion and national reconciliation.[32] This cross-cutting interest in inclusion as an essential element of both peacemaking and peacebuilding demonstrates the high-level institutional priority attached to inclusion by the UN. Crucially, while these principles emerge from reports and statements from within the UN systems, the principles were endorsed and given (soft) legal form in 2016 though the unanimous adoption of Security Council Resolution 2282, which reaffirms the importance of inclusivity within the peace and security agenda of the UN. Noting the recommendations made in the report on peacebuilding, the UN HIPPO, and

[22] UNSC Statement by the President of the Security Council (13 October 2010) UN Doc. S/PRST/2010/20.

[23] UNSC Statement by the President of the Security Council (20 December 2012) UN Doc. S/PRST/2012/29.

[24] United Nations, 'The Challenge of Sustaining Peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture' (2015) p. 14 (hereinafter 'Peacebuilding Architecture').

[25] Ibid. 21.

[26] Ibid.

[27] Ibid. 56.

[28] 'Peacebuilding' refers to local or grass roots activities that build peace from the bottom up. 'Peacemaking' refers to the high-level activity of mediating or negotiating agreements at the state or inter-state level.

[29] 'Uniting Our Strengths for Peace: Politics, Partnership and People', Report of the High-Level Independent Panel on United Nations Peace Operations, 16 June 2015 (hereinafter UN HIPPO).

[30] The terminology used to describe peace processes indicates the level at which they are being addressed. Peacebuilding refers to locally led, or bottom up, processes, whereas Peacemaking refers to state-level, internationally supported processes.

[31] UN HIPPO (n 29) 34.

[32] UN HIPPO (n 29) 40.

the Global Study on the Implementation of Security Council Resolution 1325, the resolution emphasizes that 'inclusivity is key to advancing national peacebuilding processes and objectives in order to ensure that the needs of all segments of society are taken in to account'.[33] The resolution further stresses the importance of comprehensive approaches to justice, including access to justice and the promotion of reconciliation,[34] thus addressing core concerns of *jus post bellum*.

B. UNDP and the Sustainable Development Goals

This emphasis on inclusivity is also reflected in the new Sustainable Development Goals (SDGs).[35] The SDGs were adopted in 2015 as part of 'Transforming Our World: The 2030 Agenda for Sustainable Development'.[36] Although not primarily concerned with post-conflict rebuilding, the SDGs clearly align with the priorities of *jus post bellum* in their concern for creating just and sustainable societies. Further, explicit links have been drawn between peace and prosperity through the emphasis placed throughout the goals on the need to secure a sustainable peace and linking of peace with economic development.[37] This rhetoric is also visible in recent peace agreements such as in Colombia where peace and economic development were linked.[38] In total seventeen goals are set out to guide sustainable development. The SDGs fall under the institutional remit of the United Nations Development Agency. They emerge from the UNDP's strategic plan and in particular its focus area on democratic governance and peacebuilding. While there is some overlap between the remit of UNDP and that of the Security Council, it is interesting to note that the emphasis on inclusion emerges from different thematic areas of policy and practice and from different institutional structures, thereby strengthening the claim of a system-wide attention to inclusion. The aim of the SDGs is to 'foster peaceful, just and inclusive societies'[39] and they recognize the need to build 'peaceful, just and inclusive societies that provide equal access to justice'.[40] Of particular note in this chapter are SDG 5 on gender equality, SDG 10 on reducing inequality, and SDG 16 on peace, justice, and strong institutions. Each goal is accompanied by goal targets, towards which signatories must work. These goals include a commitment to promote social, economic, and political inclusion, and ensuring inclusive, participatory, and representative decision-making at all levels. SDG 5 includes the goal of ensuring women's full and effective participation at all levels of public life.[41] SDG 10 includes the goal of empowering and promoting the social, economic, and

[33] UNSC Res. 2282 (2016) UN Doc. S/RES/2282, preamble.
[34] Ibid. para. 12.
[35] UN General Assembly Res. 70/1 (21 October 2015) UN Doc. A/Res/70/1.
[36] Ibid.
[37] See International Alert, *Peace Through Prosperity: Integrating Peacebuilding into Economic Development* (International Alert, 2015); Jan Poposil and A. Rocha Menocal, 'Why Political Settlements Matter: Navigating Inclusion in Processes of Institutional Transformation' (2017) 29 *Journal of International Development* 551.
[38] See Summary of Colombia's Agreement to End Conflict and Build Peace (2016) <http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/summary-of-colombias-peace-agreement.pdf >accessed 31 July 2017.
[39] SDG's preamble.
[40] SDG's preamble, 35.
[41] Text of SDG 5 available at <http://www.un.org/sustainabledevelopment/gender-equality/> accessed 31 July 2017.

political inclusion of all without discrimination.[42] SDG 16 is specifically concerned with finding lasting solutions to conflict and insecurity, strengthening the rule of law and promoting human rights, making it particularly relevant for the *jus post bellum*. It includes the target of ensuring responsive, inclusive, participatory, and representative decision-making at all levels.[43] The SDGs are significant because they demonstrate engagement across the UN system with the matter of inclusion. Notable also is the fact that the SDG agenda was 'accepted by all countries and is applicable to all'.[44] The goals were adopted unanimously in the General Assembly,[45] demonstrating widespread state support for their aims, which can be read as an increased acceptance of the principle of inclusivity.

The increasing emphasis on inclusion across the UN system demonstrates the emergence of a broader trend institutionally. However, the emergence of inclusion as an underpinning concept of international law and policy is not limited to institutional planning. It is also apparent across a range of thematic areas of international law. These thematic examples offer a much more textured account of inclusion as an underpinning norm, demonstrating the ways in which normative principles are drawn from different sources to create a holistic system to advance the goal of inclusion.

IV. Thematic Normative Framework

As noted, there is a significant body of existing norms across distinct thematic areas that speak to the need for inclusion in the aftermath of conflict. These existing normative frameworks often ground demands for inclusivity and form the basis for policy in this area. The examples selected here are those of the well-established WPS agenda that illustrates particularly well the impact of UN programming on inclusion; the emerging Youth Peace and Security Agenda that demonstrates the spread of these principles and procedures to diverse thematic areas; and finally minority and indigenous rights that demonstrate the use of existing normative frameworks to advance demands for inclusion.

A. Women, Peace and Security

Since the adoption of the landmark UN Security Council Resolution 1325 (SCR 1325) in 2000, it has been recognized that under-represented groups need to be included in peace negotiations. SCR 1325 provided the basis for both an international legal framework and an institutional system dedicated to ensuring women's effective participation in peacebuilding. The resolution predates the adoption of the language of inclusion, but represents the first step in this direction. The preamble stresses the importance of women's 'equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision making with regard to conflict prevention and resolution'.[46] The resolution then urges Member States to increase the representation of

[42] Text of SDG 10 available at <http://www.un.org/sustainabledevelopment/inequality/> accessed 31 July 2017.
[43] Text of SDG 16 available at <http://www.un.org/sustainabledevelopment/peace-justice/> accessed 31 July 2017.
[44] SDG's preamble.
[45] UN General Assembly Res. 70/1 (n 35).
[46] UNSC Res. 1325 (31 October 2000) UN Doc. S/RES/1325 (2000) preamble.

women at all levels of decision-making in institutions and mechanisms for the resolution of conflict,[47] and also encourages the secretary-general of the UN to implement a strategic plan of action calling for women's increased representation in conflict resolution and peace processes.[48] These commitments laid the foundations for the 'participation' pillar of the WPS agenda and also for international efforts to advance women's inclusion in peace processes. SCR 1325 was complemented by two subsequent resolutions: SCR 1888 (2009) and DCR 1889 (2009). Known as the 'participation' resolutions these resolutions aim to address gaps in implementation arising from the slow momentum of 1325 in the early years. Resolution 1889 reaffirmed the principles of resolution 1325, and called on the secretary-general and Member States to increase the involvement of women at all stages of peace processes. The resolution reiterates the vital role of women in preventing conflict and in peacebuilding, thereby highlighting the link between inclusion and peace.

As a result, this agenda has created a huge architecture of policy, advocacy, and civil society organizations dedicated to its implementation. It provides clear insight into how a 'norm' of inclusion can be implemented and evaluated. SCR 1325 was the culmination of a lengthy process of women's activism.[49] What it created was a framework embedded in the UN system from which the norm could be diffused. At an institutional level, implementation of SCR 1325 was monitored by the Security Council, through debates, reporting,[50] and the adoption of global indicators by which progress could be evaluated.[51] Most of the major UN entities have assumed responsibility for the implementation of SCR 1325 within their area of operation by mainstreaming gender throughout their work.[52] However institutional activity within the UN system is only one aspect of a much broader project of diffusion of the participation norms of the WPS agenda. At the state level the acceptance in practice of the principle of inclusion is evidenced in the adoption of National Action Plans (NAPs) that articulate the steps that Member States will take to implement the obligations of UNSCR 1325.[53] In his Report on Women, Peace and Security the Secretary-General described the NAPs as 'a key strategy in ensuring the achievement of commitments in the area of women and peace and security'.[54] He goes on to emphasize how they 'provide for a comprehensive and systematic monitoring and evaluation of activities with respect to policy goals'.[55] The NAPs are a useful example of the way in which progress towards broader policies of inclusion could be expected to proceed. Records of NAPs on SCR 1325 maintained by the Institute for Inclusive Security indicate sixty-three NAPs to date, with a further

[47] Ibid. para. 1

[48] Ibid. para. 2; The strategic plan of action was set out in UN Doc. A/49/587(1994), adopted by the General Assembly.

[49] Carol Cohn, Helen Kinsella, and Sherri Gibbings, 'Women, Peace and Security Resolution 1325' (2004) 6 *International Feminist Journal of Politics* 130.

[50] Report of the Secretary-General on Women, Peace and Security UN Doc. S/2010/498 (2010) setting out 26 indicators (hereinafter WPS).

[51] '7-point Action Plan on Women's Participation in Peacebuilding' (UN Secretary General Report S/2010/466 and UN General Assembly Res. A/65/354); UN Strategic Results Framework on Women, Peace, and Security 2011–2020 <http://www.un.org/womenwatch/ianwge/taskforces/wps/Strategic_Framework_2011-2020.pdf> (accessed 31 July 2017).

[52] These bodies include the Department of Political Affairs, the Office for Co-ordination of Humanitarian Action, the Department of Peacekeeping Operations, and UN Women. See WPS (n 50) for detailed discussion of the initiatives taken by each department.

[53] Ibid. para. 14.

[54] Ibid.

[55] Ibid.

sixteen in progress.[56] As a percentage of the UN membership the figure of seventy-nine NAPs (adopted and in progress) amounts to about 41%, with a relatively good geographical spread.

Further, action plans and policies for implementation of UNSCR 1325 are not restricted to Member States, but also adopted by international organizations. The UN,[57] the EU,[58] NATO,[59] the Organization for Security and Co-operation in Europe (OSCE),[60] and the African Union[61] have all adopted policies aimed at increasing the inclusion of women in peacebuilding. The increasing use of these plans to monitor the implementation of the principles of 1325 is interesting because it demonstrates the cascade down to regional organizations and national governments of the legal obligations contained in the UN resolutions. The adoption of an action plan, and the subsequent monitoring and reporting on the obligations contained in those plans contributes to an increasing body of state practice whereby national governments give effect to soft law and policy emanating at the international level.

However the existence of these 'soft' norms alone does not explain state action in this regard. While new international developments on inclusion help to shape state practice, this practice is also rooted in more traditionally normative sources of obligation. In particular states, in formulating their actions plans, will refer back to existing human rights law obligations contained in treaty law as a means of grounding their obligations. The Convention on the Elimination of Discrimination Against Women (CEDAW) is the most obvious example of existing treaty obligations that can be used to ground practice in WPS.[62] The work of the CEDAW Committee and that of the WPS agenda is increasingly read as interdependent, highlighting a more holistic view of the importance of inclusion in the context of women's empowerment.[63] However the equality and non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also provide a treaty basis for inclusion, as do the values and provisions of the UN Charter and the Universal Declaration of Human Rights (UDHR). Inclusion as a norm therefore emerges from within existing shared principles embodied in existing international human rights treaty law.[64] This allows states to identify their policies on inclusion as part of their existing international legal commitments, establishing a 'rights based' approach to inclusion.[65]

Perhaps most notable, however, has been the civil society mobilization around women's inclusion. The emergence of inclusion as an underpinning principle of international policy

[56] Available at <https://actionplans.inclusivesecurity.org> accessed 31 July 2017.

[57] UN system wide action plan for the implementation of CEB United Nations System Wide Policy on Gender Equality and the Empowerment of Women (2012).

[58] Comprehensive Approach to the EU Implementation of the United Nations Security Council Resolution 1325 and 1820 on Women, Peace and Security (Brussels, 2008).

[59] Integrating SCR 1325 and Gender Perspectives in the NATO Command Structure Including Measures for Protection During Armed Conflict (2009).

[60] Women in Conflict Prevention, Crisis Management and Post-Conflict Rehabilitation (2005).

[61] African Union Gender Policy (2009).

[62] See for examples the NAPs of The Netherlands <http://actionplans.inclusivesecurity.org/wp-content/uploads/2016/03/national-action-plan-women-peace-and-security-2.pdf>; Ghana <http://www.peacewomen.org/assets/file/ghana_nap_oct2010.pdf>; and Norway https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/fn/ud_handlingsplan_kfs_eng_nett.pdf> accessed 31 July 2017.

[63] Aisling Swaine and Catherine O'Rourke, 'Guidebook on CEDAW General Recommendation no. 30 and the UN Security Council Resolutions on Women Peace and Security' (UN Women, 2015).

[64] These 'pillars' of international law are also explicitly referenced as underpinning the SDGs.

[65] See Aisling Swaine, 'Assessing the Potential of National Action Plans to Advance Implementation of United Nations Security Council Resolution 1325' (2009) 12 *Yearbook of International Humanitarian Law* 403.

is strongly reflected in the campaigning of civil society.[66] This work is significant as it helps to connect global policy with local initiatives and to ensure that the policy aim of inclusion is embedded in the practice of grass roots peacebuilding. Policy-led research in this area has begun to explore not only the principle of inclusion and its purported benefits, but also the modalities of inclusion and how to operationalize the principle.[67] While activism has been most obvious in relation to women's inclusion the model itself is one that can be replicated across intersectional lines of identity. It is therefore of interest as a means of thinking about practice, but also about the impact of practice on policy.

The thematic area of WPS demonstrates the interlinkages between institutional policy, state practice, and grass roots mobilization. The circularity of this relationship helps to create a holistic practice of WPS that in turn feeds into normative development. This is a significant dynamic when considering the emergence of any norm, but demonstrates very clearly the priority attached to inclusion and the way it has shaped law, policy, and practice in post-conflict environments.

B. Youth, Peace, and Security

Although the idea of inclusion is most prominently associated with the WPS agenda, the expansion in the 2012 Report of the understanding of inclusion to include youth, labour organizations, and other under-represented groups has opened up the possibility of replicating the frameworks of WPS to advance the position of other groups in peacebuilding.[68] This is already evident in the case of the new Youth Peace and Security framework that emerged with the adoption by the Security Council in December 2015 of Resolution 2250. The resolution highlights that young people are often in the majority in countries affected by armed conflict, and recognizes the positive contribution that they can make to efforts for the maintenance of peace and security.[69] Specifically, the resolution recognizes that 'a large youth population presents a unique demographic dividend that can contribute to lasting peace and economic prosperity if inclusive policies are in place'.[70] Flowing from this, Member States are urged to 'consider ways to increase inclusive representation of youth in decision making at all levels in local, national, regional and international institutions and mechanisms for the prevention and resolution of conflict'.[71] The link is also made between inclusion and sustainable peace, with the resolution calling on all actors to recognize that the marginalization of youth is detrimental to building sustainable peace.[72] In this way, the Youth Peace and Security Agenda mirrors the rationale for inclusion—namely that exclusion is a driver of conflict and that inclusion is the means by which long-term peace is secured.

[66] See WPS (n 50) for an overview of significant civil society initiatives in this area.

[67] See e.g. Tania Paffenholz, 'Can Inclusive Peace Processes Work? Evidence from a Multi-Year Research Project', Inclusive Peace and Transition Initiative (Geneva 2015).

[68] Women, Peace and Security is explicitly referenced in the preamble to Res. 2250 to frame the need for action on Youth, Peace and Security.

[69] UNSC Res. 2250 (2015) UN Doc. S/RES/2250 (2015) preamble.

[70] Ibid.

[71] Ibid. para. 1.

[72] Ibid. para. 2.

In addition to setting out the substantive agenda for involving youth in peace and security, Resolution 2250 also mandates an institutional response to the need to implement and evaluate progress on the resolution. What this presents is the beginning of a call for the mainstreaming of the inclusion of youth throughout UN programming in the area of peace and security. It calls for effective integration across the system to improve co-ordination regarding the needs of youth in post-conflict situations.[73] In this way, it is expressly linked with the goal of sustaining peace through the creation of peaceful, just, and inclusive societies. The importance of forging links between local, national and global initiatives is also highlighted, mirroring the holistic strategy that has been so successful in advancing the WPS agenda. In the resolution the secretary-general is requested to conduct a progress study on the contribution of youth to peace and security,[74] the results of which are to be used as the basis for recommendations for effective responses at local, national, and international level.[75] It is expected that this report will be presented to the Security Council in late 2017.[76]What the example of the Youth Peace and Security Agenda demonstrates is the potential for existing frameworks for action to be applied to a diverse range of thematic areas for action.

C. Minority and Indigenous Rights

The final thematic area to be considered is that of minority and indigenous rights. In contrast to WPS this is an area with less explicit action (in terms of resolutions and operational indicators) from the UN bodies, but where there is an existing body of international law that expressly mandates inclusion. This body of law is interesting because it predates the move towards the policy language of inclusion in international law yet provides a clear framework for demands for the inclusion of traditionally marginalized or under-represented groups.[77] For both minorities and indigenous groups the right to participate in decision-making—or the right to inclusion—is enshrined in treaty form. Article 2.2. of the United Nations Declaration on the Rights of Minorities provides that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic, and public life.[78] Similarly, the UN Declaration on the Rights of Indigenous Peoples provides in Article 18 that indigenous people have the right to participate in decision-making in matters that would affect their rights.[79] These documents are both declarations, adopted by the General Assembly. As such they lack the 'hard' legal form of a treaty or convention. Nevertheless, they are a good indicator of state opinion on the rights of minorities. Similarly, although the

[73] Ibid. para. 19; The relevant agencies concerned with Youth, Peace and Security include the secretary-general's envoy on youth, the secretary-general's envoy for youth refugees, as well as UNDP, the Office of the High Commissioner for Refugees and the Office of the High Commissioner for Human Rights.

[74] Ibid. para. 20.

[75] Ibid.

[76] See <https://www.youth4peace.info/ProgressStudy> accessed 15 December 2019.

[77] This is based on the idea that indigenous people have a right to 'free, prior, and informed consent', discussed in Philipp Dann, *The Law of Development Co-operation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press 2013) 282

[78] UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) UN Doc. A/Res/47/135 (1992).

[79] UN General Assembly Declaration on the Right of Indigenous Peoples (2007) UN Doc. A/RES/61/295 (2007).

declarations relate to all areas of public life, and are not specifically conflict related, the principles that they enshrine can be read as equally applicable to post-conflict settings, making them relevant to the *jus post bellum*. Recent developments highlight this potential.

In May 2016, the UN Economic and Social Council (ECOSOC) Permanent Forum on Indigenous Issues held a session on the theme of 'Indigenous Peoples: Conflict, Peace and Resolution', during which it debated the importance of ensuring the effective inclusion of indigenous people in initiatives for peace and reconciliation.[80] In the concept note for this meeting, the rights and needs of indigenous people in conflict resolution were expressly linked with SDG 16 and the need to promote peaceful and inclusive societies with fair access to all.[81] The discussion was also linked to broader developments in the WPS agenda and the need to highlight particular challenges faced by indigenous women, thereby highlighting intersectionality and the way in which a focus on inclusion potentially has a wider impact than a narrow focus on specific areas of 'rights'. Areas specifically highlighted as being of concern to indigenous peoples are the militarization of land, exploitation of resources, displacement by violence, denial of social and cultural rights, and the consequent lack of participation in processes of conflict resolution. The concept note highlights how

> Unfortunately, indigenous peoples have not had significant gains from the processes of conflict resolution: political remedies have not always been useful, and many legal remedies are not always accessible. Although indigenous peoples are overrepresented as victims in conflicts, often they have not been considered as stakeholders in transitional justice mechanisms or in peace process negotiations and accords.[82]

What the forum highlighted was that there could be 'no peace to these conflicts unless indigenous people are equal participants in any plans for peace and resolution, with a focus on the rights enshrined in the Declaration'.[83] The report recalled the obligations under articles 7[84] and 30[85] of the declaration and called on states to take measures for the construction of a durable and lasting peace, promoting the full and effective inclusion of indigenous peoples in any initiative for peace and reconciliation.[86] This highlights the importance of the existing normative framework provided by the Declaration to ground calls for further action. What also emerges is the importance of inclusion as a means of ensuring underlying and cross-cutting human rights. Access to processes of conflict resolution and peacebuilding are the means by which the rights contained in the declaration are to be achieved.

[80] ECOSOC Plan d'action à l'échelle du système des Nations Unies visant à garantir l'unité de l'action menée pour réaliser les objectifs définis dans la Déclaration des Nations Unies sur les droits des peuples autochtones (19 February 2016) UN Doc. E/C.19/2016/L.5.

[81] See the concept note in <http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Concept-note-Conflict-discussion-FINAL.pdf> accessed 31 July 2017.

[82] Ibid.

[83] UN, 'Indigenous Peoples Must be Equal Participants in Peace Plans, Conflict Resolution, Chairs says Permanent Forum Opens' (9 May 2016) UN Doc. HR/5297.

[84] The rights of indigenous peoples to live in peace and security without being subjected to violence, including genocide.

[85] The prohibition of conducting military activity on indigenous peoples' land without consent.

[86] ECOSOC Permanent Forum on Indigenous Issues, Report of the 15th Session (May 2016) UN Doc. E/2016/43-E/C.19/2016/11 para. 52.

V. Assessing the Emergence of a 'Norm'

So far, what has been demonstrated is that inclusion is increasingly mainstreamed in international post-conflict policy. The question that remains is whether it can be said that there is a 'norm' of inclusion. Has an independent norm emerged? Can a right be derived from existing normative commitments? Or is inclusion simply a matter of good practice? If it has emerged as a norm, what is the status of that norm? All of these questions need to be asked before any claim can be made that a 'norm' of inclusion exists.

The first option is to consider whether or not the emphasis placed on inclusion in international policy and in state practice amounts to evidence of custom, either established or emerging. To exist as a customary norm of international law it would need to be demonstrated that not only was there widespread state practice in relation to inclusion, but that states adopted this practice on the basis of *opinio juris*.[87] It is possible to point to some evidence of state practice in this area, most notably through the adoption of NAPs, as discussed in Section III. Similarly, it has been suggested that this practice is rooted in existing normative commitments, meaning that states produce NAPs because they feel themselves bound to do so.[88] More interesting for the purposes of the current argument is, however, the possibility that the resolutions adopted by the UN may amount to evidence of custom. In his third report on the identification of customary international law, the UN special rapporteur highlighted that it was widely accepted that resolutions adopted by states within international organizations might have a role in the formation and identification of customary international law.[89] This opens up the possibility that the increasingly broad adoption of the principle of inclusion in resolutions of the Security Council and the General Assembly points to the emergence of custom. The rapporteur highlights how such resolutions may 'exert a strong influence' on the development of customary international law, and that this is particularly the case 'where a resolution provides the impetus for the growth of a general practice accepted as law in conformity with the text'.[90] However caution must be exercised when making such claims. The report is also clear that while resolutions of international organizations may amount to evidence of custom or contribute to its development, it cannot in and of itself constitute it.[91] While such resolutions may have normative value and provide evidence of existing or emerging law, they are not a short-cut to ascertaining international practice.[92] They must be accompanied by state practice in conformity with the proposed law.[93] In the context of inclusion, there is insufficient evidence that the commitments undertaken are honoured, nor is there a clear enough link between the specific case of the WPS agenda and other thematic areas to draw conclusions of general application that would support the existence of custom in this area.

[87] See International Law Commission, 'Second Report on Identification of Customary International Law' (2014) UN Doc. A/CN.4/672.

[88] It should be noted that there is no provision in Resolution 1325 that compels states to comply with its provisions. The sense of obligation derives more commonly from existing treaty-based frameworks with 'harder' legal character.

[89] International Law Commission, 'Third Report on the Identification of Customary International Law' (27 March 2015) UN Doc. A/CN.4/682 para. 45.

[90] Ibid. para. 52.

[91] Ibid. Draft Conclusion 13, para. 54.

[92] Ibid. para. 50.

[93] Ibid. para. 51.

However, just because there is insufficient evidence of the existence of a customary norm does not mean that no norm is emerging. While it is difficult to point to a single 'hard' legal source of obligation in respect of inclusion, it may be particularly useful to look further at the category of 'soft' law and to examine whether or not there is evidence of emerging consensus on inclusion that may crystallize into a 'hard' norm. In this context, soft law can perform a number of important functions. First, it can help to clarify the scope of existing standards. The articulation of principles of inclusion within thematic areas of international law provides definite and contextualized guidance on how a norm of inclusion should be interpreted. This helps elaborate on the requirements of the commitment to inclusion that is set out in the institutional policies of the Security Council and UNDP. With the replication of these approaches across thematic areas, consensus begins to build up both on the importance of inclusion as a principle of post-conflict policy-making, and on how to deliver it. This in turn provides the basis from which states and non-governmental organizations can formulate policy and practice. As discussed above, this practice may, in turn, be taken into account as evidence of the formation of custom. As states and international organizations begin to adopt and implement common frameworks for action, it becomes easier to point to a pattern of state practice and accompanying *opinio juris* required.

Second, soft law can help to place issues on to the agenda that may not otherwise fall within the priorities of states or elites. Agreements ending violent conflict have historically been negotiated between warring parties. They have been opportunities for elite players to carve up power and influence. While it may not be possible or even desirable for *jus post bellum* to posit a rigidly normative framework for post-conflict justice and accountability, inclusion can provide a means of directly challenging powerful actors. For weaker parties, a legal norm strengthens their ability to make demands both in terms of representation and outcomes.[94] Inclusion as a norm confirms that marginalized or vulnerable groups enjoy rights in respect of their participation in peace processes. In addition to ensuring their place at the negotiating table, inclusion also provides the context in which such groups can place issues of specific concern to them on the agenda, even where these issues conflict with the interests of powerful actors. For example, the rights of women, land rights of indigenous people, or social and economic rights that would redress past injustices and benefit marginalized communities can all be placed on the agenda where they may not otherwise be addressed.[95] Placing such issues on the agenda does not necessarily foreclose the outcome of post-conflict negotiations, but it does ensure that they must be addressed, giving those most affected by conflict a say in what the priorities of post-conflict justice should be. This in turn helps strengthen the legitimacy of such institutions if or when they are created. Further, the leverage provided by a norm of inclusion allows other rights to be raised. When coupled with a right to be included the existing international legal frameworks discussed in Section III, such as CEDAW, the ICESCR, the Declaration on the Rights of Minorities, and the Declaration on the Rights of Indigenous Peoples, can help to frame the substance of negotiations.[96] Although many of these norms exist in 'soft' legal form, they nevertheless

[94] Catherine Turner, 'Law and Negotiation in Conflict: Theory, Policy, Practice' (2016) 7 *Global Policy* 256, 266.
[95] Ibid.
[96] This is an approach used in the development context, where existing economic and social rights frameworks are used as the 'context' in which rights of participation are asserted. See Dann (n 77) 282; See also Catherine Turner 'Transitional Constitutionalism and the Case of the Arab Spring' (2015) 64 *International and Comparative Law Quarterly* 267.

create a context in which conflicting positions and interests and rights can be negotiated (if not reconciled).

Third, soft law can help to elaborate values that in turn contribute to the interpretation and progressive development of the law. As Shelton argues, a 'soft' legal methodology is often the best means of addressing important international issues, including the elaboration of new norms.[97] The gradual incorporation of principles of inclusion into a range of different soft law mechanisms begins to build up a common theme. For example, the fact that the Sustaining Peace Agenda was adopted both by the Security Council and the General Assembly, or that the SDGs were adopted unanimously at the General Assembly, demonstrates a broad commitment across UN Member States to the principles of inclusion, even if these are not cast in 'hard' legal form. This alone may be read as evidence of consensus among states on the importance of inclusion, and suggests a willingness to accept soft law principles as legally normative.[98] The gradual assertion and reassertion of these principles can, over time, harden into a more legally normative approach to the design of post-conflict institutions. While it is not argued that inclusion has emerged as a norm of customary international law, the extent of the commitment to inclusivity across institutional and thematic lines does suggest that it forms a core underpinning principle of any international post-conflict regime. In particular, it could be argued that inclusion has emerged as a 'general principle' of international law within the scope of Article 38 of the ICJ Statute. What is understood by 'general principle' in this context is a rule that can be deduced by analogy from already existing rules or from the principles that guide the legal system.[99] A general principle does not have the same binding status as custom or treaty law, but as with all soft law it has the potential to harden into a legal norm. It is clear from the examples provided above that inclusion as a norm can be deduced in this way. The number and range of different institutional and normative regimes that express a commitment to inclusion suggest that it is beginning to emerge as a norm in its own right. Crucially, it is emerging from within the existing system rather than being posited independently.

Finally, when thinking about inclusion as a general principle of *jus post bellum*, it is also useful to consider the role of inclusion as a value. Values play an increasingly important role in international law as the international community seeks to ground post-conflict law and policy in the values of the UN Charter. In the case of *jus post bellum*, inclusion as a value can help to hold disparate approaches together as a cohesive normative regime. An underlying commitment to inclusion lends legitimacy to other more normative approaches, providing a clear context in which other rights can be pursued,[100] lending strength to an overarching regime of *jus post bellum* that is concerned with the justness of the peace. In this way, thinking of inclusion as a general principle aligns with the idea of *jus post bellum* itself as a value based interpretive framework for post-conflict policy and practice. Seen in these terms, it aligns with Gallen's view of *jus post bellum* as a range of different institutions with a

[97] Dinah Shelton, 'Commentary and Conclusions', in Dinah Shelton (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 449.

[98] Christine Chinkin, 'Normative Development in the International Legal System', in Dinah Shelton (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 21, 33.

[99] Adapted from Malcolm Shaw, *International Law* (Cambridge University Press 2014) 69.

[100] See Catherine Turner, 'Human Rights and the Empire of (International) Law' (2011) 29 *Law and Inequality* 331, 337–40.

range of different goals connected, in this analysis, by an underlying commitment to inclusion and to restoring the voice of those who have suffered most in conflict.[101]

VI. Conclusion: Why Inclusion Matters

It remains contested whether there *ought* to be a normative regime of *jus post bellum*. In particular, it is by no means agreed that international law should regulate the fine detail of peace agreements. International law is simply one among many factors that determine the shape and the success of an agreement. However rather than argue that there is no role for international law, and that agreements are simply a matter for political negotiation, the focus of this chapter is on the role of international law in ensuring fair and inclusive negotiation processes. Viewing international law as a framework for participation, it is argued, opens up new possibilities for thinking about its form and potential post-conflict.

Given the contested nature of the debate, it is useful to draw some conclusions on the broader significance of a norm of inclusion for the *jus post bellum*. The first conclusion to be drawn is that while it could not yet be argued that inclusion has achieved the status of customary international law, there is a strong argument to be made that as a matter of *lex ferenda* there is clear evidence of inclusion having emerged as a general principle of international law and of *jus post bellum*. The second is that while inclusion as a norm has not traditionally been included in the list of rights to be pursued in post-conflict justice institutions, it nevertheless plays an important role in securing a range of other rights and in ensuring the broad legitimacy of these processes. Inclusion is the means by which just and equitable ends are secured. The evidence of mainstreaming inclusion as a goal throughout institutional and thematic responses to conflict suggests a more prominent role for inclusivity in the future. Any new normative regime of *jus post bellum* must also then consider how inclusivity can help to shape its goals. Inclusion addresses both the legal and relational aspects of justice. It helps to move beyond a focus on strict legal normativity to encompass moral aspects of justice and the ability to 'be' together in the aftermath of conflict. It also embodies May's principle of reparation in that it helps restore the voice of those who have been silenced and excluded both by conflict and by traditional elite-led justice.[102] This is a crucial step in re-establishing civic trust among groups affected by conflict. Any top-down regime of *jus post bellum* that excludes those who have suffered would simply perpetuate the violence of exclusion experienced during conflict. Inclusion as a general principle of *jus post bellum* helps address this problem. The final conclusion to draw is that this restoration of voice is in itself an essential element of justice. It allows victims of conflict to have a say in how the new social order should be constructed. Without inclusion, these voices remain marginalized and justice is dictated by dominant narratives of war and peace. A focus on inclusion opens up at least the possibility of negotiating justice. Any legal regime of *jus post bellum* must operate in an inherently contested political context. It is therefore important

[101] See James Gallen, '*Jus Post Bellum*: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 58. For Gallen the aims are those of restoring civic trust and the rule of law.

[102] May (n 9).

that spaces are kept open for ongoing contestation of what justice means and how it is to be delivered.[103] This is not achieved by positing normative legal regimes that posit particular justice institutions and outcomes, but rather by creating the conditions in which as many voices as possible can contribute to the debate. A norm of inclusion does not guarantee that any one idea of justice will be accepted, but it does help to ensure that each voice is heard.

[103] Christine Bell, 'Of Jus Post Bellum and Lex Pacificatoria: What's in a Name?', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 181, 201

PART III
SECURITY AND STABILITY

9

Legal Protection of the Environment

The Double Challenge of Non-International Armed Conflict and Post-Conflict Peacebuilding

*Dieter Fleck**

I. Introduction

The protection international law provides against environmental damage in relation to armed conflict is less than perfect. A comprehensive regulation is not available. Applicable principles and rules are to be searched for in different branches of international law. Their contents and consequences are often less than clear. Warring parties have taken advantage of such deficiencies. Military planners and operators notoriously tend to marginalize environmental obligations during military operations. Multilateral environmental agreements that have been concluded in peacetime are often neglected in the conduct of hostilities. Parties to an armed conflict may even find certain justification for such conduct in the principles and rules of international humanitarian law, a body of law that on the one hand requires no more (and no less) than 'due regard' to the protection and preservation of the natural environment, in that:

> [m]ethods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions[1]

and on the other provides but few specific treaty obligations of doubtful relevance: in international armed conflicts significant rules are limited to a prohibition of 'environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury',[2] and 'widespread, long-term and severe damage' to the natural environment,[3] that is damage of an extreme kind and scale that has not occurred so far and may hardly be expected in the conduct of hostilities, unless weapons of mass

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[1] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 3 vols (Cambridge University Press 2005), CIHL—Rule 44.

[2] Art. I(1) of the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques 1108 UNTS 151.

[3] Arts 35 (3), 55 (1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), 1125 UNTS 3.

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destruction would be used. As far as the protection of the natural environment in non-international armed conflict is concerned, international humanitarian law is even less precise. The aforementioned Rule 44 of the Study on Customary International Humanitarian Law (CIHL) applies, according to its authors, 'arguably' also during non-international armed conflicts. Yet there is but little relevant practice in non-international armed conflicts and the question of whether *opinio juris* may bridge this vacuum to develop customary law nevertheless, still deserves some discussion.

The present situation has the potential to obscure existing environmental obligations and to deny clear legal guidance on this matter. Such guidance is, however, necessary for policymakers and military operators alike. Lack of convincing assessment and uncertainty about the contents of existing rules may increase unnecessary suffering of civilian populations in war-torn territories, disrupt important ecosystems, and even prevent effective peacebuilding in post-conflict situations.[4]

The current International Law Commission (ILC) project on the Protection of the Environment in Relation to Armed Conflicts[5] undertakes to develop proposals on legal protections against environmental effects both *in bello* and *post bellum*.[6] Taking a 'phased' approach by considering preparation and prevention measures (phase I), obligations relating to the protection of the environment during an armed conflict (phase II), and finally reparation and reconstruction measures (phase III), the project provides an in-depth evaluation of principles and rules deriving from several relevant branches of international law, most particularly environmental law, international humanitarian law, and human rights law. It also identifies relevant principles and rules deriving from treaties and evolving custom.[7] Consultation and contact with states and the UN, the United Nations Environment Programme (UNEP), the United Nations Education, Science and Cultural Organisation (UNESCO), the International Committee of the Red Cross ('ICRC'), and relevant non-governmental organizations remain essential to reaffirm and further develop existing rules.

This chapter examines the legal basis on which environmental protections can be deemed to apply to non-international armed conflicts and what specific obligations may be entailed in post-conflict peacebuilding. In an effort to evaluate pertinent obligations in the conduct of hostilities (Section II), several questions will be addressed that appear to have been widely neglected so far, including the following: would a specific international regulation constitute an unjustified intrusion on state sovereignty? Can rebel groups fighting governments realistically be expected to adhere to environmental obligations? Does individual criminal responsibility attach to breaches of relevant prohibitions? In what sense are parties to the conflict accountable for environmental devastation? May states be liable also for injurious consequences of acts not explicitly prohibited by international law? Furthermore, issues of post-conflict peacebuilding will be discussed, to explore which principles and provisions are accepted or should be developed here, thus addressing important aspects of *jus post bellum* (Section III). Although many issues of the protection of the environment in

[4] See the 2011 Report of the International Law Commission, Annex E, UN Doc. A/66/10, 347.

[5] See ILC, UN Doc A/74/10 (2019), Chapter VI, Protection of the environment in relation to armed conflicts.

[6] See Michael Bothe, 'The ILC's Special Rapporteur's Preliminary Report on the Protection of the Environment in Relation to Armed Conflict: An Important Step in the Right Direction', in Pia Acconci, David Donat Cattin, Antonio Marchesi, Giuseppe Palmisano, and Valeria Santori (eds), *International Law and the Protection of Humanity*; *Essays in Honor of Flavia Lattanzi* (Brill/Nijhoff 2016).

[7] See above (n 5).

relation to armed conflicts are still uncertain, an attempt to draw some conclusions appears necessary and possible (Section IV).

II. Environmental Obligations in Non-International Armed Conflict

It is typical for the *jus in bello* that rules on the protection of the environment in times of war were first developed for international armed conflicts, whereas a state's military operations against insurgents were for a long time considered as that state's internal affair in which only rules of domestic law would apply. When after World War II international legal obligations of a state towards its own citizens in armed conflict were formally recognized with Article 3 common to the 1949 Geneva Conventions, there was still little idea that there should also exist international legal obligations to ensure the protection of the natural environment in non-international armed conflicts, despite the fact that significant examples of ecological devastation in such conflicts were known already at that time and the high probability of cross-border effects of such devastation, which have become more evident in the following years, was clearly foreseeable by experts.

The use of chemical defoliants in the Vietnam War and a progressively developing environmental awareness in the 1970s have led to the first relevant treaty prohibitions with the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) and Articles 35(3) and 55(1) AP I. Yet both treaties are applicable in international armed conflicts, only and their specific prohibitions are limited to environmental damage far above the scope of what had happened in any armed conflict so far. It remains, indeed, still subject to proof, whether the new treaty provisions exclude otherwise available options for military operations or—by prohibiting what is less than realistic anyway—may only lend themselves to disregard ecological devastation below the level so described. The latter reaction would not only neglect important principles of discipline and efficiency in the conduct of military operations, but also misinterpret relevant principles and rules of international humanitarian law: any attempt to argue that ecological damage below the level of 'widespread, long-term and severe' devastation may be unlimited in armed conflicts is, indeed, excluded under the principle that the natural environment as such is to be recognized as a civilian object. It would also disregard the principle of proportionality and the rule that precautions in attack shall be taken. But the present state of law is less than explicit. Clear conclusions for military behaviour are yet to be drawn. Unequivocal commitments to specifically ensure protections against environmental damage in the conduct of armed hostilities are required and in non-international armed conflicts this task is particularly pertinent.[8] Legal efforts to improve the present situation have not led to significant success so far.

It is impressive to see *opinio juris* developing nevertheless, showing states ready to confirm the protection of the natural environment in any armed conflict as a civilian object, and to describe the legal conditions for and consequences of using the environment as a

[8] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 528, refers to a 2006 commitment of the Lord's Resistance Army (LRA) in the Democratic Republic of the Congo to protect certain endangered species located in Garamba National Park, adding that in subsequent years the LRA continued to launch attacks inside the park and has killed park rangers.

military objective. General rules of international humanitarian law including those on the protection of enemy property from wanton destruction, the prohibition of excessive damage in the conduct of hostilities, the prohibition of pillage, the protection of civilian objects, and the rules regulating the use of weapons may, indeed, be more important and more effective for the protection of the natural environment than the specific rules of ENMOD and Articles 35(3) and 55(1) AP I mentioned above (n 3).[9] It is important to note that those general rules apply in international and non-international armed conflicts alike. Moreover, there may be a better understanding today for peacetime protections of the natural environment under other international treaties and their continuing relevance in times of armed conflict,[10] a factor that may further contribute to diminishing differences in the rules pertaining to the conduct of hostilities in international and non-international armed conflict.

There is a long history of environmental damage in times of war. The Scythians scorched the earth to slow the advancing Persians. The Romans salted the land around Carthage to make it infertile. But such examples cannot lead to the acceptance of similar conduct today, in a world that has become more densely populated, more vulnerable, and much smaller in the sense that accepted principles and rules progressively spread around the globe. The destruction of oil wells in Kuwait during the Gulf War of 1990–1991, excessive environmental damage in the Democratic Republic of the Congo between 2000 and 2011, the release of hazardous substances in industrial sites as a result of attacks against Hezbollah in Lebanon 2006, and ecological devastations in a great many other non-international armed conflicts have, indeed, alerted public opinion at global scale. Yet many armed opposition groups are fighting to secure (and denying the state to exercise) control on natural resources, such as oil, diamonds, gold, logging timber, and wildlife animals. It is difficult to ensure respect for legal limitations where the exploitation of natural resources, even resources necessary for the survival of civilians, is used for war funding, thus misusing natural resources as sources of war and drivers of war.

Too many warring parties today hazard the consequences of large-scale devastations despite the fact that in a long-term perspective such conduct may jeopardize their own interests. While this may explain the difficulties for progressive legal developments, international rules for internal armed conflicts have been successfully invoked nevertheless. After long and difficult negotiations on the contents of the Second Additional Protocol to the Geneva Conventions,[11] attacks on objects indispensable to the survival of the civilian population[12] and pillage[13] were prohibited for non-international armed conflicts of a higher threshold.[14] Predatory exploitation of natural resources has been condemned in UN reports and used

[9] For a recent comprehensive evaluation of pertinent rules of current international law, see Jean-Marie Henckaerts and Dana Constantin, 'Protection of the Natural Environment', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 469–91.

[10] See 2011 Report of the International Law Commission, ch. VI, sect. E, Draft Articles on Effects of Armed Conflicts on Treaties, UN Doc. A/66/10, 171–96.

[11] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 1125 UNTS 609.

[12] AP II, Art. 14.

[13] AP II, Art. 4(2)(g).

[14] The threshold for application of that protocol is considerably higher than what was more liberally circumscribed as 'armed conflict not of an international character' in Art. 3 common to the Geneva Conventions. It requires an armed conflict between regular armed forces of a state and organized armed groups under responsible command, exercising territorial control and carrying out sustained and concerted military operations (see Art. 1(1) AP II). The protocol does not even apply to armed conflicts between different groups of non-state actors, which have become quite common today.

as inducement for Security Council sanctions irrespective of whether or not it falls under existing treaty prohibitions of the *jus in bello*.[15]

A. Due Regard for the Natural Environment in Armed Conflict

A more systematic elaboration on the extent of customary rules on the protection of the natural environment and their applicability in non-international armed conflict may be based on the principle that in any armed conflict the right of the parties to choose methods or means of warfare is not unlimited (see Art. 35(1) AP I) and that such methods and means must be employed with due regard to the protection and preservation of the natural environment (Rule 44 CIHL). As argued in the Study on CIHL, the latter obligation may apply also in non-international armed conflicts, if there are effects in another state.[16] Such effects are, indeed, notorious for environmental destruction, as pollution of air or water may hardly be limited to a state's national territory. The study goes even further in suggesting that the customary rule may also apply to parties' behaviour within the state where the armed conflict takes place.[17] While the applicability of this rule as a legal obligation in non-international armed conflicts has been disputed still recently,[18] and relevant state practice shows but slow developments,[19] a discussion of the underlying legal principle may help to clarify the situation.

It should be noted that the 'due regard' formula that forms a central part of Rule 44 CIHL is also used in other branches of international law for situations in which a more specific legal obligation does not (yet) exist. An obligation to show 'due regard' appears in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[20] in a few instances which are, however, not typical for that convention's rules on the protection of the marine environment. Before these shall be examined here for better understanding, it may be recalled that while the main objective of UNCLOS is regulating peacetime co-operation, the convention is of considerable relevance also for the law of naval warfare and maritime neutrality, due to the fact that the conduct of naval operations in peacetime has an impact on wartime naval operations as well.[21] While the provisions of the convention regarding protection and preservation of the marine environment do not apply to warships and state aircraft, 'each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft' that such vessels or aircraft 'act in a

[15] See Daniëlla Dam-de Jong, 'From Engines for Conflict into Engines for Sustainable Development: The Predatory Exploitation of Natural Resources in Situations of Internal Armed Conflict' (2013) 82 *Nordic Journal of International Law* 155, reprinted in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Brill/Nijhoff, 2014) 205–27.

[16] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n 1) vol. I, 148–9.

[17] Ibid. 149.

[18] See Karen Hulme, 'Natural Environment', in Elisabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007), 204–37, 232; Karen Hulme, 'Taking Care to Protect the Environment Against Damages: A Meaningless Obligation?' (2010) 92 *International Review of the Red Cross* 675, 686, 691.

[19] See Practice Relating to Rule 44. Due Regard for the Natural Environment in Military Operations, at <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule44> accessed 9 June 2017.

[20] 1982 United Nations Convention on the Law of the Sea (UNCLOS, 1833 UNTS 397).

[21] See Wolff Heintschel von Heinegg, 'The Law of Military Operations at Sea' (ch. 20), in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations,* 2nd edn (Oxford University Press 2015).

manner consistent, so far as is reasonable and practicable', with the convention (Art. 236 UNCLOS). These saving clauses notwithstanding, the convention generally requires a distinct behaviour in respect of the natural environment even for warships, mitigated only by the clauses 'not impairing operations or operational capabilities' and 'so far as is reasonable and practicable', whereas the 'due regard' formula, wherever it applies, requires only to consider certain aspects or interests, without, however, prescribing a specific action to take. The general standard used in UNCLOS for obligations concerning the protection and conservation of the marine environment in peacetime is rather straightforward. It requires, for example, that:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention (Art. 194(2) UNCLOS)

and that states take measures 'to minimize to the fullest possible extent' any release of toxic, harmful, or noxious substances and any pollution (Art. 194(3) UNCLOS). This clearly requires more than what is expressed by the 'due regard' formula: it establishes an obligation to take appropriate measures, not only to just consider navigational rights of others and ecological consequences involved while leaving it to planners and operators to balance these measures and consequences against military requirements.

The 'due regard' formula is used in UNCLOS only in a few instances: to confirm that a coastal state in exercising its rights and performing its duties in an exclusive economic zone shall have due regard to the rights and duties of other states (Art. 56(2) UNCLOS); to describe a state's obligations in respect of the removal of abandoned installations (Art. 60(3) UNCLOS); and to regulate the prevention, reduction, and control of marine pollution in ice-covered areas (Art. 234 UNCLOS).

While these are clearly defined exceptional cases, literature and practice have used the 'due regard' formula more broadly to address a general obligation on the protection of the natural environment in armed conflict: the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea was the first international document that introduced this formula for the protection of the natural environment in armed conflict.[22] It stipulates that methods and means of warfare should be employed with due regard for the natural environment[23] and that states establishing an exclusion zone or war zone shall give due regard to the rights of neutral states to legitimate uses of the sea.[24] More recently the Harvard Manual on the Law of Air and Missile Warfare stated that 'due regard ought to be given to the natural environment' when planning and conducting air or missile operations.[25] While the Harvard Manual thus appears to slightly step behind well accepted stricter standards

[22] International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, prepared by international lawyers and naval experts convened by the International Institute of Humanitarian Law, edited by Louise Doswald-Beck (Cambridge University Press 1995).

[23] Ibid. 119–20.

[24] Ibid. 181–3.

[25] Manual on International Law Applicable to Air and Missile Warfare, Bern, 2009 (Cambridge, MA: Harvard University, Program on Humanitarian Policy and Conflict Research), Rule 89.

(without offering any explanation for the use 'ought to' instead of 'must' in its commentary), it also confirms that this rule applies in international and non-international armed conflict likewise.'[26]

As demonstrated by this short overview, the 'due regard' formula in discussions of the protection of the natural environment in armed conflict, first in naval warfare and later in air and missile warfare, was borrowed from UNCLOS where it is used, however, for situations other than operations affecting the natural environment. Nevertheless, Rule 44 of the Study on CIHL applies this formula in all theatres of war, yet without explaining its meaning and without commenting on practical consequences.

The relevant standard of behaviour in the exercise of due regard for the interests of others and for other protection requirements has often been specified as 'due diligence'. The ILC, in its 2001 Articles on the Prevention of Transboundary Harm from Hazardous Activities, has used this latter term to describe appropriate measures to prevent significant transboundary harm in order to exert the best possible efforts to minimize an existing risk, not, however, to guarantee that significant harm will be totally prevented, if it is not possible to do so.[27] In an effort to offer a definition of this term in a form as specific as possible, the commentary states the following:

> What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.'[28]

It may also follow from this understanding that during war-time a different degree of obligation will apply than in a situation of normal peace. Yet the 2001 ILC Articles have not offered any specific comment on this question. Fundamental obligations to prevent transboundary harm continue to exist in the event of an armed conflict. These obligations are closely connected with the obligation to take precautions for the protection of the civilian population in the conduct of hostilities. Due diligence, precaution, and prevention are closely linked and difficult to be treated separately The answer for what is appropriate and reasonable may drastically change as soon as armed hostilities are conducted. As will be discussed below (Section III), also in post-conflict peacebuilding the applicable standards of protection may still be different from normal peacetime situations. This should be taken into consideration when, in rather general terms and without further consideration, due diligence is being referred to as the standard basis for the protection of the environment from harm.[29]

'Due diligence' standards are not unique to the protection of the natural environment. They are equally relevant for other branches of international law where agreement on stricter rules may not have been reached, but a need was felt to find a balance between

[26] Ibid. commentary para. 4.

[27] Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries, UN Doc. A/56/10, Yearbook of the International Law Commission, 2001, vol. II, part two, 148, at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf> accessed on 19 May 2019, Art. 3 commentary paras 7–11.

[28] Ibid. para. 11.

[29] Timo Koivurova, 'Due Diligence' in Max-Planck Encyclopedia of Public International Law, at www.mpepil.com accessed 24 May 2020, paras 20–6.

rights and obligations of different subjects of international law. Thus an obligation of states to apply due diligence in ensuring cyber security[30] and taking preventive measures against malicious cyber activities originating from their territory is being discussed as part of the duty not to harm rights of other states.[31] This obligation, too, has been developed as a peacetime rule and may be subject to change *in bello* and *post bellum*.

While the question remains open to what extent there is a commonality of understanding in the different areas in which the notion of due diligence is applied, there appears to be consensus that due diligence is of relevance to obligations that require states to have due regard for the interests of others and that due regard/due diligence is an obligation of conduct, not an obligation of result.[32] What is at stake here is a primary rule of conduct, rather than a secondary rule of state responsibility. The notion so described remains very general in its contents, and its application is subject to various considerations. Yet it provides an objective standard of behaviour, taking into account the technical, economic, and financial capacities available at the time. While that standard may change according to the particular context, developments over time and in relation to the risks involved, an objective assessment of responsibilities, considering all relevant circumstances of the specific case, is required here.

Based on this understanding of the 'due regard/due diligence' standard, the contents of Rule 44 CIHL and its applicability in non-international armed conflicts becomes clearer. It describes an obligation of parties to an armed conflict to show concern for environmental effects of their military operations, and to minimize such effects not only in view of transboundary damage, but also within the territory of operations. This includes the special consideration expressed in the last sentence of Rule 44, which may be read together with the preceding sentence as follows:

> Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking [feasible] precautions [to avoid, and in any event to minimize, incidental damage to the environment].[33]

While some doubts have been expressed in this respect, based on the argument that a party cannot be expected to exercise due regard based on information other than that available at the time,[34] it should be considered that lack of certainty is nothing one may neglect in planning and performing military operations, even less so when it is feasible to take appropriate precautions in the conduct of military operations.

[30] Wolff Heintschel von Heinegg, 'Legal Implications of Territorial Sovereignty in Cyberspace', in Christian Czosseck, Rain Ottis, and Katharina Ziolkowski (eds), *4th International Conference on Cyber Conflict* (Tallinn: NATO CCD COE Publications, 2012), at <https://ccdcoe.org/publications/2012proceedings/CyCon_2012_Proceedings.pdf,> 7–19, 17–18, accessed 20 May 2020.

[31] See Katharina Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace. International Law, International Relations and Diplomacy* (NATO CCD COE Publication 2013), xvi, 165–71, 186.

[32] See ILA Study Group on Due Diligence in International Law, at <https://olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf> accessed 9 June 2014, First Report (Washington Conference, 2014), 5, 30; Second (Final) Report (Johannesburg Conference, 2016), 2, 46–7.

[33] See above, accompanying text to n 1.

[34] William H. Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press 2009) 101.

B. Customary Obligations in Non-International Armed Conflict

Standard-setting projects have underlined the importance of, and also realistic possibilities for, environmental protection projects during armed conflicts, both international and non-international.[35] During the last decades, consensus among decision makers on the importance of ecological considerations for military operations has progressively developed. The United Nations Environment Programme has conducted a comprehensive review of the environmental effects of armed conflicts,[36] thus helping to build a systematic and reliable base of knowledge that may be used for policy-making and military planning, and has broadened acceptance of pertinent international obligations.[37] The development of new rules of the *jus in bello* has often started with experience in internal wars, as can be demonstrated by the Lieber Code[38] and the Prohibition of Dum-Dum Bullets.[39] A specific case in point is the prohibition of landmines through the 1997 Ottawa Convention,[40] which according to its Article 1(1) applies likewise in international and non-international armed conflicts and is, at least in part, a result of concerns about the effect of landmines on the natural environment.[41] But while it is clearer today than in former decades that states do have international obligations vis-à-vis their own citizens, it remains a complex question, whether—and if so how—armed opposition fighters are in fact bound to apply principles and rules of international law.[42] An affirmative answer to this question may be given, following the concept of legislative jurisdiction: states have to transform international law into domestic law, as binding for the state, not just the present government.[43] They may also accept self-executing provisions of international humanitarian law as binding for all citizens, including armed opposition groups. Yet clear and reliable commitments of warring parties and special agreements, as foreseen under Article 3(3) common to the Geneva Conventions, remain of particular relevance in this context.

[35] See e.g. Britta Sjöstedt, 'The Role of Multilateral Environmental Agreements in Armed Conflict: "Green-keeping" in Virunga Park. Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo' (2013) 82 *Nordic Journal of International Law* 129, reprinted in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Brill/Nijhoff 2014) 179; see also Britta Sjöstedt, *Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements* (Lund University 2016).

[36] UNEP, *Protecting the Environment During Armed Conflict. An Inventory and Analysis of International Law* (UNEP 2009).

[37] See also Michael Bothe, Carl Bruch, Jordan Diamond, and David Jensen, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities' (2010) 92 *International Review of the Red Cross* 569–92; Michael Bothe, 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict', in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Brill/Nijhoff 2014) 91.

[38] Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln (24 April 1863).

[39] Declaration (IV, 3) concerning Expanding Bullets, signed at The Hague, 29 July 1899, 1 AJIL Supplement (1907) 155–7.

[40] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention) 18 September 1997, 2056 UNTS 211.

[41] Sivakumaran (n 8) 527, making this argument, also refers to an ad hoc declaration of 21 March 2000 against the use and production of landmines in the Philippines. It should not be overlooked, however, that in a post-conflict setting remnants of war may also protect the environment, as mined areas are no longer open for exploitation and further pollution.

[42] See Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press 2013), section 1201, commentary, para. 5.

[43] See e.g. Roger O'Keefe, 'Universal Jurisdiction. Clarifying the Basic Concept' (2004) *Journal of International Criminal Justice* 735–60, 736, 756.

State practice and practice of armed opposition groups is a continuing matter of concern for any discussion on the protection of the environment in relation to armed conflicts. Practice is important, not only to confirm the existence of a rule as part of customary international law, but also to ensure compliance with and respect for existing rules. Yet it may be accepted that in international humanitarian law *opinio juris* deserves certain prominence, thus even shadowing state practice in its role for establishing a principle or rule of customary law. In international humanitarian law, distinct from other legal branches, the formation of a customary norm appears to be possible 'even when there is no widespread and consistent state practice, or even no practice at all'. The late Antonio Cassese, developing this argument in due consideration of the impact of the laws of humanity and dictates of public conscience,[44] convincingly referred to the Martens Clause as a cornerstone of international humanitarian law, which was coined at the 1899 Hague Peace Conference and confirmed in Article 1(2) AP I and in the Preamble (para. 4) of AP II. Similarly, in critical reviews of the Study on CIHL, the dominating question remained whether and to what extent *opinio juris* could be established, rather than trying to match with the seminal work undertaken by the ICRC to collect and evaluate relevant practice.[45] That many rules on means and methods of fighting and protection are likewise applicable in international and non-international armed conflicts is common coinage today.[46] It clearly derives from *opinio juris* rather than practice. Deviating from practice is normally (and rightly so) taken as an example of breaches, but not as relevant for limiting or denying the existence of a customary rule of international humanitarian law.

C. National Sovereignty and Its Limits

The existing law on the protection of the natural environment during armed conflict is a convincing example for the often-discussed limits to national sovereignty that do apply today. It forms an essential part of human security in a world characterized by global challenges. The rule of law, respect for the rights of others, and accountability of states and individuals for non-compliance with the law deserve particular attention when discussing state sovereignty and non-interference in the domestic affairs of other states. Ecological dangers are border-crossing by nature. They convincingly call for international commitments and acceptance of clear obligations under international law. This may well lead to the removal of old thinking, to a progressively developing *opinio juris*, and eventually to the adoption of relevant rules even for non-international armed conflict.

[44] Antonio Cassese, *International Law* (Oxford University Press 2005) 160–1; see also Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *European Journal International Law* 187, reprinted in Antonio Cassese, *The Human Dimension of International Law, Selected Papers* (Oxford University Press 2008) 39.

[45] See e.g. Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007).

[46] See Fleck (n 42) section 1212.

D. Criminal Responsibility

Does individual criminal responsibility attach to breaches of pertinent prohibitions of international and/or national law in armed conflict? While an affirmative answer will be necessary to prosecute such breaches, the exercise of jurisdiction may face problems that are not to be solved easily. National jurisdiction is one of states and it is only in exceptional cases that armed opposition groups themselves could exercise disciplinary or criminal justice in an effective manner. There will be difficulties for all warring parties to ensure prosecution of crimes during the armed conflict. International jurisdiction on ecological crimes in non-international armed conflicts is factually non-existent today: the 1998 Rome Statute[47] addresses serious violations of the laws and customs applicable in armed conflicts not of an international character (Art. 8(2), lit. c and e ICC Statute), which protect civilians and other persons hors de combat, but the statute does not mention the natural environment. Pillaging a town or place is listed here as a war crime also in non-international armed conflicts (Art. 8(2), lit. e (v) ICC Statute), whereas pillaging natural resources is not, despite the fact that no such limitation applies under Art. 4(2)(g) AP II.

E. Reparations for Environmental Damage

State responsibility requires reparation for victims of armed conflict,[48] which may take the form of restitution, compensation, and satisfaction (Art. 34 ARSIWA[49]). While it is difficult to implement this principle under wartime situations, victimized states and individuals do have a right to demand reparation and to pursue this right post-conflict. There should be no doubt that the right for reparation includes losses and damage caused by breaches of environmental obligations *in bello*. Is this right limited to wrongful acts or may states (including states represented by former rebel groups) be held liable also for injurious consequences of acts not prohibited by international law? The 2006 ILC Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities[50] underline that there must be 'prompt, adequate and effective remedies' in the event of transboundary damage caused by hazardous activities (principles 4 and 6), which may have occurred despite compliance by the relevant state with its obligations concerning prevention of such damage. But the commentary explains that:

> liability is excepted if, despite taking all appropriate measures, the damage was the result of (a) an act of armed conflict, hostilities, civil war or insurrection; or (b) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;

[47] Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998, 2187 UNTS 3.

[48] Art. 3 Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907) 2 AJIL Supplement 90–117 (1908); Art. 91 AP I. See International Law Association, Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), adopted at the seventy-fourth ILA Conference (The Hague, 2010), and Procedural Principles for Reparation Mechanisms, adopted at the seventy-sixth ILA Conference (Washington DC, 2014).

[49] Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWAILC, 2001).

[50] 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with commentaries, UN Doc. A/61/10, Yearbook of the International Law Commission, 2006, vol. II, part two, at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf> accessed 19 May 2019.

or (c) wholly the result of compliance with a compulsory measure of a public authority in the State of injury; or (d) wholly result of a wrongful intentional conduct of a third party.[51]

To prove this argument, the rapporteur Dr P. S. Rao referred to exceptions under relevant treaty law on liability for nuclear damage and the EU Directive 2004/35 on environmental liability,[52] examples which may not be fully convincing, as these conventions are limited to nuclear damage and the EU Directive applies between EU Member States only. Such conditions will hardly exist in any non-international armed conflict. Hence a clarification would be useful to make that understanding more acceptable, or further adapt the 2006 principles to existing principles of state responsibility as necessary.

Reparation issues deserve more attention today in the *jus in bello*, even if it will be difficult to adopt appropriate general principles and procedures prior to the end of hostilities and even considering that during the conduct of hostilities there are notorious implementation problems for all parties to the conflict. Effective measures for avoidance, limitation, and reparation of environmental damage are of key importance in this context. No exception for environmental devastation caused in non-international armed conflicts could convincingly be construed here. A clear commitment to a responsible settlement will be essential for post-conflict peacebuilding. Hence a well commented set of rules on the subject appears necessary to enhance international awareness for the protection of the environment in relation to armed conflicts as a means to accept and ensure good governance.

III. Environmental Obligations Post-Conflict

While a systematic interdisciplinary assessment of the impact of environmental reconstruction and a dialogue with policymakers are still in a fairly early stage,[53] it should be clear that co-operation for the use of shared natural resources may help to prevent armed conflicts and support peacebuilding. To provide meaningful advice to political and military decision makers and support them in efforts to move towards 'environmental peacebuilding', an integrated approach by environmentalists, peace researchers, and international lawyers is required. Scientific and social factors need to be explored in a case-specific manner, and forms and processes for transboundary environmental cooperation need to be regulated in a spirit of showing advantages to participants rather than providing one-sided restrictions.

[51] Ibid. 161 and 434, para. 2.

[52] 1997 Protocol to amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, reproduced in INFCIRC/566, Art. IV (3); 1963 Vienna Convention on Civil Liability for Nuclear Damage, reproduced in INFCIRC/500 with Add. 1–5, Art. IV (3); 2004 Protocol to amend the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, at <http://www.oecd-nea.org/law/brussels_supplementary_convention.pdf> accessed, Art. 9; 1997 Convention on Supplementary Compensation for Nuclear Damage Convention, reproduced in INFCIRC/567, Annex Art. 3 (5); EU Directive 2004/35 on environmental liability, Art. 4 (1) and (6).

[53] See Alexander Carius, 'Environmental Peacebuilding: Conditions for Success' (2006) 12 *Environmental Change and Security Report* 59–75.

A. Environmental Projects and Peacebuilding

The United Nations Environment Programme, working to further develop UN capacities for early warning and early action in countries that are vulnerable to conflicts over national resources and ecological exploitation, has issued policy recommendations to integrate pertinent measures in peacebuilding processes.[54] The aim is to identify problem areas and support opportunities for environmental cooperation to complement and reinforce peacebuilding activities.

More efforts at a larger scale will be necessary to make environmental peacebuilding projects more effective. Very practical tasks need to be performed and further developed to achieve certain complementarity between humanitarian assistance and development activities and ensure continuity of these efforts for a sustainable post-conflict peacebuilding. Typical examples, which will be essential to overcome insecurity and ensure post-conflict recovery, may be found in the fields of water management and agriculture.[55] Other tasks should follow suit: environmental and health monitoring will be necessary to ensure acceptable living conditions. Professional services should be provided over a longer period to ensure the removal of unexploded ammunition and toxic remnants of war. Reconstruction of infrastructure will be essential for economic recovery. None of these measures is without a direct impact on the protection of the natural environment. Hence it is safe to conclude that to ensure peacebuilding and economic recovery, nature conservation may not be neglected.

A few legal principles and rules for post-conflict peacebuilding may be identified according to time frames and geographical reach of particular challenges that are to be faced. As prioritization is essential for meeting the many post-conflict tasks, a certain freedom of approach must be accepted. Concentration on a few commitments will be necessary to ensure effective results step by step and engage state and non-state actors for participation. Hence pragmatic limitation, conciliation, and participation—principles this author has advocated for a discussion of the *jus post bellum* in general[56]—may be of particular value for an effective environmental restoration post-conflict. Furthermore, transboundary effects of environmental damage must be considered, but it is to be accepted that a 'polluter pays' principle will not fully work post-conflict. Hence the implementation of multilateral environmental agreements may not be possible without exceptions post-conflict. For the sake of clarity and effectiveness relevant provisions ought to be revised or suspended in this respect. Neighbouring states are inevitably bound to participate in protection and restoration activities, but their engagement may not suffice to face the challenge, so that the international community at large will be called for, even if the damage as such would remain limited to regional scale.

[54] UNEP, *From Conflict to Peacebuilding. The Role of Natural Resources and the Environment* (UNEP 2009).

[55] See Emmy Simmons, 'Harvesting Peace: Food Security, Conflict, and Cooperation' Environmental Change and Security Program Report (2003) 14, Woodrow Wilson International Center for Scholars.

[56] Dieter Fleck, 'Jus Post Bellum as a Partly Independent Legal Framework', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 43–57, 56–7.

B. Special Reparation Principles Post-Conflict

For post-conflict peacebuilding to be effective, full-scale efforts of the international community are required within a short time frame, to be followed by long-term activities under different (i.e. peacetime) conditions thereafter. First activities may not provide a full remedy for a burden that under normal peacetime conditions would require sustainable efforts over a longer period. Enormous starting endeavours will be necessary, well exceeding existing legal obligations. Yet in a longer perspective, meeting such a challenge may be more effective and also more economic than any more cautious approach. It is in that sense that it will be necessary to prioritize peacebuilding over retribution,[57] and implement environmental restoration in an effort to serve wider interests.

The 2001 Articles on the Prevention of Transboundary Harm from Hazardous Activities[58] may pose specific, albeit different, challenges for sending states of peace operations and for their host states. Highly developed states with prospering economies will be in a different position than other states to discern, and effectively avoid, a potential disruption of ecological systems. Their military contingents operating in the host state should use environmental standards they have to comply with at home, unless there are convincing reasons to authorize an exemption. The role of peacekeeping contingents from developing countries may be different, but the UN or the regional organization involved may, and should, offer advice and support for meeting appropriate environmental standards, even if national laws and regulations of the host state are not (yet) available. Foreign armed forces participating in a peace operation should realize that any negligence in meeting those standards would be counter-productive to the task they have to perform. Finally, the host state of a peace operation should receive advice and support from the international community to develop and implement an environmental protection agenda as part of its peacebuilding efforts and adapt its national laws and regulations accordingly.

Liability for ecological disruption is a matter not to be neglected in post-conflict peacebuilding. State responsibility for war-time damage caused to neighbouring states must be honoured in addition to a great many other burdens in the reconstruction phase after an armed conflict. States must ensure civil liability of private contractors. The question whether responsibility is to be accepted in this context also for injurious consequences arising out of acts not prohibited by international law deserves to be addressed as well. It is not altogether theoretical, as even best-practice conduct in the armed conflict may have caused immense harm, not only within the own country, but also in neighbouring states. The principles adopted in 2006[59] may be useful to direct international co-operation post-conflict. But they are not directly binding; war-time damage may be formally excluded in their implementation; and full compensation will hardly be possible. It remains important for international and regional organizations involved in post-conflict reconstruction processes to support parties to the former armed conflict in meeting their responsibilities. Together with sending states of peacekeeping contingents such organizations are challenged here to exert

[57] Cymie R. Payne, 'The Norm of Environmental Integrity in Post-Conflict Legal Regimes', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 502–18, 518.

[58] See Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries (n 27).

[59] See 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with commentaries (n 50).

their influence and set good examples themselves by fully meeting their own obligations as far as reparation for wrongful acts committed during peace operations are concerned.

IV. Conclusion

Legal protections of the natural environment in relation to armed conflict derive from different branches of international law and are characterized by the continuing relevance of peacetime obligations during armed conflicts. A few general conclusions may be drawn here:

(1) While a lex specialis role of international humanitarian law is to be recognized in armed conflict, this role is limited in practice as far as the protection and preservation of the natural environment is concerned. This is due to the absence of meaningful specific treaty provisions on the subject. ENMOD and Articles 35(3) and 55(1) AP I are of extremely limited impact on modern armed conflicts and they do not affect other obligations relevant for the protection of the natural environment in the conduct of hostilities.
(2) Treaty and customary rules on the protection of civilian objects in armed conflict fully apply to the protection of the natural environment.
(3) For the development of customary law in international and non-international armed conflict *opinio juris* has certain prominence, thus even shadowing state practice in its role for identifying and establishing a customary principle or rule.
(4) Protection standards applicable in international armed conflict are more and more recognized today as being applicable also for the behaviour of states and non-state actors in non-international armed conflicts.
(5) The obligation of parties to an armed conflict to show due regard/due diligence for the natural environment is an obligation of conduct to show concern for environmental effects of military operations, and to minimize such effects not only in view of transboundary damage, but also in view of damage within the territory of operations. It is an objective standard of behaviour calling for responsible planning and precautions in attack, taking into account the technical, economic, and financial capacities available at the time
(6) The right to claim reparation for losses and damage caused by breaches of the *jus in bello* includes damage caused by breaches of environmental obligations. Liability for injurious consequences of acts not prohibited by international law may be limited or excluded during armed conflicts. Conditions and standards for such limitation or exclusion deserve further consideration.
(7) While the *jus post bellum* requires pragmatic limitation, conciliation, and participation as general attitudes to ensure post-conflict peacebuilding and secure sustainable recovery from war-time devastations, the need for prioritization must be accepted. This may entail specific consequences for forms, amounts, and time schedules for retribution. It should not lead, however, to limiting or avoiding necessary measures towards a sustainable recovery of the natural environment.
(8) International and regional organizations involved in post-conflict reconstruction processes should support former parties to the armed conflict in meeting their

> responsibilities. They should assume responsibility for the national contingents under their command and support third parties in their search for compensation.

On 5 November 2001, the UN General Assembly declared 6 November of each year as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict.[60] UN Secretary-General Kofi Annan underlined in 2003:

> Ensuring environmental sustainability is not a luxury; it is a prerequisite for the future peace and prosperity of our planet.[61]

States and international organizations remain challenged to fully act according to this conviction. Indeed, since ENMOD and AP I were adopted, *opinio juris* has come a long way to endorse this conviction. Principles and rules on protecting the environment in armed conflict are now clearer than one generation before. The role of academia was not the least important in achieving this progressive normative development.

[60] UN General Assembly Resolution 56/4 (2001) UN Doc. A/RES/56/4; See <http://www.timeanddate.com/holidays/un/day-preventing-environment-exploitation-in-war> accessed 9 June 2017.

[61] Annan calls for expanded laws against environmental damage in war (6 November 2003), see <http://www.un.org/apps/news/story.asp?NewsID=8800&Cr=environment > accessed 9 June 2017.

10

Robust Peacekeeping Mandates

An Assessment in Light of *Jus Post Bellum*

*Marco Longobardo**

I. Introduction

Since the second half of the twentieth century, peacekeeping missions have attained lots of academic attention and have been explored from different legal perspectives.[1] More recently, the United Nations (UN) and other international actors, acting through peacekeeping missions, have been increasingly involved in processes of state-building and post-conflict reconciliation since states, through these organizations, have considered the post-conflict phase not just a concern of the belligerents, but rather, a matter potentially relevant for the international community as a whole.[2]

Jus post bellum offers an interesting perspective on peacekeeping operations, since peacekeepers are often deployed in that grey area between the formal termination of an armed conflict and the actual end of violence; regulation of such situations is one of the main challenges of *jus post bellum*.[3] Indeed, from its origins, legal discourse regarding *jus post bellum*

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[1] The academic literature on peacekeeping is particularly vast and it is not possible to provide here an exhaustive list. For an overall assessment of peacekeeping, see, among many others, Derek W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens and Sons 1964); Nigel D. White, *Keeping the Peace* (2nd edn, Manchester University Press 1997) 207–84; Laura Pineschi, *Le operazioni delle Nazioni Unite per il mantenimento della pace* (Cedam 1998); Giovanni Cellammare, *Le operazioni di peace-keeping multifunzionali* (Giappichelli 1999); Pietro Gargiulo, *Le Peace Keeping Operations delle Nazioni Unite* (Editoriale Scientifica 2000); Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge University Press 2007); Hitoshi Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Martinus Nijhoff 2010); Michael Bothe, 'Peace-keeping' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) 1171; Micaela Frulli, *Le operazioni di peacekeeping delle Nazioni Unite: continuità di un modello normativo* (Editoriale Scientifica 2012); Joachim A. Koops, Thierry Tardy, Norrie MacQueen, and Paul D. Williams (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford University Press 2015); Michael Bothe, 'Peacekeeping Forces' in Max Planck Encyclopedia Public International Law online (August 2016) in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn).

[2] The literature on the role of the UN in post-conflict situations is becoming quite vast. For the main issues, see Massimo Starita, *Processi di riconciliazione nazionale e diritto internazionale* (Editoriale Scientifica 2003); Simon Chesterman, *You, The People: The United Nations, Transitional Administrations, and State-Building* (Oxford University Press 2004); Ivan Ingravallo, *Il Consiglio di sicurezza e l'amministrazione diretta dei territori* (Editoriale Scientifica 2008); Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press 2008); Ralph Wilde, *International Territorial Administration* (Oxford University Press 2008). For an analysis of the international community's interest in the post-conflict phase in light of *jus post bellum* and the doctrine of the responsibility to protect, see Peter Hilpold, '*Jus Post Bellum* and the Responsibility to Rebuild: Identifying the Contours of an Ever More Important Aspect of R2P' (2015) 6 *Journal of International Humanitarian Legal Studies* 284.

[3] For an account of the temporal dimension of *jus post bellum*, see Jann K. Kleffner, 'Towards a Functional Conceptualization of the Temporal Scope of *Jus Post Bellum*', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Cambridge University Press 2014) 287;

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has paid great attention to peacekeeping operations conducted by the UN and other international actors.[4] This chapter contributes to this discussion by exploring the impact of so-called robust peacekeeping mandates on the achievement of just peace in the aftermath of an armed conflict from the perspective of *jus post bellum*. The expression 'robust mandates' refers to those peacekeeping missions in which peacekeepers are authorized to employ armed force beyond the traditional exception of self-defence.[5] Since the peacekeepers' increasing involvement in actual military operations, it is necessary to analyse the interplay between *jus ad bellum*, *jus in bello*, *jus post bellum*, and peacetime international law in order to clarify the legal framework applicable to robust mandates. This chapter focuses in particular on the cases of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), the most robust peace mission so far, of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), and of the United Nations Mission in South Sudan (UNMISS). The mandates of these three missions present some peculiarities that make the use of armed force extremely proactive and clearly offensive in nature, so that the degree of force employed appears greater than in less recent robust mandates.

In order to study the relationship between these robust peacekeeping mandates and just peace from the perspective of *jus post bellum*, it is necessary to analyse briefly the evolution faced by peacekeeping operations, and to explore how far the UN Security Council (SC) has gone with these three 'super-robust' mandates in the Democratic Republic of Congo (DRC), Mali, and South Sudan. This chapter then assesses the evolution of peacekeeping operations against the principles of *jus post bellum* in order to verify whether these robust mandates have been successful in contributing to the attainment of a durable and just peace. Actually, these operations require a close scrutiny since the SC seems to favour these kind of mandates, which likely could be employed in other in other post-conflict scenarios.

II. The Challenges of Robust Peacekeeping Mandates

A. The Evolution of Peacekeeping Operations

When the first peacekeeping operation, the United Nations Emergency Force (UNEF), was deployed in 1956 in the aftermath of the Suez Crisis,[6] its features were quite clear: peacekeepers could use armed force only in personal self-defence, the mission should have been conducted impartially with regard to the parties of the armed conflict in the context of

Rogier Bartels, 'From Jus in Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Cambridge University Press 2014) 297.

[4] See e.g. Ivar Scheers, 'Peacekeeping & *Jus Post Bellum*: Towards A Concept of Rules in Post-Conflict Situations' (2011) 3 *Central European Journal of International and Security Studies* 75; Frederik Naert, 'International Humanitarian Law and Human Rights Law in Peace Operations as Parts of a Variable *jus post bellum*' (2011) 44 *Revue Belge de Droit International* 26; Sylvia Maus, '*Jus Post Bellum* à la United Nations? Human Rights, UN Peace Operations, and the Creation of International Law' (2014) 32 *Wisconsin Journal of International Law* 675.

[5] Some units deployed in the context of robust peacekeeping operations also perform tasks that are unrelated to the use of force. However, this chapter analyses only the issue of the use of force and its link with *jus post bellum* principles.

[6] UNEF was established by UNGA Res. 1001 (ES-I) (7 November 1956) UN Doc. A/RES/1001.

which the mission was dispatched, and the consent of the belligerents was at the basis of the deployment of the UN troops.[7] Since then, the limitation on use of armed force to situation of self-defence, the consent of the belligerents, and the neutrality/impartiality of the mission have been considered the so-called principles of peacekeeping, which have guided the creation of future peacekeeping missions. These principles were particularly suitable for peacekeeping operations tasked with the monitoring of ceasefires, the support for post-conflict reconciliation in the aftermath of international armed conflicts, and the implementation of peace treaties. The model built on the three principles of peacekeeping proved equally successful even when peacekeeping became 'multidimensional', that is, when the UN missions were requested to perform a number of military, police, and civil tasks in order to improve the security of civilians involved in armed conflicts and the building of a safety institutional environment in post-conflict situations.[8]

However, some scenarios immediately demonstrated that the traditional peacekeeping principles could have impaired the mission's success. In particular, when missions have been deployed in territories torn by non-international armed conflicts, the protection of civilians from attacks conducted mainly by armed groups required a more proactive attitude. In particular, in these scenarios, the peacekeepers were presented with the necessity to employ armed force beyond individual self-defence. Indeed, since the UN troops were mainly deployed thanks to the consent of the government against which these groups were fighting, the peacekeepers were often perceived as obstacles to the attainment of the armed groups' goals. For instance, already in the 1960s, the UN mission deployed in Congo to assist the withdrawal of Belgian troops and the consolidation of the Congolese government's authority (the United Nations Operation in the Congo, ONUC) had to use armed force in order to preserve its own freedom of movement, which was limited by some armed groups that threatened the safety of civilians in that region.[9] Again, in 1993, after the failure of two previous missions, the SC conferred enforcing powers on the mission United Nations Operation in Somalia II (UNOSOM II), which had to establish a secure humanitarian environment in Somalia, which was at that time a state torn by violence among local factions which seriously threatened the security of civilians.[10]

It is clear that the principles of peacekeeping were applied very differently from the traditional model in these last mentioned situations. This flexibility in the execution of the missions was possible because peacekeeping operations are not constrained by rules explicitly embodied in the UN Charter, but, rather, they have evolved in the practice of the UN in order to provide effective responses to situations inherently different, on a case-by-case approach.[11] This is the key to the success of many peacekeeping operations: they are extremely

[7] See Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General, A/3943, 9 October 1958, para. 179.

[8] See generally, UN Department of Peacekeeping Operations, Handbook on United Nations Multidimensional Peacekeeping Operations (December 2003).

[9] ONUC was established by UNSC Res. 143 (1960) UN Doc. S/RES/143 14 July 1960. The degree of force employed by the mission is the subject of a critical exchange of letters between the government of Belgium and the UN Secretary-General (S/5078, 16 February 1962). For more on this, see Georges Abi-Saab, *The United Nations Operation in the Congo 1960–1964* (Oxford University Press 1978) 174–6.

[10] See UNSC Res. 814 (1993) UN Doc. S/RES/814 (26 March 1993); UNSC Res. 837 (1993) UN Doc. S/RES/737 (6 June 1993). For an evaluation of the peacekeeping experience in Somalia, see Ray Murphy, *UN Peacekeeping in Lebanon* (n 1) 48–63, 93–5.

[11] There is no unanimity among scholars regarding the legal UN Charter basis—if any—of peacekeeping operations. On this issue, which is beyond the scope of this chapter, see generally, Alexandre Orakhelashvili, 'The Legal Basis of the United Nations Peace-Keeping Operations' (2003) 43 *Virginia Journal of International Law* 485;

flexible, and each mandate can be shaped around the needs of a specific conflict/post-conflict environment, based on the goals that the international community wants to pursue in each scenario through the UN.[12]

However, the flexibility of peacekeeping missions has been stretched in the most recent scenarios in which UN mandates have been tasked with active combat operations. In these cases, the original UNEF model built upon the classical principle of peacekeeping is put under significant strain.

B. Robust Mandates and the Principles of Peacekeeping

The evolution of peacekeeping operations, as well as the flexibility of their mandates, has been acknowledged by a number of strategies and reforms envisaged by the UN Secretary-General in several reports and documents published under their auspices.[13] Contrary to the efforts of many scholars to categorize different kinds of peacekeeping operations,[14] it is more practical to acknowledge the fact that the mandates are different because they are fact-specific. However, peacekeeping operations are such flexible instruments that it is possible to consider traditional, multidimensional, and robust mandates under the same legal regime.[15] Indeed, peacekeeping can be considered an 'operational model', which can concretely perform different functions depending on the will of the SC and the needs of the concerned states.[16]

The evolution of peacekeeping witnessed a significant acceleration in the 1990s. After the experience of UNOSOM II and the failure of peacekeepers to protect civilians during both the Rwandan genocide[17] and the Bosnian armed conflict,[18] an important debate on

Alfonso J. Iglesias Velasco, 'El marco jurídico de las operaciones de mantenimiento de la paz de Naciones Unidas' (2005) 1 *Foro, Nueva época* 127.

[12] See *Prosecutor v. Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09-PT (8 February 2010) para. 70.

[13] See, among others, UNGA An Agenda for Peace: Preventive diplomacy, Peacemaking and Peace-Keeping, (17 June 1992) UN Doc. A/47/277–S/24111; UNGA Supplement to an Agenda for Peace (25 January 1995) UN Doc. A/50/60–S/1995/1; UNGA Report of the Panel on United Nations Peace Operations (21 August 2001) UN Doc. A/55/305–S/2000/809 (hereinafter: 'Brahimi Report'); UN Department of Peacekeeping Operations, *United Nations Peacekeeping Operations Principles and Guidelines* (2008) (hereinafter: Capstone doctrine); UNGA A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change (2 December 2004) UN Doc. A/59/565; UN Department of Peacekeeping Operations and Department of Field Support, *New Partnership Agenda: Charting a New Horizon for UN Peacekeeping* (July 2009); UNGA Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People (17 June 2015) UN Doc. A/70/95–S/2015/446.

[14] For an overview on these classifications, see Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (Brill 2016) 289–90.

[15] On the continuity of peacekeeping operations through their evolution, see generally, Frulli (n 1).

[16] See Paolo Picone, 'Il peace-keeping nel mondo attuale: tra militarizzazione e amministrazione fiduciaria' (1996) 79 *Rivista di diritto internazionale* 5; 32, n. 87.

[17] In Rwanda, the United Nations Assistance Mission for Rwanda (UNAMIR), established with UNSC Res. 873 (1993) UN Doc. S/RES/873, was deployed when the genocide took place. On its failure to prevent the genocide, see Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Nijhoff 2007).

[18] The failure of the United Nations Protection Force to prevent the genocide has been at the centre of national and international proceedings. For more on this, see André Nollkaemper, 'Dual Attribution Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 *Journal of International Criminal Justice* 1143; Maria Irene Papa, 'The Mothers of Srebrenica Case before the European Court of Human Rights: United Nations Immunity versus Right of Access to a Court' (2016) 14 *Journal of International Criminal Justice* 893.

the powers of peacekeeping missions began at the UN. The outcome of this debate, which involved UN organs, states, and NGOs, was the acknowledgement of the need for more proactive mandates, wherein peacekeepers were authorized to use force beyond self-defence.[19] The expressions 'robust peacekeeping missions' and 'robust mandates' became commonplace in the language of international relations as well as in academic literature.[20] However, this evolution entailed the reshaping—but not abjuration—of the traditional principles of peacekeeping.[21]

With regard to the issue of the use of armed force, peacekeepers are commonly authorized to use armed force in self-defence and in defence of the mandate.[22] This expression means that peacekeepers may use force not only as a response against direct violence,[23] but also to protect civilians. Furthermore, in most recent mandates, the SC authorized the use of *any means or measures necessary* to fulfil the mandate.[24] It is clear that this expression resonates the practice of authorizing enforcement missions under Chapter VII of the UN Charter, where 'any necessary means' and 'any necessary measure' are euphemisms that encompass armed force, as in the cases of Kuwait and Libya.[25] The link between these new peacekeeping operations and enforcement missions is confirmed by the fact that robust mandates are adopted under Chapter VII of the UN Charter, although these mandates

[19] According to the Brahimi Report (n 13), peacekeepers 'must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should be sufficiently robust and not force United Nations contingents to cede the initiative to their attackers'.

[20] For more on this topic, see e.g. Winrich Kühne, 'The United Nations, Fragmenting States, and the Need for Enlarged Peacekeeping', in Christian Tomuschat (ed.), *The United Nations at Age Fifty. A Legal Perspective* (Nijhoff 1995) 91; James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart 2001); Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford University Press 2002); Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality—A Need for Change* (Martinus Nijhoff 2006) 91; Laura Pineschi, 'L'emploi de la force dans les opérations de maintien de la paix des Nations Unies "robustes": conditions et limites juridiques', in Maurizio Arcari and Louis Balmond (eds), *La sécurité collective entre légalité et défis à la légalité* (Giuffrè 2008) 139; Nigel D. White, 'Peacekeeping or War-fighting?' in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 572; Ophélie Thielen, *Le recours à la force dans les opérations de maintien de la paix contemporaines* (LDGJ 2013); Mona Ali Khalil, 'Legal Aspects of the Use of Force by United Nations Peacekeepers for the Protection of Civilians', in Haidi Willmot, Ralph Mamiya, Scott Sheeran, and Marc Weller (eds), *Protection of Civilians* (Oxford University Press 2016) 205.

[21] For a modern account of the actual role of the traditional principles of peacekeeping in recent practice, see Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2006) 11 *Journal of Conflict and Security Law* 465, according to which: 'consent, neutrality/impartiality and the use of force in self-defence oscillate between legal fiction and legal reality. Even as a fiction, they are important ontological myths', 482.

[22] See Brahimi Report (n 13) para. 49.

[23] In this context, self-defence refers to the right of every individual to respond to an attack through the use of force (for more on this in international law, see Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press 2017)). A totally different question is whether a state whose troops are employed in a peacekeeping mission can react in self-defence under Article 51 of the UN Charter if those troops are victims of an armed attack (for an overview of this issue, beyond the purview of the present essay, see Paolo Palchetti, 'Armed Attack against the Military Force of an International Organization and Use of Force in Self-Defence by a Troop-Contributing State: A Tentative Legal Assessment of an Unlikely Scenario' (2010) 7 *International Organizations Law Review* 241).

[24] See e.g. UNSC Res. 1975 (30 March 2011) UN Doc. S/RES/1975, para. 6; UNSC Res. 2100 (2013) UN Doc. S/RES/2100, para. 17; UNSC Res. 2155 (2014) UN Doc. S/RES/2155, para. 4; UNSC Res. 2295 (2016) UN Doc. S/RES/2295, para. 17; UNSC Res. 2304 (2016) UN Doc. S/RES/2304, paras 5 and 10.

[25] See UNSC Res. 678 (1990) UN Doc. S/RES/678 para. 2; UN SC Res. 1973 (2011) UN Doc. S/RES1973 para. 4. For more on the meaning of this expression, see Julian M. Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and the *Jus ad Bellum*' (2012) 17 *Journal of Conflict & Security Law* 117; Nabil Hajjami, 'Que signifie l'expression "prendre toutes les mesures nécessaires" dans la pratique du Conseil de Sécurité des Nations Unies?' (2013) 47 *Revue Belge de Droit International* 232.

are based on the principles of peacekeeping as well.[26] However, 'peacekeeping operations should only use force as a measure of last resort, when other means have failed'.[27]

With regard to the issue of consent to the deployment of the mission, the SC has sought the consent of the internationally recognized government of the territory in which the robust mission was to be dispatched, and this consent is the main legal basis that makes the deployment of peacekeepers lawful. Conversely, the SC has maintained a different approach regarding the consent of non-state actors involved in the non-international armed conflict addressed by the mission: on the one hand, the SC has considered it appropriate—but not legally mandatory—to request the consent of some non-state actors involved in the armed conflict;[28] on the other hand, the SC has decided not to seek the consent of other non-state actors considered to be insurmountable obstacles to the reconciliation process, who are usually labelled as 'local spoilers'[29] and are often targeted by UN sanctions due to alleged terrorist activities.[30] This differential approach regarding the consent of the belligerents involved in a non-international armed conflict may be justified under practical reasons: since robust mandates are deployed in order to support the central government in the reconciliation process, and peacekeepers very likely are to fight against local spoilers, it would be unrealistic that the SC would seek and obtain the consent of those same armed groups that the mission is supposed to fight.

The evolution faced by the rules on the use of armed force and consent has had a significant impact on the impartial/neutral character of the mission, the third principle of peacekeeping. Peacekeepers are no longer considered prevented from taking sides in the conflict in every circumstance. Rather, recently, the impartiality/neutrality of robust missions has been considered as 'adherence to the principles of the UN Charter',[31] which has been interpreted as dictating that the peacekeepers 'should not condone actions by the parties that violate the undertakings of the peace process or international norms and principles'.[32] However, the reference to the adherence to the principles of the UN Charter is problematic since its actual meaning is rather obscure: the only possible interpretation is that mandates adopted following the UN rules and goals are per se neutral/impartial; however, this interpretation results in confusion between the *legality* of the mandates in their entirety and their impartiality/neutrality, which is only one of the principles of peacekeeping. Moreover, since there are no means available to non-state belligerents of challenging the UN mandate

[26] On the interplay between the consent of the host state and the invocation of Ch. VII, see Pineschi, 'L'emploi' (n 20) 175–6.

[27] *Prosecutor v. Sesay, Kallon and Gbao* (Trial Judgement) SCSL-04-15-T (2 March 2009) para. 228.

[28] Ibid. para. 226: '[i]n non-international conflicts, this consent is obtained from the warring parties, not out of legal obligation, but rather to ensure the effectiveness of the peacekeeping operation'.

[29] According to the Capstone doctrine (n 13) 32:

> The fact that the main parties have given their consent to the deployment of a United Nations peacekeeping operation does not necessarily imply or guarantee that there will also be consent at the local level, particularly if the main parties are internally divided or have weak command and control systems. Universality of consent becomes even less probable in volatile settings, characterized by the presence of armed groups not under the control of any of the parties, or by the presence of other spoilers.

[30] See Giorgio Gaja, 'Use of Force Made or Authorized by the United Nations', in Christian Tomuschat (ed.), *The United Nations at Age Fifty. A Legal Perspective* (Nijhoff 1995) 39, 51; Iglesias Velasco (n 11) 144–5; Jorge Cardona Llorens, 'Universalismo y regionalismo en el mantenimiento de la paz a inicios del siglo XXI', in Organization of the American States, *Universalismo y Regionalismo a Inicios del Siglo XXI* (Organization of the American States 2010) 47, 98; Ian Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations' (2011) 18 *International Peacekeeping* 168, 171–2; Frulli (n 1) 72–9.

[31] See Brahimi Report (n 13) para. 50.

[32] *Prosecutor v. Sesay, Kallon and Gbao* (n 27) para. 227.

on the basis of its lack of adherence to the principles of the Charter, constructing impartiality / neutrality as adherence to the principles of the Charter is ultimately an exercise of faith in the respect for UN procedures and goals by the SC.[33] Accordingly, a more practical approach should be preferred. For instance, it has been argued that the impartiality/neutrality of the mission should no longer be considered to be a requirement for the *legality* of the mission—rather, the UN should pursue the *political* goal of dispatching missions that are perceived as impartial by all the relevant stakeholders.[34] In the case of robust mandates, the missions simply do *not* have an impartial/neutral nature as clearly demonstrated by the active role they play in the fight against non-state actors.[35]

The progressive involvement of peacekeepers in actual fighting had an impact also on the rules of international law that the UN troops are required to apply. For instance, in 1999 the UN Secretary-General adopted the bulletin 'Observance by United Nations forces of international humanitarian law',[36] which prescribes the observance of the law of war by UN units involved in hostilities, even if dispatched in the framework of a peacekeeping mission.[37] Following the suggestions already offered by some commentators regarding the applicability of international humanitarian law to UN forces,[38] the bulletin acknowledges that peacekeepers may be involved in actual hostilities, notwithstanding the nature of their mandates, and thus they are required to apply international humanitarian law.

A similar acknowledgement of the possibility of the peacekeepers' involvement in armed conflict is also embodied in the Convention on the Safety of United Nations and Associated Personnel, according to which peacekeepers who are involved in actual hostilities are not protected by attacks under the Convention itself.[39] Interestingly, the Statute of the International Criminal Court criminalizes direct attacks against peacekeepers only 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.[40] Whether robust mandates have changed the civilian nature of peacekeepers is an issue that must be analysed case-by-case,[41] but it is noteworthy

[33] For some critical remarks on the Brahimi Report's idea of impartiality in peacekeeping operations, see Hikaru Yamashita, ' "Impartial" Use of Force in United Nations Peacekeeping' (2008) 15 *International Peacekeeping* 615.

[34] Frulli (n 1) 62.

[35] See section II.3 for references to state practice.

[36] UNGA Secretary-General's Bulletin (6 August 1999) UN Doc. ST/SGB/1999/13. On the bulletin, see Luigi Condorelli, 'Le azioni dell'ONU e l'applicazione del diritto internazionale umanitario: il bollettino del Segretario generale del 6 agosto 1999' (1999) 92 *Rivista di diritto internazionale* 1049; Paolo Benvenuti, 'Le respect du droit international humanitaire par les forces des Nations Unies: la circulaire du Secrétaire Général' (2001) 105 *Revue Générale de Droit International Public* 355.

[37] ST/SGB/1999/13 (n 36) section 1.1. See also Ray Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?' (2003) 14 *Criminal Law Forum* 153; Rober Kolb, *Droit humanitaire et opérations de paix internationales: les modalités d'application du droit international humanitaire dans les opérations de maintien ou de rétablissement de la paix auxquelles concourt une organisation internationale* (Helbing & Lichtenhahn 2006); Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 *International Review of the Red Cross* 561.

[38] For the debate prior to the bulletin, see Luigi Condorelli, 'Le Statut des forces de l'ONU et le droit international humanitaire' (1995) 78 *Rivista di diritto internazionale* 903; Claude Emanuelli, *Les action militaires de l'ONU et le droit international humanitaire* (Wilson et Lafleur Itéé 1995).

[39] See Art. 2(2), Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363: 'This Convention shall not apply to a UN operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies'.

[40] See Art. 8(2)(b)(iii) and Art. 8(2)(e)(iii), Rome Statute of the International Criminal Court, 2187 UNTS 90.

[41] See *Prosecutor v. Abu Garda* (n 12) para. 83. On this topic, see generally, Barbara Sonczyk 'The Protection of the Intervention Brigade under Article 8 (2)(e)(iii) of the Rome Statute of the International Criminal Court' (2015) Zoom-In 13 *Questions of International Law* 25; Andrea Spagnolo, 'The Crime of Attacking Peacekeepers',

that international criminal tribunals have recognized that robust mandates have blurred the distinction between peacekeeping and peace enforcement with relevant impact on the protection of these missions.[42]

These adjustments in the application of the traditional principles of peacekeeping and the need to provide a wider legal framework regarding robust mandates demonstrate that states consider peacekeeping such a flexible instrument that robust mandates may be still included in the definition of peacekeeping, even if the classical rules on peacekeeping must be adapted to these new scenarios. However, even taking into account this evolution, some very recent mandates challenge the applicability of the principles of peacekeeping due to their extreme robustness.

C. The Use of Armed Force in the Practice of Some Recent Very Robust Mandates

C.i. *The Use of Armed Force by MONUSCO*

Since the history of UN peacekeeping in DRC is extremely complex, for the purposes of this chapter, only the last two-decade experience will be summarized, with specific regard to the issue of the armed force employed by peacekeepers.[43]

The United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) was established by SC Resolution 1279 (1999).[44] Despite the fact that, at the beginning, its mandate was not characterized by the use of force beyond self-defence,[45] in 2000, the SC authorized the mission to 'take the necessary action … to protect United Nations and co-located JMC personnel, facilities, installations and equipment, ensure the security and freedom of movement of its personnel, and protect civilians under imminent threat of physical violence'.[46] In 2003, the SC further authorized MONUC to take all necessary measures to fulfil its mandate,[47] while in 2008, the SC stressed that MONUC was authorized to use all necessary means,[48] inter alia to '[d]eter any attempt at the use of force to threaten the Goma and Nairobi processes from any armed group, foreign or Congolese … undertaking all necessary operations to prevent attacks on civilians and disrupt the military

in Fausto Pocar, Marco Pedrazzi, and Micaela Frulli (eds), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Edward Elgar 2013) 153.

[42] See *Prosecutor v. Sesay, Kallon and Gbao* (n 27) para. 223.

[43] For more details on recent UN peacekeeping efforts in DRC, see Ray Murphy, 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians' (2016) 21 *Journal of Conflict and Security Law* 209.

[44] UNSC Res. 1279 (1999) UN Doc. S/RES/1279.

[45] Ibid. para. 5.

[46] UNSC Res. 1291 (2000) UN Doc. S/RES/1291 para. 8.

[47] UNSC Res. 1493 (2003), UN Doc. S/RES/1493 paras 25–6:

> [The SC] [a]uthorizes MONUC to take the necessary measures in the areas of deployment of its armed units, and as it deems it within its capabilities: — to protect United Nations personnel, facilities, installations and equipment; — to ensure the security and freedom of movement of its personnel, including in particular those engaged in missions of observation, verification or DDRRR; — to protect civilians and humanitarian workers under imminent threat of physical violence; — and to contribute to the improvement of the security conditions in which humanitarian assistance is provided; [The SC] [a]uthorizes MONUC to use all necessary means to fulfil its mandate in the Ituri district and, as it deems it within its capabilities, in North and South Kivu'.

[48] UNSC Res. 1856 (2008) UN Doc. S/RES/1856 para. 5.

capability of illegal armed groups'.[49] Accordingly, it is clear that, when MONUC was renamed MONUSCO in 2010,[50] its mandate was already significantly robust.[51]

Since MONUSCO proved unable to guarantee the protection of civilians in the eastern regions of DRC, in 2013, at the proposal of the Secretary-General,[52] the SC deployed an Intervention Brigade, with offensive combat functions. According to Resolution 2098 (2013), the Intervention Brigade consisted

> inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander, with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities.[53]

The SC described the Intervention Brigade's mandate as follows:

> (b) Neutralizing armed groups through the Intervention Brigade: In support of the authorities of the DRC … carry out targeted offensive operations … either unilaterally or jointly with the FARDC [the DRC army], in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities.[54]

The creation of the Intervention Brigade was intended 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping'.[55] However, the SC confirmed the Intervention Brigade in 2014,[56] 2015,[57] 2016,[58] 2017,[59] and 2018.[60] Despite the SC's warning that the Intervention Brigade should have had a prompt exit strategy in order to pass its responsibilities to the DRC government,[61] the Secretary-General

[49] Ibid. para. 3(d).
[50] UNSC Res. 1925 (2010) UN Doc. S/RES1925.
[51] For an account of the degree of force employed by MONUC in that period, see Murphy, 'UN Peacekeeping in the Democratic Republic of the Congo' (n 43) 220–2.
[52] UNSC Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region (2013) UN Doc. S/2013/119 paras 60–4.
[53] UNSC Res. 2098 (2013) UN Doc. S/RES/2098 para. 9.
[54] Ibid. para. 12b.
[55] Ibid. para. 9.
[56] UNSC Res. 2147 (2014) UN Doc. S/RES/2147 para. 1.
[57] UNSC Res. 2211 (2015) UN Doc. S/RES/2211 para. 1.
[58] UNSC Res. 2277 (2016) UN Doc. S/RES/2277 para. 24.
[59] UNSC Res. 2348 (2017) UN Doc. S/RES/2348 para. 26.
[60] UNSC Res. 2409 (2018) UN Doc. S/RES/2409 para. 29.
[61] UNSC Res. 2098 (2013) UN Doc. S/RES/2098 para. 10; UNSC Res. 2147 (2014) UN Doc. S/RES/2147, para. 3; UNSC Res. 2211 (2015) UN Doc. S/RES/2211 paras 40-41; UNSC Res. 2277 (2016) UN Doc. S/RES/2211 paras 47-48; UNSC RES. 2409 (2018) UN Doc. S/RES/2409 paras 56 and 59(IV).

registered slow signs of progress by the DRC to facilitate the exit strategy of the Intervention Brigade and of the entire MONUSCO.[62]

The task of neutralizing armed groups through robust military operations has raised some criticisms among scholars with regard to MONUSCO's compliance with the principles of peacekeeping.[63] This author has already supported the idea that the Intervention Brigade per se does not increase significantly the force employed by MONUSCO, but rather, it simply rationalizes in one specific unit those military tasks that were already performed by other military components of MONUSCO pursuant to its already robust mandate.[64] However, five years of activity demonstrate that the Intervention Brigade and other military components of MONUSCO took such an active role in fighting against armed groups in DRC in the context of actual military operations[65] that the mission cannot be considered impartial/neutral at all.[66] Rather, the Intervention Brigade should be considered a party of the ongoing conflict in DRC,[67] as acknowledged by the Secretary-General himself, who

[62] See e.g. UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (30 June 2014) UN Doc. S/2014/450 para. 89; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2015) UN Doc. S/2015/172 para. 63; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (9 March 2016) UN Doc. S/2016/233 para. 74; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (28 June 2016) UN Doc. S/2016/579 para. 77.

[63] See e.g. Patrick Cammaert, 'The UN Intervention Brigade in the Democratic Republic of the Congo' (2013) *International Peace Institute Issue Brief* 7; Pricilla Fet, 'Tudo de novo no front: MONUSCO, uma nova era nas peacekeeping operations?' (2013) 10 *Revista de Direito International* 169; Bruce 'Ossie' Oswald, 'The Security Council and the Intervention Brigade: Some Legal Issues' (2013) *17 ASIL Insights*; Marco Longobardo and Federica Violi, '*Quo vadis* peace-keeping? La compatibilità dell'*Intervention Brigade* in Congo con i principi regolanti le operazioni di pace alla prova dei fatti' (2015) 70 *La Comunità internazionale* 245; Lars Müller, 'The Force Intervention Brigade: United Nations Forces Beyond the Fine Line Between Peacekeeping and Peace Enforcement' (2015) 20 *Journal of Conflict and Security Law* 381; Otto Spijkers, 'The Evolution of United Nations Peacekeeping in the Congo From ONUC, to MONUC, to MONUSCO and Its Force Intervention Brigade' (2015) 19 *Journal of International Peacekeeping* 88, 114; Denis M. Tull, 'The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo' (2018) 25 *International Peacekeeping* 167.

[64] See Longobardo and Violi (n 63) 252–4.

[65] See e.g. UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (30 September 2013) UN Doc. S/2013/581 para. 37; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (17 December 2013) UN Doc. S/2013/757 para. 40; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (5 March 2014) UN Doc. S/2014/157, para. 39; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (30 June 2014) UN Doc. S/2014/450, paras 28, 31, and 54; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (23 September 2014) UN Doc. S/2014/698, paras 55–7; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2015) UN Doc. S/2015/172, paras 35–6, and 38–9; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (26 June 2015) UN Doc. S/2015/486 paras 18–19, and 43; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (9 March 2016) UN Doc. S/2016/233, paras 24, 27, 29, and 41; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (28 June 2016) UN Doc. S/2016/579, paras 26, 32, and 33; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2017) UN Doc. S/2017/206, para. 59; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (29 September 2017) UN Doc. S/2017/826, para. 42.

[66] Longobardo and Violi (n 63) 256–7; Spijkers (n 63) 104.

[67] Longobardo and Violi (n 63) 257–65. This qualification is relevant for the application of international humanitarian law to the Intervention Brigade, a topic explored by Yutaka Arai-Takahashi, 'The Intervention Brigade within the MONUSCO: The Legal Challenges of Applicability and Application of IHL Source' (2015) Zoom-In 13 *Questions of International Law* 5; Devon Whittle, 'Peacekeeping in Conflict: the Intervention Brigade, MONUSCO, and the Application of International Humanitarian Law to United Nations Forces' (2015) 46 *Georgetown Journal of International Law* 837.

expressed serious concerns about the impact of such an extraordinary robust mission on peacekeeping.[68]

C.ii. *The Use of Armed Force by MINUSMA and UNMISS*

Two other recent peacekeeping missions, MINUSMA and UNMISS, show an interesting trend regarding super-robust mandates.

With regard to the mission in Mali, the mandate of MINUSMA has been configured as a robust mandate since its origins when Resolution 2100 (2013) authorized MINUSMA 'to use all necessary means, within the limits of its capacities and areas of deployment, to carry out its mandate'.[69] This expression has been constantly repeated in every resolution concerning the mandate of the mission.[70] In addition, MINUSMA has been requested twice to 'to achieve its more proactive and robust posture to carry out its mandate'[71] Resolutions 2295 (2016) and 2364 (2017) task MINUSMA with action 'in support of the Malian authorities … to anticipate, deter and counter threats, including asymmetric threats, and to take robust and active steps to protect civilians … engaging in direct operations'.[72] Moreover, MINUSMA has to act in 'active defence of its mandate, to anticipate and deter threats and to take robust and active steps to counter asymmetric attacks against civilians or United Nations personnel, to ensure prompt and effective responses to threats of violence against civilians and to prevent a return of armed elements to those areas, engaging in direct operation'.[73]

One of the most peculiar features of MINUSMA is the fact that the mission is deployed in the context of the fight against international terrorism. The MINUSMA mandate is the first peacekeeping mandate with so many and such clear references to counterterrorism actions. For instance, the SC has expressed its concern over 'the volatile security situation, especially the expansion of terrorist and other criminal activities into central and southern Mali as well as the intensification of intercommunal violence in the Centre of Mali'[74] and over 'the transnational dimension of the terrorist threat in the Sahel region, as well as the serious challenges posed by transnational organized crime in the Sahel region, including arms and drug trafficking, the smuggling of migrants, trafficking in persons, and its increasing links, in some cases, with terrorism'.[75] In addition, MINUSMA is tasked with the implementation of the Agreement on Peace and Reconciliation in Mali,[76] and the SC has stressed the need 'to forestall attempts by terrorist groups to derail the implementation of the Agreement'.[77]

[68] Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace (n 13) para. 122.

[69] UNSC Res. 2100 (2013), UN Doc. S/RES/2100 para. 17.

[70] See UNSC Res. 2164 (2014) UN Doc. S/RES/2164 para. 12; UNSC 2227 (2015) UN Doc. S/RES/2227 para. 12; UNSC Res. 2295 (2016) UN Doc. S/RES/2295 para. 17; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 para. 18.

[71] UNSC Res. 2295 (2016) UN Doc. S/RES/2295; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 para. 19.

[72] UNSC Res. 2295 (2016) UN Doc. S/RES/2295 para. 19(c)(ii); UNSC Res. 2364 (2017) UN Doc. S/RES/2364 para. 20(c)(2).

[73] UNSC Res. 2295 (2016) UN Doc. S/RES/2295 para. 20; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 para. 20(c)(2).

[74] UNSC Res. 2295 (2016) UN Doc. S/RES/2295 preamble para. 13; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 preamble para. 14.

[75] UNSC Res. 2295 (2016) UN Doc. S/RES/2295 preamble para. 21; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 preamble para. 25.

[76] UNSC Res. 2295 (2016) UN Doc. S/RES/2295 para. 16; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 para. 17.

[77] UNSC Res. 2295 (2016) UN Doc. S/RES/2295 preamble para. 14; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 preamble para. 15.

Furthermore, a number of non-state actors involved in the armed conflict against the Malian government are described by the MINUSMA mandate as terrorist.[78] On the basis of these and of many other references to terrorism in the mandate of MINUSMA, it has been argued that such an extremely robust mission has been tasked with counterterrorism combat operations.[79] The employment of peacekeepers to combat terrorism is quite a novelty in international law since, normally, states are required to combat terrorism through law enforcement operations conducted at a national level.

The mission dispatched in South Sudan, UNMISS, presents some features which are peculiar in relation to the use of armed force as well. As every robust peacekeeping mission, UNMISS is authorized to 'use all necessary means' to perform its tasks.[80] These tasks include the protection of civilians, which are the main aim of the entire mission.[81] However, the fulfilment of the mandate regarding the protection of civilians has been hampered by a number of attacks from non-state actors against UNMISS personnel and facilities. In order to respond against these threats, the SC has created a specific unit within UNMISS. This unit is called Regional Protection Force, and is authorized to

> *use all necessary means*, including undertaking *robust* action where necessary and actively patrolling, to accomplish the [Regional Protection Force] mandate, to: (i) Facilitate the conditions for *safe and free movement* into, out of, and around Juba, including through protecting the means of ingress and egress from the city and major lines of communication and transport within Juba; (ii) Protect the airport to ensure the airport remains operational, and protect key facilities in Juba essential to the well-being of the people of Juba, as identified by the Special Representative of the Secretary-General; (iii) *Promptly and effectively engage any actor that is credibly found to be preparing attacks, or engages in attacks, against United Nations protection of civilians sites*, other United Nations premises, United Nations personnel, international and national humanitarian actors, or civilians.[82]

On the basis of this resolution, the mandate of the Regional Protection Force appears to be robust, proactive, and of an offensive character.

Accordingly, at the moment, in South Sudan there is an already robust mission deployed to protect civilians from attacks, and a specific robust unit within that mission deployed to protect the entire mission from attacks and to guarantee the mission freedom of movement. It seems that the protectors of civilians need some protectors themselves. The UN Secretary-General has reported that the efforts to constitute this specific unit have been unsatisfactory so far.[83]

[78] UNSC Res. 2295 (2016) UN Doc. S/RES/2295 preamble paras 15–16; UNSC Res. 2364 (2017) UN Doc. S/RES/2364 preamble paras 17–18.

[79] See John Karlsrud, 'The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali' (2015) 36 *Third World Quarterly* 40, 45–7; Mirko Sossai, 'Il mandato della missione di stabilizzazione in Mali: verso una convergenza tra peacekeeping e antiterrorismo?' (2016) 3 *Quaderni di SIDIBlog* 333; Mirko Sossai, 'Il mandato delle operazioni di peacekeeping e il contrasto a gruppi terroristici', in Ida Caracciolo and Umberto Montuoro (eds), *L'evoluzione del peacekeeping: il ruolo dell'Italia* (Giappichelli 2017) 89; John Karlsrud, 'Towards UN Counter-Terrorism Operations?' (2017) 38 *Third World Quarterly* 1215.

[80] See UNSC Res. 2327 (2016) UN Doc. S/RES/2327 para. 7.

[81] Ibid. para. 7(a).

[82] Ibid. para. 9 (emphases added).

[83] See UNSC Report of the Secretary-General on South Sudan (covering the period from 16 December 2016 to 1 March 2017) (16 March 2017) UN Doc. S/2017/224 para. 49.

Both cases of MINUSMA and UNMISS are evidence of the recourse to very robust mandates by the SC in situations in which the security of civilians and peacekeepers is threatened by non-state actors conducting armed attacks which, in the case of MINUSMA, are openly labelled as terrorist. These missions do not only stretch the principle of self-defence beyond the usual practice related to robust mandates, but rather, clearly disregard entirely the principle of impartiality/neutrality. In particular, the counterterrorism mandate of MINUSMA is at odds with the idea not to side with any party of an internal conflict, and it is a precedent conflicting with a very recent UN document on peacekeeping, according to which 'UN peacekeeping missions, due to their composition and character, *are not suited to engage in military counter-terrorism operations*. They lack the specific equipment, intelligence, logistics, capabilities and specialized military preparation required, among other aspects'.[84] These features of these missions are relevant for the evaluation of robust mandates under *jus post bellum*.

III. Recent Robust Mandates and *Jus Post Bellum*

A. Outlining *Jus Post Bellum* Principles

Discussing *jus post bellum* principles from an international law perspective means translating into legal terms some ideas originated in the just war theories. Since there is no unanimity among scholars on these principles and their legal value,[85] this author will refer herein to those principles relevant for robust peacekeeping mandates on which there is some consensus among experts. These principles may be summarized as follows:

(a) Fairness and inclusiveness of peace settlements. According to Carsten Stahn, *jus post bellum* requires 'a collective bargaining process, involving a fair hearing of the interests of all parties to the conflict at the negotiating table'.[86] A broad participation must be guaranteed to all political and ethnical components of a post-conflict scenario since only a fully inclusive peace is a just peace under *jus post bellum*.
(b) The humanization of reactions and a shift from collective to individual responsibility. Some scholars argue that the international community's reaction should not affect a whole country but, rather, it must be directed only against those who are responsible for serious offences.[87] This principle draws on the experience related to

[84] Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People (n 13) para. 116, emphasis added, which concludes that counterterrorism operations 'should be undertaken by the host government or by a capable regional force or an ad hoc coalition authorized by the Security Council'.

[85] A thorough analysis on *jus post bellum* is beyond the purview of this chapter. On this topic, see generally, Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008); Vincent Chetail (ed.), *Lexique de la consolidation de la paix* (Bruylant 2009); Larry May and Andrew T. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012); Stahn, Easterday, and Iverson (n 3). Despite an increasing consensus in the academia, some authors are still sceptical of a normative foundation of *jus post bellum* (see e.g. Eric De Brabandere, 'The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept' (2010) 43 *Vanderbilt Journal of Transnational Law* 11).

[86] Carsten Stahn, '"*Jus ad bellum*", "*jus in bello*" … "*jus post bellum*"?: Rethinking the Conception of the Law of Armed Force' (2006) 17 *European Journal of International Law* 921, 938.

[87] Ibid. 939–40. The author articulates the principle here summarised in a number of different sub-principles.

UN sections that, in the past, have targeted entire communities rather than focusing on the leaders who were responsible for the international law violations that triggered the adoption of the sanctions themselves. In recent practice, UN sanctions have shifted towards a more targeted model that should protect entire communities from suffering the consequences of their leaders misbehaviours.[88]

(c) Accountability. The principle of accountability is strictly linked to that of individual responsibility. The respect for *jus post bellum* rules must be monitored at national and international levels.[89] It is necessary to guarantee the accountability of all the actors involved in the post-conflict phase in order to foster confidence and guarantee a process that is 'visible, and [includes] distinct activities toward ensuring compliance with its goals and principles'.[90]

The principles briefly summarized herein can be employed in order to assess the recent practice on peacekeeping against the cornerstones of *jus post bellum*.

B. Consonance and Dissonance Between Recent Robust Mandates and *Jus Post Bellum*

Since peacekeeping operations are the most common expression of the international community's interest in the post-conflict phase, they are at the core of *jus post bellum* discourse. Accordingly, it is not surprising that the aforementioned *jus post bellum* principles have been formulated with the peacekeeping practice in mind. In this context, the need for a fair and inclusive peace process means that '[t]he use of military and police force, coercive diplomacy, intelligence measures, and material incentives may for longer periods remain part of "realist" approaches to change behavior of non-state actors, but it cannot replace political means of persuasion through mediation, negotiation, and reconciliation'.[91] As for the humanization of international reactions, peacekeeping missions are respectful of territorial integrity of states, and multidimensional peacekeeping has taken into account the needs of the local population, working to improve their life conditions and supporting the reconciliation process and the punishment of the most brutal criminals. The most problematic issue is the respect for the rule of law and accountability: although peacekeepers have helped governments maintain order in post-conflict situations, the accountability of peacekeepers as such is hindered by the fact that they enjoy UN immunity.[92]

[88] See generally, Conforti and Focarelli (n 14) 268–70.

[89] On accountability in *jus post bellum*, see Inger Österdahl and Esther van Zadel, 'What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles' (2009) 14 *Journal of Conflict and Security Law* 175, 201–4.

[90] Dieter Fleck, '*Jus Post Bellum* as a Partly Independent Legal Framework', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Cambridge University Press 2014) 43, 55.

[91] Ibid. 56. A more enthusiastic scholar considered that *jus post bellum* has been considered in line with peacekeeping, since the latter 'exudes a spirit of consent' (Scheers [n 4] 87).

[92] This complex issue is beyond the scope of this chapter. See the authors cited in note 20, and, more generally, Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 *Melbourne Journal of International Law* 346; Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 *Harvard International Law Journal* 141; Francesco Salerno, 'International Responsibility for the Conduct of Blue Helmets: Exploring the Organic Link', in Maurizio Ragazzi (ed.), *The Law of the International Responsibility of the International Organizations, Studies in Honour of Ian Brownlie* (Brill

In cases of recent robust mandates, the link with *jus post bellum* is strengthened by the fact that these missions are at the centre of the interplay of the same legal regimes that are at the basis of the *jus post bellum* discourse.[93] Robust missions are deployed pursuant to UN resolutions, often in the framework of peace agreements; not only must they respect peacetime law—principally, international human rights law[94]—but also international humanitarian law when peacekeepers are actually involved in hostilities.[95] As it was already noted, peacekeepers' involvement in hostilities is far from a rare occurrence in robust mandates tasked with offensive combat responsibilities as in the cases of MONUSCO, MINUSMA, and UNMISS.

However, recent robust mandates and the involvement of UN forces as parties in non-international armed conflicts against armed groups make respect for *jus post bellum* principles more problematic because robust mandates are neither impartial nor neutral, they do not always guarantee a fair response from the international community, and they often overlook mechanisms for ensuring accountability of parties.

First, recent robust mandates are not impartial because specific actors are explicitly targeted by these missions as in the case of MONUSCO and MINUSMA. The deployment of such extremely robust mandates implies that some actors are not meant to be included in post-conflict reconciliation. As mentioned above, the SC decides which non-state actors are to be considered potential partners in the peacebuilding process, and which ones are labelled as spoilers and quickly dismissed (sometimes after having been qualified as a terrorist). The definition of spoilers itself is clearly more political then legal,[96] and the entire UN practice on this distinction seems out of line with a true intent to include every stakeholder in the peace process—a choice that may be reasonable in certain circumstances in which some non-state actors resort to heinous indiscriminate attacks against civilians in order to sabotage the attainment of a just peace.

Further complicating the alleged neutrality of recent robust peacekeeping mandates is the fact that blue helmets may be perceived as supporters of governments that do *not* seek inclusive and just peace settlements. In the case of MONUSCO, for instance, the Secretary-General reported that the Congolese government was preventing the political participation of several groups.[97] Worse, the Intervention Brigade appears to have been employed to pressure armed groups to discuss the terms of their surrenders,[98] so that one may question the authenticity of these armed groups' consent to participate in the peace process. The alleged neutrality of robust peacekeeping mandates is contradicted by the tasks actually performed

2013) 413; Paolo Palchetti, 'International Responsibility for Conduct of UN Peacekeeping Forces: The Question of Attribution' (2015) 70 *Seqüência (Florianópolis)* 19; Moritz P. Moelle, *The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations* (Cambridge University Press 2017).

[93] On the different legal regimes that are at the core of *jus post bellum* discourse, see Vincent Chetail, 'La consolidation de la paix: enjeux et ambigüités d'un concept en quête d'identité', in Vincent Chetail (ed.), *Lexique de la consolidation de la paix* (Bruylant 2009) 29, 53–62.

[94] On the respect for international human rights law in peacekeeping missions, see generally Kjetil Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press 2014).

[95] See the aforementioned Secretary-General's Bulletin UN Doc. ST/SGB/1999/13 (n 36).

[96] According to the Capstone doctrine (n 13) 43, n. 21, '[s]poilers are individuals or parties who believe that the peace process threatens their power and interests, and will therefore work to undermine it'.

[97] See e.g. UNSC Report of the Secretary-General on South Sudan (covering the period from 16 December 2016 to 1 March 2017 (16 March 2017) UN Doc. S/2015/172, paras 4 and 57.

[98] UN Security Council, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (2014) UN Doc. S/2014/157, para. 18.

by extremely robust units: the fact that the mandate of MINUSMA has been shaped in the framework of counterterrorism policies clearly put the entire mission on the side of the government against the insurgents. Accordingly, the fact that a UN mission openly uses force against one or more actors, and in patent support of another, may impair the achievement of fair and inclusive peace settlements.

Second, recent robust mandates do not always guarantee a selective and fair response from the international community. In at least one case, the Secretary-General acknowledged that military operations conducted by MONUSCO affected entire areas, creating displacement.[99] It should be recalled that the use of force in general—and by peacekeepers in particular—must be a last resort option, particularly in light of the impact that military operations have on civilians. Accordingly, recent robust mandates may be out of line with the *jus post bellum* principle that solutions non-affecting an entire population must be preferred.

Furthermore, robust peacekeeping mandates often fail to respect the rule of law or provide accountability mechanisms. For instance, in the case of MONUSCO, the UN is facing certain embarrassment in supporting military operations led by the Congolese armed forces, which have been facing serious allegations of human rights abuses. According to the UN Secretary-General, as of 2016, 62% of human rights violations in eastern DRC are attributable to the state actor, and only 32% to the armed groups that the Intervention Brigade is supposed to neutralize.[100] In order to avoid complicity in these violations, MONUSCO is following the Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces, according to which UN support 'cannot be provided where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures'.[101] Consequently, MONUSCO refused to join a DRC military operation due to allegations of human rights violations against recently-appointed generals.[102] The government, however, did not refrain from launching that operation, nor did it remove those officials.[103] From this episode, it is apparent that the UN Due Diligence Policy is not a sufficiently effective instrument of human rights protection when peacekeepers are involved in actual hostilities.[104]

In brief, although robust mandates are not themselves in conflict with *jus post bellum*, and taking into account the fact that robust mandates should be assessed also in light of the missions' activities that do not imply the use of armed force, there is room to argue that

[99] UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (9 March 2016) UN Doc. S/2016/233, para. 49.

[100] UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (9 March 2016) UN Doc. S/2016/579, para. 41. See also UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (3 October 2016) UN Doc. S/2016/833 para. 73.

[101] UNGA Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council (5 March 2013) UN Doc. A/67/775–S/2013/110, para. 1.

[102] UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2015) S/2015/172, para. 37.

[103] Ibid; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (9 March 2016) UN Doc. S/2016/233, para. 25.

[104] For this opinion, with specific reference to the activity of the Intervention Brigade in DRC, see Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism Against Complicity of Peacekeeping Forces?' (2015) 20 *Journal of Conflict and Security Law* 61.

proactive and offensive military operations by peacekeepers may contradict or endanger the *jus post bellum* principles.

IV. Towards a Just Peace? *Jus Post Bellum* and the Effectiveness of Recent Robust Mandates

After having described the evolution of peacekeeping operations, studied the most robust mandates, and assessed the compatibility of such extreme mandates with *jus post bellum* principles, it still remains to be determined whether robust mandates are effective in order to attain a just peace.[105] A closer look into the situations affected by these mandates offers a partially negative answer.

As a preliminary matter, one has to make a distinction between short-term and long-term goals. For instance, MONUSCO military components, the Intervention Brigade among them, achieved some important immediate goals, as the defeating of the armed group Mouvement du 23 mars.[106] As for the direct protection of civilians, it has been reported that the envisaged early warning system proved effective in most occasions.[107]

However, as for the long term, MONUSCO proved unable to neutralize all the armed groups destabilizing the DRC; rather, these groups are still active, and after several years of deployment of the Intervention Brigade, the situation of human rights and individual security in east DRC is still a matter of utmost concern.[108] Moreover, MONUSCO failed to implement an effective exit strategy, and its military components are still necessary to support the governmental authority against non-state actors in certain parts of the region.[109] Actually, MONUSCO has strengthened DRC governmental authority with its action, but failed to support military reforms that would have allowed the UN to give back to the Congolese government its responsibilities regarding the protection of civilians. From the aforementioned complaints of the Secretary-General about the lack of serious efforts by DRC regarding MONUSCO exit strategy (Intervention Brigade included), one might wonder whether such robust support produced tardiness in the DRC development of its own structures. However, it should be noted that the Secretary-General at the same time emphasizes that MONUSCO's mandate (military components included) should be renewed since it is vital for the protection of civilians and the fight against armed

[105] See generally Denis M. Tull, 'UN Peacekeeping Missions During the Past Two Decades. How Effective Have They Been?', in Joachim Krause and Natalie Ronzitti (eds), *The EU, the UN and Collective Security. Making Multilateralism Effective* (Routledge 2012) 117.

[106] S/2013/757, paras 2 and 97; Tull, 'The Limits and Unintended Consequences' (n 63) 182. The menace of M23 against civilians had been one of the factors triggering the deployment of the Intervention Brigade (UNSC Res. 2098 (2013), preamble and paras 7–8.

[107] See e.g. UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (25 September 2014) UN Doc. S/2014/698, paras 50–4; UNGA Letter dated 26 June 2015 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General (1 July 2015) UN Doc. A/69/697-S/2015/489, para. 44.

[108] See e.g. UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (28 June 2016) UN Doc. S/2016/579, para. 21; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2017) UN Doc. S/2017/206, paras 28–34. See also, Tull, 'The Limits and Unintended Consequences' (n 63) 183–5.

[109] See e.g. UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (9 March 2016) UN Doc. S/2016/233, para. 74.

groups[110]—demonstrating that after five years of MONUSCO's robust engagement, DRC is far from being pacified.

Furthermore, such a partial / not neutral mission as MONUSCO has become since the deployment of the Intervention Brigade might have worsened the safety and security conditions of the UN personnel deployed in DRC. According to the Secretary-General, who initially had feared an escalation of threats,[111] there is no general increase in danger,[112] but, rather, the attacks only become more frequent in certain areas.[113] However, in December 2017 MONUSCO suffered the most serious attack ever in the history of UN peacekeeping, which resulted in fifteen casualties and many more injured peacekeepers.[114]

From a wider perspective, robust mandates are not a guarantee of safety and security for the UN personnel as clearly demonstrate by the case of UNMISS, where the already robust mandate of the UNMISS has been recently modified so that it will be deployed a unit with the mandate to protect those same UN units involved in the protection of civilians.[115] Similarly, there are serious concerns regarding the security of MINUSMA since the mission, albeit with a robust mandate, has been increasingly targeted by non-state actors on a number of occasions.[116]

In brief, robust mandates may have some immediate positive effects on countries that are striving to emerge from an internal armed conflict. However, in the long term, they may not be effective at addressing the roots of the conflict, but rather, they may become just additional actors involved therein. Accordingly, recent robust mandates are not the most suitable international tools to reach a just peace in post-conflict scenarios since their action has met scant success in fulfilling the long-term goals of the mandates.

V. Conclusion

Sadly, recent robust mandates seem unable to accomplish their tasks and to contribute significantly to a just and lasting peace as required by *jus post bellum*. Rather, often these mandates complicate even more the already blurred divide between peace-time and war-time, a core issue to *jus post bellum* scholars. The failure of these robust mandates to contribute

[110] Ibid.

[111] UNSC Rapport du Secrétaire général sur la Mission de l'Organisation des Nations Unies pour la stabilisation en République démocratique du Congo (30 September 2013) UN Doc. S/2013/581, paras 66–8; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2017) UN Doc. S/2017/206, 64.

[112] See e.g. UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (25 September 2014) UN Doc. S/2014/698, para. 84; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (9 March 2016) UN Doc. S/2016/233, para. 64.

[113] UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (30 December 2014) UN Doc. S/2014/956, para. 34; UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2015) UN Doc. S/2015/172, para. 45. See also UNSC Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (10 March 2017) UN Doc. S/2017/206, para. 51.

[114] See UN Press Release 'At Least 71 United Nations Associated Personnel Killed in Malicious Attacks against Peacekeeping Operations during 2017' (26 January 2018) UN Doc. ORG/1663 available at https://www.un.org/press/en/2018/org1663.doc.htm> accessed 19 May 2019.

[115] UNSC Res. 2304 (2016) UN Doc. S/RES/2304 paras 7–10.

[116] See UN Press Release (n 114).

to a just peace should be borne in mind by the SC, which, in 2013, dispatched a very robust mandate with the creation of the Intervention Brigade, stressing at the same time its exceptionality and its non-precedent value.[117] However, notwithstanding these cautious words, the Intervention Brigade has been confirmed five times so far, and an exit strategy in the short term does not appear realistic. Worse, that model has opened the door to other increasingly robust mandates in Mali and South Sudan, and today the extremely robust mandates of MONUSCO, MINUSMA, and UNMISS seem part of a clear upward trend towards an even more militarized model of peacekeeping.

Perhaps, the SC should carefully evaluate the pros and cons of such mandates under the *jus post bellum* principles,[118] and try to find different solutions to the most troubled post-conflict scenarios rather than implementing the same strategy over and over again with the hopes of achieving a successful outcome, notwithstanding the growing evidence that such a strategy is ineffective. For instance, the SC could rely on the Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace, which is rather sceptical on mandates that authorize peacekeepers to conduct military operations and counterterrorism military actions.[119] It seems that the SC completely ignored this report when it confirmed the Intervention Brigade in DRC and prolonged the MINUSMA's mandate in Mali.

Although very robust mandates are, in certain circumstances, required to protect civilians,[120] it is not by chance that robust peacekeeping missions, even after several years of deployment, have failed to achieve a just peace in the areas in which they have been deployed. In this author's view, these mandates are becoming more and more robust every year in the false hope that they may finally prove effective. However, notwithstanding the prolonged character of these mandates, the achievement of a just peace seems to be an unlikely scenario in the near future. Arguably, there is a clear link between the increase of robustness of a peacekeeping mandate and the span of time in which the mission is deployed in a troubled area, but unfortunately, international law scholarship devoted scant attention to this correlation.[121] Ultimately, it should be borne in mind that peacekeeping operations should represent exceptional measures rather than long-term solutions deployed indefinitely and without a clear exit strategy.

[117] UNSC Res. 2098 (2013) UN Doc. S/RES/2098, para. 9. For an interesting discussion on the value of the Intervention Brigade as a precedent, see Diana Kearney, 'The Slippery Slope of UN Peacekeeping: Offensive Peacekeeping in Congo and Beyond' (2016) 19 *Max Planck Yearbook of United Nations Law* 100.

[118] The SC could rely on the Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace (n 13), which is rather sceptical on mandates that authorise peacekeepers to conduct military operations and counter-terrorism military actions (paras 118–23). It seems that the SC completely ignored this report when it confirmed the Intervention Brigade in DRC and prolonged the MINUSMA's mandate in Mali.

[119] Ibid.

[120] Fleck, '*Jus Post Bellum*' (n 90) 55.

[121] To the best knowledge of this author, there is no comprehensive study regarding the temporal element in peacekeeping operations (apart from Maria Julià Barceló, 'El factor tiempo en el proceso de planificación, creación y despliegue de las misiones de paz de la Unión Europea' (2015) 67 *Revista española de derecho internacional* 123, which, however, analyses different issues).

11

Power Shift

Assessing the Role of Mediators on the *Jus Post Bellum*

*Patrick C.J. Wall**

I. Introduction

Although mediation—the use of a neutral third party to help conflicting parties to find a resolution to their dispute—has been in use for centuries, its use in brokering an end to armed conflict has proliferated in recent decades.[1]

Along a similar time frame, the iteration of peace processes (whether involving mediators or not) has led—according to Christine Bell in *On the Law of Peace*—to the development of a *lex pacificatoria*, a 'law of the peacemakers', that is emerging from the practice of those engaged in peace processes and that can be observed in the text of the peace agreements that they develop.[2] The *lex pacificatoria* is, in essence, an aspect of the *jus post bellum* that can be observed in the contents of peace treaties. It is, Bell argues, taking shape in three key areas: the 'new law of hybrid self-determination', the 'new law of transitional justice' and the 'new law of third-party enforcement'.

This chapter seeks to inquire about the relationship between the proliferation of mediation as a tool of conflict resolution and the emergence of the *jus post bellum*, as observed in the *lex pacificatoria*. In particular, it seeks to understand whether the presence and/or identity of a mediator is likely to influence the degree to which the resulting peace agreement complies with the first and second of Bell's 'New Laws' and, through this metric, the extent to which mediation influences the development of the *jus post bellum*. It tentatively concludes that, while some elements of Bell's New Laws of Hybrid Self-Determination and Transitional Justice are better observed than others, those peace agreements that are the product of negotiation processes overseen by mediators that are independent of any state or international organization are more likely to observe the New Laws than are those mediated by representatives of states or international organizations, or those that are not mediated at all. It will then offer some possible explanations for this correlation between independent mediation and observance of the *lex pacificatoria*, and offer some tentative thoughts on the implications for the *jus post bellum*.

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[1] See e.g. *The Economist*, 'The discreet charms of the international go-between' (3 July 2008).

[2] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 5, 285. Law governing the conclusion of hostilities is not new, however: see the discussion on the *jus victoriae* in the Middle Ages in Stephen Neff, 'Conflict termination and peace-making in the law of nations: a[n] historical perspective', in Carsten Stahn and Jann Kleffner (eds), *Jus Post Bellum* (TMC Asser Press 2008) 77.

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II. The *Lex Pacificatoria* and its 'New Laws'

Bell theorizes that the *lex pacificatoria* is not a fully formed 'law of peace', but is rather 'a practice of peacemaking that, like the *lex mercatoria*, has become legal practice, with effects in domestic and international tribunals, state practice, and soft law international standards'.[3] The *lex pacificatoria* is 'a common approach to settlement design that links ceasefires to agreed new political and legal arrangements for the holding and exercise of power'.[4]

Bell identifies three areas in which, she argues, the *lex pacificatoria* has substantive content; she calls these the 'new law of hybrid self-determination', the 'new law of transitional justice', and the 'new law of third-party enforcement'.[5] These 'new laws' require peace agreements to include a number of features and mechanisms aimed at balancing the needs of conflict cessation and the creation of a post-conflict settlement that complies with the emerging *jus post bellum*. The first and second new laws—with which this chapter is concerned—will be examined in greater detail below, but it suffices at this stage to observe that the New Law of Hybrid Self-Determination requires peace agreements to redefine and reorganize the state so as to recognize and give effect to the right to self-determination of those using violence to challenge the legitimacy of the state, while the New Law of Transitional Justice requires peace agreements to balance the need for an agreed and sustainable ceasefire with the need to hold to account those who committed the most serious crimes during the hostilities.

III. Methodology

The focus of this chapter will be to examine the text of comprehensive peace agreements (a) to determine the degree to which they observe Bell's New Laws of Hybrid Self-Determination and Transitional Justice; and (b) to explore whether the presence and identity of a third-party mediator correlates in any way with that degree of observance.[6]

The agreements examined will be those signed between 2000 and 2010 that have been identified as 'comprehensive agreements' by the Peace Accords Matrix, a database of comprehensive peace agreements hosted by the Kroc Institute for International Peace Studies.[7] According to the Matrix, a comprehensive peace agreement is one that is the product of negotiations that (i) involve the major parties to the conflict and (ii) address the substantive issues underlying their dispute.[8] In this definition, the 'major parties to the conflict' are those that have the capacity '(a) to mobilize significant constituencies in the implementation of a peace agreement and (b) to undermine the agreement at the time of the negotiations'.[9] The 'substantive issues' are the 'main issues in dispute between the parties to the conflict'.[10]

[3] Bell, *On the Law of Peace* (n 2) 22, 80, 287.
[4] Ibid. 105.
[5] Ibid. chs 11–13.
[6] This chapter will elide the concepts of mediation and facilitation and refer simply to mediation.
[7] The Matrix can be found at <https://peaceaccords.nd.edu/>. See also Madhav Joshi and John Darby, 'Introducing the Peace Accords Matrix (PAM):A Database of Comprehensive Peace Agreements and Their Implementation, 1989–2007' (2013) 1 *Peacebuilding* 256.
[8] Lenore VanderZee et al., 'Comprehensive Peace Agreement: How is it defined and why does it matter?' (Discussion Paper, Kroc Institute for International Peace Studies, 2010) <https://www.peaceaccords.org/site_media/static/Comprehensive_Peace_Agreement_Definition.pdf>, 1.
[9] Ibid. 5–8.
[10] Ibid. 8–9.

A negotiation that includes these should 'get to the hear[t] of those issues that instigated the conflict'.[11] These substantive issues do not need to be resolved in order for the agreement to be considered 'comprehensive'; they need only be included in the negotiation process.[12]

The definition thus focuses on the 'process and product' of negotiations, not the 'implementation or impact' of the agreement reached;[13] the comprehensiveness of an agreement does not 'ensure or imply' success.[14] This is an appropriate focus for an inquiry—such as the present one—that seeks to understand the relationship between process and text.

Eleven agreements signed between 2000 and 2010 have been identified by the Peace Accords Matrix as comprehensive (Table 11.1). Although examining only comprehensive agreements limits the sample size of this study and thus the generalizability of its conclusions,[15] the limitation is warranted: comprehensive agreements 'reflect a common approach to settlement design that links ceasefires to agreed new political and legal arrangements for the holding and exercising of power'.[16] This is often not the case for other types of agreement.[17] In the context of this chapter, which aims to look specifically at these new political arrangements, it is preferable therefore to examine only comprehensive agreements.

A. The Identity of the Mediator

When examining the comprehensive peace agreements in question, a key focus for this chapter will be the presence and identity of any third-party mediator(s). As Bell notes, '[a]n ever-proliferating tapestry of mediators has become part of the peace agreement landscape' and 'the relationship of third parties to the agreement is often central to sustaining the constitutional settlement at its heart'.[18] The 'tapestry' of third parties includes the United Nations, regional organizations, groups of 'neighbours' or 'friends', neutral countries, individuals, NGOs and civil society organizations.[19]

This chapter will analyse three types of negotiation process vis-à-vis mediator involvement: those that were not mediated at all, those mediated by one or more representatives of a state or international organization, and those mediated by one or more individuals *not* representing a state or international organization.

Of the eleven comprehensive peace agreements entered into between 2000 and 2010, four fell into the first category; they had no formal third-party involvement,[20] though third parties may have advised or assisted the parties to the negotiation (this was particularly the case in the negotiations for the 2006 Comprehensive Peace Agreement in Nepal, where all parties were assisted by the UN and/or a number of NGOs).

[11] Ibid. 8.
[12] Ibid. 1, 9.
[13] Ibid.
[14] Ibid. 2, 9–10.
[15] Bell, On the Law of Peace (n 2) 16.
[16] Ibid. 105. See also Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 2 *American Journal of International Law* 373, 377–8.
[17] See Stina Högbladh, 'Peace Agreements 1975–2011: Updating the UCDP Peace Agreement Database', in Therése Pettersson and Lotta Themnér (eds), *States in Armed Conflict 2011* (Uppsala University: Department of Peace and Conflict Research Report 99 2011) 51.
[18] Ibid. 66.
[19] Ibid. 66–76.
[20] The agreements in Djibouti, Angola, Senegal, and Nepal.

Three of the agreements were mediated by serving politicians or officials from a state not party to the conflict, or by officials from an international or regional organization.[21] These types of mediator have been grouped together because it is assumed that, as current players in the international system that represent states or collections of states, they have a comparable stake in the system and are likely to view it from a similar standpoint. They also act in an official capacity as the representatives of a state or group of states, and this is likely to constrain them in similar ways because they will need to be mindful of their obligations to represent their state or organization, and may have specific instructions in this regard. This is particularly likely to be the case where negotiations are mediated by representatives of one or more geographically proximate states, or by a regional organization (as was the case with two of the agreements considered here); these processes, Bell notes, 'can offer mediators who have a clearer connection to the conflict, but with a mediation role that stands somewhere between "first" and "third" party because these are the conflict's potential regional participants'.[22] There will be huge ranges of opinion on and approaches to all manner of issues by mediators who represent a state or international organization, of course, but those opinions and approaches are likely to be based on broadly similar experiences, and are likely to be limited by similar constraints.

While it would be preferable to have separate categories for serving politicians, government officials and officials from intergovernmental organizations, the sample size of this study would not allow meaningful conclusions to be drawn from such an exercise. Furthermore, many agreements would fall into multiple categories; the 2001 Macedonia agreement, for example, was jointly mediated by US and EU representatives, while the 2007 Côte d'Ivoire agreement was mediated by the president of Burkina Faso in his capacity as chair of the Economic Community of West African States (ECOWAS).

Finally, four of the agreements were mediated by individuals not representing a state or international organization (though all were *former* politicians or government officials).[23] These are grouped together for similar reasons as applied to the previous category; these mediators have a similar role in the system and are likely to view it from a similar standpoint. The fact that they do not have an official role (any longer) is important; they act in a personal—as opposed to official—capacity and do not need to concern themselves with formally representing the interests of their state or organization, nor are they constrained by formal instructions. Nevertheless, mediators in this category are often able to bring with them 'their international status, their reputation for integrity, their experience from other peace processes, and their neutrality'.[24]

Looking specifically at the identity of the mediator and ignoring all other influences on the negotiation requires, of course, the simplification of a very complicated process, and this is certain to limit further the generalizability of conclusions. Whether a certain piece of text will be included in a finalized peace agreement depends on an infinite number of variables, none of which can ever be isolated. Furthermore, there is certain to be a deeper context and meaning to elements of the final agreement that cannot be gleaned from the text alone.[25]

[21] The agreements in Macedonia, Papua New Guinea, and Côte d'Ivoire.

[22] Bell, On the Law of Peace (n 2) 71.

[23] The agreements in Burundi, Liberia, Sudan, and Indonesia.

[24] Bell, On the Law of Peace (n 2) 74.

[25] See e.g. Steven Ratner, 'The Cambodia Settlement Agreements' (1993) 87 *American Journal of International Law* 1, 1 ('Because the accords are lengthy, and at times opaque, redundant or apparently unexceptionable, a distillation for those not familiar with the Cambodian peace process is required').

Despite these limitations, however, the emergence of a pattern that only applies to mediated negotiations, or negotiations mediated by a particular type of person, may give us valuable insight into the conduct of negotiations of that type.

B. The Agreements

The agreements examined in this chapter, categorized according to the identity of the mediator, have been set out below:

Table 11.1 Comprehensive peace agreements under consideration, and the identity of their mediator (if any)

Country & date	Name of agreement	Identity of mediator
Mediated by a former politician or official (independent mediator)		
Burundi 28 August 2000	Arusha Peace and Reconciliation Agreement.[26]	Julius Nyerere (former President of Tanzania) and, after his death in October 1999, by Nelson Mandela (former President of South Africa).[27]
Liberia 18 August 2003	Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement of Democracy in Liberia and the Political Parties.[28]	General Abdulsalami Abubakar, former President of Nigeria.[29]
Sudan 9 January 2005	Sudan Comprehensive Peace Agreement.[30]	General Lazaro Sumbeiywo, former Chief of Staff of the Kenyan army.[31]
Indonesia 15 August 2005	Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement.[32]	Martti Ahtisaari, former President of Finland.[33]

[26] Arusha Peace and Reconciliation Agreement for Burundi (2000) available at http://peacemaker.un.org/node/1207> accessed 19 May 2019 ('hereafter Burundian agreement').

[27] Burundian agreement, preamble; Henri Boshoff, Waldemar Vrey and George Rautenbach, 'The Burundi Peace Process: From civil war to conditional peace' (Monograph 171, Institute for Security Studies, June 2010), 7–8, 14–20; Léonidas Nijimbere, 'Insider Mediators: Exploring their key role in informal peace processes' (Research Report, Berghof Foundation for Peace Support).

[28] Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement of Democracy in Liberia and the Political Parties (2003) available at <http://peacemaker.un.org/liberia-peaceagreementlurdmodel2003> accessed 19 May 2019 ('Liberian agreement').

[29] Liberian agreement, preamble. See also Priscilla Hayner, 'Negotiating peace in Liberia: Preserving the possibility for justice' (Research Report, Centre for Humanitarian Dialogue, November 2007) 11.

[30] Sudan Comprehensive Peace Agreement (2005) available at <http://peacemaker.un.org/node/1369> accessed 19 May 2019 ('Sudanese agreement').

[31] Lazaro Sumbeiywo, 'The Mediator's Perspective' (2006) 18 *Accord* 22–7, 22; Cirino Ofuho, 'Negotiating Peace: Restarting a Moribund Process' (2006) 18 *Accord* 20–1, 20.

[32] Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement (2005) available at <http://peacemaker.un.org/indonesia-memorandumaceh2005> accessed 19 May 2019 ('Indonesian agreement').

[33] See generally Aguswandi and Judith Large (eds), 'Reconfiguring Politics: The Indonesia–Aceh Peace Process' (2006) 20 *Accord*.

Table 11.1 Continued

Country & date	Name of agreement	Identity of mediator
Mediated by a serving politician or official (representative mediator)		
Macedonia 13 August 2001	Ohrid Framework Agreement.[34]	US representative James Perdue and EU representative Fransoa Leotar.[35]
Papua New Guinea 30 August 2001	Bougainville Peace Agreement.[36]	The Peace Monitoring Group, a group of unarmed military and civilian personnel led by Australia and including personnel from Fiji, New Zealand and Vanuatu.[37]
Côte d'Ivoire 4 March 2007	Ouagadougou Political Agreement.[38]	Blaise Compaoré, President of Burkina Faso and Chair of ECOWAS.[39]
Not mediated		
Djibouti 12 May 2001	Agreement for Reform and Civil Concord.[40]	None.[41]
Angola 4 April 2002	Luena Memorandum of Understanding.[42]	None.[43]
Senegal 30 December 2004	General Peace Agreement between the Government of the Republic of Senegal.[44]	None.[45]
Nepal 21 November 2006	Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist).[46]	None, but extensive support was provided to the negotiators by the UN, as well as NGOs such as the Carter Centre and the Centre for Humanitarian Dialogue.[47]

[34] *Ohrid Framework Agreement* (2001) available at <http://peacemaker.un.org/fyrom-ohridagreement2001> accessed 19 May 2019 ('Macedonian agreement').

[35] Vasko Popetrevski and Veton Latifi, 'The Ohrid Framework Agreement Negotiations' in Conflict Studies Research Centre, 'The 2001 Conflict in FYROM: Reflections' (Research Report, 2004).

[36] Bougainville Peace Agreement (2001) available at <http://peacemaker.un.org/png-bougainville-agreement2001> accessed 19 May 2019 ('Papua New Guinean agreement').

[37] Australian Civil-Military Centre, Partnering for Peace: Australia's peacekeeping and peacebuilding experiences in the Autonomous Region of Bougainville in Papua New Guinea, and in Solomon Islands and Timor-Leste (Research Report, 2012) 21.

[38] Ouagadougou Political Agreement (2007) available at <https://peaceaccords.nd.edu/site_media/media/accords/Ouagadougou_Political_Agreement_OPA.pdf> accessed 19 May 2019 ('Ivorian agreement').

[39] International Crisis Group, Africa Report No 127 (2014) 2.

[40] Agreement for Reform and Civil Concord (2001) available at <https://peaceaccords.nd.edu/sites/default/files/accords/Agreement_for_Reform_and_Civil_Concord_2001-05-12.pdf> accessed 19 May 2019 ('Djiboutian agreement').

[41] Uppsala Conflict Data Program, UCDP Peace Agreement Dataset (2012) available at <http://www.pcr.uu.se/digitalAssets/124/124926_1peace-agreements-1975-2011.xls> accessed 19 May 2019.

[42] Luena Memorandum of Understanding (2002) available at <http://peacemaker.un.org/node/121> accessed 19 May 2019 ('Angolan agreement').

[43] Uppsala Conflict Data Program (n 41).

[44] General Peace Agreement between the Government of the Republic of Senegal and MFDC (2004) available at <http://peacemaker.un.org/senegal-Zinguinchor-agreement2004> accessed 19 May 2019 ('Senegalese agreement').

[45] Uppsala Conflict Data Program (n 41).

[46] Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) (2006) available at <http://peacemaker.un.org/nepal-comprehensiveagreement2006>accessed 19 May 2019 ('Nepalese agreement).

[47] Uppsala Conflict Data Program (n 41) ('The International Crisis Group notes that while the UN was not tasked with facilitating the peace talks, its role in the key area of weapons management put it at the heart of the political debate'). See also the sources (n 27).

IV. The New Law of Hybrid Self-Determination

When examining the role of self-determination in modern peace agreements, Bell identifies the well-recognized tension between the rights of peoples and the rights of states.[48] The Friendly Relations Declaration, for example, proclaims that 'all peoples have the right freely to determine, without external interference, their political status',[49] and clearly envisages that this right might be implemented through 'the establishment of a sovereign and independent State'. The declaration maintains, nonetheless, that it should not 'be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[50]

Bell attributes this tension to the fact that, although the legal right to self-determination 'was framed in general terms that seemed to contemplate a general relevance', it was a right that had emerged in the very specific context of decolonization and its application in broader contexts, where the commitments to self-government and territorial integrity appeared to be at odds, was unclear.[51] Over time, this tension began to resolve itself through the trend towards recognizing the right to self-determination as a procedural one; namely, the 'right of peoples to take part in decisions affecting their future'.[52] This shift has been described as being one from 'external' to 'internal' self-determination.[53]

'Hybrid self-determination' is the name Bell gives to the type of self-determination that she finds in peace agreements. She argues that the practical necessity of needing to have an agreed text has forced a reconciliation between the 'contradictions and indeterminacies' in established self-determination law.[54]

Bell 'states' the New Law of Hybrid Self-Determination as follows:[55]

Self-determination is to be implemented [in peace agreements] through periodic elections, coupled with three linked concepts aimed at fair participation:

(a) redefinition of the nature of the state, with reference to inclusion and equality;
(b) disaggregation of power through devices such as consociationalism, territorial subdivision, and robust human rights and minority rights protections;
(c) dislocation of power by attenuating sovereignty through devices such as binationalism, institutionalized cross-border governance, post-sovereign language, or international supervision.

Bell argues that the New Law represents 'a deliberate incorporation of internal *and* external self-determination language and mechanisms'.[56] It is not external self-determination

[48] Bell, On the Law of Peace (n 2) 35–7.
[49] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (24 October 1970) UN Doc. A/RES/25/2625 ('Friendly Relations Declaration').
[50] Ibid.
[51] Bell, On the Law of Peace (n 2) 36–7, citing James Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 16–17.
[52] Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 *Human Rights Quarterly* 186, 189, cited in Bell, On the Law of Peace (n 2) 37–9.
[53] Bell, On the Law of Peace (n 2) 205–6.
[54] Ibid. 219–20; see also 205–7.
[55] Ibid. 219.
[56] Ibid. 206 (emphasis added).

because it does not involve the dissolution of the state. At the same time, however, it is not purely internal self-determination because it 'dislocate[s] power by blurring the question of where sovereignty lies'.[57]

V. Do the Examined Agreements Observe the New Law of Hybrid Self-Determination?

A. Elections

The first element of the New Law is the conduct of periodic elections, which Bell argues is linked to the 'right to elections' (or 'right to democratic governance') that some scholars argue is emerging in international law from (i) human rights treaty provisions and associated jurisprudence, and (ii) the 'common standards found in the mandates of UN election monitoring missions'.[58]

Eight of the eleven peace agreements contain a clear promise of elections,[59] and five set a deadline for them to be conducted.[60] Two further agreements do not include concrete promises of elections, but do speak of democratic principles or democratic reform.[61] Two of the agreements—South Sudan and Bougainville—also include promises of a referendum on secession.[62] The Senegalese agreement alone is silent on the topics of elections and democracy.

There are also other provisions in the agreements related to the holding of elections: three agreements provide for the establishment of an independent electoral commission,[63] and the Sudanese agreement includes the right to vote in its bill of rights.[64]

The New Law's requirement for elections, therefore, is well observed in the majority of agreements here considered. Common practice involves the combination of a promise of elections with a deadline for their being held and/or other process-related provisions.

B. State Redefinition

The second element of the New Law of Hybrid Self-Determination is the 'redefinition of the nature of the state, with reference to inclusion and equality'. Bell elaborates that, '[a]t the

[57] Ibid.

[58] Gregory Fox, 'The Right to Political Participation in International Law' (1992) *17 Yale Journal of International Law* 539; Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000); Gregory Fox, 'Election Monitoring: The International Legal Setting' (2000) 19 *Wisconsin International Law Journal* 295, all cited in Bell, On the Law of Peace (n 2) 221–2.

[59] Burundian agreement, protocol II, ch. I, art. 5 (see also protocol I, ch. II, art. 5(6) and protocol II, ch. II, art. 20); Liberian agreement, arts 19 and 21(2); Sudanese agreement, ch. II, arts 2.2.3.1, 2.3.7, 4.4.1, and 3.5.4 (see also art. 1.4.6); Indonesian agreement, arts 1.2.2, 1.2.3, 1.2.6; Macedonian agreement, annex C, Art. 2; Papua New Guinean agreement, art. 28; Ivorian agreement, arts 2 and 5.2, annex; Nepalese agreement, preamble, art. 3.2.

[60] Liberian agreement, arts 19 and 21(2); Sudanese agreement, ch. II, art. 1.8.3; Indonesian agreement, arts 1.2.2, 1.2.3, 1.2.6; Macedonian agreement, annex C, art. 2; Nepalese agreement, preamble, art. 3.2.

[61] Djiboutian agreement, ch. IV; Angolan agreement, arts 2.1 and 2.3.

[62] Sudanese agreement, ch. I, art. 2.5; Papua New Guinean agreement, introduction (p. 8), arts 309–24 (especially art. 312(a)).

[63] Liberian agreement, art. 18; Sudanese agreement, ch. II, art. 2.10.1.1; Djiboutian agreement, art. 16.

[64] Sudanese agreement, ch. II, art. 1.6.2.11.

level of symbolism and rhetoric, peace agreements provide for a fundamental redefinition of the state, to enable the inclusion of the state's dissenters and so respond to their allegation of state illegitimacy'.[65] This symbolism does not remain symbolic, however: '[i]n articulating a new relationship between people and state, the nature of the state is changed'.[66] 'The old state both continues to exist and is replaced'.[67]

There was a spectrum of observance with this element of the New Law in the agreements studied. The Burundian agreement, for example, clearly engages in redefinition. It commits the parties to the:[68]

> Institution of a new political, economic, social and judicial order in Burundi, in the context of a new constitution inspired by Burundian realities and founded on the values of justice, the rule of law, democracy, good governance, pluralism, respect for the fundamental rights and freedoms of the individual, unity, solidarity, equality between women and men, mutual understanding and tolerance among the various political and ethnic components of the Burundian people.

The parties to the Nepalese agreement agree '[t]o carry out an inclusive, democratic and progressive restructuring of the state by ending the current centralized and unitary form of the state'.[69] Likewise, the Sudanese agreement records the parties' determination to 'usher in an era of responsible, just, transparent, people-led and integrity based governance . . . that shall help to create a solid basis to make unity of the country attractive and preserve peace'.[70] The Djiboutian agreement also expresses the parties' commitment to building a new political order,[71] even though the operative provisions concerning Public Freedoms, the Freedom of the Press and the Equality of all Citizens amount to little more than a reaffirmation of existing law.[72]

Other agreements are not as clear-cut, however; they speak—as the Liberian agreement does—of a desire 'for genuine lasting peace, national unity and reconciliation', 'a stable political environment in which our people can live in freedom under the law', and 'all-inclusive participation in governance and the advancement of democracy'.[73] This language certainly expresses a desire for the inclusion of dissenters and the improvement of state legitimacy, but it does not go as far as to engage in a 'fundamental redefinition of the state'. The same can be said of agreements—like the Macedonian or Ivorian—that assert that 'sovereignty and territorial integrity, and the unitary character of the state are inviolable'.[74] Also in this category are the Indonesian and Papua New Guinean agreements.[75]

[65] Bell, On the Law of Peace (n 2) 106.
[66] Ibid.
[67] Ibid. 207.
[68] Burundian agreement, protocol I, ch. II, art. 5(1).
[69] Nepalese agreement, art. 3.5. See also preamble, art. 3.1.
[70] Sudanese agreement, preamble. See also ch. II, preamble.
[71] Djiboutian agreement, preamble. See also art. 23(a).
[72] Djiboutian agreement, arts 13, 14, and 15.
[73] Liberian agreement, preamble.
[74] Macedonian agreement, art. 1.2 (with inclusive language in arts 1.3 and 7.1); Ivorian agreement, preamble.
[75] Indonesian agreement, preamble; Papua New Guinean agreement, arts 4, 337–43 (especially 340(b)).

At the other end of the spectrum, there are expressions of the need for reconciliation between the parties in the Angolan and Senegalese agreements,[76] but nothing that approaches a redefinition of the state.

This element of the New Law, therefore, was not well observed in the agreements here considered, as only four of eleven agreements engaged in a 'fundamental redefinition of the state'. In some cases, it is hardly surprising that the state is not redefined; it would be very odd if the agreement on Aceh were to redefine the nature of the entire Indonesian state, for example, given that the Acehnese make up just 1.4% of the population.[77] Although not fundamentally redefining the state, however, a further five agreements did express a desire to include dissenters and boost state legitimacy (which, according to Bell, is the aim of state redefinition).

C. Disaggregation of Power

The third element of the New Law of Hybrid Self-Determination is the 'disaggregation of power through devices such as consociationalism, territorial subdivision, and robust human rights and minority rights protections'.[78] This disaggregation seeks to give practical effect to the desire to include dissenters and boost the legitimacy of the state by 'reconceptualizing state governance and jurisdiction as capable of being disaggregated into a wide variety of territorial, functional, and identity-based institutional innovations, so as to accommodate competing groups' demands for effective participation'.[79]

Of the eleven agreements studied here, only the Ivorian, Angolan, and Nepalese contained no form of disaggregation of power. The remaining eight all contained elements of consociationalism (including territorial subdivision), and three of them also contained human/minority rights protections.

C.i. *Consociationalism*

There are five main institutional arrangements that are often found in consociational systems:[80]

- A power-sharing executive that includes 'the participation by the leaders of all significant segments';[81]
- Proportional representation of groups within the institutions of government, often through some form of quota system;
- Veto rights giving each group the ability to block decisions so as to promote decision-making by consensus;
- Some form of self-government for some or all groups at the sub-national level; and
- Mechanisms for the settlement of disputes.

[76] Angolan agreement, preamble, art. 2.1; Senegalese agreement, preamble.

[77] Central Intelligence Agency, *World Factbook: Indonesia* (2010) available at <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html> accessed 19 May 2019.

[78] Bell, On the Law of Peace (n 2) 106.

[79] Ibid.

[80] Arend Lijphart, *Democracy in Plural Societies* (Yale University Press 1977), ch. 2; Ulrich Schneckener, 'Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation' (2002) 39 *Journal of Peace Research* 203, 204–5.

[81] Lijphart (n 80) 31.

Seven of the agreements studied here contained elements of consociationalism. The most commonly-occurring elements were provisions for some form of self-government for specified groups at the sub-national level, and power-sharing and proportional representation at the national level.

Sub-national self-government was provided for in five agreements. In Sudan, Indonesia and Papua New Guinea, this involved the creation of new, autonomous, sub-national governments for Southern Sudan,[82] Aceh,[83] and Bougainville.[84] These were given wide-ranging powers: the Indonesian government, for example, agreed to devolve power to the government of Aceh 'within all sectors of public affairs', except certain nominated fields, and to consult with the Acehnese government on 'matters of special interest to Aceh'.[85] The Sudanese and Papua New Guinean agreements also promised a referendum on complete self-government (i.e. secession) for the people of South Sudan and Bougainville.[86]

In Macedonia and Djibouti, sub-national self-government was also provided for, through reforms that—in the words of the Macedonian agreement—'reinforce[] the powers of elected local officials and enlarge[] substantially their competencies'.[87]

At the national level, four agreements provide for some form of power-sharing or proportional representation. Appointments to the 'all-inclusive Transitional Government' in Liberia are to 'reflect a broad spectrum of the Liberian society',[88] and the agreement sets out the number of seats each group is to have in the transitional legislature,[89] as well as the ministries, agencies, commissions, and public corporations that each group is to be 'allocated'.[90] There are also specific allocations for the period prior to the first post-agreement elections in Sudan.[91]

While the parties to the Burundian agreement wanted to engage in the '[d]eliberate promotion of disadvantaged groups' by 'avoiding the quota system',[92] there is some proportional representation: the police force and—for a limited time—the armed forces are prohibited from having more than half of their members drawn from any single ethnic group,[93] and the 'first transitional President and Vice-President … shall come from different ethnic groups'.[94]

The Macedonian agreement also seeks to ensure 'equitable representation of communities in all central and local public bodies and at all levels of employment within such bodies, while respecting the rules concerning competence and integrity that govern public administration'.[95] In particular, '[t]he parties commit themselves to ensuring that the police services will by 2004 generally reflect the composition and distribution of the population of Macedonia', and the agreement includes concrete initial steps to be taken towards achieving this.

[82] Sudanese agreement, ch. II, art. 1.5.1.1 and generally.
[83] Indonesian agreement, art. 1.
[84] Papua New Guinean agreement, introduction, 8. See also arts 4–308.
[85] Indonesian agreement, art. 1.
[86] Sudanese agreement, ch. I, art. 2.5; Papua New Guinean agreement, arts 310 and 311.
[87] Macedonian agreement, art. 3; Djiboutian agreement, arts 18–22; United Nations, *Republic of Djibouti: Public Administration and Country Profile* (2005) available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023257.pdf> accessed 19 May 2019, 8.
[88] Liberian agreement, arts 21(1), 24(1), and 26(3).
[89] Liberian agreement, art. 24. See also annex 2, art. 2.
[90] Liberian agreement, annex 4.
[91] Sudanese agreement, ch. II, articles 2.2.2.1, 2.2.5, 2.3.5, 2.3.7, 2.5.1, 2.5.3, 2.5.5, 2.6.1, 2.6.2, 2.7.2.2, and 2.7.2.3.
[92] Burundian agreement, protocol I, ch. II, art. 7(4).
[93] Burundian agreement, protocol II, ch. II, arts 14(1)(g) and 14(2)(e).
[94] Ibid. art. 15(12).
[95] Macedonian agreement, art. 4.2.

Although rarer than mechanisms for self-government at the sub-national level and power-sharing at the national level, there were instances of other consociational devices in the agreements examined. The Macedonian agreement established a veto mechanism for laws that 'directly affect' culture, use of language, and other ethnically-based matters,[96] and the Sudanese and Senegalese agreements established dispute settlement mechanisms that included equal representation of the parties.[97]

C.ii. *Human Rights and Minority Rights*

The Liberian, Sudanese, and Indonesian agreements also disaggregated power through human rights protections supported by commissions or courts.[98] Although many other agreements include statements of commitment to human rights, the absence of any monitoring or enforcement mechanism for those rights means that they cannot be considered true disaggregation of power.

C.iii. *Conclusion on Disaggregation*

The disaggregation of power was a feature of eight of the eleven agreements considered here. As the New Law contemplates, there was a wide range of approaches to disaggregation, with some form of self-government at the sub-national level and power-sharing at the national level appearing most frequently.

D. Dislocation of Power

The final element of the New Law of Hybrid Self-Determination is the 'dislocation of power by attenuating sovereignty through devices such as binationalism, institutionalized cross-border governance, post-sovereign language, or international supervision'. This element involves 'blurring the concept of sovereignty . . . [to (a)] provide for powers of governance that cross state borders and are some sense shared between more than one state, and/or [(b)] place international actors at the heart of new arrangements'.[99]

The first aspect of this dislocation amounts to 'acknowledging competing nationalisms as equally legitimate and creating institutional vehicles for governance that move beyond a traditional understanding of the state's territorial limits'.[100] The mechanisms that Bell identifies for achieving this are: 'cross-border governance; devolution of *all* powers and trappings of statehood to a sub-state entity; dual citizenship; and proposed referenda on secession which reconstitute the state as requiring ongoing consent'.[101]

As has been noted, the Papua New Guinean and Sudanese agreements provide for secession referenda. None of the other suggested mechanisms were identified, however, in any agreement under consideration.

[96] Ibid. art. 5.2.
[97] Sudanese agreement, ch. I, art. 2.4; annexure 1, art. 14; Senegalese agreement, arts 2.1 and 2.2.
[98] Liberian agreement, art. 12(2); Sudanese agreement, ch. II, arts 1.6.2 and 2.10.1.2; Indonesian agreement, art. 2.2.
[99] Bell, *On the Law of Peace* (n 2) 106–7.
[100] Ibid. 107.
[101] Ibid. (emphasis added).

The second aspect—international supervision—was present, however. International supervision 'conditions full sovereignty on the building of political and legal institutions that will disaggregate power, to ensure that all groups are accommodated. In the interim period (often left indefinite) international actors are given extensive roles in domestic political and legal institutions, with a view to enforcing and developing these institutions'.[102]

A range of mechanisms was identified in the seven agreements that made provision for international supervision. Six of them established monitoring mechanisms (including mechanisms for the monitoring of ceasefires and elections) comprised solely of foreign and international actors,[103] and two established monitoring mechanisms that included a significant role for international actors.[104] Three agreements included a request for international peacekeepers,[105] and a fourth requested that the existing peacekeeping force be expanded.[106]

The Burundian agreement required the transitional government to petition the Security Council for an 'International Judicial Commission of Inquiry on genocide, war crimes and other crimes against humanity' in Burundi.[107] Should that inquiry find evidence of such crimes, the agreement further required the government to petition the Security Council for the establishment of an international criminal tribunal 'to try and punish those responsible'.[108]

The Burundian agreement also provided that, should the 'belligerent activities' continue, the parties 'agree to call collectively … upon the Governments of neighbouring states, the international agencies which are guarantors of the Agreement and other appropriate national and international bodies to take the necessary steps' to restore peace.[109]

Four agreements, on the other hand, did not provide for international supervision. The Senegalese agreement contains nothing of relevance, the Djiboutian agreement merely requests 'financial and technical support' from the international community,[110] and the closest the Angolan agreement comes is the acceptance of relevant SC resolutions.[111] Although the Macedonian agreement acknowledges 'a decision by NATO to assist' with the cessation of hostilities and the disarmament and disbandment of the Albanian militia and the need for 'acceptance by all the parties of the conditions and limitations under which the NATO forces will operate',[112] this opaque reference to what was to become Operation Essential Harvest does not include the attenuation of sovereignty required for a conclusion that there has been a dislocation of power.

This analysis shows that international supervision was the only type of power dislocation widely present in the agreements under consideration.

[102] Ibid. 107.

[103] Burundian agreement, protocol III, ch. III, art. 27(1); protocol V, art. 3; Liberian agreement, arts 10, 19(4)(a) and 29(2); Sudanese agreement, ch. II, art. 1.8.7; annexure 1, art. 1.9; Indonesian agreement, art. 5.1; Papua New Guinean agreement, G, arts 330(a), 334, and 335; Nepalese agreement, arts 4.1, 4.2, 4.6, and 9.

[104] Sudanese agreement, ch. I, art. 2.4; annexure 1, art. 14; Ivorian agreement, arts 7.2 and 8.1.

[105] Burundian agreement, protocol III, ch. III, art. 27; protocol V, art. 8; Liberian agreement, arts 3, 4, and 29(1); Sudanese agreement, annexure 1, art. 15.

[106] Ivorian agreement, art. 8.2.

[107] Burundian agreement, protocol I, ch. II, art. 6(10).

[108] Ibid. art. 6(11).

[109] Ibid. art. 2(3).

[110] Djiboutian agreement, art. 23(b).

[111] Angolan agreement, art. 2.2.

[112] Macedonian agreement, art. 2.1.

E. Conclusion on Observance of the New Law of Hybrid Self-Determination

As the foregoing analysis shows, therefore, the elements of elections and disaggregation of power are well observed in the agreements analysed here. The majority of agreements do not redefine the state in the manner suggested by the New Law of Hybrid Self-Determination, but do seek to include dissenters and re-establish the legitimacy of the state in some way. Aside from international supervision, the dislocation of power was not prevalent.

VI. The New Law of Transitional Justice

The second of the New Laws that Bell identifies is the New Law of Transitional Justice. As with self-determination, the inclusion of issues of transitional justice in peace agreements raises 'political, moral and legal dilemmas';[113] these arise 'because peace settlements are based on balance of power compromises between the state and its opponents, but exist in a world of international legal norms, such as those of human rights law'.[114] She further expands on the tension between these competing forces as follows:[115]

> Transitional justice seems to insist that values of justice be inserted into the business of pragmatic deal-making, so as to disrupt narrow deals between military actors. Transitional justice offers victims of conflict some purchase on the new constitutional arrangement. The inclusion of accountability mechanisms can restore a broader authorship to the peace agreement's development and implementation. The requirement of accountability for the past asserts the pragmatic importance of the rule of law to future peacebuilding efforts.

As with the New Law of Hybrid Self-Determination, Bell 'states' the New Law of Transitional Justice. Designed as 'a set of normative expectations that shape how peacemakers attempt to reconcile use of amnesties with the international law that claims regulatory force', it reads as follows:[116]

(1) Blanket amnesties that cover serious international crimes are not permitted.
(2) Some amnesty is required to facilitate the release, demilitarization and demobilization of conflict-related prisoners and detainees.
(3) The normative commitment to accountability should be married with the goal of sustaining the ceasefire and developing the constitutional commitments at the heart of the peace agreement. This can be achieved by creative design based around the following mechanisms:
    (a) quasi-legal mechanisms which deliver forms of accountability other than criminal law processes with prosecution, such as Truth Commissions;

[113] Bell, *On the Law of Peace* (n 2) 6.
[114] Ibid.
[115] Ibid. 255.
[116] Ibid. 240.

(b) a bifurcated approach whereby international criminal processes for the most serious offenders coupled with creatively designed local mechanisms, including forms of amnesty for those further down the chain of responsibility, aim at a range of goals such as accountability, demobilization and reconciliation.

(4) Should any party evidence lack of commitment to the peace agreement, and in particular return to violence, any compromise on criminal justice is voidable and reversible through the use of international criminal justice.

Although she recognizes 'the proliferation of simultaneous multiple mechanisms [of transitional justice] with different goals, mandates, remits, and relationships to criminal justice',[117] Bell's approach to transitional justice focuses almost exclusively on what Mani calls 'rectificatory justice' (i.e. the rectification of past injustices) and largely ignores 'legal justice', which is the term Mani uses to refer to the re-establishment of human rights and the rule of law.[118] Indeed, Bell's concept of transitional justice is heavily focused on accountability for wrongful acts—crimes in particular—committed during the war and the questions of whether and to what extent these should be the subject of amnesty. 'What has emerged' from the practice of peacemaking, she argues, 'is an understanding that norms permit and perhaps even require amnesty post-settlement, but also a level of accountability';[119] '[t]he two commitments—to accountability and to amnesty—stand in tension with each other and this tension continues to produce a substantive "new law". The new law attempts to reconcile the prohibition on blanket amnesty with the need for some amnesty compromise'.[120]

Although accountability for past crimes is important, our understanding of transitional justice is incomplete if it does not also include mechanisms to protect civil liberties and human rights into the future.[121] Vinjamuri and Boesenecker identify ten 'justice mechanisms' typically found in peace agreements:[122]

- Trials or the establishment of tribunals for crimes committed during the conflict;
- Truth and/or reconciliation commissions;
- Restitution or compensation for losses suffered;
- Traditional justice mechanisms;
- Vetting for specified officeholders;

[117] Ibid. 251.

[118] Rama Mani, 'Balancing Peace with Justice in the Aftermath of Violent Conflict' (2005) 48 *Development* 25, 25–7.

[119] Bell, *On the Law of Peace* (n 2) 243.

[120] Bell, *On the Law of Peace* (n 2) 250. Indeed, she describes this New Law as 'a compromise between amnesty and accountability—both of which are understood to be normatively required': 241. See also Bell, *On the Law of Peace* (n 2) 239 ('The new law of transitional justice has derived from an attempt to apply the normative constraints of human rights and humanitarian law to peace agreement amnesties'), 240 ('While transitional justice debates existed outside the peace agreement context, peace agreements were to focus the legal questions around the question of whether amnesties could be granted as the price of settlement'), 243 (speaking of other accountability mechanisms as 'a set of practices driven, not just by the imperatives of peacemaking, but by the need to articulate compliance with the idea that blanket amnesties are not normatively permissible'), 249 ('a prohibition of blanket amnesty in intrastate conflict does not find a positive law articulation in any regime, but must be "read into" a unified narrative of what the differentiated regimes collectively required'), 249 ('some level of amnesty is permitted and even required').

[121] Leslie Vinjamuri and Aaron Boesenecker, 'Accountability and Peace Agreements: Mapping trends from 1980 to 2006' (Research Report, Centre for Humanitarian Dialogue, September 2007) 6.

[122] Ibid. 55.

- Prisoner release and return;
- Reintegration of combatants into national militaries and/or civilian life;
- Military reform;
- Police reform; and
- Human rights commissions and/or monitoring bodies.

While the first five are primarily directed towards accountability for or rectification of past actions, the remaining five are primarily forward-looking, further emphasizing the point that Bell's focus on amnesty versus accountability emphasizes rectificatory justice but tends to overlook other elements of transitional justice. Fortunately, there is sufficient room for such elements to be considered in the new law's reference to 'creatively designed local mechanisms … aim[ed] at a range of goals *such as* accountability, demobilization and reconciliation'.[123]

It is important to note, of course, that the inclusion of justice mechanisms in an agreement does not guarantee that justice will be done. The justice mechanisms may not be implemented, or the whole agreement may fail. Even if the mechanisms are implemented, there may be disputes as to whether they have been implemented in full and in good faith, or they may simply not achieve what some parties had hoped. In the Aceh agreement, for example, the monitoring mechanism 'did little more than refer some of the key political and human rights issues (such as the [Truth and Reconciliation Commission] and Human Rights Court) to the appropriate Indonesian minister and take their assurances at face value'.[124] The Commission and Court have still not been set up.[125]

On the other hand, the implementation of justice mechanisms in the 1999 Lome Accord between the Government of Sierra Leone and the armed opposition, while certainly not perfect, has been significantly more successful. After some delays, the Truth and Reconciliation Commission received more than 9,000 statements and made wide-ranging recommendations.[126] The National Human Rights Commission is up and running.[127] A Special Court for Sierra Leone was created and there has been significant police reform, even though neither were envisaged in the Accord.[128]

VII. Do These Agreements Observe the New Law of Transitional Justice?

A. Amnesty

The first paragraph of the New Law of Transitional Justice provides that amnesties covering serious international crimes are not permitted, whereas the second paragraph provides that

[123] Bell, *On the Law of Peace*, para. (3)(b), emphasis added

[124] Edward Aspinall, 'Peace without justice? The Helsinki peace process in Aceh' (Research Report, Centre for Humanitarian Dialogue, April 2008) 13.

[125] Amnesty International, 'Time to face the past: justice for past abuses in Indonesia's Aceh Province' (Research Report, 2013).

[126] Priscilla Hayner, 'Negotiating peace in Sierra Leone: Confronting the justice challenge' (Research Report, Centre for Humanitarian Dialogue, December 2007) 26–9.

[127] Ibid. 28–9.

[128] Ibid. 25–6, 30.

'[s]ome amnesty is *required* [my emphasis] to facilitate the release, demilitarization, and demobilization of conflict-related prisoners and detainees'.[129]

The balance that Bell strikes in these two paragraphs is observed by only two of the eleven agreements here under consideration. Only the Burundian and Ivorian agreements provide for an amnesty that specifically excludes serious international crimes.[130] Four agreements provide for a general amnesty,[131] with no carve-out for serious international crimes. Four agreements (the Sudanese, Macedonian, Djiboutian, and Nepalese) provide for no amnesty at all, while a fifth—the Liberian—does not provide for an amnesty, but directs the transitional government to 'give consideration to a recommendation for *general* amnesty'.[132] Three of these agreements that do not contain amnesties—the Liberian, Sudanese and Nepalese—do provide for prisoner release, however; in certain circumstances, this may amount to the same thing.

The fact that, taken individually, a majority of agreements comply with each paragraph is beside the point;[133] Bell expressly describes these paragraphs as 'a compromise between amnesty and accountability—both of which are understood to be normatively required'.[134]

B. Other Mechanisms

The third paragraph of the New Law of Transitional Justice concerns the range of justice mechanisms—beyond amnesties—that have as their goal 'sustaining the ceasefire and developing the constitutional commitments at the heart of the peace agreements'.

The opening phrase of the third paragraph—'[t]he normative commitment to accountability should be married with'—could be interpreted as a reference to the balance struck in the first two paragraphs. If it is, it could be argued that—in agreements that do not reflect this balance—the 'normative commitment to accountability' does not in fact exist, there is nothing to marry it with and, therefore, those agreements that do not comply with the first two paragraphs—including nine of the eleven here under consideration—cannot possibly comply with the third. Similar criticisms could be made in relation to the requirement in sub-paragraph (b) that 'international criminal processes for the most serious offenders [be] coupled with creatively designed local mechanisms'. It would be overly formalistic, however, for this chapter to disregard the mechanisms of transitional justice contained in the other nine agreements for this reason. The fact that this paragraph calls for the 'creative design' of justice mechanisms aimed at sustaining the peace agreement supports a more flexible approach.

Many of the agreements under consideration include the kinds of mechanisms that the third paragraph of the New Law on Transitional Justice is referring to.

[129] Bell, *On the Law of Peace*, para. (2)

[130] Burundian agreement, art. 26(1)(l); Ivorian agreement, art. 6.3

[131] Indonesian agreement, art. 3.1; Angolan agreement, ch. 2, art. 2.1, Papua New Guinean agreement, ch. F and Senegalese agreement, art. 1.1 (acknowledging a general amnesty already passed).

[132] Liberian agreement, art. 34 (emphasis added).

[133] That is, six agreements comply with the first paragraph by not containing an amnesty that covers serious international crimes, and six contain an amnesty of some kind. As noted, however, only two agreements comply with both provisions simultaneously.

[134] Bell, *On the Law of Peace* (n 2) 241.

Table 11.2: Quasi-legal mechanisms for accountability in the peace agreements under consideration

Mechanism	Agreement(s)
Truth and/or reconciliation commission	1. Nepal 2. Indonesia 3. Liberia 4. Burundi
Vetting	1. Liberia
Restitution or compensation	1. Djibouti
Traditional justice	1. Burundi 2. Papua New Guinea

Sub-paragraph (a) refers to 'quasi-legal mechanisms which deliver forms of accountability other than criminal law processes with prosecution, such as Truth Commissions'. Of the ten types of 'justice mechanism' considered by Vinjamuri and Boesenecker, the four non-trial mechanisms I identified above as being directed primarily to accountability for or rectification of past actions—truth and reconciliation commissions, vetting of the past actions of candidates for specified positions, restitution or compensation for losses suffered, and traditional justice mechanisms—would fit this description. Six of the eleven agreements here considered included such mechanisms (see Table 11.2).

Sub-paragraph (b) refers to 'creatively designed local mechanisms' that 'aim at a range of [transitional justice] goals such as accountability, demobilization and reconciliation'. All of the justice mechanisms identified by Vinjamuri and Boesenecker could be said to be directed to at least one of those aims but, to avoid overlap with sub-paragraph (a) and to retain the distinction between backward-looking and forward-looking mechanisms developed above, I will consider only the latter here. Only one agreement—the Macedonian—did not contain any such mechanisms, and the remainder had between one (Angola and Senegal) and all five (Liberia), with the average being just shy of three (see Table 11.3).

Taking all ten justice mechanisms together, there were thirty-six occurrences across the agreements, ranging from zero (Macedonia) to seven (Liberia). The average was 3.27 per agreement.

This is not to suggest, however, that more is necessarily better when it comes to the number of such mechanisms in a peace agreement. There are five justice mechanisms in the 2005 Aceh agreement, for example, but the provisions concerning them are 'brief and general in content' and were included after little discussion or clarification, apparently because the provisions 'largely accorded with the Indonesian government position and did not much expand or contravene existing justice provisions'.[135] Less than three years after the agreement, few participants in the talks could clearly recall how issues of transitional justice were dealt with,[136] and at least one observer concluded that 'peace was sought at the expense of justice'.[137] Generally speaking, however (and particularly if we are conducting a

[135] Aspinall (n 124) 14, 15, 18.
[136] Ibid. 16.
[137] Ibid. 15.

Table 11.3 Forward-looking mechanisms for transitional justice in the peace agreements under consideration

Mechanism	Agreement(s)
Human rights commission	1. Liberia 2. Sudan 3. Indonesia 4. Nepal
Reintegration of combatants	1. Djibouti 2. Papua New Guinea 3. Angola 4. Liberia 5. Senegal 6. Indonesia 7. Nepal 8. Côte d'Ivoire
Prisoner release	1. Burundi 2. Liberia 3. Sudan 4. Nepal
Military reform	1. Burundi 2. Liberia 3. Sudan 4. Indonesia 5. Nepal 6. Côte d'Ivoire
Police reform	1. Burundi 2. Papua New Guinea 3. Liberia 4. Sudan 5. Indonesia

quantitative analysis of a large number of agreements), a large number of provisions would suggest that transitional justice played a larger role in the negotiations.[138]

C. Conclusions

Although the balance between amnesty and accountability identified by Bell is not supported by this analysis, the agreements here considered do—through a range of mechanisms—display the 'creative design' approach to transitional justice referred to in the third paragraph of the New Law on Transitional Justice. Furthermore, there is a much larger number of forward-looking justice mechanisms than backward-looking accountability mechanisms.

[138] Vinjamuri and Boesenecker (n 121) 19.

VIII. The Influence of Mediator Identity

Having analysed the extent to which the eleven agreements comply with the New Laws of Hybrid Self-Determination and Transitional Justice, this chapter will now turn to the question of whether the presence and identity of any mediator influence the degree of an agreement's compliance with the New Laws.

A. The New Law on Hybrid Self-Determination

Table 11.4 gives an admittedly crude summary of the degree to which each agreement observes the New Law of Hybrid Self-Determination.

Table 11.4: Degree of Observance of the New Law of Hybrid Self-Determination [. . .]

Country	Degree of observance of the New Law of Hybrid Self-Determination			
	Elections[139]	State redefinition[140]	Disaggregation of power[141]	Dislocation of power[142]
Mediated by a former politician or official (independent mediator)				
Burundi	High	High	Low	High
Liberia	High	Low	High	High
Sudan	High	High	High	High
Indonesia	High	Low	High	High
Mediated by a serving politician or official (representative mediator)				
Macedonia	High	Low	High	Nil
Papua New Guinea	High	Low	High	Low
Côte d'Ivoire	Low	Low	Nil	High
Not mediated				
Djibouti	Low	High	High	Nil
Angola	Nil	Nil	Nil	Nil
Senegal	Nil	Nil	Low	Nil
Nepal	High	High	Low	Low

[139] 'High' means there is a promise of elections accompanied by a deadline for their conduct or other process-related provisions. 'Low' means there is a promise without a deadline or process, or process-related provisions without a promise.

[140] 'High' means there is full redefinition. 'Low' means that a desire is expressed for the inclusion of dissenters and an improvement of state legitimacy that falls short of redefinition.

[141] 'High' means one or more mechanisms that significantly disaggregate power. 'Low' means only minor disaggregation.

[142] 'Low' means that there is a provision for international supervisors without formal power. 'High' means that the supervisors are given some formal power.

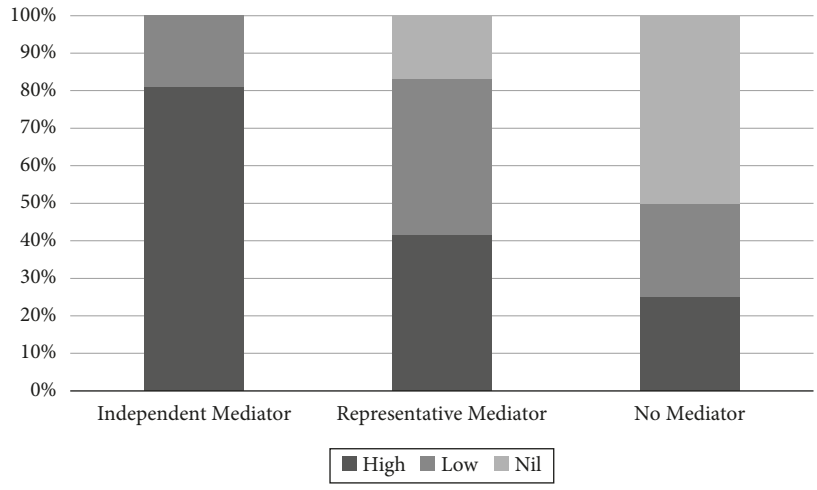

Figure 11.1: Degree of compliance with the New Law of Hybrid Self-Determination, disaggregated by mediator type

Although it is impossible to draw confident conclusions from a quantitative analysis of an unsophisticated evaluation of a small number of agreements, a pattern does begin to emerge. The percentage of High:Low:Nil ratings is 81:19:0 with independently-mediated agreements, falls to 42:42:17 with representative mediators, and further to 25:25:50 without mediation. As is represented in Figure 11.1, this is a marked difference.

Furthermore, there is also a pattern in relation to three of the four elements of the New Law. Although drawing conclusions is even more fraught when it comes to individual elements because the sample size is even smaller, the elements relating to elections, the disaggregation of power and its dislocation appear to be most fully observed with independent mediators, and still better observed with representative mediators than in the absence of mediation.

B. The New Law of Transitional Justice

As noted above, the amnesty provisions of the New Law on Transitional Justice were not well observed. As the Table 11.5 makes clear, the presence or identity of a mediator does not appear to have made a great difference to the degree of observance with this element of the New Law:

Table 11.5: Degree of observance of the New Law of Transitional Justice

Type of mediation	Full observation (amnesty not including serious international crimes)	General amnesty	No amnesty
Independent mediator	1	1	2
Representative mediator	1	1	1
No mediator	2	1	2

Table 11.6: Transitional Justice Mechanisms

Country	Transitional Justice Mechanisms		
	Backward-looking	**Forward-looking**	**Total**
Mediated by a former politician or official (independent mediator)			
Burundi	3	3	6
Liberia	2	5	7
Sudan	0	4	4
Indonesia	1	4	5
Average	1.5	4	5.5
Mediated by a serving politician or official (representative mediator)			
Macedonia	0	0	0
Papua New Guinea	1	2	3
Côte d'Ivoire	0	2	2
Average	0.3	1.3	1.7
Not mediated			
Djibouti	1	1	2
Angola	0	1	1
Senegal	0	1	1
Nepal	1	4	5
Average	0.5	1.75	2.25

On the other hand, there is a strong correlation between third-party involvement and the number of non-amnesty justice mechanisms present in each agreement (Table 11.6). Having a former politician or official as mediator correlates very strongly with having a large number of such mechanisms (in this sample, between four and seven):
Interestingly, having a mediator that is a current politician or official led to *fewer* justice mechanisms than did negotiations with no formal third-party involvement at all. This conclusion is skewed, however, by the inclusion of the 2006 Nepalese agreement, in which third-party actors played a considerable role outside the formal negotiations and which has been described by the head of the UN mission at the time as 'exceptional'.[143] If that agreement is removed from the list of peace agreements with no formal third-party involvement, the average number of justice mechanisms falls from 2.25 to 1.3 (see Figure 11.2). This is below the figure of 1.7 for agreements mediated by current politicians/officials.

Turning to individual justice mechanisms, a number of interesting observations may be made. All four of the agreements mediated by former politicians/officials made provision for both police and military reform, while these features were not simultaneously present in

[143] Ian Martin, 'The United Nations and Support to Nepal's Peace Process: The Role of the UN Mission in Nepal', in Sebastian von Einsiedel, David M. Malone, and Suman Pradhan (eds), *Nepal in Transition: From People's War to Fragile Peace* (Cambridge University Press, 2012) 201.

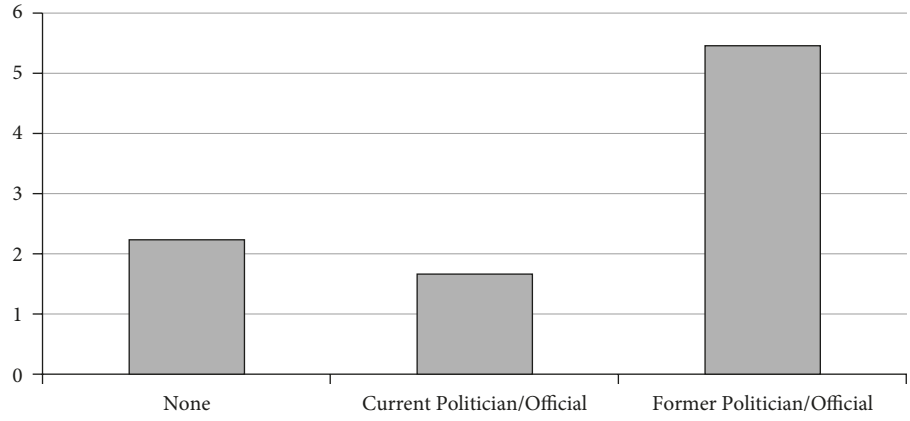

Figure 11.2: Average number of justice mechanisms for each type of formal third-party involvement

any of the remaining seven. Only one of them included police reform, and there were two instances of military reform. Three of the four included prisoner releases, but only one of the remaining seven did.

Perhaps most tellingly, there were three truth and reconciliation commissions and three human rights commissions provided for in the four agreements mediated by former politicians/officials, but only one of each provided for in the remaining seven. If the Nepalese agreement is excluded for the reasons discussed above, the remaining six had no truth and reconciliation commissions and no human rights commissions. This difference is both stark and significant.

Thus, while the involvement and identity of a mediator had no discernible impact on the presence of an amnesty in a comprehensive agreement, there was a strong correlation between negotiations mediated by former politicians and officials and comparatively high numbers of justice mechanisms. This correlation was particularly high in the cases of police and military reform, prisoner releases, and the establishment of truth and reconciliation and human rights commissions.

C. Possible Explanations

So what does all of this mean? Assuming that these agreements are not some form of aberration, how can we explain what appears to be a pattern of independently-mediated agreements paying greater attention to issues of self-determination and transitional justice than those mediated by the representatives of states or international organizations, or those that have not been mediated at all? There are a number of possible explanations.

It could be argued, for example, that this is a correlative, not causative, relationship; it is not the presence of a mediator that increases the likelihood of observance of the New Laws, but some third factor that makes both mediation and observance more likely. It could be that parties who accept mediation are predisposed to adopting stronger commitments in the areas of self-determination and transitional justice, or that conflicts for which large redistributions of power or significant numbers of justice mechanisms are required are

more likely to be mediated. For example, if the conflict has resulted in a clear victory for the government side, it is probably the case that the government can impose a solution that results in it retaining most of its power without requiring the services of a mediator; this would lead to a non-mediated agreement with a low degree of observance of the New Laws. If there is a stalemate, however, it is probably simultaneously more likely that mediation will be required *and* that the government will need to give significant ground in order to reach an agreement. This could result in a correlation between mediation and observance. Unless this line of argument can account, however, for the differing results achieved by independent and representative mediators, it is an incomplete explanation.

On the other hand, it may be that there is something that the mediator—especially the independent mediator—does that achieves a higher level of observance. This 'something' could be any one—or any combination—of a number of things. It may be that a mediator, especially an independent one, is in a better position to examine the wider situation beyond the protagonists and their conflict. (It is probably unlikely, for example, that negotiations mediated by a civilian would result in agreement like the Angolan one, which deals almost exclusively with military matters.) It may be that an independent mediator is more likely to draw on advice from experts from a range of disciplines, or that they are more likely to see themselves 'as having an active norm promotion function'.[144] It may be that they are more likely to press for the involvement of groups not directly involved in the fighting, such as civil society and women's groups, and that these groups are more likely to press for provisions that observe the New Law. It may be that they are more willing or able to engage in the kind of 'creative design' that the New Law on Transitional Justice calls for. It may simply be that, because they are not a serving politician or official, they have more time to dedicate to the negotiations.

This line of explanation is consistent with other research that suggests that the mere presence of a mediator can change the behaviour of parties to a negotiation.[145] It is also able to explain the difference in results between independent and representative mediators, because it is not difficult to imagine that independent and representative mediators will conduct themselves differently. While independent mediators act in a personal capacity (or as the representative of an NGO), representative mediators act as the representative of a state or international organization. They will be mindful of their obligations to their state or organization and, particularly in the case of officials, may have instructions as to what they can and cannot do. Former politicians and officials are not constrained in this way, and it is not inconceivable that they would use this freer rein to make or support proposals that observe the New Laws. For example, a representative mediator may shy away from recommending or supporting strong consociational mechanisms or a truth and reconciliation commission to investigate past wrongs if this stance could become public and result in unwanted demands for similar disaggregation of power or investigations in their home country or organization. Even if the risk of this is low, they gain nothing by supporting a commission. Furthermore, the fact that the representative mediator is a peer of the government negotiators (and not of the negotiators for the rebel group(s)) may give them a certain affinity with them and reduce the likelihood that they will push for the disaggregation or

[144] Bell, *On the Law of Peace* (n 2) 178, 179–81.

[145] Jacob Bercovitch and Allison Houston, 'Why Do They Do It Like This? An Analysis of the Factors Influencing Mediation Behavior in International Conflicts' (2000) 44 *Journal of Conflict Resolution* 170, 180.

dislocation of governmental power, or the oversight of government activity by a human rights commission. A mediator who acts in their personal capacity is probably less likely to experience either of these phenomena. In addition, as a member of civil society themselves, a former politician/official may be more inclined to give a larger role to civil society actors and other parties beyond the belligerents, who may be more interested in issues of self-determination and justice.

If the pattern I have identified is not merely an aberration, and if it could be explained by the conduct of the mediator, this would tell us something quite significant about the *lex pacificatoria* and, more generally, about the *jus post bellum* of which it forms part. In *On the Law of Peace*, Bell asks: 'to whom does the *lex pacificatoria* belong?':[146]

> The very idea of a *lex pacificatoria* suggests a legitimation of the *lex* because it has emerged as a set of community-based norms, but in so doing begs the question of who or what constitutes the community that is the source of authority. One answer could lie in finding peacemakers to be an 'epistemic community' of international mediators whose presence can be empirically tracked … However, it is also possible to envisage peacemakers as including all those involved in peacemaking at an international and domestic level … This broader point of view points to the 'peacemakers' less as an epistemic community and more as a 'dialogic web'. This web includes international mediators, local, international, and transnational civil society, and political-military elites as they move towards using the language of peace.

She further argues that the common approach to peace settlement design that she observes 'is not dependent on mediators'.[147]

Although disavowing any suggestion that those in the 'dialogic web … have a monolithic approach to peacemaking', Bell clearly believes that the *lex pacificatoria* belongs to 'all those who claim to be making peace', rather than just the ' "epistemic community" of international mediators'.[148] The pattern observed here, however, suggests the opposite; if its norms are significantly more likely to be observed when independent mediators are present, it would appear that the *lex pacificatoria* belongs to them, or is—at least—a more effective tool in their hands. It is their activity, after all, that has generated the momentum towards a common understanding of how peace processes should operate.[149] They are the ones with the experience of peace agreements and peace negotiations in a wide range of contexts; most of the other actors in the 'dialogic web' will not have as much—if any—experience.

IX. Conclusion

The crux of Christine Bell's argument for the existence of a *lex pacificatoria* is that '[p]eace agreements across conflicts evidence strikingly similar arrangements and devices for accommodating the competing demands of the conflict's protagonists'.[150]

[146] Bell, *On the Law of Peace* (n 2) 290.
[147] Ibid. 105.
[148] Ibid. 290.
[149] Ibid. 43.
[150] Ibid. 105.

While the analysis in this chapter suggests that Bell's New Laws of Hybrid Self-Determination and Transitional Justice are generally observed in comprehensive peace agreements, it also suggests that they are more likely to be observed to a greater degree in independently-mediated agreements.

These findings suggest that an independent mediator who acts in a personal capacity can have considerable influence on the extent to which issues of self-determination and transitional justice are addressed in peace negotiations. More broadly, they could indicate that individuals matter and can have a significant influence on the way in which the *jus post bellum* plays out in any particular circumstance. The individuals in question, however, would appear to be a global elite that may have benign intentions, but who are not representative in any way of those most directly affected by the conflict. This limited study, though, is not in a position to draw any definitive conclusions. Further research is warranted to ratify or refute what the analysis presented here suggests.

PART IV

PROTECTION OF PERSONS AND PUBLIC GOODS

12

Rights of Indigenous Peoples and Environmental Protection in *Jus Post Bellum*

*Britta Sjöstedt**

I. Introduction

The chapter studies how indigenous peoples' rights sit within the larger framework of applicable law during the aftermath of armed conflict (post-conflict)—the *corpus* of *jus post bellum*. It focuses on how respect for rights of indigenous peoples can contribute to environmental protection and build sustainable peace. The chapter analyses the legal rights of indigenous peoples to the territories that they inhabit, occupy, or otherwise use (hereinafter indigenous territories). Indigenous peoples have a special relationship to their ancestral land and it is protected under international law.[1] It is described as having a 'fundamental importance for their collective physical and cultural survival as peoples'.[2] Often, the environment of indigenous territories is adversely affected by armed conflicts worldwide. This is because indigenous communities are in many cases located in rich biodiverse and isolated areas that attract armed groups inter alia for natural resources, inaccessible locations, and the cover that the vegetation provides. Also, in the aftermath of armed conflict, governmental actors, and international organizations, as well as private enterprises, are interested in exploiting or conserving the natural resources in the indigenous territories, which may also restrict access to the land of indigenous communities. The chapter argues that a peace process offers opportunities as well as risks for indigenous communities. In terms of opportunities, a peacebuilding process could contribute to enforcing respect for the rule of law in general and more specifically for the international obligations protecting the rights of indigenous peoples to their territories. For instance, it could involve (re)building institutions and mechanisms that ensure the indigenous peoples' participation in the decision-making processes concerning land issues and access to justice. Financial institutions and international donors can condition loans and/or aid for fair treatment of the indigenous population. On the other hand, peacebuilding activities can involve development plans, foreign investments, conservation projects, and so on, which can be used as pretext for taking over the control of indigenous land. The indigenous peoples may not be consulted prior to such

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[1] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights (2007).

[2] United Nations (UN) Permanent Forum on Indigenous Issues, 'Who are indigenous peoples?', Fact Sheet. Available at <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed 1 November 2018.

Britta Sjöstedt, *Rights of Indigenous Peoples and Environmental Protection in* Jus Post Bellum In: *Just Peace After Conflict*. Edited by: Carsten Stahn and Jens Iverson, Oxford University Press (2020). © The several contributors.
DOI: 10.1093/oso/9780198823285.003.0012

projects and/or if they oppose them, they could become subject to coercion or even direct attacks. In such cases, a peace process could contribute to indigenous peoples losing access to their land, harming their land, and exposing them to further marginalization of the communities. Thus, the peacebuilding efforts must follow a structure that provides for indigenous peoples to exercise their legal rights to participate in decision-making that affects their territories. When indigenous peoples are actively involved, it may have positive outcomes in terms of building sustainable peace as well for promoting environmental protection by profiting from indigenous traditional knowledge to preserve biodiverse areas. This idea is spurred by recent developments in international environmental law, which seeks to combine conservation efforts and indigenous peoples' traditional way of living. However, due to historical mistreatment of indigenous peoples in relation to conservation measures, this model needs to be updated and implemented under the management of the indigenous communities affected.[3]

The chapter is divided into four sections. This section introduces the topic and the outline. Section II describes the concerns relating to the environment of the indigenous peoples' territories in relation to armed conflict and peacebuilding. Thereafter, Section III presents the international law applicable to protect the environment of the indigenous territories. Section IV analyses the potential framework of *jus post bellum* rules in regard to protecting indigenous land and the environment. Section V elaborates on how international law, if respected, can, by empowering indigenous people, promote peace and environmental protection in post-conflict situations.

II. Effects of Armed Conflicts on Indigenous Peoples and Their Environment

This section provides a brief overview of how armed conflicts and their aftermath affect indigenous communities and the environment of their territories. Indigenous peoples tend to suffer disproportionality from armed conflicts globally, including Colombia, Democratic Republic of the Congo (DRC), India, Myanmar, and the Philippines. The adverse effects persist even after armed conflict, such in Bangladesh, Guatemala, and Peru. The armed conflicts have different impacts on indigenous peoples. For instance, indigenous peoples are killed, subject to sexual violence, forcibly recruited to join the armed groups, and so on. In some instances, the armed groups claim they fight for their cause and the indigenous peoples choose at times to join them voluntarily and thereby become parties to the armed conflict.[4] Furthermore, indigenous peoples tend to live in highly biodiverse and often isolated areas.

[3] Indigenous peoples have suffered negative consequences of the expanding protected areas worldwide. For instance, conservation measures have caused human rights violations such as expropriation of land, forced displacement, lack of access to livelihoods and denial of justice and reparation. See the Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples (2016) UN Doc. A/71/229 (2016).

[4] The panel discussion 'Indigenous Peoples' Rights and Unreported Struggles: Conflict and Peace' held 14–15 May 2016, Columbia University, New York, focused on these issues. See for instance, Presentation by UN Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz, 'The Conflict, peace and the human rights of Indigenous Peoples' (2016) <http://unsr.vtaulicorpuz.org/site/index.php/statements/134-conflict-peace-indigenous-rights> accessed 1 November. See also Albert Barume, 'Unaccounted For: Indigenous Peoples as Victims of Conflicts in Africa' (2017) available at <https://academiccommons.columbia.edu/doi/10.7916/D8SB5DBZ> accessed 1 November 2018.

Armed groups seek refuge in these isolated areas rich in natural resources, which often become militarized in relation to armed conflicts. The areas function as hiding and training places and provide opportunities to exploit valuable natural resources. Thus, the indigenous peoples are caught in the hostilities taking place on their land. Indigenous peoples have been forcibly recruited due to their hunting skills and knowledge of forest paths. They have been targeted by other warring parties because they are suspected of collaborating with rival armed groups. In Colombia, hostilities between Fuerzas Armadas Revolucionarias de Colombia (FARC), Ejército de Liberación Nacional (ELN), various paramilitary groups, and the army have taken place on indigenous territories, turning them into conflict zones. More than 192,000 indigenous peoples and almost 795,000 Afro-Colombian communities have been affected by the hostilities over the last years.[5] There have been reports on massacres and child recruitment among the indigenous peoples. Indigenous lands have been mined by FARC, which has curtailed the indigenous communities' ability to hunt and move freely.[6] According to the Colombian Constitutional Court, at least thirty-two indigenous groups are at risk of extinction due to events related to the armed conflict.[7] Furthermore, there have been instances of armed groups committing cannibalism against the indigenous peoples in the DRC. This is due to a belief that consuming the flesh of an indigenous person (a pygmy, also referred to as Forest People) will confer magical powers. There is also an accusation of violence with genocidal intent towards the indigenous peoples in the DRC. According to the Réseau des Associations Autochtones Pygmées du Congo, the indigenous peoples have witnessed that armed groups have conducted an operation in the Ituri province under the code-name 'Effacer le tableau' (wiping the slate clean). According to survivors, the aim of the operation, taking place from October 2002 to January 2003, was to clear the forest area from the estimated 90, 000 indigenous forest peoples living in eastern DRC.[8] In 2004, the Minority Rights Group International called for a full investigation by the International Criminal Court for crimes against humanity directed at the Mbuti population.[9] In the civil war in the 1970s and 1980s in Guatemala, similar accusation has been made as around 200,000 people, most of whom were indigenous, were killed.[10] Additionally in the DRC, in recent years an ongoing conflict has been taking place in the Katanga region between the dominant Luba community and the indigenous Batwa people. The conflict revolves around natural resources, land rights, and customary practices. The Luba community has asked for shares of the collected forest products of the Batwas, including for caterpillars, considered as a delicacy (the so-called 'caterpillar tax'). According to a report of 2016, over 200 Batwa people have been killed in the hostilities, several villages burned, and around 100,000 internally displaced. This conflict has received little attention from the Congolese government.[11]

[5] Efrain Jaramillo, 'Colombia' The International Work Group for Indigenous Affairs (IGWIA)—The Indigenous World (2017) 172.

[6] Ibid.

[7] Constitutional Court of Colombia, Auto 004/09, 26 January 2009.

[8] Anne Penketh, 'Extermination of the pygmies', *Independent*, available at <http://www.independent.co.uk/news/world/africa/extermination-of-the-pygmies-552332.html> accessed 1 November 2018.

[9] Minority Rights Group website, <http://minorityrights.org/our-work/> accessed 1 November 2018

[10] Luke Moffett, 'Guatemala's history of genocide hurts Mayan communities to this day', The Conversation, June 18 2018, available at <http://theconversation.com/guatemalas-history-of-genocide-hurts-mayan-communities-to-this-day-97796> accessed 1 November 2018.

[11] Albert Barume, 'Democratic Republic of the Congo' IGWIA: The Indigenous World (2017) 473–4.

Because of the richness in natural resources on indigenous territories, not only armed groups are interested in getting the control of the land, but also state and private actors. This threat persists even after an armed conflict has ended and remains an issue during the peacebuilding process. The vast natural resources within the biodiverse indigenous land attract private investors that engage in the exploitation of such resources, notably mining and logging. Areas that previously may have been inaccessible due to the hostilities become secure for initiating development and investment projects. As investments and development projects are welcome features in a peace process, the state may agree to conditions that set aside environmental protection laws and procedures for local participation in decision-making, if adequate legal institutions are in place at all. Also, indigenous land may be expropriated for conservation purposes. The absence of functioning institutions in a war-torn society facilitates taking over indigenous land and overlooking legal rights of indigenous peoples. Often, states' domestic law does not recognize indigenous groups' collective customary legal titles to land. Moreover, since post-conflict situations are not completely safe environments, corporations tend to use private armed actors or state sponsored paramilitary forces to protect their economic interests. Sometimes, indigenous peoples are recruited in their territories to protect the investments. Thus, the militarization of the indigenous land continues during peace processes. In addition,the indigenous peoples are often excluded from the peace process to a large extent. In the DRC, and in many other places as well, indigenous peoples constitute a vulnerable group, even prior to the outbreak of the hostilities, because of reported systemic discrimination, poverty, political, and social marginalization. The indigenous people are described as being 'the most marginalized of all the marginalized people' in the DRC.[12] The armed conflicts have aggravated the situation. One of the main issues of armed conflicts is that they have been a driving force behind taking over the control of the indigenous peoples' land, which has resulted in their displacement. As mentioned earlier, indigenous peoples have a special relationship with their land and losing access to it involves a loss of the ability to maintain the traditional lifestyle and culture, which seriously threatens their survival.[13] Also, approximately 10,000 indigenous Mbutis live in camps in eastern DRC after fleeing hostilities taking place on their land.[14] However, during the Colombian peace negotiations, representatives of indigenous peoples have been invited to express their view on 'Implementation, Verification and Ratification' in the General Agreement.[15] An Ethnic Commission was created as a national body to ensure the representation of indigenous peoples in the peace negotiations. However, despite the conflict's adverse effects on indigenous communities, the influence of indigenous peoples was not fully taken into account.[16] In the peace accord, an ethnic chapter was included

[12] 'DRC: Displacement and discrimination: the lot of the Bambuti Pygmies', 1 September 2010, African Great Lakes News Repository available at <https://newsrepository.wordpress.com/2010/09/01/drc-displacement-and-discrimination-%E2%80%93-the-lot-of-the-bambuti-pygmies/> accessed 1 November 2018.

[13] Saúl Franco, Clara Mercedes Suares, Claudia Beatriz Naranjo, Liliana Carolina Báez, and Patricia Rozo, 'The Effects of the Armed Conflict on the Life and Health in Colombia' (2006) 11 *Ciência & Saúde Coletiva*, 354.

[14] Celine Schmitt, 'Looking for solutions for North Kivu's vulnerable Pygmies', 21 May 2010, UN Refugee Agency (UNHCR) available at <http://www.unhcr.org/news/latest/2010/5/4bf6570e6/looking-solutions-north-kivus-vulnerable-pygmies.html> accessed 1 November 2018.

[15] The General Agreement focused, among other things, on land and the growing of illegal drugs; as those issues directly affected the lives of indigenous peoples, their free, prior and informed consent is required. See Joint Communiqué #78, Havana, Cuba, 27 June 2016, available at <https://www.mesadeconversaciones.com.co/comunicados/comunicado-conjunto-no-78-la-habana-cuba-27-de-junio-de-2016> accessed 1 November 2018.

[16] For instance, the indigenous representatives only got a chance at the last minute to review the peace accord.

only after, allegedly, indigenous peoples had threatened to set up road blockades and to vote against the accord in the referendum. Overall, post-conflict situations tend to open areas for development, posing threats to both the environment in terms of deforestation, pollution, water contamination, and so on, and for the indigenous communities.

III. International Law Protecting the Environment of Indigenous Territories

States are required to safeguard the continuation of the special relationship that indigenous peoples have with their ancestral lands to ensure their survival.[17] To this end, international law guarantees that indigenous peoples have certain rights to their territories. The two centrepieces of international law in place to protect indigenous peoples' rights are the 1989 Indigenous and Tribal Peoples Convention of the International Labour Organization (ILO Convention No. 169)[18] and the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[19] Also, adopted in 2016, the American Declaration on the Rights of Indigenous Peoples[20] is an important instrument reaffirming many of the obligations set out in the other two instruments. In addition, the International Covenant on Civil and Political Rights[21] (ICCPR) and Convention on the Rights of the Child[22] contain rights of indigenous peoples. Furthermore, the regional human rights systems under the African Charter on Human Peoples' Rights[23] (African Charter) and the American Convention on Human Rights[24] have also played a significant role in advancing respect for indigenous peoples' rights. The Inter-American Court on Human Rights has an extensive load of case law dealing with the indigenous peoples' rights.[25] The African Commission and the African Court have also adopted some landmark decisions affirming the rights of indigenous peoples.[26] The rights of indigenous peoples have also been acknowledged in international environmental law instruments, such as the Convention on Biological Diversity (CBD).[27]

[17] See for instance, Articles 13–16 Indigenous and Tribal Peoples Convention of International Labor Organization (ILO) Convention No. 169; Articles 25–9 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

[18] Indigenous and Tribal Peoples Convention of the International Labour Organization, General Conference, 76th Session, Geneva (27 June 1989), (entered into force September 5 1991) (ILO Convention No. 169)

[19] United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007 (UNDRIP).

[20] American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16) (15 June 2016).

[21] United Nations General Assembly, Res. 2200A (XXI) (16 December 1966), 999 UNTS 171 (entered into force 23 March 1976)

[22] Convention on the Rights of the Child, United Nations General Assembly, Res. 44/25, (20 November 1989) 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990)

[23] African Charter on Human and Peoples' Rights 21 ILM 58 (entered into force 21 October 1986) (African Charter).

[24] American Convention on Human Rights, Organization of American States (entered into force 18 July 1978).

[25] The Inter-American Court of Human Rights has established safeguards requiring states to obtain the 'free, prior, and informed consent [of indigenous peoples], according to their customs and traditions'. See *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 172, 28 November 2007, para. 134.

[26] See for instantace, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment (26 May 2017); Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya 276/03, African Commission, 25 November 2009

[27] Convention on Biological Diversity 1760 UNTS 79; 31 ILM 818 (entered into force 29 December 1993) (CBD).

Moreover, the UN has three mechanisms in place to endorse the rights of indigenous peoples, namely, the UN Permanent Forum on Indigenous Issues,[28] the Expert Mechanism on Rights of Indigenous Peoples,[29] and the Special Rapporteur on Rights of Indigenous peoples.[30] Many other initiatives have been adopted related to promoting indigenous rights, such as the UN Development Group's Guidelines on Indigenous Peoples' Issues.[31]

This section focuses on the obligations regarding participation and consultation of indigenous peoples in matters concerning their land. The following part of the section studies the definition of 'indigenous peoples'. Thereafter, it examines the instruments specially protecting indigenous peoples' rights to their land within the human rights law. Lastly, this section studies the relevant instruments of international environmental law dealing with indigenous rights in relation to environmental protection.

A. Defining Indigenous Peoples

International law lacks a universal definition of 'indigenous peoples'. During the debate at the UN Working Group on Indigenous Populations on the issue of defining indigenous peoples in relation to the adoption of the UNDRIP, the observers from the indigenous organizations, as well as several states, rejected the idea of a universal definition of the term 'indigenous peoples'. This was because of the risk to constrain the term. Many of the indigenous organizations expressed that a definition is not necessary or desirable. Instead, these organizations underscored the importance of the element of self-identification as indigenous.[32] Nevertheless, various definitions have been provided in several documents that can serve as a starting point to attempt to describe who may be considered as indigenous. For instance, a working definition was given in 1986 by the Special Rapporteur José R. Martínez Cobo of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in his Study on the Problem of Discrimination against Indigenous Populations.[33] It reads:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.[34]

[28] United Nations Permanent Forum on Indigenous Issues, UN Department of Economic and Social affairs available at <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html> accessed 1 November 2018

[29] Expert Mechanism on Rights of Indigenous Peoples, UN Human Rights Office of the High Commissioner available at <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx> accessed 1 November 2018.

[30] Special Rapporteur on the rights of indigenous peoples, UN Human Rights Office of the High Commissioner available at <https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx> accessed 1 November 2018.

[31] UN Development Group Guidelines on Indigenous Peoples' Issues, February 2008, available at <https://www.ohchr.org/Documents/Issues/IPeoples/UNDGGuidelines.pdf> accessed 1 November 2018.

[32] Alan Barnard and Albert Kwokwo Barume, 'Heading Towards Extinction? Indigenous Rights in Africa: The Case of the Twa of the Kahuzi Biega National Park' (2002) 72 *Africa*, 32

[33] José Martínez Cobo, 'Study of the problem of discrimination against indigenous populations', Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986 and Add.1–4.

[34] Ibid.

Cobo's definition has been criticized for not putting enough emphasis on self-identification and for disregarding the contemporary situation for many indigenous peoples.[35] For instance, in regard to the African continent, most of the colonizers have left after the African states gained independence. According to Cobo's definition, almost everyone in Africa would be considered as indigenous since the majority of the population are not decedents of the colonizers. The definition also ignores the internal colonization that took place in several African states, which continues to be a problem affecting indigenous peoples on the African continent.[36]

Article 1 of the ILO Convention No. 169 defining its scope of the application states:

> This Convention applies to:
>
> 1. (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
>
> 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
> 3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The ILO Convention No. 169 distinguishes between 'tribal' and 'indigenous' peoples. This can be explained by the existence of tribal peoples that live in states where they are not indigenous in a literal sense but still are covered by the convention.[37] For instance, the Afro-descended tribal peoples in Colombia have not lived longer there than other populations, such as the decedents of the Spaniards. Still, the Afro-Colombians consider themselves as 'indigenous' and are entitled indigenous rights.[38] According to a fact sheet published at the UN Indigenous Peoples Forum, a contemporary understanding of 'indigenous' is based on the following criteria: self-identification as indigenous peoples at the individual level and accepted by the community as its member; historical continuity with pre-colonial and/or pre-settler societies; strong link to territories and surrounding natural resources; distinct social, economic, or political systems; distinct language, culture, and beliefs; form non-dominant groups of society; resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.[39] Although, there is no

[35] Barnard and Barume (n 32) 34.
[36] Ibid.
[37] UN Permanent Forum on Indigenous Issues, Report of the Workshop on Data Collection and Disaggregation for Indigenous Peoples (10 February 2004) UN Doc. E/C.19/2004/2.
[38] Ibid.
[39] UN Permanent Forum on Indigenous Issues (n 2).

authoritative and exhaustive definition, the various definitions seem to share a common core that indigenous persons need to identify themselves as indigenous and be accepted by the group that is somewhat separated from other populations by culture, social institutions, ethnicity, and so on.[40] The group should also be a non-dominant group of the society. The reasons to avoid adopting a clear-cut definition set out by international law builds on the respect for the self-identification of the group as well as the individuals belonging to that group. At the same time, the lack of a definition creates a certain level of insecurity for some groups, particularly since indigenous groups are entitled special legal rights distinct from other minority rights.

The issue of defining and recognizing indigenous peoples has caused extensive debate particularly in the African context, which to some extent has aggravated the situation of many indigenous peoples by denying them specific rights.[41] The term 'indigenous peoples' has been used mainly in Africa for groups of hunter-gatherers, such as the Forest Peoples in Central Africa. However, pastoralists are also often considered to be indigenous.[42] Both pastoralists and hunter-gatherers are characterized by not having a permanent occupation of land, which has made their traditional lands and territories appear vacant for outsiders, resulting in land disputes and injustices. However, since the adoption of UNDRIP, many African states have improved the situation for indigenous peoples.[43] The African Commission on Human and Peoples' rights (African Commission) has played a key role here.[44] In 2010, the African Commission stated that Kenya had violated the indigenous rights of the Endorois peoples, which are pastoralist communities of Kenya, making direct references to the UNDRIP and thereby confirming the applicability of the concept of indigenous peoples to pastoralist communities in an African context.[45] Although important progress appears to have been made to improve the situation for indigenous peoples, there are still African states that struggle with the term 'indigenous'.[46] Lacking recognition of

[40] The factor of self-identification as indigenous or tribal appears to be the main criterion, which is shared both by the Inter-American Court and the African Commission. The African Commission has defined the term to not imply that indigenous peoples have to be the first inhabitants of a given land, country, or region. Instead, the African Commission focuses on the requirement that a group identifying themselves as indigenous and 'who experiences particular forms of systematic discrimination, subordination and marginalising because of their particular cultures and ways of life and mode of production can analyse and call attention to their situation'. See Advisory Opinion of the African Commission on Human and Peoples' Rights (n 1).

[41] Historically, indigenous rights have been weak in Africa and in several African states, indigenous peoples are not recognised as such. However, there have been major improvements in the past years regarding indigenous rights in Africa, in particular in the aftermath of the adoption of the UNDRIP. See Albert Barume, 'UNDRIP Impact on Africa: 10 Years On' (2017) *IGWIA—The Indigenous World* 33–42.

[42] The Food and Agriculture Organization of the UN describes pastoralists as 'a collective of livestock keepers' that are 'distributed all over the world whose unique livelihoods face challenges that are often linked to the environment in which they live and to the mobility that characterizes them'. Food and Agriculture Organization available at <http://www.fao.org/pastoralist-knowledge-hub/background/en/> accessed 1 November 2018

[43] The African states have not participated in the early stage of the work related to indigenous peoples' rights and still many of the African states do not recognise indigenous peoples. Nevertheless, several African states have become more influential over the years, in particular towards the end of the process of adopting UNDRIP. See Barume, 'UNDRIP Impact on Africa' (n 41) 33.

[44] In 2005, a Working Group on indigenous peoples set up by the Commission published a report that for the first time discussed the term 'indigenous' from an African context. The report underscores the importance of self-identification for identifying indigenous peoples in Africa. In 2007, the African Commission has issued an Advisory Opinion on UNDRIP. See Advisory Opinion of the African Commission on Human and Peoples' Rights (n 1).

[45] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya 276/03, African Commission, 25 November 2009.

[46] In fact, the majority of the African states have not adopted any policies promoting cultural identities and in general group rights seem to have a very weak position despite the fact that the African Charter includes a whole

indigenous peoples in Africa also involves that there is a lack of data on their situation, which hinders progress for adopting appropriate legislative and policy responses.[47] This also has aggravating effects in relation to armed conflicts for indigenous peoples in Africa.

B. Human Rights Law Instruments

The ILO Convention No. 169 contains fundamental rights for indigenous peoples concerning health, education, land, employment, culture, and so on. The convention only has twenty-two state parties.[48] Even though there is a small number of ratifications, many of the provisions are recognised as having customary international law status. The UNDRIP, adopted by the UN General Assembly, is not legally binding. However, it was adopted by a large number of voting states with few objections and abstentions. Much of the content of the declaration has evolved to become customary international law. For instance, the respected International Law Association (ILA) has expressed that UNDRIP 'includes several key provisions which correspond to existing State obligations under customary international law'.[49] The UNDRIP manifests many of the rights expressed in the ILO Convention No. 169, but it also develops some of the rights. For instance, it pushes for that indigenous peoples shall maintain their own institutions and customs; calls for equitability in their relation with the state; and prohibits any forced assimilation or destruction of indigenous culture.

The focus on the participatory rights is cross-cutting and significant for the framework on indigenous peoples applied to a wide range of issues, including environment, education, health, and employment. It is a generally accepted principle in international law that there is a duty to consult indigenous peoples if a decision made by public authorities could affect them.[50] The duty to consult is expressed in Articles 6 and 7 of ILO Convention No. 169. Article 6(2) in the convention states that consultations should be carried out in good faith and in a form appropriate to the circumstances 'with the objective to achieve agreement or

section of peoples. The definitions of indigenous peoples discussed above based on prior occupancy of areas that were taken over by European colonists do not take into account the history of African population, which were subject to migrations and influxes of fellow African peoples prior the Europeans' arrival and still suffers from internal colonisation. This is not the case in Colombia where for instance the Afro-communities enjoy the indigenous rights. See Barume, 'UNDRIP Impact on Africa' (n 41) 33.

[47] Birgitte Feiring, 'Indigenous peoples' rights to lands, territories, and resources', International Land Coalition, available at <http://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf> accessed 1 November 2018.

[48] See ILO website, available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO> accessed 1 November.

[49] Resolution No. 5/2012 on rights of Indigenous Peoples. Adopted at the 75th Conference of the International Law Association held in Sofia, Bulgaria, 26–30 August 2012. The same resolution also expresses that 'states must comply— pursuant to customary and applicable conventional international law—with the obligation to recognise, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past'.

[50] Ibid. See also James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 *Arizona Journal of International & Comparative Law* 7; César Rodríguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 *Indiana Journal of Global Legal Studies* 263.

consent to the proposed measures'. The obligation does not require consent, only the objective of the consultations to strive to obtain it. According to the ILO Convention No. 169 Handbook: 'the adequate implementation of the right to consultation implies a qualitative process of good faith negotiations and dialogue, through which agreement and consent can be achieved if possible'.[51] For instance, a pure information meeting, where indigenous peoples could be heard but not having any chance to influence the decision-making would not meet the requirement. Thus, the obligation to consult implies a consultation process, which includes a certain level of participation and possibilities to influence the decision-making. However, the right to be consulted does not imply a right to veto or that the result of consultations necessarily reaches an agreement or a consent.[52]

The ILO Convention No. 169 and the UNDRIP use different modes of involvements of the indigenous peoples in decision-making, including—apart from consultation and participation—free, prior, and informed consent. According to Article 19 in the UNDRIP, 'states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'. International law has progressively advanced towards recognizing the indigenous peoples' right to free, prior, and informed consent in certain areas. As expressed by Ricardo Pereira and Orla Gough '[s]ince indigenous peoples' underlying interests are significantly different in each circumstance, it is expected that the nature and extent of consultations required would also differ'.[53] Thus, regarding certain issues—such as the use of traditional knowledge, relocation, and certain development-related activities that have an impact on indigenous peoples' lands—UNDRIP requires not only respect for the right to consultation, but provides that indigenous peoples have the right to give or withhold their consent. This standard has evolved possibly to reflect international customary law.[54]

One of the most contentious issues in regard to indigenous peoples' rights relates to land and natural resources. Modern international law requires states to protect the environment as well as the productive capacity of the indigenous land and resources, to recognise the indigenous peoples' possession of the land, and establish mechanisms to solve land claims.[55] However, César Rodríguez-Garavito describes the debate on the issue as a 'minefield'.[56] The problem has its origins in the fact that indigenous peoples have historically not held land titles in a manner recognised within European legal systems. Therefore, colonizers (from Europe) have relocated indigenous peoples from their land to reserves on marginal land

[51] Handbook: For ILO Tripartite Constituents. Understanding the C.169, 16.

[52] Ibid. 13. See also the Committee of Experts on the Application of Conventions and Recommendation (CEACR) General Observation, 2010, published 2011.

[53] Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2014) 14 *Melbourne Journal of International Law* 451, 478.

[54] For instance, the Committee on the Elimination of Racial Discrimination addressed the duty to consult and accommodate in its General Recommendation 23. The Committee called on states to 'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources in fulfilment of the non-discrimination norm. CERD further exhorted states to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.

[55] Indigenous & Tribal Peoples' Rights in Practice, A guide to ILO Convention No. 169, 94–6.

[56] César Rodríguez-Garavito uses the term minefield to describe the debate on the duty to consult indigenous peoples' rights in lands and resources. Rodríguez-Garavito (n 50) 263–305.

without recognizing their rights even to the allocated land. This practice has persisted until today.[57] The customary collective right to land is often not recognised by many states' domestic law which leaves indigenous land still to be regarded as vacant.[58] Article 14(1) ILO Convention No. 169 recognizes to some extent collective rights for ownership and possession of lands traditionally occupied by indigenous peoples. States also have an obligation to identify the land belonging to indigenous peoples in accordance with Article 14(2) in the convention. The ILO Convention No. 169 and the UNDRIP also include a right to redress by means that include restitution, or if restitution is not feasible, just, fair, and equitable compensation for confiscated, taken, occupied, used, or damaged land and resources without the free, prior and informed consent.[59] In the case of *Plan de Sanchez Massacre v. Guatemala*, the Inter-American Court of Human Rights acknowledged an indigenous community as the recipient of collective reparations. The Court established that apart from compensation, the state should undertake several measures in order to accomplish restitution, rehabilitation and satisfaction through acknowledgement.[60]

As mentioned above, the ILO Convention No. 169 as well as UNDRIP incorporate the right to participation and consultation in regard to matters affecting indigenous peoples' land and natural resources. The right has achieved customary international law status.[61] The individual and peoples' rights to natural resources are also recognized in other human rights treaties, for instance in ICCPR,[62] International Covenant on Economic, Social and Cultural Rights (ICESCR),[63] as well as in regional human rights treaties such as the African Charter and the American Convention on Human Rights. According to the ILO Convention No. 169, there is no requirement of obtaining the consent of indigenous peoples in most cases when consultations are compulsory, unless an exception applies. One of the exceptions regards the indigenous peoples' right to not be forcibly removed from their lands and not to be relocated without their free, prior, and informed consent.[64] Relocation can only be employed as an extraordinary measure. The ILO Convention No. 169 and UNDRIP provide for indigenous peoples' option to return in case of forced displacement.[65] Despite the

[57] Pereira and Gough (n 53) 452.

[58] Jermie Gilbert, 'Land Grabbing, Investments & Indigenous Peoples' Rights to Land and Natural Resources, IGIWA report 26 (2017) 40.

[59] Article 28 UNDRIP states that: 'indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'.

[60] *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Case No. C-250, 4 September 2012, para. 177, n. 266. C.f. Case of the *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations, Costs), Case No. C-125, 17 June 2005, para. 135, and Case of *Chitay Nech et al. v. Guatemala*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Case No. C-212, 25 May 2010, paras 147, 160.

[61] Anaya (n 50).

[62] Article 47 of the ICCPR states that '[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.

[63] Article 1(2) of ICESCR states that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'.

[64] Article 10 UNDRIP states that indigenous peoples 'shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return'.

[65] ILO No. 169 Article 16(3), and Article 10 UNDRIP.

controversial nature of the land rights related to indigenous land, these rights arguably have attained customary law status, such as the duty to obtain consent when involving relocation or removal of indigenous peoples from their lands.[66] In particular, as their land is strongly linked to the survival of indigenous culture, this is a contemporary international concern over indigenous peoples.[67]

The ILO Convention No. 169 does not explicitly provide for indigenous peoples' rights to minerals or other sub-surface resources on their lands and the state often maintains the ownership of those resources. Nevertheless, Article 32(2) UNDRIP applies in relation to the approval of projects affecting the indigenous peoples' lands or territories. It reads:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

It is highly contested by states as well as actors within extractive industries that this right of indigenous peoples means that consent is required in regard to the exploitation of extractable resources located on their lands. As discussed above, the right probably only implies that the consultation should have the aim to obtain such consent, and probably not that indigenous peoples could veto a decision.[68] However, James Anaya claims that the lack of consent strongly presumes that the project should not proceed, as he argues that the law requires consent by indigenous peoples in case their property rights are affected by the extraction of natural resources.[69] Moreover, the UNDRIP states that the indigenous peoples have a 'right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.[70] This right would also apply in case prospecting for mineral extraction is planned on indigenous land. Some indigenous communities argue that, in addition to consultation and participation, they also have the right to control and manage natural resources located on their land.[71] As put by Perira and Orla, '[y]et, given that under general international law the unilateral expropriation of surface rights is generally prohibited, the same argument logically appears to apply in the case of a state's concession for the extraction of subsoil resources in indigenous lands'.[72] There have been attempts by states to adopt international standards relating to access and benefit-sharing arising from commercial exploration and exploitation of natural resources. These have been adopted almost exclusively as non-binding guidelines. In addition, the existing attempts to regulate access and benefit-sharing largely preserve the principle of state sovereignty over natural resources.[73]

[66] Anaya (n 50) 8–9. For example, the Inter-American Commission on Human Rights argued in Mayagna (Sumo) Awas Tingni Community v Nicaragua ('Awas Tingni') that 'there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands'.
[67] Ibid.
[68] Ibid. 7.
[69] Ibid.
[70] See Article 32(1) UNDRIP.
[71] Pereira and Gough (n 53) 473.
[72] Ibid.
[73] Ibid. 480–4.

C. International Environmental Law Instruments

Given the importance of the land of indigenous peoples for their survival, indigenous communities are vulnerable to environmental degradation. Therefore, indigenous communities have actively promoted for protection of their ancestral land.[74] Respect for indigenous peoples' rights is most likely to be beneficial for the protection of the environment. Yet, the history of installing protected areas on indigenous land has a record of social exclusion and marginalization, and even involving forced relocation of indigenous peoples. Protected areas were often initially established though the expropriation of land of indigenous peoples that inhabited areas well preserved and highly biodiverse. In such protected areas, all humans, including indigenous peoples, and human activities were expelled seen as incompatible with the conservation objective.[75] For instance, under the pretext of conserving nature, in the late 1960s, up to 6,000 indigenous Batwas (Forest People) in eastern DRC were expelled from their ancestral land located in the Kahuzi-Biega National Park, a World Heritage site since 1980.[76] The Batwa people have sought justice through the domestic courts but without success.[77] However, since 1975, the environmental organization International Union for Conservation of Nature (IUCN) and World Parks Congress (WPC) have made announcements advocating respect for indigenous rights and the need to accommodate them in relation to protected areas. The 1975 Kinshasa Resolution adopted by these organizations recognised the importance of indigenous traditional lifestyle in conservation, and encouraged governments to provide for indigenous peoples to turn their lands into protected areas without surrendering their ownership, use, and tenure rights. In addition, the Kinshasa Resolution acknowledged that indigenous peoples should not be displaced from their traditional lands constituting protected areas, nor should protected areas be established without adequate consultation with the peoples affected.[78] One of the challenges is to enable indigenous peoples to return and ensure their control of the territories.[79] This challenge is particularly serious if the indigenous peoples have been displaced for a long period of time, which may at times lead to the loss of their traditional lifestyle that is dependent on their land. Since the 1975 Kinshasa Resolution, several resolutions have been adopted on indigenous peoples and protected areas.[80] In 2003, the IUCN and the

[74] William Andrew Shutkin, 'International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment' (1991) 31 *Virginia Journal of International Law* 49.

[75] Rights of indigenous peoples, Note by the Secretary General, 29 July 2016, UN Doc. A/71/229, paras 33–6.

[76] Barnard and Barume (n 32)16.

[77] In 2008, the affected people lost a court case and in 2013, the decision was appealed to the Congolese Supreme Court but it has not yet been heard. The case has been lodged before the African Commission. The procedural arguments have been heard but the admissibility of the case is not yet decided. See Barume, 'Democratic Republic of the Congo' (n 11) 476.

[78] IUCN Resolution 005 on Protection of traditional ways of life, Adopted by IUCN General Assembly Kinshasa, 1975.

[79] Marcus Colchester, 'Conservation Policy and Indigenous Peoples' (2004) *Cultural Survival Quarterly* (March).

[80] See the following IUCN resolutions: Res. 3.055 'Indigenous peoples, protected areas and the CBD Programme of Work' (Bangkok, 2004); Res.4.127 Indigenous peoples' rights in the management of protected areas fully or partially in the territories of indigenous peoples (Barcelona, 2008); Res. 4.049 Supporting Indigenous Conservation Territories and other Indigenous Peoples' and Community Conserved Areas (Barcelona, 2008); Res. 4.053 Mobile indigenous peoples and biodiversity conservation (Barcelona, 2008); Res. 094 Respecting, recognizing and supporting Indigenous Peoples' and Community Conserved Territories and Areas (Jeju, 2012); Res. 030 Recognising and respecting the territories and areas conserved by indigenous peoples and local communities (ICCAs) overlapped by protected areas (Hawaii, 2016).

WPC announced a 'new paradigm' for protected areas to respect the rights of indigenous peoples and local communities.[81] However, these statements have in many cases not been obeyed. For instance, the indigenous Endorois peoples were denied access to their traditional land when the Kenyan government established a game reserve in 1973. In 2009, the African Commission found that Kenya had violated the rights of the Endorois peoples.[82] Nevertheless, indigenous land continuously is expropriated by governments for the sake of conservation and, as a consequence, indigenous peoples have been pushed off their lands.[83]

At the 1992 Summit in Rio, the link between indigenous peoples and environmental conservation policies was acknowledged within international environmental law for the first time. The UN Environment (previously UN Environmental Programme [UNEP]) has recognized indigenous peoples as a 'major group'[84] under the Rio Conventions, which consists of the CBD, UN Framework Convention on Climate Change (UNFCCC), and UN Convention to Combat Desertification (UNCCD). A major group has a function to assist and support the UN Environment's mission. For instance, a major group can participate in the Major Groups Facilitating Committee (MGFC) composed of major groups' representatives and representatives from the six UN Environment regions. All major groups and stakeholders' organizations accredited to the United Nations Environment Assembly (UNEA) of UN Environment have a right to vote.[85]

Article 8(j) in the CBD specifically deals with the rights of indigenous peoples (and local communities). It regards 'in situ-conservation' and provides that state parties shall 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities … relevant for the conservation and sustainable use of biological diversity'.[86] The conservation of certain protected areas is usually employed as a tool to protect biodiversity. The inclusion of Article 8(j) in the CBD shows a shift in attitude towards indigenous peoples and protected areas, which is important considering that indigenous territories often coincide with areas of high biological diversity that have resulted in historical injustices made in the name of conservation. The Article stresses a connection between indigenous peoples and biodiversity as well as acknowledging their traditional knowledge of living in harmony with nature. In 2004, the Conference of the Parties to the convention adopted a programme of work of protected areas with references to indigenous peoples' rights. When establishing, managing, and monitoring protected areas, it is stated in the programme that indigenous peoples' rights should be respected and invited to participate in accordance

[81] The Durban Accord, 2003 <https://cmsdata.iucn.org/downloads/durbanaccorden.pdf> accessed 1 November 2018.

[82] *African Commission on Human and People's Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Groups International on behalf of Endorois Welfare Council v. Kenya*, communication No. 276/2003, 25 November 2009. See also Rights of indigenous peoples (n 75).

[83] A report from 2015 by the NGO Rights and Resources Initiative examined twenty-one countries where indigenous peoples had been adversly affected in protected areas. It reported that legal reforms had been made since the IUCN new paradgim statement. However, only eight states had reformed their legislation related to communities.

[84] There are nine major groups in total. These consist of farmers, women, the scientific and technological community, children and youth, indigenous peoples and their communities, workers and trade unions, business and industry, non-governmental organizations, and local authorities.

[85] UN Environment website, <https://www.unenvironment.org/civil-society-engagement/major-groups-facilitating-committee-and-regional-representatives> accessed 1 November 2018.

[86] See also 2010 Declaration on Bio-cultural Diversity, adopted at Montreal, 8–10 June 2010 <http://www.unesco.org/mab/doc/iyb/Declaration.pdf> accessed 1 November 2018. It acknowledges the challenges and opportunities of a prospective International Regime on Access and Benefit Sharing for indigenous and local communities who hold critical knowledge, customs, and practices associated with biodiversity.

with international obligations.[87] In 2014, the Conference of the Parties to CBD adopted a decision which highlighted the requirement that protected areas and management regimes that concern indigenous peoples must ensure full participation and consent in accordance with indigenous peoples' rights. The decision also recognised the contribution of indigenous peoples' own conservation initiatives within their territories.[88] Moreover, other environmental instruments acknowledging indigenous peoples and their environment are the Nagoya Protocol to the CBD and International Treaty for Plant Genetic Resources for Food and Agriculture. Article 5(5) of the Nagoya Protocol to the CBD provides that:

> Each party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge.

Article 5(2) of the Nagoya Protocol requires that the benefit-sharing regime be 'in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources'. The International Treaty for Plant Genetic Resources for Food and Agriculture recognizes the contribution of indigenous communities to the preservation and development of plant genetic resources, which is the basis of food and agriculture production. The treaty requires taking measures to protect traditional knowledge relevant to plant genetic resources for food and agriculture.

However, older environmental treaties lack references to indigenous peoples' rights, such as the 1972 UNESCO World Heritage Convention. Many indigenous territories are situated within natural World Heritage sites and the establishment of the sites often has been made without the consent of the indigenous peoples and resulted in the expulsion of indigenous communities and restricted access to their lands. In addition, the inscription on the list of World Heritage sites often leads to increased tourism, which could have further negative impacts on the indigenous peoples.[89] For decades, indigenous peoples have been involved in the work of the World Heritage Convention.[90] Yet, the Operational Guidelines for Implementation of World Heritage Convention, which determines the procedure for the inscription of sites on the World Heritage list, do not require participation by indigenous peoples.[91] Several other World Heritage sites have been listed in recent years without the consent of the indigenous peoples concerned.[92] In 2011, Kenya designated Lake Bogoira National Reserve as a World Heritage site without the consent of the indigenous Endorois community, despite the ruling of the African Commission establishing that Kenya had violated the indigenous rights of the Endorois.[93] As a response to the injustices related

[87] UNEP (13 April 2004) Doc. Decision UNEP/CBD/COP/DEC/VII/28.

[88] UNEP (13 October 2014) Doc. Decision UNEP/CBD/ COP/DEC/XII/12.

[89] Rights of indigenous peoples (n 75) para. 60.

[90] Indigenous Peoples' Involvement in World Heritage Sites, The International Indigenous Peoples' Forum on World Heritage website <https://iipfwh.org/indigenous-involvement-in-world-heritage/> accessed 1 November 2018.

[91] See Operational Guidelines for the Implementation of the World Heritage Convention, World Heritage Centre (July 2012), WHC 12/01. <https://whc.unesco.org/archive/opguide12-en.pdf> accessed 1 November 2018.

[92] Examples includes Quebrada de Humahuaca in 2003 in Argentina occupied by indigenous peoples, and the Kaeng Krachen National Park in Thailand in 2013 without consulting the local Karen peoples. See Rights of indigenous peoples (n 75).

[93] Despite the ruling of the African Commission in 2009. See 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya (25 November 2009).

to the implementation of the World Heritage Convention, representatives of indigenous peoples created in 2017 the International Indigenous Peoples' Forum on World Heritage to strengthen the participation of indigenous peoples. The World Heritage Committee—the executive treaty body of the convention—has taken note on the establishment of the forum to involve indigenous peoples in the identification, conservation, and management of World Heritage sites. Similar to the CBD and the UNFCCC,[94] the forum is a standing international body representing the voices of indigenous peoples in regard to the application of the World Heritage Convention.[95] Furthermore, in 2018, UNESCO adopted a policy on engaging with indigenous peoples. According to this policy, 'UNESCO does not support the removal of indigenous peoples from their lands and territories in any conservation or sustainable development project or programme in which UNESCO is involved, including the World Network of Biosphere Reserves of the Man and the Biosphere programme and UNESCO Global Geoparks'.[96]

There are several initiatives and programmes under consideration or already adopted relevant for respecting indigenous peoples' traditional lifestyle in relation to environmental protection, such as initiatives establishing revenue distribution agreements or specific funding connected to projects for safeguarding indigenous peoples' land and natural resources. As these initiatives and programmes are often led by international actors that may be influential in peacebuilding work, they may have positive outcomes for indigenous peoples also in the aftermath of armed conflicts. For instance, the UN-led Reducing emissions from deforestation and forest degradation (REDD) programme and the Reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+) under the UNFCCC focus on the role of indigenous peoples (and other local communities) in relation to natural resources and their historical responsibilities and usage rights, even if they are not accepted under national laws.[97] The World Bank is expected to play a significant role in financing REDD projects.[98] Despite the fact that the programme is designed to ensure that local communities are not adversely affected by the large-scale carbon market reforms, so far the programme has done very little to secure rights for local forest communities despite warnings from civil society groups.[99] One major deficiency of the World Bank guidelines is the lack of clarification regarding the economic benefits arising from REDD projects and how these ought to be shared by local and indigenous communities.[100] Other initiatives involve the CBD, under which the state parties have adopted the Akwé Kon Guidelines for the conduct of cultural, environmental, and social

[94] See International Indigenous Peoples' Forum on Climate Change, which serves as a mechanism for developing the united positions/statements of indigenous peoples and continuing effective lobbying and advocacy work in relation to the UNFCCC meetings/sessions.

[95] Indigenous Peoples' Involvement in World Heritage Sites, The International Indigenous Peoples' Forum on World Heritage website <https://iipfwh.org/indigenous-involvement-in-world-heritage/> accessed 1 November 2018.

[96] UNESCO policy on engaging with indigenous peoples (2018), UNESCO, available at <http://unesdoc.unesco.org/images/0026/002627/262748e.pdf> accessed 1 November 2018.

[97] Hindou Oumarou Ibrahim et al., 'The United Nations Framework Convention on Climate Change (UNFCCC)' (2018) *IWGIA—The Indigenous World* 597.

[98] Environmental and Social Policies, World Bank website <http://www.worldbank.org/en/projects-operations/environmental-and-social-policies#safeguards> accessed 1 November 2018

[99] Gilbert (n 58) 13.

[100] Ibid. 20.

impact assessments regarding developments proposed to take place on, or likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities; and the Tkarihwaiéri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity.[101]

To conclude, new approaches opting for human rights-based conservation is emerging under international environmental law, which is emphasizing the involvement of indigenous peoples. Yet, these new approaches are yet to be implemented.[102] Establishment of protected areas and other conservation efforts continue to be associated with expropriation of indigenous land and violation of indigenous peoples' rights. Only a few states have supported indigenous co-management or their own management of protected areas when located in indigenous territory. This is surprising since there are several examples of how territories managed by indigenous peoples often are better preserved than state-managed protected areas.[103] The African Commission stated in the case against Kenya in relation to the established game reserve on indigenous land, that the 'the Endorois—as the ancestral guardians of that land—are best equipped to maintain its delicate ecosystems' when comparing it to the Kenyan management authority.[104] The Inter-American Court in the case of *Kaliña and Lokono Peoples v. Surinam* found that three natural reserves had been established on indigenous territories and denied the indigenous Kaliña and Lokono peoples access to their land. The Court stated that the rights of indigenous peoples and international environmental laws should be seen as complementary rather than exclusive rights.[105] In this case, Special Rapporteur Victoria Tauli Corpuz on Issues of Indigenous Peoples was invited to act as an expert witness. She highlighted indigenous rights to participation in conservation management and their right to restitution for land incorporated into protected areas without their consent.[106] These cases highlight that if states would be able to implement the human rights-based practices encouraged in the field of international environmental law in relation to conservation work, also the position of indigenous peoples would be strengthened.

IV. Building a *Jus Post Bellum* Framework for Protecting Indigenous Environment

This section maps out the indigenous rights relevant for building peace in a post-conflict situation. A post-conflict situation can be described as the continuance of violence even if a general closure of the military operations has been accomplished or a peace accord signed. It is during this period of time when the *jus post bellum* framework would apply. The notion of *jus post bellum* can be understood as an attempt to bring together rules and standards for

[101] See CBD website <https://www.cbd.int/traditional/code.shtml> accessed 1 November 2018.
[102] Rights of indigenous peoples (n 75) paras 37–8.
[103] Ibid.
[104] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya 276/03, 25 November 2009, para. 235.
[105] *Case of the Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Inter-Am. Ct HR No. 309 (25 November 2015) para. 173.
[106] Rights of indigenous peoples (n 75) para. 64.

building a fair and just peace in the interest of peoples and individuals affected by armed conflicts.[107] Thus, it seeks to gather international law regulating aspects of accountability, compensation, rehabilitation, participation, equity, and development, which are underlying aspects of peacebuilding and achieving justice.[108] This chapter focuses mainly on the aspects concerning participation, equity and to some extent rehabilitation (of the environment). The framework of *jus post bellum* is also significant for international actors taking part in restoring the peace in war-torn societies. International actors, such as financial institutions, international organizations (including UN agencies), non-governmental organizations (NGOs), and donors have a significant influence of the social engineering of peacebuilding in war-torn societies. Internationally supported interventions have the ability to affect considerably the situation for the local population, including indigenous people. If they respect the obligations in place requiring participation in decision-making and inclusion of indigenous peoples, they could play a role together with the local communities to contribute to achieving a fair and just peace, even in the cases where the state concerned has a poor record of respecting human rights law and other international obligations.

Turning to the international law applicable to indigenous peoples' rights to the environment in post-conflict situations, at its 68th session in 2016, the UN International Law Commission (ILC) provisionally adopted a draft principle specifically focusing on indigenous environment in relation to armed conflict. The draft principle reads:

> Draft principle 6
>
> 1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.
> 2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.[109]

The purpose of this provision is twofold. First, it aims to ensure the protection of indigenous land also in times of armed conflict. Second, it seeks to facilitate the taking of remedial measures in the event that an armed conflict has adversely affected the environment of the indigenous territories. The draft principle requires consultation and cooperation with the indigenous peoples concerned through their own leadership and representative structures to restore the environment. In doing so, it ensures the participatory rights of indigenous peoples in issues relating to their territories in a post-conflict context. The draft principle is particularly important for two reasons: first, the ILC recognizes the special relationship between indigenous peoples and their environment and that it should be protected in relation to armed conflict.[110] The authoritative voice of the commission is an important step

[107] Carsten Stahn; ' "Jus ad bellum", "jus in bello" … "jus post bellum": Rethinking the Conception of the Law of Armed Force' (2006) 17 *European Journal of International Law* 921.

[108] Ibid. 937.

[109] ILC, Protection of the environment in relation to armed conflicts, Text of the draft principles provisionally adopted by the Drafting Committee (3 August 2016) UN Doc. A/CN.4/L.876.

[110] ILC, Report on the work of the seventieth session (2018) Commission, Chapter IX Protection of the Environment in relation to Armed Conflicts, 253–4.

to manifest the position of indigenous rights in international law. However, the draft principle is a result of the commission's work, which entails, apart from codifying, also progressively developing international law.[111] Hence, it cannot be regarded to fully reflect customary international law. Second, the ILC highlights the need to involve indigenous peoples in decision-making in post-conflict situations. The inclusion of indigenous peoples in deciding on measures restoring their environment sends a signal that states are not allowed to sidestep these rights under the pretext of a state of emergency, such as an armed conflict or post-conflict situation. Therefore, the draft principle is a recognition of the status of the indigenous peoples' rights to their environment and that these rights apply in times of armed conflict alongside international humanitarian law. Also, article XXX paragraphs 3–4 in the American Declaration on the Rights of Indigenous Peoples states that states have a duty to ensure indigenous peoples' protection in relation to armed conflict.

The first paragraph of the draft principle is based on Article 29(1) UNDRIP, articulating the right of indigenous peoples to the protection of the environment and the productive capacity of their territories and resources. It also builds from Article 7(4) of ILO Convention No. 169.[112] It recognizes that states should take measures in co-operation with indigenous peoples to protect their environment.[113] Also, Article 4(1) in the same convention obligates states to adopt special measures to safeguard the environment of the indigenous peoples. The measures referred to are those of a protective nature, which may be relevant during or after an armed conflict. For example, the concerned state should take steps to ensure that military activities do not take place in the lands or territories of indigenous peoples.[114] This is strengthened by the inclusion of Article 30 in UNDRIP that establishes that military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. In the commentary to the draft principle, it is suggested that this can be achieved by designating the indigenous territories as protected areas.[115] The suggestion links international environmental law and human rights law protecting indigenous peoples. Ensuring indigenous participation and management of installed protected areas could be a method to protect indigenous peoples' environment in the specific context of armed conflict. However, the indigenous people must consent to such a measure and remain in control over their territory.

The second paragraph of the draft principle applies to the post-conflict situation. According to the commentary, '[t]he purpose of this provision to facilitate the taking remedial measures in the event that an armed conflict has adversely affected the environment of the territories that indigenous peoples inhabit. In doing so, it seeks to ensure the participatory rights of indigenous peoples in issues related to their territories in a post-conflict context, while focusing on States as the subjects of the paragraph'.[116] In this regard, the commentary also refers to Article 28 in the UNDRIP and the right for indigenous peoples to

[111] ILC website, available at <http://legal.un.org/ilc/> accessed 1 November 2018.

[112] Report on the work of the seventieth session (n 110) 254.

[113] Article 7(4) ILO No. 169 reads: 'Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit'.

[114] See UNDRIP, Article 30(1): 'Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned'.

[115] Report on the work of the seventieth session (n 110) 254–5.

[116] Ibid. 255.

redress, as discussed above in the previous section. The Inter-American Court has stipulated concrete orders on the obligation to remedy and repair damages to indigenous peoples caused by state actors, their collusion with paramilitaries, or by the omission of the state to protect.[117]

The participatory rights of the indigenous people are useful in a peace process to ensure social inclusion of an otherwise marginalized group. The ILO Convention No. 169 has twice been ratified as an integral element of peace accords to put an end to civil wars that were rooted in the exclusion of certain sectors of the population in the cases of Guatemala 1996 and Nepal 2007. The convention has in these cases been applied as a mechanism for dialogue.[118] One of the major impacts of indigenous communities in relation to armed conflict and land is widespread displacement. In Colombia, the 2012 Victims and Land Restitution Law (Law 1448) sought to settle issues around the formalization of land ownership, land restitution and, more generally, reparation for the victims of the conflict. However, the restitution of Indigenous and Afro-descendant territories is not covered by Law 1448, but two associated decree laws that have been adopted relating to these territories: 4633 for Indigenous Peoples and 4635 for Afro-descendant communities. Both laws have expanded the scope of the Law 1448. Law 1448 and the decree laws are mechanisms to enable the return of some illegally acquired lands to their rightful occupants and to give occupants legal ownership over these lands, as well as to provide other forms of reparation to some victims of the conflict. Decree Laws 4633 and 4635 include measures to guarantee the right of indigenous and Afro-descendant communities to prior consultation regarding their land. They also provide for restitution of territories that are legally recognised, such as the indigenous *resguardos* (reserves)[119] and Afro-descendant community councils, as well as territories not legally recognised by the state. The decree laws also allow precautionary measures to safeguard indigenous and Afro-descendant territories. These measures are designed to protect the communities from, for example, further incursions by armed groups or exploitation by mining or agro-industrial companies, in order to prevent further forced displacements and the illegal appropriation of territories, and to guarantee the safety of the communities. Still, indigenous peoples are often forced to leave their land for various reasons, including reasons connected to armed conflict, and the process of the restitution of indigenous land is slow.[120] Although the Colombian government has issued laws intended to provide comprehensive measures of reparation and restitution of territorial rights, to date the implementation of these initiatives has been insufficient, despite several court judgments on these issues. In 2018, the Inter-American Commission on Human Rights acted to grant precautionary measures in regard to the indigenous Siona people affected by armed conflict related to military operations on their lands.[121] The Constitutional Court of Colombia has stated that with projects such as development plans or significant investments that have a major effect in indigenous peoples' territories, the state must not only consult but also obtain the

[117] *Case of the Kaliña and Lokono Peoples v. Suriname* (n 105).
[118] Handbook: For ILO Tripartite Constituents. Understanding the C.169, 17.
[119] These are autonomous territories reserved exclusively for indigenous peoples.
[120] Juan M. Maldonado and Luis O. Martínez 'Indigenous Peoples, Natural Resources, and Peacebuilding in Colombia', in Carl Bruch, Carroll Muffett, and Sandra S. Nichols (eds), *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Earthscan 2009) 608–9.
[121] See the press release of the Inter-American Commission 14 July 2018 of Colombia available at <http://www.oas.org/en/iachr/media_center/PReleases/2018/166.asp> accessed 1 November 2018.

indigenous peoples' free, prior, and informed consent, in accordance with UNDRIP. The Court has suspended the implementation of such projects until the required consultations with the concerned indigenous peoples have been made.[122]

As indicated in the commentary to the Draft Principle 7 provisionally adopted by the ILC, international actors can put pressure on war-torn governments to ensure protection the indigenous land in post-conflict by ensuring consultation with indigenous communities. It is crucial that peacebuilding activities in war-torn societies respect and promote the indigenous peoples' rights to participation as they have the capacity to influence the war-torn state. For instance, the World Bank's Inspection Panel made a decision on the DRC in 2005 regarding the indigenous Batwa peoples' rights. The World Bank's funding of a Congolese reform of the forestry sector did not acknowledge the Batwa peoples' rights. As a consequence, the World Bank had to revise its operations in the Congolese forestry sector and required the Congolese government to develop a specific indigenous people's development plan in accordance with its Operational Policy 4.10 (also known as Environmental and Social Safeguard 7).[123] Also, the UN Refugee Agency (UNHCR) is involved in some projects in eastern DRC, to regain access to the land for the hunter-gatherers but on a limited scale.[124] The DRC has agreed to ensure the respect of the land rights of the indigenous people peoples within protected natural areas and to harmonize projects of greenhouse gas reduction, deforestation reduction, and forest degradation in accordance with UNDRIP. A new law protecting indigenous peoples' rights is currently being discussed in the parliament.[125]

V. Conclusion

The chapter proposes that the respect for indigenous rights and empowerment of indigenous communities will have positive effects for building peace as well for the protection of the environment in post-conflicts. As the *jus post bellum* framework endeavours to build a fair peace in the interest of peoples and individuals affected by armed conflicts, the participation of indigenous peoples is a crucial piece of the framework. Thus, the rights of indigenous peoples need to be considered during a peace process to ensure the involvement of minority groups.[126] A practical implication of incorporating the rights of indigenous peoples into the *jus post bellum corpus*, is the pressure it would put on international actors to ensure the respect of these rights in their work in states with weak state functions. Therefore, the presence of international actors can play a role by directly engaging with the indigenous communities. The example of the DRC shows difficulties to include the marginalized

[122] Constitutional Court of Colombia, Judgment No. T-129, 3 March 2011. See José Aylwin, UNDRIP Impact on Latin America: 10 years on', IGWIA – The Indigenous World (2017) 48–9.

[123] Barume, 'Democratic Republic of the Congo' (n 11) 472–3.

[124] Schmitt (n 14).

[125] The Congolese parliament is currently discussing a draft law specifically protecting indigenous rights, but it has not been adopted. See DRC (2014b), Draft organic law on the fundamental principles of the rights of the indigenous Pygmy peoples; Proposition de loi organique portant principes fondamentaux relatifs aux droits des peuples autochtones pygmées. See Therese Di Campio Idjwi and Aaron Ross, 'In the Democratic Republic of Congo, one of Africa's oldest indigenous peoples is facing a land crisis', 12 January 2017, *Independent*, available at <https://www.independent.co.uk/news/world/africa/congo-pygmies-land-rights-africa-indigenous-peoples-a7524326.html> accessed 1 November 2018.

[126] UNEP, Natural Resources and Conflict, A guide for Mediation Practitioners (2015).

indigenous groups in the peace process. Still, although the work is slow, some progress is taking place to implement the law and initiatives to ensure respect for indigenous peoples' rights in the Congolese legislation. Furthermore, the special relationship between indigenous peoples and their environment is acknowledged in international law and respect for the indigenous rights would most likely also contribute to protecting the environment in the aftermath of armed conflict, which is also crucial in order to build sustainable peace, as embodied by the notion of environmental peacebuilding.[127] This includes involving and ensuring resilient local communities, dealing with the management of natural resources and land issues in post-conflict situations. Re-stating the rights of indigenous peoples to their land and ensuring their participation can contribute to environmental peacebuilding.[128] For instance, Article 15 ILO Convention No. 169 ensures the participatory right in relation to natural resources and it is an important vehicle to safeguard the rights of the indigenous peoples in post-conflict.

The emerging recognition for indigenous peoples' rights in relation to conservation work shows how indigenous rights and environmental law can be paired to ensure environmental protection. The active participation of indigenous peoples in the peace process in essential to promote environmental protection.[129] The management capacity of indigenous peoples to preserve protected areas has proved to be efficient and is recognised as part of the new conservation paradigm. This may be a future path to protect indigenous peoples' land in post-conflict that also feeds into environmental peacebuilding.

[127] Environmental peacebuilding integrates natural resource management in conflict prevention, mitigation, resolution, and recovery to build resilience in communities affected by conflict. See Environmental Peacebuilding Association website, available at <https://environmentalpeacebuilding.org/> accessed 1 November 2018.

[128] WWF, 'Indigenous and Traditional Peoples of the World and Ecoregion Conservation: An Integrated Approach to Conserving the World Biological and Cultural Diversity (2000) 32.

[129] Rights of indigenous peoples (n 75) paras 66–7.

13

The *Jus Post Bellum* of Illegally Transferred Settler Populations

*Eugene Kontorovich**

I. Introduction

This chapter studies the *jus post bellum* regime for dealing with settlers in occupied territories. In a belligerent occupation, the occupying power is forbidden by Article 49(6) of the Fourth Geneva Convention from 'deport[ing] or transfer[ring]' its civilian population into the territory it controls. Yet when such situations persist for decades, creating remedies for violations of the prohibition is one of the more difficult issues in crafting negotiated solutions to such conflicts and in managing the post-conflict situation.

Violations of Article 49(6) poses problems for *jus post bellum* because the violation takes an unusual form—the migration of persons, and their long-term residence in the territory. Though potentially unwelcome by the inhabitants of the occupied territory, the settlers themselves are not guilty of any crime. In prolonged occupations much of the 'settler population' may not be transferees themselves, but rather descendants of the original migrants. Thus, dealing with such populations involves the consequences of *jus in bello* violations, but not necessarily their perpetrators.

The issue of settler populations, and the appropriate legal framework for dealing them, most prominently arises in discussions of the Israel–Arab conflict. The Palestinian demand for the initial exclusion of Jewish settlers from a future Palestinian state is one of the most irreconcilable issues in the conflict.

However, the issue of settlers in occupied territory arises in many other important, but less headline-making, conflicts. Violations of Article 49(6) outside the Israeli context have gotten only the lightest academic attention,[1] and generated no legal response from international organizations or the international community more broadly.[2] Yet these situations are crucial to understanding the developing *jus post bellum* treatment of settler populations. In many of these situations, the *post bellum* treatment of these populations has been addressed in the internationally-approved settlements or proposed settlements of the conflict. Given the lack any clear positive international law on the subject, these situations are the best evidence for understanding the *jus post bellum* treatment of settler populations.

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[1] See Eugene Kontorovich, 'Unsettled: A Global Study of Settlements in Occupied Territory' (2017) 9 *Journal of Legal Analysis* 286.

[2] The International Criminal Court Office of the Prosecutor's 2017 Report on Preliminary Examinations, which addresses Russian settlers in Crimea, is a very recent exception to this. See International Criminal Court, Office of the Prosecutor, 'Report on Preliminary Examination Activities' (4 December 2017) paras 79–120.

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Examining these situations comprehensively helps answer a variety of questions about what international law requires regarding such settlers. Is the sending country obligated to remove them before or as part of a transition? Is the receiving country, in the context of a post-conflict transition allowed to deport such populations? What requirements are imposed by the Geneva Conventions and what by other aspects of international law, including custom?

In the most expansive view, based on general principles of state responsibility, the occupying state would be required to 'wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.[3] Taken in the broadest possible sense, this would require the occupying power to remove all settlers and level their habitations (and pay for any economic harm they causes, or perhaps, repatriate any economic benefit they created. Yet reconstructing what the demographic situation would look like without such transfers, in a world where population migrations are common, is extremely complex.[4] Moreover, the nature of restitution is quite flexible. As the European Court of Human Rights pointed out in rejecting a broad notion of restitution by Turkey arising from Turkish settlers in northern Cyprus: '[i]t cannot be within this Court's task … to impose an unconditional obligation on a Government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention'.[5] Instead, as this chapter shows, state practice does not follow the view that removal, in whole or in part, is in any way required. Instead, it shows that such removal is never a part of *post bellum* practice. Instead, the relevant questions *post bellum* focus on the legal status of the settlers vis-à-vis the state that subsequently exercises sovereignty in the territory.

A major question for any *jus post bellum* principles is the effect on the observance of *jus in bello*. To the extent that the former may give greater emphasis to considerations of reconciliation and rehabilitation, there are obvious concerns about undercutting the deterrent effect of the law of war. In the settler context, such concerns are particularly inapposite. No one has ever been prosecuted, or even indicted, for transferring settlers in violation of Article 49(6) in any domestic or international court.[6] A few attempts at civil litigation

[3] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Permanent Court of Int'l Justice Series A (No. 17) 47 (1928) 47.

[4] See *Demopoulos v. Turkey* ECHR 2010–I 365, paras 84–5:

> [S]ome thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. Generations have passed. The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes …
>
> Thus, the Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.

[5] Ibid. para. 116. It should be noted that *Demopoulous* involved only issues of private property, rather than demographic change, which is more inchoate and does not involve violations of individuals' rights.

[6] The issue of transfer is within the scope of the ICC's preliminary investigations in the Palestine and Ukraine situations. ICC (n 2) paras 67–71, 101. Nonetheless, in the Office of the Prosecutors 2019 Report on Preliminary Examinations, transfer of settlers was, with no explanation, dropped from consideration as one of the crimes being investigated by the prosecutor. Para 272. This underscores the extent to which criminal penalties, even in matters within the jurisdiction of the ICC, are not a significant part of dealing with such issues.

against alleged non-governmental abettors of such transfer have failed, as courts have concluded the relevant prohibitions only apply to the government of the occupying power.[7] The number of peace settlements that involve settler populations exceeds the number of attempts to judicially enforce the Article 49(6) norm. But with regard to settler populations, the *post bellum* question rather than the *in bello* one is in reality dominant.

There is also the question of incentives. The primary evil the Article 49(6) norm seeks to guard against is effecting demographic change, which destroys the occupied people 'as a race',[8] and, according to some, also to prevent changes that preclude an end to the occupation. Thus, an end to the conflict that involves the withdrawal of the occupying power in favour of the occupied state or a newly created state presumes that such an annexation policy has failed. Post-conflict removal of settler populations would then be primarily retributive, rather than specifically deterrent.

This chapter proceeds by examining several major conflicts that involve the migration of civilians from the territory of an occupying power into an occupied territory, since the adoption of the Fourth Geneva Convention.[9] After describing the nature of the possible Article 49(6) violations in each case, the chapter examines the *post bellum* treatment of the settlers. Several of these conflicts (Indonesia/East Timor; Vietnam/Cambodia; Russia/the Baltics) have actually gone through the *post bellum* phase. These provide the most robust evidence for how workable conflict resolution deals with settlers. With regard to the ongoing conflicts, this chapter examines the proposed international models for the *post bellum* situation, none of which contemplates the removal of settlers.

II. Indonesia

Indonesia occupied East Timor, a Portuguese colony, in 1975. Until the international pressure ledsto Indonesia's allowing for the independence of East Timor (Timor-Leste) in 1999, Indonesia maintained an organized 'transmigration' policy to bring settlers from the larger islands and change the demographic composition of the territory. The programme was highly organized and coordinated by the Jakarta government. Exact numbers of Indonesian settlers in East Timor are hard to obtain. Some figures suggest that approximately 15,000 migrants arrived in East Timor between 1980 and 1987, but unofficial, non-government sources estimate that the non-Timorese population living in East Timor in 1997 was as high as 160,000–180,000—nearly 20% of the population.

In advance of independence, East Timorese rebel leaders assured the international community that Indonesian settlers would not be expelled.[10] Indeed, pro-Timorese NGOs urged the Timorese to go further and guarantee that 'Indonesian migrants would be protected', for

[7] *Richardson v. DPP* [2014] UKSC 8, para. 17; Cour d'appel [CA] [regional court of appeals] Versailles, civ, 22 Mar 2013, 11/05331 (Fr) [*Alstom*].

[8] Oscar M. Uhler and Henri Coursier in Jean S. Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (trans Ronald Griffin and C. W. Dumbleton, 1958) 283.

[9] This chapter only examines the *post bellum* treatment of populations whose transfer was in colorable violation of Art. 49(6). It does not deal with the broader phenomenon of settlers in contexts to which Art. 49(6) does not apply, such as colonial situations, or in non-international armed conflicts (such as the transfer of Shiite populations from Iraq into formerly Sunni areas in Syria's ally, Iran).

[10] Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 'Summary Record of the 1475th Meeting' (24 February 1999) UN Doc. A/AC.109/SR.1475 para. 17.

their home country 'could not be expected to abandon its citizens to anarchy and revenge'.[11] The possibility that the settlers would have to be withdrawn by Indonesia itself was not raised by anyone. Many settlers (those born in East Timor or otherwise qualified) could vote in the referendum on independence as well as[12] in the election for the body responsible for drafting the first East Timorese constitution and the formation of an all-East Timorese Council of Ministers.[13]

The United Nations-led transitional regime created two mechanisms for post-conflict justice—a special mixed criminal tribunal with jurisdiction over crimes committed in the 1999 conflict that lead to Timorese independence, and a truth and reconciliation committee, which had authority to deal with human rights abuses and violations of the Geneva Conventions during the entirety of the occupation.[14] The Commission's 2,500-page report on Indonesian crimes makes no mention of ArtIcle 49(6) or settlement as a crime.[15]

Nonetheless, the domestic citizenship laws adopted by independent East Timor, effective November 2002, largely exclude settlers from automatic citizenship. Section 8(1) of East Timor's 2002 Nationality Law provides original East Timorese citizenship to anyone born in the national territory *to a parent born in East Timor*, stateless parents, or to parents whose citizenship is unknown; or anyone who is born in the national territory to a foreign parent if, being over 17 years old, the person declares themselves an East Timorese.[16] Such provision is likely to preclude automatic East Timorese nationality for most children of settlers because only those children born in East Timor before 1985 would be able to take advantage of the law's declaration provision in 2002.

It is likewise difficult for migrants to acquire East Timorese citizenship as the East Timor Nationality Law contains stringent naturalization requirements, including daunting language and cultural knowledge requirements.[17] While the Nationality Law does emphasize that a 'foreign citizen who has settled in Timor-Leste as a result of transmigration policy or foreign military occupation shall not be considered as a usual or regular resident',[18] and East Timor's Immigration and Asylum Act specifies that such persons must obtain a visa from the minister of the interior in order to lawfully remain in the country long enough to become a naturalized citizen,[19] non-indigenous persons have been deported from East Timor on only isolated occasions.[20]

[11] Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 'Summary Record of the 1475th Meeting' (1 July 1999) UN DocA/AC.109/SR.1489, 2.

[12] UNTAET Regulation No. 2001/2 On The Election Of A Constituent Assembly To Prepare A Constitution For An Independent And Democratic East Timor (16 March 2001) UN Doc. UNTATET/Reg 2001/2, para 30.

[13] See UNSC 'Report of the Secretary-General on the United Nations Transitional Administration in East Timor' (18 October 2001) UN Doc. S/2001/983 para. 4.

[14] UNTAET Reg 2001/10 (n 12) Arts 1(c)-(d), 3.1(a)-(d).

[15] Timor-Leste Commission for Reception, Truth and Reconciliation, 'Chega!' (2005) ch. 7.3 paras 279, 289 (noting Indonesian transmigration in passing, without attaching any legal or ethical significance to it) available at <http://www.etan.org/etanpdf/2006/CAVR/07.3_Forced_Displacement_and_Famine.pdf> accessed 20 March 2018.

[16] Law on Citizenship (Timor-Leste) No. 9/2002, 5 Nov. 2002, sections 8(1)(a)–(c) (unofficial translation by UNTAET) <http://www.refworld.org/docid/3dd8de914.html> accessed 20 March 2018. A child born overseas to an East Timorese mother or father is also a citizen of East Timor. Ibid. section 8(2).

[17] Ibid. para. 12(1).

[18] Ibid. para. 12(2).

[19] See Immigration and Asylum Act (East Timor) No. 9/2003, 15 October 2003, art. 131, paras (1)–(2) (unofficial translation by UNTAET) available at <http://www.unhcr.org/refworld/docid/3fc75cd32.html> accessed 20 March 2018 ('Foreigners who entered the country after September 7, 1975, and who are conducting activities in the national territory for which under the present provisions it is mandatory to be a resident or holder of a proper visa, must … request a visa that will allow them to stay').

[20] See e.g. US Dept of State, 'Country Reports on Human Rights Practices, East Timor' (2006) section 2(c), available <http://www.state.gov/g/drl/rls/hrrpt/2005/61607.htm.> accessed 20 March 2018.

There has been no suggestion by any international authority that the Indonesian government should pay either the East Timor government or East Timorese nationals for land taken by settlers. East Timor's first president, Xanana Gusmao, and his supporters overrode calls for reparations from factions within East Timor in an effort to build and maintain friendly relations with Indonesia.[21]

III. Morocco

A. Background

Western Sahara (or the Sahrawi Arab Democratic Republic—SADR) is located in northwest Africa, with Morocco to its north and Mauritania to the south and east. From the late nineteenth century, Western Sahara was a Spanish colony. As Spain was preparing to decolonize the territory in the early 1970s, Morocco laid claim to it. However, the International Court of Justice (ICJ) concluded in an advisory opinion that Rabat had no sovereign rights in Western Sahara, and that instead the indigenous Saharwi people had a right to self-determination.[22]

In response to the ICJ opinion, Moroccan King Hassan II organized a Green March—a massive civilian and military invasion of the territory on 6 November 1974.[23] The Moroccan government took administrative control of the territory and annexed most of it as the 'southern provinces' of Morocco in 1976.[24] King Hassan, claiming the consent of the Saharwi people, decided to partition and annex Western Sahara between Morocco and Mauritania. The POLISARIO, a Sahrawi national movement, declared Western Sahara's independence later that same day[25] and began staging attacks against the occupying force. Since then, dozens of countries have recognized the POLISARIO's proclaimed state, the Sahrawi Arab Democratic Republic, as an independent sovereign nation.

In 1979, the UN General Assembly adopted Resolution 34/37, declaring Morocco an occupying power and reaffirming the Sahrawi's right to self-determination.[26] The General Assembly continued to pass similarly worded resolutions once a year for ten years thereafter. In addition, the UN secretary-general issued a report calling for a settlement plan that allowed the people of Western Sahara to exercise 'their right to self-determination'.[27] More recently, the European Court of Justice affirmed Morocco's status as an occupier of the territory and dismissed Morocco's claim to legal rights over it.[28]

[21] See e.g. 'East Timorese Leader "Forgives" Indonesia', Townsville Bulletin (Australia 29 August 2001) 14.

[22] 1975 ICJ Western Sahara Advisory Opinion <http://www.icj-cij.org/files/case-related/61/6197.pdf> accessed 20 March 2018.

[23] Akbarali Thobhani, *Western Sahara Since 1975 Under Moroccan Administration* (2002).

[24] Ibid. 58.

[25] 'Proclamation of the First Government of the Saharwi Arab Democratic Republic' (27 February 1976) reprinted in *African Group of the Int'l League for the Rights & Liberation of Peoples, Western Sahara: The Struggle of the Saharawi People for Self-Determination* (2d edn 1979) 194–5 (note the typo in the date); see also Thomas M. Franck, 'The Stealing of Sahara' (1976) 70 *American Journal of International Law* 694, 715 and nn.135–6; 718, n.168; Deon Geldenhuys, *Contested States in World Politics* (Palgrave Macmillan 2009) 190, 194. The SADR was to be ruled by an eight-man POLISARIO government based in Tindouf, Algeria.

[26] UNGA Res. 34/37 (1979) UN Doc. A/RES/34/37 (1979) paras 5, 7.

[27] UN Secretary-General, 'The Situation Concerning Western Sahara: Report of the Secretary-General' (1990) UN Doc. S/21360 (1990) para. 16.

[28] See Judgment of 10 December 2015, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the EU*, T-512/12, EU:T:2015:953, paras 13, 76.

Beginning in the early 1980s, Morocco began to construct a massive wall berm around the areas of Western Sahara it controlled, stranding tens of thousands of Sahwari in refugee camps in the desert, on the Algerian border. It also commenced one of the world's most extensive settlement projects. Since its invasion in 1976, 'Moroccanization' of the Western Saharan population has been official Moroccan public policy.[29] Over the past forty years, the Moroccan government has spent multiple USD billions on Western Sahara's basic infrastructure, building airports, harbours, roads, and electricity plants.[30] The Moroccan government has offered higher salaries in order to incentivize settlers to move to Western Sahara.[31] Salaries in the occupied territory are twice what they would be in Rabat.[32] Jobs in the lucrative state-controlled extractive industries go primarily to Moroccans settlers. A combination of subsidies, generous incentives, and intensive government spending has resulted in an influx, according to varying indications, of at least 200,000–300,000 Moroccan settlers into the territory.[33] The results have been dramatic: Moroccan settlers now clearly outnumber indigenous Sahrawi, with fatal effects for the latter's self-determination. Indeed, recent reports suggest that Moroccan settlers in Western Sahara outnumber the Sahrawi by two to one.[34]

B. Treatment of Settlers in UN Peace Proposals

The first formal settlement proposals, finalized in 1991, contemplated a UN-led referendum that would provide voters with two choices: independence or integration.[35] Both parties agreed that the 1974 Spanish census would be the base of the voter registration list, thus essentially excluding settlers.[36] Nonetheless, particular debates about the details of voter qualifications broke out almost as soon as the sides agreed to a referendum,[37] and this prevented the United Nations Mission for the Referendum in Western Sahara (MINURSO)

[29] Anne Lippert, 'The Human Costs of War in Western Sahara' (1987) 34 *Africa Today* 47, 53; Geldenhuys (n 25) 199, citing Neil Ford, 'Oil Potential Could Provide Catalyst for Change' (2003) 330 *Middle East* 54.

[30] Geldenhuys (n 25) 196.

[31] William J. Durch, 'Building on Sand: UN Peacekeeping in the Western Sahara' (1993) 17 *International Security* 151, 164.

[32] Jacob Mundy, 'Autonomy & Intifadah: New Horizons in Western Saharan Nationalism' (2006) 33 *Review of African Political Economy* 255, 262.

[33] Michael Bhatia, 'Western Sahara under Polisario Control: Summary Report of Field Mission to the Sahrawi Refugee Camps (near Tindouf, Algeria)' (2001) 28 *Review of African Political Economy* 291; Jacob Mundy, 'Moroccan Settlers in Western Sahara: Colonists or Fifth Column?' (2012) 15 *Arab World Geographer* 95.

[34] 'Deadlock in the Desert' *The Economist* (10 Mar. 2007). A second Moroccan census conducted in 2004 estimates the Western Saharan population at about 355,000. 'Regions of Morocco' (*Statoids* 28 October 2015) available at <http://www.statoids.com/uma.html> accessed 20 March 2018. The CIA World Factbook puts the SADR's population today at just over 405,000. 'Western Sahara' (*CIA World Factbook* 14 March 2018) available at <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html> accessed 20 March 2018.

[35] The 1991 settlement proposals are detailed in two lengthy reports of the secretary-general. 'Report of the Secretary-General on the Situation Concerning Western Sahara' UN Doc. S/21360 (1990); 'Report of the Secretary-General on the Situation Concerning Western Sahara' UN Doc. S/22464 (1991).

[36] This formulation left neither side entirely content. Morocco claimed that the many Western Saharans who left for Morocco during the Moroccan-sponsored uprising against the Spanish in the 1950s should be entitled to vote, while POLISARIO wanted to strictly limit the referendum participants to those who could prove ties with the territory in 1974. Charles Dunbar, 'Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict' (2002) 54 *Middle East Journal* 522, 527–8. See also 'Report of the Secretary-General on the Situation Concerning Western Sahara' UN Doc. S/25170 (1993), para. 15.

[37] Report of the Secretary-General (n 36) para. 6.

from successfully operating throughout much of the 1990s.[38] Eventually, the Security Council soon recognized that the referendum scheduled to take place that year was no longer a viable option.[39]

Three years later, in May 2003, the Secretary Council endorsed a new plan for Western Sahara. Baker Plan II (named after former US Secretary of State James Baker, the Secretary-General's Personal Envoy to Western Sahara) contemplated a four-to-five-year interim Western Sahara government followed by a referendum on i.[40] There were only two categories of people who would be eligible to vote for the transitional government: (i) persons aged 18 years or over whose names appeared on MINURSO's approved voter list as of 30 December 1999 (exclusive of those persons objecting to or seeking appeals from the process); and (ii) persons aged 18 years or over whose names appeared on the UN Human Rights Council's repatriation list as of 31 October 2000.[41]

The eligibility criteria for referendum voters, on the other hand, included a significantly broader swath of the territory's population. In addition to the two lists of persons eligible to vote for the transitional government, any persons residing in the territory continuously since 30 December 1999 would be entitled to vote.[42] Under this criterion a majority of Moroccan settlers in the Western Sahara would be eligible to vote on independence.

The 'settler provision' of Baker Plan II provoked some criticism. According to these commentators, the plan demonstrated that the UN was reaffirming its 'commitment to provide for the self-determination of the people of Western Sahara, even while it seriously compromised on [that principle]'.[43] Nonetheless, the Security Council ultimately chose to endorse Baker Plan II, suggesting that despite the objections, it regarded the proposals as an internationally legitimate *post bellum* arrangement.[44] The Moroccan government ultimately rejected the plan.[45]

[38] 'Identification of Eligible Voters' (MINURSO) available at <http://www.minurso.unlb.org/IDC.html> accessed 20 December 2009; Dunbar (n 36) 535; 'Report of the Secretary-General on the Situation Concerning Western Sahara' UN Doc. S/1999/1219 (1999), paras 6, 8–11; UNSC Report of the Secretary-General on the Situation Concerning Western Sahara (2000) UN Doc. S/2000/131 paras 25–9.

[39] UN Security Council Res. 1309 (2000) UN Doc. S/RES/1309 (2000) (reaffirming its support for a Western Saharan referendum but nonetheless encouraging the parties to reach a political solution).

[40] 'UNSC Report of the Secretary-General on the Situation Concerning Western Sahara' (2003) UN Doc. S/2003/565 (2003), annex II, para. 2. Under this second plan it was expected that the referendum would have three options: independence, integration, and 'autonomy', which would essentially constitute a continuation of the interim power-sharing arrangement set forth in the Baker Plan.

[41] Ibid. para. 16.

[42] Ibid. para. 6. To satisfy continuous residence in the territory, the applicant had to present the testimony of three credible witnesses or credible documentary evidence. Ibid.

[43] Ian Williams and Stephanie Zunes, 'Self-Determination Struggle In the Western Sahara' *Foreign Policy in Focus* (September 2003), available at <http://www.globalpolicy.org/component/content/article/208/39893.html> accessed 20 March 2018.

[44] UN Security Council Resolution 1495 (2003) UN Doc. S/RES/1495 (2003), para. 1 (continuing to strongly support the efforts of the secretary-general and his personal envoy and similarly supporting the Baker Plan for Peace as the 'optimal political solution on the basis of agreement between the two parties').

[45] 'UN Security Council Report of the Secretary-General on the Situation Concerning Western Sahara' (2004) UN Doc. S/2004/325 (2004), para. 36. See also ibid. annex 1 (Letter from the Minister of Foreign Affairs and Cooperation of Morocco to the Personal Envoy of the Secretary-General [9 April 2004]). It has been suggested that the Moroccan government was concerned it could not count on the settlers' votes because of their growing discontent with the Moroccan monarchy and that because of identification complexities the number of settlers allowed to vote would be much smaller than predicted. Pablo San Martín, 'Western Sahara: Road to Perdition?' (2004) 103 *African Affairs* 651, 653.

Since Morocco's rejection of Baker Plan II in 2004, little progress has been made towards a permanent Western Saharan solution.[46] There continues to be no suggestion that the Moroccan government should make reparations for its actions in the territory—including for damages caused by the berm—or that Moroccan settlers should be removed from the area.

IV. Northern Cyprus

A. Background

The Mediterranean island of Cyprus has historically been home to a majority Greek and minority Turkish population. In 1974, Turkish troops invaded the island and over the course of three weeks took control of approximately 36.4% of the island's territory, leading the vast majority of Turkish Cypriots in the south to flee north and any Greek Cypriots in the occupied northern area to flee south. Seven months after the invasion, in February 1975, the Turkish administration unilaterally deemed the northern portion of the island a 'Federated Turkish State' and eight years later they purported to recognize the independence of a Turkish Republic of Northern Cyprus (TRNC), which has not received international recognition. The independence is *de facto* nominal only, as Turkey is in effective control of North Cyprus territory and influences definitive control of most of its affairs. Turkish military bases and 20,000–40,000 strong Turkish Armed Forces presence, including tank brigades, air defences, and immediate availability of air force intervention, stronghold this situation. Multiple rounds of United Nations-led negotiations have failed to bring about a resolution, and even the diplomatic process collapsed this year.

Shortly after the invasion, the UN Security Council adopted a resolution 'demand[ing] an immediate end to foreign military intervention in the Republic of Cyprus'.[47] The UN Security Council likewise asked all parties involved in the dispute to 'refrain from any action which might prejudice [Cypriot] sovereignty, independence, territorial integrity and non-alignment, as well as from any attempt at partition of the island or its unification with any other country'.[48] The UN also declared the TRNC's subsequent declaration of independence to be invalid and called upon other states to similarly refrain from recognizing any Cypriot state other than the Republic of Cyprus. Only Ankara has recognized the TRNC. The European Court of Human Rights, in numerous cases, has found Turkish policy in Northern Cyprus violates the human rights of Greek Cypriots, particularly in matters of dispossession of property.

Turkey has maintained a vigorous settlement enterprise in the occupied territory. Today, the majority of the territory's population consists of settlers from the mainland. The flow continues, with the population growing by more than 10% a year recently, far more than the rate of natural increase. Many housing projects are being built to accommodate the new arrivals in the occupied territory. The settler population is accommodated by massive Turkish

[46] See 'Report of the Secretary-General on the Situation Concerning Western Sahara' (2008) UN Doc. S/2008/45 (2008), para. 4.
[47] UN Security Council Res. 353 (XXIX) (1974) UN Doc. S/RES/353 (1974).
[48] UN Security Council Res. 367 (1975) UN Doc. S/RES/367 (1975), para. 1.

infrastructure investment in the area, such as an upgraded airport and direct water supply from the mainland. Today, the majority of the population of the occupied area are Turkish settlers or their offspring. Turkey has faced consistent international criticism for acting to change the demographics of north Cyprus. Cyprus itself has described Turkey's attempts to 'change the demographic character and to distort the population balance on the island' as violating Article 49(6).[49]

A. Proposed Post-Conflict Treatment of Settlers

Beginning on 6 March 1995, when the EU announced its plan to 'incorporate Cyprus at the next stage of its enlargement,'[50] the conflict in Cyprus took on new urgency. Turkey threatened to annex the TRNC if Cyprus was admitted to the EU[51] and confrontations between the two Cypriot communities reached a level of violence not seen since the unofficial ceasefire of 1974. Underlying Turkey's reaction was Turkish desire to join the EU and frustration over its inability to do so.[52] Once the international community recognized that EU membership could be used to incentivize a Cyprus solution, the UN began renegotiating a settlement among the parties.

Several of the most contentious issues included the demilitarization of north Cyprus, the right of Greek Cypriots to return to their abandoned property in the north and of Turkish Cypriots to resettle in the south, and, of course, the right of Turkish settlers to remain in a united Cyprus. As discussions moved forward it became clear that although Greek Cypriots viewed the presence of settlers as illegal, Greek Cypriot officials had 'no disposition for wrenching expulsions'.[53] Instead, 'former Cyprus President George Vassiliou emphasized financial incentives to facilitate repatriation of the settlers to Turkey'.[54] There was also broad consensus regarding Turkish settlers who had intermarried with the indigenous Turkish Cypriot population—Greek Cypriots generally considered it acceptable to grant citizenship to such people in a newly united Cyprus.[55] Suggestions that children of illegal settlers should be deemed to hold *jus soli* citizenship, on the other hand, were considered more controversial.[56]

[49] Ministry of Foreign Affairs Republic of Cyprus, 'Illegal Demographic Changes' (2006), <http://www.mfa.gov.cy/mfa/mfa2006.nsf/cyprus06_en/cyprus06_en?OpenDocument> accessed 20 March 2018.

[50] Michalis Stavrou Michael, *Resolving the Cyprus Conflict: Negotiating History* (Palgrave Macmillan 2009) 152.

[51] Ibid. 153.

[52] Ibid. ('The Turks insisted that a federal Cyprus could "join the EU only simultaneously with Turkey's accession" ').

[53] Benjamin Tyree, 'Possibilities for the Future of Cyprus' *Washington Times* (26 April 2002), A17. See also Frank Hoffmeister, *Legal Aspects of the Cyprus Problem* (Brill Nijhoff 2006) 141 (discussing the possibility that Turks not allowed to remain in Cyprus would be able to avail themselves of the applicable alien laws and were not threatened with mass expulsion *ex lege*).

[54] Ibid, Benjamin Tyree

[55] Ibid.

[56] Compare ibid. (noting that the President of the Republic of Cyprus House of Representatives believed parentage, as opposed to place of birth, should be the determinative factor in granting Cypriot citizenship), with 'Population In Northern Cyprus Rises Significantly' *Xinhua General News Service* (6 May 2006), quoting TRNC prime minister Ferdi Sabit Soyer as observing: 'Those who came to the island 30 years ago and had children who have since then had their own children can be thought of as nothing other than citizens of the Turkish Republic of Northern Cyprus … There is no way anyone could describe them as foreigners'.

Ultimately, after several rounds of preliminary discussion, the Annan Plan tried to provide a middle ground on the settler issue. The first comprehensive draft of the Annan Plan, unveiled on 11 November 2002, automatically granted Cypriot citizenship to:

(i) Any person who held Cypriot citizenship in 1960 and his or her descendants;
(ii) Any 18-year-old person who was born in Cyprus and has permanently resided in Cyprus for at least seven years;
(iii) Any person who is married to a Cypriot citizen and has permanently resided in Cyprus for at least two years; and
(iv) Minor children of the persons in the above categories who are permanently residing in Cyprus.[57]

The second provision would include a large number of settlers. Additionally, Annan Plan I allowed up to 33,000 persons who were citizens of the TRNC, but who would otherwise not qualify for Cypriot citizenship, to be naturalized.[58] If they had lived in Cyprus for at least five years, settlers who qualified for neither automatic citizenship nor automatic naturalization could apply for financial assistance to relocate to their country of origin[59] or, alternatively, could try to acquire citizenship which required remaining legally in a united Cyprus for a period of seven years.[60] Interestingly, the Plan envisaged that the new federal *Cypriot* government would be responsible for the settlers' relocation costs.[61] Although Turkey would likely be expected to contribute to the new island's budget, it was by no means the sole bearer of the financial burdens the plan imposed; the plan explicitly recognized that donations from international aid organizations would be necessary to implement its relocation provisions.[62]

After agreeing to use the November proposals as a basis for negotiations, Secretary-General Annan received clarification and settlement demands from both sides. He then went back to the drawing board and tried to incorporate the desired changes. Two years and four drafts of the Annan Plan later, the number of former Turkish citizens that would have access to Cypriot citizenship was increased to 45,000 and a longer naturalization period, requiring nine years residence on the island, was agreed to by both sides.[63] Despite the ability to acquire citizenship, some settlers could have had to leave the island because of a cap on the number of Turks that could be present in Cyprus at any given time. The Agreement provided: '[F]or a transitional period … Cyprus may limit the right of … Turkish nationals to reside in Cyprus if their number has reached 5% of the number of resident Cypriot citizens holding Turkish Cypriot internal constituent state citizenship status'.[64] An identical limit was placed on Greek nationals. Moreover, in the last moments before the referendum it was

[57] 'Basis for Agreement on a Comprehensive Settlement of the Cyprus Problem', annex III, attachment 4, Art. 3(1) (2002) available at <http://www.hri.org/docs/annan/Annan_Plan_November2002.html#_Toc24695394> accessed 20 March 2018.
[58] Ibid. Art. 3(2). See also Hoffmeister (n 53) 119.
[59] 'Basis for Agreement' (n 57), Art. 5.
[60] Hoffmeister (n 53) 119.
[61] Zenon Pophaides, 'Pro: Economic Viability of Annan V', in Andrekos Varnava and Hubert Faustmann (eds), *Reunifying Cyprus: The Annan Plan and Beyond* (Bloomsbury 2009) 138.
[62] Ibid.
[63] Hoffmeister (n 53) 126.
[64] 'Basis for Agreement On A Comprehensive Settlement of The Cyprus Problem' (2004) para. 15.

stipulated that anyone who did not obtain permanent residency rights in accordance with the plan had to leave Cyprus within five years.[65]

Annan Plan V, as the final version was called, received heavy criticism in both the academic and political arenas.[66] It was nevertheless put to the vote—in which Turkish settlers participated—on 24 April 2004.[67] While the Greek Cypriot community maintained the position that settler voting conflicts with Article 49(6), it 'acknowledged that settler voting in the TRNC [did] not nullify the results of the separate referenda'.[68] It likewise announced no intention to reject the referenda as 'illegal' because of the settler vote if both sides voted to accept Annan V.[69] Because 75.9% of the Greek Cypriot community voted to reject the Annan Plan, however (in part because of its lenient settler provisions),[70] the propriety of the Turkish settlers' participation in the TRNC referendum was ultimately a moot point. Whatever the reason for the Greek Cypriot's overwhelming rejection of Annan Plan V—and it is likely a combination of many things[71]—the Annan Plan was not accepted and no settlers have been removed. Instead, the European Community continues to condemn the influx of Turkish settlers to Cyprus[72] and the inter-community conflict continues.

V. Vietnam/Cambodia

Several hundred thousand Vietnamese settlers came to Cambodia during the decade of occupation (from the late 1970s through the 1980s). Specific estimates of Vietnamese settlement vary greatly and are coloured by politics, with estimates running between 300,000 and 700,000.[73] The actual numbers continue to baffle demographers, with modal numbers

[65] 'Report of the Secretary-General on His Mission of Good Offices in Cyprus' UN Doc. S/2004/437 (2004), para. 50, available at <http://www.un.org/en/peacekeeping/missions/unficyp/rep_mgo.shtml> accessed 20 March 2018. Because the new change did not include an enforcement mechanism, however, it is doubtful this provision had real teeth. See e.g. 'EU/Cyprus: Political and Financial Pressure Behind UN Peace Plan', *European Report* (17 April 2000) ('The Cypriot Government also highlights the absence of assurances from the international community that Turkish settlers not authorised to remain in the North of the island after reunification will indeed return to Turkey … "Who will ensure the departure of the other settlers?", one Cypriot diplomat wondered. He suggests the UN itself should step in as guarantor since the Cypriot Government is not is a position to force Turkish settlers to leave the island').

[66] For an academic discussion of the pros and cons of the Annan Plan, see generally Andrekos Varnava and Hubert Faustmann (eds), *Reunifying Cyrpus: The Annan Plan and Beyond* (Bloomsbury 2009). See also e.g. Eric Silver, 'Cypriots Who Back UN Plan Face Damnation, Says Bishop' *Independent* (London, 20 April 2004), 24; 'Report of the Secretary-General' (n 65), paras 64–5.

[67] 'Report of the Secretary-General' (n 65) annex (Statement issued by the Spokesman of the Secretary-General on the Outcome of the Referenda in Cyprus [2004]).

[68] Hoffmeister (n 53) 184.

[69] Ibid., citing a 2005 Turkish study.

[70] See e.g. Hannah K. Strange, 'U.S. Biased Over Cyprus, Say Congressmen' *United Press International* (8 July 2004) (Gene Rossides, president of the American Hellenic Institute defended the Greek Cypriot community's reaction to the plan by observing: '[T]he Annan plan did not deal with the Greek Cypriots in a fair and balanced way. "How can a plan be fair and balanced which permits the continuation of Turkish armed forces in perpetuity with intervention rights … (and) which leaves 119,000 illegal (Turkish) settlers (despite) … the Geneva Convention in Cyprus?"').

[71] Hoffmeister (n 53) 172.

[72] See e.g. 'Colonisation of the Occupied Part of Cyprus, Written Declaration 424 of the Parliamentary Assembly of Europe' (2009) available at <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12166&lang=en > accessed 6 September 2018; European Parliament Res. B7-0068/2010 (2010), para. 35, available at <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=B7-0068/2010> accessed 20 March 2018.

[73] Ramses Amer, 'The Ethnic Vietnamese in Cambodia: A Minority at Risk' (1994) 16 *Contemporary Southeast Asia* 210, 219–22.

in the 400,000–500,000 range. The settlers fell into two groups: as many as half were returning to Cambodia after having fled violence in the previous decade, while another was 'new migration of Vietnamese settlers who established themselves as shop owners, vendors, farmers or fishermen'.[74]

The Security Council failed to address the Vietnamese invasion and occupation because of a threatened Soviet veto, but the General Assembly dealt with it in annual resolutions. From 1983 to 1989, these resolutions expressed 'serious concern about reported demographic changes imposed in Kampuchea by foreign occupation forces'.[75] However, the resolutions did not concomitantly urge the withdrawal of the agents of demographic change.

The fate of the Vietnamese settlers was raised by Cambodian parties in the multilateral Paris peace negotiations that were held between 1989 and 1991. The Kampuchean representatives were extremely hostile to the Vietnamese settlers, arguing their continued presence would *de facto* perpetuate the Vietnamese occupation, and that they would serve as puppets of Vietnam, and so forth.[76] These arguments were rejected by the peace brokers, and were not reflected in the final instruments.

Indeed, the internationally-sponsored and endorsed peace agreement did not call for the removal of any civilian settlers. Instead, following an Australian suggestion, it transformed the settler question into one of voter registration, to be decided by the new government under the supervision of a United Nations authority.[77] However, many settlers were allowed to participate in the special election for a new government. Voting would be open to those born in Cambodia, or with at least one parent born there,[78] a concession to the large numbers of settlers whose families originated in northern Cambodia and had fled in prior decades. This ultimately allowed many Vietnamese to participate in the elections. Notably, the peace agreement and its associated documents only required the withdrawal of Vietnamese military forces;[79] the civilians were allowed to stay, under the protection of the UN transitional regime and its peacekeepers.

However, many of Vietnamese fled in anticipation of mistreatment by the new Cambodian government, and many more fled when those fears were realized, and the Khmer Rouge massacred thousands. The years following the Vietnamese withdrawal saw widespread attacks on the Vietnamese population, which the UN condemned, but failed to stop.[80] After a new Cambodian government was elected, the situation has stabilized significantly. Nonetheless, it seems the majority of the settlers—some 700,000 people or 5% of

[74] M. Giovani Merli, 'Estimation Of International Migration For Vietnam 1979–1989' (1997) 97-04 Univ of Wash. Ctr for Studies in Demography & Ecology Working Paper Series 97-04, 6–9.

[75] UN Security Council Res. 38/3 (1983) UN Doc. S/RES/38 (1983); UN Security Council Res. 40/7 (1985) UN Doc. S/RES/40 (1985); UN Security Council Res. 44/22 (1989) UN Doc. S/RES/44 (1989).

[76] Steven Erlanger, 'In Fear, Settlers from Vietnam Leave Cambodia' *New York Times* (23 September 1989); Michael Haas, *Genocide by Proxy: Cambodian Pawn on a Superpower Chessboard* (PRAEGER , 1991) 200, 222 (noting that other countries involved in peace process rejected Cambodian demands that it include 'just solution' to the issue of 'foreign settlers').

[77] The UNTAC rejected a Cambodian proposal that registration of Vietnamese-born voters incorporate ethnic criteria. See 'Third Progress Report of the Secretary-General of the UNTAC' UN Doc. S/25124 (1993), paras 33–4. See also ibid. para. 30 (noting sensitivity of Cambodians to voting by Vietnamese).

[78] 'Agreement on a Comprehensive Political Settlement of the Cambodia Conflict', annex III, para. 4 <https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/agree_comppol_10231991.pdf> accessed 20 March 2018.

[79] Ibid. annex II, para. V.

[80] Caroline Hughes, *UNTAC in Cambodia: The Impact on Human Rights* (ISEAS Publishing 1996) 65–70.

Cambodia's population—have remained to this day,[81] despite significant hostility from the government and Khmer population.[82]

VI. The Baltic States

A. Background

During World War II, on 15–17 June 1940, the Soviet army occupied the Baltic States (Estonia, Lithuania, and Latvia) in full.[83] However, the Soviet occupation began before the UN's creation and prior to the Fourth Geneva Convention. The Soviet occupation lasted until 1990, but the extent to which the Soviet Union (and later the Russian Federation) violated any international prohibition on 'settlement activity' remains unclear, as it depends on whether the convention's provisions apply to pre-existing occupations, and the extent and nature of their incorporation into reflecting customary international law.[84] A straightforward reading of the convention suggests its effect is purely prospective, and would not apply to occupations resulting from prior armed conflicts.[85] Moreover, the Baltics were not parties to the Geneva Conventions until the 1990s. However, some Baltic officials have claimed the Soviet Union settlement policy violated Article 49(6).

Except for a brief period of Nazi occupation preceding the end of World War II,[86] the Baltic States remained under Soviet control until the break-up of the Soviet Union. Numerous states and organizations continued to recognize the sovereign legal personality of the Baltic States and referred to them as being under occupation, including the US,[87] European Court of Human Rights,[88] the Council of Europe,[89] and the European Parliament.[90] The UN adopted resolutions reproved the Soviet Union for 'occupation' of the Baltic States—but, like many of the European institutions just mentioned, only after they

[81] 'Cambodia' (*CIA World Factbook* 14 March 2018) available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> accessed 20 March 2018.

[82] See Jennifer S. Berman, 'No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia' (1996) 87 *California Law Review* 817 (arguing Cambodian treatment of Vietnamese settlers violates international law). See also Laura Villadiego, 'Hope Floats: Cambodia's Ethnic Vietnamese Forced to Live on the Water' *Post Mag.* (14 September 2014) <http://www.scmp.com/magazines/post-magazine/article/1592212/hope-floats> accessed 20 March 2018.

[83] Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Brill 2003) 84. These countries had enjoyed internationally-recognized independence since the end of World War I.

[84] For a thorough discussion of the competing views, see generally ibid.

[85] See Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Art. 153. <https://ihldatabases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> accessed 20 March 2018.

[86] The German army entered Lithuania on 22 June 1941. See *New York Times* (23 June 1940), 1; and entered Latvia and Estonia in July the same year, see e.g. 'Finns See Estonia Fall' *New York Times* (4 July 1941), 2; 'Invaders Closing in Toward Leningrad' *New York Times* (17 July 1941), 4.

[87] See e.g. Sen. Con. Res. 87, 110th Cong. (2008).

[88] See e.g. *Kolk & Kislyiy v. Estonia* No. 23052/04 (ECtHR, 17 January 2006) ('After the German occupation in 1941–44, Estonia remained occupied by the Soviet Union until the restoration of its independence in 1991').

[89] See e.g. Parliamentary Assembly Res. 189 (1960) (Council of Europe) (recognizing the twentieth anniversary of the 'occupation' and 'illegal annexation' of the Baltic States and noting that a great many governments still accord *de jure* recognition to the independent existence of the Baltic States).

[90] See e.g. Resolution on the Situation in Estonia, Latvia and Lithuania, Eur. Parl. Doc. I-777/80 (13 January 1983), para. D (condemning that Soviet 'occupation' of Baltics 'continues'). See also Parliamentary Assembly Res. on Estonia P6_TA 0215 (24 May 2007), paras P-Q.

regained independence.[91] On the other hand, the United Kingdom[92] and Canada[93] both accorded the Baltic annexation *de facto* recognition. Still others went so far as to recognize the Baltic incorporation *de jure*.[94]

From the inception of its occupation in June 1940, the Soviet Union implemented policies intended to colonize, ethnically dilute, and 'Russify'[95] the Baltic nations.[96] In addition to the nationalization of 'all large commercial, industrial, and transportation [Baltic] enterprises',[97] the Soviet Union collectivized the Baltic agricultural industries,[98] repressed religion in the Baltic States,[99] and required Baltic schools (first explicitly and then constructively) to give instruction in Russian.[100] Arguably, however, the Russification policies that have had the biggest impact are those that changed the demographic composition of the Baltic States: the settlement of great numbers of Russians and other Soviet nationals within the Baltic States helped spread Russian/communist ideals to the Baltic masses.[101]

The net result of Moscow's Russification policies was a severe reduction in the native groups as a proportion of the total population in the Baltic States. The ethnic Latvian population had decreased from 77% in 1934, to only 52% in 1989.[102] The Estonians were similarly affected by the number of ethnic Estonians falling from 88% to 61.5% over the same period.[103]

In the movement towards independence, the status of these large Russian populations became a topic controversial debate. The more radical Baltic nationalists in Latvia and Estonia maintained that the Soviet Russification policies and the subsequent influx of ethnic Russians violated Article 49(6),[104] and that they were thus legally liable to deportation. Latvian politicians spoke openly of their right to use social and economic pressure to effectuate out-migration.[105] The citizenship laws enacted in Latvia and Estonia reflect

[91] Mälksoo (n 83) 170.

[92] See e.g. *Tallinna Laevauhisus v. Tallinna Shipping Co.* (1946) 79 Ll. L. Rep. 245, 251.

[93] See e.g. *Estonian States Cargo & Passenger Line v. SS "Elise" and Messrs Laane and Balster* (1949) 4 DLR 247 (Can. Exchequer Ct.), reprinted in part in William W. Bishop Jr, 'Judicial Decisions' (1949) 43 *American Journal of International Law* 803, 816–18 (stating that in Canada, the 'Government of the E.S.S.R. is recognized "to be the *de facto* Government of Estonia" '). France and Italy also accorded the Soviet Republics *de facto* recognition.

[94] Sweden, Switzerland, the Netherlands, New Zealand, and, for a period during the 1970s, Australia accorded the Baltic Soviet republics *de jure* recognition.

[95] The demographic-changing policies of the Soviet Union in the Baltic States have been described as 'Russification' of those nations. Mälksoo (n 83) 218.

[96] See e.g. Conference on Security and Cooperation in Europe, Hearing Before the Subcomm on Int'l, Political, & Military Affairs of the H Comm on Int'l Relations, 94th Cong. 27 (1975) (letter from Joseph Galia, President of the Lithuanian-American Community of the USA).

[97] E.g. Charles J. Kersten, Chairman of the H. Select Comm. on Communist Aggression, 83rd Cong., 'Special Report No. 12: Communist Takeover & Occupation of Latvia' (1959) 13. See also Mälksoo (n 83) 184.

[98] Kersten (n 97) 16–18.

[99] Ibid. 18–20.

[100] Sonia Bychkov Green, 'Language of Lullabies: The Russification and De-Russification of the Baltic States' (1997) 19 *Michigan Journal of International Law* 219, 245 and n. 186, 253–5.

[101] Kersten (n 97) 13.

[102] 'Report on the Application by Latvia for Membership of the Council of Europe' Eur. Parl. Assemb. Doc. No. 7169 (1994), app. IV, 1, Council of Eur. Parl. Assemb. Working Docs (Strasbourg 1995). Of the non-ethnic population in Latvia 34% were Russian, 4.5% were Belorussian, and 3.5% were Ukrainian. Ibid; James Hughes, 'Exit in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration' (2005) 43 *Journal of Common Market Studies* 739, 743–4.

[103] 'Estonia' UN Doc. CERD/C/329/Add.2 (1999), para. 38.

[104] See Mälksoo (n 83) 223.

[105] Ibid. ('Leaders of both LNNK and Fatherland of Freedom have repeatedly gone on record as saying that the 'colonists' who entered Latvia under 'Soviet military occupation' are legally liable to deportation under the Geneva convention, which forbids the settling of colonists on occupied territory. They have declared that no one will be deported by force, but have spoken openly of Latvia's right to use social and economic pressure. Their desired policy on residence and work permits would in fact amount to mass deportation by softer and slower means').

the nationalist attitude and make it extremely difficult for non-ethnic minorities to qualify for naturalization. By contrast, the citizenship laws in Lithuania are relatively lax; the small Russian population was not perceived as threatening to either the Lithuanian national identity or independence.

B. Transitional and Post-Conflict Treatment of Settlers

Making up 12% of the Lithuanian population, Russian-speaking settlers were treated much less harshly under the citizenship laws in Lithuania than they were in Estonia or Latvia. Although only Lithuanian citizens in 1940 and their descendants were granted automatic citizenship when Lithuania reclaimed independence, all other non-military persons in the territory having either a permanent place of residence or a legal source of support had a two-year window to 'opt-in' to Lithuanian citizenship.[106] Once the election period was over, Russian settlers could naturalize under the same terms as other foreigners,[107] with the exception of Soviet military and security personnel.[108]

Upon reclaiming independence and in the immediate years thereafter, neither Estonia nor Latvia took any steps to expel settlers, nor did they require their removal as a precondition to independence. Indeed, at first the Estonia legislature enacted fairly minimal naturalization requirements for non-ethnic Estonia settlers, merely necessitating permanent post-occupation residence[109] for at least two years before and one year after the citizenship application date plus a and knowledge of Estonian.[110] A harsher new citizenship law was adopted in 1995. To attain citizenship under the 1995 version of the law applicants must: (i) demonstrate five years of permanent residence in Estonia before they may apply, plus an additional year of residence after registering an application; (ii) be at least 15 years of age; (iii) meet a high level of fluency in Estonian; (iv) know the Estonian Constitution and Law on citizenship; (v) have a permanent legal income; (vi) demonstrate loyalty to the State of Estonia; and (vii) take a prescribed oath.[111] However, Russians living in Estonia prior to July 1990 were exempted from the five-year residency requirement if they were living in Estonia permanently pursuant to the 1993 Aliens Act.[112] Both active military and retired Soviet Union military personnel were ineligible for Estonian citizenship,[113] though they were allowed to remain in the country as permanent residents.[114]

[106] Citizenship Law (1989) art. 1(3) (Lith). The deadline to apply was 4 November 1991. Ibid.

[107] Ibid. (as amended in 1991).

[108] Ruling on the Compliance of the Seimas Resolution: 'On Amending Item 5 of the Resolution of the Supreme Council of the Republic of Lithuania "On The Procedure for Implementing the Republic of Lithuania Law on Citizenship"' with the Constitution of the Republic of Lithuania No. 1-2080 (Lith. Const. Ct 1994) 8–10 <http://eudo-citizenship.eu/NationalDB/docs/LITH%2013%20April%201994%20Ruling%20%28English%29.pdf> accessed 6 September 2018.

[109] The earliest date for establishing permanent residence was set at 30 March 1990. Citizenship Law (n 106).

[110] Ibid.

[111] Law on Citizenship, RT I, 1995, No. 12 (19 January 1995) (Est.), art. 6, <http://www.uta.edu/cpsees/estoncit.htm> accessed 20 March 2018 (unofficial translation).

[112] Ibid. art. 21. The 1993 Law on Aliens allows persons not qualified for either automatic or naturalized citizenship to become permanent residents. Estonia: Aliens Act of 1993 [Estonia], 12 July 1993, available at: <http://www.refworld.org/docid/4728a3ea2.html> accessed 6 September 2018.

[113] Law on Citizenship (n 106) arts 21(1)(6), 21(2).

[114] Compare Aliens Act (n 112) art. 11(2)(10), with ibid. art. 12(4)(6)–12(4)(7).

Latvia's citizenship laws are considered to be even more exclusive than those in Estonia.[115] During the period immediately following independence, only those persons who were Latvian citizens in 1940 or their descendants were given renewed Latvian citizenship.[116] Consequently, more than 40% of the Latvian population could not participate in the 1993 parliamentary elections.[117] The animosity towards occupation-era settlers was crystallized in the 1994 Law on Citizenship, pursuant to which applicants for naturalization must demonstrate (i) five years of post-occupation residence in Latvia; (ii) knowledge of the Latvian language, Constitution, and history; (iii) a legitimate source of income; and (iv) loyalty to the state.[118] The extremely high fluency requirements[119] and the relatively expensive application fee (equivalent to one month's wages) discouraged settlers from naturalizing. The international community expressed concern about these countries going too far in restricting the rights of settlers. On the one hand, it was generally accepted that the Baltic States had a right to base its citizenship policies on the principle of continuity with the pre-occupation state.[120] On the other hand, humanitarian principles such as non-discrimination and the reduction of stateless persons impacted the lens through which the international community viewed Estonia's and Latvia's citizenship policies;[121] because there was a concern that the denial of citizenship and expulsions of settlers might endanger the stability of these countries.[122] The EU in particular criticized the citizenship restrictions placed on former settlers. None of the discussions by international bodies suggested the permissibility of such measures was any greater because the target group were settlers brought in by an occupying power.

Ultimately, the Estonian and Latvian restrictions on Soviet settlers led to those states being deemed ineligible to join the European institutions immediately following independence.[123] Latvia's citizenship policies were initially so strict, in fact, that Estonia became concerned that Latvia's laws would impact *Estonia's* ability to join the EU, leading Estonia officials to encourage a Latvian naturalization approach more in line with its own. It was not until both countries relaxed their citizenship laws that they were finally invited to become EU members in the summer of 2004. In the end, therefore, the international community

[115] See 'Recommendations by the CSCE High Commissioner on National Minorities upon His Visits to Estonia, Latvia and Lithuania' CSCE Communication No. 124 (1993), annex (Letter from the CSCE High Commissioner for National Minorities to the Latvian Minister of Foreign Affairs) <http://www.osce.org/item/2959.html> accessed 20 March 2018 (critiquing the Latvian citizenship laws more harshly than those of Estonia or Lithuania) [hereinafter Letter from the CSCE High Commissioner].

[116] 'Estonia, Latvia, and Lithuania' (n 115) 150. It was additionally unclear whether non-citizens would be allowed to remain in Latvia at all. Letter from the CSCE High Commissioner (n 115) 8 ('I assume that the Government of Latvia, confronted with this situation [of numerous Russian settlers in its territory], will not decide to oblige this group or parts of it to leave the country').

[117] 'Estonia, Latvia, and Lithuania' (n 115) 150.

[118] Citizenship Law (11 August 1994) art. 12 (Lat.) (as amended through 1998) <http://www.uniset.ca/naty/latvia_en.htm> accessed 20 March 2018.

[119] Compare Letter from the CSCE High Commissioner (n 116) 10 ('Whatever language requirements are chosen, they should not exceed the level of conversational knowledge'), with Citizenship Law (n 118) section 12(3) (requiring fluency in Latvian as a prerequisite to naturalization).

[120] Mälksoo (n 83) 233.

[121] UN Doc. CCPR/C/79/Add.59 (1995), para. 12 (expressing concern that 'a significantly large segment of the population, particularly members of the Russian-speaking minority, are unable to enjoy Estonian citizenship due to the plethora of criteria established by law, and the stringency of the language criterion').

[122] Letter to the Minister of Foreign Affairs of Latvia, ref no. 1463/93/L, 3; Lowell W. Barrington, 'The Making of Citizenship Policy in the Baltic States' (1999) 13 *Georgetown Immigration Law Journal* 159, 159–60.

[123] See e.g. 'U.S. Says Baltic Nations Are Not Ready for NATO' *New York Times* (28 September 1996), 7; Council of the EU, No. 14818/01 (4 December 2001) 45, 70.

rejected the idea that the Baltic States were free to treat Russian settlers entirely as they pleased, and pressed acceptance of the principle that long-term residents of a territory had the right to acquire a nationality. It is quite clear given this that the international community would have entirely rejected any concrete steps to remove or deport Russian settlers.

VII. Conclusion

No resolution to conflicts involving settlers has involved their removal from previously occupied territories. In regards to those conflicts that have come to an end—East Timor, Cambodia, and the Baltics, it is quite clear that demands for settler removal would have made the successful end of the conflict almost impossible. And in ongoing conflicts with settlers, the addition of removal requirements to these potentially irresolvable conflicts certainly would not make them any more tractable.

It bears noting that there are several other conflicts involving settler populations that have not been examined here, simply because the post-conflict treatment of the settlers has received little attention in the resolution of these disputes.[124] Yet the actual or proposed solutions to these conflicts clearly do not contemplate settler withdrawal. For example, the Syrian occupation of Lebanon began in the 1980s, and lasted until 2005. Hundreds of thousands of Syrians migrated to Lebanon during this period, causing massive dislocations in the local economy. While the Security Council called on Syria to withdraw its troops,[125] there were no similar demands regarding Syrian civilians, who indeed stayed in the country in large numbers. Similarly, Armenia has maintained an active policy of settler Armenians in occupied Nagorno-Karabakh. The Organization for Security and Co-operation in Europe's (OSCE) 'Minsk Group', co-chaired by the US, France, and Russia, has been stewarding attempts to end the conflict. While the OSCE has documented Armenian settlement efforts, neither its proposed roadmap of principles for resolving the conflict, nor any of its statements, mention a removal of settlers, but only a return of refugees.

In short, at least outside the Israeli–Arab context, the overwhelmingly dominant conception of 'just peace' in the modern era does not contemplate the removal of civilian populations, even when their original transfer was wrongful under the Fourth Geneva Convention. Perhaps this is because of the practical difficulties of any other approach. Perhaps this is because just peace may require the punishment of perpetrators but not the imposition of penalties on innocents. Or perhaps it is because just peace strongly disfavours population-wide coercive measures; there may be an understanding that the dislocation and resentments caused by such dislocations would be destabilizing. Or perhaps it is because the notion of peace contemplates peoples living peaceably together.

[124] For a more thorough discussion of the Art. 49(6) issues in these conflicts, see Kontorovich (n 1).
[125] UNSC Res. 1559 (2004) UN Doc. S/RES/1559 (2004).

14

Right to Land, Housing, and Property

Elisenda Calvet Martínez and Aitor Díaz Anabitarte***

I. Introduction

In post-conflict situations, there is growing concern for the question of safeguarding the right of refugees and displaced persons to return to their homes, land, and property. A clear example of this trend is the adoption, in November 2016, of the peace agreement between Colombia and the Fuerzas Armadas Revolucionarias de Colombia (FARC) after 52 years of internal armed conflict, in which the first issue addressed was comprehensive land reform. This considered that access to land, the transformation of the countryside, and the development of agriculture create welfare for the rural population and contribute to building stable and lasting peace.

In this context, the adoption of the Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons by the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations, in 2005 (Pinheiro Principles),[1] was an important step forward, in order to provide further guidance on the effective implementation of programmes and mechanisms for the restitution of housing, land, and property. The right to land cannot be regarded as a universally recognized human right, but land is related to other human rights such as the right to adequate housing, the right to food, the right to health, the right to self-determination, the right to participate in cultural life, the right to water, and the right to work. The jurisprudence of regional bodies for protection of human rights in the Inter-American and African system has dealt with issues of land in relation to the rights of indigenous peoples, including the right to life, property, and many economic, social, and cultural rights.

While the right to property and the right to housing are expressly set out in various international human rights instruments, post-conflict regions face similar problems arising with the right to land. That is why they are treated together in this paper. The right to property is often associated with certain Western and liberal values that are not necessarily found in other parts of the world,[2] which explains why the 'right to private property' is absent in the

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[1] Sub-Commission on the Promotion and Protection of Human Rights, 'Principles on housing and property restitution for refugees and displaced persons', Final report of the Special Rapporteur, Paulo Sérgio Pinheiro (28 June 2005) UN Doc. E/CN.4/Sub.2/2005/17.

[2] Miriam J. Anderson 'The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (The Pinheiro Principles): Suggestions for Improved Applicability' (2011) 24 *Journal of Refugee Studies* 305.

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most important international human rights treaties (including the International Covenants of Human Rights). Accordingly, in this contribution the term 'right to land, housing, and property' will be used to address these issues in a broad sense, in order to include the different legal systems. While the rights to housing and land are intended to ensure that every person has a safe place to live in peace and dignity (including non-owners), the right to property aims to protect the rights of owners, especially from deprivation of their homes or goods. In summary, treatment of housing, land, and property in post-conflict situations is complex and does not have a fixed solution which covers the restitution of land and property, with economic compensation or offering an alternative house or land, where restitution is not possible. In any case, securing access to land is a crucial factor in the recovery and reconstruction of a country after violent conflict[3].

As a result, the right to land and property should merit special attention, particularly within the *jus post bellum* discussion.[4] This is for two main reasons: firstly, as mentioned above, the right to land contributes to the enjoyment of other human rights and helps victims of conflicts to secure a place to live, to grow food and earn income and, at the same time, enables people to rebuild economic and social relationships[5]. Secondly, the right to land can be linked to positive peace, a concept that goes beyond the mere absence of violence, and which since the 1960s has been understood from the peace research approach as a necessary condition for the establishment and consolidation of a true, just, and lasting peace.[6] This interpretation, in terms of the *jus post bellum* debate, goes beyond the mere absence of violence, which means more than a 'mere exit' of the conflict.[7] Therefore, in a context of conflict resolution and *jus post bellum*, strengthening the right to land, housing, and property (understood as a legal implementation of the principle of positive peace) can be an important component in attaining a just and sustainable peace.

This essay seeks to examine to what extent adequate protection and guarantee of socio-economic rights—such as the right to land, housing, and property, in post-conflict settlements—contributes to a just and lasting peace, understood also as positive peace. Section II explores the evolution of the concept of peace, introducing the concept of positive peace and the values that are associated with it. Section III and IV examine the treatment of socioeconomic rights in post-conflict situations from the *jus post bellum* and transitional justice perspective, focusing on the right to land, housing and property as one of the key elements for reconstruction and lasting peace. At least, the conclusions show that positive peace and addressing socio-economic rights in a post-conflict context appear jointly, like two sides of the same coin, to comprise an important principle of the *jus post bellum* that contributes to just and sustainable peace.

[3] FAO, 'Access to rural land and land administration after violent conflicts', FAO Land Tenure Studies, Rome, 2005.

[4] Senjou Kang, 'Post-conflict economic development and sustaining the peace', in David T. Mason and James D. Meernik (eds), *Conflict prevention and peacebuilding in Post-war societies: Sustaining the peace* (Routledge 2006).

[5] FAO (n 3).

[6] Heidi Burgess and Guy M. Burgess, *Encyclopedia of conflict resolution* (ABC-CLIO 1997) 233–4.

[7] Dominik Zaum, 'The Norms and Politics of Exit: Ending Post-Conflict Transitional Administrations' (2009) *Ethics & International Affairs* 189.

II. From Negative Peace to Positive Peace: Building a Just and Sustainable Peace

The definition of 'peace' has been long discussed and that is why this paper will examine, briefly, the evolution of this concept towards the notion of a just and lasting peace. To this end, the definition of peace presents two characteristics: difficulty and importance. The difficulty is due to the huge number of meanings and dimensions that one can find behind the concept. The importance is because of the relationship that peace has in the 'war-and-peace' debates.[8] Finally, the definition of peace will be framed in the discussion of *jus post bellum*, stressing the need to promote a positive peace[9].

The starting point for a notion of peace may be the etymological one, which relates peace to social construction arising from a social covenant,[10] and gives rise to the *pax-pactum* conception.[11] Moving forward, it is interesting to highlight the proposal that Christopher Pieper sets up in the *Encyclopedia of Violence, Peace and Conflict,*[12] where the author distinguishes between a descriptive and a prescriptive definition of peace. The first notion considers only the material and formal conditions needed to define peace, that is, the mere absence of violence and hostilities, or a non-war state. In this regard, it is noted that if war is usually defined positively, peace is defined (as a first approach) as the negative of war, that is: as those times when there is no war, understood as political confrontation through armed struggle between two similar groups[13] or, along similar lines, as, 'more or less lasting suspension of violent forms of rivalry between political units'.[14] Thus, while war has been defined as the strong concept of the equation,[15] peace appears at first as the dependent concept. In short, and in the term of Thomas Hobbes, the concept of (negative) peace can be defined as 'the time that is not war'.[16]

The negative notion of peace (peace as non-war) has been advancing and expanding to include other elements, such as welfare, justice, individual peacefulness, and social stability, which has resulted in a reconfiguration of the concept of peace. From this perspective, the prescriptive notion of peace includes new aspects and has its own meaning; it becomes a non-dependent value. As a result of this process of adding new dimensions and conditions, a concept of positive peace emerged,[17]

The evolution of the concept of peace can be found in the classic work of Quincy Wright, *A Study of War*, where the author describes peace 'as the condition of a community in which order and justice prevail, internally among its members and externally in its relations with other communities'.[18] This definition contains two important aspects: on the one hand, the

[8] Martin Caedel, *Thinking about peace and war* (Oxford University Press 1987).

[9] Robert E. Williams Jr and Dan Caldwell, 'Jus Post Bellum: Just War Theory and the Principles of Just Peace' (2006) 7 *International Studies Perspectives* 309.

[10] Duane Cady, 'Backing into Pacifism' (1984) 10 *Philosophy and Social Criticism* 174.

[11] In other words, peace is built on the basis of dialogue between humans and the potential capacity to reach agreements (peace pacts). An alternative to the traditional, hegemonic and realistic perspective of *si vis pacem para bellum*.

[12] Christopher Pieper, 'Peace, Definitions and concepts', in Lester Kurtz (ed.) *Encyclopedia of Violence, Peace and Conflict* (Elsevier 2008) 1548–57.

[13] Norberto Bobbio, *El problema de la guerra y las vías de la paz* (Gedisa 1992) 160.

[14] Raymond Aron, *Paix et guerre entre les nations* (Calman-Levy 1962) 192.

[15] Norberto Bobbio, *Teoría general de la política* (Trotta 2009) 549.

[16] Thomas Hobbes, *Elements of law, natural and politics* (Barnes & Noble 1969 [1650]) I, 14, and 11.

[17] David Cortright, *Peace: a history of movements and ideas* (Cambridge University Press 2008) 6.

[18] Quincy Wright, *A study of war* (University of Chicago Press 1942) 174.

relevance of 'order' as something related to law (at the national and international level); and, on the other hand, the importance of justice. Therefore, the definition of peace is conditioned by the content and meaning that is given to the concept of justice. Later on, Johan Galtung, at the end of the 1960s, introduced an epistemological shift within international studies through developing a different conception of conflict, and, as a result, a redefinition of the concepts of peace and violence, thereby producing one of the first, and most important, impacts of peace research as a scientific discipline.[19] As a result of this, the concepts of positive peace and negative peace will be explained together and will be clearly linked to a specific definition and characterization of the notion of violence, based on the redefinition of the concept of conflict achieved by the peace research studies.

A. Redefining Conflict: Direct Violence, Structural Violence, and Cultural Violence

For decades, even centuries, conflict was defined and understood as something to avoid; as something bad, in itself. Regarding this interpretation, peace research studies have developed a different version of conflict which has been the one used in the social sciences.[20] That is, a perspective that interprets conflict as something natural and inherent to human communities and therefore not strictly with negative implications. It is a different conceptualization of conflict, based on a positive and creative perspective. In other words, a different understanding of conflict based on Arendt[21] and Habermas[22] perspective of politics and the human condition. This proposal runs counter to the antagonistic proposal of Carl Schmitt (built on the friend–enemy dichotomy) and the classical Thomas Hobbes' realistic perspective. In this context, and also drawing on peace research studies, the concept of violence will also undergo a redefinition based on new dimensions to consider:[23] direct violence, structural violence, and cultural violence. Three forms of violence that, later, will allow a better understanding of the concepts of negative peace (linked to direct violence) and positive peace (linked to structural and cultural violence).

The first type of violence, direct violence, refers to physical violence. This could be defined as the violence exercised by a group of individuals over another group (or an individual over another individual) through any type of instrument, means or technology. That could range, for example, from using physical force to the use of drones.

The second type of violence, indirect violence, includes structural (or institutional) violence and cultural violence. This second type of violence, with two different expressions, could be defined as that violence 'that makes humans want to harm one another without a

[19] Johan Galtung. 'Violence, Peace and Peace Research' (1969) 6 *Journal of Peace Research* 167. Last contributions from peace research regarding the definition of the concept of peace, working on the imperfect peace concept. A new point of view based on the interaction between negative and positive visions. A hybrid version that places the debate on another level of discussion considering conditions of social and political conflict, which is a realistic arrangement that takes into account the possibilities of building effective peaceful scenarios. See also Chapter 4 in this book.

[20] Johan Galtung and Charles Webel, *Handbook of peace and conflict studies* (Routledge, Taylor and Francis Group 2007).

[21] Hannah Arendt. *The human condition* (University of Chicago Press 1998).

[22] Jürgen Habermas, *The Theory of Communicative Action* (Beacon Press 1984).

[23] Johan Galtung. 'Cultural Violence' (1990) 27 *Journal of Peace Research* 291.

direct confrontation or even will to harm'.[24] Thus, structural or institutional violence refers to those structures and social relations that hinder the development of the potential capabilities of each individual. So, there is structural violence as a result of a 'difference between the potential and the real'.[25] Meanwhile, cultural violence refers to legitimating systems, speeches, and ideologies that justify (and support) the existence of direct and structural violence.[26] Consequently, there are three types of violence that will complete the redefinition of conflict and the concepts of negative and positive peace developed by the peace research tradition.

B. Positive Peace

In this context, positive peace must be placed at a higher level than negative peace and direct violence. In fact, the concept of positive peace (and therefore also of structural violence) emerges within peace research as a result of efforts to understand the conflict in all its features. A need produced by the classical explanations of conflict and violence (Clausewitz[27] or Morgenthau,[28] for example) being seen as insufficient to understand conflict and the 'war-and-peace' debate.

Nonetheless, one might wonder about some possible scenarios of direct violence without structural violence. Two examples can be put forward: the case of extreme violence against a particular ethnic group, and an episode of confrontation within the borders of a state that, despite having consolidated high levels of welfare thanks to an efficient system of redistribution of wealth, harbours an explicit armed conflict between organized groups. In the first case, the literature that supports the concept of positive peace (and therefore of structural violence) will refer to the concept also as cultural violence, understood as the dissemination of a speech or extension of a public opinion that legitimizes the use of violence. In this sense, cultural violence will become part of the structural component. On the other hand, in the second case, the answer from the peace research approach would insist on the existence, even if it was in the sphere of the latent, of some kind of structural conflict that was curtailing the free development of the capacities of each human being (such as national identity, job insecurity as a result of temporality, externalization of services, and ultimately, an effective loss of social and political rights), as an explanation for violent confrontation; beyond the ongoing development of an effective and efficient welfare state.

In summary, a positive notion of peace has emerged from a definition of peace as the negative of war, in which the mere absence of violence has to be combined with a minimum of social welfare, fundamental freedoms, justice or what is the same, the lack of cultural violence (cultural discourse or dialectic construction that legitimizes violence) and, most importantly, the complete absence of structural violence. A kind of violence that, as shown above, occurs in situations of social impoverishment, political repression, lack of respect for human rights, or disregard of the right to self-determination.[29] Thus, peace is no longer

[24] Kathleen M. Weigert, 'Structural Violence', in Lester Kurtz (ed.) *Encyclopedia of violence, peace and conflict* (Elsevier 2008) 2007–10.
[25] Jean Paul Lederach, *El abecé de la paz y los conflictos* (Catarata 2000) 32.
[26] Galtung 'Cultural violence' (n 23).
[27] Carl von Clausewitz, *On war* (Penguin Books 1968).
[28] Hans J. Morgenthau, *Politics among nations. The struggle for power and peace* (Alfred A. Knof 1978).
[29] Cortright (n 17) 7 and Galtung 'Cultural violence' (n 23).

considered as the mere absence of violence (in the strict sense of physical violence, injury, or pain) but other conditions are required to be able to speak of the existence of peace.[30] So, the concept of positive peace can be directly linked to the notion of just and sustainable peace in the context of the *jus post bellum* debate.[31]

III. Socio-Economic Rights in Post-Conflict Situations: The Role of *Jus Post Bellum*

The *jus post bellum* doctrine has been traditionally linked to the just war theory,[32] where if a war has a just cause and is fought justly, it must also achieve a just post-conflict settlement.[33] The notion of *jus post bellum* has been subject to discussion and has no authoritative definition yet, but can be described as a 'body of legal and prudential norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace'.[34] Other authors refer to *jus post bellum* as 'moral and legal considerations that apply to situations where a war or armed conflict has come to an end,[35] while Stahn offers a tripartite conception of armed conflict that would include *jus ad bellum*, *jus in bello*, and *jus post bellum* where international actors might consider the impact of their decisions on post-conflict situations before embarking on an intervention with the use of force.[36]

Moreover, transitional justice addresses the legacies of the past in post-conflict situations or in the transition from an authoritarian regime towards a state based on the rule of law and respect for human rights. The United Nations Secretary-General describes transitional justice as comprising 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[37] In order for a state to address the atrocities committed in the past, transitional justice provides different mechanisms aimed at attaining the right to know, the right to justice, the right to reparation and guarantees of non-repetition.[38] These four elements are complementary and not mutually exclusive and need to be interpreted in a holistic manner.[39] Along similar lines, some studies show that a

[30] Adam Curle, *Conflict and peace* (Herder 1978) 88.

[31] T. David Mason and James D. Meernik (eds), *Conflict prevention and peacebuilding in post-war societies. Sustaining the peace* (Routledge 2006).

[32] Brian Orend, 'Jus Post Bellum' (2000) 31 *Journal of Social Philosophy* 117 and Gary J. Bass 'Jus Post Bellum' (2004) 32 *Philosophy & Public Affairs* 384.

[33] Francisco de Vitoria, *Relecciones de Indis y De iure Belli* (Unión Panamericana, 1963 [1539]) 250–75; Immanuel Kant, *La metafísica de las costumbres* (Tecnos, 1989 [1797]) 187–8; and Michael Walzer, *Guerras justas e injustas: una aproximación moral con ejemplos históricos* (Paidós Estado y Michael sociedad, 2001 [1977]) 381–432.

[34] Jens Iverson, 'Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) 7 *International Journal of Transitional Justice* 420.

[35] Larry May and Elizabeth Edenberg, *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2013).

[36] Carsten Stahn 'Jus post bellum: mapping the discipline(s)', in Carsten Stahn and Jan K. Kleffner, *Jus post bellum: Towards a law of transition from conflict to peace* (TMC Asser Press, 2008) 102.

[37] UN Secretary-General report, *The rule of law and transitional justice in conflict and post-conflict societies* (23 August 2004) UN Doc. S/2004/616.

[38] UN Commission on Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc. E/CN.4/2005/102/Add.1.

[39] UN Secretary-General (n 37) 9.

combination of trials and amnesties, as well as trials, amnesties, and truth commissions, has a positive impact on democracy and human rights.[40]

By contrast, the inherited notion of *jus post bellum* aims at a return to the legal *status quo ante*, but that can be considered too restrictive an approach, because following an internal armed conflict it does not make sense to go back to the situation that caused the conflict.[41] Thus, the concept of *jus post bellum* should focus on a just and sustainable peace and not just aim for the end of the violence. Therefore, *jus post bellum*, like transitional justice, should be both backward- and forward-looking,[42] and in the case of socio-economic rights, forward-looking to a positive peace.

In this context, *jus post bellum* and transitional justice have in common the existence of a legacy of mass abuse.[43] Insofar as their goals are different 'there is a significant overlap between transitional justice and *jus post bellum* since the kind of peace sought in *jus post bellum* is a just peace, and that almost always means one that is less oppressive than that what existed before'[44]. However, transitional justice can be considered the broader concept because it applies in a context of transition not only from conflict but also from an authoritarian regime, whereas *jus post bellum* only relates to the end of armed conflict progressing towards peace.

Within the transitional justice field, some voices have highlighted the importance of addressing socio-economic rights (in addition to civil and political rights) in post-conflict situations, not only as the site of human rights violations but also as the roots of conflict: 'a comprehensive strategy for transitional justice would, therefore, address the gross violations for *all* human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place'.[45] Along similar lines, Mani advocates for a transitional justice that would have more impact in the reduction of socio-economic injustices by addressing social injustice as the underlying cause of armed conflict, through truth commissions or collective reparations.[46] While Sharp brings forward a 'fourth generation' of transitional justice that would include, among other aspects, economic violence; defined as violations of economic, social and cultural rights, corruption, plunder of natural resources, and other economic crimes.[47] Accordingly, transitional justice would go beyond retributive justice to promote social justice by addressing socio-economic rights. However, some scholars are against this trend, claiming that transitional justice is of a temporary and exceptional character and has limited resources,[48] and therefore, socio-economic rights should be addressed within a development or reconstruction framework.

[40] Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32 *Human Rights Quarterly* 982.

[41] Stahn (n 36) 106–7.

[42] Ruti Teiel, 'Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May' (2013) 24 *The European Journal of International Law* 335.

[43] Mark Freeman and Darko Djukic, '*Jus Post Bellum* and Transitional Justice', in Carsten Stahn and Jan K. Kleffner (eds), *Jus post bellum: towards a law of transition from conflict to peace*. (TMC Asser Press, 2008) 218.

[44] May and Edenberg (n 35) 12.

[45] Louise Arbor, 'Economic and Social Justice for Societies in Transition' (2007) 40 *International Law and Politics* 26.

[46] Rama Mani, 'Editorial Dilemmas of Expanding Transitional justice, or Forging the Nexus Between Transitional Justice and Development' (2008) 2 *International Journal of Transitional Justice* 253.

[47] Dustin N. Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2013) 26 *Harvard Human Rights Journal* 169.

[48] Lorna McGregor, 'Transitional Justice and the Prevention of Torture' (2013) 7 *International Journal of Transitional Justice* 29; Tafadzwa Pasipandoya, 'Economic and Social Justice as Transitional Justice in Nepal'

Therefore, *jus post bellum* could help to fill transitional justice's gaps and limitations to ensure a successful peacebuilding process,[49] and embrace socio-economic rights in order to achieve a just and sustainable peace. A peace based on its positive version, as discussed above, in the sense that it includes a real will to guarantee the absence of structural violence and also cultural violence. In other words, a new state of peace that does not involve a return to the *status quo ante* and that generates the largest number of guarantees and trusts for a lasting, just and sustainable peace.

IV. Right to Land, Housing, and Property in the Post-Conflict Context

The question of restitution of land, housing, and property is particularly relevant in relation to refugees and people who want to return to their homes, land of origin, or former habitual residence after the armed conflict ends. The international community recognizes the right of refugees and internally displaced persons (IDPs) to return voluntarily, in safe conditions and with dignity.[50] This decision should be based on a free, informed, individual choice and refugees and displaced persons must have adequate information to make the decision. Regardless of the cause of a conflict, people that have been displaced need to have their land, housing, and property restituted or must be resettled elsewhere because 'without addressing these problems in the short-term, the peace process is likely to be restricted'.[51]

The adoption of the Pinheiro Principles has contributed to strengthening the right to restitution of property in a post-conflict context and provides a set of standards on property repossession that is applicable worldwide.[52] Likewise, 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, adopted by the General Assembly of United Nations in 2005, establish that victims have the right to restitution which implies, whenever possible, the duty to 'restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred' and stresses, among other goals, the 'return to one's place of residence' and the 'return of property'.[53]

(2008) 2 *International Journal of Transitional Justice* 378–97; and Naomi Roth-Arriaza, 'The New Landscape of Transitional Justice', in Naomi Roth-Arriaza and Javier Mariezcurre (eds), *Transitional Justice in the Twenty-First Century* (Cambridge University Press 2006).

[49] Freeman and Djukic (n 43) 227.

[50] UNHCR, Handbook on Voluntary Repatriation: international protection (Geneva 1996) 6–11.

[51] FAO (n 3) 32.

[52] Anderson (n 2) 305 and Sharanya Sai Mohan, 'The Battle after the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution' (2011) 36 *Yale Journal of International Law* 461. The African Commission on Human and People's Rights considers that the Pinheiro Principles are 'emerging principles in international human rights jurisprudence'. See, among others, *Centre on Housing Rights and Evictions (COHRE) vs. Sudan*, Communication No. 296/2005, 29 July 2010, para. 204.

[53] UN Basic Principles and Guidelines, 2005, para. 19.

A. International Legal Framework

The right to land is expressly enshrined in international instruments concerning indigenous and tribal peoples, such as the International Labour Organisation (ILO) Convention No. 169 of 1989 and the Declaration on the Rights of Indigenous Peoples of 2007,[54] which recognize the importance of land for those people who own it collectively and for whom it is part of their culture. These instruments create mechanisms to protect the lands and natural resources vital to their subsistence, such as the obligation of states to consult and inform indigenous peoples before moving or displacing them, including a just and fair compensation and, where possible, the option to return to their lands.

Moreover, the right to housing is recognized in Article 25 of the Universal Declaration of Human Rights (1948) (UDHR) which provides that every person has the right to an adequate standard of living, including 'food, clothing and housing'. Furthermore, the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) establishes 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

The right to property, established in article 17 of the UDHR, entails that everyone has 'the right to own property alone as well as in association with others' and that 'no one shall be arbitrarily deprived of his property'. Nonetheless, this right cannot be considered universally recognized because neither the International Covenant on Civil and Political Rights (1966) (ICCPR) nor the ICESCR includes the right to property; they only refer to it indirectly in Article 1.2, which provides that 'in no case may a people be deprived of its own means of subsistence'. Still, the right to property could be understood as part of the right to an adequate standard of living established in Article 11 of the ICESCR, to the extent that it is related to the right to food and to adequate housing. At the regional level, the right to property is recognized in Article 1 of the Additional Protocol to the European Convention of Human Rights, in Article 14 of the African Charter on Human and People's Rights (1981), in article 21 of the American Convention on Human Rights (1969) and Article 31 of the Arab Charter on Human Rights (2004).

In a context of armed conflict, international humanitarian law does not regulate expressly the right to land, housing, or property but contains some provisions that refer to the protection of objects indispensable to the survival of the civilian population:

> It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.[55]

[54] ILO Convention No. 169 of 1989, see part II about Land, Arts 13–19; UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, Res. 61/295, 13 September 2007, see, among others, Arts 8, 10, 26, 27, and 28.

[55] Article 54 of the Additional Protocol I to the Geneva Conventions of 12 August, and relating to the protection of victims of international armed conflict, of 8 June 1977 and Art. 14 of Additional Protocol II to the Geneva

This prohibition may be considered customary law applicable in situations of both international and internal armed conflict, and is related to the prohibition of starvation as a method of warfare.[56]

At the regional level, the Convention of the African Union for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009, provides for the obligation by state parties to protect those displaced communities with special attachment to, and dependency on, land, due to their particular culture and spiritual values (Art. 4.5), to adopt necessary measures to protect individual, collective and cultural property left behind by IDPs (Art. 9.2.i), and to promote satisfactory conditions for voluntary return, local reintegration or relocation on a sustainable basis and in circumstances of safety and dignity (Art. 11).

The international legal framework reflects the trend towards recognition of a right to restitution of housing, land, and property that have been confiscated as a result of armed conflict. Next, we will examine to what extent peace agreements have addressed the issue of land and property restitution, and we then analyse what are the main obstacles and difficulties in implementing these provisions of the peace agreements and the importance of a global approach to these issues in order to achieve a lasting peace.

B. The Right to Restitution

In recent decades, the international community has focused on the question of restitution of housing, land, and property primarily in the context of the right of return of refugees and displaced persons. This attention is largely due to the unique role that restitution of housing, land, and property plays to ensure the voluntary, safe, and dignified return of refugees and displaced persons to their homes and to their places of original residence.[57]

However, the study of peace agreements shows that, from 1990 to 2019, only 217 of the 1,832 peace settlements adopted in relation to 150 peace processes included land reform and rights, which represents 11.8% of the total. Figures decrease even more if we only look at property return and restitution, finding only 108 peace agreements, which is the 5.8% of the total, according to the Pa-X Database.[58]

Peace agreements that explicitly address property return and restitution are, for example, those of Bosnia and Herzegovina, Colombia, Democratic Republic of Congo, El Salvador, India, Myanmar, Nepal, Rwanda, South Sudan, Sudan, and Sri Lanka. This is due, in part, to the predominance of reconstruction programmes and initiatives of justice in post-conflict situations that are still based on the paradigms of state security and criminal prosecution,

Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflict, of 8 June 1977.

[56] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, ICRC (Cambridge University Press 2005) see rule 54.

[57] UN Sub-Commission on The Promotion and Protection of Human Rights, Housing and property restitution in the context of the return of refugees and internally displaced persons, Preliminary report of the Special Rapporteur, Paulo Sérgio Pinheiro (16 June 2003) UN Doc. E/CN.4/Sub.2/2003/11 para. 4.

[58] Christine Bell, Sanja Badanjak, Robert Forster, Astrid Jamar, Kevin McNicholl, Kathryn Nash, Jan Pospisil, and Laura Wise, *PA-X Codebook, Version 3. Political Settlements Research Programme* (University of Edinburgh 2020), available at <www.peaceagrements.org> accessed 31 May 2020.

without paying attention to the dimension of social justice;[59] leaving the causes of conflict in the background.

Thus, according to a study on Post-Conflict Justice,[60] based on a Uppsala Conflict Data Program (UCDP)/Peace Research Institute Oslo (PRIO) dataset that included 357 armed conflict episodes between 1946 and 2006, there are six different forms of addressing the harm which took place during the conflict, reparations being one of them. The study concludes that the majority of reparations refer to property or money and in lesser proportion to general community compensation, which includes the right to return to land—or if impossible, fair compensation—to refugees and internally displaced persons.[61]

From the *jus post bellum* perspective, Stahn sketches post-conflict law as comprising six principles: fairness and inclusiveness of peace settlements, punishment of aggression, humanization of reparations and sanctions, the move from collective responsibility to individual responsibility, a combined justice and reconciliation model, and people-centred governance.[62] On the other hand, May understands that the *jus post bellum* principles are retribution, reconciliation, rebuilding, restitution, reparations, and proportionality,[63] aimed at securing a just and sustainable peace at the end of war or conflict. Although *jus post bellum* principles are under discussion, the restitution of land could fit perfectly within the restitution or reparation principle. For example, the peace agreement of Colombia with the FARC in 2016, not only deals with land reform as the first issue of concern but, in the chapter on victims, also covers the restitution of land and promotes the collective return and relocation of IDPs under voluntary, safe, and dignified conditions.[64]

An example of good practice in the restoration of housing, land, and property is the case of Bosnia and Herzegovina, where, a decade after the war ended, 90% of approximately 200,000 claims for property restitution for refugees and displaced persons had been resolved.[65] In part, one of the reasons for the success of the case of Bosnia and Herzegovina is the change of approach from 'return based on restitution' to 'restitution based on the right', which led to the depoliticization of the process of implementing laws relating to property,[66] and facilitated the restitution of housing, land and property to refugees and IDPs. However, in Kosovo, although restitution was the preferred solution, in practice, most people who had demanded the restitution of their property preferred to sell their properties after

[59] Gaby Oré Aguilar and Felipe Gomez Isa (eds), *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (Intersentia 2011) 3.

[60] Post-conflict justice is defined in this study as 'any process initiated within five years following an armed conflict that attempts to address wrongdoings which took place as part of the conflict'.

[61] Helga Malmin Binningsbø, Cyanne E. Loyle, Scott Gates, and Jon Elster, 'Armed Conflict and Post-Conflict Justice, 1946–2006: A Dataset' (2012) 49 *Journal of Peace Research* 735.

[62] Carsten Stahn, 'Jus ad bellum, jus in bello … just post bellum?: Rethinking the Conception of the Law of Armed Forced' (2006) 15 *European Journal of International Law* 938–41.

[63] May and Edenberg (n 35) 3.

[64] *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*, 24 November 2016, paras 5.1.3.5 and 5.1.3.6.

[65] Charles B. Philpott, 'From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina' (2006) 18 *International Journal of Refugee Law* 31.

[66] Rohdri Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice' (2004) 37 *New York University Journal of International Law and Politics* 553.

recovery, which raises the question of whether restitution is always the solution that best suits displaced persons.[67]

Hence, the Pinheiro Principles recognize that the right of refugees and displaced persons to restitution of housing, land, and property, with the broader aim of peacebuilding in post-conflict contexts, is essential to achieve a lasting and sustainable peace:

> All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal. (Principle 2.1)

While in a post-conflict context the restitution of land, housing, and property to refugees and displaced persons should be the preferred solution and the ultimate goal, sometimes the combination of restitution with economic compensation can be the best option.[68] Thus, the restitution may consist of a combination of assisted return with a sale of the properties to which the refugees or displaced persons do not want to return, but to which they have rights, provided they receive an adequate amount of compensation. Whatever the case may be, the will of refugees and displaced persons has to be taken into account to prevent states from resorting to compensation as an easy solution when they are not willing to promote the return of these persons.

Therefore, the right to restitution is considered by the Pinheiro Principles as an autonomous right separate from the return or non-return of the refugees or IDPs:

> The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution. (Principle 2.2)

A number of peace agreements have created ad hoc committees to resolve disputes on the return of land and property to refugees and displaced persons who decide to return to their homes and whose land has been confiscated by the government itself or acquired or occupied by other persons.[69] In other situations, land restitution, following displacement because of armed conflict, mainly affects indigenous communities, as is the case of Guatemala, where the peace agreements of 1996 provide for the establishment of a Joint Commission on Land Rights, formed by members of the government and indigenous communities,[70]

[67] Jose Maria Arraiza and Massimo Moratti, 'Getting the Property Questions Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999–2009)' (2009) 21 *International Journal of Refugee Law* 432.

[68] OCAH/DIDI, UN-HABITAT, ACNUR, FAO, ACNUDH y el CNR, Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the 'Pinheiro Principles', March 2007, 27–8.

[69] See Bosnia and Herzegovina cases, Dayton Peace Agreement of 21 November (1995), annex 7, ch. II: 'The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return'. In the case of Sudan, the Comprehensive Peace Agreement of 2005, establishes Chapter III, on the ownership of land and natural resources by a National Land Commission; also, in the Darfur Peace Agreement of 2006, set out in Article 20, a Committee on Land whereby: 'Without prejudice to the jurisdiction of courts, there shall be established a (state/regional) Land Commission to address issues related to traditional and historical rights to land and to review land use management and natural resource development processes'.

[70] The agreement on the timetable for implementation, compliance, and verification of the peace accords, 29 December 1996, provides for the establishment of a Joint Commission on Land Rights.

It is also possible to leave the resolution of conflicts over the restitution of housing, land, and property in the hands of local courts; however, judicial institutions are often weak or virtually non-existent after an armed conflict. Moreover, in cases where it is estimated that many people can claim restitution of their housing, land, and property, local courts may be overwhelmed which means that they cannot address all complaints with the necessary effectiveness.[71]

Consequently, a way to resolve disputes generated around the restitution of housing, land, and property of refugees and displaced persons is through the combination of three mechanisms: specialized courts on the issue of land, ordinary courts, and traditional authorities applying local custom. Nevertheless, an ad hoc committee can not only alleviate the workload of the courts but may also offer an effective solution in terms of cost and time to those affected, who in most cases cannot afford the payments required in a procedural court which can take months, even years, to recognize their rights.[72]

The right to restitution, given that often refugees and IDPs are outside their country of origin for years and even decades, may be restricted or limited in time by their own peace agreements or property laws adopted later. In some cases, such as Rwanda, peace agreements recognized the right to restitution of land to refugees who had not been abroad for more than ten years,[73] but did not apply this threshold to the Tutsi refugees who had fled since 1959 as a result of massacres and discrimination.[74] On the other hand, in South Africa, restitution claims could be submitted by any person who had been dispossessed of their land for any reason of discrimination from 1913 to the end of apartheid.[75] After World War II, Czechoslovakia limited the restitution of housing, land, and property confiscated during the communist regime to residents and excluded those who did not have Czech citizenship.[76]

[71] Arraiza and Moratti (n 67) 441.

[72] P. De Wit and J. Hatcher, 'Sudan's Comprehensive Peace Agreement. An Opportunity for Coherently Addressing Housing, Land and Property Issues?', in Scott Leckie (ed.) *Housing, Land and Property Rights in Post-Conflict United Nations and Other Peace Operations: A comprehensive survey and proposal of Reform* (Cambridge University Press 2009) 287.

[73] Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons, Arusha, 9 June 1993 (art. 4): 'The right to property is a fundamental right for all the people of Rwanda. All refugees shall therefore have the right to repossess their property on return. The two parties recommend, however, that in order to promote social harmony and national reconciliation, *refugees who left the country more than 10 years ago should not reclaim their properties*, which might have been occupied by other people. The Government shall compensate them by putting land at their disposal and shall help them to resettle. As for estates which have been occupied by the Government, the returnee shall have the right for an equitable compensation by the Government'.

[74] Chris Huggins 'Peacekeeping and HLP Rights in the Great Lake Region of Africa', in Scott Leckie (ed.) *Housing, Land and Property Rights in Post-Conflict United Nations and Other Peace Operations. A comprehensive survey and proposal of Reform* (Cambridge University Press, 2009) 198.

[75] Restitution of Land Rights Act No. 22, 25 November 1994, art. 2.3.

[76] The Human Rights Committee considered in *Des Fours v. Czech Republic*, Communication No. 747/1997, of 30 October 2001, that the distinction based on citizenship as a condition for the restitution of property confiscated by the authorities during the communist regime was arbitrary and discriminatory, violating art. 26 of the Covenant, para. 8.4; see among others *Simunek v. Czech Republic*, Communication 516/1992 of 31 July 1995; *Adam v. Czech Republic*, Communication 586/1994 of 25 July 1995 and *Blazek et al. v. Czech Republic*, Communication 857/1999, of 9 August 2001.

V. Conclusion

The rights to housing, land, and property involve complex issues that need to be addressed at various stages of a post-conflict situation to achieve a profound transformation, reconstruction, and sustainable peace. Often these issues are also the roots of armed conflict and, therefore, it is important to tackle injustices of the past to attain reconciliation and (re)formulate domestic law in accordance with the standards of international law.

Socio-economic rights in post-conflict situations, and land tenure in particular, have been generally ignored during the process of reconstruction and peacebuilding, since only the 18.3% of peace agreements include economic, social, and cultural rights, and among them, only 10% include land issues. For this reason, it is important to include the right to restitution of land, housing, and property in the peace settlements, albeit that is not a sufficient guarantee that these agreements will be implemented effectively and appropriately. Often, peace agreements provide for the establishment of ad hoc committees to take charge of the demands of refugees and displaced persons to return to their homes, lands, and property that have been stripped arbitrarily as a result of an armed conflict. These committees must coexist with ordinary courts and local and traditional authorities, sometimes leading to the application of different laws that may even be contradictory. Refugees and displaced persons who have had their homes, land, and property confiscated are entitled to restitution, and when this is not possible, the offer of economic compensation.

However, a combination of restitution and compensation can sometimes be the best option, depending on each case and where the return of refugees and displaced persons in safety and dignity is guaranteed. As an example, the conflict resolution in Colombia has addressed land reform in the first stage of the peace settlement to promote the restitution of abandoned and arbitrarily deprived land because of armed conflict, not only to recognize the victims but also to move from a context of violence to a context of peace with social justice.

While some authors consider that transitional justice cannot address socio-economic rights due to its temporary character and limited resources, *jus post bellum* could help to fill transitional justice's gaps and restrictions to ensure successful peacebuilding and to achieve a just and sustainable peace. A positive peace, as discussed above, would include a guarantee of the absence of structural and cultural violence and attain a new state of peace; one that would not imply a return to the *status quo ante*, but is forward-looking to a just and sustainable peace.

On the other hand, positive peace and addressing socio-economic rights in a post-conflict context appear jointly, like two sides of the same coin, as an important principle of *jus post bellum* that contributes to just and lasting peace. Moreover, the Pinheiro Principles can be used as a set of standards to be taken into account in conflict resolution and also to strengthen the right to restitution of land, housing, and property in a post-conflict context, in terms of positive peace. Thus, the concept of positive peace could be interpreted as an important statement of a future *jus post bellum* policy and included within the restitution or reparation principle, focused in particular on the allocation of property rights as one of the preconditions for reintegration and return of displaced persons.

Accordingly, the positive peace concept in *jus post bellum* debate can be an opportunity (and also a challenge) on the way to a real peacekeeping, peacebuilding, and peacemaking

process, because positive peace allows for consideration of the post-conflict process beyond the mere resolution of conflict. As a result, *jus post bellum* can benefit from the insights of transitional justice and peace research studies to depart from just war theory. These two legal, social, political, and (also) moral frameworks could provide specific content and meaning to *jus post bellum* that would allow us to further define the contours of this field in modern international law.

PART V

RULE OF LAW REFORM AND ECONOMIC REFORM

15

Jus Post Bellum as Definition and Practice

*Maj Grasten**

I. Introduction: The Indeterminacy of *Jus Post Bellum*

> [M]ost of the staff of UNMIK was general affairs officers, that's what their title was, a very generic kind of title within the UN. So they were really not experts on institutional design. The UN didn't have any previous experience. This was the first mission, and they didn't in fact make a lot of effort to bring in expertise because they could have when it came to institutional design. Actually, they just, you know, I remember my colleague googled other [public administration institutions] and then compared them, and said 'okay, this is how it would look like'.[1]

This chapter traces the materialization of the rule of law in post-conflict Kosovo to argue that *jus post bellum* should be understood through interpretation and practice. It draws on several strands of literature that highlight the contingency of formal institutions, be they legal or otherwise. Insights and concepts from the sociology of professions point to how the contested definition of appropriate knowledge in given issue areas distributes authority and translates into particular practices and institutional forms. The chapter outlines how understanding *jus post bellum* requires tracing its contestation and enactment. Specifically, the role of conceptual ambiguity, expert battles over definition and jurisdiction, and practical interpretation unconstrained by the formal legal logic of the rule of law precepts must be examined to understand *jus post bellum* in any particular situation. Concurring with the introduction to this volume that *jus post bellum* and just peace require negotiations over what is 'just' in any specific context, it advocates a more general argument for a sociologically informed approach to international law. This includes due attention to the effects of indeterminacy.

On indeterminacy, Stahn et al. note, 'although scholars contend that *jus post bellum* can create more coherence in approaches to peacebuilding, one of the features of current discourse is that there are almost as many conceptions of *jus post bellum* as scholars, within and across disciplines'.[2] The same conceptual ambiguity applies to the notion of 'just peace'. For Said, 'the questions how and in what circumstances a Just Peace could take hold surround

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[1] Interview with former staff member in UN Interim Administration Mission in Kosovo (UNMIK), Department of Justice.

[2] Jennifer S. Easterday, Jens Iverson, and Carsten Stahn, 'Exploring the Normative Foundations of *Jus Post Bellum*: An Introduction', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 3 (emphasis in original).

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the notion forbiddingly with such a number of qualifications and circumstances as to make the phrase "Just Peace" nearly impossible to use with any kind of universal consistency'.[3] The conceptual ambiguity of *jus post bellum* and just peace points to a focus on practices. In practice ambiguity provides a basis for the politics of law.

Rather than defining *jus post bellum* and just peace prior to an analytical engagement with these concepts on the ground, this chapter takes a more practice- and process-oriented approach in tracing how these international policy concerns entered international legal and policy documents, institutions, and practices. It argues that they did so through what has been labelled and now is commonly referred to as the 'rule of law revival'.[4] At the nexus between *jus post bellum* and just peace sits the idea of the rule of law as a necessary component of post-conflict peacebuilding. The emergence of the rule of law as a transnational issue in the control of experts therefore offers a route into investigating the institutionalization and distributive implications of the definition of expertise in a *jus post bellum* context. By the latter, I refer to the various and at times conflicting international legal rules and norms that can be applied 'in the context of peacekeeping, peacebuilding, occupation, and international involvement and administration of territories'.[5]

Over the last two decades the rule of law has gradually and consistently been constituted as a specific task of inter- and transnational professional work. At the same time, there is profound disagreement among scholars over what the concept means. It has been referred to as a 'catch-all slogan',[6] an 'exceedingly elusive notion',[7] and 'a much celebrated, historic ideal, the precise meaning of which can be less clear today than ever before'.[8] The chapter shows that this disagreement also prevails in policy practices. According to a UN guide on rule of law reforms, *Rule of Law Indicators Implementation Guide and Project Tools*, the rule of law is 'a fundamental aspect of peacebuilding and related efforts to build effective and credible criminal justice institutions. Although the term "rule of law" is widely used and often linked to State-building efforts, there is no single agreed-upon definition'.[9] Abstract professional knowledge in these conditions of conceptual uncertainty and ambiguity translates into institutional forms and practices.

The legal politics of concern here is jurisdictional contestation of the meaning of rule of law concepts. These contests play out in rule of law as enacted on the ground is inconsistent with accepted understandings of rule of law precepts. The statement of the staff member in the UN Interim Administration Mission in Kosovo's (UNMIK) Department of Justice that opens this chapter suggests that a post-conflict environment is open to contingency and interpretation. Equally, institutions will bump up against each other in the application of rule of law on the grounds of indeterminacy. Having little to no experience in transitional

[3] Edward W. Said, 'A Method for Thinking about Just Peace', in Pierre Allan and Alexis Keller (eds), *What is a Just Peace?* (Oxford University Press 2008) 177.

[4] Thomas Carothers, 'The Rule of Law Revival' (1998) 77 *Foreign Affairs* 95.

[5] Carsten Stahn, Jennifer S. Easterday, and Jens Iverson, 'Epilogue: *Jus Post Bellum*—Strategic Analysis and Future Directions', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014)545.

[6] Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 213.

[7] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 3.

[8] Richard H. Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1.

[9] United Nations Department of Peacekeeping Operations (DPKO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), *The United Nations Rule of Law Indicators Implementation Guide and Project Tools* First edn (United Nations 2011) v.

administration of post-conflict societies, UN staff had to 'learn by doing' in establishing UN transitional administrations in Kosovo (also Timor-Leste, both 1999). The politics that played out within the bureaucratic boundaries of UNMIK took shape as contests between different actors with various institutional seats and sources of authority, seeking to control first what the rule of law is, to tame abstraction as such, and second, how and in what form it would be enacted.

First, I outline the framework deployed in the analysis drawing on scholarship in critical legal studies (CLS) and approaches that target the semantically and socially constructed nature of law in action. The second section traces when and why the rule of law became part of UN peacebuilding policies and how an emergent profession of rule of law practitioners was constructed—and therefore implicated via discourse—in this process. Third, I turn to the early phase of UNMIK rule in Kosovo and its mandate to enforce the rule of law. This coincided with the formulation of a UN policy and pool of experts for rule of law promotion. The chapter tracks professional and organizational battles between variously positioned professional groups within this transitional bureaucracy over what is 'just' and how to achieve 'peace' after conflict through the way in which law should rule. The implication is that (just) peace, and legal form more generally, is political and never objective: 'A Just Peace must necessarily reflect … differences, all of them based on actual but widely divergent experiences, and this is one reason why a Just Peace which in its meaning suggests the stability of something finally achieved is a contradictory or at least a very fluid, rather than a stable, concept'.[10] Just peace is what we make of it.[11]

II. Performing Law: Legal Knowledge and Professional Practices

I approach international law as a practice of arguing that is informed by specific forms of knowledge and modes of reasoning, which in combination maintain international law as a relatively autonomous functional field. As argued by Koskenniemi, international legal arguments constantly oscillate between apology and utopia, that is between legitimizing political power and state interests, on the one hand, and defending law's normative content, systemic autonomy, and universalist aspirations, on the other hand.[12] Law's indeterminacy resides in this fundamental condition of ambiguity, which renders international law a site of contestation[13]—a terrain for political struggle.[14] This requires a focus on international law as a language game in which legal rules and norms derive their meaning in use and from connections established between different concepts within semantic networks.[15] At the same time, international legal rules and norms are performative of the reality they describe in a given context.[16] International law's semantic structures and the social orders in

[10] Said (n 3) 179.

[11] Alexander Wendt, 'Anarchy is What States Make of it: The Social Construction of Power Politics' (1992) 46 *International Organization* 391.

[12] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company 1989).

[13] Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2011) 26 *International Relations* 3.

[14] David Kenney, 'Law and the Political Economy of the World' (2003) 26 *Leiden Journal of International Law* 7.

[15] Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989).

[16] Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Greenwood Press 1989).

which it is practised, and of which it is productive, cannot be separated. One relevant focus is on the professional actors involved in the making and interpretation of international law: 'International law is what international lawyers do and how they think'.[17] Still, Kennedy asserts, the 'nature, limits and contestability of expertise remain obscure' in international legal studies.[18]

International law's expanding scope in global governance has led to its fragmentation across different functional fields with different and often diverging types of expertise, professional vernaculars, institutional forms, and ways of doing things.[19] Fragmentation is implicated in the forms international law takes. Legal disputes have become problems of management and law defers to the politics of expertise:

> for what might be 'reasonable' for an environmental expert is not what is 'reasonable' to a chemical manufacturer; what is 'optimal' to [a] development engineer is not what is optimal to the representative of an indigenous population; what is 'proportionate' to a humanitarian specialist is not necessarily what is proportionate to a military expert.[20]

Professional practices and forms of knowledge, together with pre-existing rules and arguments, shape what international law *is*.[21] Struggles between different professional 'ecologies' and their institutional configurations structure what should be governed by international law and who gains authority. '[T]he world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos'[22]. Professionals, in the words of Kennedy, are people with projects.[23]

The world of professions is a competitive space. And expert work is 'struggle'.[24] The history of professions is determined by intra- and inter-professional competition motivated by the quest to gain control over professional jurisdiction and knowledge: 'It is the history of jurisdictional disputes that is the real, the determining history of the professions. Jurisdictional claims furnish the impetus and the pattern to organizational developments'.[25] In the world of professions, knowledge and skills can be controlled by professional groups through controlling the abstractions (e.g. the rule of law) that define problems and tasks, and practical solutions.[26] Abstractions, in turn, render definitions, labels, and specific issues

[17] Martti Koskenniemi, 'Between Commitment and Cynicism: Outline of a Theory of International Law as Practice', in United Nations (ed.), *Collections of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations 1999) 523.

[18] David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 *Sydney Law Review* 1, 3.

[19] See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (13 April 2006).

[20] Martti Koskenniemi, 'The Fate of Public International Law: Between Techniques and Politics' (2007) 70 *Modern Law Review* 1, 10.

[21] See Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper, and Wouter Werner, 'Introduction' in Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper, and Wouter Werner (eds), *International Law as a Profession* (Cambridge University Press 2017).

[22] Martti Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20 *European Journal of International Law* 7, 9.

[23] David Kennedy, *Of War and Law* (Princeton University Press 2006).

[24] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

[25] Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 1988) 2.

[26] Ibid. 9.

mutable and open to the politics of expertise. The politics of expertise is often the politics of (re)definition.[27]

A particular task can successively be redefined according to how professionals compete and co-ordinate with one another to gain control.[28] In the sociology of professions, tasks are theorized as the particular issues (legislation, mandates and terms of reference, specialized training, etc.) that professional groups are able to control by drawing on particular but abstract knowledge.[29] This knowledge is not only responsive to the task to which it is applied but also constitutive of that task, that is, its referent object.[30] The relationship between specific forms of expertise and tasks is therefore 'co-constitutive':[31] '[T]he expertise comes to (re)constitute the reality which it is describing . . . It will shape the understanding of what the problem is, what actions, strategies, and policies should be pursued, and how resources should be allocated'.[32] Accordingly, tasks do not exist prior to actors' engagement with them; equally the professional identity of actors cannot be predefined prior to their engagement with certain tasks: 'Creating a psychiatric *approach* to shell shock in World War I, for example, redefined who psychiatrists were and what shell shock was more than it defined a relation between a preexisting group and a given task'.[33]

Jus post bellum represents an emerging yet fragmented international legal field where legal knowledge remains unsettled and professional practices are subject to weak occupational control.[34] When loosely defined arenas (such as *jus post bellum*) become professionalized, actors struggle with each other to gain control over processes of definition.[35] The following sections demonstrate how the institutional and jurisdictional boundaries in this legal field are constituted and mediated in the clashing interests between professional groups. The spoils of struggle are the resulting capture and distribution of resources and powers. The rule of law, in consequence, becomes the rule of experts.[36] Global governance is in turn, 'an ongoing process of competition for the authority to define what to govern, how and why'.[37]

[27] Koskenniemi, 'The Politics of International Law' (n 22) 11.

[28] See also Leonard Seabrooke and Lasse Folke Henriksen, 'Issue Control in Transnational Professional and Organizational Networks', in Leonard Seabrooke and Lasse Folke Henriksen (eds), *Professional Networks in Transnational Governance* (Cambridge University Press 2017).

[29] Andrew Abbott, 'Linked Ecologies: States and Universities as Environments for Professions' (2005) 23 *Sociological Theory* 245, 248.

[30] On the performativity of professional knowledge and practices, see Michel Callon, *Laws of the Markets* (Wiley-Blackwell 1998); Sheila Jasanoff, *States of Knowledge: The Co-production of Science and the Social Order* (Routledge 2006); Donald MacKenzie, Fabian Muniesa, and Lucia Siu (eds), *Do Economists Make Markets?* (Princeton University Press 2007).

[31] Tanja Aalberts and Anna Leander, 'Introduction: The Co-Constitution of Legal Expertise and International Security' (2013) 26 *Leiden Journal of International Law* 783.

[32] Ibid. 786.

[33] Abbott, 'Linked Ecologies' (n 29) 248–9 (emphasis added).

[34] See also Marion Fourcade, 'The Construction of a Global Profession: The Transnationalization of Economics' (2006) 112 *American Journal of Sociology* 145.

[35] Abbott, 'Linked Ecologies' (n 29) 249.

[36] Maj Grasten, 'Whose Legality? Rule of Law Missions and the Case of Kosovo', in Nikolas M. Rajkovic, Tanja E. Aalberts, and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge University Press 2016).

[37] Ole Jacob Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (University of Michigan Press 2015) 4.

III. Defining *Jus Post Bellum* Expertise as a Transnational Professional Task

The entry of the 'rule of law' into global governance discourses followed the expansion of the UN's executive role in a post-Cold War world and was accompanied by a rereading of its founding Charter. The UN secretary-seneral, Boutros Boutros-Ghali's 1992 report, *An Agenda for Peace*, was the first important statement on the UN's renewed role in peacebuilding and conflict prevention. Based on its recommendations, the UN Department of Peacekeeping Operations (DPKO) was established the same year. Important for this analysis, is that the conception of the rule of law in subsequent UN reports and declarations would follow the connection the report made between rule of law and peace. In the report, and in a supplement published a couple of years later, it was argued that '[t]here is an obvious connection between democratic practices—such as the *rule of law* and transparency in decision-making—and the achievement of *true peace and* security in any new and stable political order'.[38] Now, it was stressed, 'international intervention must extend beyond military and humanitarian tasks and must include the promotion of national reconciliation and the re-establishment of effective government'.[39] Still loosely defined, the rule of law had become an issue to be controlled by global governance institutions. This control inevitably implied the strengthening of the UN's exercise of executive authority to ensure 'true' peace, political stability, and order.

At the turn of the millennium, the rule of law had moved to the fore of UN peacebuilding policies. While the 'rule of law' appears nowhere in the UN Charter, it was mentioned eighteen times in a pivotal UN report from 2000 on reforming the organization's peacekeeping activities. The Panel on UN Peace Operations' Brahimi report identified a particular expertise to promote the rule of law. Whereas the Agenda for Peace report suggested that the UN's conflict prevention policies should address the immediate roots of conflict to prevent escalation, the new review of UN peacebuilding activities advanced a broader, long-term, and structural approach to conflict prevention. With this approach employed in UN interventions, a professional field to pursue the project of 'promoting' justice after conflict began to take shape. The report stressed that

> a doctrinal shift is required in how the Organization conceives of and utilizes civilian police in peace operations, as well as the need for an adequately resourced team approach to upholding the rule of law and respect for human rights, through judicial, penal, human rights and policing experts working together in a coordinated and collegial manner'.[40]

The following year, the UN Development Programme (UNDP) received a new mandate, which also linked the rule of law to *jus post bellum*: 'UNDP will leverage it trusted status as a development partner to assist … countries … in the sensitive area of the rule of law [as]

[38] UN, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping' (Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992) (17 June 1992) UN Doc. A/47/277-S/24111 para. 59 (emphasis added).

[39] UN, 'Supplement to An Agenda for Peace' (Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations) (3 January 1995) UN Doc. A/50/60-S/1995/1 para. 13.

[40] UN, 'Report of the Panel on United Nations Peace Operations' (hereinafter Brahimi report) (21 August 2000) UN Doc. A/55/305-S/2000/809 para. 40.

violent conflict often arises when respect for the rule of law breaks down'.[41] The rule of law had gradually become an issue in the control of a broad spectrum of experts, ranging from judges to police officers and development experts.

In September 2003, three years after the publication of the Report, the Security Council met for the first time to explicitly discuss the role of the UN in promoting justice and the rule of law in post-conflict societies. At the meeting the secretary-general stressed, 'This [Security] Council has a heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security. This applies … in rebuilding shattered societies'.[42] The statement was made less than a month after the UN deployed a mission in Iraq mandated to assist in rebuilding the state after intervention.

At the same time, an emerging *jus post bellum* professional field took institutional form with the establishment of a criminal law and judicial advisory unit within the DPKO. The secretary-general noted that through its peacebuilding missions the UN had come to learn that 'the rule of law is not a luxury'.[43] The UN therefore had an important role in helping societies to achieve the rule of law and '[t]he task is not simply technically difficult. It is politically delicate', as the political will to comply with rule of law standards was present among international actors, but not always local actors.[44] This called for a more 'comprehensive approach' to rule of law reforms that would 'encompass the entire criminal justice chain—not just police, but lawyers, prosecutors, judges and prison officers—as well as many issues beyond the criminal justice chain'.[45] This comprehensive approach rationalized existing professional practices as the UN had already established so-called hybrid courts staffed by international judges and prosecutors in Kosovo and Timor-Leste under UN protectorates.

The UN's executive powers in post-conflict societies were further justified the following year. A report published in 2004 on 'the rule of law and transitional justice in conflict and post-conflict societies' by the secretary-general confirmed that there had been 'an increased focus by the United Nations on questions of transitional justice and the rule of law in conflict and post-conflict societies'.[46] It was in particular stressed that '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives', and that the UN had an important role in 'fill[ing] the rule of law vacuum evident in so many post-conflict countries'.[47] The approach by the UN, however, should be 'solidarity, not substitution'.[48] Moreover, the UN had undertaken an internal assessment of its expertise in rule of law promotion in 2002. The review raised the concern that the UN lacked knowledge of customary law and norms.[49] In response, the secretary-general asserted that due regard should not only be given to formal institutions but 'must be given to indigenous and

[41] Executive Board of the United Nations Development Programme and of the United Nations Population Fund, 'Role of the UNDP in Crisis and Post-Crisis Situations' (27 November 2000) DP/2001/4 para. 31.

[42] UN, 'Secretary-General's Remarks to the Ministerial Meeting of the Security Council on Justice and the Rule of Law: The United Nations Role' (24 September 2003). Available at <https://www.un.org/sg/en/content/sg/statement/2003-09-24/secretary-generals-remarks-ministerial-meeting-security-council>

[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] UN, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (Report of the Secretary-General) (23 August 2004) UN Doc. S/2004/616, summary.

[47] Ibid.

[48] Ibid. para. 17

[49] Thorsten Benner, Stephan Mergenthaler, and Philipp Rotmann, *The New World of UN Peace Operations: Learning to Build Peace?* (Oxford University Press 2011) 137.

informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition'.[50] Framing the rule of law as a professional task and its promotion as a practical solution both assisted in broadening the UN's executive powers and exposed its lack of systematic knowledge on this matter.[51]

The lack and therefore expressed need to develop particular expertise to address the issue of the rule of law was also stressed in the 2004 report. Following the secretary-general's statement that the UN should take on a more encompassing approach to rule of law reforms which would extend to engaging in 'democracy-building', the report lamented that the UN was still drawing on external expertise. The number of relevant experts within its own organization was 'not adequate for the task at hand'.[52] 'To be sure, there are plenty of persons who are expert in the workings of their own legal system, their own legislation and their own language', the report noted, '[s]uch expertise is, however, of limited value to our activities'.[53] It was therefore recommended that the UN should seek a—rather encompassing—mix of expertise. This would include not only knowledge of the UN, its norms and standards for the administration of justice, but also experience from a post-conflict setting and its legal framework, knowledge deriving from 'familiarity with the host-country culture, an approach that is inclusive of local counterparts, an ability to work in the language of the host country and familiarity with a variety of legal areas'.[54] The Brahimi report had raised the concern that the learning curve among UN staff in the emerging professional field of rule of law and justice reforms was too slow. The 2004 report recommended the establishment of 'a reliable international roster of individuals' within UN auspices. The UN could grant more resources to screen experts and provide pre-training prior to deployment.[55]

At the UN World Summit in 2005, the rule of law occupied a more prominent place in UN policies and practices. The General Assembly identified the rule of law as one of four core values the organization should observe and advocate.[56] Doing so, the Member States 'recognized' in a resolution 'the need for universal adherence to and implementation of the rule of law at both the national and international levels'.[57] When the UN General Assembly passed its resolution on the rule of law, the UN had already been engaged in one way or another in rule of law reforms for a decade. The resolution was an attempt to institutionally sustain a variety of existing but dispersed practices related to promoting the rule of law. These were spread across various UN agencies, programmes, and missions. The Office of the High Commissioner for Human Rights (OHCR), for instance, had been mandated in 1993 to offer 'technical and financial assistance to national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law'.[58]

[50] UN, 'Rule of Law and Transitional Justice' (n 46) para. 36.
[51] See also Kristina Simion and Veronica L. Taylor, 'Professionalizing Rule of Law: Issues and Directions' (Folke Bernadotte Academy 2015).
[52] UN, 'Rule of Law and Transitional Justice' (n 46), para. 60.
[53] Ibid. para. 61.
[54] Ibid.
[55] Ibid.
[56] UNGA Res. 60/1 'World Summit Outcome' (24 October 2005) UN Doc. A/RES/60/1 2005.
[57] Ibid. para. 134.
[58] UNGA World Conference on Human Rights: Vienna Declaration and Programme of Action (25 June 1993) UN Doc. A/CONF.157/24 para. 69.

The General Assembly therefore '[s]upport[ed] the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing relevant procedures … so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building'.[59] The rule of law unit was established at the highest level in the Secretariat, the Executive Office of the Secretary General. While the 'rule of law' had hardly been mentioned in fundamental UN documents on peacekeeping and peacebuilding until 1992, it had now effectively turned into a precondition as well as a yardstick for all UN policies. As asserted by Abbott: 'Abstraction enables survival in the competitive system of professions'.[60] The abstract meaning of the rule of law was constitutive of a particular professional field and expertise while strengthening and justifying the UN's executive powers in post-conflict settings. Abstractions, the following section suggests, provide the basis for the politics of expertise.

IV. Translating *Jus Post Bellum* in Transitional Administration

The Brahimi report, which stressed 'the need for an adequately resourced *team approach* to upholding the rule of law and respect for human rights',[61] was published a year into the mandates of the UN's international transitional administrations (ITAs) in Kosovo and Timor-Leste. Following the end of the North Atlantic Treaty Organization's (NATO) 'humanitarian intervention' in the war in Kosovo in March 1999, the UN Security Council adopted Resolution 1244 which established the UN transitional administration, UNMIK. The rule of law would already at the outset of international intervention in the conflict in Kosovo be granted a prominent place in the process of securing peace. As NATO failed to obtain a Security Council resolution mandate, the intervention was illegal according to international law. The rule of law, however, had been invoked as a 'right' to protect by NATO. In a press statement issued a month into the bombing campaign NATO declared that '[t]he crisis in Kosovo represents a fundamental challenge to the values for which NATO has stood since its foundation: democracy, human rights and the rule of law'.[62] The intervention spurred a heated debate on ethics and just causes of war.[63] When and how (international) law should rule was a contested issue.

The mandates of the UN transitional administrations in Kosovo and Timor-Leste were identical in terms. The Security Council resolution that established the UN Transitional Administration in East Timor (UNTAET) two months after UNMIK had been deployed, 'was a "delete Kosovo, insert East Timor" resolution'.[64] In both countries, all executive, legislative, and judicial powers were vested in one person, the Special Representative of the

[59] UNGA Res. 2005 (n 56) para. 134(e).
[60] Abbott, *The System of Professions* (n 25) 9.
[61] UN, Brahimi report (n 40) para. 40 (emphasis added).
[62] NATO Press Release, 'Statement on Kosovo' ('Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington DC on 23 and 24 April 1999 (S-1(99)62).
[63] See e.g. Martti Koskenniemi, '"The Lady Doth Protest Too Much": Kosovo and the Turn to Ethics in International Law' (2002) 65 *The Modern Law Review* 159; Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1.
[64] Samantha Power, *Chasing the Flame: Sergio Vieira de Mello and the Fight to Save the World* (Penguin 2008) 300.

Secretary General (SRSG).[65] In an unpublished note entitled 'How Not to Run a Country' the first SRSG in Timor-Leste, Sergio Vieira de Mello, reflected on his experience as the ultimate executive authority in the country:

> The UN Administrator is nominated by the Secretary-General with little or no consultation with those who are to be administered. Under Chapter VII of the UN Charter … the Administrator is authorized to impose directives and policies as well as to use force more or less at will. There is no separation of the legislative or judicial from the executive authority. There are no positive models on how to exercise such broad powers … The question remains open how the UN can exercise fair governance with absolute powers in societies recovering from war and oppression.[66]

At the same time, the Panel on UN Peace Operations was preparing the Brahimi report in which the drafters expressed concerns over the extended scope of UN executive powers and the lack of knowledge on how to carry out its extended mandate. 'The United Nations currently has no answer to the question of what such an operation should do while its law and order team inches up such a learning curve', the report deplored.[67] In fact, the report raised the question as to 'whether the United Nations should be in this business at all'.[68]

Vieira de Mello was the first SRSG of UNMIK with a mandate that extended over the summer of 1999. In the first report on the mission, the UN secretary-general announced the SRSG as 'the guarantor of the rule of law' in post-conflict Kosovo.[69] At the event of UNMIK's deployment, the rule of law was described as being completely absent by the mission's executive. Post-conflict Kosovo constituted a legal *terra nullius*. According to the senior legal adviser to Vieira de Mello, the legal and judicial system had to be established 'virtually from scratch'[70] as Kosovo 'had been stripped of [its] entire administrative and executive super-structures'.[71] The legal system needed to be recreated 'from "ground zero" '. Similarly, Vieira de Mello announced that in terms of institutions, 'nearly everything had to be brought in'.[72] The problem of a seeming 'legal vacuum' reigning in post-conflict societies had also been raised in the Brahimi report: 'there is a pressing issue in transitional civil administration that must be addressed, and that is the issue of the "applicable law". In the two locales [Kosovo and Timor-Leste] where UN operations now have law enforcement

[65] UN, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (12 July 1999) UN Doc. S/1999/779 paras 35–40; UN, Report of the Secretary-General on the Situation in East Timor (4 October 1999) UN Doc. S/1999/1024.

[66] Sergio Vieira de Mello, quoted in Joel C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-Building in East Timor' (2000) 33 *New York University Journal of International Law and Politics* 1101, 1101.

[67] UN, Brahimi report (n 40) para. 80.

[68] Ibid. 78.

[69] UN, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (12 July 1999) UN Doc. S/1999/779, para. 40.

[70] Hansjoerg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 46, 60.

[71] Hansjoerg Strohmeyer, 'Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor' (2001) 25 *Fletcher Forum of World Affairs* 107, 109.

[72] Sergio Vieira de Mello, quoted in Nicolas Lemay-Hebert, 'The Semantics of Contemporary Statebuilding: Kosovo, Timor-Leste and the "Empty-Shell" Approach', in Nicolas Lemay-Hébert, Nicholas Onuf, Vojin Rakić, and Petar Bojanić (eds), *Semantics of Statebuilding: Language, Meanings and Sovereignty* (Routledge 2014) 140.

responsibility, local judicial and legal capacity was found to be non-existent, out of practice or subject to intimidation by armed elements'.[73]

The discursive construction of Kosovo as a legal vacuum was decisive in formulating and operationalizing the specific powers of the international executive. According to the first UNMIK regulation, the SRSG was authorized to 'appoint any person to perform functions in the civil administration in Kosovo, *including the judiciary*, or remove such person'.[74] In his capacity as the 'guarantor of the rule of law', the SRSG was authorized by the secretary-general to 'change, repeal or suspend existing law to the extent necessary for the carrying out of his functions, or where existing laws [were] incompatible with the mandate, aims and purposes of the interim civil administration'.[75] Effectively, the institutionalization of the rule of law provided the political basis for the authorization and justification of UNMIK's executive's powers, including the power to define and police jurisdictional boundaries for the purpose of carrying out its mandate. Moreover, the first UNMIK regulation provided that the applicable law would be the one in place prior to NATO's intervention on 24 March1999, but only insofar these laws did not conflict with 'internationally recognized standards', UNMIK's mandate, or UNMIK regulations.[76] As noted by a former Kosovo-Albanian staffer within the Office of the Prime Minister: 'The political elite [UNMIK] that came to power they found everything in connection to the old regime to be repressing, bad, communist … I think what was lacking here was discussions with older generations as they were immediately cut off as communists'.[77]

Professional battles would soon unfold within the bureaucratic boundaries of UNMIK and challenge the executive powers of the SRSG on two fronts. On one front, the executive was facing the ombudsperson, an institution created by the Organization for Security and Co-operation in Europe (OSCE) mission in Kosovo, which also derived its legal mandate from Resolution 1244. In several reports, the ombudsperson criticized UNMIK and the SRSG for breaching fundamental rule of law principles. The ombudsperson at that time, a Polish human rights lawyer, advanced another interpretation of the initial UNMIK regulation 1999/1 that defined the scope of the SRSG's powers:

> Respect for the rule of law requires the separation of powers, a principle that is also reflected in … UNMIK Regulation N. 1999/1 … which reads, 'All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the [SRSG]'. Neither this provision, nor any other legal provision applicable in Kosovo vests judicial authority in the SRSG.[78]

Therefore, the ombudsperson concluded, 'the [SRSG] cannot be considered to be a judge or other judicial officer'.[79] This statement demonstrates the interpretation of UNMIK's

[73] UN, Brahimi report (n 40) para. 79.

[74] UNMIK Regulation 1999/1 'On the Authority of the Interim.Administration in Kosovo' (25 July 1999) UN Doc. UNMIK/REG/1999/1, section 1, para. 1.2 (emphasis added).

[75] UN, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (12 July 1999) UN Doc. S/1999/779, para. 39.

[76] UNMIK Regulation 1999/1 (n 74) section 3.

[77] Interview with former staff member in the Office of the Prime Minister, Pristina.

[78] Ombudsperson Institution in Kosovo, Special Report no. 3 on 'The Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards' (published 29 June 2001) (addressed to Mr. Hans Haekkerup, Special Representative of the Secretary General of the United Nations) para. 18.

[79] Ibid. para. 21.

mandate was heavily contested within the mission's own bureaucracy. The ombudsperson was effectively an UNMIK institution.

This was in particular stressed in the context of the SRSG's enactment of UNMIK regulation 2000/47 'On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo', which provided that 'UNMIK and KFOR, their property, funds and assets are immune from any form of legal process'.[80] In consequence, civilian and military powers governing post-conflict Kosovo were placed outside domestic jurisdiction. In consistently referring to UNMIK as a 'government' and a 'surrogate state',[81] the ombudsperson stressed that '[t]he rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where [UNMIK] in fact acts as a surrogate state. It follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to be protected against itself'.[82] The legal and judicial practices of the UN administration in Kosovo show how professional struggles over definition and institutional form were constitutive of the boundary between what belongs to law and what does not, and who had the power to speak the law and decide on limits to law's authority.

On another front, the UNMIK executive would transgress judicial independence via contesting 'jurisdictional' boundaries between the SRSG and the judiciary. The judiciary was the only independent institution during the first year of UNMIK's rule that could counterbalance the immense executive powers of the SRSG and, in particular, challenge the recourse to extra-legal practices that gradually emerged at the senior level of the mission. Only a few months into UNMIK's mandate, the SRSG would use his ambiguously defined and in practice self-interpreted and extended powers to carry out executive detentions. Among some of the first UNMIK regulations adopted by the SRSG was a regulation that authorized UNMIK to temporally detain or restrict the freedom of movement of individuals to prevent '[a] threat to public peace and order [that] may be posed by any act that jeopardizes . . . the rule of law'.[83] Paradoxically, the purpose of the regulation on executive detention was to sanction practices that would be in breach of the rule of law.

In the first UN secretary-general report on UNMIK the 'urgent need to build genuine rule of law in Kosovo'[84] had been described as imperative for the establishment of security as '[o]nly a fully functioning independent and multi-ethnic judicial system will address the existing security concerns in Kosovo and build public confidence'.[85] At the same time, the UN secretary-general had announced that 'internationally recognized standards of human rights [would be] the basis for the exercise of [the SRSG's] authority in Kosovo',[86] and that the SRSG should 'promote the independence of the judicial system as the guarantor of the rule of law'.[87] However, an internal document within UNMIK raised the concern that the

[80] UNMIK Regulation 2000/47 'On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo' (18 August 2000) UN Doc. UNMIK/REG/2000/47.

[81] Ombudsperson Institution in Kosovo, Special Report no. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 (published 18 August 2000) (addressed to Mr. Hans Haekkerup, Special Representative of the Secretary General of the United Nations) para. 23.

[82] Ibid.

[83] UNMIK Regulation 1999/2 'On the Prevention of Access by Individuals and Their Removal to Secure Public Peace and Order' (12 August 1999) UN Doc. UNMIK/REG/1999/2, para. 1.1 and 1.2.

[84] UN, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (12 July 1999) UN Doc. S/1999/779 para. 66.

[85] Ibid.

[86] Ibid. para. 42.

[87] Ibid. para. 40.

emphasis on human rights protection would be a problem for effectively carrying out the mission's mandate, and UNMIK should therefore make a choice between human rights and security.[88] Only a year into UNMIK's mandate, this concern would have practical implications. In 2000, several violent attacks by Kosovo-Albanians against Serbs in the town of Mitrovica occurred. A number of Albanians were arrested for involvement in the attacks but were acquitted by a Kosovo-Albanian judge despite admissible evidence. For that reason, UNMIK was concerned that ethnic biases and impartiality would be a problem in the administration of justice.

The majority of Serbian judges and prosecutors in Kosovo had either during or immediately after the war fled Kosovo or refused to serve in the post-war judicial system for security reasons. To ensure that cases involving Kosovo-Serbs would be adjudicated impartially, UNMIK used this single event to deploy an international judge and an international prosecutor in the district court in Mitrovica, a city with a relatively large Serbian minority population. The same year, the presence of international judges and prosecutors increased with the passing of UNMIK regulation 2000/64. Subsequently, there would be international judges deployed in each of Kosovo's district courts and in the Supreme Court in Pristina. The SRSG was now authorized to establish three-judge panels ('64 panels') and to decide on the composition of panels where at least two of three judges would be international. All judges were individually assigned to a case by the SRSG. In their capacity as UN personnel, international judges and prosecutors were subject to six-month renewable contracts, which could be used both as an instrument to shorten the term of a critical international judge, and to place international judges outside the disciplinary mechanisms that would apply to local judges in relation to the proper administration of justice.

At the same time, the SRSG's interference in the administration of justice became formally authorized by the UN's Office of the Legal Advisor (OLA) in New York, who provided the SRSG with a guide to follow in decisions on executive detentions.[89] The guide instructed the SRSG and his international legal advisers in the UNMIK headquarters in Pristina on how to maintain executive detention in cases where UNMIK would consider that 'there was a risk of judicial impropriety and misconduct'.[90] Finally, using his self-granted legislative powers, the SRSG promulgated UNMIK regulation 2001/18 ('On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders'), which would effectively legalize the SRSG's interference in justice. The regulation was promulgated shortly before the SRSG detained a group of Kosovo-Albanians who had been acquitted by a panel with a majority of international judges due to insufficient evidence.

Though international judges and prosecutors had been deployed in Kosovo's courts to ensure 'independence and impartiality' in administering justice, a special chamber of judges in the form of an ad-hoc quasi-judicial organ located outside of Kosovo's court system, and whose members were directly appointed by the SRSG, would review the legality of the SRSG's executive detentions, according to regulation 2001/18.[91] The executive leadership of UNMIK justified this practice on the basis that two years after the end of the

[88] David Marshall and Shelley Inglis, 'The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo' (2003) 16 *Harvard Human Rights Journal* 95, 106.

[89] Ibid.

[90] Ibid.

[91] UNMIK Regulation 2001/18 'On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders' (25 August 2001) UN Doc. UNMIK/REG/2001/18.

war, Kosovo would still qualify as an 'internationally-recognized emergency'. According to a UNMIK press release, 'international human rights standards accept the need for special measures that, in the wider interests of security, and under prescribed legal conditions, allow authorities to respond to the findings of intelligence that are not all to be presented to the court system'[92]. Professional knowledge and authority, as asserted earlier in this chapter, are closely interlinked. The organizing logic of UNMIK's administrative rule did not conform to the 'solidarity, not substitution' approach prescribed by the UN secretary-general in the 2004 report on the rule of law and peacebuilding.[93]

The Brahimi report had been prepared and published in the same period as these instances of contesting professional boundaries within UNMIK. It understood that the absence of the rule of law resulted from the 'learning process' among UN actors deployed in such missions, which due to '[d]ifferences in language, culture, custom and experience'[94] was slow and could easily take up to six months. The statement of a former UNMIK staff member that opened this chapter testifies to this. However, the challenges UNMIK met in the formation of a transnational professional field to promote justice after conflict were more a consequence of the extent to which organizational structures and professional boundaries were mutable and contested according to the ways in which groups of experts formed alliances or were divided within its own administration. The UN secretary-general had remarked back in 2003 that the political will to comply with rule of law standards was present among international actors, but not always local actors.[95] Organizational changes that unfolded within UNMIK shortly into its mandate point to the problematic relation between meaning and application of the professional *task* of rule of law promotion

In March 2006, the Human Rights Advisory Panel was established by UNMIK regulation 2006/12 to investigate individual complaints of human rights violations committed by UNMIK. The panel consisted of three non-UNMIK members with experience in the field of international human rights and coincided with scarce possibilities to hold the SRSG accountable for violating international human rights law because of immunity before Kosovo courts. Several corruption cases within UNMIK's own administration were also challenging the mission's legitimacy. For example, in 2002 the European Anti-fraud Office (OLAF) and the UN Office of Internal Oversight Services (OIOS) traced 4.3 million USD to a bank in Gibraltar. The UNMIK appointed an international administrator of Kosovo's national electricity provider (KEK) was sentenced 3.5 years in prison by a German court. Maybe not surprisingly, the scope of the panel's jurisdiction and its independence was severely limited by the issuing of an administrative direction by the SRSG in 2009.[96] Moreover, in 2006, the international ombudsperson had been replaced by the SRSG with a national ombudsperson with a limited jurisdiction that only applied to Kosovo domestic institutions.[97]

[92] 'UNMIK Refutes Allegations of Judicial Bias and Lack of Strategy', UNMIK News, 25 June 2001, quoted in Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013) 170.

[93] UN, 'Rule of Law and Transitional Justice' (n 46) para. 17.

[94] UN, Brahimi report (n 40) para. 80.

[95] UN, 'Remarks' (n 42).

[96] UNMIK Administrative Direction 2009/1 implementing UNMIK Regulation 2006/12 'On the Establishment of the Human Rights Advisory Panel' (17 October 2009) UN Doc. UNMIK/DIR/2009/1.

[97] UNMIK Regulation 2006/6 'On the Ombudsperson Institution in Kosovo' (16 February 2006) UN Doc. UNMIK/REG/2006/6.

V. Conclusion: Tracing Definitional Battles

Henriksen and Seabrooke suggest, 'Transitional issues are commonly organized through professional battles over how issues are treated and what tasks are involved. These professional struggles are often more important than what organization has a formal mandate over an issue'.[98] This chapter illustrates how tracing the ways in which international professional knowledge is determined and, in turn, determines that organizational change and institutional structures reveal underlying power dynamics that are critical in constituting legal frameworks and political orders in post-conflict societies. In this context, professional boundaries are therefore always in dispute. The chapter shows how these power dynamics and competition between different professional groups came to define what *jus post bellum* should be. Critically, the ambiguity of *jus post bellum* in a thinly institutionalized and legally fragmented field is usefully treated as a problem in practice.

Liberal international relations (IR) and international law (IL) approaches to rule of law promotion in global governance have focused on the constraints that the rule of law places on international actors and organizations.[99] This liberal assumption also informed the conceptualization of the rule of law in the UN secretary-general's 2004 report, which aimed at '[a]rticulating a common language of justice for the United Nations':

> [Rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally and independently adjudicated … It requires, as well, measures to ensure adherence to the principles of the supremacy of law, equality before the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[100]

The institutional practices of UNMIK challenge the liberal assumption of a shared understanding of rule of law and that international actors engaged in promoting the rule of law are prone to internalize and observe rule of law principles themselves. Tracing definitional battles serves to redress a rather positive and positivist account of the rule and role of law in global governance. The analysis suggests that rather than following constraints on politics imposed by rule of law, following the contradictions of the rule of law between meaning and application also means following the 'constraints' on the rule of law imposed by politics.

[98] Lasse Folke Henriksen and Leaonard Seabrooke, 'Transnational Organizing: Issue Professionals in Environmental Sustainability Networks' (2016) 23 *Organization* 722, 722.

[99] See Tim Gemkow and Michael Zürn, 'Constraining International Authority through the Rule of Law: Legitimatory Potential and Political Dynamics', in Michael Zurn, Andre Nollkaemper, and Randy Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transitional Governance* (Cambridge University Press 2014); John G. Ikenberry and Anne-Marie Slaughter, *Forging a World of Liberty under Law: US National Security in the 21st Century* (Princeton University Press 2006); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004).

[100] UN, 'Rule of Law and Transitional Justice' (n 46) para. 6.

16

Vetting

The Way to Prevent Recurrence?

*Alexander Mayer-Rieckh**

I. Introduction

What officials can stay on and who ought to be removed from public service is a concern that arises frequently in societies emerging from armed conflict. In post-conflict settings, there is often the additional concern about which former combatants can be integrated into security and other public institutions. In the transitional justice literature, vetting has a prominent place and is the most frequently discussed measure to prevent the recurrence of abuses. Why is this the case? And is it warranted? These are the two questions this paper aims to address. Section II situates vetting in the framework of *jus post bellum* and argues that vetting is so prominent because it can contribute to a variety of distinct aims and hence, appeals simultaneously to various concerns and audiences. Section III describes the many reasons why vetting processes can fail and have failed, and cautions against a myopic approach to vetting that fails to link vetting to related processes. The concluding Section IV argues that vetting can fulfil the high expectations often placed onto it only if basic rights are respected in the process; if the process can be completed within a reasonable timeframe and with proportionate resources; and, in particular, if vetting is embedded in a comprehensive prevention strategy that links vetting with other transitional justice measures as well as with broader institutional reform and development efforts.

II. The Locus of Vetting in *Jus Post Bellum*

Vetting is a term commonly used for processes to determine suitability for public office. In established rule of law settings, vetting refers to a process of background screening of candidates for sensitive public office positions. Such employment vetting is to be distinguished from ad-hoc vetting in post-conflict and other transitional settings that primarily targets serving public officials who committed violations of human rights and international humanitarian law. Countries emerging from armed conflict often consider it necessary to remove, or condition the employment of, abusive officials of at least certain public institutions. Vetting in transitions is commonly understood to contribute to preventing the recurrence of abuses. With *jus post bellum* understood as justice in the transition from armed conflict to peace, much of the scholarship on transitional justice may also be used in the

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context of *jus post bellum*. In the following chapter, the focus of transitional justice is in the context of transition from armed conflict to peace, although the assertions may also be germane in situations of transitional justice that do not involve the transition from armed conflict to peace.

In the aftermath of large-scale abuse, states are obliged not only to prosecute the perpetrators, provide reparations to the victims, and tell the truth about these abuses but also to prevent them from happening again.[1] Stopping the continuation of abuses and preventing their recurrence constitutes an essential element of justice in transition. Whereas the first three obligations refer to specific measures, the so-called 'guarantees of non-recurrence' relate to a function. That function is, precisely, prevention, which can be achieved, in principle, by an open-ended variety of measures.[2] Frequently proposed measures to prevent recurrence include reforming state institutions, particularly in the security and justice sectors, that were involved in serious abuses and had the means to repeat them; disbanding parastatal armed groups and demobilizing non-state armed groups; and reforming laws that contribute to impunity.[3] But the institutional realm is just one possible sphere of intervention. Effective prevention targets not just the institutional but also the societal, cultural, and individual spheres. Interventions in these spheres may include, for instance, strengthening civil society, legal empowerment, educational reforms, arts and culture, trauma counselling, and psycho-social support.[4] Effective prevention cannot limit itself to eliminating immediate structural causes of abuse but must also address their root causes. Some form of deeper socio-economic transformation of society may also be needed to effectively prevent recurrence.[5]

In relevant policy, literature, and practice, vetting occupies a prominent place among the reform measures to prevent recurrence. In the 1997 Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 37 through 42 deal with guarantees of non-recurrence. Of these six principles, principle 37 discusses guarantees of non-recurrence in general, principle 38 advocates for disbanding parastatal armed groups, and principle 39 deals with the repeal of emergency legislation and the abolition of emergency courts while the remaining three principles 40, 41 and 42 focus on vetting.[6] In the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 35 through 38 deal with guarantees of non-recurrence. Again, the focus of the section on guarantees of non-recurrence is on institutional reforms, first of which is the removal of officials who are responsible for gross human

[1] United Nations, 'The Administration of Justice and the Human Rights of Detainees: The Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political). Revised Final Report Prepared by Mr L. Joinet,' (2 October 1997) UN Doc. E/CN.4/Sub.2/1997/20/rev.1, [hereinafter: Principles to Combat Impunity], principle 18; and United Nations, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher. Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,' (8 February 2005) UN Doc. E.CN.4/2005/102/Add.1, [hereinafter: Updated Principles to Combat Impunity], principle 1.

[2] United Nations, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,' (7 September 2015) UN Doc. A/HRC/30/42 para. 23.

[3] Basic Principles and Guidelines on Reparation, para. 23; Updated Principles to Combat Impunity (n 1), principle 36.

[4] United Nations, 'Report of the Special Rapporteur' (n 2) paras 77–102.

[5] Alexander Mayer-Rieckh, 'Guarantees of Non-Recurrence. An Approximation' (2017) 39 *Human Rights Quarterly* 416.

[6] Principles to Combat Impunity (n 1) principles 37–42. These principles draw heavily on the provisions on purges in the 1992 El Salvador peace agreement. See Mexico City Agreement, section I.3.A.

rights violations.[7] Human rights treaty bodies have repeatedly recognized the role of vetting in fulfilling the states' obligation to prevent the recurrence of human rights violations.[8] Also the Security Council encouraged states to establish vetting mechanisms in order to exclude perpetrators of violations against children and of sexual violence against women from the security sector.[9]

The concentration on vetting is even more pronounced in the 2004 foundational report of the United Nations secretary-general on the rule of law and transitional justice in conflict and post-conflict societies. In its definition of transitional justice the report refers—next to prosecutions, reparations, and truth-seeking—solely to institutional reform, vetting, and dismissals, rather than to guarantees of non-recurrence more generally.[10] When the report describes these measures in more detail, it limits itself to a discussion of vetting only, making it the foremost measure to prevent recurrence.[11] When the Office of the United Nations High Commissioner for Human Rights published in 2006 six rule-of-law tools for post-conflict states, they covered prosecution initiatives, reparations programmes, truth commissions, monitoring legal systems, mapping the justice sector, and vetting.[12] Nine years later, the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence issued two reports on guarantees of non-recurrence, one general report and the other entirely dedicated to vetting.[13]

While the concept of guarantees of non-recurrence remains largely under-researched, some systematic attention has been paid to the topic of vetting in transitional settings.[14] For instance, when the International Center for Transitional Justice began to explore the field of guarantees of non-recurrence, it launched a large-scale research project on vetting that resulted in the publication of an edited volume on vetting in 2007.[15] The situation in the literature reflects the practice as well. In transitional settings, guarantees of non-recurrence remain a niche concept that does not shape intervention strategies. Vetting, on the other hand, is much debated in countries emerging from violent conflict or authoritarian rule. What officials can stay on, who ought to be removed, and who can be hired for public service are questions that arise frequently in transitions. For instance, vetting-type processes took place in most countries involved in World War II, as well as in many former communist countries following the break-up of the Soviet Union; vetting was also a fiercely

[7] Updated Principles to Combat Impunity (n 1) principles 35–8.

[8] See, for instance, Concluding Observations of the Human Rights Committee: Bolivia, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant (1997) UN Doc. CCPR/C/79/Add. 74, para. 15; Concluding Observations of the Human Rights Committee: Argentina, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant (2000) UN Doc. CCPR/CO/70/ARG, para. 9. See also United Nations, 'Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (18 February 2005) UN Doc. E.CN.4/2005/102, para. 68.

[9] United Nations Security Council, Res. 2151 (28 April 2014) UN Doc. S/RES/2151, paras 6, 19.

[10] United Nations, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General' (3 August 2004) UN Doc. S/2004/616, para. 8.

[11] Ibid. paras 52–3.

[12] United Nations Office of the High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States,' at <https://www.un.org/ruleoflaw/?s=rule+of+law+tools>.

[13] United Nations, 'Report of the Special Rapporteur' (n 2); and United Nations, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,' A/70/438, 21 October 2015.

[14] Alexander Mayer-Rieckh, 'Guarantees of Non-Recurrence' (n 5).

[15] Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007).

discussed topic during the Arab Spring, and vetting-type processes were carried out in several countries in the Middle East and North Africa.

The reason for this prominence of transitional vetting is, I suggest, that it can contribute to a variety of distinct aims and hence, appeals simultaneously to various concerns and audiences. Within the framework of transitional justice, vetting can help satisfy punitive, preventive, and enabling aims. Vetting can have *punitive* effects on abusive officials as it takes away or pre-empts employment, income, power, and access to other resources and benefits.[16] Another punitive dimension of vetting is its potential to subject people to shaming, particularly when it is a public process.[17] In contexts in which it is unlikely that all those who are responsible for abuses will face criminal prosecution due to limited judicial capacities and a large number of perpetrators, vetting can help address the 'impunity gap' by providing a measure of non-criminal accountability.[18]

Vetting can also contribute to satisfying *preventive* aims. Removing abusive officials or precluding the employment of individuals with abusive backgrounds affirms and signals a commitment to basic norms and values, thereby providing recognition to victims as citizens, promoting trust in discredited public institutions, and generally strengthening the democratic rule of law.[19] Another way in which vetting can contribute to prevention is in helping to dismantle criminal structures and covert networks with vested interests that were, and may continue to be, used to commit abuses and a variety of illicit activities. A frequently stated purpose of lustration processes was, for instance, to reduce the threat posed by former communist officials to undermine the transition to democracy.[20] Dismantling such networks helps to disable structures that may continue to be used to commit such abuses, as well as to disenfranchise opponents to reform, obstructionists to the provision of effective services, and spoilers of the transition generally.[21]

Finally, vetting can also *enable* institutions to better perform transitional justice functions as it weakens institutional sources of opposition to dealing with past grievances. A vetted police service, for instance, can more professionally investigate crimes committed in the past; a vetted prosecutor's office can more effectively issue indictments; a vetted court can more impartially render judgement or grant reparations; and truth-telling and other transitional justice mechanisms can be more effective if they enjoy the co-operation of vetted institutions. Vetting may, therefore, create implementation conditions for other transitional justice measures.[22]

[16] Vetting is also closely related to the state's obligation to prosecute those responsible for serious human rights violations; if conviction is enforced, removal or ban from public service would be a natural consequence.

[17] Pablo de Greiff, 'Vetting and Transitional Justice', in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, 2007) 525.

[18] United Nations, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher,' (18 February 2005) UN Doc. E.CN.4/2005 para. 68; United Nations Office of the High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States. Prosecution Initiatives,' at <https://www.un.org/ruleoflaw/blog/document/rule-of-the-law-tools-for-post-conflict-states-prosecution-initiatives/>, 9–10; see also Gregory L. Naarden, 'Non-Prosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnian Police Officials' (2003) 97 *American Journal of International Law* 342.

[19] De Greiff, 'Vetting and Transitional Justice' (n 17) 524–6; 530–7.

[20] Herman Schwartz, 'Lustration in Eastern Europe', in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 2 (US Institute of Peace Press, 1995) 477–8.

[21] World Bank, *World Development Report 2011. Conflict, Security, and Development* (Washington: The World Bank, 2011) 150 ff; Pablo de Greiff, 'Transitional Justice, Security, and Development,' (2010) World Development Report 2011 Background Paper, 17–18.

[22] De Greiff, 'Vetting and Transitional Justice'(n 17) 527–30.

As an institutional reform measure with preventive and enabling aims, vetting not only appeals to transitional justice constituencies but is also of interest to the security sector reform community and development constituencies more broadly. Security actors are familiar with common forms of regular employment vetting for sensitive positions in the security sector.[23] In transitional settings, vetting can facilitate security sector reform because it removes potential spoilers of the process. Transitional vetting also contributes to a comprehensive understanding of accountability, one of the two core goals of security sector reform.[24] Standard approaches to security sector reform aim to establish accountability for present and future actions only. Transitional vetting aims, however, to hold officials to account for abuses committed in the past. In doing so, transitional vetting not only promotes accountability more comprehensively but can also improve the effectiveness of the security sector, the second core goal of security sector reform: holding officials to account for past abuses increases the trust of citizens in security institutions, which is a fundamental prerequisite for an effective provision of services by these institutions.[25] Citizens co-operate with security institutions because 'they view them as legitimate legal authorities, entitled to be obeyed'.[26] Without such trust, citizens are less likely to report crimes, are less likely to turn to the police and other security institutions or the courts to resolve their conflicts, and will hardly seek police assistance for their security.[27] Vetting contributes to a justice-sensitive approach to security sector reform and institutional development more broadly because it brings into view the abusive past and helps deal with its legacy.[28]

While punitive justifications play a role in establishing vetting processes, there are good reasons to understand vetting primarily as an institutional reform measure with preventive and enabling aims.[29] The exclusion of abusive officials from public service provides a partial, non-criminal sanction but it is not an adequate sanction for serious abuses and should not be used as a pretext for abandoning criminal prosecutions entirely.[30] Vetting without criminal prosecutions of at least the worst offenders would not only violate international law but would ring hollow. Doing so may even undermine the limited punitive effects vetting can have, because the punishment vetting can provide is in no relation to the severity of the crimes committed and just removing without criminally prosecuting the perpetrators of such crimes is likely to be perceived as offensive to the victims rather than a deserving

[23] See, for instance, Geneva Centre for the Democratic Control of Armed Forces, 'Vetting and the Security Sector,' *DCAF Backgrounder* 10/2006 (DCAF 2006).

[24] UNGA 'Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform. Report of the Secretary-General' (23 January 2008) UN Doc. A/62/659-S/2008/39, para. 15.

[25] Alexander Mayer-Rieckh, *Dealing with the Past in Security Sector Reform. DCAF SSR Paper No. 10* (DCAF 2013).

[26] Tom Tyler, *Why People Obey the Law* (Princeton University Press 2006) 84.

[27] Hannah Arendt's distinction between violence, on the one hand, that is instrumental in character and uses tools to multiply natural strength, and institutionalized power, on the other, that enables a group to think and act and that draws its legitimacy from the group, is helpful here: '[V]iolence itself results in impotence. Where violence is no longer backed and restrained by power, the well-known reversal in reckoning with means and ends has taken place. The means, the means of destruction, now determine the end — with the consequence that the end will be the destruction of all power'. Hannah Arendt, *On Violence* (Harcourt Brace and Company 1970) 54.

[28] Alexander Mayer-Rieckh and Roger Duthie, 'Enhancing Justice and Development Through Justice-Sensitive Security Sector Reform', in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development. Making Connections* (Social Science Research Council 2009) 214–48.

[29] Juan E. Méndez and Javier Mariezcurrena, 'Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection' (1998) 26 *Social Justice* 98.

[30] Concluding Observations of the Human Rights Committee: Guatemala, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, CCPR/CO/72/GTM (2001): para. 13 (noting that '[t]he perpetrators must be tried and punished; mere separation from service or dismissal from the army is not sufficient').

punishment that recognizes what happened to them.[31] Substituting criminal prosecutions with a vetting process is likely to be perceived by the victims of abuses as 'cheap' justice, letting criminals of the hook. Moreover, a vetting process does not target perpetrators as such but office holders or candidates for public office who perpetrated abuses. Perpetrators who do not (anymore) hold public office or who do not aspire to hold public office cannot be caught in a vetting process. Vetting is a preventive and enabling measure with a punitive effect on abusive officials who are being excluded from public service.

III. Vetting: A History of Unfulfilled Promises

While vetting is a recurring concern in countries emerging from conflict or authoritarian rule, examples of effective and fair vetting are few. Examples of botched vetting exercises range from purge-like processes that violate basic human rights standards and undermine the rule of law, to processes that did not manage to remove abusive officials, thereby justifying their continued service and undermining the legitimacy of the institution. The many reasons for which vetting may go wrong can be grouped into three categories: because basic human rights standards are not respected in the process (see Section III.A below); because the practical challenges of doing vetting are insufficiently considered (see Section III.B below); or because it is burdened with unrealistic expectations about what it can achieve (see Section III.C below).

A. Unfair Process

In international law, there is significant flexibility regarding the concrete form of a vetting process. Vetting strategies should be adapted to the unique historical and political challenges of a specific transition, as well as to the particular requirements of the institution in question. But in any vetting process, states have to ensure that the basic rights of those subject to the process are respected. In particular, a vetting process ought to comply with the principle of non-discrimination, the right of equal access to public service, and with minimum requirements of due process.[32] The vetting procedures and criteria should be clearly and narrowly defined in order to respect the principle of legality and to avoid any discrimination or arbitrariness in the process. A failure to respect fundamental rights not only undermines the fairness of the process, opens the doors to political manipulation, and may lead to politically motivated purges, but also negates the validity of basic norms and values, thereby subverting the norm-affirming function of vetting.

The appropriate *quantum* of due process protection varies with the rights and interests at stake and hence depends on the concrete type of a vetting process.[33] In a process targeting

[31] For certain grave breaches of international humanitarian law and gross human rights violations, international law imposes an obligation on states to prosecute or extradite (*aut dedere aut judicare*). See United Nations, The Obligation to Extradite or Prosecute (aut dedere aut judicare). Preliminary Report by Zdzislaw Galicki, Special Rapporteur (7 June 2006) UN Doc. A/CN.4/571.

[32] Updated Principles to Combat Impunity (n 1) principle 36(a).

[33] Inter-American Commission on Human Rights, Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, para. 95, OEA/Ser.L./V/II.111, Doc. 20 rev. (16 April 2001). There is, however, some controversy whether public officials are protected by administrative due process

serving officials, the officials should be afforded the guarantees that apply to an administrative due process of law. Administrative due process standards are less stringent than the guarantees applicable in criminal proceedings. The basic guarantees described hereafter apply, however, to any due process of law.[34] General administrative law principles require that serving officials subject to vetting are notified of the proceedings and the case against them; are given an opportunity to prepare a defence and given access to relevant data; are provided an opportunity to present arguments and evidence, and to respond to opposing arguments and evidence; are given the opportunity of being represented by counsel; are notified of the decision and the reasons for it; and have the right to appeal to a court or other independent body.[35] Generally, the contractual obligations resulting from the separation of serving officials as a result of a vetting process should be honoured. These may include a severance package and benefits, pensions, and so on.

In a vetting process targeting candidates for public service, the procedures should ensure in particular the right of equal access to public service and the principle of non-discrimination.[36] Especially, the criteria and procedures should be transparent, clear, objective, and reasonable, and should not discriminate against a certain group. The vetting body should be independent and competent to ensure an impartial and legitimate implementation of the process. But the burden of proof usually shifts to the candidate, who has to establish that they are the most suitable for service. Generally, candidates have no right to a hearing or judicial review if they are not selected, as there is no right to be appointed to service in a security or justice institution, just a right to be dealt with fairly in the application process.

The appropriate level of due process afforded to former combatants in a vetting procedure within the framework of an integration process into the state security sector depends on the extent of individual rights granted to them. For instance, a peace or other agreement providing for a presumption of integration of former combatants into the military or other security institutions may give rise to an individual right to be integrated under certain conditions.[37] As a result, some process would have to be established providing for a possible review of cases when a former combatant is rejected for not meeting the conditions of integration including for having committed human rights abuses. On the other hand, in

standards at all. The European Court of Human Rights holds that a public official does not enjoy due process protections if the state proves that the dispute at issue relates to the exercise of state power or has called into question the special bond of trust and loyalty between the state and its official (*Vilho Eskelinen and Others v. Finland*, no. 63235/00, judgement of 19 April 2007). The Human Rights Committee stated, however, that the concept of 'suit at law' under art. 14 was based on 'the nature of the right in question rather than on the status of one of the parties' (*Casanovas v. France*, CCPR/C/51/D/441/1990, para. 5.2). This was confirmed more recently in *Perterer v. Austria* (CCPR/C/81/1015/2001), *Lederbauer v. Austria* (CCPR/C/90/D/1454/2006) and *Bondar v. Uzbekistan* (CCPR/C/101/D/1769/2008).

[34] Art. 14 paragraph 1 of the International Covenant on Civil and Political Rights. See also Federico Andreu-Guzmán, 'Due Process and Vetting', in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, 2007) 448–81.

[35] United Nations, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher (18 February 2005) UN Doc. E/CN.4/2005/102, 20. See also Federico Andreu-Guzmán, 'Due Process and Vetting' (n 34).

[36] International Covenant on Civil and Political Rights, Art. 25 para. c, and Art. 26. See also Federico Andreu-Guzmán, 'Due Process and Vetting'(n 34).

[37] Here the status of former combatants may be comparable to strong forms of affirmative action that are granted in some countries to visibly disabled persons.

processes in which former combatants are given no more than an opportunity to apply for integration into the state security sector, their status is not different from that of an ordinary candidate for public service who has a right to be considered without discrimination.

B. Insufficient Preparations, Inadequate Implementations

Vetting may not only go wrong because basic human rights standards are not respected in the process but also because the political and operational constraints following the end of a conflict or an authoritarian regime are insufficiently considered in the preparations for and implementation of vetting. The design of a vetting process is frequently overly ambitious, the resource and operational requirements are regularly underestimated, and resistance against the process is often misjudged resulting in poor execution, delays, or even breakdown of the process. The following factors in particular are often insufficiently considered in the planning for and implementation of vetting:

Resistance to vetting. Vetting in transitional contexts affects power dynamics and is likely to meet resistance, in particular when it affects the security sector. Individuals in positions of authority risk losing employment, income, and other privileges. Bearing arms confers superiority, and individuals with access to means of force are difficult to dislodge from their positions. Senior officials and politicians may be able to maintain their positions of power after the end of the conflict or the authoritarian regime and successfully resist the establishment of a vetting process. The contested nature of vetting in transitional contexts is a fact that cannot be done away with. At the same time, certain steps can be taken to adjust a vetting process to the adversarial conditions of a specific context. One way of building support for vetting in a contested environment is to enhance the level of information about vetting and to strengthen constituencies supporting vetting. Another way of dealing with possible resistance is to adjust the design of a vetting process to the adverse circumstances of a specific context. For instance, vetting could start with less contested institutions or less contested categories of public officials and slowly raise momentum for vetting. A different strategy to deal with opposition to vetting can be to focus first on categories of officials that are likely to put up the greatest resistance so that spoilers are removed early on. A further strategic option can be to design less intrusive forms of vetting such as 'soft lustration' sanctioning a 'lustration lie' only,[38] or 'indirect vetting', creating incentives for abusive officials to vacate their positions.[39] Limited forms of vetting such as merely screening new appointments, promotions, or transfers is another option that may be more acceptable in environments where abusive officials continue to hold positions of power.[40]

[38] Soft lustration as it was applied in Poland in the late 1990s was a form of vetting that only punished a 'lustration lie': officials who were truthful about their collaboration with the secret services were not sanctioned. Only those officials who made untruthful lustration statements lost their jobs.

[39] In what I call 'indirect vetting', the term vetting is not even used but incentives are created for abusive officials to vacate their positions. Following the establishment of democracy in Spain in 1975, for instance, the mandatory retirement age in the army was lowered to sixty-two years and the institution of 'active retirement' was enacted. As a result, most generals who served during the authoritarian regime had to retire but kept their honours and were given responsibilities outside the military chain of command, such as research assignments or forestry management.

[40] See e.g. Valeria Barbuto, 'Impugnación Procedures in Argentina', in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 40–79.

Institutional conditions for vetting are not in place. Certain transitional settings, particularly post-conflict contexts, are often characterized by a breakdown of institutions, the informality of decision-making, and porousness of institutional boundaries. In such circumstances, membership in a public institution is uncertain and precarious. Members may be removed or leave informally while new members may be accepted without any formal process. Frequently, it is unclear who belongs to an institution and who not, and the exact number of officials is often not known. The fluidity of such situations prevents the effective implementation of a vetting process because the pool of persons to be vetted is not clearly defined and changes continuously.[41] A vetting process should not be launched when basic institutional conditions for vetting are not in place. Rather, reform efforts should focus on establishing these institutional conditions, which may also provide a platform for other reforms. For instance, a useful starting point might be the registration of all officials, which establishes conditions not only for vetting but also for effective management and other reforms, and which helps overcome a culture of impunity.[42]

The number of persons to be vetted is high and difficult to process. While the procedural burden is generally lower in vetting than in criminal proceedings, the number of persons to be processed is usually incomparably higher. This is particularly the case in the security sector with institutions that comprise large numbers of personnel. Processing large numbers renders a vetting process tremendously complex, laborious and time-consuming. Such a process may also draw away critical resources from other development efforts that are a priority after the end of the conflict or the authoritarian regime. As a result, the risk of failure or fatigue is significant, the functioning of the institution can be seriously hampered, and the duration of the process may turn out to be unsustainable.[43] One way of dealing with high numbers of officials is to decentralize the vetting process.[44]A targeted vetting of a

[41] In the Democratic Republic of the Congo (DRC), for example, vetting the police was a possible reform activity regularly discussed following the establishment of the transitional government in the year 2003. But in addition to political and police-internal opposition to vetting, the institutional conditions for vetting were not in place in 2004. While the national police service was nominally unified, it remained internally divided and former warring factions continued to interfere with policing. Estimates about the number of police in the country varied between 80,000 and 110,000 officers. Regular recruitment, training, and promotion procedures were not followed, and the number of commanding officers was disproportional to the overall number of police officers. The police's human resource management system was not maintained and basic information on police officers did not exist. Police officers did not possess identification cards and the public could not always determine who was a police officer and who was not.

[42] In Burundi, for example, the 2000 Arusha Peace and Reconciliation Agreement dissolved all law enforcement agencies and integrated their members into a single institution, the Police Nationale de Burundi, with over 17,000 officers. But the exact number of officers, their level of education, and their professional experience could not be determined due to the fast integration of various groups of officers with hugely diverse backgrounds. As a result, the Ministry of Public Security had difficulties controlling and managing the police personnel, which nurtured a culture of lawlessness and prevented the police reform process from moving forward. In 2008, the Ministry launched a census and identification process to register and issue service cards to all police officers.

[43] In Kenya, for instance, the National Police Service Commission was mandated in 2011 to vet all close to 80,000 Kenyan police officers (see The National Police Service Act [2011], section 7). The commission took considerable time to develop the regulatory framework for the vetting process and set up the vetting secretariat. The vetting process was launched in December 2013. After two years of operation, the commission had completed the vetting of the 198 most senior police officers, around 0.25% of the total number of officers to be vetted, while the vetting of the next level had just started. Of the 198 senior officers, 17 were found unsuitable, all of which had filed an appeal in court. The commission was criticised not only for what the public considered the low number of removals but also for its slow implementation rate. The delays were caused by the complexity of the vetting procedures, operational and security challenges, internal management issues, and funding shortages.

[44] Following the reunification of Germany in 1990, for example, the vetting of civil servants and university officials in former East Germany was not conducted in one, centralised process but took place locally at the level of

limited number of officials may be considered when the vetting of all officials of an institution is not feasible with the given resources or within a reasonable time frame. The vetting could be limited to senior officials to put in place a leadership that signals a commitment to human rights and facilitates the reform process. The vetting could focus on notorious units or known offenders to remove potential spoilers and clearly convey that serious abuse is intolerable. The vetting could also target units of the institution that are in charge of internal discipline and other human resource functions ensuring that officials who commit abuses in the future are effectively held to account. Targeted vetting can be an effective approach to dismantle criminal networks, a crucial preventive aim of vetting.[45]

Vetting criteria are overly ambitious, numerous, or diverse. Generally in transitional contexts, the quality of public officials is wanting in many respects. This is often particularly acute in post-conflict contexts when former combatants without formal training are integrated into public institutions. Officials may not only be responsible for abuses of power but may also be insufficiently trained. Women and minority population groups may be underrepresented. Addressing the human resources challenge in a transitional context is often a huge undertaking requiring a sustained and comprehensive development effort that cannot be achieved solely within the framework of an ad-hoc vetting process. For instance, adding one vetting criterion means adding individual checks of each and every person undergoing the vetting process.[46] Designing a vetting process that aims to resolve all human resources shortcomings is a common mistake that significantly increases the risk of failure, in particular in the security sector. In a context with scarce capacities and large numbers of officials involved in abuses, aiming to remove all perpetrators in a fair and equitable process is likely to overstretch the capacities of a transitional vetting process. Even when such a process does not break down, it takes so long that it seriously undermines the functioning of the public sector and loses its meaning as a transitional process. Rather than using a disproportionate amount of resources in an ad-hoc process, transitional vetting should focus on human rights-related criteria and limit itself to removing or excluding high-level officials with command responsibility or officials with direct responsibility for the most serious abuses, thereby disrupting criminal networks and sending a clear signal that violations of fundamental human rights will not be tolerated in the future. This norm-affirming function can be further reinforced when vetting is complemented by other transitional justice measures such as prosecutions, truth-telling, and reparation, and when the transitional vetting process is embedded in long-term development programmes to establish a sustainable

city administrations and universities. This approach made it possible to process large numbers of officials within reasonable time frames. See Christiane Wilke, 'The Shield, the Sword, and the Party: Vetting the East German Public Sector', in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 348–400.

[45] United Nations, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,'(21 October 2015) UN Doc. A/70/438, 13.

[46] In the vetting of police in Bosnia and Herzegovina between 1999 and 2002, the United Nations Mission in Bosnia and Herzegovina (UNMIBH) introduced a new criterion at midstream in the process to verify whether police officers illegally occupied housing of refugees or internally displaced persons. As a result, supplemental information had to be sought from more than 23,000 officers and the legality of the housing situation of each and every officer had to be determined, which led to the identification of close to 8,000 illegal occupations by police officers. This additional vetting task further extended the duration of the process and contributed to the difficulties in completing it in time.

human resources management system and effective permanent accountability mechanisms in the public sector.

Information about perpetrators is difficult to obtain. Sometimes, authoritarian regimes leave behind archives that contain detailed information about its collaborators and the abuses they committed. But the veracity of such information may be questionable. Often, information about perpetrators of human rights abuses and other serious abuses of power is not even available, cannot be substantiated, or requires a disproportionate effort to obtain in transitional contexts, particularly in post-conflict contexts. Frequently, perpetrators of abuses cannot be identified, or witnesses hesitate to come forward because they fear for their safety. For instance, it is generally easier—though not without challenge in a transitional context—to determine that a public official passed the retirement age than to prove that the official ill-treated a detainee in an informal detention site during a conflict. In fact, while many transitional vetting processes are established primarily to remove abusive officials, the actual percentage of officials removed on human rights grounds is often small.[47]

Timing is off. Frequently, peace accords and other transitional arrangements include provisions to vet security officers, judicial officials, former combatants, or other public officials. Vetting is then often included in the short-term transitional timetable to be completed before the first elections after the end of the conflict or authoritarian rule. As a result, the time frame of the vetting process is unreasonably short, and vetting is to take place in parallel and competes for scarce resources with other critical transitional processes such as the preparation and implementation of elections. The transitional government may not have sufficient time and resources to implement a complex vetting process in this period. Hence the prospect of effective implementation is low. Finding the right time for vetting is critical to its successful realization. A vetting process that competes with other resource-intensive processes such as elections can easily fail. It may, therefore, not be advisable to conduct a vetting process immediately after the end of the conflict or authoritarian rule.[48] Then again the momentum for vetting can wane if a vetting process is delayed and officials who committed abuses may be able to resolidify their positions once a sense of normalcy sets in.[49] While it may not be advisable to execute a vetting process in the very early stages of a transition, a range of preparatory steps can be taken that require fewer resources but nevertheless put the process underway, build confidence in the reform process, and make it more difficult to circumvent vetting. Such steps include conducting broad-based consultations on vetting, determining vetting standards and process, establishing the legal framework, collecting information on the background of officials, or establishing the body tasked with implementing the vetting process.

[47] To give an example, in Liberia, the national transitional government with the support of the United Nations Mission in Liberia (UNMIL) conducted a vetting of the Liberia National Police (LNP) and other civilian security agencies between 2004 and 2006. While almost 60% of the serving LNP officers were removed as a result of the process, they largely had to leave on educational, medical, physical, and age grounds. Despite significant efforts, only limited information on the involvement of serving officers in human rights abuses during the years of conflict was obtained. Out of some 3,700 LNP officers, more than 2,200 were disqualified. Of these, less than 2% (39 officers) were removed because they had committed human rights violations while the retirement criteria resulted in 40% of the removals and 32% of the removals were based on educational grounds.

[48] Cynthia M. Horne, 'Assessing the Impact of Lustration on Trust in Public Institutions and National Government in Central and Eastern Europe' (2012) 45 *Comparative Political Studies* 431, 439.

[49] Samuel Huntington asserts that in 'new democratic regimes, justice comes quickly or does not come at all.' See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 228.

The potential fallout of vetting is not sufficiently considered. Particularly in the security sector, vetting has not only inherent operational risks but may also impact on the functioning of security institutions and hence on the security situation. For instance, removing a large number of military officers with expertise in using force and knowledge where to access weapons may create a significant security risk. Or, laying off many police officers may undermine the police's capacity to fight crime, provide traffic safety, or control crowds. Rising insecurity and service gaps can easily outdo any positive effects a vetting process may have and generally undermine the transition.[50] A thorough analysis of the risks of a vetting process, particularly of security risks and potential service gaps, should be conducted before engaging in a vetting process. Disbanding entire security institutions should generally be avoided due to the inherent security risks of doing so. Remedies need to be available to compensate for the negative consequences of vetting, including potential replacements for removals or interim mechanisms such as the provision of interim law enforcement by peacekeeping operations for the period when mandated institutions are not in a position to do so.

The consequences of a botched process may be worse than no vetting at all, because it not only misses its stated objectives but may also enhance the standing of abusive officials who were not removed and can, therefore, credibly claim to meet the elevated standards required for continued service in a reformed institution. A failed vetting process is likely to further erode trust in public institutions, affect the credibility of the vetting body, and perhaps even undermine confidence in the transition. Generally, realism and modesty should be employed when designing a vetting process. Vetting strategies should account for the significant constraints of a transitional context, as well as for the potential fallout of a vetting process. And the public should be regularly informed about the goals of and approach taken to vetting so that expectations can be managed. Akin to a prosecutorial strategy, a vetting strategy ought to be articulated in transitional settings in order to strengthen the prospects for an effective and fair vetting process under severely constraining circumstances.[51]

C. Unrealistic Expectations

In addition to a lack of respect for basic human rights standards and insufficient consideration of the practical challenges in transitions, vetting can go wrong because of the expectations of what it can achieve are unrealistic. Vetting processes can be burdened with unrealistic expectations in different ways. One way is to load vetting with the entire charge of punishing the perpetrators of serious abuses. Vetting can, by providing a measure of non-criminal accountability, help fill the impunity gap and complement criminal trials in which

[50] In Iraq, for example, the Coalition Provisional Authority dissolved in May 2003, around a month after Baghdad fell to US forces, the Iraqi armed forces, security services, party militias, and other notorious organisations which might have afforded Baathists opportunities to return to power. From one day to the next, some 400,000 conscripts, officers and security officials were left unemployed. This situation not only created a pool of disenchanted security officers willing to join the insurgency that evolved in 2004 and intensified from 2006 to 2008 but also significantly weakened the government's own capacity to provide security, perform law enforcement functions, and effectively respond to the insurgency. See Miranda Sissons and Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Baathification in Iraq* (International Center for Transitional Justice, 2013).

[51] United Nations, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,' (21 October 2015) UN Doc. A/70/438, 15.

only a small number of offenders can be prosecuted. But vetting on its own is not an adequate punishment for serious abuses committed in the past and should not be used as a pretext for not pursuing criminal prosecutions (see Section III.B above). An effective transitional justice strategy will not pit different transitional justice measures against each other but apply them complementarily.[52]

Another unrealistic expectation is to believe that vetting could contribute to preventing recurrence without being accompanied by other institutional reform efforts. The removal of abusive officials can be an important element of institutional reform because it can promote accountability and the rule of law, facilitate the establishment of a regular human resources management system, and strengthen the trustworthiness of public institutions. But vetting can effectively achieve these objectives only if it is embedded in a comprehensive reform effort linking vetting with related reform measures, particularly in the area of human resources management. In order to maintain and build on the gains made in a vetting process, informal personnel flows need to be stopped; a complete and up-to-date personnel database needs to be developed and maintained; merit-based selection, recruitment, appointment, and promotion procedures need to be set up; and efforts need to be made to increase the number of under-represented groups such as minorities or women among the personnel of the institution. The beneficial effects of a vetting process are likely to evaporate quickly without parallel and subsequent efforts to establish an effective and credible human resources management system.[53]

In addition, a vetting process needs to be complemented by the development of regular accountability mechanisms such as internal discipline, parliamentary oversight, ministerial and political oversight, judicial oversight, ombudsperson offices and human rights commissions, civilian complaint review boards, non-governmental human rights organizations, the media, and others. Providing accountability for past abuses by means of vetting without ensuring accountability for future abuses undermines the credibility of the vetting process and the reform effort as a whole. Accountability can be effective and is credible only when it is provided comprehensively to multiple audiences through multiple mechanisms at multiple levels of control.[54]

IV. Putting Vetting in Its Place

Paying attention to vetting in transitions is warranted both from a *jus post bellum* and a development perspective. Within the framework of *jus post bellum*, vetting can not only promote punitive aims and facilitate the implementation of other measures but also

[52] It is sensible to expect, as de Greiff notes, that 'measures that are weak in relation to the immensity of the task that they face are more likely to be interpreted as *justice* initiatives if they help to ground a reasonable perception that their coordinated implementation is a multi-pronged effort to restore or establish anew the force of fundamental norms' (Pablo de Greiff, 'Theorizing Transitional Justice', in Melissa Williams, Rosemary Nagy, and Jon Elster (eds), *Transitional Justice. Nomos vol. LI* (New University Press 2012) 35–9.

[53] Alexander Mayer-Rieckh, 'On Preventing Abuse: Vetting and Other Transitional Reforms', in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, 2007) 482–520.

[54] David H. Bayley, 'The Contemporary Practices of Policing: A Comparative View', in National Institute of Justice, *Civilian Police and Multinational Peacekeeping—A Workshop Series: A Role for Democratic Policing* (US Department of Justice 1997) 5.

contributes, in particular, to preventing the recurrence of abuses that can lead to armed conflict—a critical aim of *jus post bellum* that is often neglected.[55] Vetting may also enhance common, forward-looking approaches to development, because it brings in a focus on past abuses, which can help development better achieve its own goals by revealing the legacy of an abusive past, by calling attention to the systemic causes of abuses, and by contributing to tackle the negative effects of an abusive past on public institutions, particularly low levels of trust in these institutions.[56] Vetting is a bridge issue that links accountability with prevention; the past with the future; a concern about individual wrong-doing with interest in institutional reform and development; transitional ad-hoc interventions with the development of sustainable human resources management systems; and transitional justice with development.[57] The linking functions of vetting explain some of its appeal but also point to perils it encounters in practice.

For vetting not to disappoint but to work and actually contribute to punishing offenders, preventing the same abuses from happening again, facilitating other *jus post bellum* efforts, and building effective and trusted public institutions, the vetting process itself has to be respectful of basic human rights standards; it has to take into account the political and practical constraints of a given transitional context and be implementable within a reasonable, transitional time frame; and in particular, it has to be situated and embedded in a comprehensive prevention strategy that links vetting with other transitional justice measures, as well as with broader institutional reform and development efforts. Vetting can be thought to affirm basic norms and generate trust in public institutions only if basic norms are respected in the vetting process itself. Vetting can have punitive effects and can help fill the impunity gap only if it is an accompaniment to criminal prosecutions of at least the worst offenders. Vetting can be thought to contribute to institutional reform and development only if it is situated in a broader effort to establish an effective, fair, and merit-based human resources management system and is embedded in an overall endeavour to build public institutions that are accountable for their actions. A vetting process that is not linked with related transitional justice and institutional reform and development efforts is not even likely to make the limited contribution to prevention it can make but may further erode trust in the public sector and fail to enhance its effectiveness. Vetting can be an important element of an effective prevention strategy but is not the single way to prevent recurrence.

[55] Mayer-Rieckh, 'Guarantees of Non-Recurrence' (n 5).
[56] Horne (n 48) 412; Mayer-Rieckh, 'Dealing with the Past' (n 25).
[57] Mayer-Rieckh and Duthie (n 28) 214.

17

Norm Persistence in Distributive Justice

Labour Rights

Michael Pugh ***

I. Introduction

The subject of this chapter is labour rights in jus post bellum transition within a conceptual context of liberal ideas of distributive justice. A contested concept in liberal theory,[1] distributive justice involves trespassing on a defining element of liberalism, private ownership of assets. Distributive justice can include versions that accept rectification of past injustice, and transfers of property, such as restitution of assets and land reform. As with the reparations system devised for German resources and property after World War I, however, rectification can involve further arbitrary injustices.[2] Alternatively, cross-subsidization, socially-owned property, state ownership of land and resources, familiar in former Yugoslavia for instance, can overcome elements of inequality and signify a 'liberal' right to the 'commons' and public goods for all to enjoy or be enriched by. This chapter's contention is that liberal concerns about precariousness in political economy have been addressed in *post bellum* peacebuilding by protecting private capital accumulation, redistributing the commons, and largely ignoring labour rights.

Among theoretical approaches, John Rawls's egalitarian stance requires social and economic fairness to be based on equal opportunity to establish income and wealth combined with schemes such as taxation that result in the greatest benefit to the least advantaged in society. Apart from problems in identifying 'greatest benefit' and 'least advantaged', it requires regulation that can contravene liberal promotion of *laissez faire*.[3] In the practices of neo-liberal doctrine, however, *laissez faire* is heavily compromised or abandoned by regulatory regimes that protect competition in the acquisition of capital. If, from a deontological perspective, distributive justice is an open-ended concept and perhaps of limited use, economists and peace scholars nonetheless remain concerned with inequalities and its consequences. For example, a key injustice in post-conflict reconstruction in Southeast Europe

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[1] See Michael Allingham, *Distributive Justice* (Routledge 2014).

[2] Germany had to negotiate concessions from the Allies to retain sufficient resources and food imports so that workers could stay alive to continue production to pay the reparations. John Maynard Keynes, *The Economic Consequences of the Peace* (first published 1919, Macmillan 1920) 150–1,181.

[3] John Rawls, *A Theory of Justice* (Oxford University Press 1999). It contrasts with Robert Nozick's laissez-faire approach that admits historical hierarchies of asset accumulation but discounts the means to rectify them: *Anarchy, State, and Utopia* (Blackwell 1974).

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has been that social property allocations have been disappearing into private accumulation, along with fragmentation of social relations and hugely unequal material conditions. In his critique of welfare economics the Laureate economist, Amartya Sen, contends that development cannot be divorced from 'enhancing individual freedoms and the social commitment to help bring that about'.[4] But Sen's notion of entitlement to seek rewarded work may have little meaning in the reality of mass under-employment, and there is rarely a legal obligation on authorities to provide jobs even when full employment is an aspiration. Liberalism may then be limited to the right to attempt self-employment, to complain or vote, with a default entitlement resting on access to welfare or charity. Moreover, for Thomas Piketty immense inequalities can produce social instability and are 'of no use in promoting growth'.[5] In this respect critical development economics coincides with Rawls, May, and others on regulating unfairness. It also converges with the consequentialist thinking of peace scholars, though distributive justice theorists have not often addressed *post bellum* situations.[6]

Academics in peace studies have poured over war economies, especially in causing or prolonging conflict, and seem exercised by crime and corruption as factors that spoil stability in the aftermath.[7] But whereas ethnographers and anthropologists have examined post-conflict workplaces and household coping mechanisms at a community level, international scholars often mention the justice dimension of employment only in passing, with research on the rehabilitation of ex-combatants a notable exception.[8] Rama Mani's treatise is one of the few in international studies to highlight the inattention to distributive justice by donors and international financial institutions (the UN Development Programme [UNDP] an exception), and her analysis stands the test of time in spite of fluctuations in the global economy since her work was published in 2002.[9] Yet distributive justice is significant for peacebuilding partly as a cause of conflict to be rectified. Indeed statistical work suggests correlations between high levels of vertical and/or horizontal inequality and the incidence of conflict.[10] The balance between public and private assets is a matter of distributive justice as perceived by parties in conflict; and in Southeast Europe is widely held to have been a major factor in sundering the Yugoslav republics into independent states.[11]

[4] Amartya Sen, *Development as Freedom* (Oxford University Press 1999) 296–8.

[5] Thomas Piketty, *Capital in the Twenty-first Century* (Belknap/Harvard University Press 2014).

[6] But see Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012).

[7] See e.g. Wolfgang Benedek, Christopher Daase, Voijin Dimitrijevic and Petrus van Duyne (eds), *Transnational Terrorism, Organized Crime and Peacebuilding: Human Security in the Western Balkans* (Palgrave Macmillan 2010); James Cockayne and Adam Lupel (eds), *Peace Operations and Organized Crime: Enemies or Allies?* (Routledge 2011).

[8] See Karen Ballentine, 'Program on Economic Agendas in Civil Wars: Principal Research Findings and Policy Recommendations' (Final Report, International Peace Academy 2004) 8–9. On combatants and job markets, see Alpaslan Özerdem, *Post-war Recovery: Disarmament, Demobilization and Reintegration* (IB Tauris 2008). On households, see Patricia Justino and Roberto Santos, 'Employment and Household Welfare', in Roger Mac Ginty (ed.), *Routledge Handbook of Peacebuilding* (Routledge 2013) ch. 20. In anthropology, see relevant chapters in Stef Jansen, Čarna Brković and Vanja Čelebičić, *Negotiating Social Relations in Bosnia and Herzegovina* (Routledge 2016).

[9] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of Wars* (Polity 2002) ch. 5. See also UN Development Programme, *Post-Conflict Economic Recovery: Enabling Local Ingenuity* (UNDP 2009); Ellen Moodie, *El Salvador in the Aftermath of Peace: Crime, Uncertainty and the Transition to Democracy* (Pennsylvania University Press 2010).

[10] E. Wayne Nafziger and Juha Auvinen, *Economic Development, Inequality, and War* (Palgrave Macmillan 2003). See also Frances Stewart and Valpy Fitzgerald (eds), *War and Underdevelopment*, vol 1 (Oxford University Press 2001).

[11] Susan L. Woodward, *Socialist Unemployment: The Political Economy of Yugoslavia 1945–1990* (Princeton Univesity Press 1995).

Redistribution rarely gets mentioned in peace settlements but may be important for sustaining peace, partly because inequalities provide grounds on which community leaders mobilize populations for violent redress of disadvantages or to defend threats to privileges. To give one example of increasing sensitivity to post-conflict economies, the World Bank Development Report *Conflict, Security and Development* (2011) was peppered with references to inequality. Conforming, however, to its basic neo-liberal principles, this report had only superficial treatment of 'distributive growth', chiefly to caution against haste that would disrupt macroeconomic stability.[12]

Among the many elements that contribute to distributive justice (such as asset ownership and inheritance), access to paid employment is fundamentally important to the world's majority. Overcoming the post-conflict employment crisis is a high priority for populations. It is certainly essential for the reintegration of displaced persons, refugees and ex-combatants, and is important for restoring social life and individual dignity.[13]

A. Scope, Approach, Argument

The chapter begins with the question of whether there can be labour rights law in *post bellum* justice. It then locates obstacles to implementation and observance in the nature of developmental norms. Next, it turns critically to the ideational frameworks and prescriptions of international agencies and recovery projects. Finally, the chapter draws attention to the growth in precariat labour and the changing nature of work.

Since this chapter emerges from the political economy of peacebuilding the approach is principally materialist. Its rationale starts from the proposition that people encounter abuse of their rights usually when they are alive to be so affected. And to be alive they have to be materially as well as socially sustained. This approach does not negate the relevance of identity, ideas, or nostalgia that, for example, mythologizes workers' control in socialist countries, any more than it discounts the mystique of capitalism as 'natural' rather than socially constructed. But given that the vast majority of the world's population relies on rewarded labour for sustenance, the stimulation and protection of labour are significant in regenerating economic life, albeit regarded by Rawls for instance as secondary to political and civil rights.[14]

In the following endeavour an effort is made to link trends identifiable in the distributive and labour dimensions of world political economy to *post bellum* justice, and to discern commonalities as well as divergences that arise from the interlocking of peacebuilding interventions and host societies. Illustrations derive mainly from research in Southeast Europe (especially Bosnia and Herzegovina, and Kosovo). Their *sui generis* contexts are notable for the relatively advanced pre-war industrial structures in the European periphery, for significant military intervention and penetrating post-conflict international administrations.

[12] World Bank, *Conflict, Security and Development* (World Bank Group 2011) 168. The report noted [6] that there is no inevitable causation but the risks of conflict increase when inequality is linked to identity issues

[13] Eugenia Date-Bah (ed.), *Jobs After War: A Critical Challenge in the Peace and Reconstruction Puzzle* (ILO 2003) 1.

[14] Note that labour rights were prominent in the 1948 Universal Declaration of Human Rights (art. 23). See Ralph Wilde, 'Dilemmas in Promoting Global Economic Justice Through Human Rights Law', in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press 2016) ch. 5.

Their post-conflict evolutions are not directly translatable to other cases, but points of general relevance will be emphasized. Obviously, there is variation in the labour rights practised in different transformation settings, from virtually no rights to customary rights and rights established by contracts. Although the following analysis is mainly about labour in industrial and service sectors, it recognizes that the rights of agricultural and seasonal labour are both relevant and particular.[15] Peasant economies are stratified by family life cycles and kinship (designated *natural economy*) as well as by land rights and income from assets.[16] In the *political economy* discussed here, which also affects commercial agriculture, the norms that frame regulation and law-making invite investigation.

The argument is that legal provision for labour relations in transitions is not especially difficult to envisage. But labour rights are often more honoured in their breach than in their observance because access to work may only be possible by ignoring labour protection. Implementing *post bellum* law for labour market transitions varies according to the level of revival of formal work, the terms of capital investment, and the realization of independent labour inspection and enforcement capabilities. Additionally, a mismatch occurs between prescriptions based on prevalent economic doctrine in capitalist cores and the revival of work and labour rights. Persistent norms posit the expansion of employment as almost wholly dependent on prioritizing the efficiency of private business, rather than for instance on statist public works as a Keynesian multiplier.

II. Can There Be a Law of Labour Rights Transition?

Various instruments are available to safeguard labour rights: national regulation, membership of the International Labour Organisation (ILO), ratification of legally binding international treaties (conventions) and non-binding guidelines. The ILO's Declaration on Fundamental Principles and Rights at Work (1998) provides a basis for labour laws and international accountability through conventions that apply universally irrespective of economic level. A subsequent Declaration on Social Justice for a Fair Globalization (2008) emphasizes 'decent work', an objective that was subsequently integrated into the UN's Sustainable Development Goals (2016).[17] 'Decent' is defined as productive work that 'delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration', as well as other aspirations such as dignity and a voice.[18]

[15] See Alpaslan Özerdem and Rebecca Roberts (eds), *Challenging Post-Conflict Environments: Sustainable Agriculture* (Ashgate 2012).

[16] Mark Duffield, *Development, Security and Unending War* (Polity 2007) 104–5. As Karl Polanyi demonstrated in *The Great Transformation* (Farrar & Rinehart 1944), the Industrial Revolution gave particular impetus to the political economy of a self-regulating market which, however, was collapsing by the end of the nineteenth century. Economists err if they imagine 'open markets', competition, private acquisition, production, and exchange as natural law rather than social construction.

[17] The 1998 declaration is based on eight conventions drawn up from 1930 onwards, on such matters as slavery, child labour, and collective bargaining. ILO members that have not ratified them are obliged to respect them and submit reports.

[18] 'Decent Work and Economic Growth', Sustainable Development Goals (UN 2016) available at <http://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/8_Why-it-Matters_Goal-8_EconomicGrowth_2p.pdf> accessed 24 June 2017.

In some cases a peace process provides treaty-based law that impinges on pre-war domestic regulation. Such was the case with the 1995 Dayton Framework Agreement for Bosnia and Herzegovina (BiH) and the 1999 Rambouillet provisions for Kosovo. Both asserted free market open economies for the territories. But the interpretation and implementation of economic peace rubrics are malleable and the consequences complex. The roles and boundaries of international authority are often unclear and contested.[19] Nevertheless, interventionists, including private investors and NGOs, can make adherence to fundamental prescriptions a condition for access to external aid, loans, and capital. In cases of international administration greater direction is possible, as in Southeast Europe. Additionally, non-state networks can shape distributive justice and regulatory frameworks, such as the worldwide *La Via Campesina*, which supports modest farmers against agribusinesses and assists in protecting rural entitlements.

In fact the UN Mission in Kosovo (UNMIK) laid down transitional labour regulations in 2001, referencing former Yugoslav law and ILO declarations (though the territory is not a member of the ILO). The regulations open by specifying immunity for international staff and then go on to cover issues for Kosovo's adoption regarding slavery, child labour, discrimination, remuneration and entitlements, unionization, hours of work, health and safety, pensions, dismissal, maternity leave, and holidays.[20] These are common protective areas in national provisions. However, law does not keep injustice at bay. Many obstacles confront implementation in post-conflict situations. It is not only the scale of disruption, destruction of market linkages, and primitive accumulation that compromise effective regulation. Four aspects are worth highlighting: the tension between work revival and rights; political manipulation of labour laws; discriminations in the workplace; and transaction and budgetary costs.

III. Obstacles to Implementation

First, there are distinctions, and tensions, between work revival (restoring normal employment levels), the right to work, the right to a job and formal rights in work. The right to work for national citizens has general applicability but the right to a job is not established either in liberal or command economies, since political strategies determine the employability of labour in response to economic conditions that change unpredictably. Some *post bellum* revival may occur as a filtrate of humanitarian aid and assistance, albeit aid is often conditional, as in US regulation, on a large proportion being spent in the donor rather than recipient country. However, the normal prescription for work revival is to wait for the emergence of private capital to establish businesses that employ labour, for export markets to be arranged, and for foreign direct investment to arrive. Employment expansion is thus a medium- to long-term prospect. Arguably, moreover, a function of private business is not to see how much labour it can generate for a given output but how little it can employ productively at the lowest cost. The revival of formal work is also dependent on weak labour

[19] Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008).

[20] UNMIK On Essential Labour Law in Kosovo 2001 (8 October 2001) UN Doc. UNMIK/REG/2001/27; superseded by On Labour, Kosovo Assembly 03/L–212, 1 November 2010.

power and weak rights in order to attract capital and investment. Rights are thus potentially inimical to capital development (see fourth point below). In addition, getting and providing work amid devastation is hazardous and competitive. Work is erratic, often dependent on patronage and personal networks in which arbitrary rules apply. If such unregulated work enables households to cope in the absence of alternatives, the structural problem becomes embedded in social relations.[21] Post-conflict GDP in Southeast Europe would be at least a third larger if informal work were included.[22] Disaggregation of economic sectors in Afghanistan illustrates the variety of activities inimical to formal development and the need to move them from informal untaxable to formal taxable political economy (e.g. from B3 to B1 in Table 17.1).

Table 17.1: Taxonomy of Afghan War Economies (adapted from Goodhand and Mansfield)[23]

	A. Economies of coercion/violence	**B. Economies of accumulation**	**C. Coping/survival economies**
1. Formal audited, regulated, taxable	Police & military salaries	Registered, taxable enterprises. NGO salaries	Low wage labour e.g. public service
2. In-kind non-market transactions	Soldiers provided to militias	Reciprocal enterprise support	Subsist. agriculture; reciprocal/social labour
3. Extra legal market transactions that evade taxes	Private security firms	*Hawalla* (money exchange); unregulated firms, NGOs	Untaxed labour, small businesses, e.g. among refugees
4. Illegal market transactions that usurp state roles	Arms trafficking, protection rackets	Smuggling drugs, gems, antiquities, animals, people	Opium cultivation, low-level trafficking

Second, insofar as economic entrepreneurs take sides in a conflict, and accumulate assets by coercion, then clientelism and oligarchy are also strengthened. In the febrile aftermaths of conflict, laws can be politically charged. In April 2010, disorder broke out, damaging the federal government building in Sarajevo, when 6,000 veterans protested because laws passed six years earlier for their well-being (unemployment benefits, health care, early retirement) were not implemented.[24] The laws had been a manoeuvre to win votes in the 2006 election, a contrivance that may have been inspired by the 2000 electoral success of the Alliance for Change platform, 'Jobs and Justice', with input from the Office of the High Representative (OHR), but which produced no additional jobs. According to the economist

[21] On coping mechanisms by varied groups, see Justino and Santos (n 8) 266.

[22] Gorana Krstić and Peter Sanfey, 'Mobility, Poverty and Well-Being among the Informally Employed in Bosnia and Herzegovina' (2207) 31 *Economic Systems* 311; interviews with economists in Ljubljana, Sarajevo, and Pristina, 2014.

[23] With kind permission of the copyright holders Jonathan Goodhand and David Mansfield, 'Drugs and Disorder: A study of the Opium Trade, Political Settlements and State-Making in Afghanistan' (2010) LSE Crisis State Research Centre Working Paper 83, 4. Available at <http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/wp/wpSeries2/WP832.pdf> accessed 25 June 2017.

[24] Law on Rights of Demobilized Defenders and Members of Their Families, FBiH OG No. 61/06, 27/08, 32/08 (Sarajevo 2006); Law on the Rights of Combatants, Military Invalids and the Families of the Fallen Combatants of the Homeland War of RS (Banja Luka, 2006) art. 33; Organisation for Security and Cooperation in Europe, 'The Right to Social Protection in Bosnia and Herzegovina: Concerns on Adequacy and Equality' (Mission to

Drazen Simić, the 2006 provisions were to cost 350 million euros annually, a sum unavailable in the budget.[25] Eventually the government had to use an International Monetary Fund (IMF) loan to pay pensions at a time of a ballooning budget deficit. It was allowed on the basis of austerity in the economy that led to a retraction of veterans' rights and a 10% cut in public salaries.

Third, no matter how well-designed a peace agreement, employment discrimination is usual after intrastate conflicts. As in BiH, discrimination in the early periods of recovery can be pervasive.[26] Business owners and managers are less disposed to employing people considered to have been on opposite sides and workers may not want to work with former 'foes'. Self-discrimination also occurs when workers resist seeking employment in enterprises run by war-time opponents. Pre-conflict workplace solidarities may not survive. Trade unions can splinter into factions on ethnic or geographical lines and wrestle as much with workers as with owners of capital. In capitalist unemployment individuals are held responsible for competing effectively in labour markets and income failure. As Woodward shows in former Yugoslavia, the moral economy of unemployment was qualitatively distinct, being based on collective social relations of income and subsistence. Although by the 1980s registered unemployed had become structural and reached levels that were normalized by capitalism after conflict, public subsistence was guaranteed for most workers and varied sources of income could be accessed (such as remittances and plots of land). For much of the period until the late 1980s, workers' organizations had the right to participate in decisions about hiring and firing, and local authorities were obliged to find alternative workplaces. Unemployment was not regarded as an economic issue but a factor in social relations.[27] Although there was fragmentation between categories of labour (e.g. operatives and administrators). the degree of social responsibility meant that unemployment was cocooned within a culture of social solidarity. This began to collapse with the decentralization of economic strategy, increased autonomy of firm managers, and an inflationary economic crisis from about 1987. Unemployment rose above 30% in the southeast of Yugoslavia, and Woodward argues that the collapse of system legitimacy for dealing with it in the context of country-wide uneven economic development stimulated ultra-nationalist responses that led to war.[28] However, some non-nationalist and class solidarity articulations from pre-war norms endured during war-time and persisted afterwards. In the ethnically mixed industrial city of Tuzla in northern BiH, post-war unemployment and corruption fostered a united front leading to mass protests in 2014, which spread to other parts of BiH.[29] Social networking to bring about institutional change and to help households cope also survived.[30] But revival of pre-war

Bosnia and Herzegovina, Sarajevo 2012) available at <http://www.osce.org/bih/107168?download=true> accessed 1 July 2017.

[25] Edina Pleho, 'Bosnia and Herzegovina: The Debts of War' (*Balkan Observatory*, 4 June 2010), available at <http://www.balcanicaucaso.org/eng/All-news/Bosnia-and-Herzegovina-The-Debts-of-War-77111> accessed 24 June 2017; author's correspondence and discussions with Drazen Simić on many occasions (Sarajevo, 2011–2016).

[26] Discussion with Agnes Picod, Human Rights Officer (OHR Sarajevo, 30 September 1999); Daniela Lai, *Socioeconomic Justice*: *International Intervention and Transition in Bosnia and Herzegovina* (Cambridge University Press 2020).

[27] Woodward, *Socialist Unemployment* (n 11) 310–20.

[28] Ibid. ch. 10.

[29] Anna Calori, 'Salt and Socialism: A Deconstruction of Tuzla's Political Identity in the Context of the Bosnian Conflict' (May 2015) University of Exeter Ethnopolitics Paper 35.

[30] Čarna Brković, 'Management of Ambiguity: Favours and Flexibility in Bosnia and Herzegovina' (2015) 23 *Social Anthropology* 268.

community facilities and social cohesion remained attenuated, and gender and disability discrimination continued, as the ILO reported.[31] Discrimination is likely to be acute when formal employment is scarce, and this contributes to pools of long-term unemployed who give up looking for work.

Fourth, formal regulatory regimes add to transaction costs of capital investment and state budgets. A dearth of post-conflict capital places a premium on foreign direct investment (FDI), a key element in neo-liberal theories of development. Incentives to attract FDI often include high levels of profit repatriation, land grants and weak environmental controls as well as extant low labour costs. Foreign corporations are often in a position to dictate restrictive labour contracts and investment terms that perhaps brought the ArcelorMittal steel corporation into Liberia.[32] In a Bijeljina (Republika Srpska) engineering factory, workers and economists alike condemn what they regard as 'wage slavery' since privatization, whereby workers earn a fraction of the reward for similar work in Western Europe, even allowing for purchasing power parity.[33] Standard working hours per week may be laid down in national labour laws though do not necessarily specify other levels of entitlement such as length of maternity leave or days of holiday. However, the lack of independent checking on an employer's respect for working practices makes possible cases of employees working for weeks or months without a day off.[34] Similarly, the lack of environmental policing allows sluggish adoption by firms in fixing pollution that harms the work force and local inhabitants.[35] Formal regulation adds to government budgets for monitoring, administration, and arbitration. It took nine years before the Kosovo Assembly revised UNMIK's labour regulation in the light of an inspectorate capability. To the extent that symbiotic relations exist between politicians and entrepreneurs, it may be doubted whether the observation of labour and environmental legislation (as also in the sphere of licensing and building permits), reflects public well-being rather than the interests of private capital and oligarchs.[36]

In sum, legislative models for labour rights are clearly available for adoption under the ILO's universal rubrics, and extant pre-war national laws can be replaced or amended. But many obstacles inhibit implementation of *post bellum* law. In the wake of war-time impoverishment, labour rights have a low priority relative to subsistence and physical and political reconstruction. Law is also subject to political reflections of economic doctrine. In so-called 'advanced' societies that have not undergone post-conflict transformation, labour rights have been weakened in the twenty-first century to promote 'labour flexibility', leading in the UK for example to a marked rise in erratic work and self-employment with no contractual

[31] ILO and Council of Europe, 'Employment Policy Review, Bosnia and Herzegovina' (2009) available at <http://wcq1.ilo.org/wcq1/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_169176.pdf> accessed 26 June 2017; Lejla Somun-Krupalija, 'Gender and Employment in Bosnia and Herzegovina: A Country Study' (December 2011) ILO Bureau for Gender Equality Working Paper 4/2011, 1 available at <www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_170832.pdf> accessed 25 June 2017.

[32] Jolyon Ford and Kyla Tienhaara, 'Too Little, Too Late? International Oversight of Contract Negotiations in Post-Conflict Liberia' (2010) 17 *International Peacekeeping* 361.

[33] Emir Musli, 'Cheap Bosnia–Herzegovina Slaves', *Deutsche Welle* (Bonn, 2 May 2015). Available at <http://www.dw.com/bs/jeftini-bosanskohercegova%C4%8Dki-robovi/a-18420736> accessed 25 June 2017

[34] Jasmin Ramović, 'Maximum Profit, Minimal Peace: Insights into the Peacebuilding Potential of the Workplace' (2017) unpublished PhD thesis, University of Manchester.

[35] Discussion with members of EKOForum–Zenica (Zenica, 21 June 2014).

[36] Michael Pugh, 'Oligarchy and Economy Legacy in Bosnia and Herzegovina' (2017) 5 *Peacebuilding* 223.

rights.[37] The adoption of commercial regulations which tend to assume priority to enhance business activity confronts similar governance issues in economic transitions. But the qualitative differences between neo-liberal unemployment as the failings of individuals, as depicted in the 1980s by Ulrich Beck,[38] and the pre-war experiences of unemployment cushioned by social relations adds to a sense of injustice about a managed *post bellum* peace. It is therefore appropriate to turn to the ideational frameworks and economic prescriptions in which labour rights are contextualized.

IV. Ideational Framework and Institutional Prescriptions

Although the ILO campaigns for greater balancing in favour of employment revival after conflicts, the scales have dipped another way. Mani contends that prescriptions by a limited number of powerful institutions replicate the 1989 Washington Consensus for economic growth, known broadly as neo-liberalism. The Bretton Woods agencies, European Bank for Reconstruction and Development (EBRD), and the largest donors have promoted neo-liberal strategies since the 1980s. Although the ILO, UNCTAD, and UNDP are significant alternatives for promoting employment and well-being, they have marginal influence compared to these institutions.[39] For instance the World Bank and IMF have a veto over Poverty Reduction Strategy Papers that developing countries are obliged to produce on neo-liberal lines. To the extent that the IMF, especially, provided economic assistance to Yugoslavia with strings that destabilized the country in the 1980s, as Susan Woodward argues, then the post-war development policies of the international financial institutions (IFIs) are largely a continuation of their pre-war conditionalities.[40] The IMF has been described as an extension of the US Treasury with the largest vote share of any member (16.75% compared to China's 3%). The US has a direct veto and is a major determinant of loan decisions, intervening on behalf of creditors rather than letting them carry the risk.[41] While the IFIs claim to have shifted in the late 1990s towards greater sensitivity to the special needs of war-affected populations, their agendas continue to coalesce around the precepts of liberalization, privatization, engagement in the global economy (especially through export-led growth), and macroeconomic discipline. For countries that had previously operated socialist, state capitalist, or Keynesian economies, regime change opens the door to economic revolution—Iraq being a dramatic example.[42] As Woodward points out, the IFIs bolster neo-liberal globalization and keep themselves in business.[43]

Following Mani, it can be argued that the strategic goals of dominant institutions in peacebuilding and development are conceptually flawed. An International Peace Academy

[37] K. D. Ewing, John Hendy, and Caroline Jones (eds), 'A Manifesto for Labour Law: towards a comprehensive revision of workers' rights' (2016) Institute of Employment Rights, available at <http://www.ier.org.uk/node/3021> accessed 24 June 2017.

[38] Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter tran. Eng. edn, Sage 1992).

[39] Susan L. Woodward, 'The IFIs and Post-conflict Political Economy', in Mats Berdal and Dominik Zaum, *Political Economy of Statebuilding: Power After Peace* (Routledge 2013) 140.

[40] Susan L. Woodward, *Balkan Tragedy* (Brookings Institution 1995) 50–63.

[41] Mark Weisbrot, *Failed: What the 'Experts' got wrong about the global economy* (Oxford University Press 2015) 127, 155–8.

[42] See Toby Dodge, *Iraq from War to a New Authoritarianism* (IISS/Routledge 2012).

[43] Susan L. Woodward, 'The Political Economy of Peacebuilding and International Aid' in Roger Mac Ginty (ed.), *Routledge Handbook of Peacebuilding* (Routledge 2013) 332.

survey assessed Haiti and El Salvador as particularly damaged by market liberalization which contributed to 'weakening their economic capacities, and often exacerbating the very corruption that market forces are supposed to remedy'.[44] Another analysis suggests that such attempts to regenerate peace economies actually lead to forms of de-development.[45]

Interventionists place overwhelming emphasis on enhancing global integration and domestic private enterprise. The small-and-medium enterprise (SME) model is the pre-eminent driver prescribed for economic growth and job creation. In Southeast Europe the abandonment or demolition of large industrial sites not only represents a visible manifestation of the effects of war, but it also symbolizes the overthrow of an economic system. In contrast to large-scale industries, SMEs also fragment labour forces and make them more readily managed by an employing class. The model introduced in the 1990s for BiH was reinforced by the EBRD in 2016, even though it had failed to increased aggregate employment.[46] A typical pattern was to set up engineering plants of 300–600 workers, ghosts of the former Yugoslav republic's renowned manufacturing sector. About fifty chain suppliers of vehicle parts, from gears to filters, are dotted around BiH. Many of them feed the German motor industry on a stock-in-time basis that requires reliable supplies. But corporations constantly exert pressure on chain suppliers to reduce costs, primarily labour costs. In August 2016, when Volkswagen cancelled supplier contracts without compensation, Prevent DEV, based in Wolfsburg but with factories in BiH stopped delivering parts. Major disruption to German production meant that the majority VW owner, the state of Lower Saxony, stood to lose heavily. The dispute was settled. This seems like a case of role reversal with the tail wagging the dog, but over the longer term VW and similar global corporations can diversify the supply chain to new lower-wage producers.[47]

To further assess whether IFIs did shift their approach to conflict societies, it is worth contrasting the World Bank's *Conflict, Security and Development*, 2011 with its 2016–2020 Partnership Strategy for BiH. The 2011 report adopted a liberal institutional approach, that is to say 'transforming institutions' to bring 'security, justice and jobs'. But a notably short section on employment begins not with job creation per se but with fostering business friendly environments—meaning deregulation and support for capital accumulation exclusively by private entrepreneurs. By cutting bureaucratic obstacles, such as business registration, entrepreneurs would be 'generating economic revival and setting the stage for broader reform'. Lest it be imagined that neo-liberalism is a fundamentalist doctrine, the dominant practice in political economy betrays a 'socialistic' twist. Among other 'free market' subsidies, the World Bank encouraged 'matching grants for new market development

[44] Ballentine (n 8) 8–9.

[45] See e.g. Mandy Turner and Omar Schweiki (eds), *Decolonizing Palestinian Political Economy: De-development and Beyond* (Palgrave Macmillan 2014); Stephen Jackson, 'Protecting Livelihoods in Violent Economies', in Karen Ballentine and Heiko Nitzschke (eds), *Profiting from Peace: Managing the Resource Dimensions of Civil War* (Lynne Rienner 2005) 160–5; John Cockayne, 'Winning Haiti's Protection Competition: Organized Crime and Peace Operations: Past, Present and Future', in James Cockayne and Adam Lupel (eds), *Peace Operations and Organized Crime: Enemies or Allies?* (Routledge 2011) 115.

[46] Yuri Afansiev, UNDP resident co-ordinator, speech 'Improving the Business Environment in Una–Sana Canton' (author's notes, Bihać, 8 July 2011); 'Izetbegović receives EBRD president' *Oslobođenje* (Sarajevo, 1 September 2016) available at <http://www.oslobodjenje.ba/vijesti/daily-news/izetbegovic-receives-ebrd-president/178942> accessed 3 September 2016. See also, Jessica Banfield, Canan Gündüz, and Nick Killick (eds), *Local Business, Local Peace: the peacebuilding potential of the domestic private sector* (International Alert 2006).

[47] Julia Kollewe, 'Volkswagen settles dispute with suppliers that hit Golf and Passat production at six German factories', *The Guardian* (London, 24 August 2016) 20.

that exploit the private sector's capacity to innovate and help entrepreneurs develop new product lines while sharing the risk of investment'.[48] While the 2011 report acknowledged that governments could provide labour intensive public works to make a significant impact on welfare, citing Mozambique's Feeder Roads programme and the Liberian Emergency Employment Plan (which created 90,000 jobs within two years), such operations were to serve as an 'initial bridge' into privatized work.[49] However, as in Sierra Leone, the IFIs generally privilege 'macroeconomic stability over emergency job creation, social welfare and subsidy and protection for strategic sectors of the economy'.[50] Yet Mani provides evidence that state-owned enterprises, in Haiti for example, can return profits and produce capital.[51]

In spite of twenty years of high unemployment in BiH (42.4% in 2016) and an 18% national poverty rate in 2011,[52] the Partnership Strategy for BiH (2016–2020) adheres to the same priorities as the 2011 report. Indeed, the World Bank's persistent developmental norm since the wars has been 'to unleash the potential of the private sector while reducing the footprint of the large public sector'. The Bank's phrase—'rebalancing the economy'—considers former Yugoslavia's brand of political economy to have privileged labour and thus the well-being of the majority, at the expense of efficiency and capital accumulation. The Bank's strategy is to apply the same 'shock therapy' that was applied to Eastern Europe in the 1990s: reform the labour market while 'improving delivery of social protection to vulnerable groups and reducing the cost of labor'; improve competitiveness, entrepreneurship and the investment climate; reduce the size of the public sector while ensuring fiscal sustainability and improving public service delivery; and to invest in economic infrastructure for growth and 'inclusion'.[53] That the strategy has contradictory strands—the inclusion of underprivileged groups in economic growth while cutting sources of income in general—is perhaps unsurprising given the transformative goal of rebalancing in favour of private capital. Inclusion also implies a spread of economic justice.

The outcomes of a private capital-oriented strategy by the IMF and World Bank, however, had not been encouraging for distributive justice or compliance with labour law. In the wake of the 2014 unrest in BiH, two Balkan watchers (from UNDP and the Berlin-based institute, *European Stability Initiative*) recommended emergency employment measures.[54] The unrest eventually triggered the UK and Germany, backed by the US and the EU, to promote initiatives for faster integration into the EU as the solution.[55] Ironically in 2016–2017

[48] World Bank, *Conflict, Security and Development* (2011) 157–8.

[49] Ibid. 157–61.

[50] Neil Cooper, 'As Good as it Gets: Securing Diamonds in Sierra Leone', in Michael Pugh, Neil Cooper, and Mandy Turner (eds), *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding* (Palgrave Macmillan 2011) 109.

[51] Mani (n 9) 140.

[52] Overall unemployment was about 90% at the end of the war. The official measure of registrations includes those who abandon the formal labour market but register to secure health benefits. The ILO's Labour Force Surveys gives lower figures, indicating only able job seekers, as a proportion of the total labour force. Between surveys a modelled estimate is used. BiH Agency for Statistics, 'Labour Force Survey 2015' (Sarajevo, 2015) table 3, TB11 2015.

[53] World Bank Group, 'Country Partnership Framework for Bosnia and Herzegovina for the Period FY16-FY20' (World Bank 2015).

[54] See e.g. Kori Udovicki and Gerald Knaus, *The Balkan Employment Crisis: an urgent appeal* (European Stability Initiative 2014).

[55] Philip Hammond, 'Bosnia and Herzegovina: A new strategic approach' (UK Foreign Secretary's Berlin speech, 5 November 2014) available at <http://www.gov.uk/government/speeches/bosnia-herzegovina-a-new-strategic-approach> accessed 15 June 2017.

the UK government then set about an EU exit for itself. Heightened tensions within BiH and Northern Macedonia, and between Serbia and Kosovo, and discourses predicting a 'Greater Albania' for Kosovo, even talk of war, impelled Germany to announce an EU mini-Marshal plan for Southeast Europe called 'Berlin Plus' in June 2017. Details were sketchy, but the move signifies the abject failure of inventions to foster economic justice for stability.[56]

The counter approach would be not only to contest the ideology, but also to contest the structures; and that would entail political mobilization.

True, such shock therapy may have happened as elsewhere without war. Former Yugoslavia was already integrated with the global economy and profoundly dependent on foreign aids and loans. Its registered unemployment rose and fell in cycles, varying widely between republics, whenever its trade balances crashed. But war-time disruption and destruction facilitated a marked acceleration in a dimension of injustice that in BiH, for example, produced a registered unemployment rate after twenty years of economic guidance from outside, that was double the (perhaps under-recorded) figure for 1988.[57] Donors and international institutions, including protectorate regimes, take opportunities to introduce labour market reforms that contract or concertina the process through shock therapy. An example, from the undemocratic period of OHR governance in BiH (the exercise of Bonn powers), signifies the economic *idée fixe* of internationals.[58] In 2002, the High Representative Paddy Ashdown asserted that commerce, banking, and the general public had lost confidence in the Federation's financial affairs. He banned from politics the economics professor and federation minister of finance Nikola Grabovac, holding him accountable for an unverifiable moral crisis and failing to take action against corruption.[59] Grabovac had criticized the privatization process and claimed that the World Bank determined the Federation budget which he said was adopted 'without a public discussion'. He claimed that it axed 'employment-related measures, small business incentives, export [and production] incentives'.[60] The ban was lifted in 2005, but its original unimpressive rationale exposed the lengths to which the unelected OHR would go for a clearer run at neo-liberal reforms. The reforms converged with the practices of local oligarchs in tyrannizing labour into gaining employment for clientelistic ethno-political loyalty. For Isabell Lorey, the uncertainty that attends precarity (insecure income) and erratic and temporary labour requires a new kind of governance: the governance of uncertainty in conditions of labour

[56] Tobias Flessenkemper, '"Berlin Plus" will not change the game' (The Balkans in Europe Policy Advisory Group, 3 June 2017) available at <http://www.biepag.eu/2017/06/03/berlin-plus-will-not-change-the-game/) accessed 5 June 2017.

[57] Woodward, *Socialist Unemployment* (n 11) 340 fig 9-1.

[58] The 1997 Bonn meeting of the Peace Implementation Council granted the OHR wide powers to sanction elected representatives and officials *ultra vires*. Juan J. Garcia-Blesa, 'Transitional Exceptions to the Rule of Law in International Administrations: The Case of the Office of the High Representative in Bosnia and Herzegovina and the Right to Due Process' (2011) 18 *International Peacekeeping* 396. On Kosovo see Aleksandar Momirov, 'The Local Impact of "UN Accountability" under International Law: The Rise and Fall of UNMIK's Human Rights Advisory Panel' (2012) 19 *International Peacekeeping* 3.

[59] OHR, 'Decision removing Mr. Nikola Grabovac from his position of Minister of Finance of the Federation of Bosnia and Herzegovina' (Sarajevo, 14 June 2002) <http://www.ohr.int/?post_type=post&p=66379> accessed 27 June 2017.

[60] Nikola Grabovac, *Privreda Bosne i Hercegovine pred kolapsom: zbirka eseja i drughi dokumenata* [BiH Economy Brought to Collapse: essays and documents] (Štamparija Fojnica 2015); Lejla Čolak, 'Nikola Grabovac: Svjetska banka ima tajni cilj da razori Bosnu i Hercegovinu' [Nikola Grabovac: World Bank's secret aim to wreck BiH economy] (*Klix*, 16 December 2015, available at <http://www.klix.ba/biznis/privreda/nikola-grabovac-svjetska-banka-ima-tajni-cilj-da-razori-bosnu-i-hercegovinu/151216099> accessed 26 June 2017.

market competitiveness.[61] As well as bolstering oligarchic economic control, intervention facilitated capital exploitation of job markets that permitted pervasive flouting of labour rights law. As Jens Stilhof Sörensen points out, it is the opportunity structures that arise from state collapse, conflict, and international 'stabilization' practices that facilitate methods of neo-liberal governance; in the justice dimension here, the subjugation of workers' rights.[62]

V. The Future of Work

It may be reasonably objected that the focus here on industrial work to produce economic revival and render labour rights more secure, neglects the sector contributing to the largest portion of GDPs in many economies, including in Southeast Europe, namely service sectors. Globally these have had the greatest impact on labour rights in the past ten years. They encompass a wide range of activities: traditional employment in government services (such as education), financial operations, software design, and back-street car repairs. Expansion in parts of the sector relying on casual labour and the self-employed affects distributive justice by changing the contracts for work and escalating a shift to precariat labour.[63]

Indeed, the very profile of employment is changing in so-called advanced economies, partly as a consequence of technological substitution of labour. The ILO addressed the norms of advanced capitalism which have contributed to an increase in 'erratic labour'—the Organisation for Economic Cooperation and Development's (OECD) term for zero hours contracts and the like, experienced by about a third of its members' labour forces.[64] Variable working can reflect an individual desire for flexible hours. But the ILO's backing for what it terms 'flexicurity' requires labour to have entitlement to the security of sustenance as a *quid pro quo* for accepting uncertainty about planning for the future. An assumption here is that well-being in unemployment can be sustained by social benefits, a traditional characteristic of so-called welfare state systems. In a double movement, however, the preferred norms of post-Keynesian economic theory and much of international practice have been both to enhance labour flexibility and to squeeze state expenditure on welfare, in some cases to reduce entitlements. The socio-economic and political consequences in relatively wealthy countries are not difficult to detect, notably growing inequality. Planning a future on the basis of secure work is no longer a priority across a spectrum of economies, and this undoubtedly stoked the EU's austerity and social crisis, affecting youth unemployment in particular. In 2016, Greek and Spanish youth unemployment rates of 50% were catching up with the ILO measure for BiH (57.5%).[65]

But what is expected of societies that have experienced conflict? Aid and assistance, sometimes generous to a fault in producing distortions, certainly cushion the aftermaths

[61] Isabell Lorey, *State of Insecurity: Government of the Precarious* (Verso 2015).

[62] Jens Stilhof Sörensen, *State Collapse and Reconstruction in the Periphery: Political Economy, Ethnicity and Development in Yugoslavia, Serbia and Kosovo* (Berghahn 2009) 6–8).

[63] BiH services made up 65% of GDP in 2015 (cf. 80% in the UK). A precariat 'class' was defined by Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury 2011).

[64] OECD, 'Non-standard work, job polarisation and inequality', in *In It Together: Why Less Inequality Benefits All* (OECD Publishing 2015) ch. 4.

[65] For Mark Weisbrot the Greek crisis was treated as an opportunity by the EU and European Central Bank to enforce reforms that weak members would not have voted for, Weisbrot (n 41) 39.

of conflict and can also produce developmental booms. But economic regulation of transitions has tended to replicate the norms on which economic globalization is based, especially in peripheral economies in 'the shadows of war', which can exercise agency but lack bargaining power. In BiH a pensions system operates, and although open to abuse its inadequacy regularly leads to unrest. The World Bank encourages the two entity governments (the Federation and Republika Srpska) to end them with a one-off payment in order to pare down public spending. An unemployment registration system is used by people to register for health benefits when they have no hope of employment. The World Bank advocates detaching funding from employment.[66] In both cases, payments and benefits need reform but they represent income and entitlement guarantees that, in lieu of formal work, benefit a wider population than those drawing on them.

VI. Conclusion

In spite of disconnection between legislation and those practices that contravene it, regulation may have target value in *post bellum* distributive justice. Laws can flag-up priorities and provide markers for future capabilities. They can offer assurance to workers that they have legal backing when grievances are not addressed and provide a negotiating platform for collective bargaining. But the entrenchment of war-time and post-war coping and survival practices that are not converted into secure incomes by a revival of employment weakens the potential for labour power, labour rights, and distributive justice. Peace is thus partial, perceived by populations as unjust in economic processes and content.

Although income from work is beginning to be a recognized, if undervalued, strand of peacebuilding studies, the issue seems disconnected from macroeconomic policies leveraged by elites at the national, regional, and global levels, often acting in concert with domestic oligarchs who benefit from pliant labour. Many post-conflict and other developing countries are regarded by budgetary interventionists as heavily oriented towards public services and in need of vigorous pruning. Yet state and local authority employment safeguards incomes. The ILO's plea for innovative approaches that focus on decent work has particular resonance in the contexts of conflict disruption and insecurity.[67] A variety of recommendations and practices is available: state capital and direction as in Lower Saxony, is clearly one of them, and is held by many to have worked in Europe after 1945; worker-managed co-operatives; protectionist measures against the vulnerabilities of free trade; subsidized agriculture as in the EU; and measures to stimulate employment through work creation schemes for infrastructure development and public goods. A distributive agenda would result from regulation that not only fostered labour basic rights and entitlements but also economic participation by labour in company decision-making, inclusive worker-managed and owned capital, and fairer distributions of economic surplus from natural resources. For Andrés Solimano, neo-liberal practices manipulate markets to limit society's role in economic programming, permitting instead a nexus between increasingly rich political elites and corporate providers while converting citizens to customers in the guise of

[66] Discussion with senior World Bank officer (Sarajevo, 28 April 2016).
[67] Date-Bah (n 13) 2.

consumer sovereignty. If democracies are tolerating the privatization of economic decision-making, an alternative would be to loosen the grip of corporate elites that are rewarded through political connections.[68] However, if decent work or substitutes, such as a basic universal income currently being explored in Europe, do not materialize and if shrinkage in the economic role of the state remains a strategic priority, paralysis and popular perceptions of inadequate justice seem likely to continue.

Liberal norms are challenged and increasingly disputed in capitalist cores, partly because many of the adverse consequences also affect economies which have not experienced physical violence but which nevertheless contend with pandemics, social distress and wasted human resources. As of 2017, conceptualizing a 'post-liberal' future was in vogue and was being urged for post-conflict situations as well as other contexts marked by burgeoning erratic work.[69] Within this move it is essential to interrogate persistent norms that inhibit income expansion but which could otherwise permit shifts towards distributive justice. Legal provision is at hand for *post bellum* contexts but it cannot guarantee labour protection where an imperative revival of work is subject to the prioritizing of private capital accumulation. Finally, legal regimes for *post bellum* circumstances will certainly need to reflect transformations in the nature of work and income that prolong injustices and instabilities in peace and peacebuilding processes.

[68] Andrés Solimano, *Economic Elites, Crises, and Democracy: Alternatives Beyond Neoliberal Capitalism* (Oxford University Press 2014) 42. The EU model includes statutory provision in the 1992 Maastricht Treaty specifying levels of national debt and budget deficits in the eurozone thereby moving economic judgment from parliaments to the courts. Piketty (n 5) 565–70.

[69] Oliver P. Richmond, *A Post-Liberal Peace* (Routledge 2011); John Milbank and Adrian Pabst, *The Politics of Virtue: Post-Liberalism and the Human Future* (Rowman & Littlefield International 2016).

PART VI
ACCOUNTABILITY

18

The Long Tail of World War II

Jus Post Bellum in Contemporary East Asia

*Timothy Webster**

I. Introduction

The shadow of World War II still looms over East Asia. As in the West, formal hostilities ended in 1945. But unlike the West, issues of state accountability, corporate liability, and individual reparation roil the victims, governments, and civil society organizations of the region. The events of the 1930s and 1940s still form a critical, often controversial, backdrop for international relations among China, Japan, Korea, and other Asian nations.[1] In the past twenty-five years, numerous diplomatic and popular initiatives have undertaken to lessen the tensions that World War II still stokes. This chapter examines the contribution that civil litigation is making towards resolving the tensions, recreating historical memory, and acknowledging the massive human rights violations of World War II.

Western readers may be familiar with the Holocaust litigation, a catch-all term to describe a series of transnational lawsuits brought in the US and Europe. Beginning in the mid-1990s, victims of World War II sued European governments and multinational corporations for war crimes ranging from forced labour to seized assets.[2] Tellingly, the lawsuits themselves did not bring about a resolution; they found for defendants, leaving victim-plaintiffs in the same position they had been. The lawsuits did, however, prod political actors, on both sides of the Atlantic, to focus on these issues. By 2001, government-brokered settlement funds and other mechanisms had resolved most of these issues.[3] Though imperfect, these settlements afforded victims of serious World War II crimes a measure of reconciliation after more than half a century.

A very different scenario has unfolded in East Asia. Since 1990, well over one hundred lawsuits stemming from the war have been filed in China, Japan, Korea, the Philippines,

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[1] Most historians date World War II in Europe from 1939 to 1945. In China, World War II usually dates from 1937, with the initiation of full-scale war against Japan.

[2] See e.g. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1196 (CD Cal. 2001); *Re Holocaust Victim Assets Lit.*, 105 F. Supp. 2d 139 (EDNY 2000); *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248 (DNJ 1999) (slave labour and seized gold from concentration camp victims); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (DNJ 1999) (slave labour in Ford's German factory); LG (Dist Ct) Bremen, 1 O 2889/90 (1998) (cited in *Iwanona*, 67 F. Supp. 2d at 441); *Krakauer v. Federal Republic of Germany*, LG (Dist. Ct) Bonn, 1 O 134/92 (1997) (cited in *Iwanona*, 67 F. Supp. 2d at 441) (revoking temporary immunity for German corporations under the 1953 London Debt Agreement).

[3] See generally, Michael Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press 2003). Professor Bazyler examines lawsuits in the US and Europe for various episodes from World War II, including art, gold, and other assets looted by Nazis; and slave labour used by German corporations.

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and the US. As with their Western counterparts, Asian plaintiffs sued the government of Japan and Japanese corporations for forcible rape, slave labour, massacres, indiscriminate bombing, and other war crimes. The sheer number of lawsuits suggests that, for many victims, World War II has not been adequately resolved. Insofar as *jus post bellum* seeks to secure a 'just and lasting peace' among the parties to conflict, these lawsuits demand a re-examination of both World War II, and post-war efforts to bring about reconciliation, reconstruction, and reparation. In some sense, these lawsuits call into question the foundations of post-war peace erected by the post-war tribunals.[4]

This chapter fills an important gap by focusing attention on *jus post bellum* outside of the West. Specifically, the chapter examines the results, motivations, and achievements of approximately one hundred World War II reparations lawsuits filed in Japan. In so doing, it answers three related questions. First, why does World War II still generate controversy in the contemporary geopolitical triangle of China, Japan, and Korea? Second, how does litigation contribute to the reconciliation process? Third, what are the future prospects for reconciliation in the near future? Before answering these questions, we offer a few remarks about *jus post bellum*, and Asian efforts at reconciliation.

II. *Jus Post Bellum*

Jus post bellum fuses a set of legal, moral, and philosophical principles to bring about a lasting peace after the ravages of war.[5] Most scholars would agree with such a generality, yet differ in specifying and prioritizing those principles.[6] Some understand the task of *jus post bellum* as bringing about political reconciliation, ensuring individuals in war-torn countries have the capacity to educate themselves, and building political trust among the formerly warring states.[7] Some view *jus post bellum* as an exercise in holding to account those most responsible for violating the laws of war.[8] Still others direct the inquiry towards

[4] A few months after the war, Judge Jerome Frank described Nuremberg in the following way: 'For the maintenance of [world] peace a vigorous, organized world order is imperative. The Nuremberg trial signalizes [*sic*] the emergence of such a world order. It furnishes the precedent for a world court ready and able to punish disturbers of international peace'. Jerome Frank, 'Punishment for Today—Precedent for Tomorrow', (13 Oct. 1945) Collier's Weekly, 11, 73. Recent scholarship acknowledges defects of the post-war tribunals, but still stresses their salience. Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *European Journal of International Law* 1085, 1086 (calling the tribunals 'the lodestar of international criminal justice').

[5] *See* Brian Orend, 'Jus Post Bellum' (2000) 31 *Journal of Social Philosophy* 117.Orend lists five guiding principles: just cause for termination (aggressor submits to reasonable punishment), right intention (i.e. no revenge), public declaration by legitimate authority, distinguishing civilians from political and military leaders, and proportionality. Ibid. 128–9. See also George M. Clifford III, 'Jus Post Bellum: Foundational Principles and a Proposed Model' (2012) 11 *Journal of Military Ethics* 42. Clifford also lists five guiding principles: respect for persons, establishing justice (on philosophical grounds), ecological responsibility, multinational commitment, and progress towards closure. Ibid. 45–55.

[6] See Jennifer S. Easterday, Jens Iverson, and Carsten Stahn, 'Exploring the Normative Foundations of Jus Post Bellum: An Introduction', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014).

[7] See Colleen Murphy and Linda Reznik, 'Jus Post Bellum and Political Reconciliation', in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum & Transitional Justice* (Cambridge University Press 2015). In this account, political reconciliation would include inter alia the establishment of trust between the warring states, and individual's trust in the state.

[8] Michael Walzer, *Just & Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 2006) 288 ('There can be no justice in war if there are not, ultimately, responsible men and women').

truth-telling, believing that the denial and obfuscation that follow conflicts often hinder longer-term prospects for reconciliation.[9] On the other hand, some scholars doubt that *jus post bellum* amounts to a coherent legal concept, preferring instead to focus on existing legal regimes such as human rights law or the law of war.[10]

Since each conflict, and its ultimate resolution, is to some extent *sui generis*, scholars struggle to articulate the precise parameters of the field of *jus post bellum*. Nevertheless, Larry May and Elizabeth Edenberg have gleaned six principles that serve as a useful starting point: retribution, reconciliation, rebuilding, restitution, reparations, and proportionality.[11] To some extent, these principles overlap and interact with each other. Proportionality only makes sense by balancing one principle against another. Likewise, reconciliation requires some combination of restitution, reparation, retribution, and perhaps rebuilding. In other words, these categories may not be wholly distinct from one another. Moreover, these principles lavish attention on the state, arguably at the expense of victims. For example, retribution—holding accountable those most responsible for initiating or waging unjust war—usually requires a criminal trial, and by extension the resources and judicial machinery that only states possess. Rebuilding, likewise, hinges upon the deployment of resources normally available only to states, as the post-war reconstruction of Germany and Japan suggest.[12]

Tribunals, a key institution in many post-war reconciliation processes, promote this state-centric view. Certainly the post-war tribunals (Nuremberg and Tokyo) focused on state matters, prosecuting a narrow band of high-level government officials and military officers. The Tokyo Tribunal in particular devoted more attention to crimes against peace (preparing, initiating, and waging war) than it did to crimes against humanity (murder, enslavement, civilian killings, etc.).[13] As criminal tribunals, these institutions focused on the planning and perpetration of crimes, at the expense of examining the damage or destruction caused thereby. This has prompted scholars to criticize the Tokyo Tribunal for neglecting the devastation suffered by Asian victims.[14]

By contrast, *jus post bellum* directs attention towards the needs of individual victims, as it is 'their society that is going to be constructed in the name of just and stable peace'.[15] Post-war reconciliation mechanisms must attend to the destruction, suffering, and damage caused by war, and the lives crushed thereunder. The guiding inquiry must protect and ultimately 'empower the civilian population'.[16] More broadly, *jus post bellum* asks how to undo

[9] Cindy Holder, 'Truthfulness in Transition: The Value of Insisting on Experiential Adequacy', in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum & Transitional Justice* (Cambridge University Press 2015).

[10] Eric De Brabandere, 'The Responsibility for Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept' (2010) 43 *Vanderbilt Journal of Transnational Law* 119, 149.

[11] Larry May and Elizabeth Edenberg, 'Introduction', in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2015) 3–6.

[12] Ibid. 5.

[13] Yuma Totani, 'The Case against the Accused', in Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds), *Beyond Victor's Justice: The Tokyo War Crimes Tribunal Revisited* (Brill 2010) 147.

[14] Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard 2009). Totani notes, inter alia, the Allied prosecutors' failure to investigate Japan's (i) medical experiments on Chinese subjects (Unit 731), (ii) war crimes against Koreans and Taiwanese (who were then Japanese colonial subjects), and (iii) use of poisonous gas in China. Ibid. 248–50. She also cites the 'blanket immunity' that Western powers extended to prevent scrutiny of wrong-doing against their own colonial subjects in Southeast Asia.

[15] See Inger Österdahl, 'The Gentle Modernizer of the Law of Armed Conflict?', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014) 207, 219.

[16] Ibid. 220.

the devastation of war, to rebuild broken societies, and to restore rule of law.[17] This requires broad reflection on the types of damage visited upon civilians: property damage, sexual assault, forced labour, physical violence, and other ills.

Jus post bellum also has an important normative component. War efforts often involve propaganda efforts to demonize the enemy, whip up nationalist sentiment, and exaggerate differences between people. Post-war peace processes must reorient social norms away from antagonism and hatred, and towards co-operation and cohabitation.[18] This normative inquiry may very well change over time, as more information about the causes, conduct, and consequences of the war emerge. It is doubtful that a single 'truth', satisfactory to all parties, will emerge.[19] Instead, victims, historians, politicians, and activists will advance different, even contradictory, narratives about the causes of war, and apportion blame accordingly.

A final question involves the temporal limits of *jus post bellum*. When does the post-war period end, exactly? Most agree that *jus post bellum* begins when military hostilities end, even if it may be difficult to pinpoint that precise moment in time.[20] But when does it end? Scholars propose several possible dates for any given war, but recognize that the inquiry is, ultimately, subjective.[21] It hinges upon the actors, the situation, the measures, and subsequent reception by the international community.[22] Post-war settings have accommodated various mechanisms to build towards a sustainable peace. Regional integration, alleviation of racial tensions, compensation schema, and constitutional amendments have signified the end of the post-war period.[23] But there is neither a set formula, nor a single time frame, by which to demarcate 'post-war'. This helps explain why we are still discussing World War II reparations well into the twenty-first century.

III. Models of Post-Conflict Justice

Various mechanisms of post-war reconciliation have emerged after the Cold War (1990-present). *Ad hoc* international tribunals, resurrected for the first time since World War II, presided over war crimes prosecutions concerning Yugoslavia, Rwanda, Sierra Leone, and Cambodia. It is still premature to confirm their impact or legacy, as several are ongoing at the time of this writing. Yet these tribunals have clarified jurisdictional principles, narrowed

[17] Larry May, '*Jus Post Bellum* Proportionality and the Fog of War' (2003) 24 *European Journal of International Law* 315, 324.

[18] Jennifer S. Easterday, 'Peace Agreements as a Framework for Jus Post Bellum', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014) 379, 380.

[19] Cindy Holder (n 9) 248–9.

[20] For instance, President Bush declared the end of 'major combat operations in Iraq' on 1 May 2003. He stood before a banner that read 'Mission Accomplished' on board the USS Abraham Lincoln. In 2010, the last US combat team left Iraq, and President Obama declared an end to the combat mission. In 2017, at the time this chapter was written, some 5,000 US troops were stationed in Iraq to fight Islamic State. See Michael R. Gordon, 'U.S. to Send Over 200 More Soldiers to Iraq to Help Retake Mosul', *New York Times* (27 March 2017).

[21] See Martin Wählisch, 'Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the "Post"', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014) 316, 330.

[22] Ibid. 331 (listing a series of events from Libya, Lebanon and Bosnia-Herzegovina that signified the end of war).

[23] Ibid.

and reinforced legal doctrines, and ended impunity for *some* high-ranking officials.[24] They have also breathed new life into the study of international law (especially international criminal law and international humanitarian law), which has in turn spread norms of individual accountability across regions, and ultimately around the world.[25]

Truth and reconciliation commissions (TRCs), based in part on South Africa's experience, have also formed in Liberia, East Timor, and Guatemala. These institutions collect testimony from victims and perpetrators, conduct independent investigations, and issue reports to facilitate reconciliation.[26] They may also recommend the prosecution of those persons most culpable of human rights abuses, or reparations for those peculiarly harmed during the conflict.[27] While not uncontroversial, TRCs usually provide a comprehensive account of the major events of the conflict, thus serving a valuable truth function.

A final, and relatively recent development, involves claims commissions. These institutions hear evidence about 'loss, damage and injury resulting from the conflict'.[28] Thereupon, they make awards to civilians, prisoners of wars, and those who suffer the destruction or seizure of property. Such institutions have been set up after conflicts such as the Iran Hostage Crisis, and wars such as the Eritrean–Ethiopian War.

While each mechanism has its particular strengths and weaknesses, all require enormous coordination. The Nuremberg Tribunal, for instance, required months of negotiations among four states (UK, US, Soviet Union, and France), each with its own legal traditions, modes of criminal procedure, and goals for the tribunal.[29] Likewise, the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in the 1990s required at least nine affirmative votes from the fifteen members of the UN Security Council, and none of the Permanent Five members to cast a veto.[30] Mechanisms such as TRCs similarly demand political will from a post-conflict government, and the courage to grapple with a fresh and painful chapter of history.[31] Claims commissions may require two states, recently at war with one another, to come to the table, agree to a set of procedures, and submit to judgments by independent parties, often from third states. The rarity of such bilateral claims commissions bespeaks the difficulty of getting two sides to sit down and agree to such a mechanism.

[24] The Tadic decision held that international law can apply to internal armed conflict, as long as one government controls the military of one party to the dispute. *Prosecutor v. Tadic* (Judgment) Case No. IT-94-1-A (15 July 1999) para. 137. The ICTR has refined interpretations of genocide, incitement to genocide, and rape.

[25] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton 2011) 5–6.

[26] The leading examples would be Liberia and Sierra Leone.

[27] South Africa's TRC proved somewhat unusual in this regard, providing amnesty to those who made full disclosure. The expression of remorse was not necessary. Lyn Graybill, *Truth and Reconciliation in South Africa? Miracle or Model* (Lynne Rienner 2002) 40.

[28] Michael J. Matheson, 'Eritrea-Ethiopia Claims Commission: Damage Awards' (2009) 13 *ASIL Insights*, <asil.org/insights/volume/13/issue/13/Eritrea-ethiopia-claims-commission-damage-awards>.

[29] Many of these issues were thrashed out in the London Conference, which took place from 26 June to 2 August 1945. But even in April 1945, Truman had the idea of a tribunal in mind, and approached Justice Robert Jackson about serving as a chief prosecutor for the US. See generally Nuremberg Trial, International Military Tribunal, 1945–1946, <https://www.roberthjackson.org/nuremberg-timeline/>

[30] All fifteen members of the UNSC voted to establish the ICTY in 1993. See UNSC Res. 827 (1993) UN Doc. S/RES/827. Thirteen members of the UNSC voted to establish the ICTR. China abstained and Rwanda voted against the resolution. See UNSC Res. 955 (1994) UN Doc. S/RES/955 (1994).

[31] See generally Graybill (n 27) cit. 2–6. One of the most controversial elements of the TRC was the amnesty provisions, the 'outcome of various compromises that had been hammered out between the African National Congress and the National Party in the transition period leading to the adoption of an interim constitution in 1993, with input from twenty-six political parties'. Ibid. 2.

What if there is no consensus? States like to put wars behind them, particularly when they *lose*. State actors generally believe they fought for a just cause, and have spent years convincing the public of the reasonability, necessity, even desirability, of the war effort. After the war, one state may believe it has already done its penance; the prosecution of war—with its casualties, property damage, and civilian privation—may seem like punishment enough. Moreover, if the international community is either fractured or reluctant to intercede, both distinct possibilities, institutional paralysis may prevail. In this case, individual victims cannot reasonably expect an investigation of facts, reparations for property damages, or compensation for personal harm they suffered. In such a situation, they may take matters into their own hands.

One increasingly common response has been the resort to individual litigation. In the West, victims of a range of World War II crimes stepped forward in the 1990s to demand restitution of seized assets and property, and various types of reparation.[32] These lawsuits did not result in compensation awards. But they did set in motion a chain of events that led, ultimately, to the establishment of large foundations that compensated thousands of Holocaust victims. The Swiss,[33] German,[34] and Austrian[35] settlement funds provided reparation to those who had performed unremunerated forced labour, who had their businesses liquidated, who had their assets seized, and many others. These settlement funds offer important precedents for resolving the lingering issues of World War II damage. But as with other post-war mechanisms, they require co-ordination across borders, diplomatic tact, willingness to face dark chapters of a nation's past, and other attributes. At least in the transatlantic context, civil litigation was the spark that brought the companies, and the governments, to the negotiating table.[36] This chapter explores the role of litigation in more detail below. But first it is helpful to understand the resonance of World War II in contemporary East Asia.

IV. World War II in Contemporary East Asia

World War II still generates controversy over East Asia. Seventy-five years after the war, scarcely a year goes by without a potent reminder of the war: another compensation lawsuit,

[32] 'Reparations' is a general term used for redressing gross violations of international law. They may include restitution (restoring the victim to their *ex ante* status, including the return of property), compensation (economic loss, including physical and mental harm), rehabilitation (provision of social, medical psychological and other services), and satisfaction (measures to ensure non-repetition, return of remains of those killed). See Basic Principles & 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, UNGA Res. 60/147 (16 Dec. 2005) UN Doc. A/RES/60/147 paras 15–23.

[33] In August 2000, Swiss banks Credit Suisse and UBS, together with the Swiss government, established a $1.25 billion fund to repay the accounts the banks had effectively stolen from victims of the Nazi regime. See Bazyler (n 3) 35.

[34] The German government—together with German banks, insurers and companies—established a 10 billion deutschemark ($5.2 billion) fund in 2000. The redress aimed primarily at slave labourers in German factories, including Ford Werke (the German subsidiary of Ford), Siemens, and Daimler-Benz. Bazyler (n 3) 70–4.

[35] The Austrian government, without support from the private sector, established a $480 million fund in 2000. The settlement would pay owners of lost property, liquidated businesses, real estate, bank accounts, insurance policies, and so on. See Claims Conference, Austrian General Settlement Fund (GSF), available at <http://www.claimscon.org/about/history/closed-programs/general-settlement-fund> accessed 19 May 2019.

[36] In introducing Germany's fund, Chancellor Gerhard Schroeder stated it would 'counter lawsuits, particularly class action lawsuits, and to remove the basis of the campaign being led against Germany industry and our country'. See Roger Cohen, 'German Companies Set up Fund' *New York Times* (17 Feb. 1999).

new discovery of war remains, or a controversial revision of the events of the war. In 2018, the Supreme Court of South Korea ordered two Japanese multinationals to pay damages awards to Korean men and women who performed forced labour during World War II.[37] The decision badly damaged bilateral relations between Seoul and Tokyo, inviting a trade war and various diplomatic spats.[38] In 2017, a South Korean historian was acquitted in a criminal defamation trial for her book, which advanced views about the comfort women that were out of step with mainstream Korean ones.[39] A year earlier, she lost a civil defamation lawsuit, which ordered her to pay each of nine former comfort women 10 million won (8,000 euros) in damages.[40] In 2016, Mitsubishi settled a lawsuit filed by dozens of Chinese men who had been forced to work in its Japanese factories during the war.[41] In 2014, a graveyard containing bones of Korean workers who died during the war was discovered in Japan.[42] In 2013, Prime Minster Abe Shinzo visited Yasukuni Shrine, which honours Japan's war dead, among them fourteen Class-A war criminals.[43] His visit provoked condemnations from South Korea and China, which have criticized Japan's lack of contrition about the war.[44] Even the US, Japan's long-time ally, offered a rare rebuke of Abe's visit.[45]

During decennial anniversaries of the war—2015, 2005, 1995—the atmosphere is particularly tense, as a new set of remembrances, reinterpretations, and recriminations unfolds.[46] On the seventieth anniversary of Japan's surrender—14 August 2015—Prime Minister Abe made a wide-ranging statement about the war. He acknowledged the death and destruction Japan visited upon many Asian people, and expressed 'deepest remorse' and 'sincere condolences' for those acts.[47] But he did not issue a fresh apology, angering

[37] Choe Sang-hun, 'South Korean Court Orders Mitsubishi of Japan to Pay for Forced Wartime Labor' *New York Times* (29 Nov. 2018).

[38] Lindsay Maizland, 'The Japan-South Korea Trade Dispute: What to Know' *Council on Foreign Relations: In Brief* (5 Aug. 2019) (describing the diplomatic fallout occasioned by the Supreme Court decisions).

[39] Ms. Park Yu-ha presented a more complicated picture of the comfort women than has been conventionally accepted by mainstream South Korean society. See Choe Sang-hun, 'Professor Who Wrote of Korean "Comfort Women" Wins Defamation Case' *New York Times* (25 Jan. 2017). Unconventional accounts of the war have also spurred lawsuits in the China and Japan. A Beijing court ordered a Chinese historian to apologize to the sons of five war 'heroes' whose narratives he had questioned. According to Xinhua, the article both hurt the plaintiffs' feelings and harmed the public's sense of national identity. See 'Former magazine chief editor loses WWII-heros [sic] slander case', *Xinhua* (27 June 2016). In Tokyo, over 8,000 people sued the left-leaning *Asahi Shimbun* for 'spreading erroneous facts to international society'. 'Thousands of people sue Asahi for articles on wartime sex slavery', *San Diego Union-Tribune* (27 January 2015).

[40] See Choe Sang-hun, 'Professor Who Wrote of Korean "Comfort Women" Wins Defamation Case'.

[41] 'Mitsubishi Materials, Chinese WWII slave workers reach deal' *Chicago Tribune* (1 June 2016).

[42] Martin Fackler, 'Pressure in Japan to Forget Sins of War' *New York Times* (28 Oct. 2014).

[43] Former Prime Minister Koizumi Junichiro visited Yasukuni six times between 2001 and 2006.

[44] See Chico Harlan, 'Japanese prime minister's visit to Yasukuni war shrine adds to tensions in Asia' *Washington Post* (26 Dec. 2013); Shannon Tiezi, 'China, South Korea Not Convinced by Abe's WW2 Anniversary Speech' *Diplomat* (18 Aug. 2015).

[45] The US embassy said in a statement, '[T]he United States is disappointed that Japan's leadership has taken an action that will exacerbate tensions with Japan's neighbors'. See Embassy of the United States, Tokyo, Japan, 'Statement on Prime Minister Abe's December 26 Visit to Yasukuni Shrine' (26 December 2013) <https://japan.usembassy.gov/e/p/tp-20131226-01.html> accessed 20 June 2017.

[46] In 1995, Murayama Tomiichi offered what many consider as the sincerest apology by a Japanese prime minister for the war. See Ministry of Foreign Affairs of Japan, Statement by Prime Minister Tomiichi Murayama 'On the occasion of the 50th anniversary of the war's end' (15 August 1995), <http://www.mofa.go.jp/announce/press/pm/murayama/9508.html> accessed 12 June 2017. In 2005, Koizumi Junichiro offered his own statement. See Ministry of Foreign Affairs of Japan, Statement by Prime Minister Junichiro Koizumi (15 August 2005) <http://www.mofa.go.jp/announce/announce/2005/8/0815.html> accessed 15 June 2017.

[47] Justin McCurry, 'Japanese PM Shinzo Abe stops short of new apology in war anniversary speech', *Guardian* (14 Aug. 2015).

Japan's neighbours.[48] The Chinese government declaimed Abe's insincerity and ambiguity.[49] South Korea similarly expressed dissatisfaction, albeit in more measured terms.[50] A few weeks after Abe's public statement, Chinese president Xi Jinping—joined by Russian president Vladimir Putin and South Korea's then-president Park Geun-hye—presided over a military parade to commemorate China's victory over Japan.[51]

Beneath the political posturing—and under pressure from human rights groups, international organizations, foreign governments and victims themselves—the Japanese government has tried to address one aspect of the country's troubled war-time legacy: the 'comfort women'. In 1995, Japan launched the Asian Women's Fund, which channelled donations from the private sector to former comfort women. The Japanese government provided funds to cover medical and welfare expenses, but did not contribute to the monetary compensation scheme. Several hundred comfort women, mostly from the Philippines, accepted compensation. The fund provoked strong reactions from South Korean and Dutch comfort women, who believed that the compensation did not amount to state redress, as the Japanese government still avoided *legal* responsibility for the war.[52]

In late 2015, the Japanese and South Korean governments announced they had reached a 'final and irreversible' agreement on the comfort women issue.[53] Prime Minister Abe Shinzo offered his 'most sincere apologies and remorse'. The scheme would provide money to surviving South Korean comfort women, and the families of deceased comfort women. But sitting South Korean president Moon Jae-in, after convening a commission to look into the agreement, formally dissolved the foundation in 2019.[54]

Outside of officialdom, activists, historians, lawyers, and others have devoted significant attention to resolving lingering issues from the war.[55] Some comb historical archives

[48] Ibid.

[49] See e.g. Foreign Ministry Spokesman Hua Chunying's Remarks on Japanese Prime Minister Shinzo Abe's Statement on the 70th Anniversary of the End of the War, Min. For. Aff. People's Rep. China (15 Aug. 2015) ('Japan should have made an explicit statement on the nature of the war of militarism and aggression and its responsibility on the wars, made sincere apology to the people of victim countries, and made a clean break with the past of militarist aggression, rather than being evasive on this major issue of principle'), available at <http://www.fmprc.gov.cn/mfa_eng?xwfw_665399/s2510_665401/2535_665405/ t1288969.shtml> accessed 15 Aug. 2017. See also 'Abe's watered-down apology fails sincerity test' *Xinhua* (14 Aug. 2015). (calling Abe's speech a 'retrogression from the 1995 statement' by Prime Minister Murayama, <http://www.chinadaily.com.cn/world/2015-08/14/content_21604800.htm> accessed 15 Aug. 2017.

[50] South Korean President Park Geun-hye noted Abe's statement 'did not quite live up to our expectations'. See Commemorative Address by President Park Geun-hye on the 70th Anniversary of Liberation, Republic of Korea Cheong Wa Dae (15 Aug. 2017), <http://english1.president.go.kr/activity/speeches.php?srh%5bboard_no%5d=24&srh%5bview_mode%5d=detail&srh%5bseq%5d=11748&srh%5bdetail_no%5d=43> accessed 15 Aug. 2017. Likewise, the Korea minister of foreign affairs urged 'the Japanese government to make proactive efforts to resolve as soon as possible the pending historical issues between the ROK and Japan, including that concerning the sexual slavery victims of Japan's Imperial Army during World War II'.

[51] See Tom Phillips, 'China military parade shows might as Xi Jinping pledges 300,000 cut in army' *Guardian* (3 Sept. 2015).

[52] Stephanie Wolfe, *The Politics of Reparations and Apologies* (Springer 2013) 264.

[53] The agreement would include an apology by Japanese prime minister Abe Shinzo, and the establishment of a 1 billion yen (8 million euro) fund to care for elderly comfort women.

[54] Kyodo News, 'South Korea formally closes Japan-funded "comfort women" foundation' *Japan Times* (5 July 2019).

[55] Franziska Seraphim, *War Memory and Social Politics in Japan, 1945–2005* (Harvard East Asian Press 2009) (outlining the contributions of various civil society groups to the proper commemoration of the war dead, manipulation of national symbols and the teaching of history).

to uncover how the Japanese government planned and executed campaigns or policies.[56] Others have held mock trials to flesh out the historical, moral, and legal treatment of Japan's war-time conduct.[57] Still others rally by the thousands to ensure Japan's pacifist constitution remains intact.[58] As we will see below, litigation has provided an additional track to hold the Japanese government, and corporate sector, to account.

V. Litigation After War

Courts have played a key role in reconciling World War II. The most famous of these are the Nuremberg Tribunal (1946–1947) and Tokyo Tribunal (1946–1948). In addition, many countries, including China, Netherlands, and Russia, held domestic military tribunals to try Japanese war criminals within their jurisdiction.[59] Yet, as with any post-conflict judicial mechanism, these tribunals selectively examined the war.[60] Many crimes, from the institutionalized rape of the comfort women, to the use of human subjects in medical experimentation, were either overlooked or inadequately addressed. Moreover, some of the harm—radiation sickness from the US bombing of Hiroshima and Nagasaki, unexploded ordnance left by the Japanese Army in Manchuria—emerged only years or decades after the war. Given advances in human rights and humanitarian law, as well as just war theory, a rethink of World War II's remedial mechanisms is both timely and necessary.

Lawsuits have long probed Japan's role, responsibility, and remediation efforts for the war.[61] In the 1950s and 1960s, survivors of the atomic bombing of Nagasaki sued the Japanese government for waiving their rights to seek compensation from the US government in the San Francisco Peace Treaty.[62] The Tokyo District Court determined that the bombing of Nagasaki violated international law; but it also held individuals did not have the standing to sue governments for violations of international law, a holding with significant consequences for subsequent lawsuits.[63] In the 1970s and 1980s, plaintiffs from former

[56] The best-known example is Professor Yoshimi Yoshiaki's discovery, in the library of Japan's Defense Agency, of documents that linked the military with the comfort women stations. See Norimitsu Onishi, 'In Japan, a Historian Stands by Proof of Wartime Sex Slavery' *New York Times* (31 Mar 2007). Less well known, Professor Kosho Tadashi found a cache of documents about Korean forced labor in the library of his home institution, Komazawa University. The documents included, inter alia, a report on Korean forced labour prepared by the general affairs division of the Nippon Steel company. See William Underwood, Names, Bones and Unpaid Wages (1): Reparations for Korean Forced Labor in Japan, Asia-Pacific Journal /Japan Focus (4 Sept. 2006), available at <http://apjjf.org/-William-Underwood/2219/article.html> accessed 15 Aug. 2017.

[57] See Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, (4 Dec. 2001), available at <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/summary.html> accessed 15 Aug. 2017.

[58] David McNeil, 'Japan's pacifist constitution: After 70 years, nation changes the rules so it can go to war' *Independent* (1 July 2014).

[59] Ling Yan, 'The 1956 Japanese War Crimes Trials in China', in Morten Bergsmo, Cheah Wui Ling, and Yi Ping (eds), *Historical Origins of International Criminal Law* (Torkel Opsah Academic EPublisher 2015) 215 (noting trials in China, Hong Kong, Indonesia, the Philippines, Russia, Singapore, and Vietnam).

[60] See Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2008) 40 ('[S]ome selectivity is inevitable given the large numbers generally implicated in modern state prosecution, scarcity of judicial resources in transitional societies and the high political and other costs of successor trials. Given these constraints, selective or exemplary trials, it would seem, can advance a sense of justice'.)

[61] Yasuhiro Okuda, 'Government Liability for Injuries to Foreign Individuals in Japan' (2001) 3 *Yearbook on Private International Law* 115, 116.

[62] The plaintiffs posited that, by waiving their rights to seek reparations from the US in the San Francisco Peace Treaty, Japan became liable for their medical treatment.

[63] *Shimoda v. Japan*, translated in (1964) 8 *Japanese Annual of International Law* 212, 252 ('The dropping of the atomic bombs is a violation of international law, which can be interpreted as a tort under domestic law').

colonies Korea and Taiwan[64] demanded that the Japanese government extend them the same social welfare benefits as those provided to Japanese citizens.[65] While the courts generally did not find in plaintiffs' favour, the verdicts pressured Japan's diet (parliament) to introduce a new remedial scheme, which it did in 1987.

In the 1990s, World War II litigation entered a new phase. For the first time, victims of Japanese war crimes stepped forward to seek compensation, first from the Japanese government, and later from Japanese corporations.[66] They have since filed over one hundred lawsuits in Japan, China, Korea, the Philippines, and the US, spawning a veritable social movement known in Japanese as *sengo hoshô soshô* (or post-war compensation litigation, 'PCL'). The victims include former 'comfort women', forced labourers, victims of medical experimentation, family members of those killed and maimed during various massacres, as well as the heirs of these victims.

For most of the past three decades, Japan has been the epicentre of this movement, with over one hundreds cases filed at trial, appellate, and Supreme courts.[67] With a few exceptions, Japanese verdicts have favoured state and corporate defendants.[68] Japanese judges tend to dismiss claims either on statutes of limitation (for the corporations) or sovereign immunity (for the Japanese government).[69] Courts have also invoked post-war treaties to deny individuals the individual right to seek compensation. This, of course, obviates the possibility of court-ordered restitution, though Japanese courts are by no means unusual for dismissing claims in this way.[70]

But Asian victims have also sought reparations elsewhere. In the US, federal and state courts have presided over, and ultimately dismissed, cases brought by comfort women from various countries, Korean and Chinese forced labourers, and US prisoners of war.[71] In 2010, the Philippine Supreme Court dismissed a case brought by Filipina comfort women under the political question doctrine.[72]

[64] Japan gained control of Taiwan after defeating China in the 1895 Sino-Japanese War. Japan formally annexed Korea in 1910.

[65] See generally Yuji Iwasawa, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law* (Oxford University Press 1998) 176–9. See also Susan Southward, *Nagasaki: Life After Nuclear War* (Penguin 2015) 225 (describing the efforts of Korean atomic bomb survivors to obtain medical care and compensation).

[66] See Tanaka Hiroshi, Nakayama Taketoshi, and Arimitsu Ken, 'Sengo Hoshô Nokosareta Kadai [Remaining Challenges in Postwar Compensation]', in Tanaka Hiroshi, Nakayama Taketoshi, and Arimitsu Ken (eds), *Mikaiketsu no Sengo Hoshô: Towareru Nihon no Kako to Mirai [Unresolved War Compensation: Questioning Japan's Past & Future]* (Soshisha 2012) 8, 15 (noting over seventy cases filed since 1990). In an appendix, the authors enumerate ninety post-war compensation lawsuits, eighty-one of which have been filed since 1990. Ibid. 208–13.

[67] Igarashi Masahiro, 'Nihon no "Sengo Hoshô Saiban" to Kokusaihô' [Japan's 'Postwar Compensation Lawsuits' and International Law] (2006) 105 *Kokusaihô Gaikô Zasshi* [Journal International Law & International Relations] 1, 12.

[68] The lawsuits began in Japan in the early 1990s. Since that time, war victims have filed suits in China, Korea, and the US. Korean courts have found Japan liable in two recent decisions.

[69] See Timothy Webster 'Sisyphus in a Coalmine' (2006) 91 *Cornell Law Review* 733, 750.

[70] See *Burger-Fischer v. Degussa AG* (n 2).

[71] *Taiheiyo Cement Co. v. Superior Court of Los Angeles* [2004] Cal. Ct App. (dismissing claims brought by Korean forced labourer because California statute allowing World War II claims was unconstitutional); *Hwang Geum Joo v. Japan* [2003] DC Cir. (dismissing comfort women's claims against Japan on sovereign immunity grounds); *Re World War II Era Japanese Forced Labor Litigation* [2001] ND Cal. (striking down California statute permitted World War II claims); *Mitsubishi Materials Co. v. Dillman* [2003] Cal. Ct App. (post-war treaty waived US prisoner of war's claims against Japanese corporation).

[72] *Vinuya v. Romulo* [2010] GR No. 162230 (dismissing case as a political question: one whose resolution falls to the executive branch, not the judicial branch). The decision is available at <http://sc.judiciary.gov.ph/ jurisprudence/2010/april2010/162230.htm> (last visited 20 June 2017).

In 2007, the Supreme Court of Japan rendered two decisions that foreclosed the possibility of individual compensation from Japanese courts, at least for certain types of claims.[73] These decisions have not completely halted the flow of lawsuits in Japan,[74] but have encouraged victims to sue elsewhere. Indeed, following a monumental decision rendered by the Korean Supreme Court in 2012, Korea has now become the hotspot of World War II litigation in Asia. As of May 2017, at least fourteen lawsuits are wending their way through the Korean judiciary.[75] Meanwhile, in China, a Beijing court accepted the country's first World War II lawsuit in March 2014.[76] This ultimately produced a large settlement with defendant Mitsubishi Materials in June 2016.[77]

These experiences suggest a role for courts in remediating the harms of war, and ensuring legal peace—both central aims of *jus post bellum*. This is not necessarily a straightforward contribution; like many legal arguments, caveats apply. Let me address three. First, nationality, of courts and litigants, clearly matters. Japanese courts were largely unresponsive to claims brought by Chinese and Korean plaintiffs against Japanese corporations or the Japanese government. Conversely, Korean courts, following the 2012 decision, have shown far more sympathy to Korean victims suing Japanese corporations. While courts supposedly apply law in a dispassionate manner, the extraordinary political sensitivities raised by these lawsuits have led courts to jettison impartiality.

Second, the success of litigation in effectuating a damages award is hardly assured. Scores of lawsuits failed, including some brought in Korea, before one succeeded. In addition, nearly half a century elapsed between the end of the war (1945) and the filing of the first lawsuit (1990), and another two decades between that first case and the first unequivocal victory (2012). A seven-decade wait is hardly optimal. But it does point out the importance of the passage of time; a generation or two may be needed before a state can grapple with its own historic atrocities.

Third, domestic courts may prefer to keep a low profile in war crimes litigation. Separation of powers situates the authority to lead and conduct wars firmly in the political branches. Simply put, judges are reluctant to evaluate war policy, or its execution. It is generally quite rare that civilian judges weigh in on the conduct of war at all. Moreover, in the transnational context, judicial modesty may be appropriate. When sensitive issues of international affairs are at stake, particularly acts of foreign states (or acts coordinated by foreign

[73] Both decisions, using identical language, found that the 1972 Japan–China Joint Communique waived all individual claims brought by Chinese citizens. See Mark A. Levin, 'International Decisions: *Nishimatsu Const. v. Song Jixiao*' (2008) 102 *American Journal International Law* 148.

[74] For example, Chinese forced labourers sued the Japanese government in 2015 for abducting, transporting, and forcing them into labour at a mine in Akita prefecture. See Horikawa Takuya, 'Kyôsei Renkô Kuni o Teiso: Chûgokujinra 13-rin Baishô Motome' [Thirteen Chinese Sue the State for Forced Labour, Seeking Compensation] *Mainichi Shimbun* (27 June 2015).

[75] See Kung-nae Kang-je Dongweon Sonhe Pesang Sosong Hyeonhwang-p'o [Chart on Current Status of Forced Labour Lawsuits in Korea], International Conference to Seek a Comprehensive Solution to the Problem of Japan's Forced Mobilization, 23, available at <https://www.minjok.or.kr/wp-content/uploads/2017/05/170530-> accessed 27 July 2017.

[76] Chinese plaintiffs filed the first compensation lawsuits in Hebei and Shandong provinces as early as 2000. But the courts did not accept them. In February 2014, victims filed another lawsuit against Mitsubishi Materials and Nippon Coke (formerly Mitsui Mitsui), which the Beijing Intermediate Court accepted on 18 March 2014. Numerous class actions were then filed in Beijing and Hebei Province. Shuhei Yamada, 'True Face of Chinese plaintiffs seeking wartime compensation for forced labor' *Nikkei Asian Review* (16 May 2014).

[77] Austin Ramzy, 'Mitsubishi Materials Apologized to Chinese World War II Laborers' *New York Times* (Hong Kong, 1 June 2016).

states), the executive branch may be the preferred state actor.[78] How, then, can the judiciary contribute to peace after war?[79]

First, it is possible that courts will find for plaintiffs, and order remediation. A handful of decisions in Japan, all of which were overturned ultimately on appeal, bear this out. Similarly, recent decisions in South Korea also have found for plaintiffs. Given the individualistic nature of litigation, pitting *this* particular victim against *that* particular corporation, courts can provide an ad hoc remedy to *this* set of plaintiffs. But a global settlement typically requires the involvement of the political branches, which have thus far been unable to get involved to any great extent.

Of course, even 'victorious' plaintiffs may express dissatisfaction with the verdict. In 1998, a Japanese trial court found against the Japanese government and ordered it to pay each of three former comfort women 300,000 yen in compensation (about US$3,000). This is the only decision in Japan to find for the comfort women, and for that reason attracted significant media and scholarly attention.[80] Plaintiffs, however, were far from satisfied. They believed Japan still owed them a 'proper apology and compensation', and that the amount of money was an insult to their suffering.[81] As plaintiff Yi Sun-dok explained, 'From ages 17 to 25, I was subjected to unspeakable acts. 300,000 yen—is that some kind of joke?'[82] Thus, we cannot say that winning the case will necessarily restore the victims. In other lawsuits, however, plaintiffs have stated that the verdict restored some piece of their human dignity.[83]

Second, litigation can be empowering. Individual victims can seek justice from the entities that tormented them, whether state or corporate, and caused immense physical, psychological, physiological, and emotional harm. They need not rely on their government to act on their behalf. Instead, the victim can assert agency and take action against the entity that caused such harm. Even if the lawsuit does not return a favourable verdict, the lawsuit itself constitutes an 'exercise in self-determination'.[84] As former comfort woman Chen Yabian told a press conference shortly after losing her compensation lawsuit, 'Japan acknowledges the bad things that the Army did on Hainan Island, like raping women. Why

[78] *Banco Nacional de Cuba v. Sabatino*, 376 US 423 (1964) (precluding US courts 'from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory'); Lee Keun-Gwan, 'Han-Il Chʼeonggugweon Hyeopjeong-sang Kangje Chingyong Paesang Chʼeonggugweon Chʼeori-e Taehan Kukje Peopjeok Keomto' [The Question of Individual Claims of the Korean Victims of Forced Labour Under the 1965 Claims Settlement Agreement between Korea and Japan from International Law Perspective] (2013) 54 *Seoul Law Journal* 327, 381–2 (arguing for judicial restraint in sensitive cases such as the 2012 decision rendered by the Korean Supreme Court).

[79] Stuart Eizenstat, who held key positions in the commerce, state and treasury departments during the Clinton administration, played a pivotal role in getting European governments and corporations to set up settlement funds. A lawyer by training, Eizenstat criticized 'the inadequacies of the American legal system to resolve complex political issues. U.S. courts are not the best places to resolve profound historical and political questions'. He cited procedural complexity, evidentiary rules, 'obdurate judges,' and various types of delays as the most pressing problems with litigation. Stuart Eizenstat, *Imperfect Justice* (Perseus Books 2003) 341.

[80] The decision was translated into English, and appeared in many English language newspapers. See Teihei Okada (trans.), 'The "Comfort Women" Case: Judgment of April 27, 1998 Shimonoseki Branch, Yamaguchi Prefectural Court, Japan' (1999) 8 *Pacific Rim Law & Policy Journal* 63.

[81] See Comfort Women: Japan, Pusan Comfort Women and Women's Labor Corps members, Filed, 25 Dec. 1992, Memory and Reconciliation in the Asia-Pacific, available at <https://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/pusan.html> accessed 19 May 2019.

[82] See 'Kanpu Soshô no Hanketsu: Hanbun no Ryôshin' [Verdict in Pusan Litigation: A Half Measure of Conscience] *Kyodo News* (5 May 1998).

[83] One victorious plaintiff, Zhang Lianxin, said 'This is great, this is great. All the pain and toil we endured in Japan has finally paid off. No matter what you may say, there is still justice in this world'. Dai Xiaolin, 'Zhongguo Laogong Shouhaizhe Lüshi: Women Huode le Quanmian Shengsu' [Chinese Forced Labor Lawyer: We Got a Complete Victory] *Beijing Zhenbao* [*Beijing Morning News*] (27 Mar. 2004) (describing the reaction of plaintiffs, family members and the lawyers of a case against a Japanese transportation company).

[84] Beth Van Schaack, 'With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change' (2004) 57 *Vanderbilt Law Review* 2318.

doesn't Japan give us compensation? Why does Japan not apologize to us?'[85] When reporters pressed her on the difficulty of winning in civil litigation, Chen replied 'the Japanese government has superficially admitted its atrocities. But no matter what the Japanese courts decide, I will keep on suing'.[86]

Third, lawsuits often generate significant media attention. This raises awareness among the public, which may pressure companies and governments to assume a more conciliatory posture vis-à-vis victims. During the discovery period of civil litigation, plaintiffs' attorneys may unearth new information about the underlying human rights abuses. For example, in 1998 lawsuits against the German subsidiary of Ford Motor Company, lawyers discovered a 1945 US Army report calling it 'the arsenal of Nazism' for its manufacture of war material.[87] The report also contradicted Ford's justification that it had 'lost all contact' with its German subsidiary in 1941.

In other words, litigation helps set the factual record straight.[88] In Europe, many countries have criminalized Holocaust denial, and prosecuted people who have published accounts that deny historical facts. Japan has no such laws, and a more contested relationship with the factual basis of World War II. Japanese politicians, including current prime minister Abe Shinzo, have made numerous statements either denying Japan's role in wartime atrocities, or downplaying the severity of these crimes.[89] Not that Japan is alone in this situation. Members of many post-conflict societies subscribe to an interpretation of history that differs radically from that of their neighbours', or former enemies, or from basic reality. The contemporary Balkan states epitomize this interpretive fragmentation. Each ethnic group 'has its own ethnic truth—an interpretation of the past that is enslaved to dominant interests and thereby has perpetuated the conflict. The fierce political battle between competing truths, memories and ethnic identities has intensified in the past decade'.[90] Given the multiple truths at stake, trials can play a role here in fact-finding, and truth-assertion, though the success of such efforts is by no means assured. The ICTY provides a cautionary tale. Particularly in Serbia, where 'denialism is mainstream', the tribunal 'failed to persuade the relevant target populations that the findings in its judgments are true'.[91]

In Japan, judges pen elaborate factual findings in their opinions. Given the contested discursive terrain that surrounds Japanese discussions of World War II, the judicial opinions provide a factual anchor in the quicksand of historical memory. Japanese courts have found that the Japanese Army was involved in the abduction, transportation, and forcible rape of the comfort women, as well as taking measures to ensure their hygiene.[92] Other opinions have assiduously outlined Japan's slave labour programme, rescuing it from historical obscurity and cultural amnesia.[93] In light of the Japanese government's wilful attempts to alter

[85] Wang Xinli, 'Hainan "Weianfu" Yuangao Huiguo: Guansi Shu le Hai Zai Gao' [Hainan "Comfort Women" Plaintiff Returns Home: Lost the Suit But Will Appeal], *Xinhua* (2 Sept. 2006).

[86] Ibid.

[87] Ken Silverstein, 'Ford and the Fuhrer' *The Nation* (24 Jan. 2010).

[88] See Holder (n 9) 248–9.

[89] See Timothy Webster, 'Discursive Justice' (2018) 50 *New York University Journal of International Law & Policy* 1261.

[90] Elazar Barkan and Belma Becirbasic, 'The Politics of Memory, Victimization and Activism in Postconflict Bosnia & Herzegovina', in Klaus Neumann and Janna Thompson (eds), *Historical Justice & Memory* (Wisconsin 2015) 95, 98.

[91] Marko Milanovic, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post Mortem' (2016) 110 *American Journal of International Law* 213.

[92] *Ha Sun-nyo et al. v. Japan*. An English translation is available at Taihei Okada (trans.), 'The 'Comfort Women' Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan' (1999) 8 *Pacific Rim Law & Policy Journal* 64, 68

[93] *Cai Shujing v. Mitsui Mining Co.*, 1098 Hanrei Taimuzu 267 (Fukuoka D. Ct, 26 Apr. 2002).

history, by claiming reports were lost (when in fact they were simply hidden in government archives), litigation can help concretize the past.

Fourth, civil litigation brings legal judgment to historical events. Judges determine whether state conduct violated domestic and international law, reinserting the voice of reason into the chaos of war. As Lawrence Douglas has argued about Nuremburg, trials can 'both show the world the facts of astonishing crimes, and demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense'.[94]

In the post-war compensation lawsuits, Japanese judges have found that the state and corporate sector violated domestic tort and contract law, as well as international treaty and customary international law. Such niceties may mean little to victims, who would prefer apologies and damage awards. But lawyers and scholars take note. Even in robust democracies, courts rarely hold that their militaries or executive branches violated domestic law, to say nothing of international law.[95] So when a court finds its own government violated international humanitarian law or international human rights law, it helps end impunity, right a historical wrong, and bend the world, however slightly, to the arc of justice.

VI. Conclusion

Civil litigation—with its focus on individual grievances, rules of evidence, and procedural complexity—may not provide the ideal forum to resolve complicated issues of remediation after armed conflict. But in the absence of political will by state actors—the ones that would set up a tribunal, or a claims commission—litigation can make a positive and incremental contribution to peace. Attention to victims' suffering, damage to property, and fidelity to facts, elude many post-conflict societies.

Civil litigation can address, if not redress, some of these concerns. The judicial opinion renders a version of events that might contradict or challenge revisionist narratives espoused by political classes, especially if those classes remain in power. Or an opinion can lend credence to denialist accounts by either not finding facts, or finding them in a particularly tendentious manner. Civil suits assign blame—even if indirectly—by holding certain conduct tortious, or finding a state violated international law. It can empower individuals to work through the violence and trauma of war, giving an officially sanctioned platform to discuss events that have been ignored, suppressed, or repressed.

Given the numerous historical, legal, and moral *omissions* that haunt post-conflict societies, civil litigation has helped write, rewrite, and reinforce the legacies of the war. To be sure, litigation could also catalyze a broader conversation about reparation among state actors in East Asia, as the Holocaust litigation did for Europe and the US. But given a more nationalist political class in Japan, and the disinterest of US government actors, civil litigation may remain the final word on the issues of legal liability, state redress, and individual reparation in East Asia for decades to come.

[94] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trial of the Holocaust* (Yale 2001) 3.

[95] Justice Rehnquist found the forcible abduction of a Mexican national, by the US Drug Enforcement Agency, did not violate an extradition treaty between the two countries. *See United States v. Alvarez-Machain*, 504 US 655, 670 (1992). Justice Stevens took the opposite view in his dissent, calling the abduction a 'flagrant violation of international law'. Ibid. 682.

19

Inclusion, Justice, and Peace in Colombia

*Jennifer S. Easterday**

I. Introduction

Jus post bellum, the body of laws, norms, and principles that apply during the transition from war to peace,[1] is a growing field of inquiry. With its roots in just war theory,[2] one of the central goals of the *jus post bellum* framework is the establishment and maintenance of sustainable peace.[3] As a legal concept, it can be considered as a system of norms and principles applicable to the transition from armed conflict to sustainable peace.[4]

In order to be 'sustainable', peace must also incorporate some form of 'justice'. Justice, however, is a highly contested concept.[5] 'Justice' as a principle of *jus post bellum* should at a minimum avoid recreating an unjust status quo ante. This means, for example, avoiding the recreation of social structures and relationships that were discriminatory or excluded certain groups such as women, minorities, or indigenous persons. A just peace also includes some form of accountability. Larry May argues that just peace requires *meionexia*, which 'calls for people to accept, or demand, less than what they are due if this is necessary for some greater good as well as for achieving justice understood in its wider sense'.[6] Inclusive processes and a focus on gender equality are two integral components necessary for arriving at a just peace. How these issues are applied in practice, however, is contentious and subject to the specific context of each conflict.

The Colombian peace process serves as an example of how these principles can be applied in practice during peace negotiations. The conflict, which has raged for over fifty years, involved myriad actors—several different armed guerilla groups, paramilitaries, private actors, and the state military—all involved in shockingly brutal crimes that have left some

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[1] Carsten Stahn, 'Mapping the Discipline(s)', in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser 2008) 93, 105; Inger Österdahl and Esther van Zadel, 'What Will Jus Post Bellum Mean? Of New Wine and Old Bottles' (2009) 14 *Journal of Conflict and Security Law* 175, 178; but see Kristen Boon, 'Obligations of the New Occupier: The Contours of *Jus Post Bellum*' (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 57, 76 (defining *jus post bellum* more narrowly to 'apply to the exercise of governmental and public powers by external entities such as IOs and foreign states.').

[2] Brian Orend, 'Jus Post Bellum' (2000) 31 *Journal of Social Philosophy* 117; Michael Walzer, Just and Unjust Wars (Basic Books 2006); Larry May, *After War Ends* (Cambridge University Press 2012).

[3] Vincent Chetail, 'Introduction', in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press 2009) 1, 18.

[4] See e.g. Carsten Stahn, 'The Future of Jus Post Bellum', in Carsten Stahn and Jann Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 231, 236–7.

[5] See e.g. Mark Evans, 'At War's End: Time to Turn to *Jus Post Bellum*?', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford Univesity Press 2014) 26, 28.

[6] 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* (Oxford Univesity Press 2014) 15, 20.

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8.2 million victims, the majority of whom are civilian non-combatants.[7] The Colombian government has historically fluctuated between using military might and negotiated amnesties to end the conflict. However, Colombia recently moved to a 'transitional justice' approach and began to recognize that, in the Colombian context, justice for victims needed to be an integral part of a sustainable peace. The societal impact of the conflict and the sheer number of victims meant that an amnesty for grave crimes, negotiated without the input of victims, would not have produced a justice and sustainable peace. However, the Colombian context also confronted the stark reality of negotiated settlements—relying on traditional forms of justice involving long prison sentences was not a tenable solution. A 'just' peace in Colombia does not merely involve negotiation of 'justice' between warring parties. Rather, it requires something more than form and process; it requires an inclusive peace process that embraces the voices and views of victims of the conflict.

With extensive victim inclusion in the negotiations, the participation of women and a Gender Sub-Committee, and a referendum on the final agreement, the Colombian peace process and resulting agreement with the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC) reflect a level of inclusion rarely seen in peace processes. The final agreement is imperfect, but provides an example of how inclusion in peace processes contributes to a 'just' peace in both process and substance.

II. Conflict Background

Colombia has experienced a prolonged internal armed conflict for over fifty years. It arose out of a decade-long violent conflict between liberals and conservatives known as 'La Violencia'. In 1958, Colombia established a power-sharing agreement called the National Front. Far left groups were excluded from the political process, leading them to form armed guerrilla groups in remote regions of the country. The largest of these guerilla groups were the FARC and the National Liberation Army (*Ejército de Liberación Nacional*, or ELN).[8] In the 1970s, with assistance from the government and military, wealthy land owners, and drug lords established private armies to protect their interests and keep their land from being expropriated by the guerrillas.[9] Later, these groups unified under an umbrella organization called the United Self-Defense Forces of Colombia (*Autodefensas Unidas de Colombia*, or AUC).[10] Eventually, the conflict evolved into a contest for land, money, and control over drug routes. The conflict has been marked by extreme violence committed by paramilitary groups, guerrilla groups, and the national army. Massacres, torture, forced disappearances, forced displacement, sexual violence, and other grave crimes targeting civilians and non-combatants have become hallmarks of the Colombian conflict.[11]

[7] Registro Único de Victimas, available at <https://rni.unidadvictimas.gov.co/> accessed 1 December 2017.

[8] David Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself* (University of California Press 1993) 201–48.

[9] Winifred Tate, 'Paramilitaries in Colombia' (2001) 8 *Brown Journal of World Affairs* 163, 165. See also William Avilés, 'Paramilitarism and Colombia's Low-Intensity Democracy' (2006) 38 *Journal of Latin American Studies* 379, 394.

[10] Comisión Interamericana de Derechos Humanos, Informe sobre el Proceso de Desmovilización en Colombia (13 December 2004) OEA doc. OEA/Ser.L/V/II.120 Doc. 60, para. 42.

[11] Washington Office on Latin America, 'The Human Rights Landscape in Colombia,' (2013), available at <https://www.wola.org/analysis/the-human-rights-landscape-in-colombia-adam-isacsons-testimony-before-the-tom-lantos-human-rights-commission/#24> accessed 17 October 2017.

Two often-overlooked dynamics of the conflict are gender-based violence and exclusion communities living in rural Colombia. In 2008, Colombia's Constitutional Court found that sexual violence against women had been 'a habitual, extensive, systematic and invisible practice in the context of the Colombian armed conflict' committed by all illegal armed groups as well as members of the national armed forces.[12] The conflict has different impacts on different segments of the population, including based on gender or sexual orientation. Different modalities of violence, such as homicides (massacres, selective killings, extrajudicial executions), forced disappearances, forced displacement, kidnappings, sexual violence, and loss or destruction of property, impact women and men differently.[13] While men are more likely to be kidnapped, tortured, or killed, women and girls are more likely to be impacted by displacement, sexual violence, forced labour, or enslavement. Forced displacement is particularly burdensome on women, who often lack land titles or collective rights to property. Women also play different roles as survivors, often assuming new roles as widows, single heads of households or caregivers of those disabled by the war.[14]

Exclusion and inequality have also pervaded the Colombian conflict. Exclusion is created and sustained in part by the traditional absence of the Colombian state in many parts of the country, and its inability to effectively govern in the areas where it is present, including due to a weak judiciary.[15] A lack of connection between the state and the everyday lives of citizens enhances the social and legal exclusion experienced by a majority of Colombians.[16]

During the height of the conflict, the government inconsistently fluctuated between offering amnesties and using military power to fight the leftist guerrillas—with very limited success.[17] In recent years, the Colombian government has shifted from a military approach to ending the conflict to applying an ambitious transitional justice framework and peace negotiations with the primary armed groups. Through various demobilization and peace agreements, it has sought to strike a balance between peace and justice. The role of the victim has also increased over time, both as a legal concept and as a protagonist in the conflict and peace processes.[18] In developing its transitional justice policies, Colombia has evolved its approach to one that focuses on victims' rights to truth and using an inclusive process to

[12] Constitutional Court, Order 092 (2008), <http://www.corteconstitucional.gov.co/relatoria/Autos/2008/A092-08.htm> accessed 15 November 2017.

[13] Virginia M. Bouvier, 'Gender and the Role of Women in Colombia's Peace Process,' (New York: UN Women), 4 March 2016, 7, <https://www.usip.org/publications/2016/11/gender-and-role-women-colombias-peace-process> accessed 15 November 2017. See also Centro Nacional de Memoria Histórica (CNMH), ¡Basta Ya! Colombia: Memorias de guerra y dignidad (Bogotá: CNMH, 2013), <http://www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/> accessed 17 November 2017.

[14] Bouvier (n 13) 7–8.

[15] Historically the state has been absent from these regions, including a lack of public works, teachers, police and a diffuse judicial order. Programa de las Naciones Unidas para el Desarrollo Informe Nacional de Desarrollo Humano Colombia, Callejon sin Salida (2003), 28, 44 [hereinafter: PNUD]. Even where local residents did not support guerrilla groups' political views, often these groups provided more support and services than distant government officials. See also David Bushnell (n 8) 244.

[16] Justice Manuel Jose Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529, 541.

[17] Jorge L. Esquirol, 'Can International Law Help? An Analysis of the Colombian Peace Process' (2000) 16 *Connecticut Journal of International Law* 23, 28*;* Natalia Springer, Colombia: Internal Displacement – Policies and Problems, Writenet Report, 1 (June 2006); Catalina Diaz, 'Colombia's Bid for Justice and Peace' (2007) 2 International Center for Transitional Justice 2.

[18] Jennifer Easterday, 'Beyond the "shadow" of the ICC: Struggles over Control of the Conflict Narrative in Colombia', in Christian De Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 432.

negotiate peace. As discussed below, this has led to a peace agreement with the FARC that contains an impressive level of gender inclusion as well as a legal framework that delicately balances justice for victims with the need to strike an agreement with the guerrilla group.

In 2003, after a number of failed peace agreements, the Colombian government and the AUC paramilitary group reached a peace agreement known as the Ralito Accord.[19] In 2005, after extensive debate with the paramilitary groups, the Colombian government passed the Justice and Peace Law (JPL) in an attempt to provide accountability for crimes committed by the leaders of the paramilitary groups.[20] The JPL resembles a quasi-amnesty for crimes including genocide, crimes against humanity, or war crimes committed by members of armed paramilitary groups. It provides significantly reduced sentences to combatants that demobilize and confess to their crimes.[21] Combatants who participate in the JPL and are found guilty receive full sentences, which are then suspended and substituted with reduced conditional sentences of between five and eight years.[22] A December 2012 reform of the JPL mandated prioritization of investigating those 'most responsible' for crimes,[23] leading to an increase in investigations of paramilitary leaders.[24] The JPL included victims as a legal subject for the first time in Colombian law and allowed for victims to seek reparations, although the 2012 reform required victims to seek reparations under the 2011 'Victim's Law and Property Restitution'.[25]

Peace negotiations with leftist guerrillas have been a contentious issue in Colombia and have led to many failed peace agreements.[26] The most recent talks with the FARC started in November 2012, and talks with the ELN began in February 2017. After nearly four years of negotiations, the government and the FARC signed a comprehensive peace agreement on 24 August 2016. The agreement included terms for a bilateral ceasefire, a process for the FARC to lay down arms and integrate into society, justice processes for victims of the conflict, comprehensive rural reform, battling the illicit drug trade and the political participation of the FARC. In particular, the agreement provided for the establishment of the Special Jurisdiction for Peace, a system designed to provide criminal justice for the crimes committed during the conflict by guerrillas, members of the armed forces and others who financed or collaborated with armed groups.

The agreement was hailed as a massive success and lauded by world leaders. However, after months of vehement protest from members of the political opposition, the agreement narrowly lost a nation-wide plebiscite in October 2016. With only 37% voter turnout, the

[19] Jennifer Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study' (2009) 26 *Arizona Journal of International and Comparative Law* 50, 71–2.

[20] Ley 975 de 2005, Ley de Justicia y Paz [Law 975 of 2005, Law of Justice and Peace], Diario Oficial [DO] 45.980 (25 July 2005) (Colom.); Easterday (n 19) 75–6. Law 782/2002 and Regulatory Decree 128/03 are also part of the JPL legal framework.

[21] Ley 975 de 2005, art. 17 (full and truthful confessions).

[22] Ley 975 de 2005, art. 29. By contrast, 'normal' sentences for similar crimes run from fifty to sixty years of imprisonment. Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court* (Springer 2010) 4.

[23] Ley 1592 de 2012, DO 48.633, 3 December 2012, art. 16A.

[24] International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities 2012, para. 145.

[25] International Crisis Group, Transitional Justice and Colombia's Peace Talks, 29 August 2013, 5.

[26] For example, there have been three rounds of failed peace talks with the FARC: 1984–1989, 1991–1992, and 1998–2002. A UN database of peace agreements lists some thirty peace agreements between the Colombian government and left-wing guerilla groups between 1984 and 2008. UN Peacemaker, available at <https://peacemaker.un.org/> accessed 1 December 2017.

'no' vote won by .5%. Committed to the peace process and the core aspects of the agreement, the government and FARC quickly renegotiated a new agreement. The Colombian congress adopted this new agreement at the end of November 2016. The new agreement included many proposals put forth by the opposition and included significant revisions, including about the Special Jurisdiction for Peace (SJP).

III. *Jus Post Bellum* Principles: Inclusion and Gender Equity

Jus post bellum is a set of interlinked norms and principles that serves as a flexible guide to transitioning from conflict to sustainable peace. *Jus post bellum* interpretive norms can be considered 'procedural norms' or obligations of conduct, rather than of result. These serve as overarching principles for practitioners and policymakers against which laws and policies can be interpreted. Two of the core principles of *jus post bellum* are democratic inclusion and gender equity. This section discusses these norms in more detail; how they were applied in the Colombian context is described in the following section.

A. Inclusion

The need for dialogue and inclusion amongst various post-conflict endeavours is a central concern of *jus post bellum*. It requires consultation with affected populations and taking extra steps to ensure that traditionally under-represented groups, such as women, minorities, or indigenous populations are also duly consulted. Inclusive processes should involve a two-way exchange of information between negotiators and historically excluded groups. Who has a voice in deciding the content of an agreement and whether diverse societal interests are taken into account is a critical aspect of peace negotiations. Who sits at the table also drives the adoption of substantive norms and the perceived legitimacy of the process.[27] Many areas of peacebuilding practice have a demonstrated gap in applying inclusive practices, detracting from their legitimacy and success.[28]

There are various considerations for determining who might get a seat at the negotiating table: practical, normative, and moral. Practical requirements simply turn on whether the participation of a given actor increases the likelihood of reaching a sustainable agreement.[29] Negotiators are primarily concerned with reaching an agreement and bringing a stop to the fighting.[30] Introducing members of civil society, interest groups, or human rights groups

[27] Paul R. William, The Constitution Making Process (Public International Law and Policy Group 2006) 9, 30 (underscoring that the inclusiveness of the constitution-drafting process bears on its legitimacy). See also Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 *Chicago Journal of International Law* 663, 29, on unrepresentative constitution.

[28] See e.g. Philipp Dann and Zaid Al-Ali, 'The Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck Yearbook of United Nations Law* 423, 456–57.

[29] David Lanz, 'Who Gets a Seat at the Table? A Framework for Understanding the Dynamics of Inclusion and Exclusion in Peace Negotiations' (2011) 16 *International Negotiation* 275, 277.

[30] Anonymous, 'Human Rights in Peace Negotiations' (1996) 18 *Human Rights Quarterly* 249; Lanz (n 29); Anthony Wanis-St John and Darren Kew, 'Civil Society and Peace Negotiations: Confronting Exclusion' (2008) 13 *International Negotiation* 11, 12–13.

can complicate and detract from this goal.[31] Normative factors, often driven by the values of international mediators and sponsors of peace negotiations, include fostering democratic peace and popular support for peace. These factors weigh in favour of including civil society actors and broad segments of society, which enhances the legitimacy of the process and outcome, and increases the likelihood of sustainable peace.[32] When peace negotiations also contain significant impact on the constitution, there arises a moral claim to participation based on democratic norms of shared authorship.[33]

Exclusionary practices can weaken the durability of a peace agreement. According to one study, durable peace agreements involved direct participation by civil society in the peace negotiations. In particular, a seat at the negotiation table was considered an essential contribution to a durable agreement when the negotiations involved undemocratic elites, such as warlords.[34] A desire to limit participation to avoid impasses over competing group interests and foster a long-term agreement might also lead to efforts to keep the negotiations secret and confidential. However, excluding significant groups and opaque negotiations might exacerbate tensions in a divided society.[35] The exclusion of certain groups, especially in ethnic conflicts, can lead to an outbreak of violence.[36]

Civil society can play other roles if excluded from the negotiation process. For example, civil society groups can indirectly influence the positions of the elites who are at the table, including by bringing the parties together.[37] Civil society groups can also monitor the implementation of the agreement.[38] One way to bring the view of the people into peace negotiations is to include members of civil society in the negotiation, drafting, implementation processes and through referenda.[39] These methods of inclusion are reflected in the Colombian peace process.

B. Gender Equality

Gender equality is a critical component of peacebuilding. Addressing gender inequalities and access to justice is seen as important for addressing the root causes of violence and promoting more resilient societies capable of sustaining peace.[40] UN Security Council (UNSC) Resolution 1325 (2000) specifically recognized the importance of women in the prevention

[31] Anonymous (n 30). See also Lanz (n 29); Wanis-St John and Kew (n 30) 13.

[32] Lanz (n 29) 277, 282–3.

[33] Vivien Hart, *Democratic Constitution Making; in United States Institute of Peace, Special Report 107* (USIP 2003) 4.

[34] Wanis-St John and Kew (n 30) 14, 31.

[35] David Bloomfield, Teresa Barnes, and Luc Huyse (eds), *Reconciliation After Violent Conflict: A Handbook* (IDEA 2003)

[36] Hallie Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage' (2011) 33 *University of Pennsylvania Journal of International Law* 239, 281.

[37] This happened in Sierra Leone when civil society helped bring one of the rebel armed groups, the Revolutionary United Front, to the negotiating table. See e.g. Andrea Armstrong and Gloria Ntegeye, 'The Devil is in the Details: The Challenges of Transitional Justice in Recent African Peace Agreements' (2006) 6 *African Human Rights Journal* 1, 6.

[38] Michele Brandt, Jill Cottrell, Yashi Ghai, and Anthony Regan, *Cosntitution-making and reform: Options for the Process* (Interpeace 2011) 319.

[39] Wanis-St John and Kew (n 30) 13.

[40] Margaret McGuinness, 'Women as Architects of Peace: Gender and the Resolution of Armed Conflict' (2007) 15 *Michigan State Journal of International Law* 63, 64; UN Peacemaker, *Operational Guidance Note: Women in Peace Processes and Agreements* (UN Department of Political Affairs Gender Advisory 2006) 1.

and resolution of armed conflicts and in peacebuilding.[41] The UN has issued an operational guidance note to peace negotiators urging them to include women's issues as part of the peace process'.[42] A 2010 United Nations Development Fund for Women (UNIFEM) report found that when women occupy formal, official roles during peace negotiations, they usually have a strong impact on the language of the agreement text and there is usually a very high inclusion of provisions specific to women.[43] The importance of including women in peace negotiations was reaffirmed by the UNSC in Resolution 2122 in 2013.[44]

In spite of the increase in international provisions related to gender equality, in practice there are still significant gaps. This can be seen especially in peace negotiations. The UNIFEM report noted that ten years after Resolution 1325 was adopted, women still were vastly under-represented in peace negotiations.[45] Others have argued that UN efforts to include women in peace processes have little impact on the lives of women post-conflict because of their shallow scope, conceptualization, and execution. Focusing on the peacemaking stage of conflict termination is an impediment to ensuring positive change for women, as it ignores informal processes and earlier stages of peacemaking that typically exclude women. Even if women are present at the final stages of negotiation, their impact could be minimal if major issues were predetermined in earlier negotiations.[46]

This gap could be seriously detrimental to the ability to transition from conflict to a sustainable peace. Indeed, some argue that women's participation in peace agreements and influence over the terms of peace is a necessary precondition to sustainable peace.[47] Feminist scholarship suggests that a view of women as victims of conflict as opposed to agents of peace and a failure to include women in peace negotiations could lead to an increased focus on militarism and force.[48] Moreover, peace processes can have more of a long-term impact on women than on the underlying conflict.[49] Neglecting this can perpetuate discrimination

[41] UNSC Res. 1325 (31 October 2000) UN Doc. S/RES/1325 (2000) para. 8. The provision specifically calls on negotiators to adopt a gender perspective including '(a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.' See also UNSC Res. 1820 (19 June 2008) UN Doc. S/RES/1820; UNSC Res. 1888 (30 September 2009) UN Doc. S/RES/1888; and UNSC Res. 1889 (5 October 2009) UN Doc. S/RES/1889.

[42] UN Peacemaker, *Operational Guidance Note: Women in Peace Processes and Agreements* (UN Department of Political Affairs Gender Advisory 2006) 1.

[43] Pablo Castillo Diaz, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (UNIFEM 2010) 5.

[44] UNSC Res. 2122 (2013) UN Doc. S/RES/2122 (2013), preamble.

[45] Diaz (n 43) 5. The report noted that the representation of women at peace negotiations remains much lower than in other public decision making roles. Ibid. 3.

[46] Fionnuala D. Ní Aoláin, 'Advancing Women's Rights in Conflict and Post-Conflict Situations' (2010) 104 *Proceedings of the Annual Meeting of the American Society of International Law* 568, 568–9.

[47] McGuinness (n 40) 64; UN Peacemaker (n 42) 1.

[48] Christine Chinkin, 'Gender, Human Rights, and Peace Agreements' (2003) 18 *Ohio State Journal on Dispute Resolution* 867, 873 (noting the various ways women construct peace after conflict, including efforts that begin as humanitarian and practical and are rooted in the local context and arguing that excluding these views and experiences 'can lead to an impoverished understanding of peace and security that focuses on militarism and power supported by force.'). See also McGuinness (n 40) 82 (arguing that 'there is a complete feminist literature on international law and international institutions that suggests it is the very gendered nature of these formal peace processes within international law that has silenced women's voices and perpetuated a male-dominated international system that favours militarized solutions to global problems that, in turn, perpetuate male dominance').

[49] McGuinness (n 40).

and marginalization of women[50] and take away opportunities for a transformation to a society that includes an enhanced social position for women.[51] As Christine Chinkin writes, 'without the explicit requirement in the peace agreement to address questions relating to women, other agenda items that have been included will have greater legitimacy and be given priority'.[52] Giving other issues priority in turn shapes the priorities of donors, which could lead to reduced programming directed at women during the peacebuilding phase.[53] It would also detract from the democratic legitimation of the peace agreement by reducing the sense of ownership of the process among women.[54]

IV. Colombia: Towards an Inclusive Peace

The Colombian peace negotiations with the FARC demonstrate an unprecedented level of inclusion and gender-mainstreaming. Allowing victims and women to participate directly in the negotiations, a referendum, and subsequent political process have shaped an inclusive agreement that strives to provide procedural and substantive justice for victims of the conflict from the outset.

A. Inclusion of Victims

The inclusion of victims in the Colombian peace process was both procedural and substantive. Procedurally, victims were invited to participate or share their views with negotiators in a variety of ways. Substantively, the parties agreed to tackle the complex and sensitive questions of victims' rights and the legacy of the past through a special agenda item for victims. Both are innovative. In other peace talks, victims' rights are generally pushed to future political debate to avoid the risk of contaminating or derailing peace processes.[55] However, in Colombia both sides recognized that this approach would be intractable: a vast majority of the 8.2 million registered victims are civilians and an agreement that did not place these victims at the centre would be illegitimate and short-lived.[56]

There were three primary mechanisms for victim participation. First, victims could send proposals directly to either delegation through email or regular mail. Secondly, victims were invited to participate in a number of events around the country. Thirdly, five delegations of twelve victims each were invited to Havana to testify before the negotiation teams. In total, negotiators received some 66,000 proposals on the different agenda items through

[50] Christine Chinkin, Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women, UN Doc. EGM/PEACE/2003/BP.1 31 (United Nations Division for the Advancement of Women, 2003) 11.

[51] Ibid. 12; See also A. Lyth (ed.) *Gender Awareness in Kosovo Getting it Right? A Gender Approach to UNMIK Administration in Kosovo* (Kvinna till Kvinna Foundation 2001) 23.

[52] Chinkin, 'Promoting Gender Equality' (n 50) 12.

[53] Ibid.

[54] UN Peacemaker (n 42) 1.

[55] Andrés Ucrós Maldonado, Early Lessons from the Colombian Peace Process (2016) LSE Global South Working Paper No. 1/2016, 8 available at <http://eprints.lse.ac.uk/65606/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_LSE%20Global%20South%20Unit_Working%20Papers_LSE-Working-Paper-01%20-%202016.pdf> accessed 1 December 2017.

[56] Ibid. 8.

these different methods of participation.[57] This level of victim participation in peace negotiations was hailed by then-UN high commissioner for human rights, Navi Pillay, as 'unprecedented' and a model for other conflicts.[58]

From the start, both sides recognized that victims' rights should be a separate agenda item given the magnitude of violence and civilian suffering that occurred during the conflict. It was one of the most difficult and contentious, as it sought to balance the need for peace with justice for victims. During negotiations on this issue, sixty victims from different regions who had suffered various violations committed by different armed groups provided narratives of their experiences, suffering, expectations, and needs. It was hoped that hearing from victims directly would enlighten negotiators while talks were ongoing.[59] Indeed, negotiators called these hearings 'transcendental' and pivotal to the peace process.[60]

After over a year of talks, the negotiators agreed on a comprehensive transitional justice approach that includes the creation of a truth commission, a special unit to search for disappeared persons, and a new arm of the judiciary—called the Special Jurisdiction for Peace—to try crimes related to the conflict. The SJP was a central issue in the referendum, with the opposition viewing it as granting concessions to the FARC and supporters arguing that it was essential to reaching a peace agreement. The following paragraphs describe the SJP in more detail, although some components are subject to change as implementing legislation is enacted and the Constitutional Court reviews the legislation.

As part of the fast-track legislation passed to implement the FARC peace agreement, in April 2017 Colombia passed amendments to the constitution creating the 'Integral System of Truth, Justice, Reparation and Non-repetition' (the 'Integral System' framework).[61] Many national and international groups expressed criticism of the law and concerns about its implementation.[62] Although not perfect, the Integral System framework is innovative, combining restorative and retributive justice goals. It includes provisions for repairing damage to victims caused by the conflict as well as provisions on penalties for crimes committed in connection with the conflict. It involves several components, including the SJP, the Unit for the Search of Missing Persons, and a truth commission.[63]

The SJP is the agreement's criminal justice component. The SJP will have exclusive jurisdiction over individuals that participated in the armed conflict, including members of the

[57] Office of the High Commissioner for Peace, El Acuerdo Final de Paz (2016), available at <http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/Nuevo_enterese_version_6_Sep_final_web.pdf> accessed 10 December 2017).

[58] The Economist, 'The Moment of Truth,' 20 August 2014, available at <https://www.economist.com/news/americas/21614157-government-and-farc-grapple-victims-truth-justice-and-mechanics-ending> accessed 1 December 2017.

[59] Ucrós Maldonado (n 55) 9.

[60] Semana.com, 'Encuentro con las víctimas fue "transcendental" para la paz' (17 August 2014), available at <http://www.semana.com/nacion/articulo/gobierno-farc-hablan-sobre-encuentro-con-las-victimas/399550-3> accessed 1 December 2017.

[61] Acto Legislativo No. 01, 4 April 2017, available at <http://es.presidencia.gov.co/normativa/normativa/ACTO%20LEGISLATIVO%20N°%2001%20DE%204%20DE%20ABRIL%20DE%202017.pdf> accessed 29 September 2017.

[62] See e.g. Semana.com, Acuerdos de paz: algo no va del todo bien (15 April 2017), available at <http://www.semana.com/nacion/articulo/comunidad-internacional-preocupada-por-implementacion-de-acuerdos-de-paz/521869> accessed 22 April 2017; Washington Office on Latin America, Colombia's New Transitional Justice Law Violates the Spirit of the Peace Accords (22 March 2017), available at https://www.wola.org/analysis/colombias-new-transitional-justice-law-violates-spirit-peace-accords/> accessed 22 April 2017.

[63] Acto Legislativo 01 de 2017 (n 61).

FARC, state agents, and third parties who financed or collaborated with armed groups.[64] The SJP will also have exclusive jurisdiction over crimes committed in relation to the armed conflict, including crimes against humanity, genocide, and war crimes.

The SJP will have three tracks: amnesty for political crimes, judgment and reduced sentencing for those who confess, and trials for those suspects who do not confess. Amnesty or pardon is possible for those—except for state or military agents—who committed political or politically related crimes (such as rebellion, sedition, and illegal possession of arms or military uniforms).[65] As of July 2017, some 7,400 former FARC members had received amnesty—either by decree (6,005) or being released from jail (1,400).[66] Other, non-political crimes are subject to criminal penalties. Those who confess are eligible for reduced sentences as long as they lay down their arms and reintegrate into civilian life (in the case of FARC combatants), recognize their responsibility and contribute to victims' rights to truth, reparation, and non-repetition. Those who confess 'early' in the process will be eligible for reduced sentences involving a restriction of liberty for five to eight years in the most serious cases, or two to five years in other cases.[67] This 'restriction of liberty' requires residing in a designated demobilization zone, but not a prison. It was one of the more controversial aspects of the agreement, since the FARC refused to any provision that included prison time. Persons who confess may face additional penalties, such as reparations to victims or restorative measures. Those who confess 'later' during a trial, but before a final judgment is delivered, may be sentenced to five to eight years in prison. Those who fail to confess but who are tried and found guilty can be sentenced for firteen to twenty years in prison. Crimes committed by members of the armed forces will be subjected to a separate regime based largely on Colombian law.

The Integral System rules are considered *lex specialis*. International observers have expressed concern about rules pertaining to military prosecutions, in particular about the Integral System's narrower definition of command responsibility than that provided for in Article 28 of the International Criminal Court's (ICC) Rome Statute.[68] Some argue that under the Colombian construction of command responsibility it will be difficult, if not impossible, to convict military commanders based in Bogotà for crimes committed by their subordinates on the ground in remote regions of the country.[69]

[64] Paramilitary fighters who have demobilized or participated in the JPL process or whose cases are being heard in the ordinary judicial system are not within the jurisdiction of the SJP.

[65] Ley 1820 de 2016, art. 15. However, the peace agreement requires that all parties receive comparable treatment, leaving open the possibility of commuted sentences for those who are ineligible for amnesty.

[66] Presidencia de la República, 'Presidente Santos firmó decreto que otorga amnistía a 3.252 miembros de las Farc por delitos políticos,' Press Release, 10 July 2017; available at <http://es.presidencia.gov.co/noticia/170710-Presidente-Santos-firmo-decreto-que-otorga-amnistia-a-3252-miembros-de-las-Farc-por-delitos-politicos> accessed 28 September 2017.

[67] High Commissioner for Peace, ABC Jurisdicción Especial para la Paz, available at <http://www.altocomisionadoparalapaz.gov.co/Documents/informes-especiales/abc-del-proceso-de-paz/abc-jurisdiccion-especial-paz.html> accessed 2 October 2017.

[68] See e.g. Fatou Bensouda, 'El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad,' semana.com, January 21, 2017; available at <http://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820> accessed 29 September 2017; Human Rights Watch, 'Colombia: Amicus Curiae regarding the Special Jurisdiction for Peace,' 17 July 2017; available at <https://www.hrw.org/news/2017/07/17/colombia-amicus-curiae-regarding-special-jurisdiction-peace> accessed 1 October 2017.

[69] Marina Aksenova, 'Achieving Justice Through Restorative Means in Colombia: New Developments in Implementing the Peace Deal,' EJIL: Talk!, available at <https://www.ejiltalk.org/achieving-justice-through-restorative-means-in-colombia-new-developments-in-implementing-the-peace-deal/> accessed 1 October 2017.

B. Gender Inclusion

In addition to a high level of participation of victims, women participated in historically high numbers in the peace negotiations with the FARC. In Colombia, women have been virtually absent from the myriad peace negotiations carried out with leftist guerillas and the AUC.[70] This is also true of peace talks with the FARC, although the Pastrana government and the FARC each appointed a woman to their negotiating team during the last peace talks from 1998 to 2002.[71] With the passage of UN Security Council Resolution 1325 (2000), the Colombian government committed to facilitating the participation of women in conflict prevention and peacebuilding. Colombian civil society pushed the government to live up to this commitment and created several initiatives and coalitions to promote the participation of women in peacebuilding.[72] For example, in 2003 they secured the inclusion of a provision requiring the 'promotion of direct and autonomous participation of women's organizations in different national and local dialogues and political negotiation processes related to social and armed conflicts' in the National Development Plan.[73]

However, when the government and the FARC sat down for peace talks nearly ten years later, the situation did not appear to have changed significantly. When the process started in Norway in late 2012, all seats but one—that of the Norwegian moderator—were held by men. When formal talks began the following month, of the thirty negotiators appointed by the two sides, only one was a woman.[74] This situation slowly improved over time, but the sharp gender disparity in the formal negotiations continued throughout the first year.

Nevertheless, they persisted, and made their voices heard in other ways. Women participated in many civil society forums, working groups, and regional peace meetings held throughout Colombia. Women also submitted recommendations on provisional accords on a variety of topics.[75] In October 2013, a coalition of women's organizations held a National Summit of Women for Peace, a pivotal moment for women's participation in the peace talks. The summit, which included some 450 participants from all over Colombia, proposed that women's needs and views be considered during the peace talks and that women be included at the negotiating table and at every stage of the process.[76]

In the following months, the Colombian government appointed two women to be part of its team; the peace delegation established the Sub-Commission on Gender; and the FARC began to appoint women to its team. Women were explicitly consulted during the talks in Havana. Moreover, women filled many support positions in the Colombian government's delegation, including the High Commission for Peace's Office, and sat on

[70] Bouvier (n 13) 16.
[71] Ibid.
[72] Ibid. 16–17.
[73] 'Participación directa y autónoma de las organizaciones de mujeres en los diferentes procesos nacionales y locales de diálogo y negociación política del con icto social y armado, que incluya y represente los intereses de la diversidad de Movimiento Social de Mujeres'. Law 812, 'Mujeres constructoras de paz y desarrollo', art. 8, para. 10, 26 June 2003, El Abedul. Diario Oficial 45.231, <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=8795> accessed 14 November 2017.
[74] Bouvier (n 13) 19.
[75] Propuestas de la Cumbre de mujeres y paz presentada a la Mesa de Negociación a los puntos que están acordados y los que faltan por acordar (La Habana, 2015), available at <https://www.rutapacifica.org.co/images/libros/Documento%20a%20La%20Habana%20final%20(1).pdf> accessed 1 December 2017.
[76] Bouvier (n 13) 21.

major commissions, sub-commissions, and working groups.[77] This level of women's involvement in Colombian peace talks was a historic breakthrough.

In particular, the Sub-Commission on Gender—in spite of its lack of decision-making authority and only consultative status—has been characterized as 'an innovation with few global precedents'.[78] The sub-commission played a pivotal role in incorporating a gender perspective in the final agreement. Between December 2014 and March 2015, the sub-commission organized three delegations that included eighteen representatives of women's and Lesbian, Gay, Bisexual, Transgender/transsexual and Intersex (LGBTI) groups to Havana that focused specifically on the perspectives and proposals of women's groups. These delegations participated directly in the peace talks, emphasizing the gendered dynamic of the conflict and presenting negotiators with gender-sensitive perspectives and proposals.[79] Another key aspect of the gender sub-commission is the fact that it included members of both sides of the negotiations—and most of them were women. In Sri Lanka, peace negotiations also included a gender sub-commission, but members were external. Having the commission include members from the FARC and government negotiation teams helped the sub-commission's recommendations be taken seriously in the broader negotiations.[80]

Gender was not explicitly a part of the initial negotiations. The six main points of the agenda for negotiations were rural reform; political participation; the end of the conflict,; illegal drugs; victims; and the implementation, verification, and endorsement of the agreement.[81] But the success of the women's civil society groups and the establishment of the gender sub-commission allowed for a gendered perspective to permeate all aspects of the agreement.

The sub-commission brought gender-sensitive measures to the forefront, emphasizing the importance of such measures for women and LGBTI groups. The sub-commission highlighted that incorporating such measures into peace negotiations had no global precedent and was a milestone for peace processes.[82] Part of the responsibility of the sub-commission was to review all peace accords from a gender perspective, ensuring that this perspective was integrated into negotiations and the final peace agreement. The impact of this group was significant, and stands out among other peace processes as being truly inclusive. After the commission was established, the previously agreed draft texts of the agreement were amended to have more inclusive language. The sub-commission incorporated gender-inclusive language throughout the peace agreement and mandated gender-mainstreaming for every action, plan, and programme agreed upon. Using specific terms such as 'men and women', 'sexual orientation', 'gender identity', or 'LGBTI' throughout the agreement, the

[77] Ibid.
[78] Ibid.
[79] Ibid. 22.
[80] Ibid. 2.
[81] Gobierno de la República de Colombia & Fuerzas Armadas Revolucionarias de Colombia, Acuerdo General para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (26 Aug. 2012), available at <http://www.humanas.org.co/archivos/acuerdoconflicto.pdf> accessed 1 December 2017.
[82] Mesa de Conversaciones, Comunicado Conjunto, 345–56 (11 Sept. 2014), available at <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/Comunicado%20Conjunto%2C%20La%20Habana%2C%2011%20septiembre%202014-Versi_n%20Espa_ol.pdf> accessed 1 December 2017.

sub-commission was able to guarantee an inclusive approach to new institutions, public policies, and implementation of the agreement.[83]

As an example, the first paragraph of Point 1 of the agreement on rural reform focuses on women throughout. The first paragraph notes that the goal of comprehensive rural reform is to create 'conditions for well-being of the rural population—men and women—thereby contributing to the building of a stable and long-lasting peace'.[84] The preamble also calls for guarantees to progressive access to rural property for rural women in particular. It states 'this structural transformation also requires the promotion of equality between men and women through the adoption of specific measures to guarantee that men and women are involved in and benefit from the implementation of this Agreement on an equal basis'.[85] One of the principles the agreement takes into account for implementing the rural reform initiatives is to take an 'equality and gender-based approach', acknowledging women as 'independent citizens with rights, who, irrespective of their marital status, or relationship to their family or community, have access, on an equal footing to men, to ownership of land'. This principle also calls for the adoption of specific implementation measures to meet the special needs of women. As Céspedes-Báez writes, this principle 'was drafted to achieve one precise goal: to challenge the traditional portrayal of rural women tied to reproduction, victimhood, and the economics of care.'[86] These provisions reflect the robust international and domestic evidence demonstrating additional hurdles women face in accessing, controlling, or recovering their property rights.

In Point 2, on political participation, the agreement emphasized the importance of women's participation in politics in building strong democratic societies. The agreement notes that:

> Taking account of the fact that women face greater social and institutional barriers in terms of political participation, as a result of deep-rooted discrimination and inequality, as well as structural conditions of exclusion and subordination, there will be significant challenges in guaranteeing their right to participation, and facing up to and transforming these historical conditions will involve developing affirmative measures that will safeguard women's participation in the various areas of political and social representation.[87]

Provisions in this point closely adhere to UNSC 1325 and General Recommendations 23 and 25 of the CEDAW Committee.[88] The point on victims, Point 5, also calls for an equity- and gender-based approach and special attention to how the conflict affected women.[89]

[83] Lina M. Céspedes-Báez, 'Gender Panic and the Failure of a Peace Agreement' (2016) 110 *AJIL Unbound* 183, 185.However, Céspedes-Báez notes that the inclusion of LGBTI issues remained well within the traditional boundaries of gender binaries of men and women, either because LGBTI 'was not a pertinent category to explain certain harms or design particular policies, or there was not enough accrued expertise in the social movement to propose and advocate for specific measures.' Ibid. 186.

[84] Acuerdo final (n 57) ch. 1, preamble.

[85] Ibid.

[86] Céspedes-Báez (n 83) 186.

[87] Acuerdo final (n 57) ch. 2, preamble.

[88] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 23: Political and Public Life (1997) UN Doc. A/52/38, UN Committee on the Elimination of Discrimination Against Women, Recommendation 23, 16th Sess. (1997) UN Doc. A/52/38 and UN Committee on the Elimination of Discrimination Against Women, Recommendation 25 (2004) UN Doc. HRI/GEN/1/rev.7.).

[89] See e.g. Acuerdo final (n 57) ch. 5, 5.1.a Goals; 5.1.1.1.1. Goals.

C. Referendum

The referendum was proposed in an effort to overcome elite opposition to the peace talks. However, some evidence suggests that the attitudes and votes in the plebiscite show the impact of elite divisions over the peace process—to some extent even amplifying them.[90] This suggests that rather than serving to legitimize or strengthen a peace process, mechanisms for direct voter approval of a peace process may amplify elite splits and undermine peace processes. The Colombian case suggests that traditional negotiations involving elites from all major factions may still be the best way forward. Indeed, in the Colombian case, victims and members of civil society were involved in the negotiations process, perhaps sufficiently to ensure the sought-after legitimacy of the agreement.

If there is opposition to the agreement from minority elites, perhaps a popular vote is not the right approach. Voters may look to elites for cues, as the issues involved are complex and controversial. Referenda are 'risky' strategies, and where elements of peace agreements can be framed as concessions to the rebel groups, they are even riskier. However, some inclusivity may be possible to increase legitimacy and secure implementation. This can be done at the negotiating stage, or later through a constituent assembly (as Colombia did for constitutional reforms in 1991) or by passing the agreement through Congress—which is what ultimately happened in Colombia. This includes voters directly but with less risk of elites influencing the voters. Alternatively, holding referenda in regions most directly affected by the conflict might allow for the inclusion of voters without elites having such an influence over the outcome. These voters arguably have a more direct stake in the results of a peace agreement, as they have lived the conflict and understand how it will impact their lives day to day. In those regions, members of the FARC rebel group are their sisters, brothers, sons, and daughters. They have directly experienced the loss associated with the conflict and have a greater stake in approving justice and reconciliation terms, especially with respect to reintegrating FARC fighters into their communities.[91]

The use of referenda to approve peace processes is relatively rare and usually involves voter approval of discrete issues, such as succession, rather than the approval of an entire agreement.[92] Inclusive peace processes challenge established power structures; therefore, resistance from elite power-holders is to be expected.[93] Meaningful inclusion predated the referendum, with quality contributions given by a wide sector of Colombian stakeholders vis-à-vis direct representation at the negotiation table, consultations, inclusive commissions, and sending proposals to the negotiators. The referendum was not holding all of the weight of a participatory process.

In the Colombian context, elites who opposed the peace process used the referendum as a tool to undermine the agreement. Voters had to make a decision on the 297-page agreement with relatively little information. This forced them to rely on political messaging, putting power back in the hands of the political elites rather than the individuals themselves.

[90] Aila M. Matanock and Miguel Garcia-Sanchez , 'The Colombian Paradox: Peace Processes, Elite Divisions, and Popular Plebiscites' (2017) 146 *Daedalus* 152, 162.

[91] Ibid. 161.

[92] Ibid. 160.

[93] Thania Paffenholz, Inclusivity in Peace Processes, United Nations University Center for Policy Research (February 2015), 2; available at <http://collections.unu.edu/eserv/UNU:3220/unu_cpr_inclusivity_in_peace_processes.pdf> accessed 2 December 2017.

Uribe presented the referendum as a vote against leniency for the FARC; Santos presented it as a vote for peace. The 'no' vote closely tracked voter support for Uribe—in large part, the urban centres of the country that saw little direct impact of the conflict—while the 'yes' vote tracked regions that voted for President Santos in 2014—rural regions that saw the most direct violence and conflict.[94] Indeed, voters in regions most heavily impacted by the violence overwhelmingly supported the agreement.[95]

However, because the government and the FARC were committed to an inclusive peace process, they were able to renegotiate some of the most contentious terms, taking consideration of the views of the 'no' voters. It took the government and the FARC forty-one days to reach a new agreement. The government and the 'no' supporters developed some 500 proposed changes to the peace accord. Changes were numerous, including to the transitional justice and gender components of the agreement. Key aspects of the agreement continue to be refined by legislation and rulings by the Constitutional Court.[96]

The transitional justice component was perhaps the most controversial. In the new agreement, penalties are more clearly specified—a zone that cannot be larger than the size of a rural hamlet, or 'vereda'—and not left up to judicial discretion. The SJP's tenure was limited to ten years, with the possibility of adding five, to reduce the possibility of developing an endless parallel jurisdiction. The new agreement excludes those who committed war crimes or crimes against humanity for personal enrichment to benefit from transitional justice mechanisms. Significantly, the agreement will not become a *de facto* part of Colombia's constitution, and only gives constitutional status to those parts of the agreement that have to do with human rights and international humanitarian law.[97]

The campaign for the 'no' vote in the referendum saw the gender component of the agreement as undermining social and family values. However, gender provisions were maintained in the final provision. To appease the 'no' voters, such as conservative religious groups, the new agreement underlines respect for the family and freedom of religion. The language on gender generally improved, rather than disappeared, as it was clarified and specified during the renegotiation. For example, the agreement now uses terms such as 'equality in the participation of' or 'equal opportunities for participation' rather than simply 'gender'.[98]

Other issues, however, were not maintained. For example, the original agreement called for the creation and strengthening of social movements for the LGBTI community. In the final agreement, these provisions were removed because religious groups considered that this was a threat to the church and therefore unfair to include in the final agreement. However, in other provisions, terms LGBTI were changed to other expressions such as 'vulnerable' or 'marginalized' population. In other provisions, LGBTI issues were added,

[94] Amanda Taub and Max Fisher, 'Why Referendums Aren't as Democratic as they Seem', *New York Times* (4 Oct. 2016); available at <https://www.nytimes.com/2016/10/05/world/americas/colombia-brexit-referendum-farc-cameron-santos.html> accessed 1 December 2017.

[95] Semana.com, 'Las víctimas votaron por el Sí,' 2 October 2016; available at <http://www.semana.com/nacion/articulo/plebiscito-por-la-paz-victimas-del-conflicto-votaron-por-el-si/496571> accessed 1 December 2017.

[96] See e.g. Adam Isacson, 'Rescuing Colombia's Post-Conflict Transitional Justice System,' WOLA, 29 November 2017, available at <https://www.wola.org/analysis/colombias-post-conflict-justice-framework-remains-vague-becoming-less-fair/>accessed 15 December 2017, noting concern over recent legislation and court rulings that 'deform some of the key tenets of the peace accord'.

[97] WOLA, Key Changes to the New Peace Accord, 15 Nov. 2016; available at <http://colombiapeace.org/2016/11/15/key-changes-to-the-new-peace-accord/> accessed 1 December 2017.

[98] Bouvier (n 13) 3.

resulting in greater inclusion in the final accord. In addition, some paragraphs of the new provision specifically state a refusal to remove the LGBTI community from the accord.[99]

V. Conclusion

As a framework of norms that apply during the transition from conflict to peace, *jus post bellum* interpretive principles help practitioners interpret and apply peacemaking norms and practices in a way to promote sustainable peace. Practice and research demonstrate that peace processes should be broadly inclusive and promote gender equality to better support sustainable peace—as such, these two principles form an integral part of *the jus post bellum* framework. The Colombian peace agreement, albeit imperfect, provides an example of how those principles can be put into practice. The process was inclusive and placed victims at the centre of negotiations. Women were included in the negotiations and the resulting agreement reflects a high level of gender-mainstreaming. Although the true test will be how the agreement is implemented, the building blocks for a just peace are there. Both sides had to settle for less than what they thought they were owed—especially with respect to formal prison time for grave crimes. However, as seen by the support of the agreement in regions most heavily affected by the conflict, this was accepted as necessary for reaching peace. The two sides did not let the referendum process derail the negotiations. Rather, they considered the perspective of the opposition and reframed and refined the agreement, making it stronger in certain respects and, hopefully, more durable. It has benefitted from the input of the broader public, elected officials, and the judiciary. As such, it represents an important example of how negotiations can support a transition to a just and sustainable peace.

[99] Ibid. 4.

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