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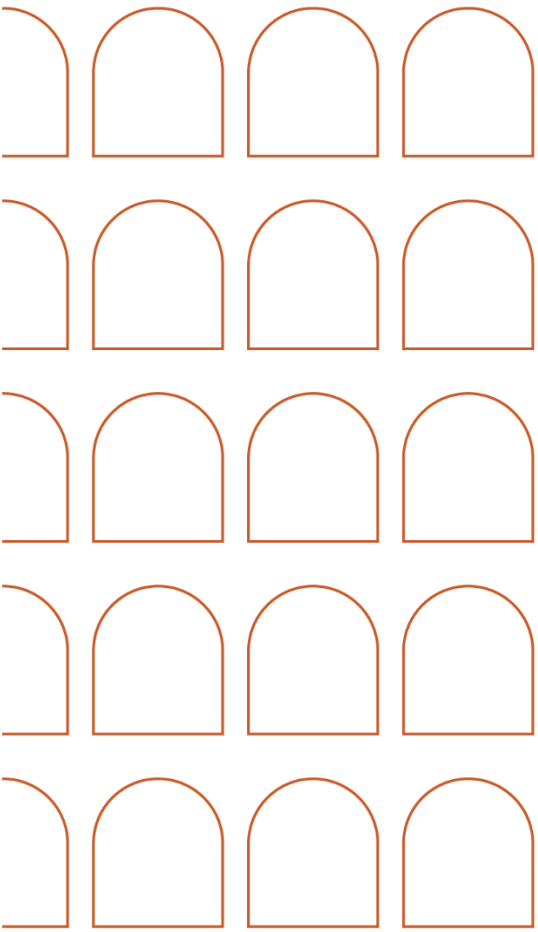

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Abstract

Unlike intuitively related areas such as dispute settlement, the use of force, the law of armed conflict, human rights and international criminal law, 'peacemaking' is not a recognised subfield of international law. It was not recognised as such in the beginning of the period under review in this volume (1989), nor by the end of it (2021). However, after the term 'peacemaking' rose to prominence in the 1990s as a concept and objective of global governance, legal scholars sought to capture the proliferation of peacemaking practices in legal language, coining or invoking concepts such as lex pacificatoria, 'legal tools for peacemaking' and jus post bellum. By the end of the period under review, none of these projects had managed to establish their version of a 'law of peacemaking' as a generally recognised subfield of international law. Lawyers had come relatively late to the practice of peacemaking, and when they did, the terrain – both in terms of political thought and practices – had already begun to shift. But while falling short of establishing a recognised subfield of international law, attempts to let law speak to peacemaking continue, albeit in less universalist terms.

The present piece is forthcoming as a chapter in Eyal Benvenisti and Dino Kritsiotis (eds), *Cambridge History of International Law, Vol. XII.*

Keywords

peacemaking, international law, *lex pacificatoria*, *jus post bellum*, legal encapsulation, legal inoculation, post Cold War

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Introduction

Unlike intuitively related areas such as dispute settlement, the use of force, the law of armed conflict, human rights and international criminal law, 'peacemaking' is not a recognised subfield of international law. It was not recognised as such in the beginning of the period under review in this volume (1989), nor by the end of it (2021). That said, it has always been possible to identify international legal rules and principles that relate to practices of 'peacemaking'. Which rules and principles are considered relevant will often reflect contemporary understandings of 'peace' and what it means to 'make' it. Thus, the set of rules and principles unified under a heading of 'the law of peacemaking' will depend, for instance, on whether peace is considered to be: the absence of disagreement, physical violence, structural violence or imperialism, or the presence of law & order, stability, non-hegemonic dialogue or something else. It is also shaped by whether 'making' peace is deemed to consist of: preventing the causes of conflict; promoting material equality; recognising existential interdependence; signing agreements or yet another practice.

At the start of the period under review, 'peacemaking' as such was not a common concept in international law and there seemed to be little interest in the organisation or creation of a subfield of international law to be known as 'the law of peacemaking'. International law had its law on the use of force and its law of armed conflict, and some still used 'the law of peace' as a common denominator for almost all other international law.[1] Peace agreements made an occasional appearance in textbooks, but mostly because they raised classic treaty questions or because of their significance for legal ordering (think 'Westphalia' or 'Versailles'), rather than as a special category of treaties giving rise to a distinct subfield of international law. Textbooks seemed to consider 'the settlement of disputes by peaceful means' as international law's most relevant rubric for peacemaking. The cornerstone of that subfield of international law was, and remains, Article 2(3) of the UN Charter, which obliges UN member states to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.[2] The UN Charter gives parties to disputes a whole range of options on how to do so, without expressing a preference or hierarchy: 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.[3] Of these, the 'legal' means of settlement, arbitration and judicial settlement, received most discussion in international law textbooks.[4] Negotiation and mediation, by contrast, were among the least institutionalised and obtained relatively little attention in international legal scholarship. When it came to dispute settlement, the focus was on inter-state conflicts; peacemaking in the context of intra-state

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[1] See Hugo Grotius, *On the Law of War and Peace* (1625, ed. Stephen C. Neff, Cambridge: Cambridge University Press 2012); Ian Brownlie's preface to his *Principles of Public International Law* (5th edn, Oxford: Oxford University Press 1998) xxiii and xxv; the organisation of Lassa Oppenheim's classic *International Law, A Treatise (1905-1906)*, *Volume I: Peace* (ed. Hersch Lauterpacht, 8th edn, London: Longmans, Green and Co. 1955) and *Volume II: Disputes, War and Neutrality* (ed. Hersch Lauterpacht, 7th edn, London Longmans, Green and Co. 1952).

[2] United Nations*, Charter of the United Nations*, San Francisco, 24 October 1945, 1 UNTS XVI, art. 2(3).

[3] UN Charter, art. 33.

[4] In Chinese and Russian practice of international law, there has been a heavy emphasis on non-judicial dispute settlement. However, the textbooks do not reflect this practice. I thank Ken Yang and Lauri Mälksoo for exchanges on this topic.

conflicts barely featured on international lawyers' radar.[5] There appeared to be little law on the matter: in the UN Charter, the obligation on UN member states to resort to peaceful dispute settlement referred only to 'international disputes'[6] and the prohibition on the use of force applied only in states' 'international relations'.[7] Moreover, the article preserving member states' *domaine reservé* explicitly provided that '[n]othing contained in the present Charter … shall require the Members to submit such matters [essentially within the domestic jurisdiction] to settlement under the present Charter'.[8] In sum, at the start of the period under review, international lawyers spoke of the international law concerning dispute settlement, but not of a 'law of peacemaking' as such, and they were not much concerned with the settlement of intra-state conflict.

However, as this chapter will set out, the term 'peacemaking' rose in prominence in the 1990s as a concept and objective of global governance. As is often the case, the increase in practices, in this case relating to peacemaking, was followed by lawyers' search for legal norms to categorise, express and govern the practices. As of the mid 2000s, legal scholars sought to capture the proliferation of peacemaking practices in legal language, coining or invoking concepts such as *lex pacificatoria*, 'legal tools for peacemaking' and *jus post bellum*. Whether the term 'law' was used to describe social practices, as a technical language or as a set of principles and rules, these attempts at encapsulating peacemaking practices within the law – and specifically international law – were deeply rooted in the dominant political thought of the 1990s.[9] There, the primary concern was no longer preventing (nuclear) inter-state conflict, but promoting intra-state transitions to liberal democracy. That concern had shaped not just the practice of peacemaking, but a diverse set of practices, each with their own solutions: accountability for international crimes, rule-of-law promotion, reparations for human rights violations, development, transitional justice, democracy promotion, international transitional administration, humanitarian intervention and a 'Responsibility to Protect' in cases of genocide, war crimes, ethnic cleansing and crimes against humanity. While giving rise to diverse pathways, all these practices were ultimately concerned with the question of how to 'make good states' and competed to be the overarching paradigm for addressing that challenge. Peacemaking, then, was another concept attempting to bring many of these practices together into one unifying theory and body of practice.[10] Reflecting this state-centrism, the dominant

[5] 'Intra-state conflict' is not a legal term of art. 'Non-international armed conflict' is, namely in the subfield of international humanitarian law. But it is precisely for that reason that I don't use 'non-international armed conflict' here or in other places where I use 'intra-state conflict' or 'civil war': the concern is not with the application of international humanitarian law and may include intra-state conflicts that do not meet the legal threshold of a 'non-international armed conflict'. Rather, the concern is with how international law approached peacemaking of conflicts that were not primarily inter-state, irrespective of whether these conflicts fulfilled the legal criteria of a non-international armed conflict.

[6] UN Charter, art. 2(3). Art. 33(1), by contrast, provides that '[t]he parties *to any dispute*, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.' But, read in its context (Chapter VI), this article is mostly considered to repeat the obligation of article 2(3) when setting out the Security Council's options for getting involved in peaceful dispute settlement.

[7] UN Charter, art. 2(4).

[8] UN Charter, art. 2(7).

[9] For an earlier though different usage of the term legal encapsulation, see Kamari M. Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham: Duke University Press 2019) 17.

[10] I thank Nehal Bhuta for discussions and ideas on this point.

peacemaking practices did not reveal other theories about how peace is to be made – for instance by changing the political and economic structures of the global legal architecture, or promoting more spiritually inspired conceptions of peace, such as recognising 'the other' as a fundamental part of oneself.[11]

One aspect of the dominant political thought of the 1990s that was particularly important for the rise of legal projects on peacemaking was 'legalism', conceptualised by Judith Shklar as a social ethos that holds moral conduct to be a matter of rule-following.[12] This is not to say that the 1990s were an era of legalism in the sense of all states complying with international law. Rather, 'the Rule of Law' was one of the most trumpeted values and one that Western states and the UN aimed to export to other states.[13] With sorting, categorising, systematising and filing as their specialisation, lawyers offered law as a remedy to what seemed like chaos.[14] The promise of law appeared particularly seductive in the context of civil wars,[15] where law's remedy was 'law and order' for the problem of 'state failure' and the 'rule of law' to remedy 'lawlessness'[16] – 'lack'-based conceptions that follow in the tradition of 'uncivilised' and 'underdeveloped'.[17] As if legislating peace into existence, legal scholars offered *jus post bellum* as their answer to situations of 'chaos and legal uncertainty'.[18] *Lex pacificatoria*, for its part,

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[11] See, among others, James Ogude (ed.), *Ubuntu and the Reconstitution of Community* (Bloomington: Indiana University Press 2019).

[12] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press 1986).

[13] With respect to the rule of law at the international level, many Western states seemed to assume that this had triumphed simply because of the West's victory in the Cold War and the arrival of the New World Order, which they would police. See, most prominently, George H.W. Bush, 11 September 1990, reported in 'Bush: "Out of these troubled times … a New World Order', Washington Post, https://www.washingtonpost.com/archive/politics/1990/09/12/bush-out-of-these-troubled-times-a-new-world-order/b93b5cf1-e389-4e6a-84b0-85f71bf4c946/: 'A world where the rule of law supplants the rule of the jungle.'

[14] I thank Sara Kendall (see chapter XXX) for discussions on the law's seductiveness.

[15] 'Civil war' is a term that is primarily used in politics and international relations; it is not a legal term of art. By contrast, as elaborated on above, the concept 'non-international armed conflict' is a legal term of art and the application of a specific set of rules of international humanitarian law hinges on the category. Here, and a few times below, I nonetheless use 'civil war', precisely to differentiate between the not well-defined concept and the more specific legal concept. For, as this chapter argues, the attempts at developing a law related to peacemaking to a large extent followed developments in global governance. In other words, the starting point was political talk about 'civil wars' rather than the subfield of international humanitarian law with its concept 'non-international armed conflict'. The 'civil wars' to be addressed by the law that was being identified or developed did not necessarily fit within the confines set by the criteria of the legal concept.

[16] See e.g. Inger Österdahl and Esther van Zadel, 'What will *jus post bellum* mean? Of new wine and old bottles', 14(2) *Journal of Conflict & Security Law* (2009) 175-207, at 177: 'These differences among and between legal scholars and moral theorists are evened out by the desire of all to apply and/or introduce a viable body of law to help societies emerge from a crisis, rather than having them struggle with chaos and legal uncertainty.' See also Kristen Boon, 'Legislative reform in post-conflict zones: jus post bellum and the contemporary occupant's law-making powers', 50(2) *McGill Law Journal* (2005) 285-326, at 293: 'In post-conflict zones, the rule of law plays a special role: it "enables wary former adversaries all to play a vital role in keeping the new order honest and trustworthy" by establishing rules that constrain the power of all parties, protect the rights of all individuals, and provide for the settlement of disputes.' (footnotes omitted).

[17] For the work done by the 'lack' argument, see James Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Durham: Duke University Press 2006) and Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law Is Illegal* (Oxford: Blackwell Publishing 2008) 7.

[18] Österdahl and Zadel, 'New wine', 177. Stahn et al. offer an additional rationale, namely that the post-conflict environment is crowded with multiple professionals, all bringing their own 'professional and personal worldview and priorities as to how to tackle the challenges of peacebuilding'. The 'jus post bellum' then was meant to offer a

proved a seductive label because it captured an area of practice of ambiguous legal status within a legal sounding category – a category that was defined by the messiness of the practice that it captured. 'Legal tools for peacemaking' suggested that peace could be made if one mastered the technique of 'lawyering'.

By the end of the period under review, none of these projects had managed to establish their version of a 'law of peacemaking' as a generally recognised subfield of international law. Lawyers had come relatively late to the practice of peacemaking, and when they did, the terrain – both in terms of political thought and practices – had already begun to shift. During the 2000s and 2010s, the preoccupations of global governance changed: from bringing non-state armed groups into the fold of non-violent politics to a 'Global War on Terror', and from statebuilding back to geopolitics. Many of the practices that were supposed to be unified under a grand theory and practice of peacemaking atrophied: they still occur, but have been overshadowed by other, more dominant, approaches. The US withdrawal from Afghanistan in August 2021 signified the end of the statebuilding project in its most ambitious form[19] and the Russian invasion of Ukraine marked the re-emergence of inter-state conflict as the primary concern of international affairs. But while falling short of establishing a recognised subfield of international law, attempts to let law speak to peacemaking continue, albeit in less universalist terms.

I. The ascent of peacemaking as a practice and concept of global governance

Practices of peacemaking occur all over the world – within families, in the workplace, in communities, under trees, and in luxurious hotels. But if we want to look at the rise of the term 'peacemaking' as a concept of global governance, we can begin with the United Nations. In June 1992, Secretary-General Boutros Boutros-Ghali published his vision on how the United Nations should respond to conflict in the post-Cold War world in his *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*.[20] The *Agenda* consisted of four areas of action: preventive diplomacy, peacemaking, peacekeeping and post-conflict peacebuilding. The report defined peacemaking as 'action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations',[21] and identified mediation, negotiation and adjudication by the International Court of Justice ('ICJ') as relevant practices.[22] The Secretary-General also

common language with shared values. Jens Iverson, Jennifer S. Easterday, and Carsten Stahn, 'Epilogue: *jus post bellum* – strategic analysis and future directions' in Stahn et al. (eds.), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press 2014) 542-553, at 550. But it is unclear why the law in and of itself would bring such agreement. A more practical push for the *jus post bellum* project came from the impending oversaturation of the adjacent subfield of international criminal law. *Jus post bellum* provided a new potential growth area, in which one could draw on expertise in international criminal law, as well as international territorial administration and the Responsibility to Protect.

[19] 'US must quit "nation building": Biden defends Afghanistan withdrawal – video', *The Guardian*, 31 August 2021, www.theguardian.com/us-news/video/2021/aug/31/i-take-responsibility-for-the-decision-biden-on-the-us-withdrawal-from-afghanistan-video (accessed 19 December 2022): 'This decision about Afghanistan is not just about Afghanistan. It is about ending an era of major military operations to remake other countries.'

[20] Boutros Boutros-Ghali, 'An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping' (1992) UN Doc A/47/277 - S/24111.

[21] Ibid., para. 20.

[22] Ibid., paras 34-39. Perhaps more surprisingly given his definition of peacemaking, the Secretary-General also discussed under this heading (paras 41-45) measures based on Chapter VII of the UN Charter (sanctions, use of

introduced the concept of 'post-conflict peacebuilding', which he defined as 'action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict'.[23]

These areas of action were not new: the UN had been doing 'peacekeeping' since its early years, the UN Secretary-General had always been engaged in 'preventive diplomacy' and the activities referred to as 'peacemaking' had been in the UN Charter since its adoption in October 1945. While presented by the Secretary-General as a new type of activity, even 'post-conflict peacebuilding'[24] contained substantive parallels with the UN's role in preparing trust territories for political independence and its 'peacekeeping' activities in newly independent Congo.[25] In this respect, the *Agenda for Peace* did not provide new ways to think about and promote peace. Rather, the document's central message was that the United Nations, and specifically the Secretariat, had extensive experience in this area,[26] but that the Cold War had 'made the original promise of the Organization impossible to fulfil'.[27] Now that the Cold War was over, this was a moment of opportunity for the UN (Secretariat) finally to do what it had always meant to. In the context of peacemaking specifically, the novelty lay in the pervasive sense of opportunity actually to use the mechanisms listed in the UN Charter.[28] This was a time, in the Secretary-General's words, to 'celebrate … restored possibilities'.[29]

At the same time, so the Secretary-General argued, these restored possibilities were more necessary than ever, given that the end of the Cold War had brought new types of conflicts and thus new challenges. Whilst the *Agenda* did not explicitly differentiate between inter-state and intra-state conflicts, the challenges described referred mostly to the then ongoing civil wars. Intra-state conflicts had become more prevalent and visible in the early 1990s since Cold War powers no longer felt the need to prop up governments in states across the world to secure their support. Such conflicts demanded a different role for the UN than the 'patrolling-the-buffer-zone' type of peacekeeping that the organisation had been involved in since November 1956. Similarly, the type of peacemaking required was different from that of a diplomatic actor mediating between formally equal states. Rather, it involved engagement with non-state actors and reorganisation of the domestic social contract – issues that for long had been considered part of the *domaine reservé* of states and therefore a no-go area for the UN.[30] Peacebuilding,

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force and peace enforcement). However, that should probably be read as a discussion of what to do if 'peaceful means fail', rather than as elements of 'peacemaking'. In his 1995 follow-up report, the Secretary-General explicitly differentiated peacemaking from sanctions and peace enforcement. Boutros Boutros-Ghali, 'Supplement to an Agenda for Peace: Position paper of the Secretary-General on the occasion of the 50th anniversary of the United Nations' (1995) UN Doc A/50/60*/S/1995/1*, para. 23.

[23] Boutros-Ghali, 'Agenda', para. 21.

[24] Ibid.

[25] On which, see Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford: Oxford University Press 2017) chapters 3 and 4.

[26] Boutros-Ghali, 'Agenda', para. 22.

[27] Ibid., para 2.

[28] Ibid., para. 3 ('a second chance'); para. 75 ('an opportunity … regained to achieve the great objectives of the Charter').

[29] Ibid., para. 76.

[30] See UN Charter, art. 2(7).

according to the *Agenda*, involved 'rebuilding the institutions and infrastructures of nations torn by civil war and strife', while also aiming 'to address the deepest causes of conflict: economic despair, social injustice and political oppression', thus requiring intervention deep into the state.[31]

The *Agenda* reflected an expectation that was prevalent in Western democracies, namely that the end of the bipolar world had brought global consensus about what 'the good state' looked like. In this expectation, the good state was an ideal version of the Western liberal state, characterised as internally and externally peaceful, democratic and subject to the rule of law. For the UN Secretariat, this putative global consensus meant that negatively defined obligations such as 'non-interference in domestic affairs' or 'respect for state sovereignty' – notions limiting the Secretariat's scope for independent action – receded into the background, thereby allowing for the promotion of substantive agendas such as democracy, rule of law and human rights. At a practical level, the early 1990s appeared to see little political opposition to this liberal agenda and witnessed fewer vetoes in the UN Security Council.[32] The brakes on UN action had been released.

The actions envisaged in the *Agenda for Peace* had both preceded the *Agenda* and would follow on from it. In the four years prior to the *Agenda*, the UN Department of Peacekeeping had deployed fourteen new missions, compared to none in the ten years prior. The UN Secretariat had already begun mediating peace agreements, monitoring the implementation of accords, organising elections, policing, providing human rights trainings, disarming ex-combatants and assisting in the drafting of constitutions. Negotiated settlements intended to bring intra-state wars to an end became increasingly 'comprehensive' – for instance, in Cambodia, El Salvador and Mozambique. 'As a result', according to the Secretary-General:

> the United Nations found itself asked to undertake an unprecedented variety of functions: the supervision of cease-fires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of their weapons; the design and implementation of de-mining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the design and supervision of constitutional, judicial and electoral reforms; the observation, supervision and even organization and conduct of elections; and the coordination of support for economic rehabilitation and reconstruction.[33]

By the end of the 1990s, the UN was running entire countries, having taken over the administration of Kosovo and East Timor.

Whereas the UN's role in Namibia, El Salvador, Cambodia and Mozambique could be recounted as success stories, the parallel or immediately following missions in Somalia, Rwanda and Bosnia revealed the huge challenges of such interventions. Issued only three years after the *Agenda for Peace*, a supplement report explained these challenges with reference to the intra-state character of contemporary armed conflicts, including 'the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos'.[34] These challenges did not

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[31] Boutros-Ghali, 'Agenda', para. 15.

[32] Ibid.

[33] Boutros-Ghali, 'Supplement', para. 21. See also para. 22 on the UN's role more specifically in the context of peacekeeping.

[34] Ibid., para. 13.

lead to a downsizing of the UN's ambitions. Rather, according to the Secretary-General, it meant that 'international intervention must extend beyond military and humanitarian tasks and must include the promotion of national reconciliation and the re-establishment of effective government'.[35] Similarly, the supplement report argued that the UN had to address causes of conflict such as economic deprivation. The remedy was believed to lie in stronger states. Institution-building, nation-building and statebuilding thus became part of the vocabulary of peace.

The UN was not acting alone in this flurry of activity. It was accompanied by its specialised agencies, as well as regional organisations such as NATO and the OSCE, and international NGOs and Western national development agencies. International financial institutions also participated. Like the UN, they were traditionally supposed to stay out of political arrangements within countries. However, 'good governance' came to be understood as a purely technical (and a-political) precondition for economic development. International financial institutions thus made loans conditional upon reforms promoting a market economy based on less government and more trade and foreign investment. During the late 1990s and early 2000s, the transitional justice agenda, focused on ideas of accountability and reparations, also increasingly became a part of the peace apparatus.[36]

The global governance project of statebuilding expanded further when Western states and the UN identified 'state failure' (a term that with time expanded to 'state fragility') as a cause of terrorism: if 'weak states' were incubators for international terrorism, then statebuilding abroad was necessary to promote peace at home. The United States, joined by some European allies, first invaded states (Afghanistan, Iraq) in order to then 'build' their governance structure, economy, security sector and humanitarian infrastructure.[37]

The UN, other international organisations, Western states and NGOs funded by actors in the West carried out these peace-promoting activities in the name of 'the international'. This was manifested in terms of 'international' standards, 'international' best practices, 'international' engagements, invoked and implemented in the name of the 'international community'. Acting in the name of 'the international' was not new – it had happened since the first international organisations were established and had increased as a result of the establishment of, first, the League of Nations, and then, even more so, with the advent of the UN: international secretariats established the international as a separate area, in and from which international officials acted independently from member states.[38] However, during the Cold War, ideological rivalries had kept that space somewhat in check: everything that was contested could not be universalised in the name of the international. International civil servants were in most issue areas at best go-betweens between states; only in a few spheres, for instance decolonisation,

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[35] Ibid. See also Meera Sabaratnam, 'The liberal peace? An intellectual history of international conflict management, 1990-2010' in Susanna Campbell, David Chandler and Meera Sabaratnam (eds.), *A Liberal Peace?: The Problems and Practices of Peacebuilding* (London: Zed Books 2011) 13-30, at 15.

[36] See e.g. British Institute of International and Comparative Law (BIICL) and Faria Medjouba (eds.), *Building Peace in Post-Conflict Situations* (London: BIICL 2012), which, despite its title, revolves entirely around concepts of transitional justice. See also the present volume, chapter XXX by Sara Kendall.

[37] James Dobbins, Seth G. Jones, Keith Crane and Beth Cole DeGrasse, *The Beginner's Guide to Nation-Building* (Santa Monica: RAND National Security Research Division 2007) xxiii.

[38] See Ole Jacob Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (Ann Arbor: University of Michigan Press 2015) 33-54. See also Guy Fiti Sinclair, 'The international civil servant in theory and practice: law, morality, and expertise', *European Journal of International Law*, 26(3) (2015) 747-66; Guy Fiti Sinclair, 'State formation, liberal reform and the growth of international organizations', *European Journal of International Law*, 26(2) (2015) 335-469; Fiti Sinclair, *Reform*.

could they operate relatively independently in the name of the international. When the explicit opposition to the liberal model disappeared, representatives of the international order (such as the UN and international financial institutions) adopted it, claimed its universality and thickened the operational space of 'the international'. As Ole Jacob Sending has argued, the 'international' became the frame of reference and the source of expertise, while the 'local' became the place in need of 'technical assistance', the place to which these norms, standards and practices had to be 'applied', or, at best, 'translated' to.[39] And, as shown by Nehal Bhuta, when elevated to 'the international', concepts such as peace, democracy, rule of law and good governance lost their historical genealogical connection to specific states and specific polities.[40] The ideal state that was being pursued was abstracted from the concrete, long and bloody histories of state- and nation-formation in which Western liberal states are rooted. Instead, peace, democracy, rule of law and good governance became key slogans for an ideal model of governance, while the ideal-type liberal state was approached as a kit to be built according to a technocratic manual and to be completed within a condensed time frame. In these expansive areas of peace- and statebuilding, international civil servants transformed themselves from diplomatic inter-state go-betweens into transnational technical social engineers.[41]

Of this myriad of activities in the name of peace, few fell under what the UN Secretary-General labelled specifically as 'peacemaking'. But both in practice and in scholarly works, the term peacemaking was often used more loosely, and at times also encompassed the phenomenon of peacebuilding.

II. Legal encapsulation: three types of scholarly approaches to bring law to peacemaking

The flurry of peacemaking activities undertaken as part of the global governance practices of the 1990s and early 2000s gave rise to a broad literature in the field of international relations and specifically in peace and conflict studies. In the mid-2000s, academic lawyers also began to study this field of practice, arguing that a legal perspective had been missing.[42] For the purposes of this discussion, we can schematise the various ways in which international law was brought to bear on peacemaking as: (a) international law as describing social practice; (b) international law as a technique offered to peacemaking practitioners and (c) international law as a set of principles and rules in accordance with which peace is to be made.

A. International law as describing social practice

The activities that UN Secretary-General Boutros-Ghali had listed under 'peacemaking' in his *Agenda for Peace* – mediation, negotiation and adjudication by the ICJ – were as such not new. What *was* new was the widespread application of these instruments in the context of the most prevalent and prominent conflicts of the time: civil wars. Binding dispute settlement by

[39] Sending, *Politics*, 64.

[40] Nehal Bhuta, 'Against state-building', *Constellations*, 15(4) (2008) 517-42, at 524.

[41] Sending, *Politics*, 128.

[42] See e.g. Christine Bell, 'Peace agreements: their nature and legal status', *American Journal of International Law*, 100 (2006) 373-412 and Christine Bell*, On the Law of Peace: Peace Agreements and the* Lex Pacificatoria (Oxford: Oxford University Press 2008). See also, later, Philipp Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict* (Cambridge: Cambridge University Press 2015), Martin Wählisch, *Peacemaking, Power-sharing and International Law: Imperfect Peace* (Oxford: Hart 2019) and Paul Williams, *Lawyering Peace* (Cambridge: Cambridge University Press 2021) 2.

the ICJ remained statutorily limited to states, but the UN, and other actors operating in its wake, could foster negotiation and mediation in the context of intra-state conflict. The rise in the prevalence and prominence of intra-state wars compared to inter-state armed conflict thus went hand in hand with a proliferation of the peacemaking method known from the international plane: peace talks and peace agreements. Especially after the end of the Cold War, peace treaties became the internationally preferred way of ending civil wars.[43]

Inter-state peace agreements had always held legal relevance, namely as treaties: agreements among states. But intra-state peace agreements raised new legal questions. In many instances, they looked like treaties in terms of their language, layout and procedures. They often also addressed matters that were of international concern, such as human rights and self-determination. And they had frequently come about with the help of foreign or international actors, who sometimes signed as witnesses, and sent them on to international fora such as the United Nations, which welcomed them. In sum, they had an 'international feel'. However, in the dominant understanding of international law, armed opposition groups did not generally have the capacity to enter into international agreements under international law.[44] So what was the legal status of such agreements?

Legal scholars studying this question usually agreed that as a matter of both international and domestic law it was hard to fit such peace agreements into existing legal categories. However, rather than concluding that, as a result, most of these peace agreements in and of themselves did not have legal status, some scholars suggested that it was international law's problem that it could not 'accommodate' these agreements.[45] For law to capture the messy reality of peacemaking, the law itself had to develop new categories, such as a 'hybrid' or 'internationalised' legal status. At that moment, the positivist method of international law, which denied legal status to most of the analysed agreements, was abandoned for other approaches. Christine Bell, for instance, first shifted to a concept developed in international relations theory – that of 'legalization'.[46] Applying this concept, she argued that these peace agreements were 'legalized', mostly referring to the fact that they 'appear' to be legal agreements, 'sound legal', are 'legal-looking', have 'legal-type' language and often give roles to third-party actors. She

[43] Tanisha M. Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (Ithaca: Cornell University Press 2018) 223-4 and Lise Morjé Howard and Alexandra Stark, 'How civil wars end: the international system, norms, and the role of external actors', *International Security*, 42(3) (2018) 127-171.

[44] In its without-prejudice clause, the Vienna Convention on the Law of Treaties did envisage the possibility of subjects of international law other than states concluding international agreements (article 3). In a commentary on an earlier draft of the VCLT, in which the scope of the convention still included agreements 'concluded between two or more States *or other subjects of international law*', the Commission explained that 'the phrase "other subjects of international law" [was] primarily intended to cover international organizations, to remove any doubt about the Holy See *and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded*.' (ILC Yearbook 1962, Vol II, p. 164, para 2, emphasis added. See also p. 162, para 8). However, in the period under consideration, the doctrines of insurgency and belligerency had fallen into desuetude due to developments in international humanitarian law and armed opposition groups tended not to get such recognition, either from third states or from the government they were opposing. See Emily Crawford, 'Insurgency', *Max Planck Encyclopedia of Public International Law* (2015) paras 1-3.

[45] Bell, 'Peace agreements', 379, 383 and 409. The article does not discuss the option that states may not want such agreements to be considered as (international) law, an option I discuss further in *Peacemaking: What's* Law *Got to Do With It*?

[46] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, 'The concept of legalization', *International Organization*, 54(3) (2000) 401-419, referring to 'a particular set of characteristics [obligation, precision and delegation] that institutions may (or may not) possess'.

concluded that this 'legalization' amounts to an emerging *lex pacificatoria*.[47] This *lex pacificatoria*, then, could be described as an empirically established set of characteristics of peace agreements concluded between a state and (an) armed opposition movement(s) in terms of what they address, whom they are signed by, what they include and who is involved in their implementation. In this context, the term 'lex' is more accurate as a description of what something looks like than as an indicator of legal status or any normative content.

B. International law as a technique offered to peacemaking practitioners

The increased prevalence and interest in peace agreements inspired the creation of databases of such agreements, facilitating text-based study of text-based peacemaking.[48] International lawyers, too, started developing such databases. The 'Language of Peace' database, for instance, was launched at the United Nations in December 2016 and allows one to select the issue one is interested in (e.g. 'amnesty', 'constitution-making', 'gender issues') and the database will then offer as 'legal tools' relevant provisions extracted from a collection of over a thousand peace agreements. Whilst in tune with the academic fashion of database production, the text-based epistemology runs the risk of providing only a text-based understanding of peacemaking: we know because of what we read and we know only what we can read.[49] The database includes provisions from peace 'agreements' that have never seen the light of day,[50] whereas undocumented peacemaking is off the radar and therefore not part of the practices that have been studied.

In scholarly projects such as the 'Language of Peace', law is primarily offered as a technique. The database is meant to serve as 'a *legal toolkit* in relation to the general and specific

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[47] For later political science research in a similar vein, namely also emphasising the 'hybrid', 'legalized' and 'internationalised' character of intra-state peace agreements, see Cindy Wittke, *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements Between State and Non-State Parties* (Cambridge: Cambridge University Press 2018). For a subsequent (more positivist doctrinal) analysis of the question of the legal status of these agreements, see Asli Ozcelik, 'Entrenching peace in law: do peace agreements possess international legal status?', *Melbourne Journal of International Law*, 21(1) (2020) 190-229.

[48] See, for instance, 'UN Peacemaker: Peace Agreement Database' (available at https://peacemaker.un.org/document-search, accessed 19 December 2022): 'a reference tool providing … close to 800 documents that can be understood broadly as peace agreements and related material. Users can access the full texts of the agreements in different languages and can use different search criteria, including searching by a number of different thematic issues.' The 'Peace Accords Matrix' (available at https://peaceaccords.nd.edu/search-pam, accessed 19 December 2022) provides data on the implementation of provisions in 758 peace agreements.

[49] The 'Language of Peace' database (available at /www.languageofpeace.org/#/, accessed 19 December 2022) builds on UN Peacemaker and allows one to search within these peace agreements on the basis of 'key issues', such as 'power sharing', 'human rights', 'statehood', 'detainees', 'elections'. 'PA-X' is a peace agreements database (available at www.peaceagreements.org/search, accessed 19 December 2022) that allows the user to search within 1915 peace agreements on a wide range of issues. The database was developed by a research team at the Lauterpacht Centre for International Law (University of Cambridge) and the United Nations Mediation Support Unit. The project also led to M. Weller, M. Retter and A. Varga (eds.), *International Law and Peace Settlements* (Cambridge: Cambridge University Press 2021).

[50] For instance, some studies cite provisions of the Darfur Peace Agreement (the DPA) as exemplary in its concern for women's issues. However, one of the key armed movements never signed it and the conclusion of the peace agreement was followed by an increase in violence. On the methodological problems of studying peacemaking, see also Alex de Waal, 'Inclusion in peacemaking: from moral claim to political fact' in Pamela Aall and Chester Crocker (eds.), *The Fabric of Peace in Africa: Looking Beyond the State* (Ontario: Center for International Governance Innovation 2017) 165-184. For the premium on text, see also Sarah M.H. Nouwen, 'Exporting peace? The EU mediator's normative backpack', *European Law Open*, 1(1) (2022) 26-59, at 31 and its note 33.

problems that typically arise in peace negotiations'.[51] As such, it matches a broader trend in this era which Roger MacGinty has described as 'technocratic peacebuilding':

> International organizations, governments, [international non-governmental organisations] and academic institutions use increasingly homogenized tools and language to describe conflicts. This framing lends itself to suggesting homogenized conflict remedies that feature heavily technocratic 'solutions' that often coalesce around the 'good governance' and state-building agendas. In a sense it is supply-led demand that reinforces the 'expertise' and primacy of elites.[52]

The background to the 'Language of Peace' database implies that the required expertise is legal expertise. 'Legal' here does not refer to the status of the agreements but to the style of writing: it is often lawyers who are asked for language – 'gimme some language' responded a UN official when reporting what he asks lawyers to do in peace negotiations[53] – to capture agreement, hide disagreement or add clauses to strengthen an otherwise purely political deal (for instance, definitions and provisions on dispute settlement). The promotion of the database as a 'legal toolkit' thus intimates that there is a particular, legal, 'language of peace'. And when peace agreements in non-international armed conflicts become part of the *savoir faire* of international lawyers, such conflicts, too, become problems that require international lawyers for their solution.[54]

C. International law as a set of principles and rules in accordance with which peace is to be made

Whereas the previously discussed projects were primarily concerned with the legal status of peace agreements and their language, other projects that aimed at legally encapsulating peacemaking practices focused on a substantive law of peacemaking.

1. Issues of international concern covered in intra-state peace agreements

Bell expanded the concept of *lex pacificatoria* also to reflect that peace agreements often dealt with issues regulated by international law, for instance, self-determination, transitional justice and third party enforcement. *Lex pacificatoria*, then, covered not just the characteristics of peace agreements, but also 'how peace agreement solutions have forced revision of traditional international law doctrines' and resulted in a 'new law of self-determination', 'a new law of transitional justice' and a 'a new law of third party enforcement'.[55] In her argument, these new 'laws' were subfields of international law that were adjusted to the context of peace negotiations: 'The full force of the *lex pacificatoria* lies in its ability to mediate inconsistent normative positions and arguments into a coherently narrated whole that revises

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[51] Lauterpacht Centre of International Law, 'Newsletter: Director's Roundup', *From the Director*, 21 (2012) (available at https://issuu.com/lauterpacht_ctr/docs/ftd21-06nov12, accessed 19 December 2022) 13 (emphasis added). See also 'Language of Peace Database: About' (available at www.languageofpeace.org/#/about, accessed 19 December 2022).

[52] Roger Mac Ginty, 'Routine peace: technocracy and peacebuilding', *Cooperation and Conflict*, 47(3) (2012) 287-308, at 288-9.

[53] Discussion, Cambridge, April 2018.

[54] For another illustration, see Paul R. Williams, *Lawyering Peace*, 2. Williams offers advice for future negotiators on 'how to […] work their way through the multitude of decision points they face in a negotiation, and then to draft legal text that encapsulates […] agreement in a way that will promote the durability of the agreement or constitution'.

[55] Bell, *On the Law of Peace*, 287.

understanding of what the norms individually might require.'[56] Bell did not, however, go into the substance of those new 'laws'.[57]

2. Jus post bellum: *developing a law that makes 'peace' more 'stable' or just'*

The push for a *jus post bellum* came from a very different direction than the *lex pacificatoria*: moral philosophy. To some actors on the victorious side of the unipolar 'New World Order', it seemed that 'the end of history' had diminished the relevance of the UN Charter's regulation of the use of force: these actors demonstrated greater appetite for using force to promote their values, especially liberal democracy, even when such force was hard to square with the UN Charter. At the same time, they propagated a change in the understanding of 'peace'. Where the peace movement after World War II had mobilised against aggression (i.e. the use of force between states), the peace project of the 1990s advocated *for* the use of force to halt what became known as 'atrocity crimes' (genocide, crimes against humanity and war crimes) and massive human rights violations, even in the absence of authorisation by the UN Security Council.[58] This advocacy for force became linked to the idea that interveners have a responsibility to 'rebuild' when a commission of eminent individuals reconceptualised 'humanitarian intervention' as the 'responsibility to protect'. According to R2P, states had a primary responsibility to protect their population, but failure to do so meant triggering an 'international responsibility to protect', consisting of a responsibility to prevent, to react – including through military intervention – and to rebuild.[59] The concept of R2P gained considerable traction in the Western world; the majority of states, however, insisted that R2P was not an independent legal basis for the use of force and resisted the notion of a responsibility to rebuild.[60] After 9/11, the United States and some allies supplemented the liberal rationale for military interventions with a neo-conservative one: in that view, with the apparent confluence of 'terrorists', 'weapons of mass destruction' and 'rogue nations', the 'costs of strict adherence to the UN Charter in a world of new security threats' had become too great.[61] In the face of these changing attitudes to the use of force, moral philosophers resorted to and revised 'just war' theory – famously revived by Michael Walzer in the 1970s – to assess when such force could be morally justified.[62]

A few moral philosophers and political scientists argued, especially after observing the quagmires resulting from some of the interventions that accompanied this greater Western appetite for the use of force (Kosovo, Afghanistan, Iraq), that there should be universal moral standards not only for 'just war', but also for a just *end* to that war – in other words, a 'just

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[56] Ibid., 257.

[57] See also the review of *On the Law of Peace: Peace Agreements and the* Lex Pacificatoria by R. C. H. Lesaffer, *Leiden Journal of International Law*, 24(2) (2011) 519-522, at 522.

[58] I thank Samuel Moyn for comments on this point. See, also, Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (London: Verso 2022), Chapter 3.

[59] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre 2001).

[60] UNGA World Summit Outcome (2005) UN Doc A/60/L.1*, paras 138-9.

[61] John C. Yoo and Will Trachman, 'Less than bargained for: the use of force and the declining relevance of the United Nations', *Chicago Journal of International Law*, 5(2) (2005) 379-394, at 384.

[62] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, New York: Basic Books 2015).

peace'.[63] This *jus post bellum* should regulate the transition from war to peace,[64] similar to how the *jus ad bellum* governs under what circumstances a state can go to war and the *jus in bello* the conduct of war.[65] Post-conflict reconstruction, reparations and 'war crimes' trials became key components of the proposed *jus post bellum.*[66]

International lawyers, especially in North America and Western Europe, also felt challenged by the conundrums posed by contemporary attempts at post-conflict state building. This concern spanned both UN territorial administration – as in Kosovo and East Timor – and statebuilding attempts by the US and allies in Iraq. Initially, the concept of *jus post bellum* was mostly limited to an argument about the contemporary law of occupation being 'ill-suited' to the demands of post-conflict statebuilding. The law of occupation did not allow the occupant radically to reform the legal system of the occupied territory, whilst statebuilding, so it was argued, required just that.[67] Whereas some legal scholars focused on the question of whether the victors in foreign military intervention had a 'responsibility to rebuild',[68] others focused on the principles that occupants had to comply with.[69]

Still other legal scholars began to use the concept in a broader sense, namely as the label for an entire subfield of international law. Some used it to cluster *existing* rules relating to the post-conflict phase, which up to that point had been scattered over various branches of international law.[70] Examples included: law of armed conflict obligations with respect to civilians and prisoners of war that continue to apply after the close of military operations;[71] post-military

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[63] See Brian Orend, 'Jus post bellum', *Journal of Social Philosophy*, 31(1) (2000) 117-137; Gary J. Bass, 'Jus post bellum', *Philosophy & Public Affairs*, 32(4) (2004) 384-412; Michael Walzer, *Arguing About War* (New Haven: Yale University Press 2004) 162-8; Robert E. Williams and Dan Caldwell, '*Jus post bellum*: just war theory and the principles of just peace', *International Studies Perspectives* 7 (2006) 309-320; Larry May, *After War Ends: A Philosophical Perspective* (New York: Cambridge University Press 2012).

[64] But cf. contra David Rodin, 'The war trap: dilemmas of *jus terminatio*', *Ethics*, 125(3) (2015) 674-695, differentiating between *jus terminatio* (the moral considerations relevant to the ending of war) and *jus post bellum* (regulating conduct in a postwar state) and thus adopting a narrower understanding of *jus post bellum*.

[65] These are the terms used by the moral philosophers. In international law, 'war' is no longer a significant concept. Rather, *jus ad bellum* regulates the use of inter-state force and *jus in bello* the conduct of hostilities during armed conflicts.

[66] In this literature, the concept of 'war crimes' is often used to refer not only to violations of international humanitarian law, but also to genocide and crimes against humanity.

[67] David J. Scheffer, 'Beyond occupation law', *American Journal of International Law*, 97(4) (2003) 842-860. C.f. contra: Daniel Thürer and Malcolm MacLaren, '"Jus post bellum" in Iraq: a challenge to the applicability and relevance of international humanitarian law?' in Klaus Dicke et al. (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot 2005) 753-782, suggesting that *jus post bellum* is occupation law.

[68] See, for instance, Antonia Chayes, 'Chapter VII½: is *jus post bellum* possible?', *European Journal of International Law*, 24(1) (2013) 291-305 and Guglielmo Verdirame, 'What to make of *jus post bellum*: a response to Antonia Chayes', *European Journal of International Law*, 24(1) (2013) 307-313.

[69] Boon, 'Legislative reform'.

[70] Vincent Chetail, 'Introduction' in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford: Oxford University Press 2009) 1-33, at 18.

[71] For instance, art. 5 of Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135; art. 6 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287 and art. 3 of Protocol Additional (I) to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, 1125 UNTS 3.

operations duties such as the duty to repatriate prisoners of war[72] or to remove mines;[73] the law of occupation; the duty to prosecute grave breaches of the Geneva Conventions;[74] obligations to investigate, prosecute and punish other international crimes in specific suppression treaties or developed in decisions by international human rights bodies;[75] the obligation 'to endeavour to grant the broadest possible amnesty' in the context of non-international armed conflicts;[76] and human rights law as it pertains to the post-conflict phase (for instance, certain power-sharing agreements can be in tension with discrimination prohibitions).[77] Depending on how one defines and conceptualises post-conflict peacemaking, other relevant rules could be found in the law on treaties, international refugee law, the law on state responsibility, self-determination law, and the law on state succession. Grouping all of these rules together under the label of *jus post bellum* enabled, according to some scholars, 'a comprehensive and coordinated approach' and 'contextualized interpretation'.[78]

Other scholars of international law did not aim merely to cluster existing rules, but to develop *jus post bellum* as a discrete subfield of international law. Carsten Stahn argued in 2006 that 'the increasing interweaving of the concepts of intervention, armed conflict and peace-making in contemporary practice make[s] it necessary to complement the classical rules of *jus ad bellum* and … *jus in bello* with a third branch of the law, namely rules and principles governing peace-making after conflict'.[79] In making that pitch, he pushed the boundaries of the *jus post bellum* project outwards. First, whilst his description of *jus post bellum* as peacemaking *after* conflict suggests that his focus, like that of the moral philosophers, was on post-conflict state building, he went on to develop principles that would also apply in scenarios of peace

[72] Geneva Convention III, art. 118.

[73] Art. 10(1) of the Protocol on Prohibitions or Restrictions on the use of Mines, Booby-Traps and other Devices (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980, 1342 UNTS 137.

[74] The four Geneva Conventions 1949, arts 49, 50, 129 and 146, respectively, and their First Additional Protocol 1977, art. 85(1).

[75] See, for instance, the Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 UNTS 277, arts V and VI; the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 UNTS 215, art. 28, and its Second Protocol, The Hague, 26 March 1999, 2253 UNTS 172, Chapter 4; the Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994, 2051 UNTS 363, arts 9-16; the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992, 1974 UNTS 45, art. 9(1); the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, 2056 UNTS 211, art. 9, and Protocol II 1996, art. 14. For the case law, see, for instance, *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights (Merits) (29 July 1998), Series C No. 4, and *Marguš v. Croatia*, European Court of Human Rights [GC] (27 May 2014), no. 4455/20.

[76] Art. 6(5) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, 1125 UNTS 609.

[77] *Sejdić and Finci v. Bosnia and Herzegovina*, European Court of Human Rights [GC] (22 December 2009), nos. 27996/06 and 34836/06.

[78] Chetail, 'Introduction', 18.

[79] Carsten Stahn, '*"Jus ad bellum", "jus in bello" … "jus post bellum"*? Rethinking the conception of the law of armed conflict', *European Journal of International Law*, 17 (2006) 921-943, at 921 (emphasis added).

negotiations.[80] Secondly, whilst he mostly adopted the moral philosophers' focus on international armed conflict and considered peacemaking the opposite side of the coin of 'intervention', he implied that *jus post bellum* would also apply after non-international armed conflict.[81] He concluded that despite the need for 'further thought', 'one fact is becoming increasingly evident: the development of rules and principles of post-conflict peace should form part of the agenda and the table of contents of international law in the 21st century'.[82]

Those developing the *jus post bellum* advanced various principles.[83] But from an international law perspective, perhaps the most striking feature of most of the proposals is the absence of a justification of a legal basis for the principles, whether as a matter of positive law or on another ground.[84] The absence of attention to the normative question is remarkable given that by the time lawyers entered the field of peacemaking, the *critique* of these practices had already been well developed.[85] Whilst some criticisms were reformist in nature,[86] many of the critiques challenged the core assumptions and desirability of liberal peacebuilding by: arguing that peacemaking was not necessarily peaceful;[87] pointing to the illiberal ways in which international actors promoted peace,[88] for instance through external regulation that stymied domestic politics;[89] revealing the mismatch between the socio-economic problems confronting war-torn countries and the market liberalisation programmes;[90] contesting the assumption that

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[80] For instance, the principles also cover the bargaining process of peace negotiations. Ibid., 938.

[81] For instance, some of the examples pertain to non-international armed conflicts. Ibid., 940, referring to civil wars. See also, explicitly, Carsten Stahn, '*Jus post bellum*: mapping the discipline(s)', *American University International Law Review*, 23 (2007) 311-347, at 333 and 'The future of *jus post bellum*' in Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (The Hague: T.M.C. Asser Press 2008) 231-7, at 233.

[82] Stahn, '*Jus ad bellum*', 943.

[83] Ibid. Here, Stahn identified six 'organizing rules and principles': (1) fairness and inclusiveness of peace settlements; (2) the demise of the concept of punishment for aggression; (3) humanization of reparations and sanctions; (4) the move from collective responsibility to individual responsibility; (5) towards a combined justice and reconciliation model and (6) people-centred governance. Österdahl and Zadel argued for a 'minimum-set' of rules (non-discrimination between civilians and combatants with regard to rights; discrimination between civilians and combatants with regard to obligations; fair, transparent and impartial trials for all prosecuted individuals; human rights applicable to all individuals; and rights to economic support for all families with children), with other rules to be 'tailor made' to the scenario. Österdahl and Zadel, 'New wine'.

[84] I develop this further in *Peacemaking: What's* Law *Got to Do With It?*

[85] By 2011, the critique was so prevalent that Shahar Hameiri called it 'the new mainstream – peacebuilding's own post-Washington consensus'. Shahar Hameiri, 'A reality check for the critique of the liberal peace' in Susanna Campbell, David Chandler and Meera Sabaratnam (eds.), *A Liberal Peace: The Problems and Practices of Peacebuilding* (London: Zed Books 2011) 191-208, at 192.

[86] See, for instance, Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press 2004) 6.

[87] See also, a few years later, Joan Cocks, 'The violence of structures and the violence of foundings', *New Political Science*, 34 (2012) 221- 227.

[88] David Chandler, *Bosnia: Faking Democracy after Dayton* (2nd edn, London: Pluto Press, 2000).

[89] David Chandler, *Empire in Denial: The Politics of Statebuilding* (London: Pluto Press 2006).

[90] Michael Pugh, 'The political economy of peacebuilding: a critical theory perspective', *International Journal of Peace Studies*, 10(2) (2005) 23-42.

causes of conflict came from inside the state and the solutions from outside;[91] pointing to the racial and postcolonial undertones of its accompanying development agenda;[92] and arguing that international norms were complicit in and necessary for civil wars in the first place.[93] But despite pertinent critiques of mistaken universalist assumptions and a highly decontextualized approach[94] with disastrous consequences,[95] many of the *jus post bellum* proposals uncritically embraced fashionable practices to bring them within the realm of law.

Also striking is the limited engagement by those propagating a *jus post bellum* with the concept of peace and its supposed opposite – 'bellum' in moral philosophy and 'armed conflict' in international law. 'Just peace' is the implied and at times explicit objective of the *jus post bellum*, but most of the attention has gone to the justice question; peace is often supposed to be self-evident. Some of the authors equate peace with 'stability',[96] others with situations in which 'the human rights of those involved in the war, on both sides, are more secure than they were before the war'.[97] Yet others posit, rather than question, that the end goals of *jus post bellum* are 'to establish security, create the political and economic basis for independence, and promote a democratic process'.[98] In the field of peace studies, meanwhile, 'what is peace' had long been a central question.[99] That field had also shown that, in terms of the experience of violence, there was often little difference between peace and war.[100] The critiques showed the importance of perspective: one person's peace can be the other's oppression.[101] The critiques also highlighted that the territories subjected to peacemaking and peacebuilding were mostly those that had once been colonised, that it was again that part of the world that was the

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[91] Jonathan Goodhand, *Aiding Peace? The Role of NGOs in Armed Conflict* (Boulder: Lynne Riener 2006) 179.

[92] Mark R. Duffield, *Development, Security and Unending War: Governing the World of Peoples* (Cambridge: Polity 2007), chapter 8 and Ilan Kapoor, *The Postcolonial Politics of Development* (London: Routledge 2008).

[93] David Campbell, *National Deconstruction: Violence, Identity, and Justice in Bosnia* (Minneapolis: University of Minnesota Press 1998).

[94] Nehal Bhuta, 'Against state-building', at 532-3.

[95] Roxana Vatanparast, 'Waging peace: ambiguities, contradictions, and problems of a *jus post bellum* legal framework' in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press 2014) 142-160. For a warning against uncritically allowing practices to turn into law, see Emmanuel De Groof, 'The emulation of peace mediation practices: beware of the jurisgenerative train' in Catherine Turner and Martin Wählisch (eds.), *Rethinking Peace Mediation: Challenges of Contemporary Peacemaking Practice* (Bristol: Bristol University Press 2021) 53-70.

[96] May, *After War Ends*, 6.

[97] Williams and Caldwell, '*Jus post bellum*', 309.

[98] Boon, 'Legislative reform', 292.

[99] See, for instance, Johan Galtung, 'Violence, peace and peace research', *Journal of Peace Research*, 6(3) (1969) 167-191 and, later, Oliver Richmond, *Peace in International Relations* (London and New York: Routledge 2008).

[100] David Keen, 'War and peace: what's the difference?', *International Peacekeeping*, 7(4) (2000) 1-22; Christopher Cramer, *Civil War is not a Stupid Thing: Accounting for Violence in Developing Countries* (London: Hurst & Co. 2006).

[101] Already in 1993, Paul Salem had pointed out that it is usually empires that have an interest in peace, namely to protect the status quo. Paul E. Salem, 'In theory: a critique of Western conflict resolution from a non-Western perspective', *Negotiation Journal*, 9 (1993) 361-9, at 362: 'Conflict and bellicosity is useful – indeed essential – in *building* empires, but an ideology of peace and conflict resolution is clearly more appropriate for its maintenance.'

laboratory for practices in the name of international governance, and that peacemaking risked continuing the civilising mission under a different banner.

By uncritically adopting the assumptions, practices and aspirations of the dominant peacemaking practices as the building blocks of a *jus post bellum*, the lawyerly promoters of this concept gave these practices a normative veneer. The *jus post bellum* label thus also 'normalised' and 'universalised' a very particular set of practices that had been carried out by some powerful actors in 'less developed', 'fragile' or 'failing' parts of the world. The decolonised world, then, served not only as the laboratory for peacebuilding and peacemaking practices, but also, and again, as a crucible for attempts to develop international law.[102]

There has been pushback in the legal literature against the drive for a legal *jus post bellum*.[103] Among the normative arguments against it have been: that it could be seen as introducing exceptions to the prohibition on the use of force through the back door of the *jus post bellum*;[104] that international rules on how states would have to be rebuilt are unlikely to be considered legitimate in the eyes of the inhabitants;[105] and that the idea that external actors have the right or even duty to put in place a structure to bring about 'what the inhabitants of the state *should* want'[106] is difficult to square with the two principles of international law that were key to decolonisation and remain key in the struggle against neo-colonialism: self-determination and sovereign equality.[107]

But rather than undermining the foundations of the *jus post bellum* project, these challenges served, unwittingly, as building blocks of a revised project: establishing a discourse.[108] Disagreements about the definition, scope and consequences of the *jus post bellum* strengthen the construction of a discourse, rather than breaking it down. In the words of legal *jus post bellum* advocates:

> The fact that various cautions and criticisms emerge in both just war theory and international law is not necessarily a troublesome development. On the contrary, it may be an indication that *jus post bellum* is coming of age. The growth of scholarship in past decades and its increasing

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[102] See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press 2005).

[103] The pushback has been on doctrinal, normative and historical grounds. For some examples, see Eric De Brabandere, 'The responsibility for post-conflict reforms: a critical assessment of *jus post bellum* as a legal concept', *Vanderbilt Journal of Transnational Law*, 43 (2010) 119-149; Antonia Chayes, 'Chapter VII½'; Gregory Lewkowicz, '*Jus post bellum*: vieille antienne ou nouvelle branche du droit? Sur le mythe de l'origine vénérable du *jus post bellum*', *Revue belge de droit international*, 44(1)-(2) (2011) 11-25.

[104] De Brabandere, 'The responsibility', 134-41; Robert Cryer, 'Law and the *Jus Post Bellum*: Counseling Caution' in Larry May and Andrew Forcehimes (eds.), *Morality, Jus Post Bellum, and International Law* (Cambridge: Cambridge University Press 2012) 223-249; and Roxana Vatanparast, 'Waging peace'.

[105] See Nehal Bhuta, who argues against a potential *jus post bellum* of constitutional transformation in territories under foreign or international administration. Nehal Bhuta, 'New modes and orders: the difficulties of a *jus post bellum* of constitutional transformation', *University of Toronto Law Journal*, 60(3) (2010) 799-854.

[106] Österdahl and Zadel, 'New wine', 201 (emphasis added).

[107] Cryer, 'Counseling', 242.

[108] *Jus post bellum* advocates incorporated many of these dissenting positions – sometimes literally, by including them in their edited collections. For instance, Stahn et al. (eds.), *Mapping the Normative Foundations*, includes critical chapters by De Brabandere and Vatanparast; May and Forcehimes (eds.), *Morality*, includes a critical chapter by Cryer.

practical relevance appear to suggest that we would lose something if we were to detract from the concept or abandon it.[109]

In support of the concept's strength, the authors pointed to a Google NGram that showed that the term '*jus post bellum*' had been increasingly cited.[110] Citations say nothing about the need for or merits of *jus post bellum* as a subfield of international law, but they are indeed significant if *jus post bellum*'s primary value is considered to be a discursive one.

III. Legal inoculation: peace mediation practitioners' recourse to law to protect their practice

The resort to normative language did not come only from scholarly lawyers attempting to bring peacemaking practices within the fold of law. In the field of peace mediation itself, the 2010s saw a turn to normative language, and, occasionally, to law. This was a resort to norms by mediation practitioners and scholars who were most of the time not lawyers. Rather than a response to the scholarly projects outlined above – which to a large extent had gone unnoticed in the field of peace mediation – the turn to norms reflected increasing guidance from political bodies, a desire for professionalisation, and an attempt legally to inoculate practices of peacemaking from interference by international human rights bodies, international criminal courts and constitutional courts.

The guidance for mediators first came mostly from within organisations – specifically, from the UN Secretariat to UN representatives. With the shift in concern from wars between states to intra-state conflicts, the understanding of the role of the mediator changed. In inter-state peace talks, diplomats and politicians of the negotiating parties had been in the driver's seat. In intra-state conflicts, however, the UN and other international actors began to mediate in the name of the 'international', understood more as supra-national than as inter-national, and which was supposed to come with moral authority. Were there constraints on what international actors, and specifically the UN, could mediate and endorse? Questions about the boundaries gave rise to increasing guidance, particularly with respect to amnesties.[111]

The more comprehensive peace agreements became, the more was at stake in negotiating peace: the parties were essentially negotiating new constitutions. For the UN Security Council, the negotiation of peace agreements became an opportunity to advance its thematic agendas. In parallel with sprawling guidance from the UN Secretariat on what and what not to include in peace agreements,[112] the Council, too, suggested in presidential statements and thematic resolutions what peace agreements should contain (for instance, provisions on disarmament,

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[109] Stahn et al. (eds.), *Mapping the Normative Foundations*, 553.

[110] Iverson et al., 'Epilogue', 544.

[111] 'Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution' (1999), published in *UN Juridical Yearbook* (2006) 493-497.

[112] Report of the Secretary-General on 'The rule of law and transitional justice in conflict and post-conflict societies' (2004) UN Doc S/2004/616, para. 64; United Nations, Department of Political Affairs (Policy and Mediation Division, Mediation Support Unit), 'Guidance for mediators: addressing conflict-related sexual violence in ceasefire and peace agreements' (2012), available at www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/Background-Doc-1-DPA-Guidance-for-Mediators-on-Addressing-Conflict-Related-Sexual-Violence-in-Ceasefire-and-Peace-Agreements.pdf (accessed 19 December 2022).

children in armed conflict, the protection of civilians, ending impunity, rule of law)[113] and should not contain (for instance, amnesties for international crimes),[114] as well as who should be involved in the process of making peace (children, women, young people).[115] While this 'inclusivity agenda' emerged, the UN also came under pressure, particularly from the Western permanent members on the Security Council, to *exclude* certain categories of people from peace processes: 'terrorists', people and groups subject to sanctions, and people subject to arrest warrants by international criminal courts and tribunals, in particular the International Criminal Court.

Another driver of UN guidance, and specifically guidance on 'how' to do mediation, was the attempt to professionalise mediation. Professionalisation, which tends to go hand in hand with standard setting, was a response to three factors. First, an awareness of the adverse consequences of peace processes that go wrong, as the Rwandan genocide had lethally illustrated.[116] Secondly, professionalisation was inspired by the need to distinguish oneself in a crowded field.[117] By the 2010s, peacekeeping and peacebuilding – the other key activities which the *Agenda for Peace* had focused on – had fallen into disrepute. Peacemaking in the sense of mediation seemed a more attractive option: a delimited area of intervention that was less risky and costly in terms of human life and finances.[118] But precisely for that reason, the field of mediation had become increasingly competitive. The UN and regional organisations thus began to bid for both epistemic and normative authority by highlighting the relevance of expertise, skills and norms, issuing guidance and setting up specialised mediation units.[119]

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[113] See, *inter plurima alia*, Statement by the President of the Security Council (8 July 1999) UN Doc S/PRST/1999/21, p. 2; UNSC Res 1261 (30 August 1999) [on children in armed conflicts], op. clause 7; UN Res 1265 (17 September 1999) [on protection of civilians in armed conflicts], op. clause 12 (see also preambular clause 9); Statement by the President of the Security Council (23 March 2000) UN Doc S/PRST/2000/10, pp. 1-2; UNSC Res 1296 (16 April 2000) [on protection of civilians in armed conflicts] , op. clause 16; UNSC Res 1612 (26 July 2005) [on children in armed conflict], op. clause 14; UNSC Res 2143 (7 March 2014) [on children and armed conflict], op. clause 9; UNSC Res 1674 (28 April 2006) [on protection of civilians in armed conflict], op. clauses 7 and 18; UNSC Res 1820 (19 June 2008) [on acts of sexual violence against civilians in armed conflicts], op. clause 4; UNSC Res 1674 (28 April 2006) [on protection of civilians in armed conflict], op. clause 11; UNSC Res 2467 (23 April 2019) [on sexual violence in armed conflict], op. clause 30.

[114] UNSC Res 1314 (11 August 2000) [on the protection of children in situations of armed conflicts], op. clause 2; UNSC Res 1325 (31 October 2000) [on women and peace and security], op clause 11; UNSC Res 1820 [on acts of sexual violence against civilians in armed conflicts] (19 June 2008), op. clause 4; UNSC Res 2467 (23 April 2019) [on sexual violence in armed conflict], op. clause 30.

[115] See, among others, UNSC Res 1314 (11 August 2000) [on the protection of children in situations of armed conflicts], op. clause 11; UNSC Res 1325 (31 October 2000) [on women and peace and security]; UNSC Res 1820 (19 June 2008) [on acts of sexual violence against civilians in armed conflicts]; UNSC Res 1888 (30 September 2009) [on sexual violence against women and children in situations of armed conflict]; UNSC 1960 (16 December 2010) [on sexual violence against women and children in situations of armed conflict]; UNSC Res 2106 (24 June 2013) [on sexual violence in armed conflict] and UNSC Res 2250 [on youth, peace and security] (9 December 2015), op. clauses 1 and 2; UNSC Res 2419 (6 June 2018) [on youth in conflict prevention and resolution], op. clause 2; UNSC Res 2535 (14 July 2020) [on youth in conflict prevention and resolution], op. clause 1.

[116] Christopher Clapham, 'Rwanda: the perils of peacemaking', *Journal of Peace Research*, 35(2) (1998) 193-210.

[117] David Lanz and Rachel Gasser, 'A crowded field: competition and coordination in international peace mediation', *Mediation Arguments*, 2 (2013) 1-20.

[118] I thank Devon Curtis for this observation.

[119] See, for instance, the report of the Secretary-General on 'Enhancing mediation and its support activities' (2009) UN Doc S/2009/189 and the 'United Nations Guidance for Effective Mediation', issued as an annex to the report of the Secretary-General on 'Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution' (2012) UN Doc A/66/811. See also Elodie Convergne, 'Learning to mediate? The

Professionalisation was also an attempt to defend mediation against encroachments by the rapidly developing fields of human rights law, international criminal law and international humanitarian law. As a result of institutionalisation (in the form of human rights courts, human rights treaty bodies and international criminal courts and tribunals), these bodies of law had grown exponentially during the 1990s and early 2000s. Many mediators supported these norms and were relieved that in peace talks they could point the parties to some internationally agreed-upon boundaries.[120] However, mediators also felt that these fields sometimes encroached too much on their terrain and interfered with their work. Professionalisation, then, was a way of saying to the human rights bodies and international courts that mediation had its own norms.

Take the UN Guidance for Effective Mediation ('the Guidance').[121] This sets forth nine 'key fundamentals that should be considered in a mediation effort', one of which is 'international law and normative frameworks'.[122] To a large extent, these 'fundamentals' could be seen as means-end considerations: if you want to be successful in mediation, this is what you need to do. However, by not differentiating between positive law and normative guidance and by putting 'international law and normative frameworks' on par with other 'fundamentals' that are key to mediation, such as consent and inclusivity, the Guidance downplays any suggestion that 'international law and normative frameworks' would have a superior normative status.[123] As one key UN mediation actor explains: 'this report is in part about staking territory for mediation: human rights lawyers, humanitarians, they all have their claims and their fields, which are all very important, but we have ours'.[124]

A second illustration of an attempt to enhance the normativity of mediation in and of itself can be found in scholarly literature on peace mediation based on interviews with mediators themselves. In one project, mediators had been asked about the norms they were dealing with in practice, and on that basis the authors developed categories of norms.[125] One of the

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Mediation Support Unit and the production of expertise by the UN', *Journal of Intervention and Statebuilding*, 10(2) (2016) 81-199. See also the African Union Mediation Support Unit, the European Union External Action Service Mediation Support Team and the Organization for Security and Co-operation in Europe Mediation Support Team. See, more elaborately, Catherine Turner and Martin Wählisch (eds.), *Rethinking Peace Mediation: Challenges of Contemporary Peacemaking Practice* (Bristol: Bristol University Press 2021) and Sarah M. H. Nouwen, 'Exporting peace?'.

[120] Interview, Geneva, 2018.

[121] United Nations, 'Guidance for Effective Mediation'.

[122] Ibid., 3.

[123] I thank David Lanz for inspiring discussions on this phenomenon. The Guidance does not claim that the fundamentals are positive law. But for political norm-setting, the status of positive law does not matter much.

[124] Discussion, April 2018. The other incentive for reports such as this guidance document is visibility among donors. As the same UN official explained: 'I tried to keep the number of norms down, also the number of reports on UN peacemaker; I am more interested in deploying. But one needs to show that one is doing something. Donors want reports and in mediation there is very often failure.' Interviewer: 'Why all these normative reports on addressing sexual violence?' Interviewee: 'If you want a western state to fund anything, do it on women …. But the good thing is that UN mediators will never look at these norms. They are political figures. Guidelines are there more to pretend there is consensus among member states.'

[125] Sara Hellmüller, Julia Palmiano Federer and Mathias Zeller, 'The role of norms in international peace mediation', swisspeace/NOREF, April 2015, available at: www.swisspeace.ch/fileadmin/user_upload/Media/Publications/The_Role_of_Norms_in_International_Peace_Mediation.pdf (accessed 19 December 2022).

categories they developed is that of 'definitional norms': 'norms [that] underpin the very definition of a mediation process'.[126] The example given of a definitional process norm is that of consent: 'If a process happens without the consent of the parties, it does not qualify as mediation.'[127] As an example of a substantive norm, the report mentions the right to life: 'the objective of a mediation process is based on norms that value a non-violent resolution of conflicts over military action and thus respect the right to life'.[128] By arguing that mediation has its own definitional 'norms', mediators push back against the imposition of external norms. When external actors put pressure on mediators to become norm entrepreneurs (for instance, to promote democracy or gender equality), this vocabulary enables them to invoke the definitional process norm of consent: without the parties' consent, there is no mediation. Moreover, by tying the practice of mediation to the human right to life, mediators reframe a tension that is often described as one between pragmatic mediation and principled human rights as a tension between one human right (the right to life) and another human right (for instance, the right to accountability for human rights violations).

A third illustration of normatively elevating the practice of negotiations and mediation can be found in the Peace Treaty Initiative, launched by the Institute for Integrated Transitions in November 2020.[129] This initiative pursues a classic international law route, namely a treaty among states, with a view to incentivising states to choose the path of negotiation. Part of that incentive is to provide 'clear standards [and an] available mechanism… to validate [a peace treaty's] conformity with international law', thereby protecting peace agreements against 'areas of international law that … impinge on a negotiation's prospect for settlement'.[130] We see a resort to law to defend peacemaking practices against intervention by other subfields of international law (e.g. human rights law, international criminal law, international humanitarian law). If the initiative is successful, the net result would still be more law, just law pointing in a different direction.

IV. Of conditions of possibility come and gone?

By 2022, the 'era of restored possibilities' that Secretary-General Boutros-Ghali observed appears to have been a short one. Mediators may have 'professionalised', but they are less in demand.[131] The preference for a mediated settlement that characterised the 1990s and early 2000s has also waned:[132] Western states have taken the position that parties accused of

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[126] Ibid., 6.

[127] Ibid.

[128] Ibid.

[129] Institute for Integrated Transitions, 'The Peace Treaty Initiative', available at https://ifit-transitions.org/peace-treaty-initiative/ (accessed 19 December 2022).

[130] Mark Freeman, 'Building the international law of peace', 10 November 2020, available at justiceinconflict.org/2020/11/10/building-the-international-law-of-peace/ (accessed 19 December 2022).

[131] Magnus Lundgren and Isak Svensson, 'The surprising decline of international mediation in armed conflicts', *Research & Politics*, 7 (2020) 1-7.

[132] One illustration of the waning norm of peace mediation is that the 'comprehensive peace agreement' that was de rigueur in the 2000s until the early 2010s has become rare. The 2016 agreement between Colombia and the FARC was one of the last ones. Another remarkable exception is the 2015 Agreement concerning South Sudan, which was 'revitalised' in 2018. It is a heavily normativised peace agreement: many of the *jus post bellum* practices appear in a 'language of peace' that resonates with that of the database. But the fact that South Sudan has such a heavily normativised peace agreement, whereas such norms have not even come close to Syria, reveals one of

terrorism should not be negotiated with,[133] whereas Russia has been seen to prefer permanent instability and conflict over comprehensive settlements, for instance in Syria. With Russia's invasion of Ukraine, the pendulum of the international focus has swung back to international armed conflict. The peacemaking modalities of the Cold War, however, are not readily available: traditional inter-state diplomacy has weakened, nuclear arms talks have been neglected or abandoned, and the peacemaking modalities that developed in the 1990s and 2000s are not easily adjustable to inter-state conflict. With the resurfacing of geopolitics, the leeway for actors operating in the name of the 'international' has diminished: the operational space considered to be the 'international' depended on, if not global consensus, at least no contestation by great powers. Who can mediate in wars with such geopolitical dimensions? Is there any space for the 'international' norms developed in peace mediation guidance documents? The 'new' peace is, so mediators fear, the *pax cynica*: when the great powers impose, anything goes.[134]

In this context, the chances of consolidating a subfield on the law of peacemaking are slim. With the exception of peace mediation guidance documents and the Peace Treaty Initiative, all projects attempting to bring law to peacemaking have been predominantly scholarly projects: they have not (yet) shaped peacemaking practice much and have received little support from states. In the West, the age of legalism has not yet ended. The ideal of ordering a chaotic world through law is still alive, with some nostalgia for the putatively 'golden era of the rule of law in the 1990s'.[135] But what has ended is the age of innocently believing in its universalism.

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the continuities since the Cold War: global governance actors insist on norms only when the great powers do not have a strong interest in the conflict in question.

[133] Unless the Western state feels it is in its own interest to negotiate: see for example The Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America (29 February 2020).

[134] Peace mediation scholarship in turn has embraced pragmatism, arguing that 'post-war transitions may depend on contested issues *not* being resolved, on groups *not* being included and negotiated parts of peace agreements *not* being implemented as stipulated.' See Jan Pospisil, *Peace in Political Unsettlement: Beyond Solving Conflict* (Basingstoke: Palgrave Macmillan 2018) 9.

[135] See Jochen von Bernstorff, 'The decay of the international rule of law project (1990-2015)' in Georg Nolte, Heike Krieger, and Andreas Zimmermann (eds.), *The International Rule of Law: Rise or Decline? Foundational Challenges* (Oxford: Oxford University Press 2019) 33-55, arguing that the 'golden era of the rule of law', the 1990s, was in fact not so pro-rule of law after all: it was western hegemony and selective appreciation for the rule of law.

Suggested readings:

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- de Waal, A. 'Violence and Peacemaking in the Political Marketplace', in A. Ramsbotham and A. Wennman (eds), *Accord: Legitimacy and Peace Processes - From Coercion to Consent* (Conciliation Resources, 2015) 17-20.
- Weller, M., Retter, M., and Varga, A. (eds.), *International Law and Peace Settlements* (Cambridge: Cambridge University Press 2021).

- Wittke, C., *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements between State and Non-State Parties* (Cambridge: Cambridge University Press 2018)