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

Kristen E. Boon

Follow this and additional works at: https://digitalcommons.lmu.edu/ilr

Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.lmu.edu/ilr/vol31/iss1/4
Obligations of the New Occupier: The Contours of a Jus Post Bellum

BY KRISTEN E. BOON*

I. INTRODUCTION

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

* Associate Professor of Law, Seton Hall Law School. This is a revised version of a paper given at Loyola Law School on April 4, 2008. Thanks to Chris Borgen, Sasha Greenawalt, Phillip Moremen, Valerie Oosterveld, Nina Schrepfer, and Charles Sullivan for their very helpful comments, and to Aaron Duff and Labinot Berlajolli for their excellent research assistance.

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

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

Jus post bellum derives its name from two existing bodies of law: jus ad bellum and jus in bello, which are applicable, respectively, to the initiation of war and to conduct in war. These bodies of law have been codified in various legal instruments including the UN Charter, national military manuals, and the laws on armed conflict, such as the four Geneva Conventions of 1949 and their Additional Protocols. Yet with the exception of the law of belligerent occupation, neither jus ad bellum nor jus in bello provide much guidance on temporary interventions after war and before peace. The illusion that war and peace are absolute, constituting a binary system, has stymied the growth of legal principles in this transitional stage.

Georg Schwartzenberger noted this fact in 1948 when he wrote: "[T]he traditional system of international law is based on the distinction between the law of peace and the law of war. In the formative period of international law, thinkers were fully aware of the problems hidden behind this classification."

Distinct legal issues arise during the transitional period between the cessation of war and the establishment of a durable peace. Do those exercising temporary power have a right or an obligation to reform national laws and institutions? Is a new constitution required as part of the longer term peace process, and if so, how will ethnic, geographic, religious, and economic tensions be reconciled? Must natural resources be federalized or subject to international management schemes, particularly where they have contributed to conflict? Should international authorities protect housing, land, and property rights? Should victims of crimes...
committed during conflict be compensated, and if so, by whom? These questions are particularly salient where occupiers and International Organizations (IOs) have a transformative goal, i.e., where the object of the post-conflict intervention is to make violent societies peaceful by engaging in political reform and economic development.

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

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

---


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

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


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


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

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


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

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

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

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

The mismatch between the spirit of IHL applicable to belligerent occupation and the practice of contemporary occupiers is one of the central reasons why the law of occupation is criticized today. As Grant Harris writes: "The international law of occupation has become essentially irrelevant as a force that..."
Obligations of the New Occupier compels action by occupying powers. Occupants rarely comply with the letter or spirit of that body of law. As a result, the law of occupation's legal authority and status are uncertain.  

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


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

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


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

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

35. Only states, not International Organizations, are a “High Contracting Power,” as per the terms of the Conventions. See David J. Scheffer, Beyond Occupation Law, 97 AM. J. INT’L L. 842, 852 (2003); Fox, HUMANITARIAN OCCUPATION, supra note 1, at 222-30. Some scholars, however, argue that international humanitarian law should bind international organizations. See BENVENISTI, LAW OF OCCUPATION, supra note 12, at xvi; BLANK, supra note 30.
state under a belligerent occupation. Yet only the UN has so far acknowledged that it will respect the principles of IHL during its operations, while the IMF, the World Bank, and other organizations involved in post-conflict reconstruction have resisted on the basis that their mandates are limited to economic and financial objectives.

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

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


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

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

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

III. AD PACEM: A MODERN THEORY OF PEACE

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

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

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

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

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


46. See, e.g., Behrami and Saramati v. France, ECHR App. No. 71412/01, para. 20 (May 2, 2007) (discussing the difference between the positive and negative peace).
obligations that inure with the recognition and enforcement of economic and social rights, the establishment of a durable peace is widely perceived to include humanitarian aid, economic reconstruction, the provision of essential food and medical care, and even the creation of institutions to administer justice and address accountability for past atrocities.\textsuperscript{47} As the President of the Security Council stated, “peace is not only the absence of conflict, but that it requires a positive, dynamic, participatory process...”\textsuperscript{48}

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

\begin{itemize}
\item \textsuperscript{47} See id. See also W. Michael Reisman, Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics, 6 TUL. J. INT’L & COMP. L. 5, 16, 21-22 (1998) (defining “peace”).
\item \textsuperscript{49} The closest international organs have come to defining peace is to attempt to define aggression. The 1974 General Assembly Resolution on Aggression and the ICJ decisions in the Nicaragua and Corfu cases consider aggression to be the “use of armed force” by a state against the sovereignty of another state. Definition of Aggression, G.A. Res. 3314 (XXIX), art. 1, U.N. Doc. A/9890 (Dec. 14, 1974); Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 112 (June 27); Corfu Channel (U.K. v Alb.), 1949 I.C.J. 4, 28-30 (Apr. 9).
\item \textsuperscript{50} War no longer requires active combat. Consider for example, the Cold War, the war on terrorism, and the war between South Korea and North Korea—all examples of situations termed “war,” but in fact defined by the absence of active fighting. See Christopher Greenwood, The Concept of War in Modern International Law, 36 INT’L & COMP. L.Q. 283, 284-87 (1987); BLUM, supra note 6, at 8. See, e.g., L. OPPENHEIM, INTERNATIONAL LAW A TREATISE VOL. II WAR AND NEUTRALITY 56 (1906) (defining war as a “contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases”).
\end{itemize}
to resolve their disputes. Indeed, some of the most important work of the international community today involves *ad pacem* activities of peacebuilding and reconstruction.

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

Three alternatives have emerged to the conundrum thus exposed: (1) incorporate human rights norms into the law of occupation and the mandates of IOs in order to expand international human rights law (IHRL) protections; (2) use the UN Security Council’s exceptional powers to modify the law of occupation; (3) incorporate human rights norms into the mandates of IOs in order to expand IHRL protections.
occupation on a case-by-case basis; or (3) carve out a new category of law, a *jus post bellum*, to develop norms that will govern the formation of peace. I will briefly examine the first two approaches to demonstrate why human rights law and Security Council involvement are only partial solutions, and conclude by advocating for the third option of a *jus post bellum*, in which I draw upon the strengths of the first two alternatives.

IV. ALTERNATIVES TO THE LAW OF OCCUPATION IN TRANSITIONAL SITUATIONS

A. The Role of Human Rights

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

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

62. Id. at 872.
recent judicial decisions that find that IHL does not displace human rights law. The International Court of Justice (ICJ), the Inter-American Commission on Human Rights (IACHR), the European Commission on Human Rights (ECHR), the European Court of Human Rights (ECtHR), and the United Nations Human Rights Committee (HRC) have all acknowledged the application of IHRL to belligerent occupiers. In addition to these international courts, the House of Lords in England has recognized IHRL in extraterritorial occupations—specifically the occupation of Iraq. Nonetheless, others, most notably those within the U.S. government, have contended that international


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


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

69. See Al Skeini v. Sec’y of State for Def., [2004] EWHC 2911 (Admin), ¶¶ 287-88 (holding that the Convention did not apply to the actions of the British troops on patrol, but that it did apply to the individual detained in a British military prison).
human rights law has no application during belligerent occupations.\textsuperscript{70}

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

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

\textsuperscript{71} \textit{See supra} note 67 and accompany text.


\textsuperscript{73} \textit{See} Fox, \textit{Humanitarian Occupation, supra} note 1, at 122 (discussing the norms of physical integrity, equality and pluralism that are now seen to inform a government's obligations towards its citizens); \textit{Christine Bell, On the Law of Peace: Legal Aspects of Peace Agreements} 198 (2007) (discussing how human rights obligations in peace agreements inform and legitimize national constitutions).

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

\textsuperscript{75} White, \textit{supra} note 72, at 28-29; Roberts, \textit{Transformative Military Occupation, supra} note 24, at 601.

\textsuperscript{76} Roberts, \textit{Transformative Military Occupation, supra} note 24, at 601.
Human rights inform the contours of a modern peace in a myriad of ways. They create universally relevant standards for post-conflict reconstruction given their independent status and reach. They also contribute to a state’s legitimacy and stability, even if respect for human rights and good government are not requirements of statehood. Moreover, the obligation to respect and ensure international human rights standards has created a presumption with regard to applicable law; prior law is presumed to remain in force unless it is inconsistent with IHRL. It is no longer realistic to exclude human rights from occupation or nation-building, as they will set the stage for the order that follows. As such, human rights are vital to jus post bellum, but they are not in and of themselves sufficient, as shown below.

B. Security Council Resolutions in Post Bellum Situations

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

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

77. Id. at 466.
78. Crawford, supra note 55, at 131, 148 (noting that good government is not a criterion for statehood—violations of human rights do not call into question the State as such).
79. Shraga, supra note 12, at 488-89.
80. Security Council resolutions have this exceptional status by virtue of Article 103 of the UN Charter. U.N. Charter art. 103.
82. Harris, supra note 25, at 38.
foundational norms of a *jus post bellum*. Security Council Resolution 1483 acknowledged the status of the United States and the United Kingdom as occupying powers in Iraq, while creating some exceptions to the restrictions inherent in the law of occupation. For example, the Security Council overrode certain conservationist principles by authorizing economic reconstruction, legal reform, and the creation of a new representative government. The Security Council also promoted the welfare of the Iraqi people through the establishment of a Development Fund for Iraq, and it encouraged the entry of the World Bank and IMF into Iraq, enlisting their support and assistance in economic strategies.

In addition, the Council set standards for the safekeeping of cultural property, and made disarmament a priority for the occupying powers, consequently modifying and updating the law of occupation.

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

---


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


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

87. Harris, supra note 25.

88. WILDE, supra note 34; Alexander Orakhelashvili, *The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law*, 8 J. CONFLICT & SECURITY L. 307, 309 (2003) (quoting the Representative of France during a debate on Resolution 1483, who said that the broad authorities vested in the occupying powers are obligations *erga omnes*, in that they “are objective in nature; they objectively protect certain non-state transcendent interests and impose respective obligations on all states involved in occupation”).
national revenues. The Council’s involvement thus lent legitimacy and logistical assistance to the reconstruction exercise in Iraq, given its considerable expertise the field.

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

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

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

VI. \textit{Jus Post Bellum} as a Framework for Post-Conflict Reconstruction

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

\begin{itemize}
  \item \textsuperscript{96} Stefan Talmon, \textit{The Security Council as World Legislature}, 99 AM. J. INT'L L. 175, 189 (2005).
  \item \textsuperscript{97} See Zwanenburg, \textit{ supra} note 95, at 767-68 (because the extensive obligations placed on occupiers under Geneva IV are less than those contained in \textit{ad hoc} Security Council resolutions).
\end{itemize}
transformations that undercut self-determination or change the fabric of society.\(^9\)

A central challenge is to define the norms, obligations, and scope of a *jus post bellum*. *Jus post bellum* is potentially very broad if one includes all of the intermediate states between active conflict and durable peace.\(^{10}\) Scholars have suggested that *jus post bellum* should incorporate various norms applicable to war-to-peace transitions, including the right to reparations, fairness and representation in peace settlements, refugee return, the establishment of the rule of law, and criminal justice mechanisms for establishing accountability after war.\(^{10}\) In my view, however, a narrower frame is preferable. *Jus post bellum* should apply to the exercise of governmental and public powers by external entities such as IOs and foreign states. While this approach may exclude certain components of the general peacebuilding process, it will leave settled law in place on issues like the law of occupation, refugees, and international criminal law. A significant contribution of a *jus post bellum* would therefore be to fill existing gaps and establish a uniform legal regime to govern the exercise of public authority during transformative occupations and war-to-peace transitions. It would be broader than the traditional concept of belligerent occupation in a number of ways. First, it would apply to all actors exercising public authority, including IOs like the UN. Second, *jus post bellum* would go beyond the temporal scope of the law of occupation, by applying to transitions from war to peace beyond periods of effective control, so as to inform the many challenges that occur as peace is consolidated.\(^{10}\) Third, it would

---


\(^{10}\) See Stahn, *Jus Post Bellum*, supra note 53 at 344 (suggesting a case-by-case analysis, such as looking at the facts surrounding the end of hostilities or a Security Council resolution). On the difficult question of what an occupation begins and ends, see
provide parameters for the depth of intervention, in light of the right to self-determination.

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

A. Accountability

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

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


104. See id. at 143, 153.

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

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

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

108. Although Dinstein is right to note that occupation is based on coercion, and so “democracy is not of any functional relevance to the running of an occupied territory,” Dinstein, supra note 93, para. 80, there are limits to the exercise of this power, as a matter of law and morality. See Reed Brody, Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees 1, 7, 17, 87 (2005), available at http://hrw.org/reports/2005/us0405.
110. Gerhard Hafner, Accountability of International Organizations, 97 Am. Soc’y Int’l L. Proc. 236, 236 (2003) (stating that “accountability” is neither an expression of the common law nor the civil law, and thus has no accepted legal meaning).
principles could be put into practice by national courts, or by the Security Council itself, through the creation of expert review mechanisms, modeled on the World Bank’s Inspection Panel.\footnote{114} Accountability is to be distinguished from transparency in that the latter requires that affected constituents have access to information regarding the manner in which normative decisions are taken.\footnote{115} Transparency is not an accountability mechanism in and of itself because it does not possess the structural mutual obligations of an accountability model, and so is a necessary, but not a sufficient condition for accountability. Nonetheless, the provision of information through transparency mechanisms can promote the free flow of information, and strengthen responsiveness promoting practices, including competition, general political mechanisms, social practices and incentives.\footnote{116}

\section*{B. Good Economic Governance}

Good economic governance is a second pillar of \textit{jus post bellum}. Economic reconstruction is now a standard component of peacebuilding operations and occupations because poverty, mismanagement of natural resources, and food or currency crises can create conflict.\footnote{117} The connection between economic stability
and durable peace is well established. The economic dimensions of conflict (including the causes of war, the effects of spoilers like warlords and militias, and economic measures to combat corruption) are becoming central to contemporary concepts of collective security.

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


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


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


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

C. Stewardship

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

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

123. See discussion in Boon, Coining a New Jurisdiction, supra note 45, at 1032-33.
124. Fox, The Occupation of Iraq, supra note 83, at 29-43 (discussing the evolution of the mandate system, and the shift from governing for outside interests to governing for the best interests of the population itself).
125. See WILDE, supra note 34, at 318.
126. WILDE, supra note 34, at 356.
127. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 668, 668-69 (7th ed. 1996); Fox, The Occupation of Iraq, supra note 83, at 319.
129. DINSTEIN, supra note 93, para. 81 (noting that in practice, trusteeship has not worked).
required the Authority to “promote the welfare of the Iraqi people through the effective administration of the territory . . . .” CPA Order No. 2 stated that all assets of the Iraqi Ba’ath Party that had been transferred or acquired were subject to seizure by the CPA “on behalf and for the benefit of the Iraqi people.” As such, international protection of certain rights and goods, including the right to sovereignty over natural resources in the period preceding self-determination, continues to have purchase in post bellum interventions by states and IOs. Nonetheless, the scope of stewardship is limited; it must be of finite duration, be carefully delineated, and there must be opportunities to hold the power holder to account, through private rights of action or accountability mechanisms as defined above.

D. Proportionality

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

133. Franck, supra note 132, at 719.
VII. CONCLUSION

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

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

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

---

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

135. To the extent that interest exists in codifying new norms, it lies in the area of detention, and has arisen due to criticisms of the standards of treatment of detainees in
“Responsibility to Protect,” written by the International Commission on Intervention and State Sovereignty, emphasizes that modern interventions cannot end after military conflict and should instead contain a “responsibility to rebuild.” This obligation includes the responsibility to implement sustainable reconstruction and rehabilitation and to prevent the conditions which led to the conflict from repeating themselves. A second development of note is the creation of the Peacebuilding Commission in 2005. This UN organ has a mandate to integrate peacebuilding strategies from the outset of UN interventions and is emerging as a coordinating power dedicated to peacebuilding strategies that have a more representative basis than traditional UN activities. Finally, concerted efforts are underway to explore the limits of the Security Council’s Article 39 jurisdiction and to define the crime of aggression. Given the interrelated concepts of war and peace, clarification of the crime of aggression and the content of international security will add substance to the obligations of building a durable peace.


139. See, e.g., id.