1. Introduction to *The Construction of the Customary Law of Peace*

Peace is both a historical and modern aim of law, dating back to the Peace of Westphalia and confirmed within universal, regional, and national constitutional instruments.¹ There are new normative iterations of peace at the international level, including recognition of its status as a human right by the UN General Assembly (UNGA) as well as a UN Sustainable Development Goal, that signal a pluralistic approach to implementation.² Latin America and the Inter-American Court of Human Rights provide a contextual setting for examination of the emerging construction of a customary law of peace evolving from its negative form (absence of violence) to its positive form (equality, non-discrimination, and social justice) and the challenge of articulating a *pro homine* peace.

The book commences with an overview of the normative development of peace at the international and regional levels concluding that peace is a *Gründnorm* that has received universal recognition due to its unique quality as both an end and a means of the legal system; as one can only attain peace through pacific means of dispute resolution. This is followed by a historical reflection of normative (treaties and declarations) and institutional peace development within Latin America, beginning with the negotiation that ended the Chaco War in 1935 between Bolivia and Paraguay. In 1936, President Roosevelt called for an Inter-American conference to promote the preservation of peace as a common aim within the region. The conference confirmed the foundational values of constitutional representative government, social justice, and peace for Latin America. This led to the establishment of the Organization of American States (OAS) and the Inter-American Court of Human Rights, as well as sub-regional organizations which characterize the region as a “Peace Zone.”

¹ Cecilia M. Bailliet, “Introduction”, *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019).

² UN General Assembly, *Declaration on the Right to Peace: resolution/adopted by the General Assembly*, 2 February 2017, A/RES/71/189, <https://www.refworld.org/docid/589c72134.html> (accessed 27 April 2020) and UN Sustainable Development Goal #16, <https://sustainabledevelopment.un.org/sdg16> (accessed 3 June 2020).

The book explores the heterogeneous normative nature of peace within Latin American constitutions beyond its status as an aim, value, or principle of the legal order: first, appearing as a marker of the state's controlling function in situations of protests, revealing the risk of oppressive peace; second, as an external obligation of pacific dispute resolution and peaceful coexistence with other states, including nuclear disarmament and territorial peace; third, as a justiciable right to be claimed by an individual or a group, alternatively as an obligation of the state and/or society vis-à-vis the domestic society; fourth as linked to human rights; and fifth as an aspect of culture through peace education and domestic alternative dispute resolution in labor conflicts. It is notable that both state and civil society actors have played a role in pursuing peace within the region, as evidenced by the six Nobel Peace Prizes awarded to Latin Americans: 1936 Carlos Saavedra Lamas (Argentina), 1980 Adolfo Pérez Esquivel (Argentina), 1982 Alfonso García Robles (Mexico), 1987 Óscar Arias Sánchez (Costa Rica), 1992 Rigoberta Menchú (Guatemala), and 2016 Juan Manuel Santos (Colombia).

In 2018, upon the commemoration of the 40th Anniversary of the Inter-American Court of Human Rights, the then acting President of the Court, Judge Eduardo Ferrer Mac-Gregor, announced that the Court would double its efforts in pursuit of peace, justice, and human rights. This book argues that peace should be interpreted in accordance with the *pro homine principle*, which calls upon judges to apply the most favorable law that will benefit individuals, regardless of their origin, their generality or specialty, or their national or international status.³ It is suggested that this can be an important strategy for the consolidation of peaceful societies and prevention of violence. In particular, this book presents the pluralistic views on the normative value of peace by former and current judges in the Inter-American Court of Human Rights. This is followed by a discussion of the issue of justiciability of positive peace through the Court's jurisprudence on equality and non-discrimination. The Inter-American Court of Human Rights can play a role in gap filling by defining the scope of the regional pluralistic normative understanding of peace as a value, aim, and principle to be respected by states and non-state actors. It is suggested that its contribution to building sustainable peace is found within its non-repetition guarantees addressing structural equality and non-discrimination measures. Yet, there are challenges for the Inter-American Court of Human Rights regarding state compliance with positive peace-related orders.

³ Yota Negishi, "The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control" 28(2) *European Journal of International Law* (2017) pp. 457–481.

The book proposes that peace should be considered as an additional component of *jus commune*. *Jus commune* refers to harmonization of a common core of legal principles. At the Inter-American regional level, *jus commune* recognizes the aims of democracy, rule of law, and human rights.⁴ To form part of the regional *jus commune* it is not necessary to harmonize the national concepts of peace, but rather to harmonize the national variants with the international understanding of peace. As there is no universal definition of peace at the international level, there is flexibility regarding acceptance of national variants, however it is arguable that at the regional level, the national variants should be interpreted in accordance with the American Convention on Human Rights, OAS Charter, and other regional human rights instruments.

This book does not focus on transitional justice or *jus post bellum* issues which have often received attention within peace studies.⁵ The book seeks to build a bridge between human rights, constitutional law, and peace scholarship. Moreover, as the current President of the Inter-American Court of Human Rights, Judge Elizabeth Odio Benito, has confirmed the commitment of the Court to pursue both peace and gendered justice, there is an examination of what are the components of a sustainable gendered peace as a particular dimension of a *pro homine* peace.⁶ The conclusion suggests that there is evidence of an evolving customary law of peace within the region that is pluralistic and may be strengthened by the Court's progressive jurisprudence as well as that of national courts. It is suggested that this will add a new chapter to the Inter-American Court of Human Rights' role as a norm entrepreneur in defining the contours of the *de lege ferenda* normative regime that aims to support the consolidation of sustainable peaceful societies.

⁴ Federico Mayor, "La paz, el desarrollo y la democracia forman un triángulo interactivo, cuyos vértices se refuerzan mutuamente" 21 *Diálogo, Derecho Humano a la Paz: Germen de un Futuro Posible* 4 (UNESCO, Mexico, June 1997).

⁵ On transitional justice in Latin America, see Elin Skar, Jemima Garcia-Godos and Cath Collins, *Transitional Justice in Latin America: The Uneven Road from Impunity Towards Accountability* (Routledge 2016). For a critical discussion of the limitations of law in the context of transitional justice and peacebuilding, see Chandra Lekha Sriram, "Beyond Transitional Justice: Peace, Governance, and Rule of Law" 19(1) *International Studies Review* (2017) pp. 53–69. On *jus post bellum* see Carsten Stahn, Jennifer Easterday and Jens Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014).

⁶ See Inter-American Court of Human Rights, "Inaguración del Año Judicial Interamericano 2020" (2020), https://corteidh.or.cr/sitios/libros/todos/docs/apertura/aj_2020.pdf (accessed 14 October 2020).

1.1 PEACE AT THE INTERNATIONAL LEVEL

1.1.1 Peace as a *Gründnorm*

Peace itself is divided between the negative variant (the absence of violence) and the positive variant (social justice, cooperation, non-discrimination, equality, and elimination of structural violence). Hans Kelsen believed that only negative peace was to be considered law; however this book argues that a regional customary law of a pluralistic peace which is inclusive of positive peace is being constructed.⁷ Kelsen's pure theory of law sets forth that all of the valid rules of law of a legal system must be mutually consistent and derive their force from a *Gründnorm* (basic norm).⁸ Taking into account that Kelsen recognized that the *Gründnorm* may not be the same in every legal order, it may be argued that peace may be considered to be a *Gründnorm* which remains under evolution at the international, regional, and national levels and hence has pluralistic normative iterations. As a *Gründnorm*, states should aim to ensure that their laws, regulations, policies, and practices harmonize with the aim of peace. The uniqueness of peace as a common value is that it is both an end and a means of the transnational legal system; one can only attain peace by pursuit of pacific means of dispute resolution. The validity of peace is grounded in its multifaceted qualities as an overarching substantive principle and provides criteria for evaluation of procedures through the concept of pacific settlement of disputes within law. It is arguable that all states claim to recognize the obligation to act in pursuit of negative peace, as evidenced by the significant reduction of inter-state conflicts in the modern period.⁹ Although Latin America has eliminated inter-state war in the modern epoch, it is plagued by high levels of internal violence and social unrest. As noted by Anna Spain, "we have shifted from a world in which peace had to be secured between states to one in which

⁷ See Helmut Rumpf, "The Concepts of Peace and War in International Law" 27 *German Yearbook of International Law* 429 (1984), discussing the fact that negative peace has a "more evident epistemological structure" (absence of violence or war) than positive peace (a social aim based on social justice which "is a matter of values and principles subject to dispute"). He states that the legal and sociological positivists discarded justice as an unscientific concept, due to its subjective quality. Hence even international relations scholars focused on negative peace.

⁸ Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange 2009).

⁹ See Hans Blix, "Is the World on the Road to Peace or War?" Lecture 1 (SIPRI 2018), noting the reduction in violence but citing concern for the maintenance of interventions, failure of the UN Security Council to respond, and contradiction of UN Security Council resolutions by member states, <https://www.sipri.org/sites/default/files/2018-10/sipri-lecture-01.pdf> (accessed 15 July 2020).

peace must be secured within the state between peoples.”¹⁰ The conundrum for states is how to promote internal peaceful coexistence in a manner that is not oppressive. This raises queries regarding implementation: What is the added value and drawback of applying peace as a normative value within law? Given that Latin American states vary in political, economic, historical, social, and cultural background, the application of peace in practice aims for consistency but also requires flexibility in order to be considered legitimate by the local society. In terms of the viability of peace receiving recognition as customary law, on the one hand it has normative recognition in the sense that it appears in universal, regional, and national instruments. However, on the other hand, the formulation of a “right to peace” has not been taken up by the International Law Commission nor espoused by the important non-governmental organizations (NGOs), such as Human Rights Watch or Amnesty International, although it is promoted by other NGOs from the South.¹¹ It is described as a third-generation hybrid human right representing “law from the South,” in company with the right to solidarity and the right to development.¹² A question arises as to how one would identify a violation of the right to peace, in the positive sense. Finally, one may inquire as to what is the added value of processing this right by a court and what is the remedy. Or have we moved beyond justiciability in terms of the search for progress towards peace?

1.1.2 Peace as Part of the Universal *Jus Commune*

Inter-American Court of Human Rights Judge Eduardo Ferrer Mac-Gregor invokes a common cultural space created by the integration of international and national human rights standards as formulating a universal *jus commune* for humanity, protecting human rights and spanning all the regions, uniting universal, European, and African approaches with Inter-American perspec-

¹⁰ Anna Spain, “Deciding to Intervene” 51 *Houston Law Review* 847 (2014).

¹¹ See Charity Butcher and Maia Carter Hallward, “Bridging the Gap between Human Rights and Peace: An Analysis of NGOs and the United Nations Human Rights Council” 18(1) *International Studies Perspectives* (February 2017) pp. 81–109, noting “[r]eligiously-affiliated and women’s NGOs typically link these concepts, while non-Western NGOs stress peace over human rights.”

¹² The draft declaration on the right to solidarity: <https://www.ohchr.org/Documents/Issues/Solidarity/DraftDeclarationRightInternationalSolidarity.pdf> (accessed 23 September 2020) and the UN Human Rights Council, Working Group on the Right to Development, Draft Convention on the Right to Development, A/HRC/WG.2/21/2 (17 January 2020) https://www.ohchr.org/Documents/Issues/Development/Session21/3_A_HRC_WG.2_21_2_AdvanceEditedVersion.pdf (accessed 23 September 2020).

tives, in pursuit of harmonization.¹³ This section reviews the normative framework of peace at the universal and regional levels.

1.1.2.1 The UN Charter – peace as an end and a means

Evidence that peace forms part of the universal *jus commune* may be gleaned from the fact that peace as a value, end, and means is explicitly recognized within the UN Charter. The preamble sets forth the aim: to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security. Article 1 articulates that the substantive and procedural 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.

Article 2(3) creates an obligation to pursue pacific dispute resolution: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” This is further developed in Article 33, which sets forth an obligatory sequence for pacific dispute resolution:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, *shall, first of all*, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means (emphasis added).

The normative framework sets forth an expected code of conduct for states as well as a set procedural and institutional structure for the pursuit of peace.¹⁴

¹³ Eduardo Ferrer Mac-Gregor, “What Do We Mean When We Talk About Judicial Dialogue?” 30 *Harvard Human Rights Journal* 89 (2017). He cites Giuseppe de Vergottini, “Dialogo Jurisprudencial” in Eduardo Ferrer Mac-Gregor, Fabiola Martinez, and Giovanni A. Figueroa (eds), *Diccionario de Derecho Procesal Constitucional y Convencional* (Universidad Autonoma Nacional de Mexico 2014) p. 584.

¹⁴ See Cecilia M. Bailliet and Simon O’Connor, “The Good Faith Obligation to Maintain International Peace and Security and the Pacific Settlement of Disputes” in

1.1.2.2 Peace and human rights

The Universal Declaration of Human Rights preamble declares the protection of human rights as a means to attain global peace, thereby linking the two umbrella terms: “Whereas 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.” Similarly, the preambles of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also state that human rights are the foundation of world peace: “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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.” These articulations underscore that it would not be possible to enjoy a true state of peace without respect for human rights, thereby implicitly impugning repressive policies and actions that would violate human rights in the name of peace. The elements of human dignity, equality, and enjoyment of rights are thus intrinsic to fulfillment of peace by a state, thereby setting a foundation for recognition of positive peace obligations. Asdrubal Aguilar suggests that peace may be considered an inalienable right of individuals and the human family, on account of being the condition for the exercise of human rights.¹⁵ Celestino Del Arenal argues that peace is a meta-right which encompasses all other human rights because without peace you cannot enjoy human rights, and inversely without human rights you cannot enjoy peace.¹⁶ Hence, one may argue that peace is the realization of human rights.¹⁷ Indeed, peace may be considered to be one of several umbrella concepts which are interlinked, e.g. Justice, Development, Security, Sovereignty, Democracy, Rule of Law, and Human Rights.¹⁸ Together, they provide an overarching foundation for international cooperation to address current global challenges – such as climate change,

Cecilia M. Bailliet (ed.), *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019) pp. 83–106.

¹⁵ Asdrubal Aguilar, “El derecho humano a la paz,” speech in the XXIX General Conference of UNESCO, Paris 1997. Talleres Graficos de la Nacion (Imprenta Nacional Caracas November 1997) p. 2, cited by Virginia Arango Durling, *Paz Social y Cultura de Paz* (Ediciones Panama Viejo 2007) pp. 16–17.

¹⁶ Celestino Del Arenal, “Paz y Derechos Humanos” 5 *Revista del Instituto Interamericano de los Derechos Humanos* (1987) pp. 5–22.

¹⁷ Nicolas Maria Lopez Calera, “Vivir en paz: Paz y Derechos Humanos” 1(1) *Derechos y libertades* (Instituto Bartolomé de las Casas 1993) pp. 169–178, cited by Durling, *supra* note 15 at 18.

¹⁸ See generally James M. McCormick and Neil J. Mitchell, “Human Rights Violations, Umbrella Concepts and Empirical Analysis” 49(4) *World Politics* (1997) p. 512.

forced migration, terrorism, racism, xenophobia, and poverty. Determination of whether there is a hierarchical relationship among the umbrella concepts, how to interpret the components of each concept, or whether one value should be sacrificed for the sake of the other present many dilemmas.¹⁹ It is not advisable to pursue hierarchical rankings among the umbrella concepts, but there is a need to research conflicts and commonalities between them. Frederico Mayer explains the interconnectedness between peace, democracy, and development:

Durable Peace is the premise and requirement for the enjoyment of human rights and obligations .. Peace, Development and Democracy form an interactive triangle. Without democracy there is durable development, the inequalities become unsustainable and there is violence, the opposite of peace. Peace corresponds to a basic human need and is capable of being defined as a human right. Without peace, there are no human rights. Without peace, not only does violence reign but humanity is degraded and human life loses its transcendental quality. Peace is an aspiration as are all human rights, that are conquered daily, limited daily, and frustrated daily.²⁰

One may consider Judge Pazmiño Freire's dissent on the 2018 Rejection of the Request by the Inter-American Commission on Human Rights for an Advisory Opinion addressing the impeachment of the President of Brazil and underscoring the importance of the Court engaging with the umbrella concepts of Democracy and Human Rights:²¹

I regret the fact that my colleagues have not chosen to make a thorough examination of this issue which, in my opinion, is essential in order to avoid the erosion of democracy in our region. The effective guarantee and defense of civil and political rights, as well as the human rights system as a whole, has become and is a crucial part of the essence of modern democracies. Accordingly, I consider it of the highest importance that the Court establish parameters that assist States in fulfilling their international obligations and, thus, that guarantee the full effectiveness of the American Convention and the strengthening of the Inter-American public order. The experiences of conflict and political persecution in our hemisphere, as well as

¹⁹ For example, consider research on the components of "Democratic Peace," see Haavard Hegre, Michael Bernhard, and Jan Teorell, "Reassessing the Democratic Peace: A Novel Test Based on the Varieties of Democracy Data" (March 2018) V-Dem Working Paper 2018:64, <https://ssrn.com/abstract=3144969> or <http://dx.doi.org/10.2139/ssrn.3144969> (accessed 15 July 2020).

²⁰ Frederico Mayer, "El derecho humano a la paz", UNESCO 1997, cited by Asdrubal Aguiar, "Perfiles éticos y normativos des derecho humano a la paz" 110 *Revista de la Facultad de Ciencias Jurídicas y Políticas* (Universidad Central de Venezuela 1998) p. 41.

²¹ I/A Court H.R., Rejection to the Request of an Advisory Opinion presented by the Inter-American Commission on Human Rights. Order of the Inter-American Court of Human Rights of May 29, 2018. Dissenting Opinion by Judge L. Patricio Pazmiño Freire.

constitutional reform without minimum standards of convention-based prevention, bear witness to what can happen in the absence of adequate safeguards for the democratic institutional framework.

Judge Friere provides an additional partial dissent in the *Case of Petro Urrego v. Colombia* (2020) involving the removal from office of the Mayor of the City of Bogotá, Gustavo Francisco Petro Urrego, who was prohibited from running for office for the next 15 years by the Attorney General of Colombia in 2013. As the process was not conducted by an independent judge competent in penal proceedings, nor were due process rights respected, the Court held that this constituted a violation of Article 23 of the American Convention on Human Rights on the right to participate in government.²² Judge Friere partially dissented, noting the failure of the Court to identify the Attorney General's characterization of Petro Urrego's left-wing policies as representing the threat of socialism of the 21st century meriting institutional silencing. In his partial dissent, Judge Friere characterized the disciplinary measures taken as disguised reprisal, persecution, or discrimination of ideology of social change constituting arbitrary action and abuse of power in violation of the principle of non-discrimination. He expressed concern that the Court failed to analyze the need to deconstruct the presumption of legality of the Attorney General's Office, given that the aim was to disqualify Petro Urrego from running for president in 2018, thereby negatively impacting democracy.²³

Consider the regional and international context, in which the academy, the justice system, as well as social and political actors, are raising their concerns regarding non-isolated practices of interference in the dynamics of democratic debate, under apparently legal forms. It is essential that we reaffirm some of the original sources that feed and sustain a republican state: the right to dissent, to diversity of opinions and creeds, and to political participation within the framework of a representative electoral democracy regime. Principles, values and rules that, by assuming them already incorporated into the institutional practice, we have taken for granted their comfortable existence; without realizing that slowly, but systematically, they are diluted ... by actions formalized in institutional frameworks, which, if not timely identified and legally contained, could favor a progressive and irreparable deterioration of the founding principles of the Inter-American system and its public order, seriously questioning the republican model of law ... At this time, it would seem, the

²² I/A Court H.R., *Case of Petro Urrego v. Colombia*, Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406.

²³ *Ibid*, Partial Dissent by Judge Freire. He cites cases in which the Court addresses disguised discrimination of processes: *Case of Granier and others (Radio Caracas Televisión) v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 189, and *Case of San Miguel Sosa and others v. Venezuela*. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348, para. 190.

transgression of the higher hierarchical order that protects universal, interdependent and indivisible human rights, as well as the founding principles of the OAS Charter, the Democratic Charter and the Convention, is being encouraged, by action or omission. The Inter-American Court on Human Rights, I am convinced, did not take advantage of the historic and decisive opportunity to vigorously contain any practice, open or veiled, that involves discrimination on the basis of ideas, confessions or creeds against politicians who exercise peacefully, democracy and law, his legitimate option of opposition status.

Violations of principal values, including democracy and peace, invariably weaken the protection of human rights and thereby require attention by practitioners, policymakers, academics, and judges. The next sub-section presents new normative developments supporting peace as a type of hybrid right for the modern epoch.

1.1.2.3 New normative developments supporting peace as a hybrid right

1.1.2.3.1 *The 2016 UN Declaration on the Right to Peace*

The identification of peace as a customary norm within Latin America may be in part derived from review of regional state practice respecting the negative peace prohibition on the use of force between states, famously characterized as “The Long Peace” (albeit contradicted by *increased* use of force within states).²⁴ Moreover there has been a marked increase in the adoption of state measures to implement positive peace guarantees related to improving enjoyment of equality and non-discrimination domestically.²⁵ Nevertheless, it may be argued that its modern customary status would also be supported through

²⁴ On the “long peace in Latin America” and the need for a new taxonomy to address latent interstate conflicts, see Tássio Franchi, Eduardo Migon, Eduardo Xavier Ferreira Glaser and Roberto Xavier Jiménez Villareal, “Taxonomy of Interstate Conflicts: Is South America a Peaceful Region?” 11(2) *Brazilian Political Science Review* (2017) pp. 1–23. Latin American States manage inter-state disputes through negotiation and discussion within the OAS forums, including the Peace Fund (<https://www.oas.org/sap/peacefund/peacefund/>, accessed 17 July 2020), inter-state complaints to the Inter-American Commission on Human Rights, as well as submission of cases to the International Court of Justice. On the increased use of force within states, see Elliott Davis, “UN Rights Official Warns of ‘Excessive Force’ Amidst Pandemic”, *US News & World Report* (29 April 2020).

²⁵ On improved equality measures within the region, see Laura Clerico, Liliana Ronconi, and Martin Aldao, “Hacia la reconstrucción de las tendencias jurisprudenciales en América Latina y el Caribe en materia de igualdad: sobre la no-discriminación, la no-dominación y la redistribución y el reconocimiento” 9(1) *Revista direito GV* (2013) pp. 115–170.

opinio juris by the recognition of peace as a human right by the UNGA, as explained by Stefan Talmon:²⁶

One argument is that modern custom is related to new and important moral values and global challenges, such as peace, human rights and the environment, where the actual practice of states has been characterized by too many violations to serve as a sound basis for induction. In these areas, there is also an urgent need to create new rules and fill existing gaps; traditional custom is ill-suited to do this, being both too burdensome and slow to develop. Modern custom, on the other hand, can develop quickly because it is deduced from multilateral treaties and declarations by international forums such as the United Nations General Assembly (UNGA), which can declare existing customs, crystallize emerging customs and generate new customs. For these reasons, it is claimed, international human rights law, international humanitarian law, international criminal law and international environmental law should be arrived at by deduction.

In 2016, the UNGA adopted the Declaration on the Right to Peace, in respect of which all the Latin American nations voted in favor.²⁷ The Declaration sets forth a framework for peace that signals recognition of a third-generation hybrid right, linking first-generation to second- and third-generation rights, and articulates the obligation of states to dismantle structural violence that impedes positive peace.²⁸ It underscores a soft obligation upon the state to implement equality and non-discrimination. It also calls upon states to guarantee freedom from fear and want, traditionally linked to social security, social welfare, access to jobs, and housing. It is not necessarily designed to be justiciable (as this would depend on the national system), as it may be implemented through a state administrative policy or international organization (IO)/NGO projects, and civil society programs.²⁹

Article 1

Everyone has the right to enjoy peace such that all human rights are promoted and protected and development is fully realized.

²⁶ Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion" 26(2) *European Journal of International Law* (2015) pp. 417–443.

²⁷ UN General Assembly, *Declaration on the Right to Peace: resolution / adopted by the General Assembly*, 2 February 2017, A/RES/71/189, <https://www.refworld.org/docid/589c72134.html> (accessed 1 March 2021).

²⁸ On second-wave third-generation rights see Rosa Freedman, "'Third Generation' Rights: Is There Room for Hybrid Constructs within International Human Rights Law?" 2(4) *Cambridge Journal of International and Comparative Law* (2014) pp. 935–959.

²⁹ See program by University of La Salle in Colombia to help displaced youths attain a life in peace, <https://www.iica.int/es/prensa/noticias/j%C3%B3venes-colombianos-construyen-su-proyecto-de-vida-en-paz-y-promueven-el-desarrollo>; CINEP, <https://www.cinep.org.co/Home2/temas/ciudadania-y-paz/4-1-iniciativasdepaz.html>; UNDP,

Article 2

States should respect, implement and promote equality and non-discrimination, justice and the rule of law, and guarantee freedom from fear and want as a means to build peace within and between societies.

Article 3

States, the United Nations and specialized agencies should take appropriate sustainable measures to implement the present Declaration, in particular the United Nations Educational, Scientific and Cultural Organization. International, regional, national and local organizations and civil society are encouraged to support and assist in the implementation of the present Declaration.

Article 4

International and national institutions of education for peace shall be promoted in order to strengthen among all human beings the spirit of tolerance, dialogue, cooperation and solidarity. To this end, the University for Peace should contribute to the great universal task of educating for peace by engaging in teaching, research, post-graduate training and dissemination of knowledge.

Article 5

Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations. The provisions included in the present Declaration are to be understood in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and relevant international and regional instruments ratified by States.

This Declaration confirms the value of creating international and national institutions for peace education and calls for implementation of peace by the UN and United Nations Educational, Scientific, and Cultural Organization (UNESCO) as well as support by international, regional, national, and local organizations, and civil society.³⁰ Hence, there are a diversity of actors and approaches when considering responsibility for peace. It should be noted that the Declaration sets forth a framework “respect, implement, and promote” peace instead of the “respect, protect, and fulfill” framework constructed to set forth the scope of fulfillment of obligations within human rights, which includes non-interference by the state, prevention of interference by third parties, as well as state adoption of legislative, judicial, or economic measures

<https://www.undp.org/content/dam/colombia/docs/Paz/undp-co-cursoconflictos-2014.pdf>; or NGO, <http://www.mpdl.org/> or <https://www.ffla.net/qu%C3%A9-hacemos-programas/cultura-de-paz-y-movilidad-humana.html> (accessed 17 September 2020).

³⁰ Articles 3–5. UNESCO was established in 1945 to promote peace thorough dialogue and mutual understanding. It promotes culture of peace education programs throughout Latin America: http://www.fund-culturadepaz.org/spa/informe_cultura_de_paz/informe/informeeng.pdf (accessed 15 July 2020).

for realization of the right.³¹ The Declaration's formulation appears to characterize peace as requiring policy approaches. This may be due to the recognition of the importance of supporting culture of peace strategies through education and dissemination programs. Nevertheless, the maintenance of "respect" recognizes the state duty to refrain from interfering with enjoyment of the right to peace and this leaves open the possibility of justiciability depending on the national context.

1.1.2.3.2 Peace as a Sustainable Development Goal

Peace is linked to UN Sustainable Development Goal number 16, which calls for promoting peaceful and inclusive societies for sustainable development, providing access to justice for all, and building effective, accountable institutions at all levels.³² Helen Ahrens refers to what may be considered as an essentialist concept of peace within the 2030 Agenda for Sustainable Development, Goal 16, which appears to be equivalent to protection from crime and violence.³³ Manfred Nowak offers a critique that there is a lack of clarity as to its scope and content:

SD16 is one of the most important SDGs as it promotes peaceful and inclusive societies, based upon equal access to justice and effective, accountable and inclusive institutions. It is particularly significant in relation to promoting civil and political rights, good governance and the rule of law. However, the relevant targets and indicators do not live up to this ambitious goal and convey more the impression of apples and oranges having been mixed together without any clear overall vision about peaceful and inclusive societies. This impression is confirmed when looking specifically at target SDG 16, which is intended to promote nothing less than the rule of law and equal access to justice for all.³⁴

³¹ See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2019). Respect: the obligation to respect requires states to refrain from interfering with the enjoyment of rights. Protect: the obligation to protect requires states to prevent violations of human rights by third parties, such as non-state actors. Fulfill: the obligation to fulfill requires states to take legislative, administrative, economic, judicial, and other measures towards the full realization of human rights.

³² <https://sustainabledevelopment.un.org/sdg16> (accessed 15 July 2020).

³³ Helen Ahrens, "SDG 16.3 Promote the Rule of Law at the National and International Levels, and Ensure Equal Access to Justice for All: Its Impact on Latin America in the light of the American Convention on Human Rights" in Helen Ahrens, Horst Fischer, Veronica Gomez and Manfred Nowak (eds), *Equal Access to Justice for All and Goal 16 of the Sustainable Development Agenda: Challenges for Latin America and Europe* (Lit Verlag 2019). Ahrens noted that some Latin American countries resisted SG 16 (pp. 3, 5).

³⁴ Manfred Nowak, "Equal Access to Justice: A Human Rights Approach to SGG 16" in Ahrens et al *supra* note 33, at pp. 17–20. "Rule of Law, Supremacy of the law,

In 2019, the Inter-American Court of Human Rights and UNESCO issued a joint document which outlines a strategy for engagement by the transnational, multi-institutional Latin American system for administration of justice, which includes public ministries, ministries of justice and human rights, judiciaries, public defenders, and international courts, to pursue UN Sustainable Development Goal number 16's objectives to promote peace, justice, and strengthened institutions.³⁵ Specifically, this is intended to reduce violence, strengthen the rule of law, and combat corruption and money laundering. It is also intended to support participation of the citizenry through protection of freedom of expression through legal and administrative reforms, addressing impunity, increasing transparency of the state, and improving public access to information. Inter-American Court Judge Ricardo Pérez Manrique encouraged judicial systems to seek an increased share of national budgets, noting "[t]o invest in Justice is to invest in Peace," thereby confirming the link between the two umbrella terms.³⁶ He expressed concern for marginalized communities that lack access to justice to assert their rights.

Parra-Vera discusses the impact of the Inter-American Human Rights System (IAHRS), which he describes as emphasizing the empowerment of individuals, groups, or state agencies (indirect effects); changes in ideas, perceptions and social imaginaries of the issues addressed in the litigation (symbolic effects), and the "unblocking effect" of IAHRS decisions in helping to confront officials and state structures that seek to obstruct the full enjoyment of rights.³⁷ He suggests that the IAHRS may additionally have a delibera-

equality before the law, accountability to the law, fairness in application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency," p. 33. See also M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" 59 *Law and Contemporary Problems* 9–28 (1996), <https://scholarship.law.duke.edu/lcp/vol59/iss4/3> (accessed 15 July 2020).

³⁵ Javier Benech, *Foro de alto nivel: Fortalecimiento del Estado de Derecho y los Derechos Humanos para lograr Sociedades Pacíficas, Justas, Inclusivas y Transparentes* (UNESCO 2019). He relates that in 2019 the "authorities of the Inter-American Court of Human Rights, the Conference of Ministers of Justice of the Ibero-American Countries (COMJIB), the Ibero-American Association of Public Ministries (AIAMP), the Ibero-American Judicial Summit and the Ibero-American Association of Public Defenders (AIDEF) met ... to improve international cooperation to combat organized crime, strengthen the confidence of the population in the system of administration of Justice and raise awareness that the rule of law is the only way to achieve better societies in which human rights become effective in their widest expression."

³⁶ Ibid at p. 12.

³⁷ Oscar Parra-Vera, "Institutional Empowerment and Progressive Policy Reforms: The Impact of the Inter-American Human Rights System on Intra-State Conflicts"

tive impact by promoting greater social participation, accountability, and debate regarding the reach and implementation of particular public policies. Through its actions, the IAHRs may become an ally for domestic institutions, thereby contributing to reforms which improve checks and balances and to the strengthening of institutions that advocate compliance with international human rights obligations. The Inter-American Commission and the Court of Human Rights can also act as allies to governments, judges, and legislatures that seek to advance compliance with their constitutional and legal commitments. Institutional empowerment can advance a progressive agenda related to sustainable peace.

The obligation of the state to provide peace may be active or passive; it may require implementation and result in accountability for omissions. One may consider the obligation of the Colombian state and the Fuerzas Armadas Revolucionarias de Colombia (FARC – Revolutionary Armed Forces of Colombia) to pursue the peace process and implement the peace agreement in good faith. The state should fulfill, facilitate, promote, and provide peace, hence there is a need to map to what extent peace is regulated at the national level. The legislature can adopt, amend, or revoke laws to harmonize with the *Gründnorm* of peace. The executive can administrate peace – such as by promoting culture of peace initiatives within schools or local communities – facilitate the use of alternative dispute resolution (ADR) in labor disputes, and pursue peace treaties or agree to participate in peace missions. The judiciary can resolve conflicts and potentially serve to prosecute violations of peace or assess state responsibility for failure to protect individuals and communities from violence, as well as holding accountable state actors which violate human rights in the name of preserving peace, such as in response to protests. States may consider the creation of domestic monitors to measure internal peace, similar to the Positive Peace Index.³⁸ However, Latin American states may claim economic limitations on their ability to meet positive peace obligations and this would require examination of the budget of the government as well as the potential extent of corruption within the state.

in Per Engstrom (ed.), *The Inter-American Human Rights System: Impact Beyond Compliance* (Palgrave 2019) p. 146.

³⁸ Institute for Economics & Peace, *Positive Peace Report* 2018 and 2019, <http://visionofhumanity.org/app/uploads/2019/10/PPR-2019-web.pdf> (accessed 17 July 2020).

1.1.2.3.3 The Global Peace Index of Positive Peace

The Global Peace Index identifies criteria to measure positive peace, which provide a framework for the study, suggesting components of positive peace:³⁹

- (1) Well-functioning government, rule of law, democracy, access to justice, separation of powers, checks and balances, transparency, good relations with neighbours.
- (2) Acceptance and rights of others – women, children, refugees, indigenous peoples, non-discrimination and equality, equitable distribution of resources, and social justice.
- (3) Low levels of corruption.

Although the first two criteria are important topics tackled by the Inter-American Court of Human Rights in its existing jurisprudence, the final issue remains a challenge for the Court in spite of the link between corruption and violation of human rights that was recently documented by the Inter-American Commission on Human Rights.⁴⁰ According to the 2020 Global Peace Index the highest five countries in terms of positive peace are: Costa Rica (32), Uruguay (35), Chile (45), Panama (56), and Argentina (74). The lowest five are Guatemala (115), Nicaragua (135), Mexico (137), Colombia (140), and Venezuela (149). The Global Index reports a regional deterioration of peace due to political terror, violence by criminal and paramilitary groups, violent protests, and forced migration. The *Latinobarómetro* 2018 reported a significant decrease in trust in government and support for democracy, an economic downturn, as well as problems with elected authoritarianism and corruption.⁴¹ Within Latin America, state repression of regime opponents in Nicaragua,

³⁹ The Institute for Economics and Peace, *Global Peace Index 2020*, http://visionofhumanity.org/app/uploads/2020/06/GPI_2020_web.pdf (visionofhumanity.org) (accessed 17 July 2020). This quote taken from the Global Peace Index's identification of Pillars of Peace published here: <https://www.files.ethz.ch/isn/169569/Pillars%20of%20Peace%20Report%20IEP.pdf>.

⁴⁰ Anne Peters, *Corruption and Human Rights*, Working Paper 20 (Basel Institute on Governance 2015); Anne Peters, "Corruption as a Violation of Human Rights" 29(4) *European Journal of International Law* (November 2018) pp. 1251–1287. Inter-American Commission on Human Rights, "Corrupción y Derechos Humanos Estándares Interamericanos" (6 December 2019) OEA/Ser.L/V/II. Doc. 236, <http://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf> (accessed 22 September 2020). See Carina Bentata Gryting, "Asking Too Much: Why Regional Human Rights Courts Cannot Tackle Corruption" in GAB: The Global Anti-Corruption Blog (24 October 2016): <https://globalanticorruptionblog.com/2016/10/24/asking-too-much-why-regional-human-rights-courts-cannot-tackle-corruption/> (accessed 22 September 2020), noting delays, funding gaps, and compliance problems facing the Court.

⁴¹ The 2018 *Latinobarómetro* Report is available at: <https://www.latinobarometro.org/lat.jsp> (accessed 20 September 2020).

societal collapse in Venezuela, and state and gang violence in El Salvador, Honduras, and Mexico have resulted in mass migration within the region. In addition, the implementation of peace in Colombia is marred by assassination of human rights activists, while Guatemala's peace is negatively affected by malnutrition, crime, corruption, and weakening of accountability for past war crimes. The pursuit of positive peace may be considered a regional imperative.

1.1.3 Other Regional Organizations

1.1.3.1 The European Union – towards a peaceful future

The Treaty on European Union sets forth a framework for recognition of peace as a regional aim as well as a corresponding obligation to uphold it both internally and externally: the preamble calls for a common defense to promote peace in the region and the world. Article 3(1) sets forth that “[t]he Union’s aim is to promote peace, its values and the well-being of its peoples” and section (5) states that the EU shall contribute to peace in its external relations. Article 8 states that the EU shall maintain peaceful relations with its neighbors and Article 21 sets forth that the EU shall have a common foreign and security policy and take common action to preserve peace. These standards have served as a foundation for EU humanitarian actions and support for post-conflict peacebuilding, reconstruction, and education in other regions.⁴² The Charter on Fundamental Rights of the European Union (2007) characterizes a peaceful future as an aim of the Union in its preamble: “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.” The European Convention for the Protection of Human Rights and Fundamental Freedoms sets forth in the preamble that the fundamental freedoms “are the foundation of justice and peace in the world,” thereby expressly linking the enjoyment of human rights as a condition for peace. Hence, there is a broad normative base for peace as a regional aim with a duty for its preservation, in keeping with the universal standards.

1.1.3.2 The Africa Union’s normative commitment to peace

The African Union has the most comprehensive normative recognition of peace, encompassing its characteristics as an aim, value, principle, collective right, and culture. The Constitutive Act of the African Union, Article 3(f) identifies peace on the continent as an objective of the Union; Article 4 recognizes peaceful dispute resolution and states’ right to peaceful coexistence and the

⁴² See Ana E. Juncos and Jonathan Joseph, “Resilient Peace: Exploring the Theory and Practice of Resilience in Peacebuilding Interventions” 14(3) *Journal of Intervention and Statebuilding* (2020) pp. 289–302.

right to live in peace as principles of the African Union. Taken together, these norms provide solid evidence for confirmation of the fundamental status of peace as an end and a means in correlation with the qualities articulated within the UN Charter. The African Charter on Human and Peoples' Rights, Article 23(1) sets forth a justiciable collective right to internal and external peace: "All peoples shall have the right to national and international peace and security." In comparison, the African Commission on Human Rights has had two cases addressing Article 23 on peace. In the first case, the Commission discussed the duty of non-intervention and obligation of pacific settlement of disputes, and in the second case, the legality of the use of embargo in response to a military coup was considered to be a breach of the peace.⁴³

The African Protocol on the Rights of Women preamble recognizes peace as an African value. Article 4 requires states to promote peace education actively through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices, and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women. Article 10 recognizes the right to peace and a culture of peace, and addresses women's participation rights as well as calling for diversion of budget away from military expenditures in favor of social development:

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
2. States Parties shall take all appropriate measures to ensure the increased participation of women:
 - (a) in programmes of education for peace and a culture of peace;
 - (b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
 - (c) in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal

⁴³ Case 227/99 African Commission of Human Rights, Democratic Republic of Congo/Burundi, Rwanda, Uganda and Case 157/96 Association pour la sauvegarde de la paix au Burundi/Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia. In the second case, the Commission found that the states legally applied an embargo on Burundi in response to military coup in Burundi which was considered a breach of the peace. The Commission concluded that the Respondent States were not guilty of violation of the African Charter. The Commission took note of the entry into force of the Burundi Peace and Reconciliation Agreement, as well as the efforts of the Respondent States aimed at restoring a lasting peace, for the development of the rule of law in Burundi, through the accession of all Burundian parties to the Arusha Accord.

- protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
 - (d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
 - (e) in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.
3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

Furthermore, Kamari M. Clarke proposes that the Malabo Protocol for the African Court pursue an approach that considers peace to be “the first measure for the management of violence and sustenance of life ... establishing pre-conditions for justice in Africa,” thereby requiring a sequencing of economic justice and political justice (including constitutional and legal reforms), followed by criminal and reparative justice.⁴⁴

The combination of international instruments, policies, and engagement by international think-tanks oriented towards peace provides a normative foundation for recognition of peace as a universal value and the building of institutional mechanisms to promote peace policies and state practice for crystallization of customary international law. The next chapter will present an overview of the evolution of the Inter-American law of peace through treaty and custom.

⁴⁴ Kamari M. Clarke, “Peace and ‘Justice’ Sequencing in Management of Violence in the Malabo Protocol for the African Court” in Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmeihille (eds), *The African Court of Justice and Human and People’s Rights in Context* (CUP 2019) p. 118.