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International humanitarian law, *jus post bellum* and transformative justice

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Abstract

*International law began as a discipline concerned with the goal of peace, seen as the ideal state of relations between States, focusing on the potential for peaceful settlement of disputes, arms control and disarmament, and the prevention of war. International humanitarian law (IHL) emerged as the first significant development in international law addressing issues of peace and security. The subsequent development of international criminal law (ICL) following World War II has enabled the criminal prosecution of war crimes (serious violations of IHL) as well as crimes against the peace, crimes against humanity and genocide. This article argues that IHL, as it was developed to regulate the conduct of war (*jus in bello*) as a means of preventing unnecessary suffering, should be considered as separate yet integrally linked to the pursuit of international criminal justice as part of transitional justice in the context of* jus post bellum*, defined as "the set of norms applicable at the end of armed conflict … with a view to establishing a sustainable peace". The article analyzes existing scholarship and emerging ideas about the relatively old yet underdeveloped concept of* jus post bellum*, and what this concept means in practice since the rapid increase in international interventions in peacebuilding*

and transitional justice in non-international armed conflicts. Applying the author's theory of transformative justice along with jus post bellum *principles to the case study example of Cambodia, the paper discusses the complexities, uncertainties and apparent contradictions of establishing a "just peace" that builds on, yet goes beyond, the intersecting norms and practices of IHL and ICL. The article concludes by proposing the need for a radical reconceptualization of* jus post bellum *in order to support a more sustainable, transformative and emancipatory peacebuilding agenda.*

Keywords: international law, *jus post bellum*, peacebuilding, transitional justice, transformative justice.

Introduction

International law began as a discipline concerned with the goal of peace, seen as the ideal state of relations between States ("Law not war!"), including the potential for peaceful settlement of disputes, arms control and disarmament, and the prevention of war. International humanitarian law (IHL) emerged as the first significant development in international law addressing issues of peace and security, focusing on the prevention of unnecessary suffering as part of the conduct of war. The evolution of international criminal law (ICL) following World War II provided a means of enforcing IHL through the criminal prosecution of war crimes as codified in the Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as crimes against the peace, crimes against humanity and genocide. This move towards individual accountability for mass atrocity crimes subsequently became entrenched as a key pillar in the new field of transitional justice, which also took on a more forward-looking approach to protecting human rights through democracy and the rule of law, with the ultimate goals of peace and reconciliation.

This article argues that IHL as it was initially created to regulate the collective conduct of war by States (*jus in bello*) should be considered as separate yet integrally linked to the pursuit of international criminal justice for individuals as part of transitional justice in the context of *jus post bellum*, defined as "the set of norms applicable at the end of armed conflict … with a view to establishing a sustainable peace". As such, *jus post bellum* cannot be regarded as part of IHL, as it should go beyond the intersecting norms of IHL and ICL to consider the complexities, uncertainties and apparent contradictions of building a "long-term just peace".[1] At the same time, IHL, along with ICL and international human rights law (IHRL), plays a critical role in clarifying the norms and standards of such a post-war peace with justice.[2]

1 Larry May and Elizabeth Edenberg, "Introduction", in Larry May and Elizabeth Edenberg (eds), *Just Post Bellum and Transitional Justice*, Cambridge University Press, Cambridge, 2013, p. 14. For a comprehensive review of *jus post bellum* theory and practice, see Carsten Stahn, Jennifer S. Easterday and Jens Iversen, *Jus post Bellum*, Oxford University Press, Oxford, 2014.

2 Whilst IHRL is undoubtedly important for building a post-war peace with justice through protecting civilians and developing good governance, this article is specifically concerned with the roles of IHL and ICL in providing justice through addressing past human rights violations as part of a *jus post*

This topic involves an investigation and interpretation of legal and moral norms and principles associated with war, peace, justice, transition and transformation, drawing on insights from multiple disciplines including international law, international relations, peace and conflict studies, philosophy and psychology.[3] As such, it offers a broader perspective than applying the rule of law in determining the purpose and principles of "justice after war", and delves into the ramifications of transformative perspectives in understanding what makes up a "just peace" – which can be seen as the common goal of both *jus post bellum* and transitional justice, as both are concerned with a process and outcome that apply justice norms and build a sustainable peace.[4]

The article analyzes existing scholarship and emerging ideas about the relatively old yet underdeveloped concept of *jus post bellum* and what it means in practice since the rapid increase in international interventions in peacebuilding and transitional justice. It draws especially on the work of Ruti Teitel and Larry May, who have been prominent in exploring the links between *jus post bellum* and transitional justice, whilst paying tribute to the original just war theorists Francisco de Vitoria and Hugo Grotius and the modern articulation of just war theory by Michael Walzer. My own work on theorizing transitional and transformative justice is used to complement that of Colleen Murphy, who has considered the links between *jus ad bellum*, *jus in bello* and transitional justice, and between *jus post bellum* and political reconciliation as a means of providing additional norms for assessing what constitutes a just peace.

The application of a model of transformative justice helps to illuminate the links between IHL, ICL and *jus post bellum* in theory and practice, drawing examples from my field research experience in a range of countries in sub-Saharan Africa and the Asia-Pacific region as well as other relevant cases. The article concludes by endorsing the need for a radical reconceptualization of *jus post bellum*, as proposed by Ruti Teitel, in order to support a more sustainable, transformative and emancipatory peacebuilding agenda.[5]

But first, the article begins with a review of the evolution of international criminal justice as the enforcement of IHL and the context for understanding and pursuing transitional justice for past mass human rights violations and peacebuilding for the future, before exploring *jus post bellum* and the potential contribution of a transformative approach to transitional justice in theory and practice. Integral to this discussion is concern for the perceived tensions that manifest in practice when deciding whether to prioritize peace or justice in the context of ending armed conflict, and how to envisage the pursuit of peace with

bellum. For further discussion of the central role of IHRL, see Nigel D. White, *Advanced Introduction to International Conflict and Security Law*, Edward Elgar, Cheltenham, 2014, pp. 115–119.

3 For a theological analysis of *jus post bellum*, see Mark J. Allman and Tobias L. Winright, *After the Smoke Clears: The Just War Tradition and Post War Justice*, Orbis, Maryknoll, NY, 2010.

4 L. May and E. Edenberg, above note 1.

5 Ruti G. Teitel, "Rethinking *Jus post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May", in Ruti G. Teitel, *Globalizing Transitional Justice: Contemporary Essays*, Oxford University Press, Oxford, 2014.

justice as required by *jus post bellum*. The case of Cambodia is used as an example of transitional justice in practice, considering the dilemmas of peace versus justice and assessing the application of *jus post bellum* principles.

From State responsibility to international individual criminal accountability

IHL, like international law more generally, is concerned with providing norms and standards for the conduct of States, and more specifically, the conduct of States, as well as non-State actors, during armed conflict. IHL holds States responsible for the actions of their nationals, and enforcement of the 1899 and 1907 Hague Conventions relied on States prosecuting their own nationals for crimes committed during wartime.[6] As Stephens and Wooden point out, even after the Nuremberg and Tokyo International Military Tribunals (IMTs) were set up to prosecute individuals for World War II war crimes (as well as crimes against humanity and crimes against the peace), the 1949 Geneva Conventions and their 1977 Additional Protocols did not include provisions for international individual criminal responsibility and instead placed the obligation on States to prosecute grave breaches of IHL in front of their domestic courts.[7] By contrast, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) did explicitly provide in Article VI for persons charged with genocide to be tried by an international penal tribunal as an alternative to a national tribunal.

It took the establishment by the United Nations (UN) Security Council of two *ad hoc* international tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) in 1994 – to further the nascent development of ICL in relation to international individual accountability for serious violations of IHL represented by the IMTs and Genocide Convention. As with the IMTs, the two *ad hoc* tribunals strengthened the pursuit of individual criminal responsibility by eliminating the defences of superior orders, command of law and act-of-State immunity.[8] The ICTY was given the power to prosecute war crimes in the form of grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity,[9] while the ICTR had authority to prosecute genocide, crimes against humanity and war crimes in the

6 Dale Stephens and Thomas Wooden, "War Crimes: Increasing Compliance with International Humanitarian Law through International Criminal Law?", in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London and New York, 2018, p. 109.

7 *Ibid.*, p. 110.

8 Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (ICTY Statute), Art. 7; Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (ICTR Statute), Art. 6. See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International law: Beyond the Nuremberg Legacy*, Clarendon Press, Oxford, 1997, p. 6.

9 ICTY Statute, above note 8, Arts 2–5.

form of serious violations of Article 3 common to the four Geneva Conventions and of Additional Protocol II (AP II).[10]

Serious violations of IHL, including but not limited to grave breaches of the Geneva Conventions and Additional Protocols, have generally been categorized as war crimes but were not specified as such in the statutes of the two *ad hoc* tribunals, the ICTY and ICTR.[11] The 1998 Rome Statute of the permanent International Criminal Court (ICC) subsequently codified a comprehensive list of war crimes for the first time, including violations of the laws and customs applicable to international and non-international armed conflict and taking into account developments in customary international law since the 1977 Additional Protocols.[12] The Rome Statute also expanded on the list of crimes against humanity codified by previous tribunals, including sexual crimes beyond rape, which were also, for the first time, defined as war crimes.[13] The ICC has jurisdiction to prosecute only "the most serious crimes of concern to the international community as a whole", including genocide (as defined in the Genocide Convention) and the crime of aggression (as later defined and included as an amendment to the Rome Statute in 2010), as well as war crimes and crimes against humanity.[14]

Leading up to and following the creation of the ICC, there have been a number of hybrid (or mixed) national/international tribunals and courts as well as national mechanisms set up to prosecute the international mass atrocity crimes of genocide, crimes against humanity and/or war crimes. These have included the hybrid Special Panels in East Timor, the international judges and prosecutors in Kosovo, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Iraqi Special Tribunal, the Special Tribunal for Lebanon and the Special Criminal Court in the Central African Republic.[15] International crimes can also be prosecuted under universal jurisdiction, such as the six cases brought by the French courts since 2014 against persons accused of committing crimes against humanity and genocide in Rwanda in 1994.[16] The ICC, meanwhile, with jurisdiction only over crimes committed since it began

10 ICTR Statute, above note 8, Arts 2–4.

11 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 85; D. Stephens and T. Wooden, above note 6, p. 113.

12 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 8. See Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, Cambridge, 2008, pp. 75–76; Andreas Zimmerman, "Article 5: Crimes within the Jurisdiction of the Court", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 22.

13 Rome Statute, above note 12, Arts 7, 8.

14 *Ibid.*, Arts 5–8*bis*.

15 Cesare P. R. Romano, Andre Nollkamper and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, Oxford, 2004; Richard J. Goldstone and Adam M. Smith, *International Judicial Institutions*, 2nd ed., Routledge, London and New York, 2015.

16 "Rwandan Doctor Given 24-Year Jail Sentence in France over 1994 Genocide", *Al Jazeera*, 20 December 2023, available at: www.aljazeera.com/news/2023/12/20/rwandan-doctor-given-24-year-jail-sentence-in-france-over-1994-genocide (all internet references were accessed in December 2024).

operations in 2002, has investigated sixteen different conflict situations[17] and issued fifty-five arrest warrants, with six cases concluded and reparations ordered for victims in Uganda, the Democratic Republic of the Congo (DRC) and Mali, as of October 2024.[18]

This emerging norm of international criminal prosecutions, named the "justice cascade" by Kathryn Sikkink,[19] has created a new set of challenges for States and international actors seeking to negotiate an end to armed conflict: the so-called "peace versus justice" dilemma. The existence of the ICC has sent an especially strong message that impunity for the perpetrators of mass atrocity crimes will no longer be accepted, and has thus posed a dilemma for peacemaking when parties to the conflict are under investigation by the ICC. In a number of cases, violence and atrocities were ongoing when the ICC commenced its investigations, most notably in the case against the leader of the Lord's Resistance Army (LRA), Joseph Kony, and his deputies, suspected of committing war crimes and crimes against humanity in Northern Uganda. The arrest warrant issued against Kony by the first ICC chief prosecutor, Luis Ocampo, caused particular controversy at the time because of the sensitive stage of the peace process and the fact that the only indictees were members of the LRA and not the Ugandan military.[20] This experience highlighted the developing debate about how much the legalities of justice can be isolated from the politics of peace in the operations of the ICC while at the same time recognizing that the two goals of peace and justice are integrally and inevitably related. This latter point was emphasized by the chief prosecutor, Fatou Bensouda, in her statement announcing the commencement of investigations into the situation of Palestine in March 2021:

> The ICC is not a panacea, but only seeks to discharge the responsibility that the international community has entrusted to it, which is to promote accountability for Rome Statute crimes, regardless of the perpetrator, in an effort to deter such crimes. … In the end, our central concern must be for the victims of crimes, both Palestinian and Israeli, arising from the long cycle of violence and insecurity that has caused deep suffering and despair on all sides. The Office [of the Prosecutor] is aware of the wider concern, respecting this Situation, for international peace and security. Through the creation of the ICC, States Parties recognised that atrocity crimes are "a threat to peace, security and wellbeing of the world", and resolved "to guarantee lasting respect for and

17 The sixteen conflict situations include nine from the African continent (Uganda, DRC, Central African Republic, Darfur/Sudan, Kenya, Libya, Cote d'Ivoire, Mali and Burundi) and seven from elsewhere (Georgia, Bangladesh/Myanmar, Afghanistan, Palestine, Philippines, Venezuela and Ukraine).

18 ICC, *The Court Today*, ICC-PIOS-TCT-01-143/24_Eng, 7 October 2024.

19 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, W. W. Norton, New York, 2011.

20 Chandra Lekha Sriram, "The International Criminal Court Africa Experiment", in Chandra Lekha Sriram and Suren Pillay (eds), *Peace versus Justice: The Dilemma of Transitional Justice in Africa*, University of KwaZulu-Natal Press, Scottsville, 2009, pp. 326–327; Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes", in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, London, 2008, pp. 14–16.

> the enforcement of international justice." The pursuit of peace and justice should be seen as mutually reinforcing imperatives.[21]

The creation of the *ad hoc* tribunals and the ICC has been premised on the assertion that such grave crimes threaten international peace and security, and that justice is therefore a critical preventive factor in restoring peace and security – but the relationship between peace and justice is far from straightforward in practice. The dilemma of peace versus justice remains a vexed question in political calculations and legal deliberations in the quest for peace agreements to end armed conflicts where atrocities have been committed, and the perceived tensions between peace and justice do not end there, at the point of peacemaking. They continue to play a role in peacebuilding as States grapple with the challenges of Statebuilding and the ongoing expectations of transitional justice, creating a moral dilemma for the pursuit of *jus post bellum*. The decision to pursue international criminal prosecutions for breaches of IHL could be at the expense of building peace and reconciliation, and conversely, if the choice is made to focus on reintegration and reconciliation through amnesties or other forms of transitional justice not including prosecutions, then the post-war peace may not satisfy *jus post bellum* requirements. As such, the extent of compliance with IHL during the conflict can affect the potential for building a sustainable peace with justice after the cessation of hostilities.

Cambodia case study – part 1

The negotiators of the 1991 Paris Peace Agreements to officially end the conflict in Cambodia decided that the inclusion of the Khmer Rouge in the negotiations took precedence over accountability for the crimes committed against the Cambodian population by the Khmer Rouge regime between 1975 and 1979. This effectively created a culture of impunity – a peace without justice – which led to many other smaller impunities in the absence of respect for the rule of law.[22] Eventually, international and local justice advocacy proved successful when the ECCC was established in 2005 as a hybrid tribunal to prosecute the surviving former senior leaders of the Khmer Rouge and those deemed "most responsible" for the atrocities. The first case commenced trial in Phnom Penh in February 2009, thirty years after the fall of the Khmer Rouge, and the final verdict for the third case was delivered in September 2022. In addition to being able to prosecute homicide, torture and religious persecution as defined in Cambodian domestic law, the ECCC was empowered to prosecute the international crimes of genocide, crimes against humanity and war crimes including crimes against cultural

21 ICC, "Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine", 3 March 2021, available at: www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine.

22 Wendy Lambourne, "Justice after Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia", *Genocide Studies and Prevention*, Vol. 8, No. 2, 2014, p. 29.

property.[23] In the end, only three trials were completed, in which the former head of the S-21 torture centre, Kaing Guek Eav (alias "Comrade Duch"), was found guilty of war crimes and crimes against humanity, and the two surviving former senior Khmer Rouge leaders, Nuon Chea and Khieu Samphan, were found guilty of war crimes, crimes against humanity and genocide.[24]

As my interviews in Cambodia at the time revealed, the indictments and commencement of trials represented not only the first experience of justice for the victims, but also the first time that they could experience a real reconciliation and feelings of relief and "peace in my heart".[25] The ECCC's creative and groundbreaking focus on victims being able to bring cases as civil parties and to claim moral and collective reparations has contributed to its potential to build a new peace with justice in Cambodia.[26] In practice, however, the impact of such victim participation, along with the tribunal's outreach programme, has been limited by political, logistical and resource constraints, despite the intended benefits of a hybrid court being located in Cambodia and thus being more accessible to those most affected.[27]

We will have to wait to assess the long-term legacy of the ECCC in terms of bringing a sense of justice, including respect for the rule of law, while at the same time supporting a sustainable peace. However, there is much we can learn in the meantime from this significant example of a sequential approach to peace followed by justice and what it tells us about meeting the requirements of *jus post bellum* through the application of ICL.

The following analysis will explore the broader concept of transitional justice and what it brings to our understanding of *jus post bellum*, going beyond the limitations of international criminal justice and considering more explicitly what it means to be seeking justice for the past at the same time as building peace and reconciliation for the future. We will then return to an assessment of the Cambodian case, applying *jus post bellum* principles in the light of transformative justice theory.

Transitional justice, peacebuilding and transformation

Whilst its origins can be traced to the beginnings of international criminal justice at Nuremberg and Tokyo after World War II, the term "transitional justice" was first

23 Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal*, UNSW Press, Sydney, 2005.
24 See the ECCC website, available at: https://www.eccc.gov.kh/en.
25 W. Lambourne, above note 22.
26 Christoph Sperfeldt, "Reparations at the Extraordinary Chambers in the Courts of Cambodia", in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill, Leiden, 2020.
27 By contrast, the two *ad hoc* international tribunals were located outside of their respective countries – the ICTY in The Hague and the ICTR in Arusha, Tanzania – and ICC trials are conducted in The Hague. John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, University of Michigan Press, Ann Arbor, MI, 2014; Wendy Lambourne, "Outreach, Inreach and Civil Society Participation in Transitional Justice", in Nicola Palmer, Phil Clark and Danielle Granville (eds), *Critical Perspectives in Transitional Justice*, Intersentia, Cambridge, 2012.

used with reference to the political transitions in Europe, South Africa and Latin America, where there was a need to deal with past human rights violations perpetrated by autocratic or authoritarian regimes which had been discredited, defeated or overthrown to make way for a new democratic government.[28] Common methods of dealing with the past, especially in post-communist Europe, included restitution and lustration, with the latter term referring to the removal from public office of those implicated in the perpetration of mass human rights violations.[29] In Latin America, as well as in South Africa, historical inquiries or truth commissions were created in order to uncover past violations and establish the truth of what had occurred in the country prior to the transition.[30] In order to enable a peaceful transition, amnesties were often granted, either blanket amnesties or conditional amnesties as in South Africa, where the Truth and Reconciliation Commission (TRC) pioneered a more forward-looking approach focusing on restorative justice rather than retributive justice through prosecutions.[31]

The development of international criminal justice documented in the previous section has contributed significantly to transitional justice, with the establishment of international, hybrid and domestic courts to prosecute those accused of mass atrocity crimes. In some countries, such as Sierra Leone, truth commissions have been established in conjunction with trials in order to further both justice and reconciliation. As an alternative to or accompanying these formal institutions, transitional justice has also been pursued through the application of Indigenous customary mechanisms such as the traditional *gacaca* system of community justice, which was adapted to deal with the crimes of the genocide in Rwanda alongside domestic prosecutions and the ICTR. *Gacaca* is an example of an approach that combines elements of restorative and retributive justice in a single mechanism.[32]

The UN definition of transitional justice provided by the former UN Secretary-General, Kofi Annan, in 2004 identifies the goals and methods of transitional justice, stating that the term covers

> the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with … individual prosecutions,

28 Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press, Washington, DC, 1995; Ruti G. Teitel, *Transitional Justice*, Oxford University Press, Oxford, 2000.

29 Melissa S. Williams and Rosemary Nagy, "Introduction", in Melissa S Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice*, New York University Press, New York, 2012.

30 Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., Routledge, New York and London, 2011.

31 Charles Villa-Vicencio, "Restorative Justice in Social Context: The South African Truth and Reconciliation Commission", in Neil J. Biggar (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Georgetown University Press, Washington, DC, 2001.

32 Wendy Lambourne, "Transitional Justice after Mass Violence: Reconciling Retributive and Restorative Justice", in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence*, Federation Press, Annandale, 2010.

> reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. … [Transitional justice necessitates] an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.[33]

Transitional justice as a field of practice has subsequently become standardized around four "essential and complementary" key pillars derived from the UN Principles to Combat Impunity, or Joinet Principles: prosecution initiatives (right to justice), truth-seeking processes (right to know), reparations programmes (right to reparation) and institutional reform (guarantees of non-recurrence).[34] These four key pillars were identified by the UN in 2010 as central to supporting transitional justice in countries seeking to build peace at the same time as addressing the legacies of mass human rights violations.[35]

Transitional justice is thus much broader than the concerns of IHL and application of ICL in the form of prosecutions; it should not be equated with the implementation of international criminal justice.[36] On the other hand, in moving beyond the context of democratic transition to become associated with peacebuilding after mass violence, transitional justice can be seen as having more in common with the concept of *jus post bellum*.

According to the UN, peacebuilding encompasses a wide range of political, developmental, humanitarian and human rights programmes and mechanisms designed to prevent the outbreak, recurrence or continuation of armed conflict.[37] Peacebuilding has short-term as well as long-term objectives aimed at ensuring sustainability in the security, political, economic and justice sectors. These objectives include the promotion of democracy and accountable governance, as well as sustainable development, the eradication of poverty, and respect for human rights and the rule of law.[38] The focus on peacebuilding thus encompasses the more traditional transitional justice goal of democracy, but also gives weight to other goals associated with development and human rights that contribute to building peace. Analyzing transitional justice in the context of peacebuilding thus can provide an insight into what may be required for a *jus post bellum*.

33 *Report of the UN Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, August 2004, paras 8, 25.

34 UN Economic and Social Council, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of the Perpetrators of Human Rights Violations (Civil and Political)*, UN Doc E/CN.4/Sub.2/1997/20, 26 June 1997; Swisspeace, *A Conceptual Framework for Dealing with the Past: Holism in Principle and Practice*, Bern, 2012.

35 *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, UN Doc. DPA/UNSG/2010-00904, 10 March 2010.

36 Wendy Lambourne, "The Idea of Transitional Justice: International Criminal Justice and Beyond", in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London and New York, 2018.

37 UN Security Council, "Statement by the President of the Security Council", UN Doc. S/PRST/2001/5, 20 February 2001.

38 *Ibid.*; Ho Won Jeong, *Peacebuilding in Postconflict Societies: Strategy and Process*, Lynne Rienner, Boulder, CO, 2005.

As I have argued elsewhere, however, imposing a model of transitional justice that prioritizes criminal justice undermines the ability of States and local communities to pursue other forms of justice that might be more compatible with the ultimate goals of peace and reconciliation highlighted in the above definition.[39] Colleen Murphy argues similarly, albeit from a different disciplinary perspective, that responses to wrongdoing in the context of transitional justice need to be "just in the sense of responding in an intrinsically fitting and appropriate manner to victims and perpetrators" in order to satisfy what she frames as the *jus in bello* analogue requirements.[40]

In terms of achieving reconciliation, international criminal justice can be seen as inadequate for a number of reasons, especially in the context of genocide or other situations where a significant proportion of the population has been involved directly or indirectly in the mass violation of human rights. These reasons include the emphasis on punishment or retributive justice, which excludes the perpetrator from society and offers no chance for reintegration, and the potential for reinforcement of the identities of "perpetrator" and "victim" rather than seeing all concerned as *survivors* who need to live together in close proximity and engage in the new polity as equal citizens.

Justice as part of peacebuilding may therefore be seen as something broader than ensuring criminal accountability, and as a process that goes beyond the short-term notion of a political transition. Transitional justice thus becomes part of a long-term process of transformation to support a comprehensive or holistic and sustainable peace, incorporating both the ending of armed conflict ("negative peace") and the building of a "positive peace" or "peace with justice".[41] As such, it equates to thinking of *jus post bellum* as addressing not only the justice of how wars end, but also how to prevent a recurrence through building peace and pursuing accountability.

Transitional justice in the context of building a positive peace suggests the need to include socio-economic and political justice, as well as legal justice that combats a culture of impunity and sets up structures to ensure ongoing respect for human rights and the rule of law. I have argued for a combination of retributive and restorative justice that would promote justice as well as reconciliation, along with symbolic justice experienced as a result of public apologies or the establishment of memorials.[42] Transitional justice therefore requires a transdisciplinary mindset and a holistic and comprehensive approach to societal as well as State transformation, incorporating insights and methods from multiple disciplinary perspectives and experiences which go beyond the dominant Western liberal "peace versus justice" paradigm. A narrow legal mindset, by contrast, limits our understanding of transitional justice both in

39 W. Lambourne, above note 36.
40 Colleen Murphy, *The Conceptual Foundations of Transitional Justice*, Cambridge University Press, Cambridge, 2017, p. 162.
41 Johan Galtung, "Violence, Peace and Peace Research", *Journal of Peace Research*, Vol. 6, No. 3, 1969.
42 Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence", *International Journal of Transitional Justice*, Vol. 3 No. 1, 2009.

theory and in practice and its ability to support peacebuilding and, by extension, a meaningful modern interpretation of *jus post bellum*.

The approach to transitional justice delineated here I have termed transformative justice which involves rethinking our focus away from "transition" as an interim, liminal stage that provides a bridge between the past and the future, and towards "transformation", which implies ongoing and long-term, sustainable processes embedded in society.[43] We therefore need to go beyond the domain of law and legal justice – undoubtedly important though it is – in order to understand how transitional justice can contribute to peacebuilding in a way that meets the justice needs of those most affected by violence and atrocities. As I have argued elsewhere based on the results of my field research interviews,[44] transformative justice involves recognizing and addressing the multiple justice needs and expectations of the local population in a way that draws on the various cultural approaches which coexist with the dominant Western world-view and practice – what I call the principles of localization and contextualization.[45] In terms of transformation, we therefore need to go further than Ruti Teitel does in her focus on the role of law in political transformation and how transitional justice can contribute to transforming societal norms in relation to constitutional and legal regimes.[46]

Colleen Murphy argues that the core challenge of transitional justice is how to "pursue and achieve societal transformation in a just manner", which she defines as the "transformation of relationships among citizens into relationships premised on reciprocal respect for agency".[47] As such, however, she frames these relationships as being governed by the rule of law, at the same time as requiring a certain level of trust and providing "genuine opportunities to shape the terms for interaction in the political, economic, and social arenas".[48] Her moral theorizing about transitional justice provides support for a number of principles in my model of transformative justice that are helpful for thinking about *jus post bellum*, including the importance of local participation and contextualization as well as seeing relational transformation along with structural and institutional reform as fundamental to political and socio-economic transformation.[49] Murphy also identifies holism, in the sense of a coordinated combination of responses, as an important principle, arguing that "no single kind of response to wrongdoing should be designed, implemented, or evaluated in isolation, but must take into account what other response(s) to wrongdoing are being pursued".[50]

43 *Ibid.*
44 Field research conducted in Rwanda (1998 and 2005), Cambodia (1999 and 2009), Timor Leste (2004) and Sierra Leone (2006 and 2016).
45 W. Lambourne, above note 42. For a critical assessment and analysis of engagement with local communities and civil society participation in transitional justice decisions, see also W. Lambourne, above note 27.
46 R. G. Teitel, above note 28.
47 C. Murphy, above note 40, p. 34.
48 *Ibid.*
49 *Ibid.*, pp. 21–37.
50 *Ibid.*, pp. 162, 191.

Culture plays an important mediating role in how people experience violence and atrocities and the potential for accepting "cultural variation in the form of appropriate or fitting responses to victims and perpetrators as well".[51] The application of internationalized Western concepts of individual criminal accountability focusing on retributive justice may not be as relevant or acceptable in a specific cultural context where community restorative justice processes might be more appropriate and meaningful. The imposition of such a standardized approach can be regarded as a form of neocolonialism that ignores local capacities and approaches to justice and reconciliation after armed conflict.[52] As I have argued elsewhere, learning from traditional customary practices that combine rather than separate justice and reconciliation, such as the *nahe biti* process in Timor Leste, can potentially assist in resolving the peace versus justice dilemma discussed earlier in this paper.[53]

In the following section, the concept of *jus post bellum* will be explored, taking into account this analysis of the transformative potential of transitional justice in the context of peacebuilding and integrating references to IHL and international criminal justice as particularly relevant to the origins of *jus post bellum*.

Jus post bellum

One of the founders of international law, Hugo Grotius, made early links between the rightful waging of war and the need for justice at the end of war: "those who waged war with illegal or wrongful intent would have to be held accountable for their actions".[54] However, it seems that the type of justice envisaged by Grotius in the early seventeenth century was not so much criminal accountability but about taking responsibility for reparations:

> [T]hose persons are bound to make restitution who have brought about the war …. [A]lso generals are responsible for the things which have been done while they were in command; and all the soldiers that have participated in some common act, as the burning of a city, are responsible for the total damage.[55]

Here Grotius is referring to responsibility for starting a war that does not meet the requirements of a just war as well as for damages caused as part of conducting war, hence making early connections between what constitutes *jus ad bellum*, *jus in bello* and *jus post bellum*.

51 *Ibid.*, pp. 170–171.
52 Line Engbo Gissel, "The Standardisation of Transitional Justice", *European Journal of International Relations*, Vol. 28 No. 4, 2022.
53 Wendy Lambourne, "Unfinished Business: The Commission for Reception, Truth and Reconciliation and Justice and Reconciliation in East Timor", in Lilian A. Barra and Steven D. Roper (eds), *The Development of Institutions of Human Rights: A Comparative Study*, Palgrave Macmillan, London, 2010.
54 Errol P. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort*, Edward Elgar, Cheltenham, 2010, p. 2.
55 *Ibid.*

In the following centuries, the primary focus of *jus post bellum* was indeed on providing reparations for war damages and the expectation of restoring things to a "putatively just or stable status quo ante",[56] rather than criminal accountability or a social transformation as envisaged as part of peacebuilding in the modern context. As outlined earlier in this paper, the development of IHL from the mid-nineteenth century was significant in codifying the laws of war (*jus in bello*) to protect the humanity of combatants and non-combatants, but criminal accountability for serious violations of what came to be known as war crimes and crimes against humanity had to wait another century until the Nuremberg and Tokyo tribunals following World War II. Horror at the destruction of war led to developments in relation to *jus ad bellum* with the Hague Peace Conferences of 1899 and 1907 and moves to end armed conflict as a legitimate activity of States except in self-defence (later reflected in the Covenant of the League of Nations created after World War I, and more definitively in the UN Charter of 1945). Criminal accountability for what were called "crimes against the peace" for those deemed responsible for starting the war in Europe and in the Pacific respectively was also included in the Nuremberg and Tokyo tribunals.

The lack of criminal accountability following World War I (along with the punishing reparations that Germany was required to pay) has been seen as a contributing factor in the rise of Hitler, his perpetration of World War II and the atrocities of the Holocaust in Europe. This lack of accountability included failing to hold the Ottoman Empire responsible for the crimes that it committed against the Armenian population, and not following through with the prosecution of Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties" and German military personnel for war crimes committed during World War I.[57] The lessons from this experience led directly to the Allies' resolve to prosecute after World War II, signalling a new focus of *jus post bellum* on criminal accountability in addition to reparations, albeit one that had to wait another half-century to be fully realized.

After the fall of the Berlin Wall and end of the Cold War in 1991, the newfound ability of the UN to pursue its mandate for the maintenance of international peace and security and the attainment of human rights led to a renewed capacity to implement international criminal justice, along with expanded peacekeeping and peacebuilding missions to help rebuild States torn apart by internal conflicts. These developments could be seen as signalling a new focus on the norms of *jus post bellum* in the wake of failed attempts to enforce IHL and the norms associated with *jus in bello*. Nigel White suggests that the need for a *jus post bellum* in the modern era can be attributed to the continued relevance of the law of armed conflict in mitigating the effects of warfare, including "[in] response to the specific needs of the post-conflict state".[58]

56 R. G. Teitel, above note 5, p. 140.
57 E. P. Mendes, above note 54, pp. 4–5.
58 N. D. White, above note 2, p. 106.

In a specific criticism of the development of international criminal accountability, Ruti Teitel asks, "How can individualized punishment address the systematic wrongs of war that is waged between collectivities?"[59] Colleen Murphy similarly points out that individual trials can hide the "complicity of ordinary citizens" and the "larger societal context in which the atrocities were planned, supported, and executed".[60] Part of the response to this concern lies in the establishment of truth commissions, which have the mandate and capacity to create a historical record of collective harms, to redirect the focus onto the groups and organizations responsible – including the government – and to make recommendations for reparations, institutional reform and other measures such as the creation of a national human rights commission to prevent recurrence in the future. Whilst truth commissions are a common response to wrongdoing in the context of transitional justice, it is unclear what role they might play in terms of the stricter conditions of *jus post bellum*. Walzer, for example, "seems to subsume *jus post bellum* considerations under *jus ad bellum*", meaning that our understanding of *jus post bellum* is a direct response to aggressive war and is limited to a focus on reparations to be paid by the aggressor State and/or criminal accountability for the crime of aggression.[61] There are also duties that follow when a war is just, as observed by Orend: "to preserve the justice of a war justly begun and justly fought".[62] As observed by Teitel, "the question of *jus ad bellum* – whether a war is unjust or just – evidently has ramifications for the duties of justice in the aftermath".[63]

In the relatively underdeveloped field of *jus post bellum* theory, Larry May has proposed and analyzed six *jus post bellum* normative principles or conditions drawing directly from just war principles relating to *jus ad bellum* and *jus in bello* and the sixteenth- and seventeenth-century writings of Francisco Vitoria and Hugo Grotius: retribution, reconciliation, rebuilding, restitution, reparations and proportionality.[64] As May and Edenberg note, three of these principles – retribution (prosecutions), reconciliation and reparations – are also mentioned in the 2004 UN definition of transitional justice.[65] Of the others, restitution is likely to be subsumed under reparations in the context of transitional justice, while rebuilding can be seen as equivalent to peacebuilding, which has developed as a separate concept and as one of the contexts in which transitional justice takes place. The sixth principle of proportionality is a just war principle not generally seen as relevant to transitional justice.

According to Teitel, the "notion of proportionality demands a consonance of purpose, means and consequences that straddles *jus ad bellum*, *jus in bello* and *jus*

59 R. G. Teitel, above note 5, p. 146.
60 C. Murphy, above note 40, p. 182.
61 R. G. Teitel, above note 5, p. 140.
62 Quoted in Colleen Murphy and Linda Radzik, "*Jus post Bellum* and Political Reconciliation", in L. May and E. Edenberg (eds), above note 1, p. 308.
63 R. G. Teitel, above note 5, p. 143.
64 Larry May, *After War Ends: A Philosophical Perspective*, Cambridge University Press, Cambridge, 2012.
65 L. May and E. Edenberg, above note 1.

post bellum".[66] Teitel discusses the principle of proportionality as it might apply to *jus post bellum* in terms of the extent to which justice in the form of criminal prosecutions might support or threaten the peace process. I would argue that justice is being implemented in the quest for peace, so therefore, when faced with the decision about whether or not to prosecute atrocity crimes, the concern for how it might impact on peacemaking or peacebuilding should prevail. The question of how to assess this potential impact is answered to some extent by applying *jus in bello* analogue moral requirements to *jus post bellum* which, according to Murphy, "are predicated on a recognition that the justice of responses to wrongdoing is not only a function of instrumental effectiveness in contributing to the *jus post bellum* aim of relational transformation".[67]

Murphy and Radzik propose a broader set of normative principles that go beyond the traditional just war principles of *jus ad bellum* and *jus in bello* to be applied in the context of *jus post bellum*.[68] They start by identifying three general aspects of *jus post bellum*: the justice of the transition from war to post-war; the justice of dealing with violations of *jus ad bellum* and *jus in bello* (including the possibility of other types of response beside criminal prosecutions); and the justice of post-war reconstruction (including whether to go beyond restoration to transformation), which is their main focus of analysis. They argue that in responding morally to the destruction of war, the principles of *jus post bellum* must go beyond the rights model of traditional just war thinking, and the needs claims of self-determination and humanitarianism, to focus on relationships in order to build a just peace.[69]

As part of understanding the rebuilding component of *jus post bellum*, I would argue that we need to consider the various types of justice that might be required for building peace in each specific case. The question then might become, how do we conceive of just means and outcomes of rebuilding the political institutions and structures necessary for political justice, the socio-economic structures and institutions for socio-economic justice, and the legal institutions and rule of law for legal justice? Murphy and Radzik's answer lies in the principles of political reconciliation and relational transformation that depend on the creation of reciprocal moral agency based on the rule of law, sufficient trust, and support for fundamental capabilities.[70] They explain how capabilities depend on relationships that "embody reciprocity and respect for mutual agency" and need to be restored because of the impact of violence on these capabilities, including the consequences of psychological trauma, physical injuries, reduced resources, insecurity and disruptions to education, health care and economic well-being.[71] This approach to *jus post bellum*, focusing on relational

66 R. G. Teitel, above note 5, p. 145.
67 C. Murphy, above note 40, p. 170.
68 C. Murphy and L. Radzik, above note 62.
69 *Ibid.*, p. 318.
70 "Capabilities refer to the genuine opportunities of individuals to achieve valuable doings and beings that are constitutive of well-being." *Ibid.*, p. 311, referencing the work of Amartya Sen and Martha Nussbaum.
71 C. Murphy and L. Radzik, above note 62, pp. 312–313.

transformation and the need for third-party intervention, can thus be seen as consistent with the evolving transformative and interventionist approaches to transitional justice and peacebuilding discussed earlier.

The Responsibility to Protect (R2P) doctrine first promulgated in 2001 provides some additional clues as to how we might conceive of *jus post bellum* in today's context. R2P was developed to prevent genocide, ethnic cleansing, war crimes and crimes against humanity, and it includes the responsibility of individual States to protect their populations from such atrocity crimes and of the international community to assist in this endeavour (responsibility to prevent), with the potential to intervene if a State is "manifestly failing" to protect its population from these crimes (responsibility to react).[72] While the application of R2P to preventing mass atrocities from occurring has been limited in practice, the doctrine also offers guidelines for the responsibility to rebuild. These include a wide range of post-intervention obligations relating to peacebuilding, security, development, and justice and reconciliation, with the statement that "if military intervention action is taken … there should be a genuine commitment to helping to rebuild a durable peace, and promoting good governance and sustainable development".[73] The responsibility to rebuild calls for the provision of "full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert".[74] It thus provides a modern example of linking just war principles with *jus post bellum*.

This new era of peacebuilding and global interventionism created very different circumstances for understanding the concept of *jus post bellum*, suggesting the need to take on a more flexible and forward-looking approach informed by the new field of transitional justice and ideas about transformative justice. The previously mentioned shift from a focus on democratic transitions to post-conflict peacebuilding as a context for transitional justice was highlighted by Ruti Teitel as one of a number of shifts in the context in which *jus post bellum* might be applied today.[75] Whilst these shifts have occurred in policies and practices, past peace and security paradigms and approaches to transitional justice and peacebuilding have also continued to prevail, making the context for understanding and applying *jus post bellum* principles even more complex.

These shifts have included:

1. a move away from aggressive inter-State wars as the norm to also include international and internal conflicts which may be driven by liberal, humanitarian motivations;
2. a move away from more conservative assumptions about restoring the situation *pre bellum* to a focus on more radical transformation to a different situation *post bellum*;

72 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.
73 *Ibid.*, para. 5.1.
74 *Ibid.*, p. XI.
75 R. G. Teitel, above note 5.

3. a move away from collective sanctions aimed at punishing an aggressor State to individualized punishment of private as well as State actors;
4. a focus on accountability for mass atrocity crimes shared between multiple warring parties who are treated equally in the application of ICL to replace experiences of victor's justice;
5. a focus on human rights and human security rather than simply a State-centric view of security as a motivation for war as well as an objective for peace;
6. a different vision of peace that goes beyond the ending and prevention of armed conflict (negative peace) to the building of a long-term sustainable (positive) peace that addresses the root causes of violence and mass atrocities;
7. developments in the legal means and obligation to pursue justice in the form of individual international criminal accountability for serious violations of IHL/mass atrocity crimes (war crimes, crimes against humanity and genocide) as well as the crime of aggression;
8. a widening of the range of types of justice seen as relevant for building peace and reconciliation, including but not limited to retributive, restorative, reparative and distributive justice;
9. a focus on attaining peace with justice that transcends the perceived dilemma of peace versus justice, even though it remains a challenge in practice; and
10. a greater recognition that armed conflict does not necessarily follow a linear path from *ad bellum* to *in bello* and *post bellum*, such that the language of *post bellum* may not be appropriate when violence is continuing at the same time as peacebuilding and justice seeking.

At the same time, there are multiple legal orders which may be applied *post bellum*, including human rights law as well as environmental law, refugee law, financial law and development law, which need to be taken into account when applying justice principles and pursuing a holistic approach to justice as part of building peace.[76]

There is a need to acknowledge the real tensions between peace and justice that will be experienced in trying to implement the normative principles and obligations of a *jus post bellum*. As argued by Grono and O'Brien, "[w]hile impunity for people who have committed the gravest acts of inhumanity is morally repugnant, sometimes doing a deal with perpetrators is unavoidable and necessary to prevent further conflict and suffering".[77] They detail examples where peace agreements were negotiated with perpetrators, as for example in Cambodia, as discussed earlier in this article. In such cases, the instrumental and moral considerations seem to favour the pursuit of peace, at least in the short term, especially where this seems to be consistent with the local context and victim priorities.

Shunzo Majima explains how the US occupiers of Japan following World War II chose to support the rehabilitation of Emperor Hirohito as a leader for peace and unity in Japan and to shield him from indictment for war crimes, and

76 *Ibid.*, pp. 143–144; N. D. White, above note 2, p. 121.
77 N. Grono and A. O'Brien, above note 20, p. 13.

asks whether this evasion of responsibility to hold the emperor accountable meant the occupation should be considered unjust because of the failure to satisfy the *jus post bellum* principle of retribution.[78] According to a perfectionist assessment, this would be the case. However, applying a holistic approach and considering the principle of proportionality, Majima concludes that the principle of retribution could be considered as at least partially satisfied because of the presumed greater benefits of avoiding a violent response from the Japanese people to the arrest of their emperor, and because others were held accountable at the Tokyo tribunal.[79] Furthermore, Majima argues that the US occupation satisfied the principle of rebuilding through its extensive economic support programme and human rights initiatives, including land reform, and that the decision not to pursue Japanese reparations, whilst failing to satisfy the *jus post bellum* principle of reparation, could be justified from a holistic perspective because of the motivation to avoid undermining Japan's economic recovery.[80] Using this example of a military victory and occupation of a defeated country considered responsible for an unjust war conducted using unjust means (violating *jus ad bellum* and *jus in bello* principles), Majima demonstrates how *jus post bellum* could be used to conclude that the peace was not unjust, even if not completely just.

Cambodia case study – part 2

Cambodia provides a more modern case study example which represents many of the changed circumstances identified earlier, where an internationally mediated peace agreement signalled the formal end of the conflict.[81] A UN peacekeeping mission, the UN Transitional Authority in Cambodia (UNTAC), was tasked with implementing the terms of the peace agreement, with peacebuilding activities gradually being passed over to the State of Cambodia. However, the peace process was taking place before the legal means and expectations for criminal accountability had taken hold in the post-Cold War "justice cascade", and hence there was less support for the normative focus on peace with justice that might be expected of a *jus post bellum*. The peace agreement also preceded the emergence of transitional justice as a field of practice, but it is clear that the aim was to support a political transition to democracy as a fundamental step towards a peaceful future for the country, thus making a break from its violent past – and mirroring the primary goals of transitional justice. This transition also coincided with the newfound emphasis on UN peacekeeping with expanded responsibilities that became part of the UN's emerging role in peacebuilding, making it an

78 Shunzo Majima, "Just Military Occupation? A Case Study of the American Occupation of Japan", in L. May and E. Edenberg (eds), above note 1.
79 *Ibid.*
80 *Ibid.*
81 For the purposes of this analysis I am ignoring the previous ten-year occupation by the Vietnamese, who invaded and militarily defeated the Khmer Rouge in January 1979; this occupation could be subject to a separate assessment in terms of *jus post bellum*.

interesting example for analyzing the application of *jus post bellum* principles with a transformative lens.

As previously noted, despite the evidence of mass human rights violations that could be classified as war crimes, crimes against humanity and genocide, the Paris Peace Agreements of 1991 ignored accountability in favour of including the Khmer Rouge in the peace negotiations. A *jus post bellum* perspective provides a window into the complexities of moral considerations underpinning the peace without justice that prevailed for another fifteen years. Was it a clear failure to satisfy the principle of retribution? My answer is a qualified "yes". The Khmer Rouge continued their guerrilla activities with impunity for another seven years before the organization was formally disbanded in 1998 after the death of Pol Pot and the defections of two other senior Khmer Rouge leaders. The government of Cambodia appeared to be following a path of reconciliation, offering amnesties to the former leaders. Applying proportionality principles, it could be argued that the moral and pragmatic considerations of enabling an unprecedented opportunity for peace outweighed the moral unacceptability of ignoring accountability for such mass atrocity crimes. On the other hand, evidence from my research interviews and from surveys conducted by various non-government organizations indicates that justice for the former Khmer Rouge leaders was a high priority for the Cambodian people, thereby suggesting that the peace might be seen as unjust.[82] This assessment is supported by observing the impact of this culture of impunity on Cambodian society, despite the greater alignment of the peacebuilding process with a just peace in some sectors, including governance and development, albeit with limited long-term impact.[83]

There was a strong focus on rebuilding, including institutional reform, with UNTAC assuming control of key sectors of the country's administration and organizing free and fair elections in May 1993, which led to a new Constitution and a new democratically elected government. The extremely high level of participation in the elections, with almost 90% of the population turning out to vote, provides strong support for a just peace assessment in the short term. In the long term, however, the promise of the democratization process faltered, with a coup that ended the shared power arrangements resulting from the elections, and a virtual one-party rule emerging to undermine any sense of political justice or reconciliation. There was no follow-through by the international community or the Cambodian government in pursuing the *jus post bellum* norms of good governance and political justice as part of a sustainable peace.

UN specialized agencies supported reconstruction and development, oversaw refugee repatriation and return, and supported the Cambodian government with human rights promotion and protection. However, unlike the case of the US rebuilding Japan, in Cambodia the failure to call for reparations or restitution could not be justified holistically by considering the international community's support for rebuilding as the Khmer Rouge were living separately in

82 W. Lambourne, above note 22.
83 T. Fawthrop and H. Jarvis, above note 23.

isolated enclaves in rural Cambodia, still fighting and unable to benefit from the UN's peacebuilding policies and programmes. As such, one might argue that the ordinary Khmer Rouge cadre were subject to a form of punishment as they continued to live in relative poverty, while the Khmer Rouge leaders who were most responsible were able to live in comparative freedom and comfort – at least until the establishment of the ECCC. So it seems that the peace was in some ways unjust but in other ways could also be seen as just, especially when considering the humanitarian grounding of *jus post bellum* as originally advocated by Grotius as contributing to an understanding of compassion affecting obligations relating to reparations and restitution.[84]

Applying a transformative justice lens and a holistic perspective to our understanding of *jus post bellum* in the modern era provides a means of assessing how the peacebuilding process has evolved over time and in relation to legal, political and socio-economic justice. This assessment has further taken into account Murphy's understanding of how issues of trust and the restoration of capabilities contribute to the relational transformation seen as necessary to support institutional transformation. There was a clear failure over time in Cambodia to rebuild a just peace as envisaged by Murphy and Radzik: "A just peace requires a social context in which agents can once again exercise their fundamental capabilities and trust in social, political, and economic institutions that model respect for agency."[85] On the other hand, in the longer term, the *jus post bellum* principles of retribution and reparation were supported through the creation of the ECCC, with its focus on accountability for the former Khmer Rouge leaders and the provision of moral and collective reparations that included memorialization and psychosocial support. Whilst it may be too soon to assess the legacy of the ECCC in terms of respect for the rule of law, the experience of Cambodia does provide an example of how *jus post bellum* might continue to be relevant as a normative framework after the identified transitional period.

Conclusion

A number of questions remain in relation to the appropriateness and usefulness of applying the concept of *jus post bellum* as guidance in a context where so much has changed and is continuing to change, or whether it would be more useful to focus on the more flexible concept of transitional justice as Ruti Teitel has argued. As noted by Teitel, "[j]ustice has gone from a prerogative of the victor, which needs restraining, to a shared international obligation", creating a radically different context for *jus post bellum*.[86] The above analysis of the case of Cambodia has started this process of assessing the value of *jus post bellum* in the modern era. Further studies are needed of more recent situations where even more of the

84 L. May and E. Edenberg, above note 1, p. 8.
85 C. Murphy and L. Radzik, above note 62, p. 316.
86 R. G. Teitel, above note 5, p. 145.

context factors have changed – addressing, for example, the issue of whether the US-led interventions in Iraq and Afghanistan created a more specific *jus post bellum* obligation on States to rebuild peace in the countries they contributed to destroying. More recently, the situation pertaining to Israel and Gaza raises the question of how *jus post bellum* principles might be applied in the aftermath if there is a return to the situation of a "victor which needs restraining"; a similar question could be asked in relation to the Russian Federation's international armed conflict with Ukraine. These are complex cases signalling a return to more inter-State use of force and less focus on the shared, international responsibility to rebuild.

As with transitional justice, *jus post bellum* has the potential to support the pursuit of justice in situations in which States are managing transitions from mass violence, either following a military victory or where there has been a peace agreement. However, transitional justice has also been applied in situations where States are taking steps to deal with a painful past even though there has been no political transition, such as in the context of post-colonial justice for Indigenous peoples in Canada and Australia.[87] Transitional justice is also being pursued in situations of ongoing conflict where mass atrocity crimes are being committed, again where there has been no transition. For example, the ICC has initiated investigations in a number of such situations, including most recently in relation to Ukraine. In both these types of situations, *jus post bellum* could not be applied, as neither of them represents a situation *post bellum* at the time of writing (October 2024).

On the other hand, *jus post bellum* creates an explicit normative link with IHL and just war theory which is absent from transitional justice. *Jus post bellum* can thus call on legal and moral principles connected with *jus ad bellum* and *jus in bello* as May and Edenberg have done, drawing on the writings of Vitoria and Grotius.[88] It is therefore much more clear and explicit that *jus post bellum* is concerned with how justice can serve the ultimate goal of peace, while the ultimate goal of transitional justice is open to interpretation, though it is more likely to favour justice over peace. May and Edenberg, for example, maintain that transitional justice and *jus post bellum* each have different goals directly related to the context in which each applies: while transitional justice is focused on "processes that lead to a less repressive, and more democratic, regime", *jus post bellum* is focused on "achieving an end to war and establishing of peace".[89] According to Murphy and Radzik, transitional justice is concerned with "how a community can transition to an ideal of democratic government", whether being undertaken in post-war or post-repression contexts, while *jus post bellum* is aimed towards a just peace that is not dependent on a move to democracy.[90] By contrast, in this paper and elsewhere, I identify the ultimate goals of transitional justice as being peace and

87 Sarah Maddison and Laura J. Shepherd, "Peacebuilding and the Postcolonial Politics of Transitional Justice", *Peacebuilding*, Vol. 2, No. 3, 2014.
88 L. May and E. Edenberg, above note 1, pp. 2–8.
89 *Ibid.*, p. 12.
90 C. Murphy and L. Radzik, above note 62, p. 305.

reconciliation, with democracy seen as one of a number of possible routes to support a peace with justice, similar to *jus post bellum*.[91] Meanwhile, the UN, as quoted earlier in this paper, and the International Center for Transitional Justice seem to put peace and democracy on an equal footing, with both goals being required for transitional justice, the context being a post-conflict or a post-repressive regime. Whatever the priority in theory or practice, scholars agree that both transitional justice and *jus post bellum* share the pursuit of a just peace or peace with justice.[92]

Reviewing the post-World War II case of the US occupation of Japan, and analyzing the international peacebuilding efforts in Cambodia fifty years later, has revealed some of the complexities of *jus post bellum* in different types of transitional contexts after a military victory and peace agreement respectively. It has also highlighted the impact of other aspects of a more modern context that supports the increasing significance of relational transformation to support institutional transformation – in other words, reinforcing the *jus ad bellum* and *jus in bello* focus on how interventions are implemented as being just as important, if not more important, than what those interventions achieve. In pursuing the fundamental *jus post bellum* goal of a just peace, combining IHL with transformative justice principles can help us understand more fully how to ensure that peace is perceived as just by those most affected in local communities as well as by the international community of legal, political and humanitarian theorists and practitioners supporting the implementation of that peace. This process involves building trust and restoring capabilities, applying principles of localization, contextualization and alternative cultural perspectives to decision-making about how to pursue justice and what to prioritize in a holistic approach recognizing the interconnections between democracy as a political justice goal and prosecutions as just one option for pursuing accountability, along with socio-economic justice needs and psychosocial justice to support relational transformation. This would entail a radical reconceptualization of *jus post bellum*, yet at the same time maintaining its essential ties to the guiding principles of IHL.

91 This analysis is not making any claims about whether democracy is necessary for peace, nor whether post-war transitions are likely to lead to either democracy or peace in practice.

92 L. May and E. Edenberg, above note 1.