Promoting Peace Through International Law

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Introduction

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Cecilia M. Bailliet and Kjetil Mujezinović Larsen

> He who wishes to approach the aim of world peace in a realistic way must tackle this problem quite soberly, as one of a slow and steady perfection of the international legal order.
>
> Hans Kelsen[1]

1. Introduction

Peace is an inherently elusive concept, varying in its definition and valuation according to historical epoch and contextual application within different cultures, institutions, civil society groups, and academic disciplines.[2] It is especially vague within the realm of international law. One of the most prominent and influential scholars in international law, Hersch Lauterpacht, famously stated in the wake of World War II that 'international law should be functionally oriented towards both the establishment of peace between nations and the protection of fundamental human rights'.[3] Yet, while the protection of human rights steadily gained support as a primary purpose of international law; international legal literature largely abandoned promoting the establishment of peace as an independent, overarching aim of international law.[4] The present book returns to the Lauterpachtian

[1] Hans Kelsen, *Peace Through Law* (Clark: The Lawbook Exchange 2008, repr. University of North Carolina Press 1944), p. ix.

[2] On the different meanings of peace, see Ian M. Harris, 'Peace Education Theory', *Journal of Peace Education* 1 (2004), 7.

[3] Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Yearbook of International Law* 23 (1946), 1, 51.

[4] The most significant text that sought to pursue law as the key to implementation of peace was Grenville Clark and Louis B. Sohn, *World Peace through World Law* (Cambridge: Harvard University Press 1958, 1960, 1966). See also Grenville Clark and Louis B. Sohn, *Introduction to World Peace Through World Law* (Cambridge: Harvard University Press, 1984). See also Kelsen, *Peace Through Law*. See also James T. Ranney, 'World Peace Through Law—Rethinking an Old Theory', *CADMUS Journal* 1 (2012), 125.

approach, as it enquires to what extent peace is promoted through existing international and national normative and institutional frameworks. This book places itself in the intersection between international law and peace studies. Whether the reader prefers to consider it as legally oriented peace research or as peace-oriented international legal research may vary—the important premise for the book is rather that it attempts to build a bridge between two disciplines that have a lot in common but that for a long time have been remarkably unconnected.

However, in order to discuss how international law promotes peace, this book needs to adopt a working definition of what is meant by peace. For this end, section 2 addresses various substantive components of the concept of peace. Section 3 describes the importance of peace in the UN Charter, before section 4 introduces the highly contentious concept of 'the right to peace'. The final section 5 provides an overview of the chapters in the book, while also pointing towards some issues relating to peace that are not addressed in the present volume.

2. Definition of the Components of Peace

Peace is a multifaceted concept that lacks clear definition and boundaries. Considerable scholarly attention within peace research has been devoted to attempting to illuminate its scope and content, but no universally accepted definition has emerged. However, for the purposes of the present book, it is useful to focus on two important components of peace.

The first component of peace is that of *negative peace*, which may be characterized as the absence of war or armed conflict. If there is no war, there is peace. In international law such a dichotomy can be traced all the way back to Hugo Grotius' fundamental distinction between 'the law of war' and 'the law of peace'. The negative peace approach focuses on the prevention of armed conflict; it advocates non-violent dispute resolution and condemns the unlawful use of force or violence. Traditionally, it has generally applied at the international level referring to interstate relations, but it is now increasingly directed also at intrastate armed conflict and violence.[5]

The majority of peace research has focused on this negative component of peace, more specifically on the prevention of war or violence.[6] Yet, even in relation to negative peace there is a significant range of approaches, which can be categorized according to their emphasis on pacifism. *Principled pacifism* is the absolute belief in non-aggression and non-violence with no exceptions permitted whatsoever. It is based on moral-religious or secular (deontological) values.[7] *Realistic*

[5] See Oliver Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2012).

[6] Nils Petter Gleditsch, Jonas Nordkvelle, and Håvard Strand, 'Peace Research—Just the Study of War', *Journal of Peace Research* 54 (forthcoming 2014).

[7] For an overview of pacifism see the Stanford Encyclopedia of Peace, http://plato.stanford.edu/entries/pacifism/ (accessed 4 Nov 2014).

pacifism, on the other hand, accepts exceptions, primarily those contained within the UN Charter, i.e. the use of force in self-defence in accordance with Article 51 or with an authorization from the UN Security Council under Chapter VII. Within realistic pacifism there are divided opinions regarding the possibility of other exceptions from the prohibition on the use of force, primarily regarding the legality and legitimacy of humanitarian intervention and the status of the emerging doctrine on the 'Responsibility to Protect' (R2P).[8] A third category, namely *contingent/conditional/selective pacifism*, evaluates *jus ad bellum* and/or *jus in bello* and/or *jus post bellum* in order to oppose particular armed conflicts, such as those involving weapons of mass destruction, or those that violate the UN Charter.[9] A fourth category, *prudential pacifism*, involves the pragmatic concern for the cost/waste of war; it is consequentialist in orientation and may have particular relevance in this time of economic/financial crisis that may limit military options from a fiscal perspective.[10]

The present book does not advocate principled pacifism, nor is it primarily concerned with selective or prudential pacifism. This book rests on the unequivocal premise that the UN Charter's system, i.e. the prohibition on the use of force in Article 2(4) with two explicit exceptions from that prohibition, is a fundamental element of international law that this book does not set out to revise. In terms of negative peace, the book applies instead a concept of realistic pacifism (as described above), meaning that the chapters within this book set out to explain how international law promotes a realistic peace.

The second component of peace is a broader conception, namely *positive peace*. While negative peace refers to the 'absence of' something (namely war and violence), positive peace refers to the 'presence of' something. As articulated by Galtung, positive peace calls for the presence of cooperation between people and states and the 'integration of human society'; incorporating social justice (equal opportunity/enjoyment of social contract/human dignity), respect for human rights, and the elimination of 'structural violence' which causes poverty, inequality, exclusion, death, or disability through inequitable distribution of resources addressing basic human needs (such as food, medicine, housing), or denial of equal protection when addressing domestic violence, hate crimes, etc.[11] It may apply to both intrastate and interstate relations. Galtung intended this concept to shift attention away from the East–West Cold War tension in

[8] See Kjell Anderson, 'The Universality of War: Jus ad bellum and the Right to Peace in Non-International Armed Conflicts', in *The Challenge of Human Rights: Past, Present and Future*, David Keane and Yvonne McDermott (eds.) (Cheltenham: Edward Elgar, 2012). See also the chapters by Pål Wrange and Ola Engdahl in the present volume.

[9] See Leonard Hammer, 'Selective Conscientious Objection and International Human Rights', *36 Israel Law Review* 36 (2002).

[10] As noted by Mary Ellen O'Connell: '(T)he next development will simply be toward using less expensive force-think drone attacks and Stuxnet worms'. 'Energized by War Fatigue', *ESIL Reflections* (2014), http://www.esil-sedi.eu/node/522 (accessed 4 Nov 2014).

[11] e.g. Johan Galtung, 'Violence, Peace, and Peace Research', *Journal of Peace Research* 6 (1969) 167–91. Structural violence refers to the phenomenon of social structures or social institutions inflicting harm upon people by preventing them from meeting their basic needs.

favour of addressing the North–South divide (although one may argue that we may be returning to a new variation of East–West friction).[12] Nevertheless, this perspective was criticized for being aligned with Neo-Marxism.[13] An apparent consequence was that international legal scholars largely shied away from peace studies, in part due to the fear of association with pro-communist or pro-Soviet sympathies, and in part on account of concern that the scope of positive peace was too broad, pursuing utopianism.[14] Thus, peace research returned to the negative orientation of preventing war and violence. To the extent it addressed cooperation, it focused on how it might reduce violence, thereby falling in line with liberal peace theory.[15] This theory emphasizes state consent to institutions and legal regimes that create rules intended to promote harmonized interests based on shared norms and principles; thereby limiting state sovereignty and resort to military power in the interest of establishing a peaceful international order through cooperation.[16] Liberalism emphasizes the recognition of individuals as primary actors in society; further it supports tolerance, diversity, equal opportunity, freedom, the rule of law, institutional reform, free elections, and free markets.[17]

This volume is not limited to a negative concept of peace. Instead, we adopt a broad definition of peace that includes a wide-ranging, positive dimension.[18] Although peace research commenced with the incentive to prevent nuclear war; at present one may argue that the looming, gradual cataclysm presented by climate change, a marked increase in inequality in the world, and the phenomenon of failing and failed states require a reorientation of academic focus.[19] There is also a juxtaposition of concern for the inequitable consequences of globalization with the increased attention on the situation and role of individuals, groups, and other non-state actors such as corporations.[20] Hence, peace may be situated within the micro level of home and family, centring on interpersonal relations and the requirements of human dignity as an element of peace; as well as at the macro

[12] Gleditsch et al. 'Peace Research'. [13] Gleditsch et al. 'Peace Research'.

[14] Edward Gordon, Book Review: 'From Erasmus to Tolstoy: The Peace Literature of Four Centuries; Jacob Ter Meulen's Bibliographies of the Peace Movement Before 1899', in *Harvard International Law Journal* 34 (1993), 641.

[15] See Michael Doyle, *Liberal Peace: Selected Essays* (New York: Routledge, 2011) and John MacMillan, *On Liberal Peace: Democracy, War and the International Order* (London: Tauris Academic Studies, 1998). See also the chapter by Kristoffer Lidén and Henrik Syse in the present volume.

[16] Gleditsch et al. 'Peace Research'. On liberalism in international relations, see Anne L. Herbert, 'Cooperation in International Relations: A Comparison of Keohane, Haas and Franck', *Berkeley Journal of International Law* 14 (1996), 222.

[17] For a critical view of liberal peace see Roger MacGinty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (New York: Palgrave, 2011), 26.

[18] On the hybridity of negative and positive peace, see Oliver Richmond, *A Post-Liberal Peace* (London: Routledge, 2011).

[19] See Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2011); A. A. Cancado Trindade, *International Law for Humankind, Towards a New Jus Gentium* (Leiden: Martinus Nijhoff, 2010).

[20] See Cecilia M. Bailliet, (ed.) *Non-State Actors, Soft Law and Protective Regimes* (Cambridge: Cambridge University Press, 2012).

level, exploring the aspiration of equality between states and peoples.[21] This book discusses how international law promotes the establishment and protection of relevant criteria pertaining to social justice, such as non-discrimination and equality. The chapters also address the *link* between negative and positive peace by discussing the normative and institutional frameworks addressing prevention of war and violence, the promotion of sustainable development, and the protection of human rights, underscoring the holistic purposes articulated in UN Charter, Article 1:

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.

Students of international law are very familiar with a holistic interpretation of negative and positive rights in the field of human rights law, and this book applies a similar framework for negative and positive elements in the concept of peace—we consider these elements as indivisible, interrelated, and interdependent.[22]

3. The Law of Peace According to the UN Charter

The modern emergence of the law of peace is derived from various instruments that articulate a notion of peace as relating to interstate relations as the formulations address the prohibition of unlawful use of force and promotion of the use of dispute settlement mechanisms to avoid breaches of the peace, *inter alia* the Briand-Kellogg Pact which condemned 'recourse to war for the solution of international controversies' (1928), the Hague Convention of 1899 which established the Permanent Court of Arbitration, the Hague Convention of 1907 which resulted in the Convention on the Pacific Settlement of International Disputes,

[21] On the micro level, see Karen Warren and Duane L. Cady, (eds.) *Bringing Peace Home: Feminism, Violence and Nature* (Bloomington: Indiana University Press, 1996); on the macro level, see Gerry Simpson, *Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

[22] See Asbjørn Eide, 'Interdependence and Indivisibility of Human Rights', in *Human Rights in Education, Culture and Science: Legal Developments and Challenges*, Vladimir Volodin and Yvonne Donders (eds.) (Aldershot: Ashgate, 2007), 11–52.

and the Covenant of the League of Nations (1919). Foremost at present is the UN Charter; the preamble states that the peoples of the UN have determined:

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

Taken together with Article 1(1), (2), and (3), it is noted that 'peace is more than the absence of war'.[23] Article 1 sets forth that the purpose of the UN is 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, suppression or acts of aggression or other breaches of the peace, and to bring about by peaceful means … settlement of international disputes or situations which might lead to a breach of the peace. Article 2(3) states 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.'[24] Article 2(4) calls upon members to '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'. The ICJ confirmed this to constitute a *jus cogens* norm.[25] Article 2(7) prohibits interference by the UN in domestic affairs: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

This has revealed to be contentious in practice as the UN Security Council has expanded its consideration of issues deemed to be 'threats to the peace' to include human rights, internal conflicts, terrorism, and other situations previously considered subject to national jurisdiction, thereby earning characterization as a World Legislature, calling upon states to freeze financial assets of individuals, block arms sales, etc.[26] However, Tsagourioas advocates recognition

[23] Wolfrum Rüdiger, 'Article 1', in *The Charter of the United Nations: A Commentary*, Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds.) (Oxford: Oxford University Press, 3rd edn. 2012), 110.

[24] See also Chapter VI, Art. 33: '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.'

[25] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* (Judgment) [1984] ICJ. (Henceforth *Nicaragua* v. *United States*)

[26] See Stefan Talmon, 'The Security Council as World Legislature', *American Journal of International Law* 99 (2005), 175; Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?', *Fordham International Law Journal* 28 (2004), 542; see also Ian Johnstone,

of Article 2(7) as a an expression of the principle of subsidiarity which has the potential to filter the 'manifestations of legislative power by the Security Council and member states with regard to the common goal of peace and security'.[27]

It is noteworthy that membership in the UN 'is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations'.[28] It has been noted that the 'peace-loving' criterion 'refers both to their past and present conduct'.[29] This was originally interpreted to include states that had engaged in the war against the Axis powers or had a non-Fascist past and also interpreted to preclude states that had governments that had been supported by the Axis powers (Spain). Of interest, at the time of the San Francisco conference, 'peace-loving' was not to be defined by reference to the internal level of democracy, because this would constitute unlawful interference in internal affairs. Yet, over time, references to democracy were made by Western countries when discussing the applications of Central and Eastern European nations. Nevertheless, states are generally considered 'peace-loving' by reviewing their external, international behaviour: 'including compliance with UN resolutions, guaranteeing innocent passage in territorial waters, settling border disputes peacefully, and respecting the principle of non-intervention.'[30]

Yet, the UN Charter does not espouse a principled, absolutist version of pacifism.[31] It is a pragmatic document that reflects realistic pacifism as it recognizes

'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit', *American Journal of International Law* 102 (2008) 275. By UNSC Res. 1267 (15 October 1999) UN Doc. S/RES/1267 (1999); UNSC Res. 1333 (19 December 2000) UN Doc. S/RES/1333(2000); UNSC Res. 1390 (28 January 2002) UN Doc. S/RES/1390(2002), as reiterated in UNSC Res. 1455 (17 January 2003) UN Doc. S/RES/1455 (2003); UNSC Res. 1526 (30 January 2004) UN Doc. S/RES/1526 (2004); UNSC Res. 1617 (29 July 2005) UN Doc. S/RES/1617 (2005); UNSC Res. 1735 (22 December 2006) UN Doc. S/RES/1735 (2006); UNSC Res. 1822 (30 June 2008) UN Doc. S/RES/1822 (2008); and UNSC Res. 1904 (17 December 2009) UN Doc. S/RES/1904 (2009), the Security Council has obliged all states to freeze without delay the funds and other financial assets or economic resources, including funds derived from property owned or controlled directly or indirectly; prevent the entry into or the transit through their territories; prevent the direct or indirect supply, sale, or transfer of arms and related material, including military and paramilitary equipment, technical advice, assistance, or training related to military activities, with regard to the individuals, groups, undertakings, and entities placed on the Consolidated List.

[27] See Nicholas Tsagourias, 'Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity', *Leiden Journal of International Law* 24 (2011), 549–50 concluding. 'Article 2(7) was placed at the intersection of United Nations' and member states' jurisdictional authority and provides the context in which the powers of the United Nations meet those of its member states in the pursuit of the common goal of peace and security.' See also Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention', *Leiden Journal of International Law* 22 (2009), 345. The ICJ recognized non-intervention as a customary law principle in *Nicaragua* v. *US*, para. 245.

[28] 1945 United Nations Charter, Art. 4(1).

[29] Ulrich Fastenrath, 'Article 4', in *The Charter of the United Nations: A Commentary*, Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds.) (Oxford: Oxford University Press, 3rd edn. 2012), 348.

[30] Fastenrath, 'Article 4', 348.

[31] Hedley Bull characterizes peace to be a goal of the society of states, not universal and permanent peace, but rather 'the maintenance of peace in the sense of the absence of war among member states of international society as the normal condition of their relationship, to be breached only in special circumstances and according to principles that are generally accepted'. Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 4th edn. 1995), 17. Hence, it may be

the exceptions of individual and collective self-defence against an 'armed attack' and protection of others, in accordance with Article 51 and Chapter VII, Article 42, as an enforcement measure at the direction of the UN Security Council; it has also been interpreted to support humanitarian intervention and self-determination movements.[32] As pointed out by Mónica García-Salmones, 'The maxim of "peace through law" goes, structurally, hand in hand with the maxim of "war through law"'.[33] The exceptions, along with evolving notions such as the 'Responsibility to Protect' have resulted in divisions between the Western governments as opposed to Eastern and Southern governments which staunchly contest the legitimacy of these actions and call for strengthened respect for the principle of non-intervention. The fact that Africa has accepted humanitarian intervention within its constitutive act demonstrates a shift towards increased recognition of R2P theory, but the other regions remain sceptical.[34] Nevertheless, the struggle to uphold non-intervention as a fundamental principle of international law is emphasized within Latin America, Russia, and China.

4. The Debate within International Law on the 'Right to Peace'

To comprehend fully the role of peace in the context of international law, one must be aware of the historical controversies surrounding the question of whether there exists a *right to peace*. The UN Human Rights Council (as well as its predecessor, the UN Commission on Human Rights) has witnessed polarizing debates regarding a soft law initiative to articulate a right to peace. There is disagreement as to whether peace may constitute a right, juxtaposing the notion of a 'liberty right' (correlating with freedom) as opposed to a 'claim right' (correlating with the duty of another).[35] The scope of any such right is a topic of contention.

argued that the international community is torn between the notion that war is an institution of international society, or that it is 'a pathological occurrence in international dealings, leading to utterly inhuman behaviour'. See Antonio Cassese, Paola Gaeta, Laura Baig, Mary Fan, Christopher Gosnell, and Alex Whiting, *Cassese's International Criminal Law* (Oxford: Oxford University Press, 3rd edn. 2013), 63. It is notable that the realistic perspective appears to have ancient roots, as Fatiha Sahli and Abdelmalek El Ouazzani remark that 'For the Muslims, peace, in theory could not be permanent. It was limited in time and appears like a truce which could not exceed a period of ten years.' Fatiha Sahli and Abdelmalek El Ouazzani, 'Africa North of the Sahara and Arab Countries', in *The Oxford Handbook of The History of International Law*, Bardo Fassbender and Anne Peters (eds.) (Oxford: Oxford University Press, 2012), 402.

[32] See generally Oliver Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Oxford University Press, 2012). See also *Nicaragua* v. *United States* case, in which the ICJ confirmed the right to self-defence as a rule of customary international law. See also Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention', *International Review of the Red Cross* 85 (2003), 807–26.

[33] Mónica García-Salmones, 'Walter Schucking and the pacifist traditions of international law', *European Journal of International Law* 22 (2011), 767.

[34] See Kioko, 'The Right of Intervention'.

[35] See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: and Other Legal Essays* (Lenox, Mass.: HardPress, 2012).

Furthermore, there is a lack of clarity as to what extent the international community of states and non-state actors have obligations in relation to peace. There are significant divisions within policy and academia on this issue. There is a considerable amount of resistance among policymakers and academics to the notion of a 'right to peace'. In part this may be the legacy of the identification of peace as being aligned with communist ideology, or a fear of the potential of weakening the exceptions within the UN charter (self-defence and Chapter VII operations). This book seeks to diminish the aversion to the discussion of peace within legal forums and teaching institutions. We believe that legal studies have an important role to play in reorienting discussions and practice towards the direction of realizing inter- and intra-state peaceful objectives, without thereby advocating that there is a 'right' to peace.

In January 2013, the editors of this volume hosted a Nordic Expert Consultation on the Right to Peace at the University of Oslo.[36] Based on the consultation, we issued Recommendations on the Components of Peace, as we suggested that the term 'right to peace' may be replaced with 'components of peace'. This would be in keeping with the notion of peace as being a meta-right, a type of overarching entitlement where reference to related enforceable human rights are used to explain its scope (similar to other solidarity rights, such as the right to a clean environment and the right to development). We consider these recommendations to represent our conception of peace as promoted within this book, and therefore reiterate them here.

Components of Peace

1. States should promote the maintenance of peace by seeking to resolve their internal and international disputes in a non-violent manner and refraining from the threat or use of force against the territorial integrity or political independence of any state, in accordance with the UN Charter.
2. Structural violence is incompatible with peace. States should seek to eliminate inequality, exclusion, and poverty among and within states.

Preconditions for Peace

3. Peace is strengthened by the recognition that everyone is entitled to a social and international order in which they are able to enjoy human rights and fundamental freedoms without discrimination.
4. The illegal arms trade is a threat to peace and requires suppression in order to prevent the illegal use of force and violations of human rights and international humanitarian law. States should maintain strict and transparent control of the arms trade.
5. a. A safe, clean, and productive environment is conducive to peace and human security. States should preserve and protect the environment, based among others on the principle of sustainable and equitable use of natural resources, as well as other principles of international law.

[36] Cecilia M. Bailliet and Kjetil Mujezinović Larsen, 'Nordic Expert Consultation on the Right to Peace: Summary and Recommendations', *Nordic Journal of Human Rights* 31 (2013), 262–78.

b. States should consider the creation and promotion of peace zones and nuclear weapon free zones. The use of weapons that cause widespread and severe damage to the environment, in particular radioactive weapons and weapons of mass destruction, is contrary to international law. Such weapons must be urgently prohibited. States that utilize them have the obligation to prevent damage to the environment, and in case of unavoidable damage, to restore the previous condition of the environment.

Individual Participation in the Promotion and Safeguarding of Peace

6. Individuals, groups, institutions, transnational corporations, and non-governmental organizations have an important role to play and a responsibility in safeguarding peace. Everyone has the right, individually and in association with others, to promote and to strive for the realization of peace at the national and international levels. Individuals have the right to freely seek, obtain, receive, publish, or disseminate information to/from others on peace, human rights, and fundamental freedoms without censorship.
7. States should promote increased representation and participation of women at all decision-making levels in national, regional, and international institutions and mechanisms for the prevention, management, and resolution of conflict and peace processes.
8. a. Individuals have the right to conscientious objection and to be protected in the effective exercise of this right.
   b. Conscientious objectors and peace or human rights activists subject to well-founded fear of persecution on account of their actions or beliefs have the right to seek and to enjoy refugee status.

Protection of Victims of Breaches of Peace

9. All individuals share the same human dignity and have an equal right to protection. Nevertheless, there are certain groups in situations of specific vulnerability who deserve special protection from discrimination and effective remedies. Among them are children, victims of enforced disappearances or arbitrary detention, elderly persons, persons with disabilities, displaced persons, asylum seekers, migrants, refugees, indigenous peoples, and minorities.
10. Breaches of the peace result in displacement of individuals and groups. Persons shall have the right to seek and enjoy refugee status if they have fled their country or place of origin on account of a well-founded fear of persecution by State or non-State agents, on grounds of race, sex, religion, nationality, sexual orientation, membership in a particular social group, or political opinion; or because of a risk to life, security, or liberty on account of generalized violence, foreign aggression, internal conflict, massive violation of human rights, natural or human-made disasters, or other circumstances that seriously disturb public order.

Education on the Components of Peace

11. All individuals should receive education on human rights, fundamental freedoms, non-violent dispute resolution, and protection of the environment as components and preconditions of peace.

5. Overview and Delimitations

As explained above, this book seeks to bridge the gap between negative and positive peace research within the framework of international law. We discuss the relation between these two notions within the context of international legal regimes. We examine, inter alia, to what extent international and national normative instruments and institutions are oriented towards reducing violence. The normative frameworks that address the maintenance of peace and security are subject to dilemmas resulting from the emerging doctrine of the 'Responsibility to Protect', but they are also challenged by their mandates oriented towards the promotion and protection of social justice, human rights, and human dignity, etc. Hence, the contributions in this book are divided into four main parts.

Part 1 discusses the normative scope of peace and its exceptions. The chapters that are included here explain the background for the conception of peace in international law, and they address a number of fundamental normative expressions of peace in international law.

In Chapter 2, Kristoffer Lidén and Henrik Syse discuss the origins of a liberal, rights-based conception of peace in the political thought of Hobbes, Locke, and Kant. The chapter outlines how this conception plays out in contemporary perspectives on international law as a source of peace, with a view to the strands of realism, internationalism, and cosmopolitanism. It is demonstrated how the argument for widening the scope of peace in international law beyond the regulation of interstate warfare relates to a liberal cosmopolitan challenge to the Westphalian state system, as defended by internationalism. It also indicates why realists and internationalists would reject such a move and insist on subjecting concerns for peace to the principle of state sovereignty. The chapter does not provide a comprehensive overview of conceptions of peace in international law but focuses on a particular strand of political philosophy associated with 'the liberal peace'. Because this idea has been highly influential in the international politics of peace over the past decades, the argument serves as a vantage point for critical analysis of the presuppositions of contemporary legal debate on peace and conflict. While the argument could be misunderstood as implying that considerations on peace in international law should be limited to a liberal political outlook of a Western kind, the chapter invites responses from non-liberal and non-Western perspectives.

In Chapter 3, Cecilia M. Bailliet traces the evolution of the international law of peace from the notion of a 'right to peaceful coexistence' to the *de lege ferenda* initiative to recognize a 'human right to peace' within the UN Human Rights Council. The chapter seeks to explain why achieving universal normative clarity within international law remains a challenge and suggests that it might be beneficial to focus on institutions addressing the components and preconditions of peace.

Chapter 4, by Simon O'Connor and Cecilia M. Bailliet, addresses the character of the obligations in the UN Charter with respect to the maintenance of international peace and security as articulated in Articles 1(1), (2), and (3), and

Chapters VI and VIII. This contribution discusses the sequential nature of the Charter to emphasize the obligations, first and foremost, to resolve disputes peacefully and prevent escalation. The chapter presents the framework of UN Bodies, including the Security Council, General Assembly, and office of the Secretary-General and their practice in implementing these obligations. Additionally, it underscores the importance of recourse to these fora in pursuing negotiations between States and non-State actors. Finally, it delineates the role of regional mechanisms in enabling states to fulfil their primary duty of pacific settlement. It concludes by examining whether future implementation should be strengthened within existing UN and regional institutions addressing the pacific settlement of disputes.

In Chapter 5, Pål Wrange offers a critical, conceptual analysis of collective security, both in the current UN shape and as a general concept. The basic premise for the chapter is that even though collective security is a fundamental goal of the UN Charter, the collective security system is fraught with many political and practical problems. The chapter analyses a number of conceptual difficulties, but argues that these difficulties do not mean that collective security is impossible. The chapter asks whether collective security could be improved better to maintain international peace and security or if there is an inherent contradiction in the idea. The analysis is informed by critical traditions in international law and international relations.

In Chapter 6, Ola Engdahl discusses how peace, in its various connotations, may be achieved through the use of military force. Protection against grave violations of human rights may also require the use of military force, and the connection between international peace and security and the respect for human rights is evident in the practice of the UN Security Council. The concept of a 'Responsibility to Protect' has grown out of a need to protect against grave violations of human rights when the Security Council has not been able to respond. The ideas behind this concept may thus to some extent be described as emphasizing protection of human rights over the prohibition on the use of force—and the maintenance of peace between states. International law does not yet provide a right of states to intervene with military force in another state to protect against human rights violations without a mandate from the UNSC, and thus seems to value peace among states more highly than protection against human rights violations. This begs the question how respect for human rights contributes to the maintenance of peace and how peace contributes to the protection of human rights, and, in a longer perspective, whether one could exist without the other.

Part 2 continues to address five important preconditions of peace. While Part 1 also discusses both the negative and positive dimension of peace, the chapters in Part 2 are forced to address the links between positive and negative peace more directly. The issues that are covered—such as human rights, the environment, or development—are issues that are may be included in a positive conception of peace, but the authors also have to consider their impact on peace in the negative sense. The linkage between negative and positive peace is described as particularly complex in the chapter examining structural violence and the challenge of attaining development in countries undergoing violent conflict. The concept of human

rights protection as a foundation of both negative and positive peace is thus explored. The section then turns to examining dispute resolution mechanisms within the context of reclamations for greater equity within world trade. In addition, the section explains the link between peace and other solidarity rights, such as the right to a clean environment and the pursuit of sustainable development. Finally, it discusses the regulation of the arms trade as a precondition for peace.

In Chapter 7, Kjersti Skarstad observes that a central premise and promise of human rights law is that the protection of human rights leads to more peaceful societies. Yet, in empirical conflict research, rights violations have for the most part not been seen as a relevant conflict risk factor. Also in the human rights literature it is unclear why and how violations possibly lead to a higher risk of violent civil conflicts. This chapter explains theoretically how human rights violations can potentially increase the risk of violent civil conflicts. It argues that human rights abuses serve as both conflict facilitators and conflict multipliers. It then demonstrates empirically that violations of basic economic and social rights and physical integrity rights increase the risk of civil war, while the effects of other civil and political rights are minor. The main implication of these results is that human rights policies and the enforcement of human rights law are well worth pursuing in order to reduce conflict risk.

In Chapter 8, Bård A. Andreassen addresses how the doctrine of 'structural violence' refers to violence where social structures, relations, and institutions threaten peoples' basic interests and needs. It is inherently related to social injustices and the failure to fulfil basic human rights The right to development discourse, as it developed in the late 1990s with reference to the UN Declaration on the Right to Development, provides a framework for analysing such structural violence from new perspectives that combine various types of rights in analysing social injustices, poverty, and 'failed development'. The chapter explores the argument that the main constraint on development may not be a poverty trap (i.e. that people living in poverty lack capacities and access to productive resources that can enable them to move out of poverty), but rather traps of violence that constrain development at both macro and micro levels. Lack of functioning legal structures and institutions for rights protection and public policies addressing poverty are important factors explaining the difficulties of escaping poverty.

In Chapter 9, Christina Voigt describes how the protection and preservation of the natural environment, integrity of ecological systems, and the survival of species are positive conditions for peace and human security. Given the interdependent and complex nature of the global environment, no state alone can effectively protect it. Rather, global cooperative efforts to reach significant concessions on states' sovereignty to exploit their natural resources are necessary in order to halt, reverse, and prevent environmental degradation. At the same time, environmental protection in order to be a foundation for peace should be aligned with eco-sensitive development needs as aptly expressed in the principle of sustainable development. International environmental law is the branch of international law that aims to translate these conditions in its design, institutions, and implementation. The author shows, however, that progress is slow, and

that a shift in the quality of international laws is required: a shift that recognizes the fundamental importance of healthy ecological conditions. Such realization requires a new vision of international law and international relations, where a healthy environment is recognized as the foundation for peaceful human societies. This chapter gives an overview over the inter-linkages between environmental protection, sustainable development, and peace. It looks at the tools and means of international environmental law in this context and highlights the importance of multilateralism and global cooperation to address these issues. It further looks at the particular example of climate change and the multilateral efforts under the UN to establish a collaborative climate effort—based on global equity and sustainable development.

In Chapter 10, Ole Kristian Fauchald discusses the relationship between peace and trade. The chapter takes as its starting point a historical account of the relationship between trade and peace. Its focus is on the dispute settlement mechanism (DSM) of the WTO, which is initially considered in the light of the general link between the WTO Agreement and the level of conflict and tensions between and within states. The chapter finds that in cases concerning interstate conflicts or tensions, the DSM is likely to reduce them, and benefit smaller and weaker states. Conversely, where cases involve internal conflicts or tensions, the DSM is more likely to increase them, and benefit bigger and more powerful states. These conclusions are based on a study of cases registered with the DSM, as well as general assumptions regarding the regulatory and institutional framework of the WTO and regarding states' use of trade measures and the DSM.

In Chapter 11, Gro Nystuen and Kjølv Egeland evaluate the potential of the Arms Trade Treaty (ATT) to reduce violations of international humanitarian law and human rights law. The chapter assesses the process and outcome of the negotiations of the ATT, the first international instrument that makes an explicit link between arms export and its potential consequences in terms of violations of international humanitarian law and human rights law. The authors present the negotiation history of the ATT, comparing it to other recent treaty negotiations within humanitarian disarmament, and discuss the association between international law and peace studies. The main aim of the chapter is to present the ATT's provisions for regulating in which situations arms exports will be prohibited.

Part 3 is based on the editors' firm conviction that civil society plays an instrumental role in the pursuit and promotion of peace. This section underscores the significance of ensuring equal participation of racial/ethnic groups, refugees, and women in the promotion of peace; equality and non-discrimination are central principles in relation to peace, nevertheless there is great discrepancy between normative language and its actual implementation and enjoyment in practice.

In Chapter 12, Vibeke Blaker Strand discusses the relationship between human rights norms pertaining to equality and non-discrimination, and peace. The author argues that a society that is based on inequality and discrimination is not a society where people live peacefully together. It is not a society in peace. The term 'positive peace' rests on an understanding of peace that includes this broader picture, as it considers respect for human rights and social justice as components

relevant to peace. Human rights norms on non-discrimination and equality can be seen as the twin of the notion of positive peace, the author argues, in that the aim behind these norms is not only to achieve formal equality, but substantive equality. The aim of the chapter is threefold. First, it explores the rich approach towards substantive equality that is embedded in international human rights conventions. This exploration involves both an individualistic approach towards substantive equality and a group-based approach. Secondly, it addresses some of the challenges that have been detected under the present international legal regime, and how the UN supervisory committees have responded to such challenges. The author argues that the path towards substantive equality is characterized by the UN supervisory committees' dynamic interpretation in order to strengthen and develop the protection against discrimination and inequality. Thirdly, the chapter draws links between the legal sphere and the political struggles that have been, and are being, fought in this field.

In Chapter 13, Maja Janmyr explores how refugeehood is intrinsically linked to various aspects of peace. First, as is evidenced by the definition of 'refugee', refugees may be seen as consequences of breaches of peace. Second, the grant of asylum is a peaceful and humanitarian act that should not be regarded as unfriendly by another state. Third, the linkage between refugees and (a lack of) peace is apparent in the reality in which refugee protection is deeply affected by greater security issues. Finally, the notion of peace is also relevant in discussions of durable solutions for refugees; repatriation, resettlement, and local integration all have the ultimate goal of allowing refugees to rebuild their lives in dignity and peace.

In Chapter 14, Cornelia Weiss analyses the state of inclusion of women as peacemakers, peacekeepers, and peacebuilders in law and practice. The chapter explores the status and effect of the Convention on the Elimination of All Forms of Discrimination Against Women and UN Security Council resolutions that address women peacemakers, peacekeepers, and peacebuilders. It investigates compliance measures and how they can be used. It addresses options to influence practice when the law does not. This chapter argues that the pursuit of peace is illusory without the inclusion of women.

Part 4 discusses the institutional implementation of peace, including 'peace through justice' institutions, such as international courts and truth commissions. What is the impact of dispute resolution mechanisms, in particular courts, on peace? What is the relationship between the pursuit of truth, justice, and accountability in the context of peace-building? The section also includes critical review of other institutional mechanisms including peacekeeping, fact-finding procedures, and returns to an examination of Kantian ideals within the context of constitutional forums. We consider whether there is a need to reform international and national institutions in order to improve the enforcement of protection standards relating to peace. The epilogue advocates peace education, characterized by UN Secretary-General as the road to peace.[37]

[37] Ban Ki-moon, 'International Day of Peace: Education for Peace', 21 September 2013, http://www.un.org/en/events/peaceday/2013/sgmessage.shtml (accessed 4 Nov 2014).

In Chapter 15, Kjetil Mujezinović Larsen discusses the notion of 'peace' in international peace operations with a mandate from the United Nations Security Council, and how international law promotes or prevents the achievement of such peace. The chapter shows that international peace operations generally pursue a 'liberal peace', and it shows how this general concept of peace is translated into concrete functions in particular operations. The chapter shows further that international law does little to promote peace through the creation of peace operations, since international law neither requires nor encourages such creation even though it is permitted. The chapter discusses further how international humanitarian law, international human rights law, and other regimes that regulate the conduct of personnel might contribute to the achievement of peace in peace operations.

In Chapter 16, Jemima García-Godos addresses national and international efforts of post-conflict reconstruction and reconciliation in societies emerging from armed conflict or authoritarian regimes. Such efforts place great emphasis on the need for accountability for past human rights violations. The assumption behind these efforts is that justice must be addressed if the goal is a stable, long-lasting peace. Based on a discussion of victims' rights and the links between justice and peace, this chapter argues that transitional justice is a constitutive element of positive peace because it contributes to rebuild relations of trust in post-conflict societies. The chapter addresses the main transitional justice mechanisms applied by countries seeking to establish some form of accountability for past violations: prosecutions, truth commissions, and victim reparations, providing examples from specific transitional justice experiences in Latin America.

In Chapter 17, Gentian Zyberi discusses the role and impact of international courts and tribunals in the promotion of peace. The author argues that maintenance and restoration of peace is an essential community interest, clearly embedded in both treaty and customary international law and pursued through different institutional mechanisms and procedures, including international courts and tribunals. Courts can play an important role in efforts aimed at maintaining or restoring interstate or intrastate peace, alongside existing non-judicial means and methods of settling disputes that could endanger international peace and security. By settling interstate disputes, advising international organizations, or investigating and prosecuting those most responsible for having committed mass atrocity crimes, these courts and tribunals can potentially create the necessary conditions for the normalization of relations between States or between affected parts of a society in a post-conflict situation. The chapter discusses the role and contribution of principal international courts and tribunals, which through their case law have developed and interpreted important aspects of the scope of relevant legal obligations incumbent upon states, international organizations, and individuals. Despite their potential and eventual contribution, past and recent history shows that the role of courts in maintaining or restoring peace remains limited. For that reason this chapter addresses not only possibilities, but also institutional and other limitations related to the activity of courts which affect their potential contribution to peace.

In Chapter 18, Cecilie Hellestveit discusses various types of international fact-finding mechanisms and assesses their role in the promotion of peace. This chapter relies on a stringent view of peace as a reflection of the absence of armed conflict. The author shows that international fact-finding mechanisms have gained ground as tools by which the international community responds to man-made emergencies that may threaten peace, but they give rise to a number of dilemmas. The chapter asks a number of crucial questions in this regard: 'Do international fact-finding mechanisms serve to bemoan violations of international law while concealing inadequacies in international law's ability to respond to armed conflict and serious human rights abuse? Or is fact-finding an increasingly decisive component in the architecture of the international law of peace and its ability to contain, alleviate and ease recovery from armed conflict, responding to the predicament of fact-finding as "a significant weapon in the armoury of world order"?'

In Chapter 19, Azin Tadjdini addresses the constitutional dimension of peace. The chapter begins with the Kantian theory on constitutions as a prerequisite for peace. Having established the significant role of constitutions in this regard, the chapter continues with an analysis of peace promoting and peace threatening features in contemporary and past constitutions. The author argues that if we agree that the aim of peace is respect for each and every human being we can more easily identify constitutional features that are detrimental to peace, as these features will not see each human being as an end in itself. The chapter considers particularly three features: comprehensive doctrines, constitutional inequality and weak protection of human rights, and the lack of control mechanisms for impositions by the state. It is argued that a human-centric rather than state- or sovereign-centric constitution will in this regard be a more effective peace-promoting constitution.

In an epilogue (Chapter 20), Maria Sommardahl advocates education for peace, characterized by the UN Secretary-General as 'the road to peace'. The chapter builds on the idea that education on the components of peace, which are discussed in the previous chapters, constitutes a pivotal part of the institutional implementation of peace. The chapter explores and suggests a tangible approach to education for peace and explains its importance for promoting peace. The chapter concentrates largely on different sources from the United Nations and international law that refers to the promotion of peace as to keep in mind the institutional mechanisms to foster peace.

Even with this range of chapters, it must be acknowledged that the book doesn't cover a number of other issues that are also relevant to the promotion of peace in either the negative or the positive sense. For example, the book does not analyse the law of peace agreements.[38] A more fundamental issue that is also omitted is the relationship between democracy and peace. It may be argued that a well-functioning democracy is a fundamental precondition for peace (taken together with economic interdependence and international cooperation to form

[38] For an analysis of peace agreements, see Christine Bell, *On the Law of Peace: Peace Agreements and the Law Pacificatoria* (Oxford: Oxford University Press, 2008) and Christine Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000).

the Kantian triad), yet there is already an impressive amount of literature within the social sciences testing this principle.[39] Other issues omitted concern the international law of self-determination, secession, humanitarian law, disarmament, and the human rights of minorities and indigenous peoples. We selected papers in part based on topics raised at the Nordic Expert Consultation on the Right to Peace. We wish to emphasize to the reader that international law does not only promote peace through a topical and compartmentalized approach; it is international law as a *whole*, as a *system*, that promotes peace. The chapters in this book must be regarded as a representative exemplification of relevant areas of international law, without any claim on behalf of the editors that these are the only relevant areas of international law. Finally, the editors wish to offer this book as a call for a new consciousness to replace the dominant post-9/11 narrative of the 'War on Terror' within international law, instead seeking to revitalize the idea of promoting peace through international law.

[39] Examples of Democracy and Peace literature include Håvard Hegre, 'Democracy and Armed Conflict', *Journal of Peace Research* 51 (2014), 159–72, see also Margaret G. Hermann and Charles W. Kegley J., 'Democracies and Intervention: Is there a Danger Zone in the Democratic Peace?', *Journal of Peace Research* 38 (2001), 237; see also Christopher Layne, 'Kant or Cant: The Myth of the Democratic Peace' 19 (2) *International Security* 19 (1994), 5. On Trade and Peace, see Katherine Barbieri and Gerald Schneider, 'Globalization and Peace: Assessing New Directions in the Study of Trade and Conflict', *Journal of Peace Research* 36 (1999), 387, or Håvard Hegre, John R. Oneal, and Bruce Russett, 'Trade Does Promote Peace: New Simultaneous Estimates of the Reciprocal Effects of Trade and Conflict', *Journal of Peace Research* 47 (2010), 763.