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Mapping a Norm of Inclusion in the *Jus Post Bellum*

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I. Introduction

In recent years much greater attention has been paid to peace agreements and the way in which justice and accountability are secured in the aftermath of conflict. This has resulted in greater interest in the historical concept of *jus post bellum* and the idea that law might effectively regulate the post-conflict environment. The rapid evolution of the related fields of international criminal law and transitional justice have led to a considerable body of academic and policy literature assessing the requirements of justice in the aftermath of conflict. This debate has inevitably included the question of whether or not international law should regulate post-conflict policy, and how to balance competing international and local priorities.[1] While international law does provide guidance on the negotiation of peace agreements,[2] and on the substance of what is being negotiated,[3] it cannot fully address the specificity of individual conflicts. Indeed, too great an emphasis on international norms in such processes can undermine local ownership and provoke political backlash against international actors.[4] This is part of a trend that Bell describes as the 'global re-negotiation of international norms',[5] where what had been promoted as common values and norms of post-conflict justice are now challenged and in some cases rejected. It is increasingly clear that the normativity of international law must be balanced against the political process of negotiation in post-conflict contexts. As a result, attention must be paid not only to the substantive outcome of peace negotiations but also to the process by which agreement is reached. While international law should not necessarily dictate the outcome of the process, what it does provide is a *normative* basis for inclusion. It is increasingly recognized that sustainable peace requires the inclusion of a much broader range of actors than had

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[1] Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014); Matthew Saul and James Sweeney (eds), *International Law and Post-Conflict Reconstruction Policy* (Routledge 2015).

[2] United Nations Guidance on Effective Mediation (2012); For commentary, see Martin Wählisch, 'Normative Limits of Peace Negotiations: Questions, Guidance and Prospects' (2016) 7 *Global Policy* 261.

[3] Secretary General of the United Nations, 'Guidance Note on the United Nations Approach to Transitional Justice' UNSG 2010 Guidance Note 5.

[4] Catherine Turner and Ruth Houghton, 'Constitution Making and Post Conflict Reconstruction Policy', in Matthew Saul and James Sweeney (eds), *International Law and Post Conflict Reconstruction Policy* (Routledge 2015) 119.

[5] Christine Bell, *Navigating Inclusion in Peace Settlements: Human Rights and the Creation of the Common Good* (British Academy 2017) 5.

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traditionally been the case.[6] By requiring the inclusion of a wide range of civil society actors in negotiations international law acts as a normative framework for participation, helping to bridge the divide between international law and the political process of negotiation.

This chapter maps the existence in international law and policy of provisions requiring the inclusion of traditionally excluded groups in peace negotiations. Section I outlines the definition of 'inclusion' and locates it within the broader framework of international law. Section II then examines institutional moves towards inclusion in international law and policy, looking particularly at the shifting language of the United Nations. Section III examines thematic instances where inclusion has been integrated into normative frameworks and the ways in which this helps to shape a broader norm of inclusion. Finally, Section IV discusses the evidence of an emerging norm of inclusion and emphasizes the importance of inclusion for broader *jus post bellum* debates. Ultimately the chapter argues that international law requires inclusion not only as an aspiration of thematic regimes or an optional political gesture but as a general principle of the *jus post bellum*. It proposes that understanding inclusion as an underpinning norm of *jus post bellum* ensures the sustainability of peace by ensuring that those most affected by post-conflict initiatives have a role in shaping them.

II. Framing the Debate: Why Inclusion?

Jus post bellum has been described as 'the laws and norms of justice that apply to the process of ending war and building peace'.[7] It is one among a number of normative regimes to have emerged in recent decades that purport if not to regulate the post-conflict environment, at least to present a normative framework for moving from the state of war to that of peace.[8] In the context of *jus post bellum* a number of key principles have been identified as being core to this transition. These include retribution, rebuilding, restitution, and proportionality.[9] However, most notable for the purposes of this chapter are the principles of *reconciliation*, or the idea that 'parties can come to a lasting peace where mutual respect for rights is the hallmark'[10], and *reparation* as a means of re-establishing trust among the parties.[11] While debate has centred on more or less agreed principles of what a regime of *jus post bellum* should seek to achieve, disagreement persists over how this is to be delivered. Should *jus post bellum* be a legally normative or codified regime that dictates justice outcomes?[12] Does

[6] Seth Kaplan and Mark Freeman, *Inclusive Transitions Framework* (Barcelona, Institute For Inclusive Transitions 2015).

[7] Jennifer Easterday, Jens Iverson, and Carsten Stahn, 'Exploring the Normative Foundations of *Jus Post Bellum*: An Introduction', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 1.

[8] See also Ruti Teitel, *Transitional Justice* (Oxford University Press 2000); Christine Bell, *On the Law of Peace: Peace Agreements and the* Lex Pacificatoria (Oxford University Press 2008).

[9] Larry May, '*Jus Post Bellum*, Grotius and *Meionexia*', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 15, 16–18.

[10] Ibid. 16.

[11] Ibid. 18.

[12] Christine Bell, 'Of Jus Post Bellum and *Lex Pacificatoria*: What's in a Name?', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 181.

it provide a framework for operationalization of key justice principles, through hard law, soft law, or in policy and practice? Or is it no more than a moral framework for action?

This chapter suggests that these tensions can be addressed through a focus on inclusion. There are a number of reasons for focusing on inclusion as a general principle of *jus post bellum*. They relate both to the process of negotiating a just peace as well as to the outcome sought. Questions about the justice of peace most often arise at the point at which violent conflict is brought to an end. It is tempting to regard the signing of a peace agreement as the end of conflict. However in reality this is rarely the case. Conflict continues in a different form as the details of how an agreement is to be implemented are negotiated. As Bell notes, 'peace settlements are seldom based on a clear pre-commitment to the common good; rather they require this commitment to be constructed in an ongoing way'.[13] What this means is that the peace agreement is not the end of the conflict, but rather the beginning of a new phase in which the modalities of the new social order are to be worked out. The justice of the peace therefore depends on the way in which questions of justice and accountability are addressed as part of the new order. This is where inclusion becomes important. Negotiating a settlement between elites and armed actors perpetuates the marginalization of vulnerable groups who may have suffered the most as the result of conflict. This exclusion can fuel violence and undermine justice efforts.[14] An inclusive process extends the parameters of who should be given a seat at the negotiating table and gives all groups in society the opportunity to be heard. It can 'knit together a frayed social fabric and give all groups a stake in transforming their country'.[15] This in turn increases the chances of a sustainable peace.

Inclusion as a general principle therefore speaks both to normative outcomes of *jus post bellum*, such as the need for justice institutions which acknowledge the harm committed on all groups in society, but also more holistically to the principle that those most affected by war and violence should be involved in the design of these institutions. In other words, inclusion addresses the *means* and the *ends* of *jus post bellum*. It encompasses both legal and relational aspects of justice by encouraging broad ownership of post-conflict justice and an inclusive discussion of what justice requires. In so doing, it avoids emphasis on strongly normative outcomes which may be difficult to agree and which may not enjoy the support of affected populations, while still providing a normative basis as an entry point for marginalized groups into post-conflict processes. The question that needs to be addressed, however, is whether it can be said that a norm of inclusion already exists as a matter of *lex lata* drawn from existing legal obligations in this area, or whether it is simply an emerging principle of *lex ferenda*? In this way, the question of whether there is a norm of inclusion in *jus post bellum* mirrors some of the core questions of the field itself.

The following sections map the existence of a norm of inclusion within existing international law and policy. What is demonstrated is the emergence of principles of inclusion across both the peacebuilding architecture of the Security Council and the sustainable development agenda of the United Nations Development Programme (UNDP). By demonstrating the way in which inclusion is mainstreamed into both development and diplomacy

[13] Christine Bell, *Navigating Inclusion in Peace Settlements: Human Rights and the Creation of the Common Good* (British Academy 2017) 2.

[14] Colette Rausch and Tina Luu, 'Inclusive Processes are Key to Ending Violent Conflict' USIP Peace Brief, 2017 available at www.usip.org/publications/2017/05/inclusive-peace-processes-are-key-ending-violent-conflict accessed 19 May 2019.

[15] Ibid.

policy frameworks internationally, the sections map the existence of a norm across institutional and thematic frameworks, building a picture of an institution-wide norm. Having demonstrated the interlinkages in policy and practice in this area, the chapter then explores whether such a norm could be said to be legal rather than moral in nature and how it might underpin an overarching framework of *jus post bellum*.

III. Institutional Frameworks

The first place to begin a discussion of a norm of inclusion is to define what is understood in international law and policy by the term 'inclusivity'. In his 2012 report on peacebuilding (hereinafter the '2012 Report'), the Secretary-General defined inclusivity as 'the extent and manner in which the views and needs of parties to the conflict and other stakeholders are represented, heard and integrated into a peace process'.[16] This definition is used throughout the chapter as the basis of an assessment of whether or not a norm of inclusion has emerged or is emerging in international law. The discussion begins by considering the shifting nature of UN promotion of inclusive peace processes. There is evidence of the emergence of a norm of inclusion across distinct institutional mandates at the UN. Of most interest, and the two that will be discussed in more detail, are the Security Council and the UNDP.

A. The Security Council and the Peacebuilding Architecture

Since 2012, there has been a clearly discernible trend in UN policy towards inclusion. This emphasis has evolved from the more narrowly focused Women, Peace and Security Agenda (WPS), discussed in Section 3, but can be traced more specifically to the 2012 Report of the Secretary-General on Peacebuilding in the Aftermath of Conflict.[17] The 2012 report identified inclusivity as the first of three strategic priority areas for UN support for peacebuilding, recognizing the need for broad based participation.[18] An early emphasis on inclusion, the report stated, was essential.[19] The reason given for this prioritization of inclusion was that states with inclusive political settlements were less likely to relapse into conflict. The emphasis on inclusion is therefore instrumental. Inclusion, beyond being a worthy ambition, is the means by which peace is secured in the medium to long term.

Following the publication of the report, the language of inclusion began to be used more systematically. In 2012, the Statement of the President of the Security Council on post-conflict peacebuilding referenced inclusivity for the first time, highlighting the need for inclusivity to ensure that the needs of all segments of society are taken into account.[20] Prior to the 2012 Report, the language of inclusion had been absent from the statements on peacebuilding by the president of the Security Council.[21] In 2010, reference was made to

[16] UNSC Report of the Secretary General, Peacebuilding in the Aftermath of Conflict (2012) UN Doc. A/67/499 – S/2012/746.
[17] Ibid.
[18] Ibid. para. 4. The other two priorities were institution building and international support.
[19] Ibid.
[20] UNSC Statement by the President of the Security Council (20 December 2012) UN Doc. S/PRST/2012/29.
[21] UNSC Statements by the President of the Security Council (2009) UN Doc. S/PRST/2009/23; UNSC Statement by the President of the Security Council (21 January 2011) UN Doc. S/PRST/2011/2; UNSC Statement by the President of the Security Council (11 February 2011) UN Doc. S/PRST/2011/4.

women's participation,[22] and the need to ensure national ownership of post-conflict processes was clearly referenced, but it was not until 2012 that the specific term 'inclusivity' appeared.[23] More recently, the 2015 Expert Report 'The Challenge of Sustaining Peace' recognized the politics of exclusion as a driver of conflict. The report highlighted exclusion as a threat to sustainable peace because of the way that one group can dominate power to the exclusion of others.[24] The report further defined the scope of inclusivity to include groups such as youth, labour organizations, civil society, religious leaders, and other underrepresented groups.[25] In response, the report reaffirms commitment to 'inclusive national ownership' and prioritizing support to broaden inclusion within peacebuilding. The UN aims to support, in operational terms, processes that help governments to broaden ownership and to enable maximum participation in all stages of peacebuilding.[26] To this end, a specific recommendation of the report is that the UN should consider a new emphasis on national ownership and mechanisms for broadening peace deals in to inclusive processes.[27] Indeed this emphasis on inclusion can be found not only as an aspect of the peacebuilding architecture, but it has also managed to cross the divide between peacebuilding and peacemaking.[28] Whereas inclusion would seem to fit naturally in grass roots and civic initiatives to build peace, it can be more difficult to negotiate in high-level political or diplomatic initiatives. The significance attached to the concept of inclusion is therefore reflected in that it is included not only in UN reports on peacebuilding but also appears as a central aspiration within the Report of the UN High-level Independent Panel on Peace Operations (hereinafter UN HIPPO),[29] giving it (in theory at least) a prominent place within the design of high-level processes, not just within national processes supported by the UN.[30] The UN HIPPO highlights the long-term nature of peace processes and the need to ensure high-level support for national efforts to increase inclusion.[31] The report highlights the link between political exclusion and conflict and on this basis recommends that UN Peace Support operations should provide political and operational support to processes of inclusion and national reconciliation.[32] This cross-cutting interest in inclusion as an essential element of both peacemaking and peacebuilding demonstrates the high-level institutional priority attached to inclusion by the UN. Crucially, while these principles emerge from reports and statements from within the UN systems, the principles were endorsed and given (soft) legal form in 2016 though the unanimous adoption of Security Council Resolution 2282, which reaffirms the importance of inclusivity within the peace and security agenda of the UN. Noting the recommendations made in the report on peacebuilding, the UN HIPPO, and

[22] UNSC Statement by the President of the Security Council (13 October 2010) UN Doc. S/PRST/2010/20.

[23] UNSC Statement by the President of the Security Council (20 December 2012) UN Doc. S/PRST/2012/29.

[24] United Nations, 'The Challenge of Sustaining Peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture' (2015) p. 14 (hereinafter 'Peacebuilding Architecture').

[25] Ibid. 21.

[26] Ibid.

[27] Ibid. 56.

[28] 'Peacebuilding' refers to local or grass roots activities that build peace from the bottom up. 'Peacemaking' refers to the high-level activity of mediating or negotiating agreements at the state or inter-state level.

[29] 'Uniting Our Strengths for Peace: Politics, Partnership and People', Report of the High-Level Independent Panel on United Nations Peace Operations, 16 June 2015 (hereinafter UN HIPPO).

[30] The terminology used to describe peace processes indicates the level at which they are being addressed. Peacebuilding refers to locally led, or bottom up, processes, whereas Peacemaking refers to state-level, internationally supported processes.

[31] UN HIPPO (n 29) 34.

[32] UN HIPPO (n 29) 40.

the Global Study on the Implementation of Security Council Resolution 1325, the resolution emphasizes that 'inclusivity is key to advancing national peacebuilding processes and objectives in order to ensure that the needs of all segments of society are taken in to account'.[33] The resolution further stresses the importance of comprehensive approaches to justice, including access to justice and the promotion of reconciliation,[34] thus addressing core concerns of *jus post bellum*.

B. UNDP and the Sustainable Development Goals

This emphasis on inclusivity is also reflected in the new Sustainable Development Goals (SDGs).[35] The SDGs were adopted in 2015 as part of 'Transforming Our World: The 2030 Agenda for Sustainable Development'.[36] Although not primarily concerned with post-conflict rebuilding, the SDGs clearly align with the priorities of *jus post bellum* in their concern for creating just and sustainable societies. Further, explicit links have been drawn between peace and prosperity through the emphasis placed throughout the goals on the need to secure a sustainable peace and linking of peace with economic development.[37] This rhetoric is also visible in recent peace agreements such as in Colombia where peace and economic development were linked.[38] In total seventeen goals are set out to guide sustainable development. The SDGs fall under the institutional remit of the United Nations Development Agency. They emerge from the UNDP's strategic plan and in particular its focus area on democratic governance and peacebuilding. While there is some overlap between the remit of UNDP and that of the Security Council, it is interesting to note that the emphasis on inclusion emerges from different thematic areas of policy and practice and from different institutional structures, thereby strengthening the claim of a system-wide attention to inclusion. The aim of the SDGs is to 'foster peaceful, just and inclusive societies'[39] and they recognize the need to build 'peaceful, just and inclusive societies that provide equal access to justice'.[40] Of particular note in this chapter are SDG 5 on gender equality, SDG 10 on reducing inequality, and SDG 16 on peace, justice, and strong institutions. Each goal is accompanied by goal targets, towards which signatories must work. These goals include a commitment to promote social, economic, and political inclusion, and ensuring inclusive, participatory, and representative decision-making at all levels. SDG 5 includes the goal of ensuring women's full and effective participation at all levels of public life.[41] SDG 10 includes the goal of empowering and promoting the social, economic, and

[33] UNSC Res. 2282 (2016) UN Doc. S/RES/2282, preamble.
[34] Ibid. para. 12.
[35] UN General Assembly Res. 70/1 (21 October 2015) UN Doc. A/Res/70/1.
[36] Ibid.
[37] See International Alert, *Peace Through Prosperity: Integrating Peacebuilding into Economic Development* (International Alert, 2015); Jan Poposil and A. Rocha Menocal, 'Why Political Settlements Matter: Navigating Inclusion in Processes of Institutional Transformation' (2017) 29 *Journal of International Development* 551.
[38] See Summary of Colombia's Agreement to End Conflict and Build Peace (2016) <http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/summary-of-colombias-peace-agreement.pdf >accessed 31 July 2017.
[39] SDG's preamble.
[40] SDG's preamble, 35.
[41] Text of SDG 5 available at <http://www.un.org/sustainabledevelopment/gender-equality/> accessed 31 July 2017.

political inclusion of all without discrimination.[42] SDG 16 is specifically concerned with finding lasting solutions to conflict and insecurity, strengthening the rule of law and promoting human rights, making it particularly relevant for the *jus post bellum*. It includes the target of ensuring responsive, inclusive, participatory, and representative decision-making at all levels.[43] The SDGs are significant because they demonstrate engagement across the UN system with the matter of inclusion. Notable also is the fact that the SDG agenda was 'accepted by all countries and is applicable to all'.[44] The goals were adopted unanimously in the General Assembly,[45] demonstrating widespread state support for their aims, which can be read as an increased acceptance of the principle of inclusivity.

The increasing emphasis on inclusion across the UN system demonstrates the emergence of a broader trend institutionally. However, the emergence of inclusion as an underpinning concept of international law and policy is not limited to institutional planning. It is also apparent across a range of thematic areas of international law. These thematic examples offer a much more textured account of inclusion as an underpinning norm, demonstrating the ways in which normative principles are drawn from different sources to create a holistic system to advance the goal of inclusion.

IV. Thematic Normative Framework

As noted, there is a significant body of existing norms across distinct thematic areas that speak to the need for inclusion in the aftermath of conflict. These existing normative frameworks often ground demands for inclusivity and form the basis for policy in this area. The examples selected here are those of the well-established WPS agenda that illustrates particularly well the impact of UN programming on inclusion; the emerging Youth Peace and Security Agenda that demonstrates the spread of these principles and procedures to diverse thematic areas; and finally minority and indigenous rights that demonstrate the use of existing normative frameworks to advance demands for inclusion.

A. Women, Peace and Security

Since the adoption of the landmark UN Security Council Resolution 1325 (SCR 1325) in 2000, it has been recognized that under-represented groups need to be included in peace negotiations. SCR 1325 provided the basis for both an international legal framework and an institutional system dedicated to ensuring women's effective participation in peacebuilding. The resolution predates the adoption of the language of inclusion, but represents the first step in this direction. The preamble stresses the importance of women's 'equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision making with regard to conflict prevention and resolution'.[46] The resolution then urges Member States to increase the representation of

[42] Text of SDG 10 available at <http://www.un.org/sustainabledevelopment/inequality/> accessed 31 July 2017.
[43] Text of SDG 16 available at <http://www.un.org/sustainabledevelopment/peace-justice/> accessed 31 July 2017.
[44] SDG's preamble.
[45] UN General Assembly Res. 70/1 (n 35).
[46] UNSC Res. 1325 (31 October 2000) UN Doc. S/RES/1325 (2000) preamble.

women at all levels of decision-making in institutions and mechanisms for the resolution of conflict,[47] and also encourages the secretary-general of the UN to implement a strategic plan of action calling for women's increased representation in conflict resolution and peace processes.[48] These commitments laid the foundations for the 'participation' pillar of the WPS agenda and also for international efforts to advance women's inclusion in peace processes. SCR 1325 was complemented by two subsequent resolutions: SCR 1888 (2009) and DCR 1889 (2009). Known as the 'participation' resolutions these resolutions aim to address gaps in implementation arising from the slow momentum of 1325 in the early years. Resolution 1889 reaffirmed the principles of resolution 1325, and called on the secretary-general and Member States to increase the involvement of women at all stages of peace processes. The resolution reiterates the vital role of women in preventing conflict and in peacebuilding, thereby highlighting the link between inclusion and peace.

As a result, this agenda has created a huge architecture of policy, advocacy, and civil society organizations dedicated to its implementation. It provides clear insight into how a 'norm' of inclusion can be implemented and evaluated. SCR 1325 was the culmination of a lengthy process of women's activism.[49] What it created was a framework embedded in the UN system from which the norm could be diffused. At an institutional level, implementation of SCR 1325 was monitored by the Security Council, through debates, reporting,[50] and the adoption of global indicators by which progress could be evaluated.[51] Most of the major UN entities have assumed responsibility for the implementation of SCR 1325 within their area of operation by mainstreaming gender throughout their work.[52] However institutional activity within the UN system is only one aspect of a much broader project of diffusion of the participation norms of the WPS agenda. At the state level the acceptance in practice of the principle of inclusion is evidenced in the adoption of National Action Plans (NAPs) that articulate the steps that Member States will take to implement the obligations of UNSCR 1325.[53] In his Report on Women, Peace and Security the Secretary-General described the NAPs as 'a key strategy in ensuring the achievement of commitments in the area of women and peace and security'.[54] He goes on to emphasize how they 'provide for a comprehensive and systematic monitoring and evaluation of activities with respect to policy goals'.[55] The NAPs are a useful example of the way in which progress towards broader policies of inclusion could be expected to proceed. Records of NAPs on SCR 1325 maintained by the Institute for Inclusive Security indicate sixty-three NAPs to date, with a further

[47] Ibid. para. 1

[48] Ibid. para. 2; The strategic plan of action was set out in UN Doc. A/49/587(1994), adopted by the General Assembly.

[49] Carol Cohn, Helen Kinsella, and Sherri Gibbings, 'Women, Peace and Security Resolution 1325' (2004) 6 *International Feminist Journal of Politics* 130.

[50] Report of the Secretary-General on Women, Peace and Security UN Doc. S/2010/498 (2010) setting out 26 indicators (hereinafter WPS).

[51] '7-point Action Plan on Women's Participation in Peacebuilding' (UN Secretary General Report S/2010/466 and UN General Assembly Res. A/65/354); UN Strategic Results Framework on Women, Peace, and Security 2011–2020 <http://www.un.org/womenwatch/ianwge/taskforces/wps/Strategic_Framework_2011-2020.pdf> (accessed 31 July 2017).

[52] These bodies include the Department of Political Affairs, the Office for Co-ordination of Humanitarian Action, the Department of Peacekeeping Operations, and UN Women. See WPS (n 50) for detailed discussion of the initiatives taken by each department.

[53] Ibid. para. 14.

[54] Ibid.

[55] Ibid.

sixteen in progress.[56] As a percentage of the UN membership the figure of seventy-nine NAPs (adopted and in progress) amounts to about 41%, with a relatively good geographical spread.

Further, action plans and policies for implementation of UNSCR 1325 are not restricted to Member States, but also adopted by international organizations. The UN,[57] the EU,[58] NATO,[59] the Organization for Security and Co-operation in Europe (OSCE),[60] and the African Union[61] have all adopted policies aimed at increasing the inclusion of women in peacebuilding. The increasing use of these plans to monitor the implementation of the principles of 1325 is interesting because it demonstrates the cascade down to regional organizations and national governments of the legal obligations contained in the UN resolutions. The adoption of an action plan, and the subsequent monitoring and reporting on the obligations contained in those plans contributes to an increasing body of state practice whereby national governments give effect to soft law and policy emanating at the international level.

However the existence of these 'soft' norms alone does not explain state action in this regard. While new international developments on inclusion help to shape state practice, this practice is also rooted in more traditionally normative sources of obligation. In particular states, in formulating their actions plans, will refer back to existing human rights law obligations contained in treaty law as a means of grounding their obligations. The Convention on the Elimination of Discrimination Against Women (CEDAW) is the most obvious example of existing treaty obligations that can be used to ground practice in WPS.[62] The work of the CEDAW Committee and that of the WPS agenda is increasingly read as interdependent, highlighting a more holistic view of the importance of inclusion in the context of women's empowerment.[63] However the equality and non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also provide a treaty basis for inclusion, as do the values and provisions of the UN Charter and the Universal Declaration of Human Rights (UDHR). Inclusion as a norm therefore emerges from within existing shared principles embodied in existing international human rights treaty law.[64] This allows states to identify their policies on inclusion as part of their existing international legal commitments, establishing a 'rights based' approach to inclusion.[65]

Perhaps most notable, however, has been the civil society mobilization around women's inclusion. The emergence of inclusion as an underpinning principle of international policy

[56] Available at <https://actionplans.inclusivesecurity.org> accessed 31 July 2017.

[57] UN system wide action plan for the implementation of CEB United Nations System Wide Policy on Gender Equality and the Empowerment of Women (2012).

[58] Comprehensive Approach to the EU Implementation of the United Nations Security Council Resolution 1325 and 1820 on Women, Peace and Security (Brussels, 2008).

[59] Integrating SCR 1325 and Gender Perspectives in the NATO Command Structure Including Measures for Protection During Armed Conflict (2009).

[60] Women in Conflict Prevention, Crisis Management and Post-Conflict Rehabilitation (2005).

[61] African Union Gender Policy (2009).

[62] See for examples the NAPs of The Netherlands <http://actionplans.inclusivesecurity.org/wp-content/uploads/2016/03/national-action-plan-women-peace-and-security-2.pdf>; Ghana <http://www.peacewomen.org/assets/file/ghana_nap_oct2010.pdf>; and Norway https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/fn/ud_handlingsplan_kfs_eng_nett.pdf> accessed 31 July 2017.

[63] Aisling Swaine and Catherine O'Rourke, 'Guidebook on CEDAW General Recommendation no. 30 and the UN Security Council Resolutions on Women Peace and Security' (UN Women, 2015).

[64] These 'pillars' of international law are also explicitly referenced as underpinning the SDGs.

[65] See Aisling Swaine, 'Assessing the Potential of National Action Plans to Advance Implementation of United Nations Security Council Resolution 1325' (2009) 12 *Yearbook of International Humanitarian Law* 403.

is strongly reflected in the campaigning of civil society.[66] This work is significant as it helps to connect global policy with local initiatives and to ensure that the policy aim of inclusion is embedded in the practice of grass roots peacebuilding. Policy-led research in this area has begun to explore not only the principle of inclusion and its purported benefits, but also the modalities of inclusion and how to operationalize the principle.[67] While activism has been most obvious in relation to women's inclusion the model itself is one that can be replicated across intersectional lines of identity. It is therefore of interest as a means of thinking about practice, but also about the impact of practice on policy.

The thematic area of WPS demonstrates the interlinkages between institutional policy, state practice, and grass roots mobilization. The circularity of this relationship helps to create a holistic practice of WPS that in turn feeds into normative development. This is a significant dynamic when considering the emergence of any norm, but demonstrates very clearly the priority attached to inclusion and the way it has shaped law, policy, and practice in post-conflict environments.

B. Youth, Peace, and Security

Although the idea of inclusion is most prominently associated with the WPS agenda, the expansion in the 2012 Report of the understanding of inclusion to include youth, labour organizations, and other under-represented groups has opened up the possibility of replicating the frameworks of WPS to advance the position of other groups in peacebuilding.[68] This is already evident in the case of the new Youth Peace and Security framework that emerged with the adoption by the Security Council in December 2015 of Resolution 2250. The resolution highlights that young people are often in the majority in countries affected by armed conflict, and recognizes the positive contribution that they can make to efforts for the maintenance of peace and security.[69] Specifically, the resolution recognizes that 'a large youth population presents a unique demographic dividend that can contribute to lasting peace and economic prosperity if inclusive policies are in place'.[70] Flowing from this, Member States are urged to 'consider ways to increase inclusive representation of youth in decision making at all levels in local, national, regional and international institutions and mechanisms for the prevention and resolution of conflict'.[71] The link is also made between inclusion and sustainable peace, with the resolution calling on all actors to recognize that the marginalization of youth is detrimental to building sustainable peace.[72] In this way, the Youth Peace and Security Agenda mirrors the rationale for inclusion—namely that exclusion is a driver of conflict and that inclusion is the means by which long-term peace is secured.

[66] See WPS (n 50) for an overview of significant civil society initiatives in this area.

[67] See e.g. Tania Paffenholz, 'Can Inclusive Peace Processes Work? Evidence from a Multi-Year Research Project', Inclusive Peace and Transition Initiative (Geneva 2015).

[68] Women, Peace and Security is explicitly referenced in the preamble to Res. 2250 to frame the need for action on Youth, Peace and Security.

[69] UNSC Res. 2250 (2015) UN Doc. S/RES/2250 (2015) preamble.

[70] Ibid.

[71] Ibid. para. 1.

[72] Ibid. para. 2.

In addition to setting out the substantive agenda for involving youth in peace and security, Resolution 2250 also mandates an institutional response to the need to implement and evaluate progress on the resolution. What this presents is the beginning of a call for the mainstreaming of the inclusion of youth throughout UN programming in the area of peace and security. It calls for effective integration across the system to improve co-ordination regarding the needs of youth in post-conflict situations.[73] In this way, it is expressly linked with the goal of sustaining peace through the creation of peaceful, just, and inclusive societies. The importance of forging links between local, national and global initiatives is also highlighted, mirroring the holistic strategy that has been so successful in advancing the WPS agenda. In the resolution the secretary-general is requested to conduct a progress study on the contribution of youth to peace and security,[74] the results of which are to be used as the basis for recommendations for effective responses at local, national, and international level.[75] It is expected that this report will be presented to the Security Council in late 2017.[76]What the example of the Youth Peace and Security Agenda demonstrates is the potential for existing frameworks for action to be applied to a diverse range of thematic areas for action.

C. Minority and Indigenous Rights

The final thematic area to be considered is that of minority and indigenous rights. In contrast to WPS this is an area with less explicit action (in terms of resolutions and operational indicators) from the UN bodies, but where there is an existing body of international law that expressly mandates inclusion. This body of law is interesting because it predates the move towards the policy language of inclusion in international law yet provides a clear framework for demands for the inclusion of traditionally marginalized or under-represented groups.[77] For both minorities and indigenous groups the right to participate in decision-making—or the right to inclusion—is enshrined in treaty form. Article 2.2. of the United Nations Declaration on the Rights of Minorities provides that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic, and public life.[78] Similarly, the UN Declaration on the Rights of Indigenous Peoples provides in Article 18 that indigenous people have the right to participate in decision-making in matters that would affect their rights.[79] These documents are both declarations, adopted by the General Assembly. As such they lack the 'hard' legal form of a treaty or convention. Nevertheless, they are a good indicator of state opinion on the rights of minorities. Similarly, although the

[73] Ibid. para. 19; The relevant agencies concerned with Youth, Peace and Security include the secretary-general's envoy on youth, the secretary-general's envoy for youth refugees, as well as UNDP, the Office of the High Commissioner for Refugees and the Office of the High Commissioner for Human Rights.

[74] Ibid. para. 20.

[75] Ibid.

[76] See <https://www.youth4peace.info/ProgressStudy> accessed 15 December 2019.

[77] This is based on the idea that indigenous people have a right to 'free, prior, and informed consent', discussed in Philipp Dann, *The Law of Development Co-operation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press 2013) 282

[78] UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) UN Doc. A/Res/47/135 (1992).

[79] UN General Assembly Declaration on the Right of Indigenous Peoples (2007) UN Doc. A/RES/61/295 (2007).

declarations relate to all areas of public life, and are not specifically conflict related, the principles that they enshrine can be read as equally applicable to post-conflict settings, making them relevant to the *jus post bellum*. Recent developments highlight this potential.

In May 2016, the UN Economic and Social Council (ECOSOC) Permanent Forum on Indigenous Issues held a session on the theme of 'Indigenous Peoples: Conflict, Peace and Resolution', during which it debated the importance of ensuring the effective inclusion of indigenous people in initiatives for peace and reconciliation.[80] In the concept note for this meeting, the rights and needs of indigenous people in conflict resolution were expressly linked with SDG 16 and the need to promote peaceful and inclusive societies with fair access to all.[81] The discussion was also linked to broader developments in the WPS agenda and the need to highlight particular challenges faced by indigenous women, thereby highlighting intersectionality and the way in which a focus on inclusion potentially has a wider impact than a narrow focus on specific areas of 'rights'. Areas specifically highlighted as being of concern to indigenous peoples are the militarization of land, exploitation of resources, displacement by violence, denial of social and cultural rights, and the consequent lack of participation in processes of conflict resolution. The concept note highlights how

> Unfortunately, indigenous peoples have not had significant gains from the processes of conflict resolution: political remedies have not always been useful, and many legal remedies are not always accessible. Although indigenous peoples are overrepresented as victims in conflicts, often they have not been considered as stakeholders in transitional justice mechanisms or in peace process negotiations and accords.[82]

What the forum highlighted was that there could be 'no peace to these conflicts unless indigenous people are equal participants in any plans for peace and resolution, with a focus on the rights enshrined in the Declaration'.[83] The report recalled the obligations under articles 7[84] and 30[85] of the declaration and called on states to take measures for the construction of a durable and lasting peace, promoting the full and effective inclusion of indigenous peoples in any initiative for peace and reconciliation.[86] This highlights the importance of the existing normative framework provided by the Declaration to ground calls for further action. What also emerges is the importance of inclusion as a means of ensuring underlying and cross-cutting human rights. Access to processes of conflict resolution and peacebuilding are the means by which the rights contained in the declaration are to be achieved.

[80] ECOSOC Plan d'action à l'échelle du système des Nations Unies visant à garantir l'unité de l'action menée pour réaliser les objectifs définis dans la Déclaration des Nations Unies sur les droits des peuples autochtones (19 February 2016) UN Doc. E/C.19/2016/L.5.

[81] See the concept note in <http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Concept-note-Conflict-discussion-FINAL.pdf> accessed 31 July 2017.

[82] Ibid.

[83] UN, 'Indigenous Peoples Must be Equal Participants in Peace Plans, Conflict Resolution, Chairs says Permanent Forum Opens' (9 May 2016) UN Doc. HR/5297.

[84] The rights of indigenous peoples to live in peace and security without being subjected to violence, including genocide.

[85] The prohibition of conducting military activity on indigenous peoples' land without consent.

[86] ECOSOC Permanent Forum on Indigenous Issues, Report of the 15th Session (May 2016) UN Doc. E/2016/43-E/C.19/2016/11 para. 52.

V. Assessing the Emergence of a 'Norm'

So far, what has been demonstrated is that inclusion is increasingly mainstreamed in international post-conflict policy. The question that remains is whether it can be said that there is a 'norm' of inclusion. Has an independent norm emerged? Can a right be derived from existing normative commitments? Or is inclusion simply a matter of good practice? If it has emerged as a norm, what is the status of that norm? All of these questions need to be asked before any claim can be made that a 'norm' of inclusion exists.

The first option is to consider whether or not the emphasis placed on inclusion in international policy and in state practice amounts to evidence of custom, either established or emerging. To exist as a customary norm of international law it would need to be demonstrated that not only was there widespread state practice in relation to inclusion, but that states adopted this practice on the basis of *opinio juris*.[87] It is possible to point to some evidence of state practice in this area, most notably through the adoption of NAPs, as discussed in Section III. Similarly, it has been suggested that this practice is rooted in existing normative commitments, meaning that states produce NAPs because they feel themselves bound to do so.[88] More interesting for the purposes of the current argument is, however, the possibility that the resolutions adopted by the UN may amount to evidence of custom. In his third report on the identification of customary international law, the UN special rapporteur highlighted that it was widely accepted that resolutions adopted by states within international organizations might have a role in the formation and identification of customary international law.[89] This opens up the possibility that the increasingly broad adoption of the principle of inclusion in resolutions of the Security Council and the General Assembly points to the emergence of custom. The rapporteur highlights how such resolutions may 'exert a strong influence' on the development of customary international law, and that this is particularly the case 'where a resolution provides the impetus for the growth of a general practice accepted as law in conformity with the text'.[90] However caution must be exercised when making such claims. The report is also clear that while resolutions of international organizations may amount to evidence of custom or contribute to its development, it cannot in and of itself constitute it.[91] While such resolutions may have normative value and provide evidence of existing or emerging law, they are not a short-cut to ascertaining international practice.[92] They must be accompanied by state practice in conformity with the proposed law.[93] In the context of inclusion, there is insufficient evidence that the commitments undertaken are honoured, nor is there a clear enough link between the specific case of the WPS agenda and other thematic areas to draw conclusions of general application that would support the existence of custom in this area.

[87] See International Law Commission, 'Second Report on Identification of Customary International Law' (2014) UN Doc. A/CN.4/672.

[88] It should be noted that there is no provision in Resolution 1325 that compels states to comply with its provisions. The sense of obligation derives more commonly from existing treaty-based frameworks with 'harder' legal character.

[89] International Law Commission, 'Third Report on the Identification of Customary International Law' (27 March 2015) UN Doc. A/CN.4/682 para. 45.

[90] Ibid. para. 52.

[91] Ibid. Draft Conclusion 13, para. 54.

[92] Ibid. para. 50.

[93] Ibid. para. 51.

However, just because there is insufficient evidence of the existence of a customary norm does not mean that no norm is emerging. While it is difficult to point to a single 'hard' legal source of obligation in respect of inclusion, it may be particularly useful to look further at the category of 'soft' law and to examine whether or not there is evidence of emerging consensus on inclusion that may crystallize into a 'hard' norm. In this context, soft law can perform a number of important functions. First, it can help to clarify the scope of existing standards. The articulation of principles of inclusion within thematic areas of international law provides definite and contextualized guidance on how a norm of inclusion should be interpreted. This helps elaborate on the requirements of the commitment to inclusion that is set out in the institutional policies of the Security Council and UNDP. With the replication of these approaches across thematic areas, consensus begins to build up both on the importance of inclusion as a principle of post-conflict policy-making, and on how to deliver it. This in turn provides the basis from which states and non-governmental organizations can formulate policy and practice. As discussed above, this practice may, in turn, be taken into account as evidence of the formation of custom. As states and international organizations begin to adopt and implement common frameworks for action, it becomes easier to point to a pattern of state practice and accompanying *opinio juris* required.

Second, soft law can help to place issues on to the agenda that may not otherwise fall within the priorities of states or elites. Agreements ending violent conflict have historically been negotiated between warring parties. They have been opportunities for elite players to carve up power and influence. While it may not be possible or even desirable for *jus post bellum* to posit a rigidly normative framework for post-conflict justice and accountability, inclusion can provide a means of directly challenging powerful actors. For weaker parties, a legal norm strengthens their ability to make demands both in terms of representation and outcomes.[94] Inclusion as a norm confirms that marginalized or vulnerable groups enjoy rights in respect of their participation in peace processes. In addition to ensuring their place at the negotiating table, inclusion also provides the context in which such groups can place issues of specific concern to them on the agenda, even where these issues conflict with the interests of powerful actors. For example, the rights of women, land rights of indigenous people, or social and economic rights that would redress past injustices and benefit marginalized communities can all be placed on the agenda where they may not otherwise be addressed.[95] Placing such issues on the agenda does not necessarily foreclose the outcome of post-conflict negotiations, but it does ensure that they must be addressed, giving those most affected by conflict a say in what the priorities of post-conflict justice should be. This in turn helps strengthen the legitimacy of such institutions if or when they are created. Further, the leverage provided by a norm of inclusion allows other rights to be raised. When coupled with a right to be included the existing international legal frameworks discussed in Section III, such as CEDAW, the ICESCR, the Declaration on the Rights of Minorities, and the Declaration on the Rights of Indigenous Peoples, can help to frame the substance of negotiations.[96] Although many of these norms exist in 'soft' legal form, they nevertheless

[94] Catherine Turner, 'Law and Negotiation in Conflict: Theory, Policy, Practice' (2016) 7 *Global Policy* 256, 266.
[95] Ibid.
[96] This is an approach used in the development context, where existing economic and social rights frameworks are used as the 'context' in which rights of participation are asserted. See Dann (n 77) 282; See also Catherine Turner 'Transitional Constitutionalism and the Case of the Arab Spring' (2015) 64 *International and Comparative Law Quarterly* 267.

create a context in which conflicting positions and interests and rights can be negotiated (if not reconciled).

Third, soft law can help to elaborate values that in turn contribute to the interpretation and progressive development of the law. As Shelton argues, a 'soft' legal methodology is often the best means of addressing important international issues, including the elaboration of new norms.[97] The gradual incorporation of principles of inclusion into a range of different soft law mechanisms begins to build up a common theme. For example, the fact that the Sustaining Peace Agenda was adopted both by the Security Council and the General Assembly, or that the SDGs were adopted unanimously at the General Assembly, demonstrates a broad commitment across UN Member States to the principles of inclusion, even if these are not cast in 'hard' legal form. This alone may be read as evidence of consensus among states on the importance of inclusion, and suggests a willingness to accept soft law principles as legally normative.[98] The gradual assertion and reassertion of these principles can, over time, harden into a more legally normative approach to the design of post-conflict institutions. While it is not argued that inclusion has emerged as a norm of customary international law, the extent of the commitment to inclusivity across institutional and thematic lines does suggest that it forms a core underpinning principle of any international post-conflict regime. In particular, it could be argued that inclusion has emerged as a 'general principle' of international law within the scope of Article 38 of the ICJ Statute. What is understood by 'general principle' in this context is a rule that can be deduced by analogy from already existing rules or from the principles that guide the legal system.[99] A general principle does not have the same binding status as custom or treaty law, but as with all soft law it has the potential to harden into a legal norm. It is clear from the examples provided above that inclusion as a norm can be deduced in this way. The number and range of different institutional and normative regimes that express a commitment to inclusion suggest that it is beginning to emerge as a norm in its own right. Crucially, it is emerging from within the existing system rather than being posited independently.

Finally, when thinking about inclusion as a general principle of *jus post bellum*, it is also useful to consider the role of inclusion as a value. Values play an increasingly important role in international law as the international community seeks to ground post-conflict law and policy in the values of the UN Charter. In the case of *jus post bellum*, inclusion as a value can help to hold disparate approaches together as a cohesive normative regime. An underlying commitment to inclusion lends legitimacy to other more normative approaches, providing a clear context in which other rights can be pursued,[100] lending strength to an overarching regime of *jus post bellum* that is concerned with the justness of the peace. In this way, thinking of inclusion as a general principle aligns with the idea of *jus post bellum* itself as a value based interpretive framework for post-conflict policy and practice. Seen in these terms, it aligns with Gallen's view of *jus post bellum* as a range of different institutions with a

[97] Dinah Shelton, 'Commentary and Conclusions', in Dinah Shelton (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 449.

[98] Christine Chinkin, 'Normative Development in the International Legal System', in Dinah Shelton (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 21, 33.

[99] Adapted from Malcolm Shaw, *International Law* (Cambridge University Press 2014) 69.

[100] See Catherine Turner, 'Human Rights and the Empire of (International) Law' (2011) 29 *Law and Inequality* 331, 337–40.

range of different goals connected, in this analysis, by an underlying commitment to inclusion and to restoring the voice of those who have suffered most in conflict.[101]

VI. Conclusion: Why Inclusion Matters

It remains contested whether there *ought* to be a normative regime of *jus post bellum*. In particular, it is by no means agreed that international law should regulate the fine detail of peace agreements. International law is simply one among many factors that determine the shape and the success of an agreement. However rather than argue that there is no role for international law, and that agreements are simply a matter for political negotiation, the focus of this chapter is on the role of international law in ensuring fair and inclusive negotiation processes. Viewing international law as a framework for participation, it is argued, opens up new possibilities for thinking about its form and potential post-conflict.

Given the contested nature of the debate, it is useful to draw some conclusions on the broader significance of a norm of inclusion for the *jus post bellum*. The first conclusion to be drawn is that while it could not yet be argued that inclusion has achieved the status of customary international law, there is a strong argument to be made that as a matter of *lex ferenda* there is clear evidence of inclusion having emerged as a general principle of international law and of *jus post bellum*. The second is that while inclusion as a norm has not traditionally been included in the list of rights to be pursued in post-conflict justice institutions, it nevertheless plays an important role in securing a range of other rights and in ensuring the broad legitimacy of these processes. Inclusion is the means by which just and equitable ends are secured. The evidence of mainstreaming inclusion as a goal throughout institutional and thematic responses to conflict suggests a more prominent role for inclusivity in the future. Any new normative regime of *jus post bellum* must also then consider how inclusivity can help to shape its goals. Inclusion addresses both the legal and relational aspects of justice. It helps to move beyond a focus on strict legal normativity to encompass moral aspects of justice and the ability to 'be' together in the aftermath of conflict. It also embodies May's principle of reparation in that it helps restore the voice of those who have been silenced and excluded both by conflict and by traditional elite-led justice.[102] This is a crucial step in re-establishing civic trust among groups affected by conflict. Any top-down regime of *jus post bellum* that excludes those who have suffered would simply perpetuate the violence of exclusion experienced during conflict. Inclusion as a general principle of *jus post bellum* helps address this problem. The final conclusion to draw is that this restoration of voice is in itself an essential element of justice. It allows victims of conflict to have a say in how the new social order should be constructed. Without inclusion, these voices remain marginalized and justice is dictated by dominant narratives of war and peace. A focus on inclusion opens up at least the possibility of negotiating justice. Any legal regime of *jus post bellum* must operate in an inherently contested political context. It is therefore important

[101] See James Gallen, '*Jus Post Bellum*: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 58. For Gallen the aims are those of restoring civic trust and the rule of law.

[102] May (n 9).

that spaces are kept open for ongoing contestation of what justice means and how it is to be delivered.[103] This is not achieved by positing normative legal regimes that posit particular justice institutions and outcomes, but rather by creating the conditions in which as many voices as possible can contribute to the debate. A norm of inclusion does not guarantee that any one idea of justice will be accepted, but it does help to ensure that each voice is heard.

[103] Christine Bell, 'Of Jus Post Bellum and Lex Pacificatoria: What's in a Name?', in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds), *Jus Post Bellum*: *Mapping the Normative Foundations* (Oxford University Press 2014) 181, 201