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Peace settlements and international law: from *lex pacificatoria* to *jus post bellum*

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Abstract

This paper will examine the ways in which peace settlements are producing a *lex pacificatoria*, a new 'law of the peacemakers', in a range of different areas relating to international conflict and security law. The essay illustrates how the practice of fashioning and implementing peace settlements is forcing a revision of relevant international law, as the traditional assumptions and boundaries of the relevant bodies of law do not fit within post-settlement political landscapes, are inadequate for enabling and regulating peace settlement implementation and do not contain guidance for the dilemmas faced post-settlement. The paper describes the ways in which a lack of fit between peace settlement dilemmas and international legal doctrines have generated new practices and new articulations of how international legal regimes regulate settlement implementation. Building on earlier arguments, I argue that these revisions constitute a new *lex pacificatoria*, or 'law of the peacemakers', in the form of a normativized practice of conflict resolution. The extent to which these new practices constitute 'law' at all is critically evaluated throughout the chapter. In conclusion, I consider whether it is possible, useful and desirable to frame and develop the 'new law' as a new *jus post bellum* drawing across existing regimes, to supplement the *jus ad bellum* and *jus in bello*.

Keywords

Peace settlement; *lex pacificatoria*; international conflict; security law; international law; *jus ad bellum*; *jus in bello*.

14. Peace settlements and international law: from *lex pacificatoria* to *jus post bellum*

Christine Bell*

1 Introduction

This chapter will examine the ways in which peace settlements are producing a *lex pacificatoria*, a new ‘law of the peacemakers’, in a range of different areas relating to international conflict and security law.¹ The essay illustrates how the practice of fashioning and implementing peace settlements is forcing a revision of relevant international law, as the traditional assumptions and boundaries of the relevant bodies of law do not fit within post-settlement political landscapes, are inadequate for enabling and regulating peace settlement implementation and do not contain guidance for the dilemmas faced post-settlement.

The chapter sets out the relationship between peace agreements and international law, describing the ways in which a lack of fit between peace settlement dilemmas and international legal doctrines have generated new practices and new articulations of how international legal regimes regulate settlement implementation. Building on earlier arguments, I argue that these revisions constitute a new *lex pacificatoria*, or ‘law of the peacemakers’, in the form of a normativized practice of conflict resolution. The extent to which these new practices constitute ‘law’ at all is critically evaluated throughout the chapter. In conclusion, I consider whether it is possible, useful and desirable to frame and develop the ‘new law’ as a new *jus post bellum* drawing across existing regimes, to supplement the *jus ad bellum* and *jus in bello*.

2 Peace settlements and international law

The contemporary peace settlement is a post-Cold War phenomenon. International law historically divided conflict into ‘international’ conflict, to which international law applied, and ‘internal’ conflict, to which it largely did not. This classification, never entirely satisfactory, faced a particular challenge post-Cold War where it appeared to reflect neither

* I would like to thank Kasey L. McCall-Smith for research assistance.

¹ This piece builds and develops arguments set out in C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, (Oxford: Oxford University Press, 2008) and C. Bell, ‘Post-conflict Accountability and the Reshaping of Human Rights and Humanitarian Law’, in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law*, (Oxford: Oxford University Press, 2011).

the factual situation of war, which itself appeared ever more fused in its international and internal dimensions, nor to delimit appropriate boundaries governing the engagement of international law and international organizations.

As the Cold War ended, an apparent post-Cold War rise in intrastate conflict appeared to constitute the main threat to international peace and so drew both the attention and involvement of international actors acting within a framework of international law. Intrastate conflict, originating mainly within state borders, involving state forces and non-state armed opposition groups, for example, in Bosnia, Sri Lanka, Sierra Leone and Liberia, increasingly had interstate repercussions. It spilled across borders, drew in regional actors as conflict-underwriters or mediators, and attracted the attention and intervention of international organizations, in particular the United Nations (UN), and relevant regional organizations.² In addition, new practices of terminating intrastate conflict through negotiated settlement came to constitute a key international response to conflict. The new post-Cold War conflicts prompted the use of negotiation in an attempt to contain and divert conflict. Long-standing conflicts appeared to hold real possibilities for conflict resolution and to present needs and opportunities for international intervention – itself now free from Cold War strictures and able to experiment. From 1990 onwards, peace processes appeared to break out all over in contexts as diverse as South Africa, the Middle East, Central America, and Eastern, and even Western, Europe. Even in the most domestic of conflicts, international actors – states, coalitions of states and international organizations – became involved in conflict resolution efforts. Moreover, conflict resolution within state boundaries was also curiously generated by interstate conflict. Post-Cold War, ‘international’ armed conflict began to see international military intervention justified partly in terms of post-conflict outcomes for the state against which force was deployed. International conflict in Bosnia, Kosovo, Afghanistan, Iraq (2003) and Libya were all articulated wholly, or in part, in terms of ambitions to change the government and constitutional order of the states in question.³ These international interventions contemplated some type of post-conflict political and legal reconstruction, often to involve the accommodation of those sub-state groups involved in an internal conflict operating in parallel to the international conflict.

² D. Wippman (ed), *International Law and Ethnic Conflict*, (Ithaca: Cornell University Press, 1998).

³ There have also been some ‘pure’ interstate conflicts involving two states and often revolving around border disputes, for example: Chad/Libya, Ethiopia/Eritrea, China/India, India/Pakistan, and Ecuador/Peru. However, even many of these conflicts also had closely related intrastate dimensions. The first war with Iraq of 1991 forms a clearer exception as an interstate conflict with little (initial) relationship to events within the state.

It is difficult to overestimate the scale of this landscape on conflicts from 1990 onwards. In the period between 1990 and 2010, over 600 peace agreements were signed in around 90 jurisdictions.⁴ The types of conflict in which negotiated settlements were attempted were varied in terms of their scale, nature, geographical location, the degree of internationalization of conflict containment and conflict resolution efforts, and the constellation of international actors involved. However, settlement terms indicated a common approach to conflict resolution, namely an attempt to negotiate a permanent ceasefire coupled with political and legal reforms, aimed at restructuring the state to accommodate the state's dissenters in a revised state formation. Peace settlements also almost invariably contemplated some type of international involvement to secure implementation – from full-on international administration, such as in Bosnia or Kosovo, to *ad hoc* involvement of 'international figures' for one-off implementation tasks, such as the involvement of individuals in decommissioning in Northern Ireland.

3 International conflict and security law

This conflict and peace settlement landscape had an impact on international law even as international law attempted to regulate it. The assumptions of relevant international legal regimes – human rights law, humanitarian law, refugee law, and even UN Charter law on the use of force – were often inapposite to peace process needs and dilemmas. The post-settlement environment defied distinctions between international/domestic spheres of action, between war and peace, and indeed between public (state) and private (non-state) actors, on which the boundaries of these legal regimes depended.

(i) *'International-domestic' hybridity* Ending conflict required an internal political settlement that was inclusive of military opponents within the state and the external enforcement of that settlement.⁵ The internal and external dimensions were linked: internal settlement and compromise on the nature of the state was necessary to stopping the fighting, while external actors were needed to reassure the state's opponents that the state would be held to its side of the bargain in a domestic political and legal order that was now every bit as 'anarchic' as the international legal system itself. Thus, the typical post-conflict political and legal landscape was therefore characterized by 'international-domestic' hybridity with post-

⁴ See Bell, *On the Law of Peace*, *supra* n.1, appendix.

⁵ *Ibid.*, Chapters 5 and 10.

settlement implementation tasks undertaken by international and domestic actors together. Post-conflict, states became entities that were both a national jurisdiction, with technical continuity of statehood, and at the same time a space of transnational administration permeated by international actors and characterized by ‘post-sovereign’ elements, such as bi-nationalism and international administration. This international-domestic hybridity created difficulties for traditional understandings of sovereignty and accountability, as assuming an ability to categorize the connection between the governors and the population they govern.

(ii) *War-peace hybridity* Post-conflict seldom is *post*-conflict – even when a conflict has been terminated through a formally agreed ceasefire. War-peace hybridity can be seen in the ‘no-war-no-peace’ situation that tends to prevail post-settlement. The move from war to not-war is seldom linear and forms of violence often mutate in complex ways, rather than being eliminated. In practice, the signing of a peace agreement was seldom the end of the matter. Parties to settlements often reneged on their commitments and, covertly or overtly, returned to violence. Parties outside the negotiations post-settlement acted as ‘spoilers’ and attempted to destabilize fragile accords through high profile dramatic acts, such as the assassination of Rabin post-Oslo accords in the Middle East (now clearly not ‘post-conflict’), the Omagh Bomb by the ‘real IRA’ immediately after the Belfast Agreement in Northern Ireland, the post-Arusha Accord genocide in Rwanda, and on-going violence in Iraq and Afghanistan. On-going conflict violence typically continued and, in some situations, even increased. Or the conflict ostensibly ended to be replaced by the new, more amorphous violence of dissenters, ‘organized criminals’, or increased inter-personal violence; for example, the ‘new’ racist violence of South Africa, the ‘new’ organized criminality of erstwhile paramilitaries in Colombia, or domestic violence. These ‘new’ forms of violence were at once different and yet linked to the past conflict in ways that were difficult to document and articulate, let alone legally categorize, again with implications as to the governing body of law

In short, post-settlement environments were characterized by a complex mix of war-acts, human rights violations, and ‘ordinary’ criminal law violations, perpetrated by a range of domestic and international, state and non-state actors. Clear categorization of either the type of violence or the status of the perpetrator became impossible. Traditional regime boundaries, determining which legal regime applied, to whom and when, simply did not seem to fit the facts. Similarly, shifting in and out of different legal regimes, as violence waxed and waned, did not service the need for a coherent peace settlement implementation capable of being

sustained, even in the face of violent attempts to destabilize it. Rather, what implementation required of law was the steady guidance and regulation of a set of complex implementation tasks to be undertaken in a fluid and complex security situation.

(iii) *State and non-state actors* Finally, post-conflict environments contained a complex mix of state and non-state actors, both of whom could be alleged to be acting in private interest whilst laying legitimate claim to be public actors. Indeed, the very distinction between public and private, state and non-state actors is complicated by the fact of political transition. Both state and non-state actors face charges from each other that they do not represent 'the public' whilst claiming such representation for themselves. During transition from conflict to peace, the nature of the state itself is in transition from an authoritarian, illegitimate, violent or exclusionary regime, not acting in the traditional 'public' role of the state, towards a less authoritarian, more legitimate, less violent and exclusionary future, where public actors are restrained by public law.⁶ Non-state actors may also be transiting from 'private' actors and claiming a representative legitimacy, as politicians or army chiefs, for example. The post-conflict period is one of attempted transition to a new political and even constitutional framework aimed at creating a new 'public' in which both the 'old' state and the new non-state actors will participate, eventually under the legitimacy of a revised form of election. However, the period of transition is one in which the legitimacy of both state and non-state actors is constantly under question and where civil society actors and international actors (also operating without electoral mandates) are often given a role to supplement and supervise the role of state and non-state actors as authors and implementers of any new order. In legal terms, this set of transitional political realities creates difficulties for deciding who constitutes 'the state' in the event that the new transitional arrangements for holding power start to fall apart. Given that international law distinguishes between public and private actors and draws its use of force boundaries, with specific reference to concepts such as 'state consent', again a set of 'fit' dilemmas arises: if peacekeepers need to move from peaceful settlement of disputes to enforcement – whose consent is necessary? What do the traditional concepts of neutrality and impartiality between conflict parties mean in a context in which the fabric and legitimacy of the state is being re-constituted to include both former state officials and anti-state combatants as part of the new constitutional order? If part of the post-conflict business is accountability for past human rights abuses and violations, but

⁶ See generally, C. Bell, 'Peace Agreements: Their Nature and Legal Status', (2006) 100 *AJIL* 373.

any attempt to move from these patterns of abuses and violations depends on the on-going consent of both state and non-state actors to a new set of political and legal institutions, then who should hold who accountable for what and under what legal regime?

4 A new *lex pacificatoria*

Over the last twenty years of peace settlement practice, the needs and dilemmas of that practice began to force an interpretive revision of international law. Elsewhere I have argued that these developments can best be understood as a new '*lex pacificatoria*' or 'law of the peacemakers'. This *lex* bears similarity to the concept of *lex mercatoria* in that it stands less as a fully-fledged new legal regime and more as a set of practices moving in a normativized direction, that is: they are increasingly codified by soft law standards (as the 'industry standards' of peacemakers rather than merchants); shape, and are incorporated in, interpretations of binding legal instruments; on occasion influence, or are determinative of, court judgments. However, it is suggested that the normative impact of the new *lex* lies less in these normative impacts and more in the ways in which the practices are articulated to be compliant with, and even creative extensions of, traditional legal doctrines. The *lex* creates an on-going normative expectation as to how the political and moral conundrums of post-conflict reconstruction should be handled, thus giving it a jurisgenerative quality. A full account of these dynamics is beyond the scope of this chapter, however, the broad rubric and dynamic of the emergent 'new *lex*' can be sketched in outline.

5 A new law of hybrid self-determination

A Traditional understandings

Self-determination law provides that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'⁷ A range of legal declarations (and indeed the UN Charter) make clear that states retain a right to territorial integrity.⁸ Prior to 1990 it was a truism to state that the law on self-determination was unclear. Emerging in the de-colonization period as a legal norm, whether and how the norm applies post-decolonization

⁷ Article 1, International Covenant on Civil and Political Rights (1966).

⁸ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970), GA Res. 2625(XXV) (1970); Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), GA Res. 1514(XV) (1960); Article 2(4), Charter of the United Nations (1945).

has been much debated. Outside the de-colonization context the norm's two pillars, respect for territorial integrity and a commitment to representative government for peoples, appear to clash. Rather than resolving self-determination disputes, the norm stood accused of fuelling them by telling states and their secessionist opponents that they both had a right to the quite different territorial and political states they aspire to.⁹

B The lex pacificatoria

This relationship between peace processes, peace settlements and self-determination law produced a new concept of 'hybrid self-determination', which operated to transcend the apparent tension of the dual commitment to territorial integrity and representative government by incorporating dimensions of both external and internal self-determination into the framework for resolving conflict. Conflict resolution practices centred on negotiations that included state and non-state actors on an equal basis and brokered compromise agreements that split power through a range of innovative power-sharing mechanisms, but also split sovereignty – not territorially, but by internationalizing the new constitutional arrangements in innovative ways. Even the commitment to elections – a legal requirement under international human rights law – is, at the same time, a practical political necessity for auto-implementation of the new order.

The hybrid self-determination solutions of peace settlement, in general terms, therefore had some, or all, of the following elements:

- a procedural right for peoples to be heard, as implemented through negotiations between the state and groups who can credibly claim to be excluded from the state's social contract
- a substantive right to elections, to an individual rights framework and to additional constitutional arrangements aimed at *effective* participation of groups in public decision-making, through mechanisms such as power-sharing and/or territorial autonomy

⁹ See discussion in M. Weller, 'Settling Self-determination Conflicts: Recent Developments', (2009) 20 *EJIL* 111, initial pages dealing with three instances where the law was unclear; see generally, J. Crawford, *The Creation of States in International Law*, (Cambridge: Cambridge University Press, 2006).

- a right to dislocated statehood, or ‘fuzzy sovereignty’, which dislocates the state’s power from a territorially defined ‘demos’, through forms of bi-nationalism, the language of external self-determination and/or international supervision

From one point of view, these elements are produced as a logical consequence of the commitment to negotiated solutions to conflict. The logical response to negotiating disputes over access to the symbolism, power and resources of the state is to find ways to ‘split’ them and give all contenders access. The attempt to ‘dislocate’ power, from a territorially defined ‘demos’ to a more fluid ‘beyond-the-state’ set of institutions and actors, further splits power.

However, this new ‘hybrid self-determination’ did not present itself as a crude compromise, but also as a reconciliation of the conflicting legal claims that the parties had made as to the application of self-determination law. By incorporating elements of internal self-determination through changes in the nature of the state, to make it more representative of all its peoples, and also of external self-determination through a more fluid notion of the external territoriality of the state, hybrid self-determination could claim to be an innovative fulfilment of self-determination law, capable of transcending, and thereby reconciling, not just competing self-determination claims.

In addition to this claim to normativity rather than mere conflict resolution technique, a range of soft law standards and court decisions began to both reflect and underwrite the development of the practice, adding to the norm’s normative dimensions. These standards underwrite not just a ‘right to be heard’ but the second element of hybrid self-determination, namely, a right to some substantive revision of state political and legal institutions to ensure an on-going ‘right to be heard’ that goes beyond a right to elections (legally guaranteed in human rights law), to ensure not just participation as representation but ‘*effective participation*’. The UN Declaration on the Rights of National Minorities, the UN Declaration on the Rights of Indigenous Peoples, and the Council of Europe Framework Convention on Minority Rights developed the idea of ‘effective participation’ as a substantive legal requirement of domestic constitutional and legal processes.¹⁰ In addition to these minority

¹⁰ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992), GA Res 47/135, annex, UN Doc. A/47/49 (1993) (hereinafter referred to as UN Declaration on Minorities), Articles 2(3) and 5 (effective participation); Declaration on Rights of Indigenous Peoples (2007), GA Res. 61/295, UN Doc. A/RES/61/295 (2007) (hereinafter referred to as UN Declaration on Indigenous Peoples), Articles 18-20 (effective participation) and 38 (consultation with indigenous peoples to achieve goals

and indigenous peoples' standards, a number of legal standards and international guidelines now also address the need for inclusion of other groups: participation of women (addressed further in 3 below), children, and even groups, such as 'victims' or 'displaced persons', in political negotiations and legal processes that will affect them.¹¹ The endorsement of a 'right to be heard' can also be seen in decisions of international organizations and international courts and tribunals, which have emphasised a right to processes of resolution in self-determination cases, rather than deciding in favour of the status quo of the existing state, or secession in cases involving self-determination claims.¹²

of declaration); Council of Europe, Framework Convention on the Protection of National Minorities (1994) (hereinafter referred to as Framework Convention), that draws on the Conference on Security and Cooperation in European (later OSCE) documents that preceded it; see for example, Report of the CSCE Committee of Experts on National Minorities (19 July 1991), (1991) 30 *ILM* 1692. The Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) (1989), adopted on 27 June 1989 by the General Conference of the International Labour Organization, similarly emphasises recognition and the need to move beyond representative democracy to ensure participation: article 2(1) provides that: 'Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.'

Article 6(1)(b) provides that Governments are to: 'Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.'

¹¹ Report of the Fourth World Conference on Women, Annex II, Beijing Platform for Action (1995), UN Doc. A/CONF.177/20 (1995) (hereinafter referred to as Beijing Platform for Action), at paras 181-195 (Women in power and decision-making); Article 68 (participation of victims), Rome Statute of the International Criminal Court (1998) (hereinafter referred to as Rome Statute). New standards on impunity also provide for the participation of women, minorities, and victims in the design of transitional justice mechanisms, and associated rule of law reform, see D. Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Commission on Human Rights, UN Doc. E/CN.4/2005/102/Add.1 (2005) (hereinafter referred to as Updated Set of Principles), at paras 7(c) and 35. See also UN Secretary-General, Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004), UN Doc. S/2004/616 (2004), at para. 64(f), providing that participation of 'groups most affected by conflict and a breakdown of the rule of law, among them children, women, minorities, prisoners and displaced persons'. New standards on a right to return of refugees and displaced persons similarly note their right to 'participate in the return and restitution process and in the development of the procedures and mechanisms put in place to protect these rights'; see for example, Sub-Commission on the Promotion and Protection of Human Rights, The Right to Return of Refugees and Internally Displaced Persons (2002), UN Doc. E/CN.4/SUB.2/RES/2002/30 (2002), at para. 6.

¹² See, ICJ decisions cited in J. Klabbers, 'The Right to be Taken Seriously: Self-determination in International Law', (2006) 28 *HRQ* 286; see also, Opinions Nos. 1-10 of the Arbitration Commission of the Peace Conference on Yugoslavia, published in (1992) 31 *ILM* 1494 (No. 1), 1497 (No. 2), 1499 (No. 3), 1501 (No. 4), 1503 (No. 5), 1507 (No. 6), 1512 (No. 7), 1521 (No. 8), 1523 (No. 9), 1525 (No. 10); Opinions 11-15 published in (1993) 32 *ILM* 1586 (No. 11), 1589 (No. 12), 1591 (No. 13), 1593 (No. 14), 1595 (No. 15) (collectively referred to as the Badinter Opinions); European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States (16 December 1991), (1992) 31 *ILM* 1485. See, R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', (1993) 4 *EJIL* 36; M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', (1992) 86 *AJIL* 569, for discussion of the complex relationship between the Yugoslav Guidelines, the conflict in Yugoslavia and the Badinter Opinions issued with respect to it.

As regards the second innovative dimension of hybrid self-determination, ‘fuzzy sovereignty’, again this concept is promoted by international legal standards that contemplate that self-government can go ‘beyond-the-state’.¹³ As regards bi-nationalism, and group contacts and governance that goes beyond the state’s territory, the Council of Europe Framework Convention on National Minorities and the UN Declaration on National Minorities refer to the right of ethnic groups to maintain cross-border contacts with ethnic counterparts in other jurisdictions and for states even to sign bilateral agreements to this effect.¹⁴ The Declaration on the Rights of Indigenous Peoples expressly provides that indigenous peoples divided by international borders ‘have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders’ and that states should take effective measures to ‘facilitate the exercise and ensure the implementation of this right’.¹⁵ These provisions parallel and underwrite self-determination settlement attempts to sever notions of ‘nationhood’ from territorially-based notions of ‘statehood’.

The second mechanism for dislocating power – international supervision – also has a tenuous legal basis. First and foremost, international administration and supervision can be authorized by the UN Security Council (UNSC) in particular conflicts. More recently, however, there have been attempts to found a more general legal articulation of ‘fuzzy’ or ‘contingent’ sovereignty through the ‘responsibility to protect’ doctrine.¹⁶ Attempts to rationalize and bound ‘humanitarian interventions’, (that is military intervention justified as a response to violations of humanitarian law), have attempted a fundamental revision of state sovereignty at the international constitutional level by developing a concept of ‘responsibility to protect’. The ‘responsibility to protect’ doctrine works by attempting to reframe military intervention away from a ‘humanitarian’ exception to state sovereignty and towards a new conceptualization of sovereignty that views sovereignty as contingent on the state’s

¹³ See generally, W. Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, (Oxford: Oxford University Press, 2007), at 3-55, *passim*, (arguing that these are a key part of the ‘re-internationalization’ of state-minority relations).

¹⁴ UN Declaration on Minorities, *supra* n.10, Articles 2(5), 5(2) and 6; Framework Convention, *supra* n.10, Articles 17 and 18.

¹⁵ UN Declaration on Indigenous Peoples, *supra* n.10, Article 36.

¹⁶ See, 2005 World Summit Outcome Document, UN Doc. A/60/L.1 (2005), at paras 138-139; International Coalition for the Responsibility to Protect, available at www.responsibilitytoprotect.org; Global Centre for the Responsibility to Protect, available at globalr2p.org.

willingness and ability to protect its own citizens.¹⁷ Of course, the attempt to formulate sovereignty as conditioned on ‘the responsibility to protect’ can be seen as not very bounded and merely a rhetorical flourish that mitigates and justifies foreign intervention almost at will. Nonetheless, cynical or not, the concept of ‘responsibility to protect’ illustrates an attempt to underwrite international intervention by revising the concept of sovereignty, rather than articulating intervention as an exception to it: sovereignty must be envisaged as justified by states in terms of the prior normative authority of ‘the people’, rather than claimed as a static attribute of states as black boxes and therefore confers obligations as well as rights. Once sovereignty is reconceived as a ‘relational’, rather than an absolute, concept it becomes more ‘fuzzy’ – degrees of sovereignty, shared sovereignty and ‘earned’ sovereignty all become possible and international organizations are legitimized as supervisors and enablers of sovereignty, rather than entities that transgress the legitimate sphere of states.

C Normative (in)stability

Despite the emergence of a normativized practice of ‘hybrid self-determination’, its normative basis is unstable with regard to its two main innovations. Soft law standards, the practices of international organizations, and even international courts and tribunals, have all appeared to endorse the concept; however, as Kymlicka has pointed out, these normative developments remain *ad hoc*, unstable, patchy and difficult to roll out beyond a European context.¹⁸ However, courts have sent out mixed messages as regards what provision for the ‘effective participation’ of groups is required or permitted concomitant with international human rights standards focused on the equality of individuals. Kymlicka argues that there is a tension between an approach of general anti-discrimination norms and targeted norms that go beyond anti-discrimination to suggest substantive measures aimed at including particular kinds of minorities, such as national minorities or indigenous peoples. As Iorns Magallanes argues, this tension can also be viewed as a tension between ‘democratization’ standards, and ‘indigenous peoples’ standards, which in practice comes down to a different stance on groups rights, and in particular the need to have measures that ensure the effective participation of groups in the political process.¹⁹ In short, while indigenous peoples’ standards and decisions involving such group dimensions appear to have moved towards requiring such mechanisms, in the realm of minority rights there appears to be a measure of retreat to a concept of

¹⁷ *Ibid.*

¹⁸ Kymlicka, *supra* n.13, Chapter 8.

¹⁹ C. Iorns Magallanes, ‘Indigenous Rights and Democratic rights in International Law: An “Uncomfortable Fit”’, (2010) 15 *UCLA J Int’l L & Foreign Affairs* 111.

individual equality and a classic ‘liberal’ framework for political participation and rights. As regards power-sharing, for example, some soft law standards, guidelines and commentators suggest that it constitutes good practice, its hybridity between representative and participative democracy constitute a form of ‘responsible realism’, which combines a commitment to individual rights with a commitment to the realities of the need for group accommodation for equality to be achieved and sustained in practice.²⁰ However, other international courts and commentators view such mechanisms as being of dubious international legality, at best to be tolerated as a temporary transitional device where they can be demonstrated to enable a move from conflict to peace, moving to unlawful once the situation has stabilized.²¹

Similarly, the post-state dimensions of hybrid self-determination also have an unstable normative basis. The ‘right to protect’ is a new and controversial doctrine and while some legal standards promote ‘beyond-the-state’ institutions, it is unclear that these are *required* of states. It is often claimed that ‘self-determination law is not a suicide club for states’, and neither is the new *lex* of ‘hybrid self-determination’. While international law shows some programmatic endorsement of extra-national mechanisms for creating beyond-the-state governance, and while there are attempts to justify international intervention on the grounds that claims of sovereignty must be connected to good government within the state, both constitute a radical revision of a system of international law based on the sovereign equality of states, about which there is little to no formal consensus.

The instability of the norms underwriting hybrid self-determination appear to invite resolution in the direction of retreat to more traditional notions of participation and statehood, or in the direction of solidifying and clarifying the boundaries of the new normative approach in a way that states could tolerate. Paradoxically, this normative instability is, to some extent, sustaining normative developments: neither development of the norm, nor retreat from it appear possible or desirable. Curiously, the capacity of hybrid self-determination arrangements to operate as a ‘holding device’ for disagreements between the parties to a conflict over sovereignty also enables it to operate as a holding device at the international

²⁰ J. McGarry and B. O’Leary, *The Northern Ireland Conflict: Consociational Engagements*, (Oxford: Oxford University Press, 2004), at 19-24. See, Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note (September 1999), available at www.osce.org/hcnm/30325.

²¹ *Case of Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, Eur. Ct. Hum. Rts. GC, Judgment of 22 December 2009; see also, S. Wheatley, *Democracy, Minorities and International Law*, (Cambridge: Cambridge University Press, 2005), at 153, decrying power sharing as violating international law, as cited in Iorns Magallanes, *supra* n.19.

level, bridging competing conceptions of how sovereignty should be understood in a post-Westphalian international legal world. It is easier, for example, for states to live with a fluid and partial quasi-law of hybrid self-determination into which they can all read a version of self-determination law they can ascribe to, than to embrace and support a move to international law as requiring, for example, liberal statehood or a defined concept of a humanitarian exception.

6 A new law of gender inclusion

A Traditional understandings

Traditionally, the process of negotiating an end to a conflict was a matter for the parties to the conflict and, to the extent that the conflict was viewed as an ‘internal’, the only thing constraining who came to the table, and what was discussed there, was the political will of the parties involved. Peacemaking in non-international conflicts was a domestic political matter for those involved in the conflict and untouched by international legal frameworks. With the development of human rights law, equality for women became a matter of international concern. However, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) notoriously did not address violence against women, nor did it address violent conflict in which women were caught. The idea that equality for women should make demands on the process or substance of peace settlements required over a decade of exploring the gendered dynamics of conflict, a rise in the impact of human rights law more generally and experience of the gendered nature of peace negotiations.

B The lex pacificatoria

The post-Cold War environment was one in which human rights and humanitarian law standards were understood to apply to both conflict and peace processes and were increasingly understood to constrain both the process and substance of negotiations. Moreover, the same post-Cold War years that witnessed a steady proliferation of peace processes and peace agreements aimed at bringing violent social conflict to an end²² were also marked by the transnational mobilization of women to secure feminist-informed reform

²² For description of the rise in peace agreements, the reasons linking it to the end of the Cold War, and the scale of the phenomenon, see Bell, *On the Law of Peace*, *supra* n.1.

to international law and institutions.²³ Violence against women was itself defined as a form of discrimination²⁴ and increasingly international conferences and resolutions began to emphasise the need to consider the gendered dimensions of armed conflict and its impact on women and women's equality.²⁵ With the rise of peace processes and agreements, attention focused on the inclusion of women in peace processes, the gender impact of what the parties to conflict agreed to and post-conflict accountability for the abuse of women, in particular sexual violence.

It can also be argued that concern about the inclusiveness or non-inclusiveness of peace processes with regard to women also derived from the concept of hybrid self-determination. A concept that endorses a right to participate cannot draw the line at the participation of the ethnic protagonists to the conflict. As touched on in Part 2, processes aimed at linking ceasefires to constitutional revision raise questions as to the appropriate authors of such revision. In a context where neither state nor non-state actors can assert themselves as fully legitimate representatives of 'the people', and where issues of 'equality' and inclusion are central to conflict resolution, it begs the question of how widely the concepts of equality and inclusion should go.

Again, it can be argued, both as a conflict resolution imperative and a response to international human rights standards relating to women, that a new law of gender inclusion began to be articulated and underwritten by new legal standards that specifically addressed peace processes. Most notably, marking the culmination of a series of resolutions and World Conference commitments, on the 31 October 2000 UNSC Resolution 1325 on Women, Peace and Security was passed.²⁶

²³ N. Reilly, *Women's Human Rights: Seeing Gender Justice in a Globalising Age*, (Oxford: Polity, 2008); see also, A. Boyle and C. Chinkin, *The Making of International Law*, (Oxford: Oxford University Press, 2007), Chapter 2.

²⁴ Committee on the Elimination of all forms of Discrimination against Women, General Recommendation No. 19 (1992), UN Doc. CEDAW/C/1992/L.1/ Add.15 (1992), at para. 1: 'Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.'

²⁵ Windhoek Declaration and Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations (2000), UN Doc. A/55/138-S/2000/693, Annex I and II (2000); Beijing Platform for Action, *supra* n.11; Vienna Declaration and Programme of Action (1993), UN Doc. A/CONF.157/23 (1993), at para. 29.

²⁶ Resolution on Women, Peace and Security, SC Res. 1325 (2000), UN Doc. S/RES/1325 (2000).

Resolution 1325 called for women's equal participation with men and their full involvement in all efforts for the maintenance and promotion of peace and security. It reaffirmed the need to fully implement international humanitarian and human rights law to protect women and girls from human rights abuses, including gender-based violence.²⁷ It identified the need to mainstream gender perspectives in relation to conflict prevention, peace negotiations, peacekeeping operations, humanitarian assistance, post-conflict reconstruction and disarmament, demobilization and reintegration initiatives.²⁸ The resolution was addressed variously to UN institutions, member states and all parties to armed conflict. Of particular note here, the Resolution specifically targeted peace processes and agreements; paragraph 8:

Calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia:

- (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction;
- (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements;
- (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary;

The adoption of Resolution 1325 was significant on several grounds. The resolution constituted the first time that the UNSC turned its full attention to the subject of women and armed conflict and acknowledged the role of women as active agents in the negotiation and maintenance of peace agreements, legalizing the issue.²⁹ The resolution symbolically marked the impact of war on women and provided formal, high-level acknowledgement that the exclusion of women from conflict resolution is a threat to peace. In practice, the resolution automatically triggered on-going UN attention to women, peace and security, not least

²⁷ *Ibid.*, at paras 9, 10, 11 and 12.

²⁸ *Ibid.*, at paras 1, 2, 5, 6, 7, 8 and 13.

²⁹ Resolution 1325 is a 'thematic' resolution best understood as a Chapter VI UN Charter (non-binding) resolution. Its legal authority has been accentuated by the fact that it was passed unanimously, and that the resolution uses the language of obligation. On the status and nature of Resolution 1325, see S. Anderlini, *Women Building Peace: What they do, Why it Matters*, (Boulder Colorado, London: Lynne Rienner, 2004), at 196-199; on the background of Resolution 1325, see generally, Peace Women website, available at peacewomen.org/themes_theme.php?id=15&subtheme=true; UNIFEM Women War and Peace Portal, available at womenwarpeace.org/1325_toolbox.

through creating the need for on-going UN Secretary-General reporting on its implementation.³⁰ The resolution constituted a major victory for women's transnational mobilization in mainstreaming women's equality within the UN.³¹ In the approach to its ten year anniversary, Resolution 1325 was supplemented by additional UNSC resolutions aimed at strengthening and expanding its provisions and securing its implementation. UNSC Resolution 1820 (2008) continues and reinforces Resolution 1325's provisions on sexual violence against women in armed conflict and urges increased participation of women in peace talks.³² UNSC Resolution 1888 (2009), focusing on the implementation of measures dealing with sexual violence, also notes in its preamble 'the under-representation of women in formal peace processes, the lack of mediators and ceasefire monitors with proper training in dealing with sexual violence, and the lack of women as Chief or Lead peace mediators in United Nations-sponsored peace talks.'³³ This was closely followed by UNSC Council Resolution 1889 (2009) aimed at increasing awareness and achieving the implementation of Resolution 1325 and affirming its key peace process dimensions.³⁴

C Normative (in)stability

Unlike the normative developments with relation to hybrid self-determination, the norm of gender inclusion appears to be fairly clearly articulated and fairly stable. However, it also remains sparsely implemented. Between 1990 and 2010, only 16% of peace agreements mention women in any form, although these mentions rise from 11% before the passing of UNSC Resolution 1325, to 25% after.³⁵ Most of these references are isolated and, while

³⁰ SC Res. 1325, *supra* n.26, at para. 17. For reports see tracking at www.womenwarpeace.org/1325_toolbox#tracking.

³¹ See further, C. O'Rourke, 'Feminism v. Feminism: What is a Feminist Approach to Transnational Criminal Law?', (2008) *ASIL Proceedings of the 102nd Annual Meeting* 274.

³² SC Res. 1820 (2008). Paragraph 12 urges 'the Secretary-General and his Special Envoys to invite women to participate in discussions pertinent to the prevention and resolution of conflict, the maintenance of peace and security, and post-conflict peacebuilding, and encourages all parties to such talks to facilitate the equal and full participation of women at decision-making levels.'

³³ Paragraph 17 urges that 'the issues of sexual violence be included in all United Nations-sponsored peace negotiation agendas', and also that 'the inclusion of sexual violence issues from the outset of peace processes in such situations, in particular in the areas of pre-ceasefires, humanitarian access and human rights agreements, ceasefires and ceasefire monitoring, DDR [demobilization, demilitarization and reintegration] and SSR [security sector reform] arrangements, vetting of armed security forces, justice, reparations, and recovery/development.'

³⁴ SC Res. 1889 recognizes in its preamble the under-representation of women 'at all stages of peace processes', and in particular at the level of mediators. The preamble also notes the particular exclusion from peace processes of refugees and internally displaced persons, both being groups where women tend to be over-represented. Paragraph 1 calls on member states, international and regional organizations to improve the participation of women in peace processes, paragraph 4 calls on the Secretary-General to develop a strategy to increase the number of UN mediators who are women.

³⁵ C. Bell and C. O'Rourke, 'Peace Agreements of Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements', (2010) 59 *ICLQ* 941.

perhaps of benefit to some women, do not evidence the adoption of a holistic ‘gender perspective’ that UNSC 1325 contemplates. Rather than normative instability, there is an ‘under enforcement’ issue.³⁶ The under enforcement of UNSC 1325, however, raises a wider difficulty with the normativisation of peace processes and peace agreements. How far should normative standards dictate the substance of peace agreement texts and the make-up of peace agreement processes, and to what extent do the ideals which they articulate need to be balanced with the need to leave enough substance to negotiators, to enable them to reach agreements which they are capable and willing of implementing? The development of a norm of gender inclusion in peace processes and agreements points to a tension between using norms to shape, and even dictate, who and what gets included and the need to create a dynamic process, which has capacity to lead to a number of different outcomes and is thus capable of bringing fighting parties to the table – the conflict itself often forming a key barrier to any material gains for women.

7 A new law of return

A Traditional understandings

Traditionally international law did not address the right of refugees and displaced persons to return to their home country, less to the actual physical houses that they had been forced out of. Rather, refugee law was more concerned with the right of refugees *not* to return to homes where they would be persecuted.³⁷ The one conflict in which return was a political demand of refugees, the Israel-Palestine conflict, was excepted from the refugee convention regime and had its own UN agency.³⁸ A number of general human rights provisions, however, appear to support a right of refugees and displaced persons to return home at the end of conflict: namely, article 12(4) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that ‘no one shall be arbitrarily deprived of the right to enter his own country.’ Article 17 of the Universal Declaration of Human Rights provides for a right to

³⁶ See Fionnuala Ní Aoláin for the concept of ‘under-enforcement’ in a gender context, F. Ní Aoláin, ‘Gendered Under-enforcement in the Transitional Justice Context’, in S Buckley-Zistel and R. Stanley (eds), *Gender in Transitional Justice*, (Basingstoke: Palgrave Macmillan, 2012); F. Ní Aoláin and E. Rooney, ‘Underenforcement and Intersectionality: Gendered Aspects of Transition’, (2007) 1 *Int’l J of Trans Justice* 338.

³⁷ Article 33(1), UN Convention on the Status of Refugees (1951) (hereinafter referred to as Refugee Convention).

³⁸ Refugee Convention, *ibid.*, provides in the introductory note that the Convention:

[D]oes not apply to those refugees who benefit from the protection or assistance of a United Nations agency other than UNHCR, such as refugees from Palestine who fall under the auspices of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

own private property and not to be arbitrarily deprived of that property, which could be used to support a right to return to actual homes that were vacated or to be provided with compensation, although this right appears in neither the ICCPR nor the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). The concept of ‘refugee’ is given a strict legal definition under the Refugee Convention 1951 as, ‘people who have fled across an international boundary as a result of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion.’³⁹ Those who have committed serious crimes are not included. No specific legal regime provides for either the right not to return, or the right to return, of ‘non-status refugees’ – those fleeing across state borders displaced by general armed conflict, or ‘internally displaced persons’ – those who flee homes and localities but do not cross international borders.

B The lex pacificatoria

The post-Cold War conflict and post-conflict environment exposed a lack of fit between the coverage and concerns of refugee law and the political and material needs of all those displaced by the conflict and also third party states affected by flows of people. As regards fit, often the refugee law definitions of refugee do not fit those who flee as a result of conflict. People do flee merely under well-founded fears of persecution, but also in anticipation of attack, meaning it can be unclear whether [or ‘if’ – but not ‘how’] they satisfy the Convention definition. In practice, the scale of mass movement triggered by conflict post-1990 reinvigorated a notion of ‘temporary protection’ used by third party receiving countries to avoid processing individual asylum claims, but also to keep post-conflict ‘return’ open both legally and politically.⁴⁰ In fact, the Refugee Convention itself does not provide a formal right to resettlement in the country of refuge, or a right of resettlement elsewhere, neither does it provide for a formal right not to be returned to the state of origin once the situation permits. The 1990s saw a concept of ‘safe return’ promoted by reception states as a mid-way measure between ‘voluntary return’ (the concept preferred by the UN High Commissioner on Refugees) and *de facto* expulsion, as debates over the temporary nature of protection, the extent of necessary protection from refoulement, and the permissibility of mandatory return under the Convention gathered pace. For reasons of self-interest, displacement as a result of

³⁹ Regional conventions definitions are somewhat broader, see OAU, *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

⁴⁰ See generally, C. Bell, *Peace Agreements and Human Rights*, (Oxford: Oxford University Press, 2000), at 235-242.

conflict focused international attention on the return of refugees and displaced persons as a post-conflict imperative.

From the perspective of the political and moral basis of the peace process, however, there were also reasons to make provision for return. Where displacement had been not just a consequence of conflict but a tool of the conflict, for example, the ethnic cleansing of Bosnia, 'undoing' the expulsion of ethnic groups through return constituted a political demand of displaced constituencies and their representatives, while fitting with the interests of reception states. Negotiating return in such cases, however, is clearly linked to broader questions over the allocation of power and territory to competing ethnic groups, at the core of peace settlements. Most notably, return of the displaced has capacity to change the balance of minorities and majorities in electoral units. Return was often also viewed as part of a concept of reparation for victims of the conflict and an attempt to 'restore' them to their previous situation. Moreover, from a purely pragmatic point of view, aggrieved displaced communities could sow the seeds of renewed conflict by creating an on-going perception that the conflict is not over by agitating as diaspora against an indigenous leadership, and even by funding conflict. An unmanaged return and re-claiming of property, with no peace agreement provision for re-distribution or compensation, had a very direct capacity to re-ignite local conflicts and the central conflict itself. Dealing with the return of those displaced by the conflict became a peace agreement imperative because failing to do so would affect the sustainability of the settlement.

Even where displacement was a consequence, rather than a tool, of the conflict it was important to deal with issues of return in many peace agreements. People often start to return home if a situation is perceived to be safe, such as when a ceasefire or peace agreement is signed, even in the absence of a peace agreement commitment to return. A rapid return of a large number of people without the involvement of appropriate international and domestic agencies can create a host of social problems that a peace agreement can usefully anticipate and address. Management of return was understood to be crucial to post-conflict stability and the safety of returnees.

Again, provision of peace agreements bolstered by soft law standards began to address these gaps, 'creating' law and fleshing out more detailed legal provision and new institutional mechanisms to facilitate a 'right to return'. In 1995, for example, the Dayton Peace

Agreement made detailed provision for a 'right to return' for displaced persons. Annex 7 provided an Agreement on Refugees and Displaced Persons, Article 1 providing that

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them the property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.⁴¹

A set of positive obligations and mechanisms for giving effect to this right were then provided for: the UNHCR was called on to 'develop in close consultation with asylum countries and the parties [to the agreement] a repatriation plan' to allow for 'early' return of refugees and displaced persons; while the parties undertook to cooperate with, and give unrestricted access to, UNHCR, the International Committee of the Red Cross, the UN Development Programme and other relevant international, domestic and non-governmental organizations.⁴² Similar provisions aimed at establishing and enabling a right to return can be found in a range of other peace agreements.⁴³

These types of mechanisms began also to be reflected in soft law standards, such as UN Guiding Principles on Internal Displacement and the Principles on Housing and Property Restitution for Refugees and Displaced Persons.⁴⁴ These specifically defined and addressed all forms of displaced persons, whether they satisfied Refugee Convention definitions or not, and started to flesh out a right to return, to include

A right to return to one's country and even locality

A right for return to be voluntary

A right not to be returned where conditions are not safe

A right to return to own homes or to be compensated where this is not possible

⁴¹ General Framework Agreement for Peace in Bosnia and Herzegovina (14 December 1995) (hereinafter referred to as Dayton Peace Agreement), Annex 7, 'Agreement on Refugees and Displaced Persons', Article 1.

⁴² *Ibid.*, Articles I, para. 5, and III, para. 2.

⁴³ See for example, Comprehensive Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), 21 November 2006; Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000.

⁴⁴ UN Commission on Human Rights, Guiding Principles on Internal Displacement (1998), UN Doc. E/CN.4/1998/53/Add.2 (1998) (hereinafter referred to as Guidelines on the Internally Displaced); P. Sérgio Pinheiro, Final report of the Special Rapporteur, Principles on Housing and Property Restitution for Refugees and Displaced Persons, Annex: Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17 (2005).

A right not to be discriminated against, having returned, and to political, legal and physical security

A requirement on parties to the conflict to cooperate with the relevant agencies to ensure safe and voluntary return

A right to be included as a group in decisions about return, including in the peace negotiations themselves

These standards claimed to be an elucidation of existing hard law standards, such as human rights law or international criminal law.⁴⁵ However, they significantly develop the law as they apply it to the post-settlement context, constituting a quasi-specialist regime for displaced persons.⁴⁶

C Normative (in)stability

As with the area of gender inclusion, there is little internal instability in these new norms, although there appear to be no moves to codify them as ‘hard law’. Rather, they too are ‘under enforced’. Further, as with the issue of gender, when taken cumulatively with other norms relating to peace settlement terms, these ‘return’ norms appear to further limit the realm of what can be freely negotiated, again indicating a dilemma over whether to adopt a maximalist approach that attempts to ensure that return is dealt with, and dealt with in appropriate detail, and a pragmatic approach that leaves room to pragmatic concerns of how best to get people to agree and to implement their agreement.⁴⁷

8 A new law of transitional justice

A Traditional understandings of post-conflict accountability

Traditionally, the ending of interstate conflict included broad amnesties for those waging the war aimed at the demobilization of troops and the return of prisoners taken during the war.⁴⁸ After the First World War, punitive reparations were imposed against Germany, which were

⁴⁵ See, W. Kälin, *Guiding Principles on Internal Displacement – Annotations*, (Washington, DC: ASIL and Brookings Institutions, 2000).

⁴⁶ Guidelines on the Internally Displaced, *supra* n.44, Principle 28(2); see also, Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building, Brookings Institute-University of Bern (September 2007).

⁴⁷ G. McHugh, *Integrating Internal Displacement in Peace Processes and Agreements*, (Washington, DC: Brookings Institute, 2010).

⁴⁸ See further, A. Du Bois-Pedain, *Transitional Amnesty in South Africa*, (Cambridge: Cambridge University Press, 2007), at 302 .

later seen as having played a part in the political dynamics which led to the rise of Hitler. After the Second World War, an individual criminal justice approach was preferred, with the dedicated and temporal individual criminal law processes in the Nuremberg and Tokyo tribunals. In the period between 1945 and 1990, however, a concept of international responsibility for internationally wrongful acts continued to be developed that viewed state-to-state reparations as the key remedy.⁴⁹

As regards internal conflict, the question of how to deal with those who had been involved in the conflict was assumed to be a political matter, with the granting of domestic amnesty even a 'right' of states. Up until the early 1990s, the negotiated settlements of such conflicts typically viewed amnesty as a key tool in peace negotiations and the idea that there was a justice-peace dilemma did not figure. For example, formal or de facto amnesties figured in attempts to end the conflict in Northern Ireland and the conflict with the Red Brigades in Italy in the 1980s. Concepts of reparations as applying between the state and individuals within the state were to depend on developments in human rights law.⁵⁰

B The lex pacificatoria

Again, it can be argued that the post-conflict landscape has significantly revised international law towards a partial and somewhat messy 'new law' of transitional justice. In this case, the new *lex* was a product of 'fitting' the accountability requirements of human rights and humanitarian law to post-conflict accountability demands, as mediated by the need to sustain the ceasefire. This process revised both regimes, whilst also shaping the development of international criminal law, moving towards establishing a broad 'common denominator'. This common denominator establishes a normative imperative in the direction of a prohibition of broad amnesties that include serious war crimes, while leaving some (loosely identified) scope for negotiating partial accountability as not requiring full investigation, prosecution and punishment for all violators and violations. Coupled with this provision on

⁴⁹ See for example, *Corfu Channel Case (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, 23; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986 [1986] ICJ Rep 14, at paras 283, 292; see further, Articles on Responsibility of States for Internationally Wrongful Acts, reproduced in UN Doc. A/56/49(Vol.I)/Corr.4 (2001), Article 1 .

⁵⁰ For history of development see, T. 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', available at untreaty.un.org/cod/avl/pdf/ha/ga/ga_60-147/ga_60-147_e.pdf.

accountability, the new *lex* requires the rights of victims to be addressed and has involved viewing reparations as the entitlement of victims and local communities, rather than states.⁵¹

The normative move towards prohibiting amnesties has been articulated as being required by the combined import of human rights and humanitarian law, as underwritten by international criminal law developments.⁵² These new interpretations of the legal regimes are again underwritten by a range of soft law standards, by judicial decisions, and by peace agreement practice.

(i) *Human rights law.* At the end of the Cold War it was not initially apparent that human rights had any post-conflict regulatory claim over the conflict just past. It was with respect to the resolution of conflicts in Central and South America that the argument first came to be made that human rights law had a post-conflict reach. Human rights commentary and advocacy from the early 1990s argued that human rights law did impose obligations on the post-settlement regime to account for the violations of the past regime.⁵³ The argument was that human rights standards imposed not just a negative obligation to not violate rights, but, in respect of serious human rights violations, such as arbitrary execution and torture, imposed positive obligations to investigate and, possibly, to prosecute and even punish those responsible, which constrained and outlasted any political settlement and even regime change. However, it was suggested that a balance with the political needs of transition were met by the fact that not all human rights violations had to be systematically investigated, prosecuted and punished, but rather international legal requirements could be met by focusing on grave human rights abuses.⁵⁴ Perhaps not surprisingly, these arguments were developed first in the context of Central and Southern America, where impunity was a key feature of the conflict and a mechanism whereby it tended to be recycled. From this context the idea of an explicitly ‘transitional’ form of justice was required as a form of justice that took place in,

⁵¹ *Ibid.*

⁵² For academic support see, H. Gropengießer and J. Meißner, ‘Amnesties and the Rome Statute of the International Criminal Court’, (2005) 5 *Int’l Crim L Rev* 267; R. O’Brien, ‘Amnesty and International Law’, (2005) 74 *Nordic J Int’l L* 261; J. Gavron, ‘Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court’, (2002) 51 *ICLQ* 91; R.C. Slye, ‘The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?’, (2002) 43 *Va J Int’l L* 172.

⁵³ See in particular the influential articles of D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, (1991) 100 *Yale LJ* 2537; N. Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’, (1990) 78 *Cal L Rev* 449.

⁵⁴ See, D. Orentlicher, ‘“Settling Accounts” Revisited: Reconciling Global Norms with Local Agency’, (2007) 1 *Int’l J Tran Justice* 10, for an explanation of the context in which her 1991 article was written.

and responded to, a political transition from authoritarianism to democracy. The concept of ‘transition to democracy’ was understood to shape the type of accountability offered. Pursuit of democratic transition both underwrote arguments that human rights law had purchase and, paradoxically, also legitimated an approach whereby partial forms of accountability of those most responsible for the most serious violations would suffice.⁵⁵

(ii) *Humanitarian law.* Similar problems of fit and reinterpretation arose with regard to the application of humanitarian law. As with human rights law, towards the beginning of the 1990s humanitarian law’s standards of accountability were not viewed as requiring post-conflict accountability for violence in intrastate conflicts. Although humanitarian law has provisions dealing with non-state as well as state action, and was specifically designed for situations of conflict, arguments that humanitarian law required post-conflict accountability again had to be asserted and required an interpretive shift, similar to that of human rights law.

Although from 1945 onwards there has been a clear legal framework in the Geneva Conventions imposing legal requirements on states to prosecute for grave breaches of international law taking place during international conflict, there was no clear requirement of a duty to prosecute in internal armed conflict. Only a sub-section of intrastate armed conflict is covered by humanitarian law – conflicts involving national liberation movements (Protocol I), and conflicts meeting the threshold tests of Protocol II and Common Article 3 of the Geneva Conventions.⁵⁶ Even where an intrastate conflict does fall within humanitarian law’s parameters, states are often reluctant to concede its application and (unlike with human rights treaties) there is no supervisory body to enforce the Conventions rather there is an obligation on all states to ensure its implementation.⁵⁷ Moreover, what these texts require as regards post-conflict accountability in internal conflict is not spelt out. There is no equivalent to the

⁵⁵ See, P. Arthur, ‘How “Transitions” Re-shaped Human Rights: A Conceptual History’, (2009) 31 *HRQ* 321, arguing that concept of ‘transition to democracy’ prioritised legal-institutional reform also over social justice and redistribution. Cf R. Teitel, *Transitional Justice*, (New York: Oxford University Press, 2000), addressing the broader lineage and application of the term ‘transitional justice’.

⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977); Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977); Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), Geneva Convention Relative to the Treatment of Prisoners of War (1949), and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (collectively referred to as the Geneva Conventions).

⁵⁷ F. Ní Aoláin and O. Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, (Cambridge: Cambridge University Press, 2007).

explicit grave breaches regime that imposes an obligation to prosecute grave breaches of humanitarian law in international armed conflict. The argument that humanitarian law required post-conflict individual liability to be imposed through criminal law process required an interpretive revision.

Over time, the application of individual criminal accountability to violations of humanitarian law in non-international armed conflict came to be firmly accepted in a range of state practice and judgments of international courts and tribunals.⁵⁸ Moreover, the consequent duties to prosecute were understood to be on-going and therefore to have post-conflict application.⁵⁹ By 2005, international acceptance that humanitarian law imposed on-going accountability requiring individual criminal responsibility was apparently so comprehensive that the International Committee of the Red Cross (ICRC) stated as customary law that

- individuals are responsible for war crimes committed in both international and non-international armed conflict
- states are required to investigate such war crimes and, if appropriate, prosecute
- states have the right to vest universal jurisdiction in their national courts for such crimes⁶⁰

However, a further difficulty of fitting humanitarian law to intrastate conflict was Article 6(5) of Protocol II to the Geneva Conventions, which appears to require amnesty, providing that

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

As the pressure for post-conflict accountability increased states that had rejected the application of humanitarian law during the conflict began to turn to it in peace negotiations.⁶¹

⁵⁸ See for example, *Prosecutor v. Dusko Tadić*, IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, paras 96-127, available at www.icty.org.

⁵⁹ J.M. Henckaerts and L. Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2005).

⁶⁰ *Ibid.*

⁶¹ See, C. Campbell, 'Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment', (2000) 82 *Int'l Rev of the Red Cross* 627; see also, N. Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward', (1996) 59 *Law & Contemp Probs* 93.

This new-found attraction of states to humanitarian law lay in its perceived capacity to demand accountability, not just of the state, but of its non-state armed opponents, while also promoting mutual amnesty as a conflict-resolution tool. While peace settlements incorporated provisions taken from humanitarian law to non-state actors in conflicts, domestic courts began relying on Article 6(5) to justify amnesties and truth commissions against human rights challenges.⁶²

Combating this turn to humanitarian law as a justification for amnesty required an interpretive revision of humanitarian law as being consistent with human rights law. Faced with questions as to the scope of Article 6(5) in 1995 the ICRC produced an explanatory interpretation of international law's one provision requiring amnesty.⁶³ The ICRC argued that Article 6(5) had been designed to offer 'the equivalent of what in international armed conflicts is known as "combatant immunity"' that was implicitly limited by commitments to accountability:

Article 6(5) attempts to encourage a release at the end of hostilities for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law.⁶⁴

While the ICRC's opinion clearly carries weight, the point remains that this opinion was driven by the need for internal regime coherence and also coherence with human rights law. The type of interpretation offered by the ICRC simply was not needed or given at the time of drafting (and does not appear in the contemporaneous commentary). The ICRC reading of Article 6(5) constituted an attempt to reconcile the Protocol's requirement of amnesty, with the accountability requirements found in other parts of humanitarian law, and indeed human rights law, so as to further underwrite the emerging prohibition on amnesty.

(iii) *International criminal justice* Post-conflict revisions of international human rights and humanitarian law were also reinforced by moves towards the use of international

⁶² See for example, *Azapo v. President of the Republic of South Africa* 1996 (4) SA 562 (CC) . See also, Roht-Arriaza, *supra* n.61, at 96-98; N. Roht-Arriaza and L. Gibson, 'The Developing Jurisprudence on Amnesty', (1998) 20 *HRQ* 843.

⁶³ Letter of Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, to the Department of Law at the University of California of 15 April 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319), cited in Roht-Arriaza, *supra* n.61, at 97 .

⁶⁴ *Ibid.*

criminal justice. In essence, international criminal law initiatives codified a merged regime of post-conflict accountability. The *ad hoc* tribunals in Rwanda and former Yugoslavia created definitions of crimes that drew on the crimes of humanitarian law, concepts of ‘crimes against humanity’ and of gross human rights violations, but in ways that clearly addressed both international and internal conflict.⁶⁵ A similar list of crimes was used by the Special Criminal Court of Sierra Leone.⁶⁶ These provisions added to developing arguments of universal jurisdiction for grave breaches of humanitarian law and a move towards universal jurisdiction with respect to humanitarian law violations in internal conflict.⁶⁷

The merging of human rights and humanitarian law, with respect to defining international criminal law, was also followed by the Rome Statute of 1998 establishing the permanent International Criminal Court (ICC).⁶⁸ While originally conceived as a response to interstate conflict, with antecedents that long preceded the peace agreement era,⁶⁹ the ICC’s eventual establishment took place against a backdrop of intrastate conflict and associated transitional justice developments. The Rome Statute framework of criminal responsibility, like that of the *ad hoc* tribunals and hybrid tribunals, offered a merged set of humanitarian and human rights legal standards capable of applying over a range of conflict scales and, most importantly for current discussion, not limited to either ‘internal’ or ‘international’ conflict.⁷⁰ Importantly, the seismic normative development of a new international court and the lack of an explicit transitional justice exception, also spoke symbolically to amnesty of serious crimes as lifted out of the discretion of domestic and international mediators. Post-conflict accountability for serious international crimes now appeared to be a straightforward legal requirement of a hierarchical criminal justice regime, policed ultimately by the ICC.

However, the scope for compromise was not entirely eliminated. Prosecuting strategies targeted only those most responsible and it soon became clear that very few perpetrators would ever see the inside of a court. As will be seen below, the application of international

⁶⁵ See, Updated Statute of the International Tribunal for Former Yugoslavia (2009); Statute for International Tribunal for Rwanda (2004).

⁶⁶ Statute of the Special Court for Sierra Leone (2002).

⁶⁷ T. Meron, *War Crimes Law Comes of Age: Essays*, (Oxford: Clarendon Press, 1998), at 235-244.

⁶⁸ Rome Statute, *supra* n.11. The statute entered into force on 1 July 2002. See generally, W.A. Schabas, *An Introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 2006); and on drafting history, M.C. Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’, (1999) 32 *Cornell Int’l LJ* 443.

⁶⁹ On these antecedents, see, Schabas, *ibid.*, at 1-21.

⁷⁰ Article 5, Rome Statute, *supra* n.11.

criminal law to intrastate conflict did not entirely eliminate scope for restorative justice mechanisms. Rather, international criminal law, particularly pre-ICC, can be viewed as creating a ‘bifurcated approach’, whereby international criminal justice was to hold those ‘most responsible’ to account, leaving more flexible quasi-law mechanisms to sweep up the rest.

(iv) *Regime merge?* Over time, therefore, a prohibition of a blanket amnesty in intrastate conflict that nonetheless tolerates some unspecified forms of amnesty has emerged as a common denominator in both human rights and humanitarian law, now supported by international criminal law. This common denominator does not find a positive law articulation in any regime, but must be ‘read into’ a unified narrative of what the differentiated regimes collectively require. As one court has put it, the prohibition is a ‘crystallising’ norm of international law derived from diverse legal sources.⁷¹ The corollary of a prohibition of blanket amnesty is that some level of amnesty is permitted and even required; here too the permissibility of amnesty must again be garnered from a variety of legal doctrines.⁷² The only direct treaty law provision for amnesty is Article 6(5) of Protocol II to the Geneva Conventions which only covers certain intrastate conflicts and which the ICRC contends does not apply to serious violations of humanitarian law. The international legality of limited amnesty is also supported by the view that some domestic amnesties are outside international law’s reach and still constitute a political matter within the gift of the state.

The prohibition of a broad amnesty has been normatively endorsed in soft law standards and UN policy statements and practice. Throughout the 1990s soft law standards articulating normative requirements of accountability for mass atrocity referencing both human rights and humanitarian law regimes were developed. The 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, prohibits blanket immunity from prosecution for extra-legal, arbitrary or summary executions in Article 19.⁷³

⁷¹ *Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, Case No. SCSL-2004-15-AR72(E) and Case No. SCSL-2004-16-AR72(E) (Special Court for Sierra Leone) (13 March 2004), at para. 72. See also D. Orentlicher, *Amicus Curiae Brief Concerning the Amnesty Provided by the Lomé Accord in the case of the Prosecutor v. Morris Kallon*, SCSL-2003-07 (27 October 2003).

⁷² See Slye, *supra* n.52, who has attempted to conduct an even broader ‘regime merge’ so as to produce specific criteria for ‘legitimate amnesty’ which are similar to the stated ‘new law’; Orentlicher, *ibid.*

⁷³ UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1984), ECOSOC Res. 1989/65, UN Doc. E/1989/89 (1989).

Similarly, the 1993 UN Declaration on the Protection of All Persons from Enforced Disappearances prevents special amnesty for disappearances.⁷⁴ In 1997 the Joint Principles provided a 'Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity.' Principle 25 sets out limits to amnesty, prohibiting its application to perpetrators of 'serious crimes under international law' while clearly contemplating that amnesty may be used nationally 'when intended to establish conditions conducive to a peace agreement or to foster national reconciliation.'⁷⁵

These normative developments towards viewing forms of amnesty as unlawful were bolstered by UN practice and policy statements as the UN attempted to reconcile its peacemaking practices with its norm-promotion role. In July 1999, the UN Secretary-General Representative in Sierra Leone, on the instruction of the UN Secretary-General, added a proviso to the UN signature on the Lomé Agreement, between the Sierra Leonean government and the Revolutionary United Front (RUF) making it clear that the 'United Nations holds the understanding that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of humanitarian law'.⁷⁶ This UN dissent served to 'normativize' and publicise its move towards a position as a 'normative negotiator'. It can be argued that the Lomé rider, with its real-world impact in terms of UN signature and controversy, gave the prohibition on blanket amnesty instant legal effect in a way that statements of commitment and soft law standards could not. As will be seen, it also arguably paved the way for the

⁷⁴ UN Declaration on the Protection of All Persons from Enforced Disappearances (1993), GA Res. 47/133, UN Doc. A/47/687/Add.2 (1993).

⁷⁵ See, Report of the Special Rapporteur Louis Joinet, The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (1997), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II (1997); see also, UN Commission on Human Rights, Res. 2005/35, Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. E/CN.4/2005/L.10/Add.1 (2005); UN Commission on Human Rights, Res. 2004/34, the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/2004/127 (2004).

⁷⁶ Seventh Report of the Secretary-General on the UN Observer Mission in Sierra Leone (1999), UN Doc S/1999/836 (1999), at para. 7. Interestingly, the versions of the agreement available online do not record this disclaimer. The UN does not seem to be able to produce a copy of the disclaimer (correspondence on file with the author). The Secretary-General's report to the UN Security Council, while describing the rider, did not quote it, and subsequent citations of the rider seem to refer to this description, see for example, W.A. Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', (2004) 11 *UC Davis J Int'l L & Pol'y* 145, at 149; P. Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, (Geneva: Henry Durant Centre for Humanitarian Dialogue, 2007).

UNSC to later establish a Special Criminal Court for Sierra Leone that operated contemporaneously with the Truth Commission.⁷⁷

The new normative stance of the UN was reinforced on 10 December 1999 when the UN Secretary-General reported in a press release that he had issued guidelines addressing human rights and peace negotiations to his envoys.⁷⁸ These guidelines, at time of writing, have not been made public.⁷⁹ The UN direction towards clear prohibition of amnesty was further consolidated by an intervention by the UN Secretary-General in his August 2004, Report on *The Rule of Law and Justice in Conflict and Post-Conflict Societies*, which reasserted a UN position of rejecting any endorsement of broad amnesty and capital punishment.⁸⁰ In 2005, Orentlicher updated the Joinet Principles and in Principle 24 reiterated Joinet's approach of prohibiting broad amnesties while contemplating some form of restricted amnesty as still possible.⁸¹ While the norms appear to articulate the two poles – accountability for serious violations of international law, and amnesty for lesser violations, there is little to no codification as to the grey area in the middle and where the line should be drawn.

C Normative (in)stability

It can be argued that these standards operate to establish a broad and programmatic direction towards the prohibition of amnesty, which still leaves some, seemingly narrowing, room to manoeuvre. In practice, innovative institutional developments have attempted to work within these two poles. Thus, truth commissions that attempt to reconcile some amnesty with some accountability, or approaches that couple international criminal justice for the most serious offenders with some softer 'restorative justice' mechanism involving narratives of reconciliation rather than punishment for the majority of those involved in the conflict, have attempted to work within the normative poles of the new *lex*. However, as with the concept of hybrid self-determination, the compromise of the new law is apparently internally unstable. Neither human rights, nor humanitarian law, nor international criminal law have any explicit

⁷⁷ SC Res. 1315 (2000). Views are somewhat divided on how exactly the rider did this, and whether the rider created an impetus for accountability which was acted on once fighting was renewed, or whether the rider was in part responsible for the renewed fighting itself, see for example, Schabas, *supra* n.76.

⁷⁸ UN Secretary-General, Press Release, Secretary-General Comments on Guidelines given to Envoys (10 December 1999).

⁷⁹ The rationale for privacy can be mooted to lie in the wish to keep the guidelines as an internal almost bureaucratic matter so as not to reveal mediator's hand. In the interests of disclosure, the author has viewed the Guidelines in the context of an expert meeting to advise on their updating.

⁸⁰ UN Secretary-General, Report at the Security Council, Report on the Rule of Law and Justice in Conflict and Post-Conflict Societies (2004), UN Doc. S/2004/616 (2004), at para. 64(c).

⁸¹ Updated Set of Principles, *supra* n.11.

provisions that require or permit balancing accountability for the past with a wider social ‘good’ and human rights protection in the future, which can follow from achieving and sustaining a peace settlement. The new norm appears to try to hold together a middle ground that is squeezed by both ends: the desire to resolve the norm towards a more absolute and inflexible standard of prosecution and punishment in all cases on one hand, and the desire to retreat from it as unhelpful to peace negotiations on the other.

While there have been some attempts to provide a normative blueprint that would spell out the boundaries and conditions of an explicitly ‘transitional’ form of justice, it has proved impossible to articulate a precise relationship between accountability and amnesty.⁸² It is suggested that it is impossible precisely because specification of the relationship would require an impossible-to-achieve shared understanding of the permissible goals of transition and consensus as to when these political considerations might attenuate the letter of human rights law. In the absence of such a shared understanding, any attempt to provide for an explicitly exceptional transitional justice runs the danger of undermining, rather than reinforcing, human rights and humanitarian law standards of accountability.

9 A new law of third party intervention

A Traditional understandings

Chapter VI and Chapter VII of the UN Charter provide a formal legal basis for third party intervention in conflict and post-conflict settings. Chapter VI provides for Pacific Settlement of Disputes, Article 33 providing that

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

⁸² A series of UN Commission and UN Council Resolutions on Transitional Justice have avoided attempting to articulate a relationship emphasising the need to provide for transitional justice and the rule of law and setting out some process matters, see for example, Human Rights Council, Human Rights and Transitional Justice, Res. 9/10 (2008); UN Human Rights Commission, Human Rights and Transitional Justice, Res. 2005/70 (2005).

Chapter VI additionally empowers the UNSC to become involved and make recommendations for resolution of the conflict. However, there is no provision for enforcing these recommendations.

Chapter VII provides for Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39 providing that

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40 empowers the UNSC to call for provisional measures; Article 41 provides for enforcement not involving armed force, such as disruption of economic relations; Article 42 provides that where other measures have proved inadequate, action involving armed force can be taken to address the conflict.

As regards formally authorized intervention, under Chapter VI pacific resolution of the dispute can be taken with the consent of the parties in cases involving a threat or potential threat to international peace and security. Non-military and military actions can be taken without the consent of the party in the event that pacific resolution of the dispute fails and there is an actual threat to peace – by implication *international* peace. In practice, however, these chapters apply to formal Security Council authorized intervention. A range of other organizations can intervene as a matter of their own constitutions, provided they do not contravene the UN Charter.

B The lex pacificatoria

The contemporary post-conflict environment relies heavily on a diverse range of international actors to carry out a diverse range of peace implementation functions. These functions can be categorized in terms of four broad tasks: policing demobilization and demilitarization; guaranteeing and implementing an internal constitutional settlement; mediating its development; and administering the transitional period in some form. The scale and nature of international intervention is varied, ranging from full administration, to forms of

peacekeeping to involvement in domestic institutions, such as hybrid courts.⁸³ Some forms of governance and peacekeeping are undertaken by the UN, some are UN authorized but conducted by regional groupings such as the North Atlantic Treaty Organization (NATO) some, such as those in Iraq, are performed by third party states, and some are undertaken by ‘international’ individuals with state endorsement but no clear representative capacity.⁸⁴ Discrete parts of the UN also become involved in separate issues, for example, UN High Commissioner for Refugees (UNHCR) in return and repatriation of refugees and displaced persons.⁸⁵ Other international organizations can also find themselves with peace implementation roles; for example, the International Labour Organization has played a role in the implementation of the San Andreas Agreement between the Ejército Zapatista de Liberación Nacional (EZLN) and the Mexican government, undertaken under the rubric of its treaty monitoring with relation to the International Labour Organization’s Indigenous and Tribal Peoples Convention 1989 (169).⁸⁶ International ‘individuals’ and civil society actors can also be given third party implementation roles.. The main regulatory framework for these tasks is often the internal constitution of the institutions undertaking these tasks.

Again, the assumptions of the traditional framework for regulating international intervention in conflicts appear inappropriate for the type of international intervention required and undertaken in pursuit of peace settlement implementation. The UN Charter framework does not envisage or address the broad range of possibilities for international involvement within states; for example, it does not provide a clear framework for the regulation of the intervention of regional organizations, now often equal or predominant players to the UN in mediation, peacekeeping and settlement implementation tasks.

There are also further difficulties of ‘fit’ as regards Charter regulation of UNSC authorized intervention. In conflicts occurring largely within international state boundaries, it can sometimes be unclear when a threat constitutes a threat to *international* peace and security

⁸³ For a full picture of third party involvement see, Bell, *On the Law of Peace*, *supra* n.1, at 175-195.

⁸⁴ For a full review of international territorial administration see, R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, (Oxford: Oxford University Press, 2008).

⁸⁵ See for example, Arusha Peace and Reconciliation Agreement for Burundi (28 August 2000), Protocol 4, Chapter 3, article 17, available at www.usip.org/library/pa.html.

⁸⁶ See, Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No.169), made under article 24 of the ILO Constitution by the Authentic Workers’ Front (2004), available at www.ilo.org/ilolex/english/newcountryframeE.htm, in which the ILO examined the complaint as regards the Convention through the framework of the San Andrés Larraínzar Agreement between ELZN and Mexican Government, which was based on this Convention.

and countries tend to resist the ‘internationalization’ of a conflict precisely because it puts their own sovereignty in question. Where a settlement framework is in place, and a tentative ceasefire holds, it can become even more difficult to justify post-conflict intervention in terms of a threat to international peace and security. Therefore, the legal boundary as when international actors can forcibly intervene or not does not always relate appropriately to the nature of post-settlement implementation. Similarly, a distinction between consensual intervention and non-consensual intervention is difficult to apply in situations of political transition from one state structure to another, particularly when the new structures involve brokered compromise and power-sharing between former ‘state’ officials and their non-state opponents. In practice, consent may fluctuate and operations that were consent-based may need to move to a non-consensual basis very quickly. In the event that some parts of ‘the state’ withdraw their consent, but the state is being reconstructed whose consent is relevant? In short, the Charter framework contemplates a clear sovereign independent state, capable of giving or withholding consent, clear distinctions between peace and conflict and between international and non-international threats to peace. Post agreement, ambiguity over ‘who’ constitutes the state, and whether the war is over, means that such clarity seldom exists in periods of post-settlement transition. As regards other organizations and forms of intervention not requiring or having UNSC authorization, when and how they can intervene largely depend on the terms of their own constitutions.

A practical pressure for the development of a *lex pacificatoria* to justify and govern third party intervention also comes from the need for international actors, focused on ‘implementing’ democracy and the rule of law, to be able to articulate a legal basis for their own intervention. A legal grey zone relating to the basis and legality of the third party intervention can undermine third party implementation functions because it can be used by recalcitrant parties to the settlement to undermine those functions where they are resisting them. As Bertram notes with reference to the UN, legal challenges to third party implementation can

[c]reate serious problems on the ground, undermining the credibility and capability of UN peace builders to carry out their missions. Inevitably, groups that stand to lose as

a result of UN intervention will claim – legitimately or not – infringement of state sovereignty and the perception of infringement may also trigger popular opposition.⁸⁷

Again, the difficulty of lack of ‘fit’ of law to task and dilemmas has generated revisions in how the law applies. As regards UNSC authorized third party intervention, the authorizing resolutions tend to reference both consent and authorization and often remain silent and ambiguous as to whether they are Chapter VI or Chapter VII resolutions – the extension and development of a silent so-called VI ½ resolution as best suited to peace settlement enforcement. Interestingly, this development does not just involve international organizations being enabled to move from consent to use of force in Chapter VI-like initiatives, but also involves reaching back for consent in what are stated to be Chapter VII interventions. The use of international force in Kosovo, for example, was terminated by UNSC 1244, which made provision for international administration but attempted to build internal structures with reference to the Rambouillet Agreement.⁸⁸ This draft agreement had been negotiated with the parties to the conflict, under the threat of use of force, but to which they had ultimately failed to agree – triggering the NATO intervention. The attempt to incorporate Rambouillet, post-conflict, in a UNSC Resolution constituted an attempt to reach backwards for an element of consent from the recalcitrant parties in the state’s transitional structures.

In many post-conflict situations, however, the UNSC is not involved. In these cases, as with both peacekeeping and the broader range of implementation functions undertaken by diverse third parties, the peace agreement itself often serves as a ‘quasi-legal’ basis for third party legitimacy and intervention – capable of both authorizing, defining and limiting third party tasks, effectively bypassing questions of consent. The constitutional and treaty-like nature of the hybrid self-determination settlement terms creates a situation in which the involvement of third parties can be presented not as an exception to sovereignty and self-determination, but part-and-parcel of achieving it. The necessary consent is of all the parties (domestic and international) to the peace settlement itself.

C Normative (in)stability

⁸⁷ E. Bertram, ‘Reinventing Governments: The Promise and Perils of United Nations Peace Building’, (1995) 39 *J of Conflict Resolution* 387.

⁸⁸ SC Res. 1244 (1999), at para. 11(a): ‘Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648)...’

The emergent 'lex pacificatoria' in the area of third party intervention remains vague, general and operating at a political and programmatic level. It is difficult to imagine coherent reform of the UN Charter to enable authorization of a broader range of peace agreements. Developments in understandings of what the Charter permits have been addressed by consecutive UN Secretary-Generals in a series of 'lessons learned' reports that tried to grapple with, and revise, concepts of 'consent', 'neutrality' and 'impartiality' in the context of post-conflict reconstruction tasks that often required the redistribution of power within the state.⁸⁹

10 A new law of third party accountability

A Traditional understandings

Traditionally, the spheres of operation of international organizations and the sphere of operation of the state domestically were understood to be distinct: international organizations existed to pursue common state interests, such as taking collective action with respect to common or global problems. The accountability of state actors was through the framework of the state's institutions and accountability of international actors through the framework of the international organization's institutions. In so far as international organizations committed wrongs within states, any accountability was contemplated from the international organization to the state, however, when and how accountability applied remained controversial, depending on matters such as the relationship between the organization and its member states and what acts were attributable to the organization.⁹⁰

B The lex pacificatoria

Again, these assumptions are inapposite to post-conflict scenarios and tasks. The tapestry to international involvement in peace settlement implementation tasks, as described in 6 above, gives rise to questions of third party accountability for violations of international law with respect to local populations. Two exercises of power in particular give rise to demands for accountability to local populations: the use of force and the exercise of what are normally the

⁸⁹ See for example, United Nations (1995) 'Supplement to An Agenda for Peace, Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, Report of the Secretary-General' 3 January 1995, New York, United Nations. UN Doc A/50/60-S/1995/1; United Nations (2000) 'Report of the panel on United Nations Peace Operations' 21 August 2000, New York, United Nations. UN Doc A/55/305-S/2000/809.

⁹⁰ See, J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed., (Cambridge: Cambridge University Press, 2009), at 271-293.

powers of government. When international implementers use force and exercise governmental functions they, in essence, carry out the business of the state. The exercise of what is normally conceived of as domestic government by international actors, like all use of public power, can give rise to human rights violations. Local populations have asserted that the third parties are themselves violating legal rights found in international human rights and humanitarian law and indeed the domestic framework of peace settlements. In practice challenges to the actions of peacekeepers have included challenges to the use of force,⁹¹ charges of sexual abuse,⁹² use of administrative detention⁹³ and, in Bosnia, challenges to the constitutionality of the exercise of domestic legislative power by the Office of the High Representative.⁹⁴ Human rights challenges require a response from third parties because human rights abuses undermine peace settlement implementation efforts by undermining third party legitimacy in the eyes of the local population. Given that peace building typically involves a re-allocation of power from one side in the conflict to another, challenges to third party legitimacy tend to be seized on by ‘spoilers’, that is, recalcitrant parties who view settlement failure as their desired outcome, and can help build their political base locally.⁹⁵

While the application of human rights and humanitarian law seems relevant, again both regimes have difficulties of fit. The post-conflict environment, with its hybrid international/domestic actors and ambiguous sovereignty, does not sit easily with the assumptions of either human rights or humanitarian law. The accountability offered by each regime is inadequate, both in reach and in enforcement mechanism, for dealing with the third party accountability issues that arise. The normal assumption that the state is able and capable of being the primary locus of human rights accountability does not prevail. The peculiarity of transitions from conflict gives rise to pressure for a form of regime merge that, in its broad dynamic, is similar to that described with reference to transitional justice.

⁹¹ Allegations of torture and execution against Belgian, Italian and Canadian UN troops in Somalia (1992-1995), see for example, Report of the Somalia Commission of Inquiry, available at www.dnd.ca/somalia/somaliae.htm.

⁹² See, UN Secretary-General, Special Measures for protection from sexual exploitation and sexual abuse (2007), UN Doc. A/61/957 (2007), detailing sexual exploitation and related offences in the UN system in 2006, including sexual assault and sex with a minor.

⁹³ See for example, *Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58, *Al-Jedda v United Kingdom*, Application no. 27021/08, 8 July 2011.

⁹⁴ See, *Twenty-five Representatives of the People's Assembly of Republika Srpska*, Constitutional Court of Bosnia Herzegovina U-26/01, (28 December 2001) at para 13 available at www.ccbh.ba/eng.

⁹⁵ S.J. Stedman, ‘Spoiler Problems in Peace Processes’, (1997) 22 *Int'l Sec* 5; Bertram, *supra* n.87.

(i) *Human rights law* Human rights law is acknowledged to apply in situations of conflict and of peace and the standards it offers appear to have the capacity to hold international implementers to account, to the extent that they are using force or undertaking governmental-type roles. Human rights treaties impose a high standard of protection with regard to the right to life, capable of providing for accountability for killings by peacekeepers. Their strength, but also their weakness, is that they contemplate such killings as something other than potentially legitimate acts of war. As regards international governance, human rights standards are specifically designed to provide accountability for the exercise of government power, vis-à-vis the individual, and so would seem to be relevant to international administrators when they exercise the powers of the state. Finally, in the event that states fail to provide mechanisms for adjudicating on human rights breaches, unlike humanitarian law, there is international machinery, in the form of treaty mechanisms, capable of providing for some form of adjudication of a breach.

The difficulty is that human rights treaties regulate relationships between a state and the people within its borders, with the state obligated to deliver rights as minimum standards. As a technical matter, the rights contained in international conventions only apply to the state parties that sign the conventions, and so therefore do not apply directly to international organisations. The application of existing rights mechanisms to international organisations, including the UN, is not obvious and remains legally controversial.⁹⁶ While mission mandates and regulations can provide for international organizations to undertake duties in ways that protect and promote human rights,⁹⁷ these seldom provide for a clear mechanism through which victims of rights violations can pursue accountability. There are similar difficulties with the application of customary international law to international organizations. Although the state technically retains its on-going treaty and customary law human rights

⁹⁶ See generally, A. Devereux, 'Selective Universality? Human-rights Accountability of the UN in Post-conflict Operations', in B. Bowden, H. Charlesworth and J. Farfall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations*, (Cambridge: Cambridge University Press, 2009), at 198; B. Kondoch, 'Human Rights Law and UN Peace Operations in Post-conflict Situations', in N. D. White and D. Klaasen (eds), *The UN, Human Rights and Post-conflict Situations*, (Manchester: Manchester University Press, 2005), at 19; J. Cerone, 'Reasonable Measures in Unreasonable Circumstances: A Legal Responsibility Framework for Human Rights Violations in Post-conflict Territories under UN Administration', in N. D. White and D. Klaasen (eds), *The UN, Human Rights and Post-conflict Situations*, (Manchester: Manchester University Press, 2005), at 42, 68; G. Verdirame, 'UN Accountability for Human Rights Violations in Post-conflict Situations', in N. D. White and D. Klaasen (eds), *The UN, Human Rights and Post-conflict Situations*, (Manchester: Manchester University Press, 2005), at 81; F. Mégret and F. Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *HRQ* 314.

⁹⁷ See for example, UNMIK Regulation 1/1991 (25 July 1999), available at www.unmikonline.org, discussed further below.

commitments, having abrogated its power to international organizations, and often having given them immunity at point of entry through status of forces agreements, it cannot effectively hold international actors to account.

In response, commentators have posited a range of legal routes to finding the UN accountable.⁹⁸ Some commentators have contended that human rights apply directly to the UN by virtue of the constitutional standing of the UN Charter in combination with the International Covenants on Civil, Political and Economic, Social and Cultural Rights of 1966.⁹⁹ This argument views UN administrators as bound by human rights standards as part of its own constitution. Others have found *jus cogens* and customary law obligations to be directly applicable to UN administrators, given the UN's status as a subject of international law.¹⁰⁰ A third route to application finds the UN to be subject to human rights norms through its usurpation of the state's functions – either as surrogate state, or as derivative or successor of the state. Each line of argument could, in theory, apply also to regional peacekeeping in terms of the respective constitutional foundations of the relevant regional organisation (which also have roots in the UN Charter framework). The very existence of these arguments, however, testifies to an unhelpful lack of clarity as to UN human rights obligations. Moreover, these UN accountability theories leave the accountability of non-state third parties, such as non-governmental organizations, private security contractors, companies and individual actors, untouched.

Third party 'home' states would seem, in principle, to retain treaty responsibility to pursue the accountability of their own personnel. This form of accountability is unsatisfactory for local populations as it seems to deliver accountability to the wrong constituency. Nevertheless, it is a form of accountability. However, asserting home state accountability in practice has exposed clear limitations on when treaty obligations apply.¹⁰¹ Cases asserted under the European Convention on Human Rights, for example, have determined that

⁹⁸ For a full review see, Devereux, *supra* n.96.

⁹⁹ Kondocho, 'Human Rights Law', *supra* n.96, at 36; see also, N.D. White and D. Klaasen, *supra* n.96, at 7; N.D. White, *The United Nations System: Towards International Justice*, (Boulder: Lynne Rienner, 2002), at 14-17; P.-M. Dupuy, 'The Constitutional Dimension of the Charter of the UN Revisited', (1997) 1 *Max Planck UNYB* 1. For arguments on the UN Charter as constitutional law see, B. Fassbender, "'We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law', in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism*, (Oxford: Oxford University Press, 2007), at 269.

¹⁰⁰ Kondocho, *supra* n.96, at 36-37; White and Klaasen, *supra* n.96

¹⁰¹ See further, T. Hadden (ed), *A Responsibility to Assist: Human Rights Policy and Practice in European Union Crisis Management Operations*, (Oxford: Hart Publishing, 2009).

- the Convention is primarily applicable territorial but can apply to states acting extra-territorially when they ‘exercise all or some of the public powers normally to be exercised’ by governments; or exercise effective control over the area in which they operate¹⁰²
- however, where the mission is formally authorized by the United Nations, UN SC authorization to carry out a specific operation or use ‘use all necessary measures’ may legitimize actions which would otherwise violate human rights standards¹⁰³
- and where the operation is a UN one, responsibility lies with the UN rather than the contributing states¹⁰⁴

(ii) *Humanitarian law.* Similar difficulties apply with reference to the application of humanitarian law. Once again, it is unclear that this body of law applies to the peacekeeping forces of international organisations. While most UN states are state parties to the Geneva Conventions, the UN itself is not and direct accession has apparently been ruled out.¹⁰⁵ As Cerone notes, a further query over application lies in ‘the notion that operations undertaken pursuant to the Chapter VII power of the SC are somehow exempt from the ordinary application of international law, such that even the IHL obligations of the member states participating in the operation are inapplicable.’¹⁰⁶ International legal accountability for private actors, to whom third party states contract-out peace-implementation duties, is even more unclear.¹⁰⁷ Moreover, the starting point of UN operations has been to provide for the immunity of peacekeeping and mission personnel from host jurisdiction. It has been standard practice for UN and regional terms of agreements between the international organization and

¹⁰² *Banković and others v. Belgium and others*, Application No. 52207/88, GCJ (dec.), no. 52207/99, ECHR 2001-XII; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, 7 July 2011.

¹⁰³ *Al-Jedda*, *supra* n.93 (although the Grand Chamber of the European Court of Human Rights found that there was no clear conflict between the UNSC resolution and the Convention, as the UNSC resolution did not require the use of detention such as was at issue in the current case.

¹⁰⁴ *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Application Nos. 71412/01 and 78166/01, Eur. Ct. Hum. Rts. GC, Judgment of 2 May 2007.

¹⁰⁵ See, U. Palwankar, ‘Applicability of International Humanitarian Law to United Nations Peacekeeping Forces’, (1993) 294 *Int’l Rev of the Red Cross* 227; Cerone, *supra* n.96.

¹⁰⁶ *Ibid.*

¹⁰⁷ On issues of accountability raised by private contractors see, ‘Symposium: Private Military Contractors and International Law’, (2008) 19 *EJIL*; A. Faite, ‘Accountability of Private Contractors in Armed Contract: Implications under Humanitarian Law’, (2002) 4 *Defence Studies* 166.

the host state to include immunity for its personnel, and now often also for private contractors.¹⁰⁸

Humanitarian law's standards also seem inapposite to the type of accountability sought by local actors. As regards the use of force, humanitarian law authorizes the use of lethal force against enemy combatants and permits some margin of error with regard to the collateral killing of civilians. Military action involving large number of civilian casualties is legitimate, as long as the intention was to target enemy combatants, adequate planning and precautions were taken, and appropriate means used, even if large scale civilian loss of life results. However, as Hadden writes, where peacekeepers are responsible for civilian deaths the result 'will often be to cause a substantial reduction in the perceived legitimacy and acceptability of the international forces.'¹⁰⁹ Reliance on humanitarian law, which includes more scope for lawful killing than human rights law, undercuts the very concept of the political landscape as 'post-conflict.'

As regards the broader governance roles of international actors and violations of rights other than the right to life, again there is a mismatch between humanitarian law's rationale, assumptions and standards and the governance functions undertaken by third parties implementing contemporary transitions from conflict. For standards addressing the broader governance roles of third parties, one must look to humanitarian law's regulation of occupation. Geneva IV and the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907, regulate an occupation, regardless of whether it is legal or not. Recourse to the law of occupation, however, is not automatic for international administrators. As Ratner notes, UN missions have tended to assume the priority of the human rights framework of accountability, while state-led international administrations have tended to view humanitarian law as the governing framework.¹¹⁰ He argues that regime choice is more a 'default position' than a choice, determined by the nature of the third party. International administrations tend to be run by civilians and so assume the primacy of human rights law,

¹⁰⁸ UN Model Agreement between the United Nations and Member State contributing personnel and equipment to the United Nations peace-keeping operations (1991), UN Doc. A/46/185, Annex (1991); Hadden, *supra* n.101, at 109.

¹⁰⁹ Hadden, *supra* n.101 at 118.

¹¹⁰ S.R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', (2005) 16 *EJIL* 695, at 702-703.

while state interventions run by military personnel tend to automatically turn to humanitarian law.¹¹¹

Where humanitarian law is viewed as the appropriate framework there are further difficulties of fit, based on its lack of provision for a concept of ‘transformative occupation.’¹¹² The underlying rationale driving the standards is an attempt to prevent the illegality of acquiring territory by force.¹¹³ The law aims to protect the occupied state from being incorporated into the territory of the occupier. Therefore, ‘the watchword is the legal maintenance of the status quo while protecting the basic welfare of the population, pending a final disposition of territory, typically a withdrawal from it.’¹¹⁴ The difficulty for contemporary transitions is that rules designed to restrict an occupier’s capacity to reshape the state’s internal configuration also restrict third parties, whose implementation function under a peace agreement is precisely that of ‘transforming’ state structures. Geneva IV limits on occupiers preclude actions that peacekeepers undertake as a matter of practice, such as disapplying former laws, involvement in constitutional reform and associated substantive reform of political and legal institutions.¹¹⁵ The whole point of international implementation of contemporary transitions is to move away from the *status quo* associated with a war towards a situation in which the laws of war do not apply. International implementers aim to achieve this precisely by changing institutions and government by agreement. The assumptions and remit of the international humanitarian law of occupation and its modalities of accountability seem inapposite to the third party enforcement tasks of international organizations. This has led to alternative forms of legal authorization being sought post-conflict. In Iraq, for example, the move towards ending occupation led to UN SC resolutions being used to create extraordinary occupation powers, through using the argument that Geneva IV did not provide for the needs

¹¹¹ *Ibid.*

¹¹² A. Roberts, ‘Transformative Military Occupation: Applying the Law of War and Human Rights’, (2006) 100 *AJIL* 580.

¹¹³ *Ibid.*

¹¹⁴ Ratner, ‘Foreign Occupation’, *supra* n.110, at 700.

¹¹⁵ A brief glance at the opening Article 47 of Section III of Geneva IV on occupation illustrates the mismatch between regime and contemporary transition: Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

of a gradual transition, such as the need for occupiers to engage in domestic constitutional reform, or management of oil resources.¹¹⁶

A third difficulty in fitting humanitarian law to post-conflict pressures for accountability is that it appears to offer accountability of international actors to the ‘wrong’ people. Accountability for third party actions is contemplated to lie with the domestic legal mechanisms of the third party state, with little formal international machinery to force states to comply and no treaty monitoring mechanism.¹¹⁷ Whether use of force or other violations of rights are at issue, for local parties the perception, and mostly the reality, is that international actors have de facto immunity from the international norms that they promote locally.¹¹⁸ In short, there is a perceived ‘accountability gap’ between local populations and international implementer, which is not addressed by home state accountability in either principle or in practice.

The difficulty of fitting and applying either humanitarian law or human rights regime to the post-conflict tasks that third parties undertake again can be argued to be producing forms of regime merge and institutional innovation.

(iii) Regime merge? Post-conflict accountability pressures have forced attempts at new normative articulations. It can be argued that the hybrid international-domestic, war-no war, post-conflict environment prompts recourse to the provisions of both human rights and humanitarian law regimes. Again, this turn to both regimes is not a process of orderly harmonization with priority being given to the most appropriate *lex specialis* where standards cannot be reconciled. As Ratner, Roberts, and Stahn have all pointed out (from slightly different perspectives), the political context of post-conflict peace-building efforts points towards the need to view the laws of occupation and human rights law as, in some sense, a

¹¹⁶ SC Res. 1483 (2003); SC Res. 1511 (2004); SC Res. 1546 (2004). On the US justification for the need for these resolutions see, J. Bellinger, ‘Summary of Remarks available at State Department Legal Adviser Discusses U.S. Views on International Law, Security Council Powers under Chapter VII of the UN Charter’, (2005) 99 *AJIL* 891, at 892-893.

¹¹⁷ Ratner, ‘Foreign Occupation’, *supra* n.110, at 701. As Ratner notes, the international enforcement of state accountability is largely informal through lobbying, with only the Security Council or possibly the International Court of Justice being able to issue a binding directive to the state.

¹¹⁸ Hadden, *supra* n.101, at 112-113.

harmonised regime capable of servicing the needs of the contemporary transition.¹¹⁹ In practice, regime merge has involved an attempt to eclectically draw on the ‘spirit’ or ‘observance’ of the regimes as both offering relevant standards, but mediating the strict legal application of those standards so as to balance it with peace-building imperatives.¹²⁰ The attempt at formulating new normative guidance is a complex effort to apply different standards to different third party functions by applying different standards to different actors, or different standards to the same actors when exercising different functions. Normative and institutional innovation illustrates the ways in which ‘the spirit’ or ‘values’ of the regimes are invoked, rather than their strict application.

The search for accountability again reaches out to pluck from humanitarian law, human rights law, and criminal law, eclectically and often simultaneously. The point can be illustrated by a glance at some of the attempts at norm-development, aimed at filling the accountability gap left by the lack of fit of human rights and humanitarian law. In 1999, for example, the UN Secretary-General issued a Bulletin providing for the ‘Observance by United Nations forces of international humanitarian law.’¹²¹ This Bulletin sets out a subset of humanitarian law provisions that are to apply to UN forces in situations of conflict when ‘they are actively engaged therein as combatants’.¹²² It provides that, in Status of Forces Agreements concluded between the UN and a host state, the UN will undertake to ensure that the force ‘shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.’¹²³ However, violations of humanitarian law are to be prosecuted in the national courts of the contributing state.¹²⁴

¹¹⁹ Ratner does not aim to go so far as resolving the legal issues here, but states his purpose to be ‘to show how any doctrinal approach, legal or political, must take account of the commonalities of these missions’; Ratner, *supra* n.110, at 697.

¹²⁰ See for example, UN Model Agreement between the United Nations and Member State contributing personnel and equipment to the United Nations peace-keeping operations (1991), UN Doc. A/46/185, Annex (1991), Article 28, which provides that UN peacekeeping operations ‘shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel’.

¹²¹ UN Secretary-General’s Bulletin (6 August 1999), UN Doc. ST/SGB/1999/13 (1999) (a Code of ‘principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations’ command and control’, promulgated by then UN Secretary-General Kofi Annan. The Code does not provide for the direct application of humanitarian law, neither does it apply to peacekeeping forces under control other than that of the UN).

¹²² *Ibid.*, Section 1.1.

¹²³ *Ibid.*, Section 3.

¹²⁴ *Ibid.*, Section 4. Moreover it does not apply to peacekeeping organizations under the command and control of regional organizations, even when deployed under UN auspices.

In 2000, UNSC Resolution 1325 stated the UN's willingness to incorporate a 'gender perspective' into peacekeeping operations and urged the Secretary-General 'to ensure that, where appropriate, field operations include a gender component.'¹²⁵ In 2006, a UN Group of Legal Experts, established in response to concerns about sexual violence committed by peacekeepers, submitted a report to the General Assembly on the Accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations.¹²⁶ The Report's emphasis was on placing criminal law accountability with the host state, however, it also raised the possibility that hybrid domestic-international tribunals might be an innovative way to enable local justice, whilst responding to concerns of contributing states as to fair process and human rights protections for their staff.¹²⁷ The Report's attempt to plug accountability gaps remained limited as it only contemplated criminal accountability in cases such as sexual abuse, which by their nature fell outside the definition of 'acts performed in the exercise of their official functions', and contemplated an on-going backdrop of UN immunity.¹²⁸ The Expert Group appended a Draft Convention on the criminal accountability of UN officials and experts on mission, which included these limitations,¹²⁹ and also the limitation that the convention 'not apply to military personnel of national contingents assigned to the military component of a United Nations peacekeeping operation' and to other persons who status-of-forces agreements stated were 'under the exclusive jurisdiction of a State other than the host state.'¹³⁰

Regional organizations have also moved towards standard forms of codified application of international legal standards. For example, as Hadden documents, the European Union (EU) has developed a series of documents providing for general standards of conduct for all EU Missions,¹³¹ and guidelines for mainstreaming human rights and gender.¹³² These documents set out principles aimed at 'behavioural' standards of conduct and procedures for implementation, which include a requirement that provision be made for procedures of

¹²⁵ SC Res. 1325, *supra* n.26, at para. 5.

¹²⁶ Report of the Group of Legal Experts on ensuring accountability of United Nations Staff and experts on mission with respect to criminal acts committed in peacekeeping operations (2006), UN Doc. A/60/980 (2006).

¹²⁷ *Ibid.*, Section C.

¹²⁸ *Ibid.*, at para. 9.

¹²⁹ Article 18, Draft Convention on the Criminal Accountability of the United Nations Officials and Experts on Mission, GA Res. 61/29 (2011), provides that the Convention does not confer any right or impose any obligation which is 'inconsistent with any immunity of a UN official or expert unless the competent organ of the UN has waived such immunity...'

¹³⁰ *Ibid.*, Article 2(2).

¹³¹ Generic Standards of Behaviour for ESDP Operations (18 May 2005), CEU 8373/3/05 (2005).

¹³² Mainstreaming Human Rights in ESDP Missions (7 June 2006), CEU 10076/06 (2006); Conclusions on Promoting Gender Equality and Gender Mainstreaming in Crisis Management (13 November 2006).

complaints and reporting misconduct. While extending clarified standards for accountability to EU Missions, discipline remains to be provided for by ‘national authorities’, or heads of missions in the case of ‘contracted personnel’.

In addition to codification, attempts have been made to provide a level of accountability through the legal instruments that establish the peace operation. In particular, since the 1990s Status of Forces Agreements of the UN (SOFAs), while providing for immunity of troops from local state jurisdiction, have also begun to ‘contract’ some application of human rights and humanitarian law by including references in their provisions. Although these agreements reaffirm the immunity of UN Troops from local jurisdiction, they now also contain provision for ‘full respect for the principles and spirit of conventions concerning military personnel’,¹³³ However, at the EU level the EU Model Status of Forces and EU Model Status of Mission Agreements, promulgated initially in 2005, have been criticized for conferring a more extensive set of privileges and immunities on EU operations than current international practice warrants.¹³⁴ Neither do these Model Agreements include any provision, similar to that of the UN Model Code, providing for ‘full respect for the spirit and principles’ of humanitarian law.

Civilian missions can similarly be contracted or regulated into some form of human rights commitment. In Kosovo, UNMIK Regulation 1 provides that ‘all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground...’.¹³⁵ The limitation of these provisions is that it is somewhat unclear what respecting the ‘principles and spirit’ of the conventions, or ‘observing’ the standards, requires in practice and the mechanism for enforcement remains organizational disciplinary structures or home state

¹³³ Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda (5 November 1993), Article 7.

¹³⁴ Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State (20 July 2007), CEU 11894/07 (2007); Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA)(15 December 2008), CEU 17148/08 (2008) . See further, A. Sari, ‘Status of Forces and Status of Mission Agreements under the ESDP: THE EU’s Evolving Practice’, (2008)19 *EJIL* 67, commenting on largely similar 2005 drafts of the Model Agreements.

¹³⁵ UNMIK Regulation 1/1991 (25 July 1999), available at www.unmikonline.org.

criminal law jurisdiction, meaning that an accountability gap persists as regards local populations.¹³⁶

The pressure for direct accountability to local populations, however, has resulted in another route to third party accountability, through *ad hoc* institutional innovation. For example, an ombudsperson's office was set up in the UN Transitional Administration in East Timor (UNTAET) and the UN Interim Administration Mission in Kosovo (UNMIK), with the ombudsperson authorized to receive complaints against all the people employed by the UN, as well as against personnel working for local authorities, but with no enforcement mechanism.¹³⁷ In Kosovo, for example, UNMIK has taken steps in effect to 'accede' to human rights conventions through technical agreements with the Council of Europe that bring them within the supervision mechanisms of the Convention on the Prevention of Torture and the Framework Convention on the Protection of National Minorities.¹³⁸ These agreements state that UNMIK is to provide the relevant information through a specifically designed reporting mechanism and so bypass the difficulties of a technical accession to the Conventions. A further step towards accountability took place in 2006 when an international Human Rights Advisory Panel was established to 'examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of the human rights of [eight human rights conventions]'.¹³⁹ The crafting of the Advisory Panel's jurisdiction operates practically to incorporate the conventions domestically as regards UNMIK, by

¹³⁶ See further, R. Kolb, S. Vité and G. Porretto, *L'application Du Droit International Humanitaire Et Des Droits De L'homme Aux Organisations Internationales: Forces De Paix Et Administrations Civiles Transitoires*, (Brussels: Bruylant, 2005).

¹³⁷ See, F. Hampson, Administration of Justice, Rules of Law and Democracy, Working paper on the Accountability of International Personnel Taking Part in Peace Support Operations Submitted by Françoise Hampson, UN Doc. E/CN.4/Sub.2/2005/42 (2005), at para. 79. A local ombudsperson's office was also set up in other PSO missions, including in the United Nations Mission of Support in East Timor (UNMISSET).

¹³⁸ See, Agreement between the United Nations Interim Administration in Kosovo and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities (23 August 2004), available online at http://www.unhcr.org/refworld/country,...MULTILATERALTREATY_SRB...0.html. For full body of reports and Committee of Ministers resolutions pursuant to this agreement see, <http://www.cpt.coe.int/en/states/srb.htm>. Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on technical arrangements related to the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (23 August 2004), available online at http://www.unhcr.org/refworld/country,...MULTILATERALTREATY_SRB...0.html. See further, UNMIK, Press Release, UNMIK/PR/1216 (23 August 2004), available at www.unmikonline.org/press/2004/pressr/pr1216.pdf. These agreements expressly note in their preambles that they do not make UNMIK a 'party' to the treaty in question.

¹³⁹ See, UNMIK Regulation No 2006/12, On the Establishment of a Human Rights Advisory Panel, UNMIK/REG/2006/12 (2006), Chapter 1, Section 1.2, available at www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_12.pdf.

providing a domestic mechanism for their application.¹⁴⁰ Other *ad hoc* accountability mechanisms include a Personnel Conduct Committee in the United Nations Mission in Sierra Leone (UNAMSIL), and the Code of Conduct Committee in the United Nations Operation in Burundi. Both of these involved quasi-judicial mechanisms, with no enforcement arm, in response to well-publicised abuses.¹⁴¹

To this example an exceptional instance of host state accountability over international actors can be added.¹⁴² In Bosnia, the Dayton Peace Agreement (DPA) provision established the Office of the High Representative (OHR) as the ‘theatre of final authority’ for the entire agreements and these powers were subsequently extended to include the power to legislate when the domestic legislature was log-jammed.¹⁴³ The Bosnian Constitutional Court was subsequently repeatedly asked to consider the constitutionality of this OHR-promulgated legislation. In response the court asserted that ‘the mandate of the High Representative derives from Annex 10 of the [DPA], the relevant resolutions of the United Nations Security Council and the Bonn Declaration and that the mandate and the exercise of the mandate are not subject to the control of the Constitutional Court.’¹⁴⁴ Nevertheless, the Court simultaneously found that, ‘in so far as the High Representative intervenes into the legal system of Bosnia and Herzegovina, the laws enacted by him are, by their nature, domestic laws of Bosnia and Herzegovina, whose conformity with the Constitution of Bosnia and Herzegovina can be examined by the Constitutional Court.’¹⁴⁵ In this move, the constitutional court whose authority derives from one of the DPA’s sub-Annexes, empowered itself to

¹⁴⁰ The domestic incorporation had already happened through UNMIK Regulation No. 1001/9, Constitutional Framework for Provisional Self-government, UNMIK/REG/2001/9 (2001), Chapter 3, but appeared to apply only to the institutions of government listed in the constitution.

¹⁴¹ UNAMSIL, Press Release, Special Representative of the Secretary-General launches UNAMSIL Personnel Conduct Committee (26 August 2002), available at http://www.un.org/depts/oios/reports/a57_465.htm; PeaceWomen website, Burundi: UN Mission Sets up Units to Check Sexual Abuse (15 November 2004), <http://www.irinnews.org/report.aspx?reportid=52053> . See further, Hampson, Working Paper, *supra* n.136, at paras 80-81.

¹⁴² There is a partial example also in Northern Ireland, where the international Bloody Sunday Tribunal was repeatedly judicially reviewed by the English Court of Appeal so as to overturn venue and anonymity rulings of the Tribunal – raising the spectre of judicial review of the Tribunal’s final findings . For judgments see, <http://webarchive.nationalarchives.gov.uk/20101103103930/http://bloody-sunday-inquiry.org/rulings-and-judgments/index.html>.

¹⁴³ These powers were provided in the Peace Implementation Conference, Bonn Conclusions (10 December 1997), Article XI(2), available at www.ohr.int/pic/default.asp?content_id=5183.

¹⁴⁴ Twenty five Representatives of the People’s Assembly of Republika Srpska, U-26/01 (28 December 2001), at para. 13; see also, *Trideset i četiri poslanika Narodne skupštine Republike Srpske*, U-25/00 (23 March 2001); Eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, U-9/00 (3 November 2000); Eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina U-16/00 (2 February 2000), all available at <http://www.ccbh.ba/eng> .

¹⁴⁵ *Ibid.*

review the actions of the OHR who is the ‘final theatre of authority’ for the whole agreement – enforcement inversion whereby international actors are accountable through domestic institutions, rather than holding them to account. This innovation illustrates the capacity of peace agreement dilemmas of fit to reshape and reconstruct both the international, and indeed the domestic legal order, established by the peace agreement. The Bosnian Constitutional Court’s assumption of jurisdiction created a new relationship between international enforcer and domestic court (in this case itself an internationalized court), that reconfigured the third party role with respect to the peace agreement as treaty.

The above innovations illustrate the diversity of *ad hoc* attempts to respond to legitimacy crises which attempt to restore a connection between accountability mechanism and those whose rights are violated. The mechanisms both respond to the mix of international and domestic actors in the post-conflict state and further construct the post-conflict state as a space of hybrid governance characterized by transnational legal pluralism.

C Normative (in)stability

In the area of third party accountability the development of a *lex pacificatoria* is incomplete and *ad hoc*. Some of the difficulties of applying norms to international organization are a specific version of the broader difficulty with the accountability of international organizations under contemporary international law.¹⁴⁶ However, part of the difficulty in this context is the complex innovation, as regards the use of international third parties in peace settlement implementation tasks, and the difficulty international law-making has with catching up. Moreover, the task of ‘catching up’ is difficult as it is unlikely that one instrument could ever capture the full range of third parties and third party functions. Third parties include a range of other actors, private actors, judges, non-governmental organizations and donors, many of whom stand beyond international law’s easy reach and whose functions would require specifically tailored standards.¹⁴⁷

As a result, the very partial *lex pacificatoria* that has emerged can be conceived of as establishing a broad framework for accountability, namely that

¹⁴⁶ See generally, Klabbers, *supra* n.90, at 271-293; see also, reports of the International Law Commission, The Responsibility of International Organizations, available at www.un.org/law/ilc/.

¹⁴⁷ See for example, International Criminal Court, Code of Judicial Ethics, ICC-BD/02-01-05 (9 March 2005).

- international human rights law, humanitarian law, domestic constitutional law principles and the peace agreement itself, should all be understood to provide standards relevant to the accountability of third parties for their transitional actions, and that
- the more third party actors take on functions of governance, the more they should be accountable through international human rights commitments, however that accountability is achieved; and
- the longer third party actors undertake functions of governance, the more they should be accountable through domestic legal and political processes, however that accountability is achieved.

However, these principles must be drawn from across quite different existing legal standards, judgments and practices. A recent report by Hampson in 2005 illustrates the complexity of fashioning any accountability regime which would cut across the complexity of third party functions in this context. Tellingly, and perhaps ambiguously, entitled ‘Administration of Justice, Rule of Law and Democracy’ the report addresses the accountability of ‘international personnel’ taking part in peace support operations and aims to address a broad cross section of third party post-conflict roles: civilian and military personnel, international experts, international civil servants and others, such as the foreign staff of non-governmental organizations. It documents the complex, overlapping and chaotic types of immunity that pertain, and the equally complex, overlapping and chaotic range of constituencies to whom accountability is owed, all of which point to different venues for determining accountability.¹⁴⁸ As demonstrated above, in place of coherent formal legal accountability, soft law norms have been fashioned, providing for a range of different accountabilities for different types of actors, together with a set of *ad hoc* mechanisms providing for accountability of some actors in particular conflicts, or attempts to ‘contract’ such obligations into the legal instruments that ‘contract’ the international implementers into their tasks.

11 From *lex pacificatoria* to *jus post bellum*?

The attempt to apply international law to transitions from conflict has produced re-interpretations of key international legal doctrines which operate to re-shape what are understood to be the boundaries of international legal regimes and, indeed, international law

¹⁴⁸ Hampson, *supra* n.137.

itself. It has been argued throughout that the attempt to use international law to regulate peace agreement settlements and their implementation has required new accounts of how international law applies and what it demands. These new accounts have re-worked the scope and concerns of core international legal regimes, such as refugee law, human rights law and humanitarian law, so as to address the peculiar political dilemmas of transition. I have termed these new developments a new *lex pacificatoria* or ‘law of the peacemakers’.

In each case, however, any shift in international legal doctrine is partial and unstable and it is unclear whether the interpretations will be sustained, developed, or rolled back. It is that the new *lex* does not operate as a clear new legal regime establishing a set of legal obligations. Rather, it operates as a set of programmatic standards that provide guidance and, at times, go further in creating a normative expectation as to how the dilemmas of peace settlements can be resolved concomitantly with the requirements of international law.

The very partiality and instability of the *lex pacificatoria* means that it is tempting to view it as a *lex deferenda*, or ‘developing law’, whose natural trajectory would seem to be towards a more established, clearly legal, and fully worked out body of law capable of applying to transitions from conflict. Indeed, it has been argued that the types of developments outlined in this chapter point to a need for, and indeed the development of, a *jus post bellum* that extends and develops concepts of *jus ad bello* and *jus in bello* to provide a differentiated application of current legal regimes to the post-conflict phase; a ‘post-conflict needs’ argument has been central to driving discussion of a *jus post bellum* in recent years.¹⁴⁹ Lawyers dislike ‘quasi’ legal regimes, laws that do not contemplate or fit the facts, and radical legal pluralism, whereby it is constantly unclear which legal regime applies and has precedence. From this dislike derives an instinct to codify a *jus post bellum* that would regulate post-conflict dilemmas more clearly and more appropriately. If international law is now a law of regimes, and the post-conflict environment has no specific or appropriate regime, then, the argument runs, it now needs one.

A second driver for *jus post bellum* discourse, however, lies in the link between the waging of international armed conflict and a justificatory discourse rooted in the need to transform

¹⁴⁹ See for example, C. Stahn, “‘Jus ad Bellum’, ‘Jus in Bello’, ‘Jus post Bellum’? – Rethinking the Conception of the Law of Armed Force”, (2006) 17 *EJIL* 921.

the targeted state, in particular to prevent human rights abuses.¹⁵⁰ In the international armed conflicts of recent years, the legality of intervention has been disputed in many key cases, namely, Kosovo, Iraq, and Afghanistan. Against the challenge to legality, talk of a *jus post bellum* has been driven by attempts to link the practice of intervention to questions of the morality of war and just war theory. Where there are concerns over the legality of the war, arguments of the need for state transformation have been used either to bolster arguments of lawfulness or to suggest that ‘technical’ unlawfulness is overcome by a higher moral good. Both types of justification of armed intervention are undermined if the resultant state is not transformed. An illegal or unjust war can be legitimated retrospectively by achieving a measure of justice for the citizens of the country attacked, while a legal or just war it would seem should achieve a just result and can be understood as ‘unjust’ if it does not. To the extent the legal arguments are built on the case for humanitarian intervention, then the justice arguments and the legality arguments are connected.

Both these drivers indicate the practical political, legal, and moral reasons to reach for a distinctive *jus post bellum*. In conclusion, however, this chapter will address whether a new and distinct *jus post bellum* is either possible or desirable.

A Is a jus post bellum possible?

There are a number of practical problems impinging on whether a more fully fledged *jus post bellum* can be achieved. Firstly, it is unclear who would design and sign up to any new regime. Practices of international law-making are complex and typically protracted. Multi-lateral treaties involve complex and lengthy interstate negotiations that increasingly involve a host of other actors. There is no clear will or capacity to agree a new ‘fifth’ Geneva Convention or suchlike.

Secondly, even if the will did exist it is unlikely that consensus could be reached on the content of any new regime. Attempts to codify, even in soft law standards, some of the ‘new law’s’ current content have often foundered or produced very vague general principles. This failure owes more to the difficulty of the subject matter than to a lack of commitment or will. It is difficult to contain the consequence of any new standard, for how we understand the legal regimes to apply in less controversial settings. For example, will a new standard on

¹⁵⁰ *Ibid.*

transitional justice strengthen or water down existing human rights provision; how is an explicitly *transitional* justice to be articulated – as an exception to norms demanding accountability, or a differentiated application of them appropriate to the transitional state; what is the definition of ‘transition’ to which this ‘different’ form of justice would apply? Where soft law guidance currently exists it relates to one dimension of transition – refugees, transitional justice, gender, or third party accountability. It is difficult to imagine how the developing soft law of these disparate areas could be woven into a coherent, unified formal legal regime capable of regulating all aspects of transition.

Thirdly, while the pressure for a new international legal regime arises in part to escape the boundary dilemmas of existing regimes, a new regime would merely present a new set of ‘boundary’ dilemmas. To which types and scales of conflict would the new regime apply? The very scale of peace agreement practice illustrates the diverse conflict situations to which a *jus post bellum* might be argued to apply: fully fledged international wars, Protocol II non-international armed conflict, conflict governed by Common Article 3 of the Geneva Conventions and conflict that falls outside humanitarian law definitions altogether. When is a conflict the type that triggers a *jus post bellum*? If the categories of humanitarian and human rights law are to be merged, then the concept of the relevant ‘conflict’ also becomes more fluid. Are there any limits to what situation a new *jus post bellum* would apply in?: what type of conflict and political transition suffices? How and when is it decided that a situation is ‘post’-conflict? Peace settlements are often only partially implemented, with sporadic or sustained violence re-emerging. Post-settlement is not the same as ‘post-conflict’, although the literature often assumes that it is. Often, no consensus exists between any of the parties (including international third parties) as to whether a situation is ‘post-conflict’, or when a distinctive ‘transition’ begins and ends. Without a clear sense of such boundaries it is unclear when the differentiated standards of any *jus post bellum* would begin or end. The fluctuating nature of post-conflict violence indicates a difficulty in deciding when any new *jus post bellum* might apply.

B Is a jus post bellum desirable?

These practical problems prompt the question of whether a new ‘third-way’ post-conflict regime is desirable. It can be argued that the partial nature of the *lex pacificatoria* leaves vital room for negotiations. It can be argued that the consent of the parties to a conflict to new political and legal arrangements is vital to ending a conflict. Guidelines for what peace

agreements should include, therefore, may be more appropriate to enabling negotiated solutions, rather than using international law to require particular substantive outcomes. A broad sketching of the possible parameters of amnesty, exhortations to include women and ‘best practice’ guidance on the return of refugees and displaced persons leave some room for the parties to negotiate solutions with some flexibility. What is lost in the give and take may be gained in the commitment and ability to implement whatever is agreed. Binding international legal standards making detailed provision on what is required in each area would effectively operate to require a particular blueprint of any political deal, narrowing the parties’ room to manoeuvre. The more law specifies peace settlement terms, the less the parties are able to negotiate. Rather than guiding negotiations, a new regime would run the risk of effectively establishing legal pre-requisites for any end of the conflict.

More positively, the partially-formed state of the *lex pacificatoria* may assist and enable agreement to some normative framework for resolving conflicts. At present, the ‘new law’ of peacemakers operates as a holding device for disagreement over what law and conflict resolution requires and should require. For example, in the area of transitional justice, it holds together the idea that both accountability and amnesty are useful and permissible and some sense of where the line should be drawn between them. In the undefined middle space lie possibilities for negotiated settlement. As the area of transitional justice illustrates, a project of bringing ‘clarity’ to a *jus post bellum* almost inevitably involves excluding the middle ground, the search for which has driven the new developments. This middle ground – the only ground on which international actors can find agreement – is often the same middle ground that enables the parties to conflict to reach agreement.

A second danger to moving to a *jus post bellum* pertains. The new boundary disputes of a new *jus post bellum* regime create the possibility that, to the extent that a *jus post bellum* allows for an exceptional application of humanitarian or human rights law, this exceptionality would begin to creep through to all applications. The boundary disputes created by the category, in particular the difficulty of defining ‘post-conflict’ or ‘transition’, open up the possibility of attenuating human rights standards indefinitely, of using humanitarian law in times of peace and even a self-serving selective grab of international enforcers of enabling provisions, such as ‘administrative detention’, cut free from their overarching framework of accountability.

Third, whether the *jus post bellum* is viewed as a useful development of international law, will depend on what view is taken of the political import of any *jus post bellum*, with reference to the underlying justification for international law-making itself. The desirability and shape of any *jus post bellum* will depend on an account of the the current situating of international law as post-Westphalian and whether this situation is viewed positively or negatively.

If the project of international law is seen as having moved from the ‘international law’ of states to the ‘international law of regimes’, then the creation of a new regime may perhaps be understood as inevitable, but will be evaluated differently by those who think specialist regimes are a useful development of international law and those who are concerned about international law’s fragmentation. Beyond a general concern with fragmentation, sterner critiques of international law as the ‘law of regimes’ have been made, namely that understanding international law as a law of regimes repositions international lawyers as regime experts, and the politics and majesty of international law becomes lost in a series of inter-regime battles approached as technocratic projects.¹⁵¹ From this point of view, even the technocratic project of ‘fixing mess’ by clarifying post-conflict soft law as a *ius post bellum*, has a politics, being the politics of obscuring what is at stake in regime disputes of experts.¹⁵²

Alternatively, if the post-Westphalian project of international law is viewed as the international promotion, and even requirement, of liberal statehood, then one may view the current *lex pacificatoria*’s incomplete nature as a way-station towards achieving a clearer *jus post bellum*. However, the parameters of this *ius* will be set by the goal of achieving liberal democratic statehood. The project of embracing and building a new *jus post bellum* would, from this perspective, become very explicitly tied up with ensuring the emergence of a liberal democratic state and its components would be developed so as to ensure that such a state is delivered. Thus, some of the more fluid dimensions of the *lex pacificatoria* would be rejected in the codification, or tolerated only to the extent that they were expressly transitional. For example, power-sharing and group rights might be tolerated short-term, but with pressure to move towards individual elections, and rights and short term amnesties might be tolerated with a pressure to move to full human rights accountability for all. Moreover, a liberal

¹⁵¹ See for example, M. Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’, (2007) 70 *MLR* 1.

¹⁵² D. Kennedy ‘The Mystery of Global Governance’ in J.L. Dunoff, J.P. Tracthman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009).

international lawyer may be predisposed to reasserting the state as the only appropriate power-holder whose monopoly on the use of force must be bolstered to include the punishment of non-state actors all aimed at installing a standard set of legal and political institutions. However, if the development of liberal peace-making is viewed sceptically, these attempts may be resisted in favour of acknowledging and working with prevailing domestic power-structures – even when profoundly illiberal, while understanding the contingent nature of both state and non-state legitimacy. It can also be argued that such a project will inevitably result in any case. Case studies question whether what emerges from liberal peacemaking practices is in fact ‘liberal peace’ or a hybrid variant where top-down imposition of liberal institutions compete with bottom-up resistance operating to preserve indigenous power structures, which often subvert the liberal peace-making project.¹⁵³ The role of law, from this perspective, would perhaps be one of a limited ambition aimed at constructive engagement with the dynamic of imposition and resistance, rather than an attempt to require, ever more militarily forcibly, a move towards western liberal values and institutions.

Finally, there are those who may be sceptical of a *jus post bellum* on realist grounds, namely that its strong association with the justifications for international intervention mean that it cannot be separated from uni-polar attempts to pursue the interests of the United States and its allies, and that its development and application cannot resist being subverted to those ends. From this perspective, the move from existing regimes of human rights and humanitarian law may be viewed suspiciously as enabling their selective application in pursuit of the ambitions of the international hegemon. The enabling parts of regimes, for example, administrative detention, could be lifted free from wider constraints, for example, those preventing ‘transformative occupation’, with few new constraints being put in place by the new regime.

12 Conclusion

The term *lex pacificatoria* in its allusion to the *lex mercatoria* has a descriptive accuracy in its allusion to a body of law that operates somewhere between binding international law and not law. It also points to the contingent nature of the developments and the possibility both for further development, but also for retreat. It does not signal a fully fledged regime as a possible, or desirable, end point of current developments, as opposed to *jus post bellum*.

¹⁵³ R. Mac Ginty 'Hybrid Peace: The interaction between top down and bottom up peace', *Security Dialogue* (2010) 41 391.

Moreover, the term, in remaining open as to the future, does not automatically equate resolution of the indeterminacy of current regulation of post-conflict dilemmas by international law with being ‘a good thing’. Finally, the term *lex pacificatoria*, in contrast to the term *jus post bellum*, signals openness to the possibility that the useful purpose of international legal regulation of peace settlements is to set out broad normative parameters that support negotiated outcomes involving local parties to conflict, rather than to dictate outcomes.

For these reasons, I prefer the term *lex pacificatoria* as a way of capturing the current state of international law governing peace settlements and their implementation, not because it is important to have a battle over Latin terms, but because terms start to tell stories about the current state of play and the law’s future directions and ambitions. The *lex pacificatoria* acknowledges that international law may usefully be shaped by conflict resolution innovations, even as it attempts to shape settlement terms, and that it is important to understand the two-way nature of the interface.