JUS POST BELLUM À LA UNITED NATIONS? HUMAN RIGHTS, UN PEACE OPERATIONS, AND THE CREATION OF INTERNATIONAL LAW

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INTRODUCTION

For centuries, and to a great extent up until today, international law has been divided into the two distinct categories of *jus pacis* (laws of peace) and *jus in bello* (laws of war). Although the strict dividing line is

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softening, a general distinction is still one of the cornerstones of international law.[1] This also holds true for the applicability of human rights.[2] Hence, international law does not contain a specific legal regime for the somewhat grey area in the transition from war to peace—namely, the post-conflict phase. Instead, when the applicability of *jus in bello* ends, peacetime rights and obligations come back to the fore, including the full applicability of human rights law.

The legal framework applicable in post-conflict situations is not only relevant to countries emerging from conflict, but also for the United Nations (UN). Since the first peacekeeping operation in 1948,[3] UN peace operations have expanded continuously, making the UN "one of the largest providers of assistance in post-conflict situations around the globe."[4] The resulting influence of UN peace operations, not only on the ground, but also for the application and implementation of legal principles, as well as the further development of the normative framework governing such situations, calls for a closer examination of the extent to which the UN shapes the legal components applicable in post-conflict situations. This paper will focus on a particular aspect of this legal framework, human rights, and how their implementation by UN peace operations affects the law applied after conflicts.

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1 *E.g.*, Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, *in* JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM WAR TO PEACE 93, 99 (Carsten Stahn & Jann K. Kleffner eds., 2008) [hereinafter Stahn].

2 *See* Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119, 120 (2010) [hereinafter De Brabandere] (citing the International Court of Justice's advisory opinions in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 I.C.J. 136 (9 July); *Legality of the Threat or Use of Nuclear Weapons* 1996 I.C.J. 226, 238-40 (8 July), which confirmed the continued application of human rights during wartime, subject to certain limitations). *See also* U.N. Human Rights Comm., The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11. U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (confirming the complementary and inclusive character of both legal frameworks); *See also* Ralph Wilde, *The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA J. INT'L & COMP. L. 485, 489–491 (2005) (discussing the applicability of international human rights law in wartime).

3 *See* S.C. Res. 50, U.N. Doc. S/RES/801 (May 29, 1948) (establishing the United Nations Truce Supervision Organization (UNTSO)).

4 Nigel D. White & Dirk Klassen, *An Emerging Legal Regime?*, *in* THE UN, HUMAN RIGHTS AND POST CONFLICT SITUATIONS 1, at 1 (Nigel D. White & Dirk Klassen eds., 2005).

THE CONCEPT OF *JUS POST BELLUM*

From a doctrinal perspective, this paper subscribes to the view that the current bipolar order is in the process of change, leading to the acknowledgment of a third category of law specifically governing the post-conflict phase; that is, *jus post bellum.* Such a legal framework would complement the existing bodies of law applicable before and during war; namely *jus ad bellum* (laws on the legality of the use of armed force) and *jus in bello* (laws applicable during armed conflict). The concept of *jus post bellum* has its origins in the *just war theory*, going as far back as to Saint Augustine, and further elaborated upon by Thomas Aquinas, Hugo Grotius, and Immanuel Kant. It was again taken up by just war theorists at the turn of the millennium.[5] The idea of a category of law specifically suitable for and applicable in the post-conflict phase has gained currency recently in legal scholarship as well.[6] There has been—and still is—a certain amount of confusion and debate regarding the exact content of *jus post bellum*,[7] as well as its relationship to other legal concepts and how to delineate it from other legal categories.[8] A survey of international practice[9] can give a hint about nascent rules and principles, but apart from that, "there is no agreement

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[5] *See, e.g.*, MICHAEL WALZER, JUST AND UNJUST WARS (4th ed. 2006); BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE (2000). *See also* Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, MIL. L. REV., Winter 2005, at 116; Louis V. Iasiello, *Jus Post Bellum: The Moral Responsibilities of Victors in War*, NAVAL WAR C. REV., Summer/Autumn 2004, at 33.

[6] *See generally* Carsten Stahn, Jus ad bellum – Jus in bello . . . Jus post bellum: Towards a Tripartite Conception of Armed Conflict, (May 15, 2004) (paper presented at the ESIL Founding Conference) [hereinafter Stahn, Jus ad bellum], *available at* http://www.esil-sedi.eu/sites/default/files/Stahn2_0.PDF; Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 AM. U. INT'L L. REV. 311, 328 (2008); *See also* Stahn, *supra* note 1.

[7] *Compare* Inger Österdahl & Esther van Zadel, *What Will Jus Post Bellum Mean? Of New Wine and Old Bottles*, 14 J. CONFLICT & SECURITY L. 175 (2009) (presenting existing rules pertaining to *jus post bellum*), *and* Stahn, Jus ad bellum, *supra* note 6, *with* De Brabandere, *supra* note 2 (criticizing existing rules pertaining to *jus post bellum*).

[8] *See* Jens Iverson, Contrasting the Normative and Historical Foundations of Transitional Justice and *Jus Post Bellum* (Aug. 11, 2012) (working paper), *available at* http://ssrn.com/abstract=2127620 (delineating *jus post bellum* with respect to the concepts of Transnational Justice and International Criminal Law); *See also* Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations,"* 51 N.Y.L. SCH. L. REV., 496 (2006–2007) (describing the role of the rules on belligerent occupation within jus post bellum); Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 LOY. L.A. INT'L & COMP. L. REV. 57 (2009) (describing the rules on belligerent occupation within *jus post bellum*).

[9] *E.g.*, Stahn, Jus ad bellum, *supra* note 6.

on *canon* of *jus post bellum* principles."[10] In a nutshell, the quintessential aim of *jus post bellum* is to group together rules necessary for a sustainable transition from conflict to stable and lasting peace, thus regulating "how one gets from 'here' to 'there'."[11]

HUMAN RIGHTS OBLIGATIONS OF THE UN

As this paper focuses on the human rights aspects of UN peace operations, the starting point of the discussion is the fact that the application of human rights obligations to peace operations remains controversially debated.[12] To date, many details are still far from obvious, but there seems to be at least an emerging general consensus that UN peace operations can be held accountable for blatant violations of human rights law.[13] This has come up as a consequence of well-founded allegations of misconduct (i.e., sexual exploitation and abuse) by UN peacekeeping personnel in the past,[14] which has prompted an unequivocal reaction on the part of the UN.[15] In academic literature, accountability of

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[10] Stahn, *supra* note 1, at 107; *see also* BRIAN OREND, THE MORALITY OF WAR 185–214 (2d ed. 2013); Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384 (2004) (describing the just war theorists' view on the content of *jus post bellum*).

[11] Jann K. Kleffner, *Introduction: From Here to There. . .And the Law in the Middle*, *in* JUS POST BELLUM, *supra* note 1, at 1–2 [hereinafter Kleffner].

[12] *See, e.g.*, ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); Frédéric Mégret & Florian Hoffman, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314 (2003); Boris Kondoch, *Human Rights Law and UN Peace Operations in Post-conflict Situations*, *in* THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS, *supra* note 4, at 19; John Cerone, *Reasonable Measures in Unreasonable Circumstances: A Legal Responsibility Framework for Human Rights Violations in Post-conflict Territories under UN Administration*, *in* THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS, *supra* note 4, at 42.

[13] *See, e.g.*, Guglielmo Verdirame, *UN Accountability for Human Rights Violations in Post-conflict Situations*, *in* THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS, *supra* note 4, at 81; Annemarie Devereux, *Selective Universality? Human-Rights Accountability of the UN in Post-Conflict Operations*, *in* THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS 198 (Brett Bowden et al. eds., 2009); Matteo Tondini, *Putting an End to Human Rights Violations by Proxy: Accountability of International Organizations and Member States in the Framework of Jus Post Bellum*, *in* Stahn, *supra* note 1, at 187; Karen Kenny, *UN Accountability for its Human Rights Impact: Implementation through Participation*, *in* THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS, *supra* note 4, at 438.

[14] *See* S.C. Res. 1769, ¶ 16, U.N. Doc. S/RES/1769 (July 31, 2007); S.C. Res. 1565, ¶ 25, U.N. Doc. S/RES/1565 (Oct. 1, 2004) (responding to allegations of sexual exploitation in the Darfur and the Democratic Republic of the Congo).

[15] *See* U.N. Secretary-General, *U.N. Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, U.N.Doc. ST/SGB/2003/13 (Oct. 9, 2003); *See also Ten Rules Code of Personal Conduct for Blue Helmets*, UNITED NATIONS r. 4,

peacekeepers for human rights violations in the form of sexual misconduct is supported virtually unanimously.[16] Apart from this minimum consensus, however, there still exists an "unhelpful lack of clarity as to UN human rights obligations."[17] Open questions remain, for instance, concerning remedies,[18] procedures for making individual complaints,[19] and reparations mechanisms.[20] The present paper will not add yet another voice to the debate on human rights obligations of peace operations, but rather will focus on the effects of UN activity for human rights in the course of the development of a *jus post bellum* framework.

Against this theoretical backdrop, it will be argued that by referring to and working with human rights, the UN, through its peace operations, takes part in the formation of the rules applicable in the post-conflict phase. Part I will start by examining the extent to which the UN takes part in the creation of law in the sense of *jus post bellum*, before turning the focus of analysis to the mandates establishing peace operations. Part II will analyze (1) whether human rights generally form part of peace operations; (2) which genuine human rights measures (e.g., monitoring of human rights) and human rights-related activities (e.g., preparation of elections as implementation of civil and political rights)

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http://www.un.org/en/peacekeeping/documents/ten_in.pdf; *We are United Nations Peacekeepers*, UNITED NATIONS 3, http://www.un.org/en/peacekeeping/documents/un_in.pdf.

[16] *E.g.*, MARTEN ZWANENBURG, ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS (2005); John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469 (2001); Guglielmo Verdirame, *Compliance with Human Rights in UN Operations*, HUM. RTS. L. REV., 2002, at 265.

[17] Christine Bell, *Peace Settlements and International Law: From Lex Pacificatoria to Jus Post Bellum* 39 (Edinburgh School of Law Research Paper No. 2012/16, 2012), *available at* http://ssrn.com/abstract=2061706.

[18] Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113 (2010); Rosa Freedman, *UN Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. INT'L L. 239 (2014); GUGLIELMO VERDIRAME, THE UN AND HUMAN RIGHTS. WHO GUARDS THE GUARDIANS? (2011).

[19] *See* Christine Chinkin, Int'l Law Meeting Summary, The Kosovo Human Rights Advisory Panel (Jan. 26, 2012), http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/260112summary.pdf (The first independent individual complaints mechanism with the aim of investigating violations of international human rights law committed by or attributable to UN field operations is the Kosovo Human Rights Advisory Panel, established in 2006 with a mandate to investigate allegations of human rights violations by the United Nations Interim Administration in Kosovo ('UNMIK')).

[20] *See* Kirsten Schmalenbach, *Third Party Liability of International Organizations. A Study on Claim Settlement in the Course of Military Operations and International Administrations*, 10 INT'L. PEACEKEEPING: Y.B. INT'L PEACE OPERATIONS 33 (2005).

are undertaken; and (3) what relationship they have to other tasks of the mission. Subsequently, Part III will highlight the role of human rights in the general framework of *jus post bellum,* and as it is evolving in relation to UN activity, in particular. In the Conclusion, avenues of reform are identified for the purpose of making the emerging framework of *jus post bellum* more suitable to an effective implementation of human rights and the overall goal of sustainable peace. This article does not aim to give definite answers to all of the questions raised; rather, it intends to provide a fresh look at the debate of human rights in post-conflict situations

I. THE ROLE OF THE UN IN THE CREATION OF INTERNATIONAL LAW

Since its beginnings, UN peacekeeping has evolved from the originally narrow task of securing cease-fires to complex multi-dimensional endeavors with a variety of functions.[21] While traditional monitoring and observation is still part of the portfolio, peacekeepers additionally engage, inter alia, in the protection of civilians; assist in the disarmament, demobilization, and reintegration of former combatants (DDR); facilitate the political process and support of the organization of elections; establish or restore the rule of law; conduct security sector reform; and, last, but not least, promote and protect human rights.[22] Given the ever-growing number of UN peace operations and their level of influence in post-conflict situations, it is necessary to shed some light on the implications of these activities from a legal perspective, not least of all for the evolution of *jus post bellum.* Traditional legal doctrine recognizes three sources of international law, as laid down in Article 38(1) of the Statute of the International Court of Justice (ICJ):

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> (b) international custom, as evidence of a general practice accepted as law;

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[21] *What is Peacekeeping?*, UNITED NATIONS, http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml (last visited Nov. 1, 2014).

[22] *See* MARI KATAYANAGI, HUMAN RIGHTS FUNCTIONS OF UNITED NATIONS PEACEKEEPING OPERATIONS 37–61 (2002); *see also* ALEX J. BELLAMY & PAUL WILLIAMS, UNDERSTANDING PEACEKEEPING (2d ed. 2010). *see generally* UNITED NATIONS PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT (Ramesh Thakur & Albrecht Schnabel eds., 2001) (describing the evolution of peacekeeping, especially since the 1990s).

(c) the general principles of law recognized by civilized nations.[23]

Certainly, the UN, by including human rights in mandates of peace operations, does not create any of these three sources of law. However, current debate has moved on from this narrow perception of international law to include several additional ways of international law making.[24] For the present analysis, especially, the law-making powers of international organizations come to the fore.[25] In traditional legal doctrine, simply put, the law-making powers of international organizations depend on the law-making powers attributed to them in the constituent treaty by the member states establishing the organization.[26] Those attributed law-making powers limit the scope of action for international organizations and are only complemented by implied powers, allowing for additional activities necessary to implement the goals of the organization.[27] Law-making powers generally pertain to internal matters of the organization without any effect on other subjects of international law.[28] In the light of expanding activities of international organizations, however, it seems "that the traditional propositions no longer hold true."[29] Without plunging too much into the depths of these debates, this paper is premised on a broader understanding of law-making powers of international organizations. It will be argued in the following section that the UN indeed takes part in the creation of international law in post-conflict situations.

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[23] Statute of the International Court of Justice art. 38, para. 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

[24] *See* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW (2007); *see* Ingo Venzke, *Contemporary Theories and International Law-Making*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW-MAKING (Catherine Brölmann & Yannick Radi eds.) (forthcoming 2014) (succinctly summarizing the main contemporary legal theories and their views of international law-making).

[25] David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275 (1996).

[26] *E.g.*, C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (2nd ed. 2005).

[27] *See* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 92–95 (2005) [hereinafter ALVAREZ] (on the doctrine of implied powers); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY paras. 232–236 (5th rev. ed. 2011) [hereinafter SCHERMERS & BLOKKER]; Krzysztof Skubiszewski, *Implied powers of International Organizations*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 855 (Yoram Dinstein & Mala Tabory eds., 1989).

[28] ALVAREZ, *supra* note 27, at 120–21; JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2002) [hereinafter KLABBERS].

[29] Jan Wouters & Philip De Man, *International Organizations as Law-Makers* 6 (Leuven Centre for Global Governance Working Paper No. 21, 2009) [hereinafter Wouters & DeMan], *available at* http://dx.doi.org/10.2139/ssrn.1767888.

The Charter of the United Nations plays a prominant role in this endeavor. The Charter itself is "predicated on being part of post-conflict law,"[30] since it was with the Charter that international law "intended to ensure a transition from the scourge of the two World Wars"[31] to international peace and security. Before turning our attention to the practices established under the umbrella of the Charter, some light will be shed on the mandates of peace operations—namely, resolutions by the Security Council.

A. SINGLE COMPONENTS OF *JUS POST BELLUM*?—THE ROLE OF SECURITY COUNCIL RESOLUTIONS ESTABLISHING PEACE OPERATIONS

When issuing mandates for peace operations, the Security Council generally acts under Chapter VII of the UN Charter. Pursuant to article 25 of the UN Charter,[32] such decisions of the Security Council are binding on member states.[33] With respect to the human rights obligations provided for in the respective mission mandates, this means that the UN—and its member states—must strive to fulfill these obligations. Of course, given the complex distribution of powers and the relationship between troop-contributing countries, host states, and the UN as an organization, the attribution of responsibility is hardly easy to parse out. Consequently, a simple and generalizable judgment on the actual implementation of these human rights obligations—and, to an even greater extent, an assessment concerning a potential lack of implementation or even breach of obligation—is no trivial task. It is thus neither possible, nor appropriate, in a paper like this and will thus not be further pursued here.[34]

Instead, regarding the legal status of these mandates, the International Law Commission's (ILC) *Draft Articles on Responsibility*

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[30] Kleffner, *supra* note 11, at 2.

[31] *Id.*

[32] U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

[33] Anne Peters, *Article 25*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 787-854 (Brunno Simma et al. eds., 3d ed. 2012).

[34] Additional factors such as the difference between UN-mandated and UN-led operations, the issue of attribution, due diligence considerations, and immunities play a role. I attempt to shed light on some of these issues in my doctoral thesis.

of International Organizations (DARIO) offers valuable insight.[35] According to Article 2(b) of the DARIO, "decisions, resolutions and other acts of the international organization adopted in accordance with [the constituent] instruments" form part of the "rules of the organization."[36] As binding acts based on the constituent instrument, namely the Charter, they form part of international law.[37] In the recent past, the Security Council has, in several instances, set general rules for broader phenomena affecting peace and security. With respect to countering terrorism,[38] non-proliferation of weapons of mass-destruction,[39] women, peace and security,[40] and children in armed conflict,[41] the Security Council has taken on some form of legislative functioning,[42] which has spurred considerable debate in international legal scholarship.[43]

In the present case, however, the Security Council does not adopt generally applicable resolutions on a broad-ranging topic, nor does it

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[35] Rep. of the Int'l Law Comm'n, 63d Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/66/10 para. 87 [hereinafter Rep. Of the Int'l Law Comm'n]; GAOR, 66th Sess., Supp. No. 10 (2011) [hereinafter DARIO].

[36] *See* Christiane Ahlborn, *The Rules of International Organizations and the Law of International Responsibility*, 8 INT'L ORG. L. REV. 397, 398 (2011) [hereinafter Ahlborn] (discussing the role of these "rules of the organization").

[37] DARIO, *supra* note 35, at 97–98; *see also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 89–91 (July 22).

[38] *See, e.g.*, S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); *see, e.g.*, S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

[39] *See* S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004); *see also* S.C. Res. 1673, U.N. Doc. S/RES/1673 (Apr. 27, 2006); S.C. Res. 1810, U.N. Doc. S/RES/1810 (Apr. 25, 2008); S.C. Res. 1977, U.N. Doc. S/RES/1977 (Apr. 20, 2011); S.C. Res. 2055, U.N. Doc. S/RES/2055 (June 29, 2012).

[40] Note the landmark resolution. *See* S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000), and subsequent resolutions, S.C. Res. 1325, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009); S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010); S.C. Res. 2106, U.N. Doc. S/RES/2106 (June 24, 2013); S.C. Res. 2122, U.N. Doc. S/RES/2122 (Oct. 18, 2013) (exhibiting the most recent resolution on the topic).

[41] *See* S.C. Res. 2143, U.N. Doc. S/RES/2143 (Mar. 17, 2014) (the most recent on the this topic).

[42] Pleuger calls these activities "creating new international law and establishing itself as a new source of international law next to international customary and treaty law." Gunter Pleuger, *Climate Change as a Threat to International Peace – The Role of the UN Security Council*, *in* CLIMATE CHANGE AS A THREAT TO PEACE: IMPACTS ON CULTURAL HERITAGE AND CULTURAL DIVERSITY 33, at 34 (Sabine von Schorlemer & Sylvia Maus eds., 2014).

[43] Literature on this topic has become abundant. *See, e.g.*, Jan Wouters & Jed Odermatt, *Quis Custodiet Consilium Securitatis? Reflections on the Lawmaking Powers of the Security Council* (Leuven Centre for Global Governance Studies, Working Paper No. 109, June 2013), *available at* http://ssrn.com/abstract=2286208.

intend to set general standards of *jus post bellum*. In contrast, each and every mandate refers to a specific situation or to a particular threat to the peace, and has no direct effect on other current or future operations. Therefore, the mandates with their respective scopes and contents exist side-by-side individually. Their general importance as international law components of peace or *jus post bellum* can be largely ignored.

B. VISIONS OF HUMAN RIGHTS IN *JUS POST BELLUM*?—NON-BINDING DECISIONS AND DOCUMENTS

In addition to the mandates, over the last several years, the UN has produced a considerable number of other non-binding decisions and documents making reference to human rights in peace operations. These include numerous Secretary-General reports, in which the role of human rights as a normative framework and vital instrument are repeatedly brought forward.[44] However, these reports are, generally, of an advisory and/or explanatory character and thus cannot be considered decisions or rules of the organization potentially amounting to international law.[45] More to the point in this regard are decisions and documents of other organs such as the Department of Peacekeeping Operations (DPKO) or the Office of the High Commissioner on Human Rights (OHCHR). In one of its landmark documents, the Capstone Doctrine, DPKO underlines that "all United Nations entities have a responsibility to ensure that human rights are promoted and protected by and within their field operations."[46] This statement is repeated in the codes of conduct handed

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[44] *See* U.N. Secretary-General, *An Agenda for Peace: Preventive diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, U.N. Doc. A/47/277-S/24111 (June 17, 1992 U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, U.N. Doc. A/59/2005 (Mar. 21, 2005); U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Rep. of the Secretary-General*, ¶¶ 5–6, U.N. Doc. S/2004/616 (Aug. 23, 2004); U.N. Secretary-General, *No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations: Rep. of the Secretary-General*, ¶ 17, U.N. Doc. S/2001/394 (Apr. 20, 2001); U.N. Secretary-General, *Rep. of the Secretary-General to the Security Council on the protection of civilians in armed conflict*, ¶ 4, U.N. Doc. S/2004/431 (May 28, 2004).

[45] And exception might be Kofi Annan's Decision on "Human Rights in Integrated Missions," in which he points out that "All UN entities have a responsibility to ensure that human rights are promoted and protected through and within their operations in the field." S.C. Res. 2005/24, U.N. Doc. S/RES/2005/24 (Oct. 26, 2005).

[46] UNITED NATIONS DEP'T OF PEACEKEEPING OPERATIONS, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 27 (2008), *available at* http://pbpu.unlb.org/pbps/library/capstone_doctrine_eng.pdf.

out to blue helmets.[47] The 1999 Memorandum of Understanding between DPKO and OHCHR not only echoes this statement of responsibility, but also instructs human rights components[48] to promote an integrated approach to human rights work, while taking into account the special needs of vulnerable groups.[49] Irrespective of their binding force, these documents can be said to form "law produced by the system" which has, as White explains, the purpose to uphold, implement, and enforce the basic values of the UN embedded in the "law that frames the system"—that is, the Charter.[50]

In traditional legal doctrine, that law would be considered internal law, only governing relations within the organization, without any bearing on other subjects of international law.[51] Nowadays, however, "the line between internal and external law-making is fading."[52] To date, legal scholarship, including the ILC in its commentary to the DARIO, does not offer a definite answer to the legal nature of the rules of an international organization.[53]

What is proposed here, in agreement with Wouters, is "that most decisions of international organizations have an internal *and an external normative impact.*"[54] If one follows this argument, what is the external normative impact of the documents just mentioned? A recurring theme is the affirmation of the vital role of human rights in UN peace operations. Therefore, the documents are evidence of established consent about the need for including human rights in peace operations. At this point, a deeper look into the practice might clarify further the emergence of a rule on the inclusion of human rights in peace operations.

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[47] UNITED NATIONS DEP'T OF PEACEKEEPING OPERATIONS TRAINING UNIT, WE ARE UNITED NATIONS PEACEKEEPERS, *available at* http://www.un.org/en/peacekeeping/documents/un_in.pdf; UNITED NATIONS DEP'T OF PEACEKEEPING OPERATIONS TRAINING UNIT, TEN RULES CODE OF PERSONAL CONDUCT FOR BLUE HELMETS, r.5, *available at* http://www.un.org/en/peacekeeping/documents/ten_in.pdf.

[48] *See* THE HUMAN RIGHTS FIELD OPERATION: LAW THEORY AND PRACTICE (Michael O'Flaherty ed., 2007) (discussing the complex roles and functions of human rights components).

[49] *Memorandum of Understanding Between the Office of the High Commissioner for Human Rights and the Department of Peace-Keeping Operations*, *in* DOCUMENTS ON THE LAW OF UN PEACE OPERATIONS 181 (Bruce Oswald, Helen Durham & Adrian Bates eds., 2010) [hereinafter *Memorandum of Understanding*].

[50] NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 24–25 (2d ed. 2005).

[51] Ahlborn, *supra* note 36, at 435–36; SCHERMERS & BLOKKER, *supra* note 27, § 1196.

[52] Wouters & De Man, *supra* note 29, at 6.

[53] Rep. of the Int'l Law Comm'n, *supra* note 35, at 97–98.

[54] Wouters & De Man, *supra* note 29, at 8 (emphasis added).

C. FORMING *JUS POST BELLUM* THROUGH ACTION?—THE PRACTICE OF THE UN

The possibility of amending or further developing the rights and duties of an organization through practice has become undisputed amongst legal scholars.[55] It enables the organization to adapt to changing circumstances and allows for necessary evolution of the institution, without going beyond the rules originally enshrined in the constituent document and consented to by member states.[56] For the UN, Schachter eloquently phrased the need for the possibility of evolution of the Charter by stating that, "the Charter is surely not to be construed as a lease of land or an insurance policy, it is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future."[57] Already in 1949, the ICJ confirmed in its *Reparations for Injuries* Advisory Opinion that, "the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and *developed in practice.*"[58] Hence, it can be argued that the evolution of human rights in peace operations, which has led to their firm establishment as part of peace operations, mirrors an "established practice of the organization,"[59] and has thus become a rule of the organization. Taking it one step further, one could also argue that rules—for instance, on the scope and content of human rights aspects in peace operations—can equally be derived from practice, even in the absence of the adoption of formal acts introducing such rules.[60] On a similar note, it has been argued that practice of an international organization—especially, a universal one like

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[55] KLABBERS, *supra* note 28, at 66; *see also* Bardo Fassbender, *The United Nations Charter As Constitution of The International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 598 (1998); Louis B. Sohn, *The UN System as Authoritative Interpreter of its Law*, *in* 2 UNITED NATIONS LEGAL ORDER 169, 171–74 (Oscar Schachter & Christopher C. Joyner eds., 1995); *cf.* Vienna Convention on the Law of Treaties art. 31, para. 3(b), Jan. 27, 1980, 1155 U.N.T.S. 331 (acknowledging "subsequent practice in the application of the treaty" as source for treaty interpretation).

[56] *E.g.*, Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT'L L.J. 1609, 1615 (1995) (pointing out that the invention of peacekeeping is "a shining example" of this possibility).

[57] Oscar Schachter, *Review of Kelsen: The Law of the United Nations*, 60 Yale L. J. 189, 193 (1951) (book review).

[58] Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, at 180 (Apr. 11) (emphasis by author).

[59] Rep. of the Int'l Law Comm'n, *supra* note 35, at 52 (Art. 2(b) Draft Articles).

[60] *See* PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 455–56 (5th ed. 2001).

the UN—could be regarded as indicative of state practice. As such, it "could potentially be seen as revealing norms of customary international law, and will then also become applicable to non-State parties."[61]

Critics of such claims would argue that the design of peace operations does not follow a blue print, but is decided on a case-by-case basis. It is more than likely that the Security Council—as well as organs and entities involved in the preparation of the resolution—act on a fully individual basis, without any intention of creating a new rule. Nevertheless, the practice is considerable and has been consistent enough over the last several years to create an expectation that the UN will follow an established pattern of human rights inclusion in peace operations. According to the principle of *estoppel*, the UN is not allowed to act in such a way, so as to contradict reasonable expectations of hitherto established practice.[62] Therefore, the practice of UN post-conflict activity in the realm of human rights can be said to be pointing at the development of a new rule of international law in this respect.

II. IMPLEMENTATION OF HUMAN RIGHTS BY UN PEACE OPERATIONS

Having established that UN activity does have some impact on the creation of international law; the nature of its effect in the evolving realm of *jus post bellum* must be scrutinized. The first time human rights provisions were included in the mandate of a peacekeeping operation was the United Nations Observer Mission in El Salvador (UNOSAL), established in 1991.[63] Human rights provisions are now found in the majority of mandates for the fourty-seven missions established since. Remarkably, all currently running missions established after 1991 include provisions on human rights.[64]

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[61] Wouters & De Man, *supra* note 29, at 25.

[62] *See* Tobias H. Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation*, 44 GERMAN Y.B. INT'L LAW 353, 369 (2001) (arguing along these lines regarding human rights obligations on the UN).

[63] *See* S.C. Res. 693, U.N. Doc. S/RES/693 (May 20, 1991).

[64] These nine missions are: United Nations Interim Administration Mission in Kosovo (UNMIK), United Nations Mission in Liberia (UNMIL), United Nations Operation in Côte d'Ivoire (UNOCI), United Nations Stabilization Mission in Haiti (MINUSTAH), African Union/United Nations Hybrid operation in Darfur (UNAMID), United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), United Nations Organization Interim Security Force for Abyei (UNISFA), United Nations Mission in the Republic of South Sudan (UNMISS), and United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).

In their 1999 Memorandum of Understanding, DPKO and OHCHR underline the importance of human rights with respect to "United Nations efforts to prevent conflicts, to maintain peace, and to assist in post-conflict reconstruction endeavours,"[65] and claim that "due attention to their human rights aspects is instrumental to the success of United Nations work in these areas."[66]Accordingly, human rights have evolved into a keystone of UN peacekeeping and now form "an integral part of the normative framework for United Nations peacekeeping operations."[67] In his 2005 decision, "Human Rights in Integrated Missions," then-Secretary General Kofi Annan outlined the general stance on human rights in peacekeeping operations:

> (a) All UN entities have a responsibility to ensure that human rights are promoted and protected through and within their operations in the field;
>
> (b) A commitment to human rights and the ability to give the necessary prominence to human rights should be important factors in the election of SRSGs/DRSGs, and in the monitoring of their performance, as well as that of the mission;
>
> (c) OHCHR, as "lead agency" on human rights issues, has a central role to play through the provision of expertise, guidance and support to human rights components. These components should discharge core human rights functions and help mainstream human rights across all mission activities.[68]

The last point does not come as a surprise since the idea of mainstreaming human rights throughout the entire UN system has been on the agenda of the organization for some time. Even though it remains a "considerable challenge,"[69] the concept itself is undisputed and has also

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[65] *Memorandum of Understanding*, *supra* note 49.

[66] *Id.*

[67] UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES, *supra* note 46 at 14 (Capstone Doctrine - DPKO's fundamental document on principles and guidelines of UN peacekeeping operations); *See also* WE ARE UNITED NATIONS PEACEKEEPERS, *supra* note 47 (explaining the codes of conduct given out to peacekeepers); TEN RULES CODE OF PERSONAL CONDUCT FOR BLUE HELMETS, *supra* note 47 (explaining the codes of conduct given out to peacekeepers).

[68] THE HUMAN RIGHTS FIELD OPERATION: LAW THEORY AND PRACTICE, *supra* note 48, at 9 (citing G.A. Dec. 2005/24).

[69] *See* U.N. Secretary-General, *Rep. of the Secretary-General on the work of the Organization*, ¶ 62, U.N. Doc. A/66/1 (July 26 2011); *see also* Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 450–501 (2009).

become a cornerstone of UN peace operations doctrine.[70] This means that human rights considerations play a role in all mission activities and on all levels. DPKO frames the goals of the human rights teams as threefold:

> to contribute to the protection and promotion of human rights through both immediate and long-term action;
>
> to empower the population to assert and claim their human rights;
>
> to enable State and other national institutions to implement their human rights obligations and uphold the rule of law.[71]

Given the double approach of mainstreaming human rights into all mission activities, on the one hand, and the permeation of mandates with human rights provisions on the other, it would seem that at least in peacekeeping doctrine, the promotion and protection of human rights enjoys high priority within UN peace operations. Whether this perception passes the test of reality is the focus of the next section.

A. THE SCOPE AND CONTENT OF HUMAN RIGHTS MANDATES

Naturally, there is no blueprint for mission set-up, but a brief analysis of the human rights provisions in current mandates shows that the majority of peace operations focus on three main human rights tasks: first, monitoring, investigating, and reporting human rights violations;[72] second, providing training, as well as institution and capacity building to local human rights institutions and host governments;[73] and third, supporting host governments in promoting and protecting human rights.[74] In some instances, against the background of the specific situation on the

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[70] *Human Rights*, UNITED NATIONS PEACEKEEPING, http://www.un.org/en/peacekeeping/issues/humanrights.shtml (last visited Nov. 1, 2014).

[71] *Id.*

[72] *E.g.*, S.C. Res. 2100, para. 15(d)(i), U.N. Doc. S/RES/2100 (Apr. 25, 2013); S.C. Res. 1542, para. 7.III(b), U.N. Doc. S/RES/1542 (Apr. 30, 2004); S.C. Res 1542, para. 10, U.N. Doc. S/RES/1542 (Apr. 30, 2004); S.C. Res. 1996, para. 3(b)(iii), U.N. Doc. S/RES/1996 (July 8, 2011); S.C. Res. 2112, para. 6(f), U.N. Doc. S/RES/2112 (July 30, 2013).

[73] *E.g.*, S.C. Res. 2100, *supra* note 72, ¶ 22; S.C. Res. 1769, para. 16, U.N. Doc. S/RES/1769 (July, 31 2007); S.C. Res. 1996, *supra* note 72, ¶ 3(c); S.C. Res. 2112, *supra* note 72, ¶ 6(d).

[74] *E.g.*, S.C. Res. 2100, *supra* note 73, ¶ 16(d)(iv); S.C. Res. 1542, *supra* note 72, ¶ 7.III(a); S.C. Res. 1769, *supra* note 73, ¶ 16; S.C. Res. 2112, *supra* note 72, ¶ 6(f); S.C. Res. 1509, para. 3(l), U.N. Doc. S/RES/1509 (Sept. 19, 2003).

ground, peace operations are also mandated to prevent or aid in the prevention of human rights violations and protection of civilians.[75]

Apart from the above tasks, the mandates generally do not mention substantive rights to be particularly observed. In fact, human rights components of peace operations follow an integrated approach, "paying due attention to civil, cultural, economic, political and social rights, including the right to development, and to the special needs of women, children, minorities, internally displaced persons, and other groups requiring special protection."[76] A considerable number of mandates particularly mention the protection of the rights of vulnerable groups, such as women and children, as well as refugees and displaced persons. As a second recurring theme, the need to take action against sexual exploitation and gender-based violence is highlighted in several mandates, not only as a consequence of sexual misconduct by peacekeepers,[77] but also since such actions have become a particularly appalling means of waging war in some conflicts.[78] Last, but not least, the goal of ending impunity and bringing perpetrators of human rights violations to justice has been incorporated into the majority of mandates.[79]

In contrast to that, no mandate makes explicit reference to economic, social, or cultural rights, or to the right to development. Obviously, the lack of an explicit reference does not preclude their implementation. In fact, the importance of their promotion and protection as recognized factors for sustainable peace is undisputed.[80] Nevertheless,

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[75] *E.g.*, S.C. Res. 2100, *supra* note 72, ¶¶ 16(d)(i), 26; S.C. Res. 1769, *supra* note 15, ¶¶ 15(a)(ii), 16; S.C. Res. 1925, para. 12, U.N. Doc. S/RES/1925 (May, 28 2010); S.C. Res. 2112, *supra* note 72, ¶ 6(f); S.C. Res. 1244, para. 11(j), U.N. Doc. S/RES/1244 (June 10, 1999).

[76] *Memorandum of Understanding*, *supra* note 49.

[77] *See* discussion *supra* section 1.2.

[78] These include DR Congo, but also Darfur, Cote d'Ivoire, Mali and most recently South Sudan. *See* UNMISS, CONFLICT IN SOUTH SUDAN: A HUMAN RIGHTS REPORT (2014). The Security Council stressed in Resolution 1820 of 19 June 2008 that "sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security." S.C. Res. 1820, para. 1, U.N. Doc S/RES/1820 (June 19, 2008); *see also* Christine Chinkin, *Gender-Based Crimes*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011).

[79] S.C. Res. 1542, *supra* note 72, ¶¶ 7.III(a), 8(a); S.C. Res. 1925, *supra* note 75, ¶ 12(c); S.C. Res. 1769, *supra* note 15, ¶ 15; S.C. Res. 2100, *supra* note 72, ¶ 13; S.C. Res. 2112, *supra* note 72, ¶ 6(f).

[80] Eberhard Pförtner, *Menschenrechte in Friedensmissionen – Erfahrungsbericht eines Rechtsberaterstabsoffiziers*, 3 J. OF INT'L L. OF PEACE AND ARMED CONFLICT 163, 168 (2005).

their protection does not seem to be perceived as important or pressing enough to be explicitly called for in the mandates. Instead, a closer look at other mission tasks even reinforces the impression that economic, social, and cultural rights receive little attention overall. While issues with a bearing on civil and political rights—such as the holding of elections, security sector reform, and the rule of law—are common features in mandates, merely one mandate makes reference to economic- and social rights-related issues: only the mandate of the African Union/United Nations Hybrid operation in Darfur (UNAMID) emphasizes the "need to focus, as appropriate, on developmental initiatives that will bring peace dividends on the ground in Darfur, including in particular, finalising preparations for reconstruction and development, return of IDPs to their villages, compensation and appropriate security arrangements."[81]

In addition, policy development and training activities of OHCHR show a drift towards privileging civil and political rights over economic, social, and cultural rights.[82] Thus, the tenor of the human rights support provided to peace operations reinforces the impression gained through analysis of the mandates. The importance of civil- and political-rights-related activities is not to be underestimated, and has without a doubt yielded some success. Even more so, there is no need to discuss the importance of the protection from physical harm—be it death, torture or inhumane treatment, or sexual abuse—in a conflict and post-conflict environment. Nevertheless, with a view to sustainable success of a peace operation and the establishment of lasting peace, the early implementation of economic, social, and cultural rights is vital and will tend to support the peace process.[83] Therefore, human rights activities should not be limited to the protection of civil and political rights, but should include the protection of economic, social, and cultural rights, as well.[84]

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[81] S.C. Res. 1769, *supra* note 15, ¶ 20.

[82] *See* Sylvia Maus, *Institutionalising Human Rights in UN Peacekeeping Operations: Critique of the Status quo – and a Call for a Human Rights Law Post Belum*, *in* MAINSTREAMING HUMAN SECURITY POLICIES, PROBLEMS, POTENTIAL 57, 74–75 (Wolfgang Benedek, et al. eds., 2010).

[83] *See* Hurst Hannum, *Peace versus Justice: Creating Rights as well as Order out of Chaos*, 13(4) INT'L PEACEKEEPING 588, 589 (2006).

[84] *See* Pförtner, *supra* note 80; *See also* Manfred Nowak, *The Role of Human Rights in Post-Conflict Peace Building in Bosnia and Herzegovina*, *in* SYMPOSIUM ON ROLE OF HUMAN RIGHTS IN POST-CONFLICT SITUATION IN SEE: SUMMARY REPORT, OCCASIONAL PAPER SERIES (Wolfgang Benedek & Gudrun Rabussay eds., 7th ed., 2002).

B. THE RELEVANCE OF HUMAN RIGHTS TASKS COMPARED TO OTHER PEACE OPERATION TASKS

It goes without saying that peace operations are not responsible for human rights issues only, but instead have a variety of different goals to fulfill. Mandates regularly list tasks such as monitoring of ceasefires, preparing and conducting elections, executing disarmament, demobilization and reintegration (DDR), facilitating national reconciliation, and advancing security sector reform and police reform. Human rights are only one item in this long list, and are more often than not the one standing at the bottom of the ladder. Legally speaking, the position of a task within a mandate has no bearing on the validity or priority of that task. Nevertheless, this positioning might indicate the perceived importance of human rights to peacekeeping missions.

More concretely, commentators have repeatedly pointed to the need for balancing considerations of security with those of human rights,[85] with the latter regularly getting the short end of the stick. This hardly comes as a surprise, given that peace operations are often—and increasingly—confronted with precarious security situations, which put both peacekeepers and the civilian population at risk.[86] As a consequence, UN peacekeeping has seen seminal new developments recently, including the establishment of the first-ever "offensive" combat force of the UN—namely, the Intervention Brigade for the Democratic Republic of the Congo.[87]

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[85] UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES, *supra* note 46, at 15; *See also* Michael Kelly, *The UN, security and human rights: achieving a winning balance*, *in* THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS 118, 119, 145 (Nigel D. White & Dirk Klaasen eds., 2005).

[86] Richard Gowan, *The Changing Face of Peace Operations: New Mandates and Risks for Peacekeeping and Political Missions*, *in* ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS 2013, 13, 15 (Center on International Cooperation ed., 2013). Already in the past, UN peace operations engaged in offensive operations, e.g. in Haiti and the DRC. U.N. Secretary-General, *Report on the United Nations Stabilization Mission in Haiti*, ¶ 25, U.N. Doc. S/2005/631 (Oct. 6, 2005) (Haiti); *see also* U.N. Secretary-General, *Rep. of the Secretary–General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, ¶¶ 16–17, U.N. Doc. S/2012/355 (May 23, 2012) (DRC); U.N. Secretary-General, *Rep. of the Secretary–General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, ¶ 37, U.N. Doc. S/2013/96 (Feb. 15, 2013) (DRC).

[87] SC Res. 2098, U.N. Doc. S/RES/2013, at 4 (Mar. 28, 2013); *see also* Press Release, Security Council, 'Intervention Brigade' Authorized as Security Council Grants Mandate Renewal, U.N. Press Release SC/10964, (Mar. 28, 2013), *available at* https://www.un.org/News/Press/docs/2013/sc10964.doc.htm. For a legal analysis of the mandate, including thoughts on human rights related issues, see Bruce 'Ossie' Oswald, *The Security Council and the Intervention Brigade: Some Legal Issues*, 17 ASIL INSIGHTS 15, *available at*

Generally speaking, there seems to be a change in peace operations following "a growing demand for peacekeepers to shift towards peace enforcement."[88] Notwithstanding the obvious paramountcy of physical security of both peacekeepers and the civilian population, security in a broader sense can only be guaranteed by overcoming a confrontation between security and human rights. Instead, the understanding of security has evolved, acknowledging that security—including post-conflict security—must account for human rights.[89] Consequently, robust action with the aim of delivering physical security must be balanced with material incentives for peace-building (broader security), in order to ensure an early humanitarian and economic recovery.[90]

C. PEACE OPERATIONS' HUMAN RIGHTS ACTIVITIES IN LIGHT OF THE OVERALL GOAL OF SUSTAINABLE PEACE

The above overview of human rights activities in UN peace operations has revealed three main findings. First, human rights have evolved, now representing a well-established component of every multi-dimensional peace operation. Second, from a substantive perspective, no specific human rights explicitly stand out for protection, while at the same time, there seems to be an emphasis on civil and political rights-related activities (e.g., focus on the rights of vulnerable groups, special attention to sexual and gender-based violence, and efforts for accountability). Third, human rights issues overall seem to occupy a lower ranking in relation to security interests.

What implications does this have for the stated goal of creating the conditions for sustainable peace? On a positive note, it would be surprising to see future missions that lacked any reference to human rights. Thus, the underlying assumption that human rights are crucial for sustainable peace has translated into the practice of peace operations.

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http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues.

[88] Bruce D. Jones & Richard Gowan, *Leadership and the Use of Force in Peace Operations: Principles for Peacekeeping and Political Missions*, *in* ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS 2013 23, 24 (Center on International Cooperation ed., Lynne Rienner 2013) [hereinafter Jones and Gowan].

[89] U.N. Secretary-General, *United Nations, Securing peace and development: the role of the United Nations in supporting security sector reform*, Rep. of the Secretary-General, ¶ 35, U.N. Doc A/62/659–S/2008/39 (Jan. 23, 2008).

[90] Jones & Gowan, *supra* note 88, at 28.

The other two findings lead to a more complex picture of potential consequences.

A broad consensus exists amongst academics and practitioners that creating sustainable peace does not stop with the mere cessation of actual fighting. Establishing peace requires a range of additional activities in order to prevent a relapse into conflict. This risk must not be underestimated, as more than half of all countries that emerge from armed conflict fall back into violence within five years.[91] Against this backdrop, the concept of positive peace has gained currency in the debate, even though an established definition for this concept is still missing.[92] Nevertheless, some characteristic elements, such as the promotion of justice, democracy, and economic and social well-being are regularly mentioned as forming part of positive peace.[93]

The UN, for its part, has also identified three objectives as relevant for successful peace building: (a) consolidating internal and external security, (b) strengthening political institutions and good governance, and (c) promoting economic and social rehabilitation and transformation.[94] While the first objective covers what can be summarized generally under the topic of negative peace (e.g., physical security provided by peacekeepers or military observers, security sector reform, DDR, mine clearance), the second objective has a strong civil- and political-rights impact. It focuses, inter alia, on strengthening national democratic institutions, capacity building for government and civil society, electoral assistance during all phases of an election process, and fighting against corruption. The third objective complements the peace building efforts by fostering conditions for economic and social development; the safe and sustainable return of refugees and displaced persons; national reconciliation; providing social services, including health, water, and sanitation; reintegration of former combatants and

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[91] PAUL COLLIER ET AL., BREAKING THE CONFLICT TRAP: CIVIL WAR AND DEVELOPMENT POLICY 83–88 (2003).

[92] For a short overview over the range between very narrow and very broad concepts, see Wolf Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 847 (2004).

[93] White, *supra* note 50, at 28–29. *See also* Nigel D. White, *Towards a Strategy for Human Rights Protection in Post-Conflict Situations*, *in* THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS 463–93 (N. D. White & D. Klaasen eds., 2005).

[94] U.N. Secretary-General, *No Exit Without Strategy: Security Council Decision- Making and the Closure or Transition of United Nations Peacekeeping Operations, Rep. of the Secretary-General*, ¶ 20, U.N. Doc. S/2001/394 (Apr. 20, 2001).

returning persons to society and work life; and reconstructing infrastructure.

In theory, we can determine an equal coexistence of all three objectives. The practice of peace operations, however, seems to speak a different language. First, in practice, security considerations seem to enjoy higher priority than considerations of human rights-related issues. Second, within all fields of activities, tasks to be subsumed under the promotion of economic and social rehabilitation and transformation (i.e., social and economic rights-related activities) hardly appear in the mandates and point to a lack of recognition of this last field.

III. *JUS POST BELLUM* À LA UNITED NATIONS?

After the above *tour d'horizon* about the scope and content of human rights activities of UN peace operations, the paper will now turn to the impact of these activities on the framework of *jus post bellum.*

A. THE ROLE OF HUMAN RIGHTS IN A *JUS POST BELLUM* FRAMEWORK IN GENERAL

Since it has become a truism that at least some form of respect for and protection of human rights plays a vital role for sustainable peace, it stands to reason that human rights law represents a crucial element of *jus post bellum.* The exact scope and content, however, remain without clear articulation so far. One particular aspect under debate is the question of the extraterritorial application of human rights norms—a question relevant in most post-conflict situations and, especially, with the presence of a foreign peace operation.[95] Generally speaking, it appears uncontested that basic, universally applicable human rights belong to the minimum set of rules of *jus post bellum* and form the

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[95] Scholarly commentary on this issue is abundant. *See* Theodor Meron, *Extraterritorialty of Human Rights Treaties,* 89 AM. J. INT'L L. 78, 78 (1995); Ralph Wilde, *Legal 'Black Hole'?: Extraterritorial state action and international treaty law on civil and political rights,* 26 MICH. J. INT'L. L. 739, 739 (2005). For civil and political rights, Wilde comes to the conclusion that "bodies representing leading international or quasi judicial institutions monitoring the application of international legal instruments on civil and political rights . . . all conclude that as a matter of principle this area of international human rights law should apply extraterritorially." Ralph Wilde, *Are Human Rights Norms Part of the Jus Post Bellum, and Should They Be?, in* JUS POST BELLUM, 163, 185 (Carsten Stahn & Jann K. Kleffner eds., 2008).

normative baseline of any post-conflict activity,[96] even though the issue is "as important as it is under-evaluated."[97] The remainder of this paper intends to contribute to this still nascent debate from a UN perspective.

B. HUMAN RIGHTS LAW AS IN *JUS POST BELLUM* À LA UN

The question remains as to whether this purported *jus post bellum* à la UN differs from the standard human rights regime applicable in post-conflict situations. Instead of trying to give a full account, which would go beyond the scope of this paper, two characteristic points are highlighted.

As has already been mentioned, the default post-conflict regime (i.e., after the end of hostilities) requires the full application of existent human rights obligations. For host countries, this means that, in addition to obligations under customary human rights law, obligations resulting from treaties to which the state is a party come back into force. For the UN, the exact scope is a lot more difficult to grasp, but it will certainly include customary law obligations and those resulting from the human rights provisions of the Charter.[98]

The nascent *jus post bellum* à la UN simultaneously goes beyond and falls behind the existing legal framework. First of all, it goes beyond existing international law on the issue of accountability. As demonstrated, a great majority of mandates call for support in ending impunity and bringing human rights violators to justice. In the last decades, the past practice of enabling peace agreements by offering generous amnesties has become outdated.[99] Instead, the consensus is that amnesties for mass atrocities, such as genocide, crimes against humanity, or war crimes are no longer in conformity with international law.[100] At the same time, restricted amnesties can, most likely, still be deemed

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[96] *E.g.* Österdahl & van Zadel, *supra* note 7, at 193–94; *see generally* CHRISTINE BELL, ON THE LAW OF PEACE. PEACE AGREEMENTS AND THE LEX PACIFICATORIA (2008).

[97] Wilde, *supra* note 95, at 185.

[98] *See supra* text and accompanying footnotes in section 1.2 of this article.

[99] For an overview of the development of amnesties, see Bell, *supra* note 17, at 21–22.

[100] *E.g.* U.N. Secretary-General, *Report of the Secretary-General on justice and reconciliation for Timor-Leste*, ¶ 30, U.N. Doc. S/2006/580 (July, 26 2006). As but two examples of extensive academic comment, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) and Anja Seibert-Fohr, *Reconstruction through Accountability*, *in* 9 MAX PLANCK Y.B. ON UNITED NATIONS LAW 555 (2005).

possible.[101] In contrast, peace operations mandates do not limit accountability to serious crimes, but pursue a comprehensive approach to fight impunity. Therefore, it can be argued that the evolving *jus post bellum*, as shaped by the UN, includes a requirement for all-encompassing accountability, thus advancing existing international law.[102]

On the other end of the spectrum, there are also elements that potentially lag behind established international law. It has been argued above that UN peace operations feature some bias in favor of civil and political rights to the detriment of economic, social, and cultural rights. Depending on the scope of the respective countries' human rights obligations, this may constitute a step backwards on the way to universal protection of human rights. Clearly, given the difficult situations in which peace operations often exist and the strains on resources and funding they are subject to, it goes without saying that not all human rights can be implemented at once—neither by the host country alone, nor with the support of a peace operation. This leads to difficult choices on the parts of human rights field officers on the ground. White and Odello note, "in the immediate post-accords period, choices are dictated by issues of immediacy and priority. What human rights should be guaranteed in this period, given the practical impossibility of guaranteeing all?"[103] It would be naïve to expect immediate and full implementation of human rights in a post-conflict environment since, as Kelly recounts, the "environment was therefore not 'normal' in the sense that a mature human rights regime could be expected or sustained . . . . It should have been expected, articulated and accepted that there would be some derogation of human rights standards in a situation that equated to a state of emergency."[104] A step-by-step implementation of human rights might therefore be unavoidable.[105] However, the default privileging of

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[101] *See, e.g.*, Diane F. Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Commission on Human Rights, Principle 24, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

[102] *Cf.* Bass, *supra* note 10, at 404 (regarding the conduct of war crimes trials part of *jus post bellum*). According to Stahn, a survey of international practice points into the same direction. Stahn, Jus ad bellum, *supra* note 6, at 8.

[103] Nigel D. White & Marco Odello, *The Legal Base for Human Rights Field Operations*, *in* THE HUMAN RIGHTS FIELD OPERATION LAW, THEORY AND PRACTICE 61 (Michael O'Flaherty ed., 2007).

[104] Kelly, *supra* note 85, at 145.

[105] *Cf.* Österdahl & van Zadel, *supra* note 7, at 194 (arguing in favor of a "locally designed and owned" *jus post bellum*).

civil and political rights, which, arguably, is part of the emerging UN *jus post bellum*, is not only counterproductive to the goal of sustainable peace, but may also contradict established international law.

Apart from these two elements, the above analysis has shown that peace operation mandates remain rather vague with respect to human rights. Against this backdrop, it would be difficult to draw any further conclusions on the scope and content of a nascent *jus post bellum*. Overall, it can be said that UN post-conflict activities in the field of human rights are too eclectic and biased to serve as a normative framework of *jus post bellum* suitable for governing specific post-conflict situations and advancing the goal of sustainable peace.

IV. CONCLUSION

This paper demonstrates that, as a consequence of numerous and widespread activities of UN peace operations, the creation of new international law in post-conflict situations, especially with respect to human rights, has already begun and a human rights regime applicable in post-conflict situations—that is, some form of *jus post bellum*—is evolving. However, it may be doubtful that a regime derived from UN peacekeeping practices is conducive to the goal of long-term positive peace. Therefore, it is necessary to reform UN peace operations' implementation of human rights. Gowan points out that "some sort of structured strategic debate will be required within the UN . . . . A purely case-by-case approach to these problems may sometimes be a matter of necessity, but this can wear down states' trust in peace operations and block the *development of effective doctrines* to guide new missions."[106]

The exact contours of such reform must be subject to further research and will, in the end, be the result of a political process within the UN. As a baseline, the newly created or evolving *jus post bellum* should at least acknowledge the specific circumstances in post-conflict situations, just as *jus in bello* takes account of specific circumstances in times of belligerent conflict, while, at the same time, supporting the full implementation of human rights obligations. If pushed in the right direction, a new legal regime that explicitly accounts for specific challenges will not only counteract arguments of the infeasibility of human rights implementation in post-conflict situations, but will also improve the enforcement and preservation of lasting peace.

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[106] Gowan, *supra* note 86, at 20 (emphasis added).