PROCEDURAL JUSTICE, JUS POST BELLUM, AND TRANSITIONS FROM ARMED CONFLICT: BEYOND "PEACE VERSUS JUSTICE" TO PEACE AS THE FOUNDATION OF PROCEDURAL JUSTICE

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ABSTRACT

This Article reviews major categories of existing procedure guiding the transition from armed conflict to peace. It introduces the concept of peace agreement procedural law. It reviews questions of amnesty and aut dedere aut judicare (Latin for "extradite or prosecute") in the context of jus post bellum. It addresses the nature of United Nations Security Council resolutions having a bearing on procedural justice and jus post bellum. It covers trusteeship and accountability procedures. It notes the law of state succession. It concludes with reflections on peace as the foundation of procedural justice. The Article seeks to bring a new perspective to the often sterile debate on "peace versus justice." Peace versus justice is often effectively a euphemism for the question of whether or not to proceed with international criminal law investigations and prosecutions if such criminal law mechanisms may reduce the possibility of achieving a negative peace. This question is unlikely to be universally resolved in the abstract. That said, approaching peace as the foundation of procedural justice widens the scope of considering what "justice" means, not only criminal accountability for those credible accused of international crimes, but also establishing the application of legal procedure for building the post-conflict environment. All of the areas discussed in this Article navigate the difficult tension between establishing a new beginning for justice, while recognizing that the context of recent armed conflict inevitably is a flawed foundation from which to proceed. The Article builds on Lawrence Solum's emphasis of the value of participation in procedural justice, citing it as essential for legitimacy. Allowing the meaningful participation of affected communities is important not only for the laws governing the formation of peace, but the nature of any criminal accountability for conduct related to the armed conflict. Legitimacy and procedural justice is a cross-cutting issue, not limited to one side or the other in the reified peace versus justice debate. A transition from armed conflict judged to be more procedurally just and legitimate is more likely to sustain a more robust post-conflict criminal law effort.

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I. INTRODUCTION

One could wonder whether the procedure by which peace is procured after an armed conflict really matters once sustainable peace is achieved. *Jus post bellum*, best understood as a framework of legal and prudential norms that apply to the entire process of the transition from armed conflict to a just and sustainable peace,[1] is often focused on normative ends. Professor Larry May advocates that six normative principles of *jus post bellum* should be recognized: rebuilding, retribution, reconciliation, restitution, reparation, and proportionality.[2] Peace that achieved these ends would thus be judged as a fulfilment of the principles of *jus post bellum*.[3] This Article will argue that procedural justice, not only normative ends, matters in *jus post bellum*.

First, this Article defines a study of procedural justice, *jus post bellum*, and armed conflict to peace transitions. Procedural justice is usually contrasted with substantive justice, just as procedural rules are contrasted with substantive rules. In the case of armed conflict to peace transitions, the substantive result of a just

[1] *See* JUS POST BELLUM AND TRANSITIONAL JUSTICE 1 (Larry May & Elizabeth Edenberg eds., 2013); Jens Iverson, *Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics*, 7 *INT'L J. TRANSITIONAL JUST.*, 420-21 (2013).

[2] Larry May, Jus Post Bellum *Proportionality and the Fog of War*, 24 EUR. J. INT'L L. 315, 316 (2013).

[3] *See* JUS POST BELLUM AND TRANSITIONAL JUSTICE 1 (Larry May & Elizabeth Edenberg eds., 2013); Jens Iverson, *Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics*, 7 *INT'L J. TRANSITIONAL JUST.*, 420-21 (2013).

and sustainable peace is almost always the focus of *jus post bellum*.[4] As a result, little has been written about procedural justice and *jus post bellum*. Michal Saliternik has helpfully written about procedural justice in peace negotiations,[5] but the focus of *jus post bellum* goes beyond peace negotiations. Because *jus post bellum* is often wrongly conflated with post-conflict accountability for war-time conduct rather than approached as a framework for addressing the overall transition from armed conflict to peace,[6] any focus on *jus post bellum* is usually in relation to the substantive rules pertaining to post-conflict justice.[7] This Article is a first effort to address this thinly developed area.

In his article entitled *Procedural Justice*, Lawrence Solum asks, "[h]ow can we regard ourselves as obligated by legitimate authority to comply with a judgment that we believe (or even know) to be in error with respect to the substantive merits?"[8] Solum calls this "the hard question of procedural justice."[9] Translated from Solum's civil litigation context to the context of *jus post bellum* and transitions from armed conflict to peace, one might ask whether "substantive rules and outcomes [are] all that matter in the ending of armed conflict and building a positive peace" or indeed "if peace is the desired end, under what circumstance could there be procedures that should stand in the way of establishing peace?"[10]

This Article will proceed as follows: Part II introduces peace agreement procedural law. Part III reviews questions of amnesty and *aut dedere aut judicare* (Latin for "extradite or prosecute").[11] Part IV addresses the nature of

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4 *Id*.

5 *See generally* Michal Saliternik, *Perpetuating Democratic Peace: Procedural Justice in Peace Negotiations*, 27 EUR. J. INT'L L. 617 (2016).

6 Iverson, *supra* note 1.

7 *Id.* at 421.

8 Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004). For more on procedural justice, *see generally* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119 (2012); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

9 Solum, *supra* note 8, at 190.

10 Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004). For more on procedural justice, *see generally* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119 (2012); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

11 See e.g. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV 449 (1990). This principle

United Nations Security Council ("Security Council") resolutions having a bearing on procedural justice and *jus post bellum*. Part V covers trusteeship and accountability procedures. Part VI notes the law of state succession. The conclusion further reflects on peace as the foundation of procedural justice.[12]

II. PEACE AGREEMENT PROCEDURAL LAW

A. *Introduction*

This section reviews what might be called "peace agreement procedural law"—similar to, but different from, Christine Bell's *lex pacificatoria.*[13] It focuses primarily on the application of the principles within the Vienna Convention on the Law of Treaties ("VCLT") to peace treaties specifically, and peace agreements (including agreements with non-state parties that do not qualify as treaties) more generally. It concludes by addressing Solum's hard question of procedural justice, discussed above.

One formal distinction that should be made is the distinction between an armed conflict terminating through the use of a peace treaty (or series of peace treaties) in the case of an international armed conflict, versus a peace agreement (or series of peace agreements) in the case of a non-international armed conflict. The term "peace treaty" is generally reserved for agreements not signed by non-state organized armed groups,[14] whereas the more general term "peace agreement" can include peace treaties, but is used more frequently for agreements that are not technically treaties because they include non-state groups (other than inter-governmental organizations) in the agreement.[15]

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goes back to Hugo Grotius. 2 H. Grotius, DE JURE BELLI ET PACIS (THE RIGHTS OF WAR AND PEACE), ch. XXI, § IV (1), at 347 (V. Whewell trans. & ed. 1853).

[12] This Article will not detail procedural law at post-conflict criminal mechanisms. That subject is broad and widely detailed elsewhere. That being said, the procedural law applicable to substantive criminal and civil law can also be part of the transition to peace. This is not only with respect to the high profile and highly contested issues such as amnesties for the perpetration of alleged crimes related to the armed conflict, but also includes questions of jurisdiction, immunities, statutes of limitation, and other questions of admissibility. This Article is not meant to be exhaustive but rather to demonstrate the need for further exploration and conceptual development of this area.

[13] *See* CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 5 (2008) [hereinafter BELL, ON THE LAW OF PEACE]; Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 375 (2006) [hereinafter Bell, *Peace Agreements*].

[14] *Id*.

[15] *Id*.

B. *Article 52 of the Vienna Convention on the Law of Treaties*

The VCLT is almost universally ratified and is generally accepted as customary international law.[16] Article 52 of the VCLT states in full: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[17] A literal reading of this Article as applied to any peace treaty indicates that the validity of the peace treaty depends on whether there has been an illegal threat or use of force to procure that treaty.

The difficulty arises in that each side to a treaty may believe that the other not only used the threat of force, but actual force, in violation of the principles of international law in order to achieve their negotiating position at the peace table. Further, the threat of ongoing or renewed force almost inevitably forms the backdrop of peace negotiations—otherwise peace negotiations would not be required.

An interpretation of Article 52 in the context of peace treaties thus requires special consideration so as not to invalidate peace treaties in general, while retaining a disincentive for states to use force or the threat of force to create grossly unfair treaties. This may be done in part through Article 43 ("Obligations imposed by international law independently of a treaty"), Article 44.5 (disallowing separation of the treaty in cases governed by Article 52), Article 53 ("Treaties conflicting with a peremptory norm of general international law"), Article 71 ("Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law"), Article 73 ("Cases of State succession, State responsibility and outbreak of hostilities"), and Article 75 ("Case of an aggressor State").[18] Articles 73 and 75, in particular, limit the application of the VCLT regarding questions arising from the outbreak of hostilities between states or treaty obligations of an aggressor state.[19] These limitations of the VCLT, however, raise more questions as to the effect of the use or threat of force on the validity and effects of peace treaties.

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[16] Vienna Convention on the Law of Treaties n.1, May 23, 1969, 1155 U.N.T.S. 332 (entered into force Jan. 27, 1980) [hereinafter VCLT]. *See generally* SIR IAN M. T. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (1984); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009); VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, at v (Oliver Dörr & Kirsten Schmalenbach eds., 2012) [hereinafter VIENNA CONVENTION COMMENTARY].

[17] VCLT, *supra* note 16, art. 52. This Article builds upon unpublished works of the author.

[18] *Id.* at arts. 43, 44.5, 53, 71, 73, 75. Article 75 states in whole: "The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression." *Id.* at art. 75.

[19] For more on the interaction between Articles 75 and 52, *see generally* SINCLAIR, *supra* note 16, at 177-79; VILLIGER, *supra* note 16, at 913-15; VIENNA CONVENTION COMMENTARY, *supra* note 16, at 1284-85.

One could argue peace agreements that are not peace treaties, i.e., binding non-state actors, are guided by similar considerations of procedural fairness, but only by analogy, as the VCLT and the customary law it represents does not apply directly. In terms of *lex lata*, [20] this argument by analogy is not terribly persuasive. As a prudential matter, however, the warning for the party to the potential peace agreement not to rely entirely on the threat of future force and demand an entirely one-sided agreement is sensible, lest the peace created be unjust or unsustainable.

C. *Other Treaty and Agreement Law*

Several other articles in the VCLT are specifically relevant for the formation of peace treaties with respect to procedural fairness. Article 47 reads as follows:

"If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent."[21]

This is as straightforward as far as it goes, although there is a long tradition stating that there are limits to what a state representative may alienate, ultimately culminating in the prohibition of annexation. Article 48 reads as follows:

> "1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
>
> 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.
>
> 3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies."[22]

This presumably is not meant to invalidate peace treaties due to the notoriously difficult to ascertain battlefield facts or strategic position. Use of this Article with respect to peace treaties, or by analogy to peace agreements, should be depreciated. Article 49 covers fraud.[23] Article 50 addresses corruption of a representative of a state.[24] These are likewise unlikely to affect the validity of a

[20] A Latin expression that means "The positive law currently in force, without modification to account for any rules subjectively preferred by the interpreter." (as opposed to lex ferenda) *See also* "de lege lata"; Aaron X. Fellmeth and Maurice Horwitz, GUIDE TO LATIN IN INTERNATIONAL LAW (2009).

[21] VCLT, *supra* note 16, art. 47.

[22] *Id*. art. 48.

[23] *Id*. art. 49.

[24] *Id.* art. 50.

peace treaty or agreement. Of more potential impact is Article 51, which deals with coercion of a representative of a state:

> "The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."[25]

This text from Article VCLT 51 mirrors Article 52,[26] but instead of the threat of the use of force against a state, it concerns coercion of a state's representative. While normal diplomatic immunity and international humanitarian law ("IHL") protections for those seeking to negotiate a ceasefire or peace treaty (inviolability of parlementaires)[27] should shield representatives from harm, if those protections are not respected and representatives are coerced into signing a peace treaty, that treaty would be void.[28]

D. *Solum's Hard Question with Respect to Peace Agreement Procedural Law*

Solum's hard question on procedural justice is: "How can we regard ourselves as obligated by legitimate authority to comply with a judgment that we believe (or even know) to be in error with respect to the substantive merits?"[29] This section of the Article details many areas where, even if a peace agreement or set of agreements may be deemed substantively just in outcome, the procedure that went into the crafting and consent to those agreements is highly relevant for determining their legitimacy. The text of a peace agreement is without any particular relevance in the abstract—it is only the legitimacy of the process that creates the text that provides the text with legal or moral weight. However, certain procedural considerations matter more than others. What might be considered a fatal procedural flaw with respect to Article 52 violations in other treaties, may need to be put aside in marginal cases for peace agreements. Given that all peace agreements are crafted in the context of the threat of force, disagreements on the legitimacy of that threat should not always undermine the agreement itself. That said, aggression that compels a peace treaty or threats to the agents crafting the peace agreement—even one that promises peace which, on paper, protects certain areas of justice—can ultimately be a procedural disqualification for the peace agreement itself.

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[25] VCLT, *supra* note 16, art. 51.

[26] VCLT, *supra* note 16, art. 52.

[27] *See e.g.*, Laws and Customs of War on Land (Hague, IV) art. 32, Oct. 18, 1907, T.S. 539; International Committee of the Red Cross [ICRC], Project of an International Declaration Concerning the Laws and Customs of War, art. 43, Aug. 27, 1874; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 227, 229 (3rd ed. 2007).

[28] VCLT, *supra* note 16, art. 51.

[29] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004).

III. AMNESTY AND *AUT DEDERE AUT JUDICARE*

Amnesty and *aut dedere aut judicare* (Latin for "extradite or prosecute") are procedural obligations or mechanisms that have a bearing on the transition to peace. These mechanisms of procedural justice are in obvious tension—if amnesty is granted, extradition or prosecution is normally impossible. [30] It is important to emphasize that despite the blanketing rhetoric against "amnesty" and a "culture of impunity," in a rhetoric driven by valid human rights concerns, certain amnesties are not only permitted, but also suggested by the laws of armed conflict. The most obvious case is when someone has participated in the conflict as a legal combatant under international humanitarian law, but his or her participation is considered illegal under domestic law (either directly or through criminalizing activities such as carrying arms). For example, Article 10.1 of Additional Protocol II of the Geneva Conventions forbids punishment of ethical medical care even if it supports an insurgency: "Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."[31] An amnesty provision covering such activities may well be necessary, given, for example, the increasingly overbroad domestic prosecution of covering aiding or abetting administratively determined terrorist groups. [32]

The obligation to prosecute the alleged perpetration or extradite perpetrators for prosecution of certain crimes is well-established, but it can create tensions.[33] The fight against impunity creating this tension, which is often at the heart of the "peace vs. justice" debate, may complicate the short-term transition to peace, but is often helpful to make the transition to peace successful in the long run.[34] This obligation is typically described using the term *aut dedere aut judicare*, although it is common now to tamp down the demand to prosecute to merely "submit for prosecution" because of varied responsibilities and procedures at the domestic level and the presumption of innocence in criminal law. [35]

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[30] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 10(1), June 8, 1977, 1125 U.N.T.S. 609.

[31] *Id.*

[32] *See e.g.*, Amanda Shanor, *Beyond Humanitarian Law Project: promoting human rights in a post-9/11 world*, SUFFOLK TRANSNAT'L L. REV. 34 (2011): 519.

[33] *See e.g.* Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev 449 (1990).

[34] *See e.g.*, Sara Darehshori, *Selling Justice Short: Why Accountability Matters for Peace*, HUMAN RIGHTS WATCH 1, 20-25 (2009), https://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf [https://perma.cc/7DGK-3SHD] (discussing the possibility of significant tension that could arise in Liberia by the extradition of former President of Liberia, Charles Taylor).

[35] For example, see Article 7.1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case

Different crimes have different bases for *aut dedere aut judicare*. The Convention on the Prevention and Punishment of the Crime of Genocide,[36] for example, requires the state on whose territory a genocide allegedly occurred to prosecute the genocide. The Geneva Conventions of 1949 likewise require prosecution (or extradition for prosecution) of alleged grave breaches.[37] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment likewise requires prosecution or extradition,[38] as does the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[39] This set of obligations also extends to issues less central, although potentially relevant to *jus post bellum*, such as terrorism,[40] apartheid,[41] crimes against internationally protected persons,[42] and corruption.[43] Aside from direct treaty obligations to extradite or prosecute, indirect treaty obligations such as human rights law obligations also often create the duty to prosecute or extradite, particularly the duty to respect and ensure rights that exists within the Inter-

to its competent authorities for the purpose of prosecution." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[36] Article 6 states:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 78 U.N.T.S. 277.

[37] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287.

[38] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 113.

[39] UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 17, May 14, 1954, 249 U.N.T.S. 215.

[40] Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, Dec. 16, 1970, 860 U.N.T.S. 105; International Convention against the Taking of Hostages pmbl., Nov. 17, 1979, 1316 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings art. 7(2), Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism art. 9(2), Dec. 9, 1999, 2178 U.N.T.S 197.

[41] International Convention on the Suppression and Punishment of the Crime of Apartheid art. 4(b), Nov. 30, 1973, 1015 U.N.T.S. 243.

[42] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 6(1), Dec. 14, 1973, 1035 U.N.T.S. 167.

[43] G.A. Res. 58/4, annex, United Nations Convention Against Corruption (Oct. 31, 2003).

American system,[44] as explained in the *Barrios Altos* case.[45] In certain cases, such as with genocide, there also exists a customary international law norm with respect to the duty to prosecute or extradite.[46] All of that said, given the actual state practice and demonstrated opinio juris, one cannot generally assert there is a general customary duty to prosecute or extradite for all alleged international criminal law violations.

These questions of procedure—whether or not there is a duty to refer for prosecution or extradition, or whether amnesty is allowed or compelled—are often reflected in the text of peace agreements.[47] The hard question for procedural law is whether some defect in the procedural regime established by the peace agreements necessarily negates the legitimacy of the peace agreement as a whole. This question may not be answerable in the abstract or in universal terms, but will be revisited in the conclusion of this Article.

IV. SECURITY COUNCIL RESOLUTIONS

Some subjects are very difficult to characterize as mostly substantive or procedural, or at least require further analysis to distinguish particular aspects that are more substantive or procedural. For example, the United Nations Security Council Resolution 1325 ("Resolution 1325") enunciates both procedural norms for the resolution of armed conflict[48] and norms for the substance of peace agreements.[49] The authority of United Nations Security

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[44] *See generally* Organization of American States, American Convention on Human Rights art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[45] "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated." Barrios Altos v. Peru, Judgment, Inter-Am Ct. H.R. (ser. C) No. 87, ¶ 19 (Nov. 30, 2001) (citing Organization of American States, American Convention on Human Rights art. 63(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123).

[46] *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 191, ¶ 152 (Feb. 26).

[47] For example, Legal Tools for Peace-Making Project, *Language of Peace*, https://www.languageofpeace.org/#/search (an innovative tool to search provisions of Peace Agreements, which provides easy access to compare and collate language on key issues of around 1,000 peace agreements), a search for language regarding accountability on 13 September 2019 revealed 823 paragraphs in 98 peace agreements.

[48] S.C. Res. 1325, ¶ 1 (Oct. 31, 2000) ("*Urges* Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict . . . .").

[49] *Id.* at ¶ 8 ("*Calls on* all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the

Council resolutions derives from the United Nations Charter, particularly Chapters VI and VII.[50] The Charter itself derives its legal status not only from the general force of treaty law as an almost universally ratified treaty, but also from Article 103 of the Charter, which states, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[51] Article 25 obliges Members of the United Nations to carry out the decisions of the Security Council.[52] While the United Nations Security Council was not intended to function as a legislative body, it has wide powers on matters touching upon peace and security.

A. *UNSC Resolutions of General Relevance*

The United Nations Security Council has issued a number of resolutions of relevance regarding the transition from armed conflict to peace, including resolutions that have applicability outside a particular territorial situation. Resolution 1325 and United Nations Security Council Resolution 1889 ("Resolution 1889") are of particular note. In general terms, Resolution 1325 enunciates both procedural norms for the resolution of armed conflict and norms for the substance of peace agreements.[53] Resolution 1889 also enunciates procedural norms for the resolution of armed conflict as well as substantive requirements in the post-conflict phase.[54]

Further, Resolution 1889

> "*[u]rges* Member States, international and regional organisations to take further measures to improve women's participation during all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding, including by enhancing their engagement in political and economic decision-making at early stages of recovery processes, through inter alia promoting women's leadership and capacity to engage in aid management and planning, supporting women's organizations, and countering negative societal attitudes about women's capacity to participate equally; . . . . *Urges* Member States to ensure gender

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implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary . . . .")

[50] *See generally* U.N. Charter arts. 23-54, 75-85.

[51] *Id.* at art. 103.

[52] *See id.* at art. 25.

[53] With respect to procedural norms, *see e.g.*, S.C. Res. 1325, ¶ 1 (Oct. 31, 2000) ("Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict . . . .").

[54] With respect to procedural aspects of United Nations Security Council Resolution 1889, *see e.g.*, S.C. Res. 1889, pmbl. (Oct. 5, 2009).

> mainstreaming in all post-conflict peacebuilding and recovery processes and sectors . . . ."[55]

In addition to Resolutions 1325 and 1889, there are international standards for peace agreements emerging from the United Nations.[56] The Secretaries-General of the United Nations have taken particular interest in this subject in recent decades.[57]

B. *UNSC Resolutions Relevant to Specific Transitions to Peace*

The resolutions can also regulate specific transitions to peace. Rather than simply putting an end to conflict, they often attempt to establish good future governance—part of the transition to a just and sustainable peace. United Nations Security Council Resolution 1244 drew upon the Rambouillet Accords [58] to regulate the transition to peace in Kosovo.[59] One can see similar regulation with the transition to peace in Cambodia,[60] the former Yugoslavia,[61] Liberia,[62] Haiti,[63] Afghanistan,[64] and Iraq.[65] Most of these examples cannot always be neatly categorized into international armed conflict or non-international armed conflict. The situation in Cambodia was largely a non-international armed conflict with significant foreign involvement that may have internationalized it;[66] the conflicts in the former Yugoslavia included organized armed groups, states, and organized armed conflict under some degree of state control;[67]

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[55] *Id*. ¶ 1, 8. For substantive aspects of Resolution 1889, *see id.* pmbl (expressing intention to ameliorate gender equality for women and girls in post-conflict situations).

[56] *See, e.g.*, Rep. of the S.C., at 21, U.N. DOC. S/2004/616 (Aug. 23, 2004) (discussing recommendations for negotiations, peace agreements, and Security Council mandates); Rep. of the Panel on U.N. Peace Operations, ¶ 58, U.N. DOC. A/55/305-S/2000/809 (Aug. 21, 2000) (mandating the UN's capacity to put conditions on peace agreements); Press Release, Secretary-General, Secretary-General Comments on Guidelines Given to Envoys, U.N. Press Release SG/SM/7257 (Dec. 10, 1999) (regarding guidelines on human rights and peace negotiations).

[57] *See id*.

[58] S.C. Res. 1244 (June 10, 1999). *See also* Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, U.N. DOC. S/1999/648, annex (Feb. 23, 1999).

[59] Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, U.N. DOC. S/1999/648, annex (Feb. 23, 1999).

[60] *See* S.C. Res. 745 (Feb. 28, 1992).

[61] *See* S.C. Res. 1023 (Nov. 22, 1995).

[62] *See* S.C. Res. 788 (Nov. 19, 1992).

[63] *See* S.C. Res. 1277 (Nov. 30, 1999).

[64] *See* S.C. Res. 1378 (Nov. 14, 2001).

[65] *See* S.C. Res. 1483 (May 22, 2003).

[66] *See e.g.* Hans-Peter Gasser, *Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145 (1983).

[67] *See e.g.* Theodor Meron, *Classification of armed conflict in the Former Yugoslavia: Nicaragua's fallout*, 92.2 AM. J. OF INT. L., at 236-242 (1998).

Liberia's conflict was a non-international armed conflict with significant foreign involvement;[68] East Timor may have amounted to a non-international armed conflict before independence(after independence any armed conflict would be an international armed conflict);[69] and Afghanistan's history of conflict is remarkably baroque.[70]

The Security Council's role in the transition to peace in Liberia exemplifies the emphasis on future-oriented goals of good governance and is not simply focused on the cessation of armed conflict. The Security Council has passed a great number of resolutions on the UN Mission in Liberia ("UNMIL") and the situation in Liberia between 2002 and 2016. These included Preliminary matters;[71] establishment of UNMIL;[72] continuing its mandate;[73] other matters, including targeted sanctions against Liberian President Charles Taylor and others.[74]

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[68] Quentin Meron, *'It's terminal either way': an analysis of armed conflict in Liberia*, 1989–1996, REV. OF AFRICAN POLITICAL ECONOMY 24.73, at 355-371 (1997).

[69] James Scambary, *Anatomy of a conflict: the 2006–2007 communal violence in East Timor*, 9.2 CONFLICT, SECURITY & DEVELOPMENT at 265-288 (2009).

[70] *See e.g.* Michael Vinay Bhatia and Mark Sedra, AFGHANISTAN, ARMS AND CONFLICT: ARMED GROUPS, DISARMAMENT AND SECURITY IN A POST-WAR SOCIETY, (2008).

[71] S.C. Res. 1408, (May 6, 2002) [on the situation in Liberia]; S.C. Res. 1458, (Jan. 28 2003) [on the situation in Liberia]; S.C. Res. 1343, (Mar. 7, 2001) [on the situation in Sierra Leone]; S.C. Res. 1478, (May 6, 2003) [on the situation in Liberia]; S.C. Res. 1497, (Aug. 1, 2003) [on the situation in Liberia]; S.C. Res. 1521, (Dec. 22, 2003) [on dissolution of the Security Council Committee established pursuant to Resolution 1343 (2001) concerning Liberia].

[72] S.C. Res. 1509, (Sept. 19, 2003) [on establishment of the UN Mission in Liberia (UNMIL)].

[73] S.C. Res. 1836, (Sept. 29, 2008) [on extension of the mandate of the UN Mission in Liberia (UNMIL)]; S.C. Res. 1938, (Sept. 15, 2010) [on extension of the mandate of the UN Mission in Liberia (UNMIL)]; S.C. Res. 1885, (Sept. 15, 2009) [on extension of the mandate of the UN Mission in Liberia (UNMIL)]; S.C. Res. 2008, (Sept 16, 2011) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2012]; S.C. Res. 2066, (Sept. 17, 2012) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2013]; S.C. Res. 2176, (Sept. 15, 2014) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 31 Dec. 2014]; S.C. Res. 2190, (Dec. 15, 2014) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2015]; S.C. Res. 2215, (Apr. 2, 2015) [on the drawdown of the UN Mission in Liberia (UNMIL)]; S.C. Res. 2239, (Sept. 17, 2015) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 30 Sept. 2016]; S.C. Res. 2308, (Sept. 17, 2016) [on extension of the mandate of the UN Mission in Liberia (UNMIL) until 31 Dec. 2016].

[74] S.C. Res. 1532, (Mar. 12, 2004) [on preventing former Liberian President Charles Taylor, his immediate family members and senior officials of the former Taylor regime from using misappropriated funds and property]; S.C. Res. 1549, (Jun. 17, 2004) [on re-establishment of the Panel of Experts to monitor fulfilling the conditions for the lifting of sanctions]; S.C. Res. 1561, (Sept. 17, 2004) [on UNMIL]; S.C. Res. 1579, (Dec. 21, 2004) [on the Situation in Liberia and West Africa]; S.C. Res. 1607, (Jun. 21, 2005) [on the Situation

It is worth noting that a strictly temporal approach to *jus post bellum* would necessarily cut off early United Nations Security Council resolutions that occurred during armed conflict.[75] Similarly, a definition of *jus post bellum* that focused on backwards-looking criminal justice measures and not forward-looking establishment of a just and sustainable peace (particularly good governance) would overlook some of the most important regulation in the transition from armed conflict in Liberia.[76]

As Aboagye and Rupiya note in their 2005 work on democratic governance and security sector reform in Liberia, more than half of the armed conflicts that "ended" through peace agreements in the previous fifteen years have restarted.[77] In evaluating the immediate implementation of the 2003 Comprehensive Peace Agreement by the national transitional government of Liberia with the support of UNMIL,[78] they note that United Nations Security Council Resolution 1509 (2003) mandated UNMIL not only to focus on traditional peacekeeping, but also on supporting the institutionalization of human rights and the rule of law in Liberia.[79] This gave UNMIL wide-ranging responsibilities including humanitarian assistance, establishing security conditions, human rights monitoring, restructuring the security sector, legal reform, judicial reform, and

in Liberia and West Africa]; S.C. Res. 1626, (Sept. 19, 2005) [The situation in Liberia]; S.C. Res. 1638, (Nov. 11, 2005) [The situation in Liberia]; S.C. Res. 1647, (Dec. 20, 2005) [Liberia renews the measures on arms and travel imposed by paragraphs 2 and 4 of resolution 1521 (2003) for a further period of 12 months]; S.C. Res. 1667, (Mar. 31, 2006) [The situation in Liberia]; S.C. Res. 1683, (Jun. 13, 2006) [The Situation in Liberia]; S.C. Res. 1688, (Jun. 16, 2006) [Sierra Leone]; S.C. Res. 1689, (Jun. 20, 2006) [The Situation in Liberia]; S.C. Res. 1694, (Jul. 13, 2006) [The Situation in Liberia]; S.C. Res. 1712, (Sept. 29, 2006) [Liberia]; S.C. Res. 1731, (Dec. 20, 2006) [The Situation in Liberia]; S.C. Res. 1750, (Mar. 30, 2007) [Liberia]; S.C. Res. 1753, (Apr. 27, 2007) [The Situation in Liberia]; S.C. Res. 1777, (Sept. 20, 2007) [Liberia]; S.C. Res. 1792, (Dec. 19, 2007) [on renewal of measures on arms and travel imposed by resolution 1521 (2003) and on extension of the mandate of the current Panel of Experts on Liberia]; S.C. Res. 1819, (Jan. 18, 2008) [on extension of the mandate of the Panel of Experts on Liberia]; S.C. Res. 1854, (Dec. 19, 2008) [on extension of the mandate of the Panel of Experts on Liberia]; S.C. Res. 2025, (Dec. 14, 2011) [Liberia]; S.C. Res. 2079, (Dec. 12, 2012) [on the situation in Liberia]; S.C. Res. 2116, (Sept. 18, 2013) [on Liberia]; S.C. Res. 2128, (Dec. 10, 2013) [on the situation in Liberia and West Africa]; S.C. Res. 2188, (Dec. 9, 2014) [on the situation in Liberia].

[75] *See e.g.*, S.C. Res. 1497, (Aug. 1, 2003); S.C. Res. 1478, (May 6, 2003); S.C. Res. 1458, (Jan. 28, 2003); S.C. Res. 1408, (May 6, 2002); S.C. Res. 1343, (Mar. 7, 2001).

[76] *Id.*

[77] Festus B. Aboagye & Martin R. Rupiya, *Enhancing Post-Conflict Democratic Governance Through Effective Security Sector Reform in Liberia*, *in* A TORTUOUS ROAD TO PEACE - THE DYNAMICS OF REGIONAL, UN AND INTERNATIONAL HUMANITARIAN INTERVENTIONS IN LIBERIA 249, 249 (Festus Aboagye & Alhaji M. S. Bah eds., 2005).

[78] *Id.* at 251. *See also* Letter dated 27 August 2003 from the Permanent Representative of Ghana to the United Nations Addressed to the President of the Security Council, UN DOC. S/2003/850, annex at 24 (Aug. 29, 2003).

[79] Aboagye & Rupiya, *supra* note 77, at 256-57. *See also* S. C. Res. 1509 (Sept. 19, 2003).

correctional reform.[80] UNMIL established a Human Rights and Protection Unit with a role in "child protection, rule of law, . . . gender and trafficking advisors, . . . as well as the institutionalisation and operationalisation of the [Truth and Reconciliation Commission] and [Independent National Commission on Human Rights], in pursuance of the [Comprehensive Peace Agreement] . . . ."[81] While Aboagye and Rupiya's critiques of the state of democratic governance and security sector reform in 2005 are warranted, the United Nations Security Council and ECOWAS's efforts in combination with local efforts in the subsequent decade are not without merit, as they have provided some indication of the benefits of a comprehensive, future-oriented approach. United Nations Security Council resolutions regulating the transition to peace are increasingly oriented towards building a positive peace, not merely putting an end to past conflict.

C. *Conclusion: UNSC Resolutions*

Security Council resolutions are both substantive and procedural sources in the transition from armed conflict to peace. What may look like a procedural concern (e.g., involving women in the peace process negotiations) may often be tightly tied to the substantive outcome (e.g., a peace agreement that reflects the needs, rights, viewpoints, and concerns of women in affected communities). While procedural failures may not always eliminate the legitimacy of peace agreements, they will often reduce the justness of the resulting peace. U.N. Security Council resolutions, when framed as such, are specifically binding and facilitating law, which create regulations and capacities to allow the transition to peace. While Security Council resolutions that provide guidance on general procedure may not regulate procedural justice to the degree that, for example, a comparative paucity of women's participation would invalidate an otherwise valid peace agreement, following such guidance increases the legitimacy and accountability of the resulting agreement.

V. ACCOUNTABILITY PROCEDURES IN THE CONTEXT OF TRUSTEESHIP

What does procedural justice mean in the context of trusteeship and the transition to peace? The *jus post bellum* principles identified by Kristen Boon regarding occupation and international territorial administration extend beyond trusteeship to also include accountability to the population of the administered territory.[82] With respect to accountability, "both [the United Nations Mission in Kosovo] and [the United Nations Transitional Administration in East Timor] included consultative mechanisms with local representatives."[83] This limited practice is not a strong evidentiary basis for this principle, although local-

[80] Aboagye & Rupiya, *supra* note 77, at 256-57.

[81] *Id.* at 257.

[82] Kristen Boon, *Legislative Reform in Post-Conflict Zones:* Jus Post Bellum *and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 294-95 (2005).

[83] *Id.* at 320-21.

ownership as a prudential mantra has become widespread for any sort of external intervention in post-conflict justice.[84] A stronger theoretical and legal basis for the principle of accountability is likely found in the peremptory norm of self-determination. If self-determination applies, it limits the degree to which an administration can be unaccountable to the local population. The words of Article 73 of the United Nations Charter, while not directly applicable to such administration, are noteworthy. They read in pertinent part:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; c. to further international peace and security . . ."[85]

As a matter of guiding principle, it would be odd if these obligations bound member states individually but not collectively. The language in Article 73 requires not only trusteeship values (promoting the interests of the inhabitants, respecting their culture, advancing them, treating them justly, and protecting them from abuses), but also to develop self-government.[86] Again, while not a strong argument for a *lex lata* obligation of accountability to the local population for international territorial administrations (let alone a clear determination of the operationalizations of such an obligation), the overall thrust of the obligations inherent in the peremptory norm of self-determination and the trusteeship obligations described in Article 73 are orthogonal, with existing practice requiring some accountability mechanisms between the international territorial administration and the populations of the administered territory. As argued by Ruth Gordon, there is a strong case to be made that the right of self-determination applies to non-self-governing people in general.[87] The shorter the

[84] See e.g. Timothy Donais, PEACEBUILDING AND LOCAL OWNERSHIP: POST-CONFLICT CONSENSUS-BUILDING (2012); Patricia Lundy and Mark McGovern, *Whose justice? Rethinking transitional justice from the bottom up*, 35.2 J. OF LAW AND SOCIETY 265-292 (2008).

[85] U.N. Charter art. 73.

[86] *Id*.

[87] Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 319 (1995).

period of administration and the greater the accountability, the less tension there is with the principle of self-determination.

Boon suggests a tension between the obligations of trusteeship (what inhabitants "should" want) and the obligations of accountability (what inhabitants do or do not want) that can be resolved using the principle of proportionality.[88] While helpful, this general term could be further operationalized. In general, there is a potential for paternalism in any exercise of trusteeship—in assuming that the administrators are better placed to determine the obligations of trusteeship (what inhabitants "should" want) better than the inhabitants themselves. Ideally, there should be no tension between the two, and the administrator should, unless there is a compelling reason not to do so, be led by the expressed will of the inhabitants of the territory.[89] One notable exception to this general rule is when the will of the majority of inhabitants is at odds with the rights or interests of the minority. Ethnic Serbs in Kosovo or Ethnic Indonesians in East Timor are pertinent examples.[90] Then, presumably, one way to operationalize the norm of proportionality between trusteeship and accountability as introduced by Boon is to tie it to the overall *telos* of *jus post bellum*: taking the rights and interest of minorities into account not only for their own sake, but to serve the overall goals of societal reconciliation and a just, sustainable, positive peace.

When should violations of trusteeship and accountability procedures stand in the way of establishing peace after armed conflict? Here, the connection between the procedural justice of the process of transition from armed conflict to peace and the substantive justice of the resulting peace may be particularly strong. A mismanaged occupation or transitional authority that lacks legitimacy due to its disregard for trusteeship and accountability is likely to establish a post-occupation/authority regime that lacks legitimacy in the eyes of many. This arguably is a problem that has bedeviled Iraq more than, for example, Kosovo, East Timor, or Cambodia.[91] The procedural justice of including the viewpoints of minority interests, as well as accountability to inhabitants more generally,

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[88] *See* Boon, *supra* note 82, at 323-25.

[89] For more on subjective and objective public reasoning on collective goods, *see generally* AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (2014); AMARTYA SEN, THE IDEA OF JUSTICE (2009); AMARTYA SEN, DEVELOPMENT AS FREEDOM (2001). The concept of a "right to development" has faded from scholarly and United Nations discourse, but if given credence would also have bearing on the obligations of an administrator: particularly a long-term administrator or one that radically changed regulations in terms of investment, property, and resource exploitation.

[90] *See e.g.* Sumon Kumar Bhaumik, Ira N. Gang, and Myeong-Su Yun, *Ethnic conflict and economic disparity: Serbians and Albanians in Kosovo*, 34.4 J. OF COMP. ECONOMICS 754-773 (2006). For a comparable question of ethnic complexity in East Timor, see Benedict Anderson, *Imagining 'East Timor'*, ARENA MAGAZINE No. 4, Apr/May 1993: 23-27.

[91] For an early but insightful review of the challenges of the occupation of Iraq, *see* Gregory H. Fox, *The occupation of Iraq*, 36 GEO. J. INT'L L. 195 (2004).

during a period of trusteeship is likely to set the tone for the sustainability of the resulting peace.

VI. THE LAW OF STATE SUCCESSION WITH RESPECT TO TREATIES

State succession is "the replacement of one State by another in the responsibility for the international relations of territory . . . ."[92] This law (Art. 2 of the Vienna Convention on Succession of States in Respect of Treaties) governs the procedure by which that replacement occurs. Succession occurs in situations of territorial change, such as decolonization, cession of territory, secession, dismemberment of a state, incorporation of one state into another, or merger of multiple states into a new state.[93] These can all be the result of an armed conflict, but do not have to be.[94] Succession has to be distinguished from situations where no territorial changes occur, despite a change in the relationship between the governmental entity responsible for the territory and the territory, such as military occupation, a change in government, or a failed state.[95]

With respect to the law of state succession regarding treaties, two dichotomous approaches can be taken.[96] The first approach uses the principle of universal succession, upholding past treaty obligations.[97] The second *tabula rasa* approach emphasizes sovereignty at the expense of prior obligations[98] The dominance of these approaches varies with the type of succession.

In decolonization, the newly independent state is not bound to maintain in force a treaty of the predecessor state, but may establish its status as a party to such a treaty through unilateral declaration.[99] Decolonization frequently happened as a result of armed conflict, so this practice is particularly relevant for *jus post bellum* historically, although it likely lacks contemporary relevance.

With cession of territory from one sovereign to another (e.g., Hong Kong[100]) the general rule is to follow the moving treaty frontiers principle:

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[92] Vienna Convention on Succession of States in Respect of Treaties art. 2, Aug. 23, 1978, 1946 U.N.T.S. 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts art. 2, U.N. DOC. A/CONF.117/14 (Apr. 8, 1983). *See also* Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, 1991 I.C.J. Rep. 53, ¶ 53 (Nov. 12, 1991).

[93] *See generally*, DANIEL P. O'CONNELL, THE LAW OF STATE SUCCESSION, (2015) 15-49.

[94] *Id*.

[95] *Id.* at p. 47.

[96] *See* Matthew C. R. Craven, *The Problem of State Succession and the Identity of States Under International Law*, 9 EUR. J. INT'L L. 142, 147-48 (1998).

[97] *Id*.

[98] *Id*.

[99] *See* Vienna Convention on Succession of States in Respect of Treaties art. 16, Nov. 6, 1996, 1946 U.N.T.S. 3.

[100] Roda Mushkat, *Hong Kong and Succession of Treaties*, 46.1 INT'L & COMP L. Q. 192, 181-201 (1997) (noting the cession of territory but also the complexity of the situation in Hong Kong).

> "When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."[101]

This scenario, however, should be inoperative in an ordinary contemporary post-conflict scenario, as annexation of territory through conquest is prohibited under international law.[102] That said, issues regarding contested borders may be resolved during peace treaties, so this law may theoretically be operative.

If one state is voluntarily incorporated into another, the obligations of the absorbed state would not normally be taken on by the incorporating state unless the parties decided otherwise.[103] However, the obligations of the incorporating state would be extended to the territory of the absorbed state, excepting localized treaties.[104] Again, this scenario is problematic in a post-conflict context, as one would question the voluntary nature of the incorporation.

To the degree that the Vienna Convention on Succession of States in Respect of Treaties is applied, if two or more states merge to form a new state (e.g., Yemen),[105] all treaties continue to be enforced on the previous states with their previous territorial scope unless further action is taken: "Any treaty continuing

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[101] Vienna Convention on Succession of States in Respect of Treaties art. 16, Nov. 6, 1996, 1946 U.N.T.S. 3. art. 15.

[102] This may be derived from U.N. Charter art. 2.4. *See also* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (United Nations [UN]) UN Doc A/RES/2625(XXV), Annex (e.g. "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal." Also, "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect.").

[103] *See e.g.,* Jan Klabbers, et al., eds. STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION: THE PILOT PROJECT OF THE COUNCIL OF EUROPE (1999) p. 144 (explaining that for example, treaties concluded by the former German Democratic Republic were considered lapsed upon voluntary incorporation with the Federal Republic of Germany).

[104] *Id*.

[105] *Id*. at 114.

in force . . . shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States . . . ."[106]

In the case of a complete dissolution of a state into multiple states (e.g., Yugoslavia), the treaties of the predecessor state continue in force for each successor state.[107] In contrast, when one of the entities on the territory continues the legal personality of the predecessor state (e.g., USSR, Russian Federation), the continuing state continues all treaty relations (excepting localized treaties).[108] These scenarios can come into play in the post-conflict environment, and they can thus be important components of *jus post bellum*.

VII. Conclusion: Peace as the Essential Foundation for Procedural Justice

Tension exists between considerations of procedural law and armed conflict. This can be illuminated in part by contrasting procedural law and armed conflict with judicial proceedings. In criminal law, for example, procedural justice is largely a question of the procedural fairness that determines punishment (or lack thereof). A fair punishment that is the result of an unfair process is considered substantively just, but procedurally unjust. The question of simply letting the litigants determine the issues in a case through the use of force does not arise. In matters of war and peace, however, this question looks different. In addition to the possibility of a more or less procedurally just process for transitioning from armed conflict to peace, there is often the possibility that the transition does not occur, and the armed conflict either continues or restarts. Armed conflict has historically been associated with punishment,[109] but it cannot be classified as anything other than an unjust procedure for determining the outcome of peace. The aphorism "might does not make right" does not preclude the victorious side fighting with a just cause. While it may produce a substantively fair outcome, this aphorism implicitly recognizes that as a matter of *procedure*, not only is there no guarantee that force or the threat of force will necessarily be fair in outcome, but even more clearly, it does not even pretend to be procedurally fair. Nonetheless, the transition to peace is inevitably built in the shadow of this fundamental procedural unfairness.

This Article has reviewed major categories of existing procedure guiding the transition from armed conflict to peace. It brings a new perspective to the often sterile debate on "peace versus justice." Peace versus justice is often effectively a euphemism for the question of whether or not to proceed with international

[106] Vienna Convention on Succession of States in Respect of Treaties art. 16, Nov. 6, 1996, 1946 U.N.T.S. 3. art. 31.

[107] Vienna Convention on Succession of States in Respect of Treaties art. 16, Nov. 6, 1996, 1946 U.N.T.S. 3. art. 34.

[108] Vienna Convention on Succession of States in Respect of Treaties art. 16, Nov. 6, 1996, 1946 U.N.T.S. 3. art. 35.

[109] *See generally* David Luban, *War as Punishment*, 39 PHIL. & PUB. AFF. 299 (2011).

criminal law investigations and prosecutions if such criminal law mechanisms may reduce the possibility of achieving a negative peace. This question is unlikely to be universally resolved in the abstract, but approaching peace as the foundation of procedural justice widens the scope of considering what "justice" means; it does so not only in prioritizing criminal accountability for those credibly accused of international crimes, but also establishing the application of legal procedure for building the post-conflict environment.

All of the areas discussed in this Article navigate the difficult tension between establishing a new beginning for justice, while recognizing that the context of recent armed conflict inevitably is a flawed foundation from which to proceed. Lawrence Solum emphasized the value of participation in procedural justice, citing it as essential for legitimacy.[110] Allowing the meaningful participation of affected communities is important not only for the laws governing the formation of peace, but the nature of any criminal accountability for conduct related to the armed conflict. Legitimacy and procedural justice is a cross-cutting issue, not limited to one side or the other in the reified peace versus justice debate. A transition from armed conflict judged to be more procedurally just and legitimate is more likely to sustain a more robust post-conflict criminal law effort. It is often said that if one desires peace, one should work for justice.[111] However, those who wish to establish post-conflict justice mechanisms must also pay attention to the procedural justice of the transition to peace.

[110] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004).

[111] *See e.g.*, Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 234 (1996); Ronald C. Smith, *If You Want Peace, Work for Justice*, 16 CRIM. JUST. 1 (2001).