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Obligations of the New Occupier: The Contours of Jus Post Bellum

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BY KRISTEN E. BOON*

I. INTRODUCTION

A pressing task for international lawyers is to define the legal regime that applies during transitions from conflict to peace. The urgency of this project has become apparent with recent humanitarian interventions, multilateral state-building exercises, and the transformative occupations of Iraq and Afghanistan.[1] Although each intervention has given rise to a unique set of problems and has involved different sets of actors, contemporary approaches to peacebuilding and post-conflict reconstruction are similar. Many have involved extensive legal reform, the promotion of democratic institutions, economic reconstruction, and the creation of mechanisms to establish accountability for past atrocities.[2] There is, however, no uniform legal framework regulating transitions from conflict to peace, nor is there consensus on the obligations that unilateral or multilateral actors incur when they engage in transformative occupations and interventions. Theories of *jus post bellum*, or law after war, are emerging to fill this lacuna.[3]

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1. GREGORY H. FOX, HUMANITARIAN OCCUPATION 8-12 (2008) [hereinafter FOX, HUMANITARIAN OCCUPATION] (discussing the scope and legal frameworks of contemporary interventions).

2. *Id.* at 49-50 (discussing the common tasks and objectives of second generation peacebuilding missions).

3. Carsten Stahn, *'Jus Ad Bellum', 'Jus In Bello'. . . 'Jus Post Bellum'?—Rethinking the Conception of the Law of Armed Forces*, 17 EUR. J. INT'L L. 921, 941-943 (2006) (describing the tripartite nature of the law of armed force).

Jus post bellum derives its name from two existing bodies of law: *jus ad bellum* and *jus in bello*, which are applicable, respectively, to the initiation of war and to conduct in war.[4] These bodies of law have been codified in various legal instruments including the UN Charter, national military manuals, and the laws on armed conflict, such as the four Geneva Conventions of 1949 and their Additional Protocols. Yet with the exception of the law of belligerent occupation, neither *jus ad bellum* nor *jus in bello* provide much guidance on temporary interventions after war and before peace.[5] The illusion that war and peace are absolute, constituting a binary system, has stymied the growth of legal principles in this transitional stage.[6] Georg Schwartzenberger noted this fact in 1948 when he wrote: "[T]he traditional system of international law is based on the distinction between the law of peace and the law of war. In the formative period of international law, thinkers were fully aware of the problems hidden behind this classification."[7]

Distinct legal issues arise during the transitional period between the cessation of war and the establishment of a durable peace. Do those exercising temporary power have a right or an obligation to reform national laws and institutions? Is a new constitution required as part of the longer term peace process, and if so, how will ethnic, geographic, religious, and economic tensions be reconciled? Must natural resources be federalized or subject to international management schemes, particularly where they have contributed to conflict? Should international authorities protect housing, land, and property rights? Should victims of crimes

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4. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5-18 (Oxford Univ. Press 2007) (discussing the historical development of the doctrines); MICHAEL WALZER, JUST AND UNJUST WARS 21 (4th ed. 2000).

5. Stahn, *Rethinking the Conception of the Law of Armed Forces*, *supra* note 3, at 927 ("[T]he traditional rules of *jus in bello* are therefore only partially equipped to address the problems arising in the context of peace-making and the transition from armed conflict to peace."). *See generally* Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

6. GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES 7 (Harvard Univ. Press 2007) ("[T]he binary model of war and peace often no longer appropriately captures what we, sometimes dimly, grasp as the constantly changing political reality of our lives. The darker aspects of globalization and interdependence breed—alongside cooperation and growth—new enemies, new weapons, and new vulnerabilities. We are no longer sure at all times when either peace or war is occurring.").

7. Georg Schwarzenberger, *Jus Pacis Ac Belli?*, 37 AM. J. INT'L L. 460, 470 (1943) (discussing the "status mixtus" between war and peace).

committed during conflict be compensated, and if so, by whom? These questions are particularly salient where occupiers and International Organizations (IOs) have a transformative goal, i.e, where the object of the post-conflict intervention is to make violent societies peaceful by engaging in political reform and economic development.

Transformative approaches to peacebuilding have revealed profound inadequacies in the current legal framework, and principles of international law have not developed sufficiently to fill the gaps. Neither the Charters of the UN, IMF, or World Bank, nor the law of occupation (codified in the Geneva Conventions and the Hague Regulations) are sufficient in and of themselves to provide general principles on transitional interventions to build the peace. These inadequacies have created complexities on the ground because the duties and obligations of the various international actors are uneven and often unclear.

In this article, I assess whether the law of occupation is a workable point of departure for a *jus post bellum*. I then comment on what theory of peace informs *jus post bellum*, and I conclude with some suggestions on the scope and content of a *jus post bellum*, emphasizing the role of human rights, multilateralism, and economic reconstruction. In particular, I argue that *jus post bellum* should be based on the emerging norms of accountability, stewardship, good economic governance, and proportionality. *Jus post bellum* triggers principles in play in periods after armed conflict, moving away from war (*ab bello*) towards justice (*ad jusitiam*) and peace (*ad pacem*).[8] *Jus post bellum* expands the traditional binary rules of international law into a tripartite system, which will bring the law into closer conformity with the challenges presented by the peace-making, peacebuilding, and post-conflict practices of today.[9]

8. This analysis focuses on the stages between armed conflict and peace, although some of the principles may be applicable by analogy to natural disasters. *See, e.g.*, U.N. Int'l Law Comm'n, *Preliminary Report on the Protection of Persons in the Event of Disasters*, U.N. Doc. A/CN.4/598 (May 5, 2008) (*by* Eduardo Valencia-Ospina, Special Rapporteur).

9. Philip Jessup, *Should International Law Recognize an Intermediate Status Between War and Peace?* 48 AM. J. INT'L LAW. 98, 102 (1954) (discussing the state of intermediacy between war and peace and how its acceptance would bring the law into closer conformity with the facts of international life).

II. THE LAW OF OCCUPATION: A FOUNDATION FOR *JUS POST BELLUM*

International humanitarian law (IHL) and, specifically, the Hague Conventions of 1907 and the Fourth Geneva Convention of 1949 are the traditional touchstones for identifying what legal obligations obtain when territory comes under the control and administration of a foreign presence.[10] The ICJ has stated that the trigger for the law of occupation is a showing of *de facto* control: territory is considered occupied when it is placed under the effective control of a hostile army.[11] Article 43 of the Hague Regulations makes clear that occupation does not confer sovereignty on the occupying power, thus during an occupation, the sovereignty of the occupied state becomes dormant, while the occupier exercises *de facto* ruling authority in recognition of the ongoing, but displaced sovereignty of the state.[12] Occupiers are therefore obliged to protect the civilian population, by acting as trustees and reserving fundamental political and legal changes to future governments representing the occupied population.[13] This

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10. *See generally* Hague Convention IV: Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention IV]; Geneva IV, *supra* note 5.

11. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, ¶ 78 (July 9) ("[T]erritory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."). *See also* Hague Convention IV, *supra* note 10, art. XLIII. It is important to note that no actual showing of armed conflict is required; Art, 2(2) of the Geneva IV provides that the Convention shall apply "even if the said occupation meets with no armed resistance." Geneva IV, *supra* note 5, art. 2(2).

12. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 8 n.9 (Princeton University Press 2003) [hereinafter BENVENISTI, LAW OF OCCUPATION]; Daphna Shraga, *Military Occupation and UN Transitional Administrations—The Analogy and Its Limitations*, *in* PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW 479, 481 (Marcelo G. Kohen ed., 2007); Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law Making Powers*, 50 MCGILL L.J. 285, 296 (2005) [hereinafter Boon, *Legislative Reform*].

13. The conservationist principle is illustrated by Article 43 of the Hague Regulation which requires that the Occupying Power "[respect], unless absolutely prevented, the laws in force in the country." Hague Convention IV, *supra* note 10, at art. 43. Rudiger Wolfrum, *The Adequacy of International Humanitarian Law Rules on Belligerent Occupation: To What Extent May Security Council Resolution 1483 Be Considered a Model for Adjustment?*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 497, 498 (Michael N. Schmitt ed., 2007). *Cf.* FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 29-33 (arguing that the mandate system did not require the

principle has been described as one of "conservationism," which involves three presumptions: occupations are temporary, non-transformative, and limited in scope.[14]

This fundamental premise, that occupiers will conserve the *status quo ante* of an occupied territory, has in practice, been demonstrated to be a fiction.[15] The 2003 invasion and occupation of Iraq provided confirmation, if any was needed, that the core principle of "conservationism" has been seriously compromised.[16] Although the United States and the United Kingdom reluctantly recognized their status as occupying powers in Iraq, they embarked on an aggressive campaign to reform domestic laws and institutions.[17] During the Coalition Provisional Authority's (CPA) fourteen months in existence, it enacted twelve regulations, one hundred orders, and issued seventeen explanatory memoranda on subjects ranging from domestic criminal law to tax reform.[18] Economic development was a clear priority for the CPA, as evidenced by the multitude of reforms targeting the economy, including legal changes, the direct involvement of the World Bank and IMF in the reconstruction effort, and in the CPA's efforts to

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promotion of political rights or self-government and that there was very little international oversight).

14. Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 726 (2005) (describing occupation as a temporary state of fact); Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* THE ADMINISTRATION OF OCCUPIED TERRITORY 241, 265-66 (Emma Playfair ed., 1992) (describing the temporary authority of occupiers); FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 235.

15. Hillary Charlesworth, *Law After War*, 8 MELBOURNE J. INT'L L. 233, n.40 (2007).

16. Some occupations have had limited purposes. *See* BENVENISTI, LAW OF OCCUPATION, *supra* note 12 (discussing the Coalition Occupation of Southern and Northern Iraq and the Israeli Occupation of Southern Lebanon). For a discussion of the principle of conservationism in prolonged occupation, see Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990) (stating that even in a prolonged occupation, occupying powers must avoid making drastic changes).

17. *See generally* Boon, *Legislative Reform*, *supra* note 12 (discussing legislative reform in Iraq under the CPA and comparing it to the legislative reform that took place in East Timor and Kosovo under UN Interim Administrations). It was somewhat surprising, as Hillary Charlesworth notes, that the United Kingdom and United States agreed to the status of occupier. Charlesworth, *supra* note 15, at n.40.

18. Boon, *Legislative Reform*, *supra* note 12, at 308; COALITION PROVISIONAL AUTHORITY, AN HISTORICAL REVIEW OF CPA ACCOMPLISHMENTS 4 (2004), http://www.cpa-iraq.org.

improve infrastructure and manage natural resources in Iraq.[19] Institutional changes were vast as well; the process of "de-Ba'athification" of Iraqi society involved the elimination of party structures and government ministries that were used to "oppress the Iraqi people and as institutions of torture, repression and corruption."[20] As General Tommy Franks notoriously proclaimed upon entering Baghdad, "this is about liberation, not occupation."[21]

It would be a mistake, however, to view the United States and United Kingdom's transformative intervention in Iraq as unique. The sweeping social and institutional reforms that took place in both Japan and Germany after WWII tell a similar story.[22] The Allies' main goal during the post-war occupation of Japan and Germany was the eradication of existing national institutions and the establishment of democratic ones in their stead.[23] The conservationist principle had thus been deftly circumvented long before the 2003 occupation of Iraq.[24]

The mismatch between the spirit of IHL applicable to belligerent occupation and the practice of contemporary occupiers is one of the central reasons why the law of occupation is criticized today. As Grant Harris writes: "The international law of occupation has become essentially irrelevant as a force that

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19. Kristen E. Boon, *Open for Business: International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT'L L. & POL. 513, 533-38 (2007) [hereinafter Boon, *Open for Business*].

20. FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 261 (internal citation omitted).

21. Katherine Butler & Donald Macintyre, *General Franks Strides Into His Baghdad Palace*, THE INDEP., Apr. 17, 2003, *available at* http://www.independent.co.uk/news/world/middle-east/general-franks-strides-into-his-baghdad-palace-594752.html. *See also* Charlesworth, *supra* note 15 (noting that the invasion was intended to create a turning point for democracy not only in Iraq, but also in the Middle East in general).

22. The occupations of Germany and Japan took place before the Geneva Conventions were codified. Article 43 of the Hague Regulations of 1907 provided the principal source of regulation, stating that the occupier shall restore order and safety while respecting the laws in force. Hague Convention IV, *supra* note 10, at art. 43. *See* FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 259 (illustrating why some argued the Hague Regulations did not apply to these occupations).

23. BENVENISTI, LAW OF OCCUPATION, *supra* note 12, at 91.

24. Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 585 (2006) (discussing annexation as a precursor to transformative occupation) [hereinafter Roberts, *Transformative Military Occupation*]. *See* FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 233-35 (noting that it was ironic that the concept was reconfirmed in Article 64 of the Geneva Conventions of 1949).

compels action by occupying powers. Occupants rarely comply with the letter or spirit of that body of law. As a result, the law of occupation's legal authority and status are uncertain."[25]

The majority of scholars and states today consider the law of occupation to be inadequate to the realities of modern occupation, and to the demands of modern peacebuilding and post-conflict reconstruction by analogy.[26] While IHL remains an extremely important and almost universally accepted body of law, there are a number of reasons why its applicability to modern war-to-peace transitions is limited. First, occupation law applies to only a subset of the war-to-peace transitions. For the protections of Geneva IV to apply, the conflict must be of an international character and the invader must be a state or foreign army that is actually exercising authority.[27] Most provisions of Geneva IV do not, therefore, apply to internal conflicts, to multilateral peacekeeping missions, or to the period after a formal occupation, but before a stable peace.[28] Many nebulous and extended transitions between war and peace will not, therefore, come within the purview of Geneva IV unless the relevant parties independently and voluntarily choose to apply

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25. Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 9 (2006).

26. *Id.* Stahn, *Rethinking the Conception of the Law of Armed Forces*, *supra* note 3, at 928 ("The norms of international humanitarian law are therefore only to a limited extent relevant to the broader process of building peace after conflict."); Brett H. McGurk, *Revisiting the Law of National-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 453 (2004-2005). *But see* Roberts, *Transformative Military Occupation*, *supra* note 24 (arguing that the law of occupation can accommodate modern circumstances of occupation).

27. The obligations in conflicts that are considered "not of an international character" are significantly less burdensome, as per common art. 3 of the Geneva Conventions. *See, e.g.*, Geneva IV, *supra* note 5, art. 3; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442. On the complexities of applying the "effective control" requirement in Gaza see Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68, 69-71 (2008).

28. Common Article 3 of the Geneva Conventions, however, sets down minimum standards for conflict not of an international character. For an excellent discussion of the typology of international occupations and the criteria required to trigger Geneva IV, see Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. OF INT'L L. 249 (1984) [hereinafter Roberts, *What is a Military Occupation?*].

it.[29] As such, the law of occupation addresses only a narrow set of *in bello* situations, but does not govern the broader whole.

A second reason why the law of occupation is of limited applicability to modern war-to-peace situations is that it does not bind IOs, such as the UN, the IMF, or the World Bank.[30] This gap is troublesome because IOs now play a dominant role in post-conflict reconstruction for reasons of expertise, legitimacy, burden sharing, and resources.[31] IOs provide technical and humanitarian assistance;[32] and they have been extensively involved in legal reform.[33] In Kosovo and East Timor, the UN even created transitional administrations with full executive and legislative authority, illustrating what may be the high water mark of intervention by IOs.[34] To date however, IHL has not been embraced by IOs. To be sure, IOs do not have standing to become parties to international treaties such as the Geneva Conventions.[35] Nonetheless, there are parallels between the international administration of territories and the temporary administration of a

29. *See* Ian Brownlie, *First Report of the Effect of Armed Conflicts on Treaties*, ¶ 17, *delivered to the General Assembly*, U.N. Doc. A/CN4/552 (Apr. 21, 2005) (contemporary conflicts are increasingly characterized by civil wars with international assistance). The Article 2 requirement for a total or partial occupation, for example, limited the applicability of the Geneva Conventions after the CPA's transfer of authority to the multinational forces in Iraq in June 2004. *See* INT'L COMM. OF THE RED CROSS, IRAQ POST TRANSFER (2004), http://www.icrc.org/web/eng/siteeng0.nsf/html/63KKj8.

30. *See* FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 222-30. *See generally* LAURIE BLANK, UNITED STATES INSTITUTE OF PEACE, THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS IN INTERNATIONAL HUMANITARIAN LAW (2002), http://www.usip.org/pubs/peaceworks/pwks42.pdf.

31. KATHARINA P. COLEMAN, INTERNATIONAL ORGANISATIONS AND PEACE ENFORCEMENT: THE POLITICS OF INTERNATIONAL LEGITIMACY 2-3 (2007).

32. *See generally* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL ORGANIZATIONS IN IRAQ 21-25 (2003), http://ihlresearch.org/iraq/pdfs/IHL_IO_Iraq.pdf.

33. *See* Boon, *Open For Business*, *supra* note 19 (discussing the role of the World Bank and IMF in legal reform).

34. The transitional administrations in Kosovo and East Timor are examined in RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY 144-46, 178-88 (2008).

35. Only states, not International Organizations, are a "High Contracting Power," as per the terms of the Conventions. *See* David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 852 (2003); FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 222-30. Some scholars, however, argue that international humanitarian law should bind international organizations. *See* BENVENISTI, LAW OF OCCUPATION, *supra* note 12, at xvi; BLANK, *supra* note 30.

state under a belligerent occupation.[36] Yet only the UN has so far acknowledged that it will respect the principles of IHL during its operations,[37] while the IMF, the World Bank, and other organizations involved in post-conflict reconstruction have resisted on the basis that their mandates are limited to economic and financial objectives.[38]

A further limitation of the law of occupation is that, even where the law of occupation applies, most occupiers do not acknowledge that they are bound, whether because they are interested in permanent control of the territory, because the status of the territory is disputed, or because they wish to avoid the considerable burdens and liabilities created by Geneva IV. Occupiers have engaged in what Benvenisti calls a "pattern of denial" about the applicability of occupation law.[39] The law of occupation requires occupants to care for civilians, provide food and medical supplies to the population, ensure humane treatment of protected persons, and prohibit physical and moral coercion.[40] These factors create an incentive for *de facto* occupiers to find reasons why they should not be saddled with the burdens of full compliance.[41] What is more, because there are no effective legal mechanisms to hold occupiers to account, only the court of public

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36. *See generally* Boon, *Legislative Reform*, *supra* note 12. *Cf.* Shraga, *supra* note 12, (on the limits of the analogy and an explanation of why international administrations do not meet the "effective control" test of belligerent occupation).

37. *See* The Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), *available at* http://www.un.org/peace/st_sgb_1999_13.pdf. For commentary, see Stephen C. Neff, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 344-45 (Cambridge Univ. Press 2005); Sylvain Vité, *L'Applicabilité du Droit International de l'Occupation Militaire aux Activités des Organisations Internationales*, 86 REVUE INTERNATIONALE DE LA CROIX ROUGE 9, 21-22 (2004).

38. The IFIs have also taken this position with regard to the applicability of human rights. *See, e.g.*, Francois Gianviti, *Economic, Social, and Cultural Human Rights and the International Monetary Fund*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 113 (Philip Alston, ed., 2008); Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471, 474 (2008); John W. Head, *Protecting and Supporting Indigenous Peoples in Latin America: Evaluating the Recent World Bank and IDB Policy Initiatives*, 14 MICH. ST. J. INT'L L. 383, 408 (2006).

39. BENVENISTI, LAW OF OCCUPATION, *supra* note 12, at 149.

40. *See, e.g.*, Geneva IV, *supra* note 5, arts.. 3(1), 31-33, 55. For a discussion of the security exception, see Boon, *Legislative Reform*, *supra* note 12, at 302-03.

41. Kathleen Cavanaugh, *Rewriting Law: The Case of Israel and the Occupied Territory*, *in* NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 227, 239 (David Wippman & Matthew Evangelista eds., 2005) (discussing Israel's objections to the applicability of the law of occupation in Gaza).

opinion creates an incentive for occupiers to abide by its provisions.[42] In sum, despite the universal ratification of the Geneva Conventions, IHL is not broad enough to cover the expansive challenges that arise in contemporary multilateral occupations and peacebuilding situations.

III. *AD PACEM:* A MODERN THEORY OF PEACE

The law of belligerent occupation reflects a nineteenth century laissez-faire view of the state, in that it assumes that the role of foreign occupiers in the civil, economic, and political aspects of society is minimal.[43] This presumption is outdated. Today, states are often expected, and sometimes legally obliged, to play a much more active management role in day-to-day domestic issues. Similar expectations are created when foreign territories are administered or occupied by international regimes.

This changing conception of the state is relevant to the *jus post bellum*. Whereas war and peace were once defined in opposition to one another,[44] today it is acknowledged that peace is not simply created by a *de jure* agreement like a peace treaty, but as a normative matter, requires consolidation, such as compliance with peace agreements, monitoring ceasefires, demilitarization of former combatants, repatriation of refugees, mine clearance, economic development, and the reform of police forces.[45] Under the UN Charter, peace is no longer limited to a minimalist negative core but increasingly contains positive duties linked to the conditions that make peace practicable.[46] Like the positive

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42. *See* Geneva IV, *supra* note 5, art. 9 (providing for a Protecting Power). *See also* BENVENISTI, LAW OF OCCUPATION, *supra* note 12, at 204-07 (arguing that the most effective way of enforcing obligations on occupiers is through regional and international organizations); Tristan Ferrero, *Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities*, 41 ISR. L. REV. 331 (2008).

43. BENVENISTI, LAW OF OCCUPATION, *supra* note 12, at 209.

44. As Hobbes wrote, "for war is nothing else but that time wherein the will and intention of contending by force is either by words or actions sufficiently declared; *and the time which is not war, is peace.*" THOMAS HOBBES, THE ELEMENTS OF LAW 73 (Ferdinand Tonnies ed., Frank Cass & Co. 2d ed. 1969) (1889) (emphasis added). *See also* GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 832 (Francis W. Kelsey trans., Oceana 1964) (1625) ("Inter bellum et pacem nihil est medium").

45. Kristen Boon, *Coining a New Jurisdiction: The Security Council as Economic Peacekeeper*, 41 VAND. J. TRANST'L L. 991, 1017 (2008) [hereinafter Boon, *Coining a New Jurisdiction*].

46. *See, e.g.*, Behrami and Saramati v. France, ECHR App. No. 71412/01, para. 20 (May 2, 2007) (discussing the difference between the positive and negative peace).

obligations that inure with the recognition and enforcement of economic and social rights, the establishment of a durable peace is widely perceived to include humanitarian aid, economic reconstruction, the provision of essential food and medical care, and even the creation of institutions to administer justice and address accountability for past atrocities.[47] As the President of the Security Council stated, "peace is not only the absence of conflict, but that it requires a positive, dynamic, participatory process . . . ."[48]

This fuller understanding of the contours of peace has emerged recently,[49] no doubt influenced by the fragmentation of the concept of war.[50] Nonetheless, it informs international interventions because states enduring civil wars or engaged in international conflict often lack the political infrastructure needed

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47. *See id. See also* W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 TUL. J. INT'L & COMP. L. 5, 16, 21-22 (1998) (defining "peace").

48. The President of the Security Council, *Statement by the President of the Security* Council, U.N. Doc.S/PRST/2000/25 (July 20, 2000). *See also* S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000) (stressing the importance of the participation and involvement of civilians, especially women, in all efforts for the maintenance and promotion of peace and security); S.C. Res. 1645, pmbl., U.N. Doc. S/RES/1645 (Dec. 20, 2005) ("*Emphasizing* the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace . . . .") (emphasis in original). The Red Cross has adopted a similar definition: "The Red Cross does not view peace simply as the absence of war, but rather as a dynamic process of cooperation among all states and peoples; cooperation founded on freedom, independence, national sovereignty, equality, respect of human rights, as well as a fair and equitable distribution of resources to meet the needs of peoples." Yves Sandoz, *The Red Cross and Peace: Realities and Limits*, 3 J. PEACE RESEARCH 287, 295 n.2 (1987).

49. The closest international organs have come to defining peace is to attempt to define aggression. The 1974 General Assembly Resolution on Aggression and the ICJ decisions in the Nicaragua and Corfu cases consider aggression to be the "use of armed force" by a state against the sovereignty of another state. Definition of Aggression, G.A. Res. 3314 (XXIX), art. 1, U.N. Doc. A/9890 (Dec. 14, 1974); Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 112 (June 27); Corfu Channel (U.K. v Alb.), 1949 I.C.J. 4, 28-30 (Apr. 9).

50. War no longer requires active combat. Consider for example, the Cold War, the war on terrorism, and the war between South Korea and North Korea—all examples of situations termed "war," but in fact defined by the absence of active fighting. *See* Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283, 284-87 (1987); BLUM, *supra* note 6, at 8. *See, e.g.*, L. OPPENHEIM, INTERNATIONAL LAW A TREATISE VOL. II WAR AND NEUTRALITY 56 (1906) (defining war as a "contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases").

to resolve their disputes.[51] Indeed, some of the most important work of the international community today involves *ad pacem* activities of peacebuilding and reconstruction.[52]

What should be done about the inadequacy of the law applicable to war-to-peace transitions? The concept of *jus post bellum* requires a conversation about what can be carried over from the law of occupation itself and what norms should apply after the *in bello* period between conflict and peace, and during the peacebuilding process itself.[53] *Jus post bellum* is, by definition, a law of transition.[54] It does not, and cannot, share the legal presumption in the law of occupation that the *status quo ante* be restored. Moreover, it builds on the positive concept of peace creating obligations for entities exercising public authority that go beyond the absence of armed conflict. A *jus post bellum* must therefore reconcile inherent conflicts between the occupiers' or the UN's desire to transform and improve conflict-ridden states, and the right of self-determination of states themselves.[55] As Michael Reisman notes, a ceasefire is not enough; rather, we must create the basis for the permanent cessation of conflict.[56]

Three alternatives have emerged to the conundrum thus exposed: (1) incorporate human rights norms into the law of occupation and the mandates of IOs in order to expand international human rights law (IHRL) protections;[57] (2) use the UN Security Council's exceptional powers to modify the law of

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51. FOX, HUMANITARIAN-OCCUPATION, *supra* note 1, at 45.

52. *See generally* Mats Berdal, *The Security Council & Peacekeeping*, *in* THE SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 175, 193 (Vaughan Lowe et al. eds., 2008) (discussing the evolution of Security Council peacekeeping missions and the surge in UN peace operations after 2003).

53. Carsten Stahn, *Jus Post Bellum, Mapping the Discipline(s)*, 23 AM. U. INT'L L. REV. 311, 335 (2008) [hereinafter Stahn, *Jus Post Bellum*].

54. *Id. See also* Mark Freeman & Drazan Djukic, *Jus Post Bellum and Transitional Justice*, *in* JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE 213, 214 (Carsten Stahn & Jann K. Kleffner eds., 2008) (discussing the "transition" in transitional justice).

55. *See* Roberts, *Transformative Military Occupation*, *supra* note 24, at 580; JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 128-30 (2d ed. 2006).

56. Reisman, *supra* note 47, at 16. *See also* Major Richard P. Dimeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 146 (2005) ("It is of little practical value . . . to justly engage in war and successfully terminate a conflict, yet allow conditions to remain that permit violence and aggression to again erupt.").

57. *See generally* Roberts, *Transformative Military Occupation*, *supra* note 24.

occupation on a case-by-case basis;[58] or (3) carve out a new category of law, a *jus post bellum*, to develop norms that will govern the formation of peace.[59] I will briefly examine the first two approaches to demonstrate why human rights law and Security Council involvement are only partial solutions, and conclude by advocating for the third option of a *jus post bellum*, in which I draw upon the strengths of the first two alternatives.

IV. ALTERNATIVES TO THE LAW OF OCCUPATION IN TRANSITIONAL SITUATIONS

A. The Role of Human Rights

IHL is typically considered *lex specialis*, which replaces the laws of general application in times of peace.[60] According to this traditional conception, IHL applies during wartime, while IHRL applies during peacetime.[61] A modified version of this argument is that human rights law should only serve the subsidiary function of clarifying concepts of IHL that are in need of specification.[62] From a temporal standpoint, this special status of IHL is significant: the Geneva Conventions of 1949 predate major human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights of 1966. Only the Additional Protocols to the Geneva Conventions, which are less widely ratified than the Conventions, hint at the relevance of human rights.[63] Thus the *lex specialis* approach gives short shrift to the role of human rights in wartime situations.

Some international law scholars believe the traditional view has been thoroughly repudiated, whether because IHRL has a wider scope of application than the laws of war or because of

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58. *See* Scheffer, *supra* note 35, at 852; Robert Cryer, *The Security Council and International Humanitarian Law*, *in* TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 245, 273 (Susan C. Breau & Agnieszka Jachec-Neale eds., British Institute of Int'l and Comp. L. 2006).

59. *See generally* Stahn, *Jus Post Bellum*, *supra* note 53.

60. *See generally* William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, 40 ISR. L. REV. 592 (2007) (explaining and critiquing the *lex specialis* theory as applied to international humanitarian law).

61. Wolff Heintschel Von Heinegg, *Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 868 (2004).

62. *Id.* at 872.

63. *See generally* Roberts, *Transformative Military Occupation*, *supra* note 24 (discussing the ways in which IHL incorporates human rights).

recent judicial decisions that find that IHL does not displace human rights law.[64] The International Court of Justice (ICJ),[65] the Inter-American Commission on Human Rights (IACHR),[66] the European Commission on Human Rights (ECHR), the European Court of Human Rights (ECtHR),[67] and the United Nations Human Rights Committee (HRC)[68] have all acknowledged the application of IHRL to belligerent occupiers. In addition to these international courts, the House of Lords in England has recognized IHRL in extraterritorial occupations—specifically the occupation of Iraq.[69] Nonetheless, others, most notably those within the U.S. government, have contended that international

64. *See id.* at 590-91; John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1447, 1448 (2006); Steven R. Ratner, *Foreign Occupation and International Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695, 704 (2005) (discussing The Case on the Wall); U.N. Human Rights Comm., Int'l Covenant on Civil and Political Rights, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 29, 2004) [hereinafter General Comment No. 31].

65. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 226, ¶ 25 (July 8) (announcing the Court's opinion that the ICCPR's protections do not cease during wartime); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Reports ¶¶ 104-113 (July 9) (acknowledging that the ICCPR is applicable outside of a state's territory to acts of an occupying state committed in the exercise of its jurisdiction); Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1 (Dec. 19) (holding the ICCPR and other human rights treaties applicable to Uganda's armed occupation of the Democratic Republic of Congo).

66. *See, e.g.*, Coard v. U.S., Case 10.951, Inter-Am C.H.R., Report No. 109/99, OEA/Ser.L./V/II.85, doc.9 rev. (1999) (holding that human rights laws were violated by U.S. armed forces operating in Grenada).

67. *See* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) (holding that the application of the European Convention on Human Rights is not limited to the national territory of the High Contracting Parties); Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 335, ¶ 71 (2001) (holding that European Convention applies where the occupier, "through the effective control of the relevant territory... as a consequence of military occupation... exercises all or some of the public powers normally to be exercised by [the occupied territory's] Government").

68. *See* General Comment No. 31, *supra* note 64, ¶ 10 (asserting that "a State party must respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party").

69. *See* Al Skeini v. Sec'y of State for Def., [2004] EWHC 2911 (Admin), ¶¶ 287-88 (holding that the Convention did not apply to the actions of the British troops on patrol, but that it did apply to the individual detained in a British military prison).

human rights law has no application during belligerent occupations.[70]

My purpose here is not to retrace these arguments, but rather to posit that IHRL applies in situations of war and peace, and informs IHL during times of conflict.[71] The interesting inquiry then is where human rights are useful and relevant in war-to-peace transitions, and thus in *jus post bellum*. Five lessons are apparent from recent occupations and peacebuilding missions: (1) human rights create limits on the exercise of governmental authority;[72] (2) human rights can inform the positive content of laws;[73] (3) some human rights are non-derogable and must be respected even in emergency situations, such as during an occupation or transition where security is not consolidated;[74] (4) human rights can influence peacekeeping mandates, setting priorities and goals for the outcome of the intervention and fill the gaps in the law of belligerent occupation;[75] and (5) if some individuals are considered not to fall within the categories of protected persons as laid down in the four 1949 Geneva Conventions, human rights protections may relate to their situations.[76]

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70. For example Michael Dennis of the State Department, speaking in his individual capacity, stated that human rights treaties do not generally apply extraterritorially during occupation. *See* Michael Dennis, *Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupations*, 100 AM. SOC'Y INT'L L. PROC. 86, 86 (2006).

71. *See supra* note 67 and accompany text.

72. *See* Nigel D. White, *Towards a Strategy for Human Rights Protection in Post-Conflict Situations*, *in* THE UN, HUMAN RIGHTS AND POST CONFLICT SITUATIONS 463, 465 (Nigel D. White & Dirk Klaasen eds., 2005); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS 36-37 (2d ed. 2003) (discussing the relationship between the state and human rights generally); JAMES DOBBINS ET AL., THE BEGINNER'S GUIDE TO NATION-BUILDING 65, 76 (2007) (noting the relevance of human rights to the military and police and the frequent violation of international standards on detentions).

73. *See* FOX, HUMANITARIAN OCCUPATION, *supra* note 1, at 122 (discussing the norms of physical integrity, equality and pluralism that are now seen to inform a government's obligations towards its citizens); CHRISTINE BELL, ON THE LAW OF PEACE: LEGAL ASPECTS OF PEACE AGREEMENTS 198 (2007) (discussing how human rights obligations in peace agreements inform and legitimize national constitutions).

74. *See* International Covenant on Civil and Political Rights arts. 6-8, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171. The ICCPR states that non-derogable rights include the right to life, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to be free from slavery. *See also* Roberts, *What is a Military Occupation?*, *supra* note 28, at 250, n.6.

75. White, *supra* note 72, at 28-29; Roberts, *Transformative Military Occupation*, *supra* note 24, at 601.

76. Roberts, *Transformative Military Occupation*, *supra* note 24, at 601.

Human rights inform the contours of a modern peace in a myriad of ways. They create universally relevant standards for post-conflict reconstruction given their independent status and reach.[77] They also contribute to a state's legitimacy and stability, even if respect for human rights and good government are not requirements of statehood.[78] Moreover, the obligation to respect and ensure international human rights standards has created a presumption with regard to applicable law; prior law is presumed to remain in force unless it is inconsistent with IHRL.[79] It is no longer realistic to exclude human rights from occupation or nation-building, as they will set the stage for the order that follows. As such, human rights are vital to *jus post bellum*, but they are not in and of themselves sufficient, as shown below.

B. Security Council Resolutions in Post Bellum *Situations*

The Security Council's extensive involvement in Iraq has been held up as a second possible source of *jus post bellum,* in that the Council showed its willingness to adapt and vary the law of occupation on a case-by-case basis. Because Chapter VII Security Council resolutions take precedence over other provisions of international law, the Security Council can alter the obligations of the occupiers by tailoring IHL to the situation at hand.[80] Rudiger Wolfrum, for example, has argued that Security Council involvement is more effective in preventing the abuse of an occupant's powers than a watered-down IHL that merely expands the discretionary powers of a belligerent occupant.[81] In other words, there is strong support for the proposition that the multilateralization of an occupation is the best way to ensure political legitimacy, sustained economic reconstruction, and the creation of durable peace.[82]

The key inquiry, however, is whether the Security Council's involvement in Iraq should be viewed as good precedent for

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77. *Id.* at 466.

78. CRAWFORD, *supra* note 55, at 131, 148 (noting that good government is not a criterion for statehood—violations of human rights do not call into question the State as such).

79. Shraga, *supra* note 12, at 488-89.

80. Security Council resolutions have this exceptional status by virtue of Article 103 of the UN Charter. U.N. Charter art. 103.

81. RÜDIGER WOLFRUM, UNITED NATIONS: LAW, POLICIES AND PRACTICE 1147-61 (1995).

82. Harris, *supra* note 25, at 38.

foundational norms of a *jus post bellum*. Security Council Resolution 1483 acknowledged the status of the United States and the United Kingdom as occupying powers in Iraq, while creating some exceptions to the restrictions inherent in the law of occupation. For example, the Security Council overrode certain conservationist principles by authorizing economic reconstruction, legal reform, and the creation of a new representative government.[83] The Security Council also promoted the welfare of the Iraqi people through the establishment of a Development Fund for Iraq, and it encouraged the entry of the World Bank and IMF into Iraq, enlisting their support and assistance in economic strategies.[84] In addition, the Council set standards for the safekeeping of cultural property, and made disarmament a priority for the occupying powers, consequently modifying and updating the law of occupation.[85]

The Security Council's involvement in Iraq has, nonetheless, met with mixed reviews. On the positive side, the Security Council broadened the CPA's presence to include international interests[86] while at the same time reaffirm that the sovereignty of Iraq lay in the Iraqi people themselves.[87] Furthermore, the UN had a limited mandate, and presumably fewer conflicts of interest with the local population than the typical occupying power.[88] The Security Council's recommendations were tailored to the situation in Iraq, and took into account the dominant role of oil in the national economy. A trust fund was created to manage the proceeds of the oil industry for example, which constitutes 90 percent of Iraq's

83. S.C. Res. 1483, ¶ 8, U.N. Doc. S/RES/1483 (May 22, 2003) (appointing a Special Representative to undertake these tasks in coordination with the CPA). *See also* G.H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 273 (2005) (noting that the Coalition Provisional Authority in Iraq relied on Security Council Resolution 1483, as well as other substantive international standards, as a basis for its regulations).

84. Boon, *Open for Business*, *supra* note 19, at 539.

85. S.C. Res. 1483, *supra* note 83, ¶ 8.

86. DOBBINS, *supra* note 72, at 138 (discussing the UN mandate which shows that the international community agrees the operation is legally and morally justified).

87. Harris, *supra* note 25.

88. WILDE, *supra* note 34; Alexander Orakhelashvili, *The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law*, 8 J. CONFLICT & SECURITY L. 307, 309 (2003) (quoting the Representative of France during a debate on Resolution 1483, who said that the broad authorities vested in the occupying powers are obligations *erga omnes*, in that they "are objective in nature; they objectively protect certain non-state transcendent interests and impose respective obligations on all states involved in occupation").

national revenues.[89] The Council's involvement thus lent legitimacy and logistical assistance to the reconstruction exercise in Iraq, given its considerable expertise the field.[90]

On the other hand, the Security Council was criticized for its involvement as well. The Security Council was perceived by some as a rubber stamp for U.S. ambitions or as partial in its own right due to the legacy of the Oil for Food scandal, and the decade of harsh sanctions against Iraq.[91] Furthermore, the Council did not require that the new government in Iraq be created on the basis of democratic elections, which was a *sine qua non* in the view of many.[92] The Council's resolutions were not explicit enough to give good guidance on exceptions to the law of occupation; for example, the Council recognized the United Kingdom and United States as occupying powers, but did not acknowledge or define the role of other coalition members such as Romania and Poland. The Council's unilateral declaration that the occupation of Iraq ended upon dissolution of the CPA on June 30, 2004 similarly flew in the face of black letter law, because under Article 43 of the Hague Convention a belligerent occupation continues as long as the occupying forces are in effective control of the occupied territory.[93]

There are limits on the Security Council's ability to supply general legal norms in the occupation and peacebuilding context. The Security Council is hampered by its selectivity with regard to the situations it engages in. Its activist involvement in Iraq need only be compared to its passive approach in Zimbabwe, Darfur, and Rwanda, to illustrate that intervention by the Security Council is a function of political calculations and consensus.[94] The Security

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89. S.C. Res. 1483, *supra* note 83, ¶ 20.

90. *See* DAVID M. MALONE, THE INTERNATIONAL STRUGGLE OVER IRAQ POLITICS IN THE UN SECURITY COUNCIL 1980-2005 (2006).

91. Andrew Mack, *Oil-for-Food Scandal: The Security Council is to Blame*, INT'L HERALD TRIB., May 12, 2004.

92. Orakhelashvili, *supra* note 88, at 312.

93. S.C. Res. 1546, ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004) ("*Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty") (emphasis in original). *Cf.* YORAM DINSTEIN, THE LAW OF BELLIGERENT OCCUPATION 35, 273 (2008).

94. *See also* Daniel Thurer, *Current Challenges to the Law of Occupation*, INTERNATIONAL COMMITTEE OF THE RED CROSS, Nov. 21, 2005, http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105. See *generally* Press Release, Security Council, Security Council Fails to Adopt Votes, U.N. Doc. SC/9396 (July 11, 2008); S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994).

Council makes law of exceptions, but it is unrealistic to expect it to consistently and impartially intervene where the interests of its permanent members are involved.[95] This structural drawback is compounded by the fact that Security Council resolutions are notoriously vague due to the process of negotiations and political compromise that ensues.[96] Moreover, the absence of neutral bodies to interpret Security Council resolutions leaves little room for outside clarification, and may ultimately give occupiers under Security Council regimes the upper hand.[97] Despite the Council's critical role in multilateral interventions therefore, its attempts to rewrite the law of occupation should not be viewed as a source of consistent or impartial norms applicable to the transition between war and peace.

VI. *JUS POST BELLUM* AS A FRAMEWORK FOR POST-CONFLICT RECONSTRUCTION

IHL, IHRL, and Security Council resolutions provide useful points of reference for a *jus post bellum.* These instruments illustrate the interwoven (although sometimes competing) threads of justice, peace, self determination, and democracy.[98] In addition, they add content to the transitional roles and obligations of the international community in light of the positive peace. Although there is some overlap between governance under the law of occupation *in bello*, and the exercise of public powers *post bellum*, a key difference between the *in bello* and *post bellum* regimes is that the latter abandons the conservationist principle. There is flexibility in IHL to accommodates changes to laws under Article 43 of the Hague Convention and Article 64 of Geneva IV, but it is generally agreed that they should not be distorted to promote

95. Marten Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, 86 INT'L REV. RED CROSS 745, 763-64 (2004).

96. Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 189 (2005).

97. *See* Zwanenburg, *supra* note 95, at 767-68 (because the extensive obligations placed on occupiers under Geneva IV are less than those contained in *ad hoc* Security Council resolutions).

98. *See* The Secretary-General, *Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616, 1 (Aug. 23, 2004) [hereinafter *The Rule of Law and Transnational Justice in Conflict and Post-Conflict Societies*].

transformations that undercut self-determination or change the fabric of society.[99]

A central challenge is to define the norms, obligations, and scope of a *jus post bellum*. *Jus post bellum* is potentially very broad if one includes all of the intermediate states between active conflict and durable peace.[100] Scholars have suggested that *jus post bellum* should incorporate various norms applicable to war-to-peace transitions, including the right to reparations, fairness and representation in peace settlements, refugee return, the establishment of the rule of law, and criminal justice mechanisms for establishing accountability after war.[101] In my view, however, a narrower frame is preferable. *Jus post bellum* should apply to the exercise of governmental and public powers by external entities such as IOs and foreign states. While this approach may exclude certain components of the general peacebuilding process, it will leave settled law in place on issues like the law of occupation, refugees, and international criminal law. A significant contribution of a *jus post bellum* would therefore be to fill existing gaps and establish a uniform legal regime to govern the exercise of public authority during transformative occupations and war-to-peace transitions. It would be broader than the traditional concept of belligerent occupation in a number of ways. First, it would apply to all actors exercising public authority, including IOs like the UN. Second, *jus post bellum* would go beyond the temporal scope of the law of occupation, by applying to transitions from war to peace beyond periods of effective control, so as to inform the many challenges that occur as peace is consolidated.[102] Third, it would

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99. DINSTEIN, *supra* note 93, paras. 252-270; Marco Sassoli, *Article 43 of the Hague Regulations and Peac Operations in the Twenty-First Century*, Int'l Humanitarian L. Res. Initiative 1, *available at* http://www.ihlresearch.org/ihl/pdfs/sassoli.pdf.

100. Brian Orend, *Jus Post Bellum: The Perspective of a Just-War Theorist*, 20 LEIDEN J. INT'L L. 571, 573-574 (2007).

101. *See* Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384, 390-91 (2004); Harris, *supra* note 25, at 2-3 (discussing elements of human rights, transparency, and shared authority); BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 232, 227-28 (2000) (focusing on war crimes trials); Robert E. Williams, Jr. & Dan Caldwell, *Jus Post Bellum: Just War Theory and the Principles of Just Peace*, 7 INT'L STUD. PERSP. 309, 309 (2006) (discussing the human rights dimensions of jus post bellum); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 98, at 5-6 (providing an operational perspective of the rule of law during peace from the UN).

102. *See* Stahn, *Jus Post Bellum*, *supra* note 53 at 344 (suggesting a case-by-case analysis, such as looking at the facts surrounding the end of hostilities or a Security Council resolution). On the difficult question of what an occupation begins and ends, see

provide parameters for the depth of intervention, in light of the right to self-determination.

While the scope and content of *jus post bellum* are developing, in my view there are four emerging norms. These are: (1) accountability; (2) good economic governance; (3) stewardship; and (4) proportionality in intervention, to safeguard self-determination. These principles constitute emerging norms of customary international law that are increasingly respected by, and consequently in the process of becoming binding on, states and IOs.[103]

A. Accountability

Transitional governments are by their very nature unelected and thus not subject to the typical constraints of a democratic system; still they must meet basic criteria of accountability in order to be perceived as legitimate.[104] Edmund Burke wrote that accountability is the "very essence of every trust,"[105] and this has borne true in the growing demands that specific institutional mechanisms must be created to hold power holders to account.[106] Accountability in governance is now the *sine qua non* of international administrations, even in transitional situations. Despite the difficult local conditions that obtain after conflict, authorities that do not respect basic principles of transparency and accountability have been widely criticized and forced to reform

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Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation*, Tel Aviv Univ. Law School Faculty Papers No. 93 (2008) (on file with author). For example, neither the Third nor Fourth Geneva Convention provide any legal basis for continuing the detention of prisoners post-transfer, as the conventions require that prisoners must either be released or charged with a crime and tried. *See* Geneva III, *supra* note 27, arts. 118-119; Geneva IV, *supra* note 5, art. 133.

103. *See* Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 856-59 (1989) (arguing that acts of international organizations, particularly the UN, contribute to and are reflected in the practice and *opinio juris* of states, both of which are central elements in the formulation of customary international law). The International Law Commission listed the following as classical forms of evidence of customary norms: treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors, and practice of international organizations. Int'l Law Comm'n, *Report of the International Law Commission to the General Assembly*, 368-372, U.N. Doc. A/1316/SER.A./1950 (July 1950).

104. *See id.* at 143, 153.

105. *See* WILDE, *supra* note 34, at 392.

106. Erica De Wet, *Holding International Institutions Accountable*, 9 GERMAN L.J. 1987, 1987 (2008).

their practices.[107] The outcry against the CPA in Iraq over its treatment of detainees in Abu Ghraib is an example of this phenomenon.[108] Likewise, in Kosovo and East Timor, the interim administrations were accused of various human rights violations such as arbitrary detentions. Because rights of judicial review were limited, ombudspersons were one of the mechanisms created to investigate the complaints in response.[109]

Although there are no legal conventions setting out the contents of international accountability,[110] accountability can be understood as requiring that decision making be based on reasoned account, and that duties are owed to individuals affected by the exercise of that power, not only to the entities that have delegated their power, such as member states of an international organization.[111] Under this model, accountability would be owed by the foreign presence to the accountees (the local population) by recognizing the right of accountees to demand the accountor render account for its performance, on the basis that the accountor has the authority to impose sanctions.[112] The transitional justice movement, in contrast, has sought to create accountability within populations, by making the population accountable to itself for past injustices. The draft articles on the Responsibility of International Organizations and certain national decisions limiting the scope of privileges and immunities of IOs involved in governance activities demonstrate the developing legal bases for holding power holders to account in transitional situations.[113] Such

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107. *See* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATIONS, AND STATE BUILDING 153 (2004) [hereinafter CHESTERMAN, YOU, THE PEOPLE].

108. Although Dinstein is right to note that occupation is based on coercion, and so "democracy is not of any functional relevance to the running of an occupied territory," DINSTEIN, *supra* note 93, para. 80, there are limits to the exercise of this power, as a matter of law and morality. *See* REED BRODY, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 1, 7, 17, 87 (2005), *available at* http://hrw.org/reports/2005/us0405.

109. CHESTERMAN, YOU, THE PEOPLE, *supra* note 107, at 147.

110. Gerhard Hafner, *Accountability of International Organizations*, 97 AM. SOC'Y INT'L L. PROC. 236, 236 (2003) (stating that "accountability" is neither an expression of the common law nor the civil law, and thus has no accepted legal meaning).

111. De Wet, *supra* note 106, at 1987-89.

112. Richard Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*, at 16 (2008) (draft on file with author).

113. *See, e.g.*, International Law Commission, *Draft Articles on the Responsibility of International Organizations*, *available at* http://untreaty.un.org/ilc/guide/9_11.htm (specifically the rules on attribution to international organizations). *See also*

principles could be put into practice by national courts, or by the Security Council itself, through the creation of expert review mechanisms, modeled on the World Bank's Inspection Panel.[114]

Accountability is to be distinguished from transparency in that the latter requires that affected constituents have access to information regarding the manner in which normative decisions are taken.[115] Transparency is not an accountability mechanism in and of itself because it does not possess the structural mutual obligations of an accountability model, and so is a necessary, but not a sufficient condition for accountability. Nonetheless, the provision of information through transparency mechanisms can promote the free flow of information, and strengthen responsiveness promoting practices, including competition, general political mechanisms, social practices and incentives.[116]

B. Good Economic Governance

Good economic governance is a second pillar of *jus post bellum*. Economic reconstruction is now a standard component of peacebuilding operations and occupations because poverty, mismanagement of natural resources, and food or currency crises can create conflict.[117] The connection between economic stability

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Constitutional Court of Bosnia and Herzegovina, Decision in Case U 9/00 (regarding the law on the State Border Service), Nov. 3, 2000.

114. Similar proposals have been forwarded with regards to Security Council black lists on terrorist financing. *See, e.g.*, Simon Chesterman, *The UN Security Council and the Rule of Law* (N.Y.U. Sch. of Law Pub. Law Research Paper No. 08-57, 2008) para. 47, *available at* http://ssrn.com/abstract=1279849.

115. De Wet, *supra* note 106, at 1991.

116. *See generally* Stewart, *supra* note 112..

117. *See, e.g.*, S.C. Res. 1037, ¶ 11(f), U.N. Doc. S/RES/1037 (Jan. 15, 1996) (Eastern Slavonia); S.C. Res. 1244, *supra* note 94, ¶¶ 11, 13, 17 (establishing the UN Mission in Kosovo (UNMIK), which required the international administration to "[support] the reconstruction of key infrastructure and other economic reconstruction"); S.C. Res. 1272, ¶ 2(f), U.N. Doc. S/RES/1272 (Oct. 25, 1999) (similarly requiring the UN Transitional Administration in East Timor (UNTAET) "[t]o assist in the establishment of conditions for sustainable development"); S.C. Res. 1419, ¶ 10, U.N. Doc. S/RES1419 (June 26, 2002) (Afghanistan); S.C. Res. 1770, ¶ 2(b)(iv), U.N. Doc. S/RES/1770 (Aug. 10, 2007). In the Congo, the Council called on member states to provide long-term assistance for social and economic reconstruction and rehabilitation, drawing on the assistance of international financial institutions. *See, e.g.*, S.C. Res. 1379, ¶ 8(e), U.N. Doc. S/RES/1379 (Nov. 20, 2001); S.C. Res. 1376, ¶ 12, U.N. Doc. S/RES/1376 (Nov. 9, 2001); S.C. Res. 1296, ¶ 16, U.N. Doc. S/RES/1296 (Apr. 19, 2000); S.C. Res. 1270, ¶¶ 3-4, 8b; 8c, 20, U.N. Doc. S/RES/1270 (Oct. 22, 1999); U.K. Dep't for Int'l Dev., *The Causes of Conflict in Sub-Saharan Africa*, Oct. 2001, at 11, *available at* http://www.dfid.gov.uk/pubs/files/conflictsubsaharanafrica.pdf; Slobodanka B. Teodosijević, *Armed Conflicts and Food*

and durable peace is well established.[118] The economic dimensions of conflict (including the causes of war, the effects of spoilers like warlords and militias, and economic measures to combat corruption) are becoming central to contemporary concepts of collective security.[119]

While the history of international regulation of natural resources is not unblemished (colonial powers often pursued the exploitation of raw materials), management of natural resources is now a shared objective of the IFIs and the Security Council in pursuit of minimizing threats to peace and security in the international economic system.[120] A specific example of economic regulation is the management of natural resources, given their potential to directly fuel the underlying conflict.[121] The Security Council has thus urged the lawful and transparent exploitation of natural resources, encouraged "certificate of origin" schemes such as the Kimberly Process for diamond certification, and now includes substantive economic objectives in its peacekeeping mandates.[122] In the peacebuilding context, the Security Council has underscored the importance of economic rehabilitation and good

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Security 6 (Agric. & Dev. Econ. Div., Working Paper No. 03-11, 2003), *available at* ftp://ftp.fao.org/docrep/fao/007/ae044e/ae044e00.pdf.

118. *See* Paul Collier, Post-Conflict Economic Recovery (Apr. 2006) (unpublished paper, *available at* http://users.ox.ac.uk/~econpco/research/pdfs/IPA-PostConflict EconomicRecovery.pdf) (noting that typically there is a 39 percent risk that peace will collapse within the first five years, and a 32 percent risk that it will collapse in the next five years); Paul Collier, *Policy for Post-Conflict Societies: Reducing the Risks of Renewed Conflict* 3-4 (World Bank, Working Paper No. 28135, 2000) (stating that the three highest risks for post-conflict societies are a high dependency on natural resource rents, a downturn in economic opportunities and ethnic dominance).

119. *See generally* Boon, *Open for Business*, *supra* note 19. *See also* Laurence Boisson De Chazournes, *Collective Security and Economic Interventionism of the UN—The Need for a Coherent and Integrated Approach*, 10 J. INT'L ECON. L. 51, 52 (2007) (discussing emerging practice of integrating economic elements into collective security arrangements); Augustine Ikelegbe, *The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria*, 14(2) NORDIC J. AFR. STUD. 208, 210, 212 (2005).

120. Wilde, *supra* note 34, at 334 (colonial legacies). *See generally* Boon, *Coining a New Jurisdiction*, *supra* note 45.

121. *See* Rex J. Zedalis, Iraqi Oil and Revenues from Its Sale: A Review of How Existing Security Council Resolutions Affected the Past and May Shape the Future, 18 EUR. J. INT'L L. 499, 513 (2007).

122. *See* S.C. Res. 1698, ¶¶ 6, 10, 11, U.N. Doc. S/RES/1698 (July 31, 2006); Ian Smillie, *What Lessons from the Kimberly Process Certification Scheme?*, *in* PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR 47, 47 (Kimberly Ballentine & Heiko Nitzschke eds., 2005); Boon, *Open for Business*, *supra* note 19, at 566.

economic governance in many regions, including Eastern Slavonia, Kosovo, East Timor, the Congo, Liberia, Afghanistan, and Iraq.[123]

C. Stewardship

A third principle is stewardship. The concept of stewardship derives from the mandate system of the League of Nations, and the special obligations of occupiers to the occupied recognized in the Hague Regulations and the Geneva Conventions.[124] Whereas trusteeship was meant to humanize earlier forms of state colonialism and rein in the impulses of occupiers to transform the occupied state in their own image, the concept of stewardship does not have these historical connotations.[125] Nonetheless, Ralph Wilde notes a commonality between occupations, colonial trusteeships, Mandate and Trusteeship arrangements, and UN territorial administrations, in that the administrative control by international actors—whether states or IOs—is over a territorial unit whose identity is understood as something "other" than that of the administering actors.[126]

In the context of occupation, stewardship require that administrators respect the rights and safeguard the interests of inhabitants under their purview.[127] This obligation entails acting in the best interests of the populations concerned, because local populations are vulnerable to the risk of misconduct.[128] While there have been vociferous objections to the colonial overtones of the trusteeship model, and great criticism of the fanciful nature of this obligation in the occupation context,[129] the occupation of Iraq shows the continuing relevance of stewardship duties to *jus post bellum*. In Iraq, the Security Council and the CPA deliberately, recognized the dependence of the people of Iraq on the international community. The Security Council, for example,

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123. See discussion in Boon, *Coining a New Jurisdiction*, *supra* note 45, at 1032-33.

124. Fox, *The Occupation of Iraq*, *supra* note 83, at 29-43 (discussing the evolution of the mandate system, and the shift from governing for outside interests to governing for the best interests of the population itself).

125. *See* WILDE, *supra* note 34, at 318.

126. WILDE, *supra* note 34, at 356.

127. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 668, 668-69 (7th ed. 1996); Fox, *The Occupation of Iraq*, *supra* note 83, at 319.

128. *See* RICHARD CAPLAN, A NEW TRUSTEESHIP? THE INTERNATIONAL ADMINISTRATION OF WARTORN TERRITORIES 13-29 (2002).

129. DINSTEIN, *supra* note 93, para. 81 (noting that in practice, trusteeship has not worked).

required the Authority to "promote the welfare of the Iraqi people through the effective administration of the territory . . . ." [130] CPA Order No. 2 stated that all assets of the Iraqi Ba'ath Party that had been transferred or acquired were subject to seizure by the CPA "on behalf and for the benefit of the Iraqi people." [131] As such, international protection of certain rights and goods, including the right to sovereignty over natural resources in the period preceding self-determination, continues to have purchase in *post bellum* interventions by states and IOs. Nonetheless, the scope of stewardship is limited; it must be of finite duration, be carefully delineated, and there must be opportunities to hold the power holder to account, through private rights of action or accountability mechanisms as defined above.

D. Proportionality

A final principle of *jus post bellum* is proportionality. The scope of reforms taken in pursuit of establishment of a durable peace must be proportionate to the legal end goals of the occupations or peacebuilding missions in question. Moreover, *jus post bellum* must not infringe on the right to self-determination. Proportionality is a concept central to domestic and international legal systems. [132] It is also relevant to the *post bellum* assessment because it derives from the "just war" doctrine, whereby the recourse of the resort to force is assessed against the wrongs committed, and the measures deployed as countermeasures must be proportionate in turn. [133] Factors that weigh in favor of deeper intervention include the collapse of central institutions, the absence of a functioning legal system, and laws that are contrary to major international human rights treaties. Elements that auger in favor of a "lighter footprint" by foreign states or entities will include a modern legal system, a functioning civil society, a history of a democratic, elected governance, and respect for human rights and universal norms.

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130. S.C. Res. 1483, *supra* note 83, ¶ 4.

131. Coalition Provisional Authority, *Dissolution of Entities with Annex A*, Order 2, § 2 (Aug. 23, 2003), *available at* http://www.cpa-iraq.org/regulations/index.html# Regulations.

132. Boon, *Legislative Reform*, *supra* note 12, at 324. For the role of proportionality generally in international law, see Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008).

133. Franck, *supra* note 132, at 719.

VII. CONCLUSION

A primary goal of *jus post bellum* is durable peace. Conflict prevention, peacekeeping, peacebuilding, and post-conflict reconstruction have this central goal in common. Identifying the content of a new *jus post bellum* thus involves finding a workable set of principles and emerging customs that provide standards to address the myriad of challenges arising in war-to-peace transitions. To be sure, a case-by-case approach will be required in every situation, and each intervention will present its own circumstances. Nonetheless, the identification of core norms applicable to the exercise of public powers in transitional situations between war and peace will greatly reduce gaps in law and legitimacy.

The emergence of a *jus post bellum* has wide-reaching implications for international law: it shows the evolution of the concept of collective security and peace, and the relevance of non-state actors (including IOs, non-governmental organizations, and private corporations) to peacebuilding.[134] Moreover, at a time when IOs are promulgating the rule of law externally, it is no surprise that they are being called to act upon the rule of law internally. In an immediate sense, post-conflict reconstruction has exposed weaknesses in the internal legal structures of IOs, and in the constitutional theories applicable to the interpretation of their Charters, given the malleability of doctrines such as implied powers and amendment by practice. In the longer term, *jus post bellum* is likely to reveal that IOs must confront profound questions about their relevance and the scope of their mandates in the twenty-first century as economic globalization and multilateral approaches to peacebuilding deepen.

Although there is little present momentum for codifying new instruments in this field, three developments indicate the consensus that *jus post bellum* is an important area of activity and is representative of emerging norms.[135] First, the report on the

134. *Compare* INIS L. CLAUDE JR., SWORDS INTO PLOWSHARES 224 (1964) (collective security is "the proposition that aggressive and unlawful use of force by any nation against any nation will be met by the combined force of all other nations"), *with* Boon, *Coining a New Jurisdiction*, *supra* note 45, at 1017 (discussing the aspects of collective security that do not involve the threat or use of force, such as economic threats to the peace).

135. To the extent that interest exists in codifying new norms, it lies in the area of detention, and has arisen due to criticisms of the standards of treatment of detainees in

"Responsibility to Protect," written by the International Commission on Intervention and State Sovereignty, emphasizes that modern interventions cannot end after military conflict and should instead contain a "responsibility to rebuild."[136] This obligation includes the responsibility to implement sustainable reconstruction and rehabilitation and to prevent the conditions which led to the conflict from repeating themselves.[137] A second development of note is the creation of the Peacebuilding Commission in 2005.[138] This UN organ has a mandate to integrate peacebuilding strategies from the outset of UN interventions and is emerging as a coordinating power dedicated to peacebuilding strategies that have a more representative basis than traditional UN activities.[139] Finally, concerted efforts are underway to explore the limits of the Security Council's Article 39 jurisdiction and to define the crime of aggression. Given the interrelated concepts of war and peace, clarification of the crime of aggression and the content of international security will add substance to the obligations of building a durable peace.[140]

Iraq, and the norms governing transitions from an occupation to a Security Council mandated force.

136. *See* Int'l Comm'n on Interverntion and State Sovereignty, *Report: The Responsibility to* Protect, XI (Dec. 2001), *available at* http://www.iciss.ca/pdf/Commission-Report.pdf. *See also* Stahn, *Rethinking the Conception of the Law of Armed Forces*, *supra* note 3, at 931.

137. INT'L DEV. RESEARCH CTR., THE RESPONSIBILITY TO PROTECT 40-46 (2001), *available at* http://www.idrc.ca/en/ev-28741-201-1-DO_TOPIC.html; The Secretary-General, *Report of the Secretary-General on Implementing the Responsibility to Protect*, UN Doc. A/63/677 (Jan. 12, 2009). There is less support for the application of the R2P doctrine in the context of natural disasters. *See, e.g.*, Gareth Evans, *Facing up to Our Responsibilities*, THE GUARDIAN, May 12, 2008, http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsbilities (discussing the situation in Burma in 2008).

138. Peacebuilding Comm'n, Working Group on Lessons Learned, *Meeting on Peacebuilding Strategic Frameworks, Indicators, and Monitoring Mechanisms*, http://www.un.org/peace/peacebuilding/pbc-lessons.shtml (follow hyperlink "Summary Notes of the Chair" corresponding to date 19.09.2007) (Sept. 19, 2007).

139. *See, e.g.*, *id.*

140. *See, e.g.*, COAL. FOR THE INT'L CRIMINAL COURT, THE ICC AND THE CRIME OF AGGRESSION FACTSHEET, *available at* http://www.iccnow.org/documents/CICCFS_Crime_of_Aggression_Factsheet_eng_ASP_6_Jan08.pdf (last visited Apr. 17, 2009).