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# HOW DO WE UNDERSTAND INTERNATIONAL LAW AND PEACE?

by

REBECCA L. SIMS

UNDER THE DIRECTION OF HENRY CAREY, PHD

## ABSTRACT

This review essay provides a comprehensive roadmap of the international law of peace, which has not been so presented in the International Law-International Relations literature before. In Part 1 we review peace law as such, that is, where it is simply and directly mandated in international law. In the second of the two parts, we depict international law that does not mandate peace, but requires behavior that indirectly results in peace. In both parts the three sources of international law, treaty, custom or principles are identified, along with soft law, which is incipient, but non-binding. Laws of peace per se include all the United Nations Charter provisions (treaty and customary) related to peace and peaceful conditions, jus ad bellum (custom) and the law against aggression (treaty), the 1970 Declaration on Friendly Relations Among States (custom and principle) and the Human Right to Peace (custom, soft law). Indirect effects of international laws and conditions on peace include the Vienna Convention on the Law of Treaties (treaty), all international treaty regimes (treaty), expanding authority of international

actors and institutions in creating and interpreting international law (custom), humanitarian and human rights law (treaty), and the Responsibility to Protect norm (soft law). The review takes a legal approach. Development of peace law is placed in the history of international law and within the progressive development of international law today. All peace law per se in Part 1 is found to be legalized and binding except the Human Right to Peace which is legalized but non-binding so far. The review identifies how peace is the ultimate purpose of all international law.

INDEX WORDS: INTERNATIONAL LAW, PEACE, LEGALIZATION

HOW DO WE UNDERSTAND INTERNATIONAL LAW AND PEACE?

by

REBECCA L. SIMS

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Art in Political Science

in the College of Arts and Sciences

Georgia State University

2018

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2018

HOW DO WE UNDERSTAND INTERNATIONAL LAW AND PEACE?

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August 2018|

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## **DEDICATION**

I dedicate this Thesis to Dr. Henry Carey, without whom it would not have come to completion, and whose confidence in me gave me confidence in myself, and to my children, whose patience and understanding while I worked helped me keep going.

### **ACKNOWLEDGEMENTS**

I gratefully acknowledge and thank my committee, Dr. Henry (Chip) Carey, Dr. John Duffield, and Dr. Jennifer McCoy and the time they spent reviewing my work and offering invaluable suggestions. I thank Colleen Williams for her ability to get me quick answers, her encouragement and her always cheerful responses. I thank my Dean, Dr. Rob Page, for never pressuring me about time frames and for always understanding. I thank Dr. Ingrid Thompson-Sellers for also removing any pressure regarding time so that I could handle completion of this work despite several family issues that required time and attention. I am grateful to my colleagues over the years who gladly changed course schedules so that I could teach when I was not due in a graduate class in Atlanta. Finally, I thank Dr. Sarah Gershon and Dr. Carrie Manning for their understanding generally, and always being supportive. I am grateful to have had the chance to work with all of you.



## TABLE OF CONTENTS

ACKNOWLEDGEMENTS .....	V
LIST OF ABBREVIATIONS .....	XI
1 INTRODUCTION .....	1
1.1 Purpose of the Study .....	5
1 PART ONE: PEACE AS THE EXPLICIT AND IMPLICIT LEGAL PURPOSE OF INTERNATIONAL LAW .....	5
1.2 Historical Basis and Development of the International Law of Peace. ....	5
10.1 Explicit IL of Peace: The Preamble, Article 1, UN Charter .....	11
10.2 Article 2 (3) and Article 2(4) and other UN Charter Provisions. ....	13
10.3 Prohibition of the Use of Force (Kellogg-Briand).....	15
15.1 Jus ad bellum and Aggression. ....	20
15.2 The New Human Right to Peace. ....	24
15.2.1 1948 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR): .	27
15.2.2 1949/51 UN Genocide Convention: “Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,” <i>http://www.preventgenocide.org/law/convention/text.htm 48/2011</i> ).....	27
15.2.3 1953-2010 European Convention on Human Rights (ECHR), formerly <i>European Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols:</i>	27

**Commented [WU3]:** Do not delete the table of contents. This table of contents is already formatted. Instead, you will update your headings in the document and then right click the table of contents and select “update field”. Then, you will select “entire table”.

15.2.4	1966/1976 INTERNATIONAL ECONOMIC, SOCIAL AND CULTURAL RIGHTS:	28
15.2.5	1982/1986 Article 23 of the African Charter of Human and Peoples' Rights, which affirms the right of all peoples to national and international peace, and the duty to strengthen solidarity and friendly relations among peoples.....	28
15.2.6	2006-2010 LUARCA/SANTIAGO DECLARATION ON THE HUMAN RIGHT TO PEACE:.....	28
15.2.7	25-29 JANUARY 2010 HUMAN RIGHTS COUNCIL: adopted for the first time in 2008 a resolution entitled "Promotion of the right of peoples to peace" reiterating the traditional position that "peoples of our planet have a sacred right to peace" and that "preservation and protection of this right constitutes a fundamental obligation of each State". A workshop was held in Geneva in December 2009 to further clarify the content and scope of this right. (UNGA A/HRC/AC?4/NGO/3 20 January 2010). The eventual result of this work was the 2016 General Assembly Resolution adopting the Human Right to Peace. The process of work on the Human Right to Peace illustrated the developmental aspect of peace law generally.....	29
15.3	Development of International Law as a Continuum .....	29
2	PART 2: PEACE AS AN EFFECT OF INTERNATIONAL LAW .....	35
15.4	Jus in Belli .....	36
15.5	The Vienna Convention of the Law of Treaties (VCLT) .....	37
	Treaty Regimes and Functional IL.....	38
19.1	Human Rights Law Generally.....	39

19.2	Responsibility to Protect (R2).....	40
19.3	Evolution of Actors Creating “Peace” law: Those Who Have Access to the System	41
25.1	Role of Courts Affecting Peace Law .....	44
3	CONCLUSION .....	50
33.1	.....	50
	REFERENCES.....	53



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**Commented [WU4]:** • The List of Figures table is populated according to the figures selected in the body of your manuscript. You do not have to manually number the figures; the program will do it for you.

1. The List of Figures is populated in the exact same manner as the List of Tables with one exception.
2. In the caption window, you will select Figure. This will place the title below the figure.

**LIST OF ABBREVIATIONS**

ECHR European Convention on Human Rights  
HL Humanitarian Law  
HR Human Rights  
HRC Human Rights Commission  
ICC International Criminal Court  
ICTR International Criminal Tribunal for Rwanda  
ICTY International Criminal Tribunal for Yugoslavia  
IGO Intergovernmental Organization  
IL International Law  
ILC International Law Commission  
IO International Organization  
KB Kellogg-Briand Pact (Peace Pact)  
NGO Non-governmental Organization  
R2P Responsibility to Protect  
SC Security Council  
UDHR 1948 Universal Declaration of Human Rights  
UN United Nations  
UNGA United Nations General Assembly  
VCLT Vienna Convention on the Law of Treaties

## 1 INTRODUCTION

Peace is “one of the main purposes of the International Law”.<sup>1</sup>

The elephant in the room in discussions about International Law (IL) is the fact that the fundamental purpose of all IL is to promote peace<sup>2</sup> and world order yet that point is generally not clearly made if addressed at all. An obligation exists under IL that requires states to conduct themselves peacefully in all relations with other states, and there is a similar obligation to conduct relations toward their own people in a peaceful way, that is, to honor a human right to peace. Current research focuses on what peace may be conceptualized as (positive, negative, meaning of, peacebuilding) or what constitutes aggression, but does not directly address what the IL of peace is or who is bound by it, or the fact that all IL contributes to peace.

The obligation of states to conduct relations with each other in what amounted to a “just” and peaceful way was customary law preceding the United Nations (UN) Charter. After World War I and the deaths of nearly 19 million people<sup>3</sup>, the obligation of states under IL developed into renouncing war as a tool of international relations in the Kellogg-Briand Pact (Peace Pact). After World War II and the deaths of an additional estimated 56.4 million people (military and civilian)<sup>4</sup> international law graduated a step further to require peaceful relations in positive IL in the UN Charter and numerous other international agreements.

Those with memories of the human tragedy of WW II are fading now and the younger generations do not conceive how easily war can begin nor comprehend its horrors. The euphoria upon the end of the Cold War was short-sighted. Even with news of Syria and Yemen appearing

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<sup>1</sup> Edmundo Vargas Carreno (2009). “Address”. *Peace Through International Law: The Role of the International Law Commission*.

<sup>2</sup> Malcom Shaw, *International Law* (4<sup>th</sup> ed. Cambridge: Cambridge University press, 2005, 717).

<sup>3</sup> Haythornthwaite, Philip J., *The World War One Source Book* pp 382-383.

<sup>4</sup> Guinness World Records. <http://www.guinnessworldrecords.com/world-records/highest-death-toll-from-wars/>

daily, the horror of what is happening there does not seem real to those who are not within the proximity of it. Current detachment from the horror of war among western democracies and rising nationalism worldwide is more reason to pursue lawful means to pressure all governments...at the very least to make them consider fully their obligations to the international community and their own citizens before they initiate armed conflict that too easily can spiral out of control once begun.

Peaceful relations among states and people is the intended result or at least a secondary effect of several areas of IL including the norm of a Responsibility to Protect, the Vienna Convention on the Law of Treaties, international human rights law, humanitarian law, the emergence of new actors creating IL, the prolific emergence of treaty regimes and functional IL, and the increasing focus of international court decisions affecting all aspects of IL. IL exists that arguably applies the obligation of peace to intra-state relations as well as to interstate relations. The legalization of peaceful international and intra-national relations has progressed and continues to progress with every new example of man's capacity for massive destructiveness and inhumanity. What is remarkable is that the legal principle and requirement of peaceful relations between states and peoples is not clearly given center stage in scholarship where leaders, scholars, and common people alike would necessarily have to focus on its guiding principle.

Previous study of IL addresses its history, development of its philosophical bases, the various forms that law takes under IL: human rights IL, functional IL, humanitarian IL, environmental IL, issues of enforcement, the progressive development of IL, the usefulness or lack thereof of IL, and most particularly the laws of war and prohibitions on the use of force. In recent years the body of IL has expanded exponentially as international institutions and organizations have emerged. As more actors join the world stage so too have additional actors



joined the ranks of objects of as well as formulators of IL. We all talk about the *trees* of IL but we do not discuss the *forest*. The *forest* is the fact that all of it...all IL, exists to create conditions under which we can manage and recuperate from conflict without violence, that is, world conditions without armed conflict, or, in other words, at least minimal conditions of peace. Advocating a world without conflict is unrealistic, but over time, the institution of law can move the management of conflict forward. The *forest* tells us that armed conflict and violence are not legal in the relations of states and between states and their peoples<sup>5</sup>. Naming that concept the international law of peace is merely reframing what it already is. The challenge to define exactly what “peace” means in a social science and political sense doesn’t negate its legal existence as a requirement under IL. There are innumerable ways to commit a murder and yet we still call each one murder. Failure to prosecute or punish a perpetrator for murder doesn’t negate the fact that a murder occurred.

“Peace” for the purpose of international law may be defined as the *absence of* aggression, armed conflict, or the use or threat of use of force in violation of the United Nations Charter; *and* as the *presence of* (or commitment to) conditions under which fundamental human rights: the dignity and worth of the human person, the equal rights of men and women and of nations large and small, and justice and respect for the obligations arising from treaties and other sources of international law, can be maintained (See UN Charter, Preamble, Purpose, and Article 1; “Peace” at UN.org/rule of law; “Peace and Security” at UN.org; International Law Commission, *From War to Peace*, UN Library; International Law Commission, “Draft Declaration on Right and Duties of States” Art. 3, 7, 8 and 9, in *From War to Peace*, UN Library). We use the legal

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<sup>5</sup> “individuals are not subjects of IL but may be objects of IL. It may be for the benefit of states or individuals or entities less than states” (Kaplan and Katzenbach, (1961). *The Political Foundations of International Law*. New York: Wiley and Sons, Inc.

requirement of peace to prevent armed conflict, to end existing conflict, and to promote conditions under which fundamental human rights may be maintained.

The legalization process of international peace law is ongoing. It's lack of precision about "peace" and lack of full delegation for enforcement do not take away from the underlying obligation of states to conduct international relations in a peaceful manner. This essay does not attempt to address the various political distinctions between "peace," "peaceful conduct," "peace keeping" and "peace building". Those distinctions may be the subject of other studies and will develop as the law develops.

The heart of this essay uses a legal approach which is then evaluated in the conclusion. The first question addressed in the essay is not why or how law guides, or how the law is implemented, but what law does guide (Kapp 2013; see Handler 2011; core values of the law see Begum 2014; for review of existing laws and conventions that might apply to the development of new law see Partain 2015). Next, we address what laws, rules or international institutions and actors are developing that affect peace and peace law. Under IL, customary law<sup>6</sup> often precedes treaties and conventions, and afterward may be considered law if not in conflict with the treaty. In the case of *jus cogens*, a treaty may not change the obligations of the law<sup>7</sup>. We will review what the direct law of peace is and how it applies.

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<sup>6</sup> Somewhat like the understanding of common law in a domestic system, but in IL customary law requires both state practice and *opinio juris* for proof of the law. "*Opinio juris* denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question" See ICJ Statute, Article 38 (1)(b). See also Theodore Meron, (1989). *Human Rights and Humanitarian Norms as Customary Law*. New York: Oxford University Press.

<sup>7</sup> "norms, which are defined as norms which cannot be changed through positive law methods and must, therefore, be explained by a theory outside the positive law", O'Connell, Mary Ellen (2008) p. 132. *The Power and Purpose of International Law: Insights from the Theory & Practice of Enforcement*. New York : Oxford University Press.

## 1.1 Purpose of the Study

The goal of this review is to identify peace as the ultimate purpose of all international law, to explain the direct international law of peace per se, to identify laws and international developments that have indirect effects on peace and peace law, and to explain the role of the legalization in international law. In doing so we will review the historic basis and context of the International Law system, development of international law respecting peace, legal development where peace is an effect of law, and modern changes in the International Law system affecting peace and peace law.

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# 1 PART ONE: PEACE AS THE EXPLICIT AND IMPLICIT LEGAL PURPOSE OF INTERNATIONAL LAW

## 1.2 Historical Basis and Development of the International Law of Peace.

2 The roots of IL and the desire of states and peoples for peace are equally deep.

Augustine said, "Peace is not sought in order to arouse war, but war is waged in order to win peace" (Panizza, 2013-2014) and a "just war" to restore peace (Augustine, IEP). Kaplan and Katzenbach's perspective is that the whole purpose of IL is to develop rules to govern state relations to avoid constant war (1961 p. 60). Pufendorf's ultimate concept of a state of nature was a state of peace (1672). Peace was not necessarily the opposite of war, but the absence of war enabled conditions of peace and human existence.

3 IL traditionally concerned itself with just conduct between states to avoid unjust war and depended on state practice for agreement on what just conduct included. Then the just conduct concept was superseded by discussion of just war. Similarly, in the modern era, it has been asked why we still focus on the IL of war when we should focus on the IL of

peace. There is a positive law of peace and an older natural law argument for peace. The natural law argument finds a role in human rights law in the progressive legalization process of peace law. The international law of peace derives its foundation from natural law, and in more modern times, from customary law followed by treaty law. *Where a treaty has not yet been created* on a matter of international concern, natural law and soft law are often the initial sources in the development of IL. Customary law develops from them and also plays a role in legal development of IL.

4 Hugo Grotius, often called the “father” of IL, articulated principles of IL in his era in *De jure belli ac pacis* and *jus belli* (1625). By defining what “just” war consisted of, he essentially set out when the “peace” could legally be broken in the community of nations. In the “Old World Order,” the time before the Kellogg-Briand Pact (Hathaway and Shapiro, 2017), states followed Grotius and “considered war to be “just’ if it consists in the execution of a right, and ‘unjust’ if it consists in the execution of an injury” (Hathaway and Shapiro, citing *De Jure Praedae Commentarius*). Peaceful options were to be considered first, but when no peaceful option remained, a “just” war was allowed. If an enemy “had not violated or threatened to violate any rights” states could “not wage war” (Hathaway and Shapiro, p.10). Grotius equated reasons for waging war with those for pursuing a lawsuit... “causes of action” to right a wrong and considered courts to be a substitute for war (Hathaway and Shapiro, 2017 p. 9-10). *In the absence of international institutions capable of resolving disputes between states*, IL developed to allow a ‘just’ resolution by war, but war only in the context of its being ‘just’.

5 Samuel von Pufendorf contended that the law of nations is really the “law of nature or part of civil laws of the states where observed” and as such, doesn’t “depend on universal

reason or mankind so long as many people and states agree on the points” (Pufendorf, 1672). The law of nations according to many authors consisted of “customs mutually observed by tacit consent” (Pufendorf, 1672). *Ius Gentium* or *Jus Gentium* is the law of nations that is not statutory but customary law. Cicero described it thus: *ius gentium* is “a higher law of moral obligation binding human beings beyond the requirements of civil law” (Partitiones Oratoriae 37, 130) For the customs to be universal, the obligations understood had to be general (Puffendorf, 1672). Included at that time in the voluntary law of nations were such laws as the law of embassies and the right of burial. Hans Kelsen agrees that “customary international law represents unconscious and unintentional lawmaking” (2003). Presently, international custom is “evidence of a general practice accepted as law” (Art. 38(1)(b) Statute of the ICJ; Meron, 1989 citing the Nicaragua Cases in the ICJ; Goldsmith and Posner 2005, p. 23; Dunoff, Ratner and Wippman, 2010). Mary Ellen O’Connell<sup>8</sup> echoes Pufendorf in contending that some customary IL is from natural law, against the critique that natural law is “hopelessly” subjective. She asserts that it is for the courts to interpret natural law, and, what natural law *is* now part of IL amounts to *jus cogens* (O’Connell, 2013-2014 Lecture).

6 Today, evidence of both state practice and *opinio juris* are required to prove customary IL. (See ICJ Statute, Article 38(1)(b). The acts concerned must “amount to a settled practice...carried out in such a way as to be evidence of requiring it...a subjective element – belief” (Meron, 1989, citing The North Sea Cases<sup>9</sup>) “Whether the practice of a state is due to a *belief* that

<sup>8</sup> Hersh Lauterpacht Memorial Lectures, University of Cambridge. “Understanding the Higher Norm against Aggression” (2013-2014). <https://sms.cam.ac.uk/media/1664077>

<sup>9</sup> “it was indispensable that State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved. Some 15 cases had been cited in which the States concerned had agreed to draw or had drawn the boundaries concerned according to the principle of equidistance, but there was no evidence that they had so acted because they had felt

it is legally obliged to do a particular act is often difficult to prove objectively. Therefore, *opinio juris* is an unsettled and debated notion in international law” (Cornell Law School Legal Information Institute 2018; See also Chesterman 2014). Proof may be difficult, depending on the circumstances, but it is not impossible.

7 Customary IL may be referred to as norms of IL which are binding, or as non-binding soft law by some scholars, adding to confusion of terms and meaning (see Shinoda, 2001; see also Shaffer and Pollack, in Dunoff and Pollack, 2013). The binding effect of legal norms determines whether they are part of the legal system or part of the political system, i.e. codified existing law or part of the “progressive development of law”...*de legi lata* compared to *de legi ferenda* (Scott, 2010, p. 92; Malanczuk, 1997, p. 54; the distinction between hard and soft law according to legal positivists depends on the “binding or nonbinding nature” of the law, Reinicke and Witte 2000; Guzman and Meyer 2010; in Shaffer and Pollack, Dunoff and Pollack 2013). These distinctions are important in illustration of the legal development of IL to where it is today and to what it may become in the future.

8 Once found to exist, customary IL is law of the same legal authority as positive or treaty IL, and when included in conventions, becomes positive IL too. An IL requiring peaceful settlement of disputes exists as both as customary law, amounting to a *jus cogens* norm, and is also binding IL under the UN Charter treaty provisions. In addition to law directly requiring peaceful international relations, there is also IL where the maintenance of peace is an effect of the law.

9 To give historical context to the discussion of peace law, I place the evaluation of it on the backdrop of Kaplan and Katzenbach’s (K and K’s) 3 phases of development of IL. Their first phase consisted of the years from the Renaissance to the Congress of Vienna. K and K

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legally compelled to draw them in that way by reason of a rule of customary law.” Judgment, The North Sea Continental Shelf Cases, 20 February 1969. <http://www.ici-cij.org/files/case-related/51/5537.pdf>

propose that during Phase 1 of IL, the whole purpose of the law was to “develop rules to govern state relations to avoid constant war” (1961, p. 60). IL was all about guiding rulers so that they could determine what they “ought” to do. What rulers “ought” to do was related to morality, justice and reason, and was based upon universal principles and a universal law of nature (1961, p. 57). During the 18<sup>th</sup> century, according to K and K, and consistent with Enlightenment thinking, “man sought justice” (p. 67). Justice, although not equated with peace as such, seeks the moral, just and reasonable course of action for a state. By the 19<sup>th</sup> century, during K and K’s Phase 2, IL was viewed more as “a matter of formal political consensus and not universal moral principles” (p. 69). During this time IL became more legalized in treaties. Positivism took precedence. (Kaplan and Katzenbach 1962, p. 69). The positivism trend obscured the underlying purposes of IL to seek peace and a higher moral purpose, as explained by Augustine and Puffendorf, but did not change that purpose.

K and K’s Phase 3 of IL (WWI – 1961), continued a focus on positivism and functionalism but also renewed interest in what states “ought” to do in the sense that it focused on documents and institutions to avoid war (1961). That trend continues through the present.

Today, IL’s “generally agreed upon rules and principles of action” or customary laws, “serve the indispensable function of providing a basis for the *orderly management* of international relations” (Collins, 1970). Treaties are the preferred form of IL<sup>10</sup>, but custom “continues to play a vital role,” and “non-traditional” law-making supplements both treaties and custom (Dunoff, et al, 2010). We think of IL as a system of practice and authorities regulating the international society “*offering an alternative to anarchic society*” (Chesterman, 2001 p. 9). Collins’ “orderly management of international relations” and Chesterman’s “alternative to anarchic society” are

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<sup>10</sup> During Kaplan and Katzenbach’s Phase 2 of the development of IL, 1815-WWI, sources of IL became treaty and custom with an increased emphasis on treaty and positive law (1961); see also Collins, Ed. 1970; and Scott 2010).

reminiscent of K and K's Phase 1 description of IL as a means for states to seek moral, just and reasonable conduct in international relations, or more simply, peaceful conduct between states. The IL determining any conduct in international relations falls in this category and becomes part of the IL purpose to maintain peace.

The modern expanded view of IL in hierarchical order (and thus the order in which to evaluate the law) is: treaties, customary IL, general principles of law recognized by all nations, judicial decisions, and teachings of the most highly qualified jurists (Art. 38(1) Statute of the International Court of Justice (ICJ); Weeramantry and Burroughs, 2005). Treaty law is binding IL on all parties to the treaty. UN membership for all practical purposes includes all countries in the world<sup>11</sup> and so the UN Charter is binding on all countries and IL from the UN Charter is universal law.

10 The current conception of the goal of IL is that IL exists for "peace, or peace and justice" (Buchanon, 2004, p. 77). Bailliet and Larsen refer to peace as a "vague vision" that can be moved to an "operative directive principle, referring to the "progressive evolution" of its foundation (2015). This author contends that the "vague vision" is no less than the *legal* purpose of the body of IL both explicitly and implicitly. Discussions like those of Bailliet and Larsen attempt to arrive at social science agreement on "peace" so that conditions of "peace" may be pursued, but for legal purposes, "peace" is defined herein in the context of the purpose of the UN Charter, as stated in the Introduction. The following review of IL will support that position.

When reviewing legal matters, the express wording of laws, treaties and legal obligations is the preferred place to begin (see Scott 2010; see also Putman and Albright 2014). The actual wording of the laws is primarily determinative of the interpretation given them due to the legal

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<sup>11</sup> Palestine and The Holy See have permanent Observer Mission Status. UN.org



maxim that one must give words their plain meaning if not ambiguous. However, ultimately one may go beyond the instrument to make the final determination that these plain meanings were intended<sup>12</sup>. This article unapologetically begins its discussion of the law of peace with significant portions of the key documents rather than simply referring to them. I will begin in Part One with the express law of Treaties and Conventions, or the positive law of peace.

### 10.1 Explicit IL of Peace: The Preamble, Article 1, UN Charter

Under positive treaty law, all signatories are bound to stated legal obligations whether the state is “feeling” the legality of the obligation or not. “The basis of obligation is the same in every legal order: the consciousness, which prevails among the subjects of the legal order, of this order's need to realize a common end...The purpose and the legal order cannot be separated” (Hoffman, 1961). The United Nations Charter falls under this category of law and legal order. The United Nations Charter Preamble in 1945 provides its purpose, which is reflected in the Charter body. The purpose is to seek, facilitate, and maintain world peace:

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to **reaffirm faith in fundamental human rights, in the dignity and worth of the human person**, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS:

- to practice tolerance and **live together in peace** with one another as good neighbours, and

<sup>12</sup> McBaine, James, P. (1943). “The Rule Against Disturbing Plain Meaning of Writings”. 31(2) Cal.L.R., 143, Art. 2. <http://scholarship.law.berkeley.edu/californiareview/vol31/iss2/2>. “The ordinary or dictionary meaning of words will be accepted unless the court is convinced that another standard was employed in the preparation of the written instrument” (149).

- to unite our strength **to maintain international peace and security**, and
- to ensure, by the acceptance of principles and the institution of methods, **that armed force shall not be used**, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples, (UN Charter).

#### Article 1

The Purposes of the United Nations are:

1. **To maintain international peace and security**, and to that end: **to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;**
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting **and encouraging respect for human rights** and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

(<http://www.un.org/en/documents/charter/preamble.shtml>).

The stated purpose of the United Nations in the Charter Preamble and Article I

(1) provides clarity of intent behind the subsequent requirements in the Charter, but perhaps more importantly, standing alone both are evidence of consensus on the obligations accepted by states under the Charter. It is not possible to legitimately deny a state obligation under the Charter Preamble and Art. 1 (1) to: reaffirm faith in fundamental human rights, in the dignity and worth of the human person, to live together in peace, to maintain international peace and security, and not to use armed force, based on these words along with state practice. No Court has been called upon to rule on the legal status of those words, but it is difficult to imagine any international court

concluding anything other than that the Preamble and Art. 1 (1) express legal obligations under the Charter even though mandatory language is not included at that point.

Consider the terms of the Preamble of the United States Constitution. The Preamble clarifies the intent of the American Founders: to establish justice and secure the blessing of liberty among other purposes, and more. Is it legitimate to legally challenge whether establishing justice and securing liberty are requirements of the document even though they are not fully defined in the body of the document? We are still defining what “justice” and “liberty” mean in the United States but we don’t question the legal obligation to provide both, through national and state government, to our citizens because of the Constitution. The body of the UN Charter mandates what members “shall” do and then sets out the authority of the Security Council (SC) to implement and enforce the *purpose* and requirements of the Charter, somewhat analogous to American courts interpreting the U. S. Constitution.

#### **10.2 Article 2 (3) and Article 2(4) and other UN Charter Provisions.**

The UN legal mandates that relate to international peace and security are listed below but for the sake of brevity some are not verbatim:

- Art. 2, Par. 3 provides that: “All Members **shall** settle their international disputes by **peaceful** means **in such a manner that international peace and security, and justice, are not endangered**”; and
- Art. 2, Par. 4 : “All members **shall refrain** in their international relations **from the threat or use of force** against the territorial integrity or political independence of any state, or **in any other manner inconsistent with the Purposes of the United Nations** (UN Charter; see Collins, p.340; Bailliet and Larsen refer to this provision as jus cogens law based on the ICJ Nicaragua Judgment 2015).

- Chapter VI, Art. 33 requires parties (“**shall, first of all**”) to seek solutions to disputes by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.
- Art. 34 empowers the Security Council (“may”) to investigate any dispute.
- Chapter VII, Art. 39 mandates that the Security Council (SC) determine existence of any threat to the peace, breach of the peace, or act of aggression and allows it to make recommendations or decide what measures shall be taken to maintain or restore international peace and security.
- Art. 41 of Chapter VII gives the SC discretion to decide what measures to use outside of armed force in order to give effect to its decisions.
- Art. 42 (Ch. VII) authorizes the SC to take measures by air, sea or land forces as may be necessary to maintain or restore international peace and security if the Art. 41 measures would be or have proved to be inadequate. And, notably,
- Art. 43 makes all signatory states subject to assisting the SC measures undertaken for peace and security.  
(UN Charter; and Collins 1970, p. 340-342).

The foregoing provisions legally require peaceful behaviors by member states as positive direct law and enable action by the Security Council. The required behaviors exist to facilitate peaceful conditions in the world. Art. 2 (3) requires that disputes be settled so as not to endanger international peace. The Art. 2 (3) obligation was also held to be customary IL in the *Nicaragua v. United States of America* Case in the International Court of Justice in 1986 (*Nicaragua Case*). Art. 2(4) mandates that members may not use force or the threat of force against another state in a way inconsistent with the Charter. Also involved in the 1986 *Nicaragua Cases* the “parties agreed that the Charter provisions represented customary law and the Court accepted this without going into the question of how far the meaning of Article 2(4) was fixed or how far it had evolved over time” (Gray 2008; *Nicaragua Cases* 1986). The remaining obligations from the Charter listed above are positive law of the Charter<sup>13</sup> and customary law too. The legal definition

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<sup>13</sup> The International Law Commission has done a report on identifying customary IL and intends to create a list of customary IL at some time in the future. See Chapter V, A/71/10. International Law Commission. [Legal.un.org/docs/?path=../ilc/reports/2016/English/chp5.pdf&lang=EFSRAC](http://legal.un.org/docs/?path=../ilc/reports/2016/English/chp5.pdf&lang=EFSRAC)

of “peace” in IL is derived from these provisions of Art. 2 (3) and 2 (4) in view of the stated purpose of the UN.

The UN Charter unambiguously exists to maintain world peace (“to maintain international peace and security” Art. 1(1)). The behaviors addressed are legal obligations for the member states, ignoring for the sake of argument the issue of how enforcement should or might occur. There is no doubt that legally all 193 states have agreed to the mandatory and authorizing terms of the UN Charter. In doing so, they have accepted the legal obligation to adhere to peaceful conditions as between states, or more simply, they have agreed to an IL of peace.

### **10.3 Prohibition of the Use of Force (Kellogg-Briand)**

11 The UN Charter represents the ongoing development of IL. Previously, the Hague Peace Conventions of 1899 and 1907 introduced the concept of an international court of arbitration to settle disputes and promoted laws of war and war crimes. World War I’s devastation gave reason for The Kellogg-Briand Pact of 1928 (KB) (Treaty for the Renunciation of War, often called The Peace Pact) which contained language that set the course for subsequent treaties regarding war and peace, stating signatories “condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another....” (1928). (The League of Nations Covenant, although part of the progression of law toward result of legalizing peace, did not reach the level of prohibition of armed violence that KB states<sup>14</sup>). In Art. II of KB, the following unequivocal language states “the settlement or

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<sup>14</sup> See the Covenant of the League of Nations in 1924 which did not renounce aggression or the use of force or war. Its language recites an “obligation not to resort to war”, a purpose to “achieve international peace and security” and a recognition that peace “requires reduction of national armaments”. It did assert that: “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League”. <http://www.firstworldwar.com/source/leagueofnations.htm>

solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall *never* be sought except by pacific means.” (Kellogg-Briand Pact 1928; Collins Ed. 1970 p. 340). Unfortunately, there were no enforcement mechanisms built into the treaty (see KB). So, KB was notably followed by the Japanese invasion of Manchuria, World War II and many other armed conflicts. However, like the principle “All men are created equal” in the Declaration of Independence, the articulation of the standard: the concept that war is no longer a legitimate tool in international relations (peace was then defined as the absence of war), took on an inherent value in directing legalization of the IL of peace over time. The renunciation of war survived as a guiding principle in IL of the law of peace. Hathaway and Shapiro point to KB as the watershed moment between their “Old” and “New” World Orders, the Old being the time when war (use of force) was accepted as a tool in international relations, and the New referring to the time after KB when war was outlawed as a tool of international relations. (see Hathaway and Shapiro, 2017).

12 Article 2 (4) of the UN Charter legally requires all members to “refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. Article 2(4) is the operative law of KB (O’Connell, 2013-2014). However, self-defense is allowed under the UN Charter, so interpretation of what amounts to legal self-defense and the permissible use of force remains an issue. In the *Nicaragua Case*, the International Court of Justice (ICJ) determined that self-defense is to be interpreted “in the light of customary international law.”<sup>15</sup> Current scholarship and international court interpretation leave the interpretation of a legal “use of force” as a “dynamic interpretation of Articles 51 and 2(4) based on the development of state practice

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<sup>15</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (hereinafter *Nicaragua Case*) ICJ Reports (1986) 14 at para 176.

(Gray 2008; Gray citing herself in Lowe and Warbrick, 1994). Several UN General Assembly resolutions have elaborated on the use of force over the years and western states apparently “accept the legal significance and customary international law status” of some of them (Gray, 9). However, ambiguity still exists respecting controversial issues (2008). Christine Gray opines that the 1987 *Declaration on the Non-Use of Force*, meant to clarify some of the remaining issues, really does no more than the *Declaration on Friendly Relations* (2008). The UN Security Council has authority to determine whether any state conduct endangers peace and security in violation of the Charter. Although there is no agreement as to whether SC decisions are “conclusive as to legality, illegality, and as to the content of the applicable norms” (Gray 2008 at 13), SC decisions do legalize action taken pursuant to them. Absent SC intervention, court interpretation remains the means of identifying what state conduct is legal.

13 In the Congo Case, Uganda claimed it acted in self-defense as justification for its use of force. The ICJ rejected the defense saying:

- 14 Uganda never claimed that it had been the victim of an armed attack by the armed forces of the DRC; the “armed attacks” to which reference was made came rather from the ADF; there was no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC; and the attacks did not emanate from armed bands or irregulars sent by the DRC, or on behalf of the DRC, within the meaning of Article 3 (g) of General Assembly resolution 3314 (XXIX) of 1974 on the Definition of Aggression.  
(Judgment, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda* 19 December 2005).

Presumably self-defense may be authorized by the SC if a state seeks SC approval prior to the use of force, the key being prior approval. That may or may not be possible in all circumstances and the decision whether self-defense was justified under the law may have to be viewed retrospectively. At any rate, the use of force is not legal in IL except in the event of legitimate

self-defense and only the SC and the ICJ can legitimize it. Maintaining world peace and security require that force not be available as a remedy for disputes.

15 For years during the Cold War the Security Council (SC) was unable to act to enforce UN positive law due to potential and actual vetoes by the United States and the U.S.S.R, yet world war was avoided. During these years, progress was still being made in legal development of the obligation of states to maintain peace. The 1970 Declaration on Friendly Relations Among States (GA/RES/2625) (“The Declaration”) defined aggression as a crime against peace for which there is legal responsibility under IL, specifically stating:

**Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of Friendly relations and Co-operation among States...Reaffirming ...the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations...the paramount importance of the Charter of the UN in the promotion of the rule of law among nations...equally essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN...that all States shall settle their international disputes by peaceful means in accordance with the Charter...A war of aggression constitutes a crime against the peace, for which there is responsibility under international law...the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention...etc.”**

<http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm> 10/13/2010).

Other parts of The Declaration are equally important to the legalization of peace. The Declaration prefaces the body of its content by reaffirming previous UN resolutions “in which it affirmed the importance of the progressive development and codification of the



principles of International Law concerning friendly relations and cooperation between States” (GA/RES/2625). In doing so it attaches itself to the legal status of the UN Charter provisions as well as its independent legal status. The Declaration provides that states have an obligation “not to intervene in the affairs of any other State” since any form of intervention violates the “letter of the Charter” and “leads to the creation of situations which threaten international peace and security (GA/RES/2625).

And:

**any attempt** aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or of its political independence is incompatible with the purposes and principle of the Charter (GA/RES/2625).

States have a “duty not to intervene in matters within the domestic jurisdiction of any state” (GA/RES/2625). And also, that:

Every state has the **duty to refrain from organizing, instigation, assisting or participating in acts of civil strife** or terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts when the acts referred to in the present paragraph involve a threat or a use of force.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of International Law with respect to the maintenance of international peace and security.” “States shall cooperate in the promotion of universal respect for, and observance of, human rights and freedoms for all... (GA/RES/2625).

Most importantly, principles set forth in the Declaration are declared to “constitute principles of International Law” (GA/RES/2625). General principles of international law have always been considered part of the body of IL, cannot be “overridden by treaty” and are “best explained by natural law” (O’Connell 2013-2014). Whether the principles are

fully enforceable is not the issue in this review. The provisions of The Declaration are part of positive IL and the law of peace.

Another important aspect of The Declaration is the potential for it to be used as a legal tool to deal with states that become involved in civil wars in other states. States are not to even assist in acts of civil strife in other states. The roadblock of enforcement may prevent meaningful use of The Declaration provisions for the instances that occur now in civil strife, but Hathaway and Shapiro's "outcasting" demonstrates potential for putting pressure on states that violate the Declaration (2017 Ch. 15). At any rate, The Declaration reinforced the IL of peace during an historical period of difficult progress in IL.

Since the Cold War ended in 1991, the UN's effectiveness has experienced mostly positive changes. At first the SC was unable to act quickly enough to be effective in situations like Serbia/Kosovo and Rwanda. However, the SC learned from its failures. The SC response to Libya in 2011 (SC Resolution 1970, 1973) is seen as an improvement in enforcing the UN Charter respecting peace. As effectiveness of the UN role in international relations increases, so does effectiveness of IL of peace.

### **15.1 Jus ad bellum and Aggression.**

A recap of the terms used to refer to IL relating to war and by inverse relationship to peace law, is helpful here. The old categories of the law of war and in war date back to St. Augustine but are most well-known in connection with Hugo Grotius's work *On the Law of War and Peace* (Stahn 2008 at 313; Guinn at 765). The terms *jus ad bellum* and *jus in bello* were traditionally used to classify legal scholarship regarding the law leading to war ("on recourse to force") and the law that applies in war and "governing the conduct of hostilities" (Stahn 2008; Murphy 2013; Maus 2014). *Jus ad Bellum* refers to the law on the justification of and limits to

the use of armed force, the law leading to war (Maus 2014; Allison 2018). *Jus Belli* or *Jus in Bello* is the customary law in war or “laws applicable to armed conflict” (Maus 2014; Allison 2018; Chesterman 2001, citing Grotius 1625). *Jus Pacis* is the law during times of peace (Grotius 1625; Stahn 2008).

The law leading to war involves when aggression or the use of force is justified in international law. The law of aggression and the use of force were integral to the development of the law of peace per se. UN Charter Art. 2 (4) is now the controlling IL on the use of force. The legal definition of “peace” is the *absence of* aggression, or armed conflict, or the use or threat of use of force in violation of the United Nations Charter; and as a presence of (or commitment to) conditions under which fundamental human rights: the dignity and worth of the human person, the equal rights of men and women and of nations large and small, and justice and respect for the obligations arising from treaties and other sources of international law can be maintained (see UN Charter) . The positive IL on the use of force and aggression partially delineates the IL of peace. States are the subjects of IL, but individuals are also objects of IL and state aggression and use of force impact individuals directly. The laws of aggression and use of force are therefore inherently connected to human rights and humanitarian issues. The law of aggression and the use of force has to do with peace per se whereas peace is an effect of humanitarian law, human rights law and other law of the International Criminal Court

Use of the term “aggression” in the **1970 Declaration on Friendly Relations Among States** was criticized for failing to include a clear legal standard. States needed to know what state behavior specifically was considered out-of-bounds, so to speak, in customary IL and the prohibitions of the UN Charter. States also considered the Declaration on Friendly Relations statement to be for the benefit of the Security Council and did not insist on a better definition

most likely because of the use they considered it for (Solera 2010). Another problem with the definition became apparent when it was anticipated that the developing international crime of aggression would fall within the jurisdiction of the International Criminal Court (ICC) after 2002 and “penal rules must clearly describe the conduct that is considered unlawful” (Solera 2010). UN Resolution 3314 on 14 December 1974 (soft law) initially defined an act of state “aggression” as follows:

Aggression is the use of armed force by a *State* against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...  
The Resolution includes the following as specific acts of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

(A/RES/29/3314 with Annex).

The international *individual* “crime of aggression” was not defined until the Kampala Conference in 2010 and amendment to the Rome Statute of the International Criminal Court as Article 8 *bis*, activated and now approved by 35 states (positive treaty law):

... the planning, preparation, initiation or execution, by *a person* in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2.

... “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression...[repeating a-g of the 1974 Resolution above here].

(Rome Statute, Art. 8 bis [http://untreaty.unoorg/ilc/summaries/7\\_5.htm](http://untreaty.unoorg/ilc/summaries/7_5.htm) ; see also Akanda 2010).

The prohibition against aggression is also a *jus cogens* norm based on natural law theory coupled with the positive law of the ICC (See O’Connell, 2013-2014, the Nicaragua Cases (1986) from the International Court of Justice (ICJ); and the International Law Commission (ILC), 2013-2014, Hersch Lauterpacht Memorial Lectures). *Jus Cogens* norms of IL are not necessarily in the treaty category unless reiterated in one. (Aggression is part of treaty law: Rome Statute). Typically, *jus cogens* “emerge from social life” so are considered part of natural law and are subject to reason (O’Connell). They don’t need “explanation, custom or treaty” (O’Connell 2013-2014)<sup>16</sup>.

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<sup>16</sup> Those norms of general international law accepted and recognized by the international community of States as those from which no modification, derogation or abrogation is permitted.

Norms of *Jus Cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable.

(International Law Commission, Special Rapporteur, Draft 3, 27 May 2015).

Peace at its minimum is a condition of being without war or aggression or use or threat of force (see Morgenthau 1948). The use of war as a tool of international relations has been outlawed since KB in 1928. Aggression by “use of armed force by a *State* against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” has been positive IL since the Charter and a *jus cogens* norm of IL since at least 1974. “Aggression” has been an individual crime in IL since 2010. The law prohibiting aggression as a component of positive peace law per se is fully legalized through obligation, precision and delegation.

## 15.2 The New Human Right to Peace.

International human rights law is also part of the foundation for the IL of peace. A human rights law momentum resulted in a UN General Assembly Resolution affirming the human right to peace, and implicitly, a human right to life. The 2016 Human Right to Peace was the result of extensive work coming out of the UN and joined other soft laws requiring peace already in existence. Meyres McDougal provocatively makes this comment in his 1989 article on “Law and Peace”:

Hence, for reasons of interdependence or identity, there can be but one answer to President John F. Kennedy's question "Is not peace, in the last analysis, basically a matter of human rights?"<sup>12</sup> The basic community policies that underlie conceptions of peace and human rights are in any democratic community the same policies that underlie all law (1989).

The “**Declaration on the Right to Peace**” was adopted by the General Assembly on December 19, 2016. It states that “everyone has the right to enjoy peace such that all human rights are promoted and protected and development is fully realized” (A/RES/71/189). Art. 2 and

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3 require that states “should” take certain steps that would assist in building peace. “Should” expresses what is accepted as “right” conduct by states. In Art. 4 states “shall” promote education for peace, so that provision is legally binding. Art. 5 reiterates that nothing in the declaration “shall” be interpreted as “contrary to the purposes and principles of the UN” (A/RES/71/189). Unfortunately, that means that states still may use Charter protected self-defense as an excuse for the use of force.

All resolutions of the General Assembly are not necessarily considered hard IL (Oberg 2006). Yet as nonbinding soft law, the human right to peace is progressing in the legalization process of becoming hard law (See Ku, 2012; Diehl and Ku 2010). Ian Hurd says that the power of IL is not from compliance but from its “ability to shape the terrain for political contestation in international relations” (2014, p. 367). A nonbinding resolution has that power despite its nonbinding nature (Oberg 2006).

The new human right to peace represents an IL milestone. The wording of the right does not mandate specific behavior by member states other than promoting education for peace. However, considered in the context of all other requirements of IL and the UN Charter, one may argue that the new Right to Peace is soft IL. Given that position, one may also argue that it is binding on all whether by consent or not. Raising the specter of enforcement difficulties does not negate the existence of the right any more than enforcement issues would negate the existence of any IL (Abbott, et al. 2000). The legal effect of this new human right to peace will be determined as states, IOs and international courts react to it. If the SC uses it to make decisions to protect international peace, then it will move toward binding IL. As state and non-state actors act as though they accept it as binding, it will become so over time. How much time will that process take? There is no way to predict a timeline.

One very important aspect of the Human Right to Peace is its potential for use as a legal tool to control some of the civil wars that are prevalent now. Hathaway and Shapiro find empirically that “violations of basic economic and social rights and physical integrity rights increase the risk of civil war, while the effect of other civil and political rights is minor” (2017 Ch. 7). The implication is that increasing the strength of human rights IL can “reduce conflict risk” (Ch. 7). There are two ways to approach strengthening HR law. One is discussed in the Conclusion herein involving domestication of international treaties and conventions so that domestic courts will constrain actors within state. There are some limitations on the effectiveness of that method, mainly being that in states with dictators the courts won’t have much chance to be effective. The second method is to use international action through the SC by virtue of Art. 1(3) (encourage respect for human rights), Art. 2(3)(legal obligation to settle international disputes by peaceful means in such a manner that international peace and security and justice are not endangered, Art. 39 (SC to determine the existence of any threat to the peace and to maintain or restore international peace and security) and Art.42 (Ch. VII) (authority of the SC to take measure necessary to maintain or restore international peace and security). Most intra-state conflict spills over into surrounding states threatening international peace and security. The migration and refugee issues of 2014-present are examples of that problem. Human rights law has the potential for growing into a means to control some of this conflict and to minimize the damage to people.

The soft law efforts outlining development of human rights IL generally and contributing to the human right to peace are as influential on the growth of peace law as the Human Right to Peace is (Abbott, et al. 2000). The following series of events illustrates the continuum on Abbott et al.’s spectrum of development for IL from normative statement to soft law. In the conclusion herein, existence of relative obligation, precision and delegation are presented as means to locate



the extent of legalization of a concept. The events listed below although not exclusive, are offered as illustration of human rights law development of obligation, precision and delegation.

These efforts are:

**15.2.1 1948 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR):**

- Art. 3: “Everyone has the **right to life**, liberty and security of person”.
- Art. 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.
- Art. 8: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution of by law”.
- Art. 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”
- Art. 18: “Everyone has the right to freedom of thought, conscience and religion; ...
- Art. 28: “*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized*”  
(Cranston 1973 p. 88).

This document forms the foundation for the progress of human rights law for the last 70 years. The new human right to peace culminated from work during those years toward conditions of peace for people.

**15.2.2 1949/51 UN Genocide Convention: “*Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,*”**

<http://www.preventgenocide.org/law/convention/text.htm> 48/2011)

**15.2.3 1953-2010 European Convention on Human Rights (ECHR), formerly European Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols:**

Reaffirming their profound belief in those **Fundamental Freedoms which are the foundation of justice and peace** in the world and are best maintained on the one hand by an effective political democracy and on the other

by a common understanding and observance of the **Human Rights** upon which they depend... (Cranston 1973 p. 137).

**15.2.4 1966/1976 INTERNATIONAL ECONOMIC, SOCIAL AND CULTURAL RIGHTS:**

Considering that, in accordance with the principles proclaimed in the Charter of the UN, recognition of **the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace** in the world...the ideal of free human beings enjoying **freedom from fear and want** ...obligation States under the Charter of the UN to promote universal respect for, and observance of, human rights and freedoms...

(Cranston, with similar language in the Preamble of the International Covenant on Civil and Political Rights, p. 93 and 107).

**15.2.5 1982/1986 Article 23 of the African Charter of Human and Peoples' Rights, *which affirms the right of all peoples to national and international peace, and the duty to strengthen solidarity and friendly relations among peoples.***

**15.2.6 2006-2010 LUARCA/SANTIAGO DECLARATION ON THE HUMAN RIGHT TO PEACE:**

...peace is a universal value...**positive concept of peace...taking into account principles and rules enshrined in the main human rights instruments of the UN...Individuals, groups and peoples have the inalienable right to a just, sustainable and lasting peace...** Everyone has the right to human security...the right to civil disobedience and conscientious objection for peace...

15.2.7 *25-29 JANUARY 2010 HUMAN RIGHTS COUNCIL*: adopted for the first time in 2008 a resolution entitled “**Promotion of the right of peoples to peace**” reiterating the traditional position that “peoples of our planet have a **sacred right to peace**” and that “preservation and protection of this right constitutes a fundamental obligation of each State”. A workshop was held in Geneva in December 2009 to further clarify the content and scope of this right. (UNGA A/HRC/AC?4/NGO/3 20 January 2010). The eventual result of this work was the 2016 General Assembly Resolution adopting the Human Right to Peace. The process of work on the Human Right to Peace illustrated the developmental aspect of peace law generally.

### 15.3 Development of International Law as a Continuum

The development of the direct laws of peace per se reviewed in Part 1 illustrate a continuum of the law. In Oona Hathaway and Scott Shapiro’s book *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, the story of the Kellogg-Briand Pact and the development of IL prohibiting war is recounted with an argument for reinvigorating the development of IL and peace. Their perspective is that KB created a turning point in IL and international relations by outlawing war, regardless of whether all war has ceased since 1928, and that due to the turning point, KB then became encapsulated in the UN Charter. Their argument fits with the perspective of other scholars who previously said that IL is the product of progressive development and is best explained by utilizing a legalization framework (Goldstein et al. 2000 p.386). A legalization framework illustrates how developing law allows for “normative evolution” (Goldstein et al. 397). The progression of human rights initiatives leading up to the human right to peace reviewed in Part 1 illustrate the progression that Abbott et al. (2000) describe from soft law norm to customary hard law. The progression from Grotius’s law

of “just war” to KB’s outlawing of war, to the UN Charter prohibition of aggression and the illegal use of force is an example in which hard IL has been made over time. Direct peace law in the UN Charter is universally binding *jus cogens*. But the legalization process described below illustrates how peace law continues to progress and how to consider aspects of the law.

Abbott et al. describe the elements of legalization of IL: obligation, precision and delegation. The lack of full development of all three of those elements does not negate the existence of an IL and it is actually “inappropriate” to draw absolute lines between law and politics when a continuum on the spectrum for obligation, precision and delegation is understood to exist in IL (Abbott, et al. 2000). Generally, the more legalized a concept, the less subject it is to the political realm and the more it exists in the legal realm. “Obligation” is when “states or other actors are bound by a rule or commitment or by a set of rule or commitments...that they are *legally* bound...in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of IL, and often of domestic law as well” (Abbott et al, 2000, 401). “Precision” is when there is no ambiguity in the rules (Abbott et al. 2000), and “delegation” is when “third parties have been granted authority to implement, interpret, and apply the rules, to resolve disputes, and to (possibly) make further rules” (Abbott et al. at 401). Abbott et al. use a linear scale (somewhat like a Likert scale) to illustrate the levels on a spectrum for each of the criteria: obligation, precision and delegation, met by any IL or developing norm (2000).

The direct legal obligation of states to provide peace exists as presented in Part 1 herein. The level of precision and delegation of peace law inures to the effectiveness of the law rather than to its existence. In applying obligation criteria to the law of peace, the analysis can be framed two ways: First, recognize the legal obligation to maintain international peace and to

prevent conflict standing by itself, or second, recognize legal obligations of each component of peace law - to refrain from the threat or use of force, to settle disputes by peaceful means, to protect the human right to peace, and to protect a human right to life (UDHR).

Addressing the second option first, states have a direct positive/hard *jus cogens* law obligation to refrain from the illegal threat or use of force (UN Art. 2(4)) and to settle disputes by peaceful means (UN Art. 2(3)). The human right to peace is a direct soft law (non-binding) norm. The human right to life is included in the UDHR and the UDHR is customary law. Therefore, all the separate parts of direct peace law in Part 1 are legal obligations of IL. Where each part of the law of peace is a legal obligation, it follows logically that the obligation to maintain international peace is the ultimate legal obligation.

In Part 2 of this essay I will discuss *jus in belli*, The Vienna Convention of the Law of Treaties, treaty regimes and functional IL, human rights law generally, R2P, the evolution of actors creating peace law, the role of courts, and the developing *jus post bellum* to illustrate how other areas of IL have indirect effects on peace and peace law. These areas of IL range from hard law in the VCLT to soft law to conditions like the increasing roles of nonstate actors in drafting agreements and the morphing role of the SC. The obligation spectrum represented by all these extends from nonlegal norms to binding rules (Abbott, et al., 404). When a rule is legally binding “states may assert legal claims” and “invoke procedures” (411). Abbott et al. add that even “nonbinding declarations can shape the practices of states and other actors and their expectations of appropriate conduct leading to the emergence of customary law or the adoption of harder agreements” and “soft commitments may also implicate the legal principle of good faith compliance” (412). The result is that all the examples given in Part 2 contribute indirectly to peace and the IL of peace in some form or fashion when obligation is considered in the

analysis. Each area would have to be analyzed independently to establish where it exists on the spectrum of obligation, precision and delegation, an endeavor that is beyond the scope of this review.

Precision in the law is the second criteria to consider in legalization (Abbott et al. 2000). A unified concept of peace falls in the category of being “standard-like” as opposed to being “rule-like” (413). However, if the direct peace law of Part 1 is broken down into its component parts, precision may be more rule-like for parts such as the prohibition of aggression, the requirement to settle disputes peacefully, and the illegal use of force. Aggression is clearly defined in IL. The illegal use of force exists when the SC or the ICJ says the use of force was illegal and for the SC, that would be when use of force occurs without prior authorization by the SC. The availability of self-defense under the UN Charter can cloud precision on the use of force in some fact situations. In others, precision would be clarified from the facts. The law itself is not ambiguous: force is illegal except in cases of self-defense, but facts may make the situation ambiguous. The part of peace law that requires states to maintain international peace and security may be accused of ambiguity since those conditions are subject to interpretation. The human right to peace is an inherently ambiguous law. However, precision may be established by a standard rather than a rule for both examples. In domestic law, the reasonable man standard is ubiquitous. What determines reasonableness depends on the facts of the circumstances. The SC and the ICJ can interpret what the facts presented under the IL to maintain peace and security, the legal use of force and the human right to peace. The SALT agreements are one of Abbott et al.’s examples of an international agreement that is “rule-like” in that there were specific details about ICBMs in the agreement. Lack of a precise rule does not negate the existence of the law.

Whether any given violation in the international community amounts to failure to “maintain international peace and security,” or an illegal “use of force,” or a violation of the human right to peace, depends on a finding of facts and interpretation of the circumstances, like the reasonable man standard of domestic law. The SC or an international court may interpret the circumstances to arrive at legal precision. The need for a fact finder does not negate the existence of the law any more than asking a jury to determine if a man acted reasonably under certain circumstances would negate the domestic law in question. The law must put states on notice about types of behaviors. The requirements to maintain international peace and security, not to use illegal force and to respect the human right to peace do place states on sufficient legal notice.

Delegation of Authority to Implement, Interpret, Apply Rules, or Resolve Disputes is the third criteria of legalization. In the international community there are multiple examples of delegation to third parties: The Security Council, the ICJ, the ICC, mechanisms written into conventions, WTO, Soviet era arms control treaties and more. As discussed in Part 2 herein, the SC has begun to take an almost legislative role and is the gatekeeper for the legal use of force and the imposition of peacekeeping and peacebuilding functions, so its determination of legality of the use of force is highly delegated. The ICJ makes findings of fact when peace has been violated and determines what law applies. The ICC makes findings of fact and imposes judgment on individuals for crimes against humanity, bringing enforcement to the domestic level. Delegation of peace law is incomplete but is advancing on its continuum and spectrum. Due to the UN SC, direct peace law in Part 1 is delegated.

So, although Stephen Walt critiques KB calling it “misplace idealism” and an “irrelevant footnote to history” (2017) he does not evaluate the impact of legalization on direct peace law

obligations in the UN Charter. The development of IL and specifically law regarding management of conflict and (by definition) peace, has progressed more as Hathaway and Shapiro propose than not. The point in this essay is not the degree of implementation or enforcement of the peace law, but the development and existence of legal obligations to maintain international peace and security and human security.

Analogous to the Declaration of Independence recitation that the purpose of government is to secure our rights, the UN Charter recites its purpose to maintain international peace and security, which is the purpose of all IL. Just as the Declaration of Independence set forth the principle that “all men are created equal” which has guided American law ever since, the Kellogg-Briand Pact set forth the principle that war is not available as a tool of international relations, guiding IL since then. Aristide Briand said upon the signing of KB: “Peace is proclaimed: that is well, that is much. But it still remains necessary to organize it...That is to be the work of tomorrow” (Hathaway and Shapiro, Conclusion, 2017). As Briand predicted, Hathaway and Shapiro have shown, and Abbott et al. describe, legal development of IL affecting peace continues.



## 2 PART 2: PEACE AS AN EFFECT OF INTERNATIONAL LAW

In Part One I discussed peace as such under international law. In Part 2 I will discuss peace as an effect of international law. There are ILs, areas of IL, and international developments affecting IL that result in the legal development of peace. Among these are development of law affecting state responsibility to maintain peace within borders, the Vienna Convention of the Law of Treaties, human rights and humanitarian law, the development of international treaty regimes generally, the so-called Responsibility to Protect, development of the International Criminal Court and international courts generally, and emerging *Jus Post Bellum*.

### What About Peace Within States?

International law has the power to “bind both nations and individuals” through sanctions and their enforcement (O’Connell, 2008 p. 16). Several international conventions and agreements have effects within state borders producing conditions favorable to peace. The” binding force of IL derives from *civitas maxima*: the will of the international community” (Lauterpacht, 1933, 2011). According to Lauterpacht, IL exists for states, but states serve human beings. He goes on to clarify that the international community is “a community of individuals whose will ... was expressed by states” (Feichtner, 2011). Hathaway and Shapiro speak of “outcasting” whereby states and individuals are brought under the pressure of the international community to force them to comply with international law. Examples would be any international agreements/regimes where compliance measures are written into conventions or agreements (other than the UN Charter since it is already enforceable as positive law) whereby the soft law of the agreement (if the agreement is not hard law yet) is moved toward hard law by self-imposed measures. If the agreement is already hard law, delegation of compliance/enforcement issues strengthens it in the international community, building *civitas maxima*. In this way, peace is an effect of general IL

as society becomes more ordered thus reducing actual conflict and the potential for conflict. This concept has potential for extending IL obligations of peace inside of state borders. States are increasingly bound to honor obligations *not* to create conditions that threaten peace and security under the UN Charter as found by the Security Council. The following is a list of UN sponsored agreements that have effects on peace and create legal obligations for states with effects conducive to peace inside their borders:

- [International Convention on the Elimination of All Forms of Racial Discrimination \(1965\)](#)
- [International Covenant on Civil and Political Rights \(1966\)](#)
- [International Covenant on Economic, Social and Cultural Rights \(1966\)](#)
- [Convention on the Elimination of All Forms of Discrimination against Women \(1979\)](#)
- [United Nations Convention on the Law of the Sea \(1982\)](#)
- [Convention on the Rights of the Child \(1989\)](#)
- [Comprehensive Nuclear-Test-Ban Treaty \(1996\)](#)
- [International Convention for the Suppression of the Financing of Terrorism \(1999\)](#)
- International Convention for the Suppression of Acts of Nuclear Terrorism (2005)
- [Convention on the Rights of Persons with Disabilities \(2006\)](#)
- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)
- [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights \(2008\)](#)

(<http://www.un.org/en/sections/issues-depth/international-law-and-justice/index.html> )

#### 15.4 Jus in Belli

The law of war involves issues such as the banning of biological and chemical weapons, the treatment of prisoners of war, the treatment of civilians and other humanitarian issues.

Humanitarian law derives from *jus in belli*. By lowering the levels of violence in conflict and possibly eliminating some forms of conflict and aggression, *jus in belli* has a direct effect on the use of force and international peace and security even though it may not cause peace itself.

Quinn points out that humanitarian law, human rights law and international criminal law all “promote peace by protecting human dignity” (2018). Examples of humanitarian laws that seek

to limit effects of armed conflict and thus affect peace are the Geneva Conventions beginning in 1949<sup>17</sup> and the Hague Conventions of 1899 and 1907 (Hague Peace Conference).

### 15.5 The Vienna Convention of the Law of Treaties (VCLT)

The Vienna Convention of the Law of Treaties (VCLT) of 1969 entering into force in 1980, is hard law on how to interpret the law. Although the VCLT does not itself require peace or resolve substantive disputes, it is positive law that aids in preventing disputes from spiraling into armed conflict. Peace is an effect of VCLT. An apropos analogy is that every good lawyer knows that one strives to win in the courtroom, but the point is *not* to have to be in the courtroom in the first place. VCLT is also an example of legalization in IL...in this instance, legalizing the process itself. In this way VCLT contributes to hard IL of peace. The *pacta sunt servanda* rule in the VCLT, “the principle that agreements must be performed” (Kaplan and Katzenbach 1961, 25) is stabilizing in that states must be able to trust that other states will comply with their treaty obligations in good faith (Nolte, Ed. 2009, p. 79).

One scholar poses the following question: “in assessing the contribution of law of treaties to the maintenance of peace and security, should the test or the determining factor be the final settlement of the dispute or *would not the law of treaties redeem and contribute to peace and stability by...channeling a conflict that otherwise has the potential of getting out of hand?*” (p. 120). That is, staying out of the courtroom? Peace and security are facilitated by treaty regimes that keep the parties out of open conflict. According to that perspective, all treaties regulating conduct between states are part of the IL facilitating peace and security, even though they do not specifically require “peace”. The effects of channeling conflict and reducing uncertainty about actions of states contribute to maintaining conditions of peace.

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<sup>17</sup> Geneva Conventions. <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>

### **Treaty Regimes and Functional IL**

- 16 Rules developed in almost all international regimes and functional IL reduce the potential for inter- state conflict and effectively support international peace and security by doing so. “International institution” is often equated with “international regime” and is broadly conceived as “sets of rules meant to govern international behavior in specific issue areas” (Engstrom 2010, p. 2). International regimes supplement the formal IOs within an analytical framework that focuses on the rules, norms, and principles governing state behavior.
- 17 To the extent that the rules of a regime are formal, they can be referred to as positive IL, binding on participant states. Even the informal rules play a role in institutionalizing behavior that may become formally recognized as IL in time. In the international lawmaking process “International rules as embedded in regimes can be effective even if compliance is low as “high levels of compliance can indicate low, readily met and ineffective standards” and regimes with “significant non-compliance can still be effective if they induce changes in behavior” (Engstrom p. 3).
- 18 Environmental security issues are a good example of increasing potential for state conflict. Interestingly, environmental law has been a partial success story for IL. Nele Matz-Luck, Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, writes that “A definition of global peace – even if reduced to the definition as the absence of war – must necessarily take into consideration aspects of environmental security” (Engstrom p. 127). Water issues will increasingly be the subject of serious controversy between states and among peoples. There are many examples of treaties

and conventions in natural resources and environmental concerns as the international legalization process in that regime area grows.

19 Treaty regimes have proven to be effective tools in development of IL. The more interconnected regime law is, the more pathways to mediate conflict between states exist, reducing the possibility of conflict and use of armed force. The multitude of regimes in IL is too lengthy to list, but all contribute to peace law by regulating interactions among states. A comparative study of several regimes' contribution to prevention of conflict would be helpful to the development of IL of peace. Human rights regimes deserve special mention due to the close relationship of human rights to peace.

### **19.1 Human Rights Law Generally**

All Human Rights Law (HR) and Humanitarian Law (HL) “mesh with the general principles of IL” to “advance its effectiveness” (Theron, 1989). Peace is the most basic of human rights (Alston, 1980, peace as a human right). The goal of human rights law generally is to “avoid destructive conflict” (Guinn 2018, 780) which is also a goal of peace law. HRL resurrects Phase One of Kaplan and Katzenbach’s phases of the development of IL in the sense that HR has a moral dimension... of what “ought” to be true between the state and individuals. HR law is a “means of promoting and sustaining peaceful coexistence” (Guinn, 757). Guinn argues that the 1948 Universal Declaration of Human Rights is the “foundation of freedom, justice, and peace in the world” (757). HRL works toward the same goals as the goals of legal “peace” implicitly. Its effect is to advance the cause of peace.

The UDHR is customary law but it is placed together with other human rights IL to illustrate a soft law trend evident in the “promulgation in recent years of a wide variety of quasi-legal instruments, from industry codes of conduct to guidelines issued by international

organizations to achieve multiple and varied purposes” (Dunoff et al, p. 74; the art of soft law becoming customary law, Dunoff et al, p. 81). Customary norms are relevant to human rights law since a norm is binding by influence on all states whether party to an instrument or not (Meron, 1989). Although subject to some criticism, as Meron discusses, human rights law is an example of norms being accepted as obligatory though all states do not yet agree.

Since 1863 there have been 779 human rights instruments according to Michael Elliott’s dataset (2011) so I will not list them here. These instruments show a correlation with the international peace movement. The goals of the peacemaking processes such as the one in Sierra Leone “reflect human rights of the Universal Declaration of Human Rights” (Kumar 2010). HR is a “means of social change” which can help bring about the condition of peace (Guinn, 2016, 756). The emerging consensus is “that protecting HR represents a key strategy in the larger effort to promote and maintain peace in which each domain contributes in its own way to the whole” (Guinn, 2018, at 774). Furthermore, HR “seeks to empower the individual in relation to the state” (p.756).

Michael Ignatieff asserts that human rights as an idea is “synonymous with civilization” (2001). A definition of “Civilization” is “the stage of human social development and organization which is considered most advanced” (Oxford Dictionary). Human rights law is by concept inextricably entangled with human social development and organization. HR law is a vital pathway to world peace and peace law, but also is an invaluable tool for bringing peace law to the domestic state level.

## **19.2 Responsibility to Protect (R2P)**

The “Responsibility to Protect” (R2P) is a soft law norm that may with time rise to customary law status. The effects of it indirectly contribute to the maintenance or restoration of

peace by interventions calculated to prevent or end large scale crimes against humanity and the illicit use of force. In the early 2000s R2P seemed to be leading work toward a norm of peace, but the Human Right to Peace from the UN General Assembly may be a stronger tool now. The Syrian and Yemen Civil Wars have presented insurmountable issues for trying to protect the citizens of both states by R2P. In theory, with SC approval, action to protect civilian populations pursuant to R2P may succeed. Furthermore, R2P's existence illustrates developmental changes in IL. The previously perceived absolute sovereignty of states is subject to R2P now, if invoked by the SC.<sup>18</sup> Suffice it to say that globalization and world governance is creating an international web whereby states are ceding portions of their sovereignty for various benefits of joining the international community. R2P is but one example of the trend<sup>19</sup>.

### 19.3 Evolution of Actors Creating “Peace” law: Those Who Have Access to the System

20 The identity of law-making actors has implications for the IL of peace. The role of actor has expanded from states alone in the Westphalian system to multiple levels of actors today even though states are still primary actors. NGOs have taken part in panel discussions, round table meetings, lobbying, monitoring treaty processes, insisting on state accountability, naming and shaming for non-compliance, and encouraging states to become parties to treaties and soft law instruments (Boyle and Chinkin, 2007, p. 81). (2007 p. 93). NGOs, the SC and other international actors are inextricably involved in influencing IL and by participating are influencing the IL of peace.

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<sup>18</sup> The issue of sovereignty has an entire body of literature on it and is too extensive to address here.

<sup>19</sup> Walling Hall's article *International Law and the Responsibility to Protect* contains an excellent review of the literature on the topic of R2P including the debates on its status (guiding principle or norm or customary IL if regularly invoked? etc.), when and how it might be invoked to support military intervention, and how it emerged (Hall 2009 p. 13).

- 21 Today the trend is “towards more flexible and less hierarchical modes of cooperation” and “informalisation” in IL (referring to comments by Christopher Daise, Nolte 2008). NGOs *are* building state practice, strengthening norms and moving states toward new norms, in the case of this paper, toward a norm of peace. Where no international procedures existed, NGOs have sought their introduction. When excluded from the law-making process, NGOs have initiated their own process by developing texts, codes of conduct, guidelines and interpretive treaty commentaries, often “in the hope they will be adopted by other international actors” (2007, p. 89). While Boyle and Chinkin admit that “the actual influence NGOs have had on the development of IL is empirically uncertain”, they “have a catalytic effect. They bring issues onto the international agenda.”
- 22 The end of the Cold War and 9/11 brought “new security risks and challenges that could no longer be met by existing security institutions” and “when institutional reform is unlikely or too slow, states or groups of states tend to act outside of those institutions and to create – willingly or not – new ones which are better-(or seemingly better-) suited to cope with emerging threats” (Nolte 2008 p. 180). Hanqin Xue, a member of the International Law Commission, adds that there is “unprecedentedly broad participation and representation in the international law-making process”, and “proliferation of international institutions” (Nolte p. 183; law-making by international organizations, Johnston, 2013; the power of non-governmental organizations to affect international law-making, Spiro, 2013; the impact of non-state actors, Falk, 2006; the increased ability of institutions to engage “with and around legal norms, Chinkin and Kaldor, 2017, Ch. 3; the role of non-state actors, Boyle and Chinkin, 2007; the profound changes to IL due to issues, people and institutions affected by



it, its connection to “sub-national institutions, IOs, non-state actors and individuals,” Ku, 2012, Ch. 5).

- 23 A “heavy reliance on soft law” as a “strategy of legalization” exists now (Abbott and Snidal 2012). Non-state actors are engaged in “regulatory standard-setting” although not in the security context (Abbott and Snidal 2012). Prost and Clark discuss IOs as shapers of IL (2006). McDougal emphasizes that a “law relevant to peace” must include “all the various roads to peace” such as “international governmental organizations, third-party decision making, the facilitation and protection of diplomacy and negotiation, conflict resolution, the organization of deterrence, the management of collective security, and so on” (1989, p.5).
- 24 Perhaps most importantly, several scholars speak of the role of the Security Council becoming more like a legislative role, particularly in relation to its responsibility to determine whether threats to international peace and security exist and choices to send peacekeeping operations to states (binding acts of the SC as IL, Maus 2014 p. 683, citing Rep. of the Int’l Law Comm’n 63<sup>rd</sup> Sess., Apr. 26-June 3, July 4-Aug. 12, 2011, U.N.doc. A/66/10 para.87).
- 25 There is “undoubtedly a growing practice towards, and expectation of NGO participation at the UN” as the relationship evolves (Boyle and Chinkin 2007 p.52). NGO participation depends on rules of procedure for the organization or treaty in question. Boyle and Chinkin rhetorically ask: “Is this democratizing IL making?” and answer “The expression of a cosmopolitan, popular will through NGO voice – the ‘conscience of the world’ – is itself seen by some as a basis of legitimacy” (p.58). The opposite view is that NGO participation is “a degradation of the technical work of international lawyers in the face of pressure groups and a side-stepping of existing international law requirements and

procedures” and that NGOs are not always transparent, may not be democratic, may be self-appointed with their own agendas, and may have evangelical/or elitist zeal (Boyle and Chinkin 2007 p.58). The fact remains that the role of these actors is affecting legalization of international peace law.

### 25.1 Role of Courts Affecting Peace Law

International courts have the delegated authority to interpret and apply rules of IL respecting peace law which means helping shape what that law is. Through their enforcement of the laws of peace they strengthen it also. International court judgments assist in building the IL of peace by articulating guidelines for states to follow, and by clarifying ambiguous or undefined provisions in the law as applied to certain facts. References to the *Nicaragua Cases* and the *Congo Case* herein are illustrative of what the ICJ has contributed to peace law. Creation of the ICC has facilitated peace by providing enforcement against crimes perpetrated by individuals against the peace and security of peoples. State consent to the the ICC has been problematic, but the ICC moved the legalization process of peace forward by delegation of authority to third parties for enforcement. Enforcement of IL is not the issue addressed herein, but the delegation of authority to third parties is one criteria of legalization and is important itself. International tribunals also have a soft law impact on the legalization process (Guzman and Meyer 2008). The fact that the ICC has successfully operated and still exists after 16 years fuels hope for its role in future development of peace law.

26 The Nuremberg Tribunal paved the way for court involvement in peace efforts. Hathaway and Shapiro’s discussion of the legal issues of creating that tribunal and allowing it to prosecute individuals for crimes of war is an interesting story illustrating the shift from IL that

allowed any conduct toward people during a “just” war to the position that if war was not “just” then the perpetrators are responsible for their complicity in what the state did (2017).

27 The Charter of the International Military Tribunal at Nuremburg contributed to the hard law of peace by creating jurisdiction of the court over “crimes against peace” and throwing a wide net to deal with those who contributed to the atrocities of World War II. “Aggression” was not yet defined, but Nuremburg is considered an important milepost in the development of crimes against peace and the crime of aggression. Its Charter provides as follows:

## II: JURISDICTION AND GENERAL PRINCIPLES

Art. 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) '**Crimes against peace:**' namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) '**War crimes:**' namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) '**Crimes against humanity.**'- namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in

the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan (<http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument> 4/8/2011).

28 The documents founding the ICTY and the ICTR and the action of the tribunals advanced legal development of the IL of peace. SC Resolution 827 (1993) creating the power and jurisdiction of the International Criminal Tribunal for Yugoslavia (ICTY) not only gave the tribunal jurisdiction to prosecute genocide and crimes against humanity, but also created individual culpability in persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes, and specifically denied heads of state or government or other government officials the right of immunity from responsibility<sup>20</sup>. SC Resolution 955 (1994) creating the tribunal for Rwanda (ICTR) referenced the threat to international peace and security, and pursuant to Chapter VII of the UN Charter authorized that tribunal to prosecute genocide, defined the same as in the ICTY Resolution. Jurisdiction also included prosecution for: b) Conspiracy to commit genocide; c) Direct and public incitement to commit genocide; d) Attempt to commit

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<sup>20</sup> Genocide in the ICTY Resolution is defined as:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
  - (b) causing serious bodily or mental harm to members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) imposing measures intended to prevent births within the group;
  - (e) forcibly transferring children of the group to another group.
- ([http://www.icls.de/dokumente/icty\\_statut.pdf](http://www.icls.de/dokumente/icty_statut.pdf) 4//2011).

genocide; e) Complicity in genocide, and crimes against

humanity. (<http://www.unict.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>  
4/8/2011).

- 29 The country specific international tribunals laid the legal developmental groundwork for the ICC, clearly delegating IL enforcement capacity. In 1998 the Rome Statute, signed by 120 countries, created the court<sup>21</sup> which entered into force in 2002 (<http://www.icccpi.int/Menus/ICC/About+the+Court/>). The ICC is the first permanent treaty-based international court with delegated authority to uphold international law. The international crimes against peace set out in the Statute are hard law and the court has full authority when a case comes before it. The significance of this court to international law is still being discovered. The creation of the ICC has encouraged states to assert universal jurisdiction themselves since the ICC jurisdiction is based on complementarity (Slye 2010).

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<sup>21</sup> The ICC Statute of Rome criminalized certain individual acts against humanity, reinforces the law against aggression, and enforces IL respecting peace, humanitarian and human rights law. Prosecutable crimes against humanity now include:

- a. Murder,
- b. Extermination,
- c. Enslavement,
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture, Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- g. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- h. Enforced disappearance of persons;
- i. The crime of apartheid;
- j. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(ICC Rome Statute Art. 7 (1)).

30 Some effects of the court on peace are known. Prosecutor Luis Moreno-Ocampo had the court issue arrest warrants for individuals charged with mass crimes in Sudan, Uganda, the Democratic Republic of Congo, and Muammar Ghaddafi. Word spread that there was justice beyond warlords. Public perception began to change (Crossette, 2010). Moreno-Ocampo said that even before a formal trial opened, the case of Lubanga had an impact: “In Nepal, 3,000 kids were released as soldiers because of the Lubanga case” (Crossette, 2010). Another example of the impact of its existence is perhaps the report February 23, 2011 on CNN that Libyan pilots refused to bomb oil fields south of Benghazi and instead ejected from the plane (Tobruk, Libya CNN). Unfortunately, in the last few years, the court has seemed to stall in effectiveness. That it is still functioning after 16 years continues the prospect of accountability for those who commit crimes against international peace strengthening the law of peace. When the Syria tragedy is over, it will be important to the development of the IL of peace to have prosecution in the ICC for those responsible for crimes against humanity and crimes against peace in Syria.

31 Domestic courts also play a role in affecting the IL of peace. Delegation of HR law and peace law (against aggression and the use of force) to the domestic level strengthens both laws and thus the result of conditions of peace under IL. HR law has proven a leader in becoming part of state law. Beth Simmons (2009) reviews how domestic courts are incorporating IL and thus spreading its impact. Two examples are Chile and Israel. Simmons used the Convention Against Torture (CAT) to quantify levels of incorporation of human rights law into domestic situations. Chile’s reputation regarding human rights was not good. In 1987 the Chilean people voted by 87% to ratify Constitutional provisions incorporating CAT into their Constitution. At first, Simmons finds, the state courts were

reluctant to comply. By 1997, however, they were prosecuting torture cases in state courts (p. 293) signifying full acceptance (a form of delegation) of the HR IL at the state level, effectively utilizing IL to creating conditions conducive to peace within Chile. Israel ratified CAT in 1991. Although results in Israel were not dramatic, the courts were apparently used to help modify Israeli interrogation techniques (Simmons, 2009). The bottom line is that state ratification of the international convention was associated with “significant improvements in torture practices” (2009). Delegation worked to formalize IL affecting peace at the state level.

32 HR treaties became the source for HR law once incorporated in Argentina (Jackson, Tolley and Volcansek, 2010). Anne-Marie Slaughter generally advocates incorporation of IL into state law for enforcement by state courts as a means of developing IL. She quotes J. Sinclair Armstrong, Professor of International, Foreign and Comparative Law at Harvard Law School:

National courts are the vehicles through which international treaties and customary law that have not been independently incorporated into domestic statutes enter domestic legal systems.  
(Slaughter, 1999-2000).

The body of IL gains legal authority when it is incorporated into domestic systems. The effect is to strengthen progressive development of IL.

#### The Development of *Jus Post Bellum*

33 A category of *jus post bellum* is being created (Stahn 2008; Maus 2014), emerging from *just war* theory (Maus 2014). This law has to do with creating conditions where peaceful conditions after conflict may be sustained. Moving areas post conflict into conditions conducive to long term peace will be an effect of these laws. There is not yet agreement on

“*jus post bellum* principles” (Maus, p. 678) but the concept is a grouping of “rules necessary for a sustainable transition from conflict to stable and lasting peace” (Maus, p. 678; See also Allison 2018; Stahn 2006; See also Stahn, 2008). The recent Peacebuilding Commission under the UN and a history of peacekeeping and now peacebuilding operations are contributing to the growth of best practices for building peace. As they do, standard successful practices for creating stability after conflict are developing. At the same time, new international agreements are recognizing responsibility for human security (Stahn p. 323). Human rights are central to peacekeeping and building efforts and is part of the *jus post bellum* concept (Maus, 2014, citing United Nations Peacekeeping Operations: Principles and Guidelines). Regional organizations are becoming central players in peace efforts. Laws setting rules for building conditions conducive to peace, facilitating those conditions, and setting rules for human rights and security are more likely to be more substantive and directive than the general UN Charter mandate to maintain international peace and security. Again, time will tell as the development of the law of peace and laws affecting peace goes on.

### 3 CONCLUSION

#### 33.1

34 All peace law per se in Part 1 is found to be legalized and binding except the Human Right to Peace which is legalized but non-binding so far. The IL of peace is defined by UN Charter requirements. The UN Charter Preamble and Art. 1(1), Art. 2(3) require states to settle disputes by peaceful means. Art. 2(4) requires states to refrain from the illegal threat or use of force. We have seen that legalization requires obligation, precision, and delegation. These Charter provisions represent legal obligations, they are precise enough to set clear



standards for conduct, and authority to resolve issues relating to them has been delegated by Art. 31, 34, 41 and Chapter 7 Art. 42 to the Security Council.

- 35 *Jus ad bellum* is customary IL involving the use of force and aggression leading to war. The law governing use of force is UN Charter 2(4) above. The Rome Statute as amended makes aggression a crime. The only force or threat of force that is legal under the UN Charter is when force is used for self-defense. We have shown that whether self-defense is/was appropriate is determined by the SC, or, in retrospect, by the ICJ based on the facts of the case. The obligation not to use force is precise enough for states to understand the standard. Delegation of the issue of use of force (aggression if it is unauthorized use of force) to the SC and aggression to the ICC has occurred. Therefore, the law regarding force and aggression is fully legalized.
- 36 The 1970 Declaration of Friendly Relations Between States is declared to be principles of IL by its terms, and it is soft peace law per se, but as a declaration it reiterates the purposes of the UN Charter and Art. 1 of the UN. Therefore, it may be binding both as customary law and by its connection to the Charter. Precision and delegation are the same as for the UN Charter provisions.
- 37 The Human Right to Peace was declared by the UN General Assembly and so is a soft law that is of yet unbinding. It represents an obligation of law but is not precisely defined although a standard for definition could be used, and no complete delegation to a third party has specifically occurred. However, the SC does have authority to make determinations if a threat to international peace and security has occurred so that a major violation of the human right to peace could come within the authority of the SC.

38 In Part 2 we have considered laws that do not mandate peace per se, but that require behaviors that indirectly result in peace. The VCLT is treaty law fully legalized by obligation, precision and to some extent, delegation, affecting treaties and thus peaceful relations between states. All relevant treaty regimes in IL minimize conflict and disputes and so affect peace. In positive law treaties and conventions addressing specific areas of IL channel state behavior so that the potential for or actual armed conflict is avoided. Each regime would have to be analyzed for extent of legalization and the degrees of legalization of regimes will vary, primarily due to precision and delegation. Nevertheless, regimes are usually recognized as legal obligations in IL. Human rights laws and humanitarian laws whether by treaty or jus cogens affect conditions of peace. Human rights laws help reduce sources of conflict and humanitarian laws help improve conditions for people in conflict. Both are often not fully legalized despite the existence of obligations, because delegation and precision are not developed enough. R2P is a soft law norm that affects peace. The authority of international actors and institutions by emerging customary law is creating and interpreting IL and thereby affecting peace.

The review identifies how peace is the ultimate purpose of all international law. Legally, peace is the absence of the illegal threat or use of force, including armed conflict, and the presence of or commitment to conditions under which fundamental human rights: the dignity and worth of the human person, the equal rights of men and women and of nations large and small, and justice and respect for the obligations arising from treaties and other sources of international law can be maintained. That purpose frames our understanding of all IL.

IL either directly requires conditions of peace per se or it indirectly affects peace and conditions of peace. IL creates mechanisms to assist in efforts to channel state behavior. It

creates certainty in expectations regarding state behaviors and clarity about state obligations on the world stage. Ultimately in any area of IL, states are required to settle all their disputes, commercial, security, criminal and environmental, by peaceful means and promote conditions favorable to fundamental human rights.

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