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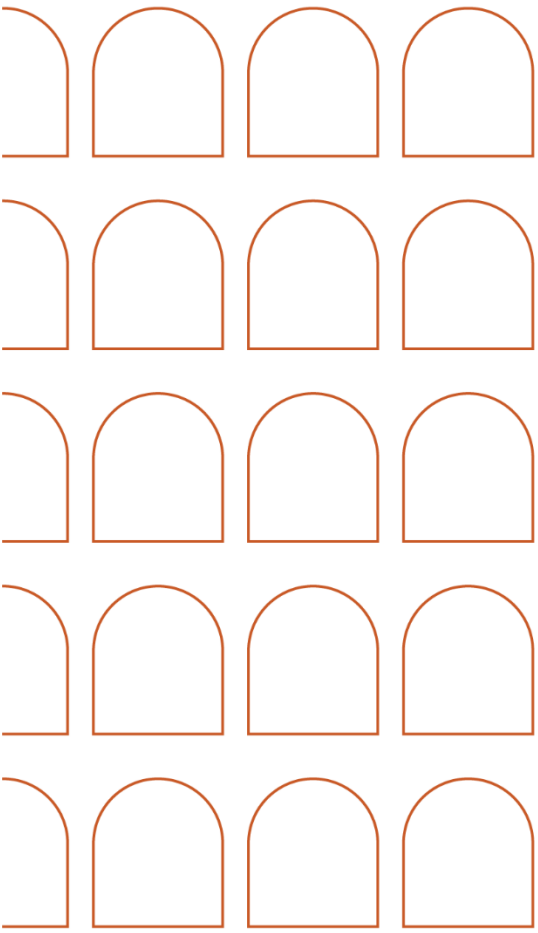

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"Law & Peace": Law, in what sense?

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Abstract

Literature on ‘law and peace’ has grown substantially. One of the explanations may be the flexible way in which the concept ‘law’ has been used. This entry for the forthcoming *Elgar Concise Encyclopedia on Law and Peace*, edited by Louise Mallinder, Rachel Killean and Lauren Dempster, uses five bodies of scholarly work on ‘law and peace’ to illustrate divergences in the conceptualisation of ‘law’. It argues that when reading the literature on ‘law and peace’, it is important to ask the question ‘law, in what sense?’

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Keywords

law, peacemaking, peace, norms, jus post bellum, lex pacificatoria

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1. Introduction: Law, in what sense?

Since the 2000s, scholars have developed labels, categories and norms to express, order and govern practices of 'peacemaking' – a term that rose in prominence in the 1990s as a concept, objective and set of practices of global governance (Nouwen [2023]). Whether developing a **-> '*lex pacificatoria*'**, a **-> '*jus post bellum*'** or 'legal tools', many of these scholarly works have suggested that there is a 'law of', 'law on' or 'law related to' peacemaking. But they seldom specify what they mean by 'law'. Given that 'law' is often invoked to ascribe consequences to conduct, we should ask what the author means by 'law'. This entry uses five bodies of scholarly work on 'law and peace' to illustrate divergences in the understanding of 'law'.

2. Law as positive law

The idea of 'peace through law' is one of the beliefs sustaining the field of international law. The slogan of the International Law Association, for instance, is 'peace and justice through law' (https://www.ila-hq.org/en_GB). Here, the assumption is that law and legal processes, such as arbitration and court proceedings, can prevent and end war. In this understanding, more law and more legal process mean more peace. This idea of peace through law predates (eg Kelsen [1944]) the rise of peacemaking as a global governance practice (Nouwen [2023]).

In the concept 'peace through law', 'law' usually refers to positive law: that which authorized lawmakers have pronounced as law. In international law, positive law is predominantly understood to stem from one of the primary 'sources' in article 38 of the International Court of Justice Statute: treaties, custom, and general principles.

Much scholarship on international law and peacemaking continues in this tradition. It studies, for instance, what the UN Charter provides on peacemaking and whether the practices of UN organs have changed that law (eg White [2021]); what treaties, as interpreted and applied by courts and specialized committees, say on amnesties and whether a customary norm against amnesties has emerged (see eg Mallinder [2008] and Freeman [2009]); and to what extent the Women, Peace and Security agenda is not merely UN policy, but has become positive law (Chinkin [2022]).

3. Norms as political expectations

The concept 'norm' exists in law and political science, but with different meanings. In law, 'norms' are usually understood to refer to legal obligations. In political science, 'norms' have been defined as 'collective expectations about proper behaviour for a given identity' (Katzenstein [1996] 5); these expectations need not be part of positive law.

Political science scholars have observed a proliferation of norms related to peacemaking, especially peace mediation (Hellmüller et al [2015]; Von Burg [2015]; Palmiano Federer [2016]; Pring [2017]; Zeller et al [2017]). Examples are content norms relating to what must be included in peace agreements (eg, democracy promotion, gender equality and transitional justice) and what is not allowed to be included (eg amnesty for international crimes), as well as process norms such as 'inclusivity', according to which certain groups (women, youth) must be included in a peace process while others (eg people sought by the International Criminal Court or

'terrorists') must be excluded. Scholars have identified these norms based on UN documents, speeches and interviews with mediators. These studies focus on political expectations, rather than whether these norms are positive law.

In peacemaking processes, however, the difference between political expectations and positive law can be crucial. When, during the 2006 peace talks between the Government of Uganda and the Lord's Resistance Army, some international actors invoked a norm that one cannot talk peace with the LRA, or more specifically, the LRA members for whom the ICC had issued arrest warrants, the legal advisor to the mediation pointed out that neither the Rome Statute nor any other legal instrument criminalised or prohibited talking (Afako [2006]). Similarly, mediators and negotiators in the peace process between Colombia and the FARC explored the finesses of international criminal law, international human rights law and Colombian constitutional law, to see what exactly the law required in terms of accountability, punishment and victims' rights. In a context of general 'no impunity' and 'no amnesties' political norms, this refined legal analysis allowed them to find the political compromise contained in the 2016 peace agreement.

4. Jus post bellum: moral philosophy, positive law and dominant practices

Those referring to -> ***jus post bellum*** ('jus': 'the law'; post bellum 'after war') have done so with diverging meanings of the concept 'jus', including universal moral standards; positive international law and dominant practices.

When in the early 21st century, moral philosophers and political scientists began to call for a *jus post bellum,* they used the label 'jus' for a moral project: in their view, there should be universal moral standards not only for 'just war', but also for a just end of that war, in other words, a 'just peace' (Orend [2000]; Walzer [2004] 162-8; Bass [2004]).

Some lawyers began to use *jus post bellum* as an umbrella term to cluster *existing* – positive – rules relating to the post-conflict phase, scattered over various branches of international law (Chetail [2009] 18).

Other lawyers, however, aimed to *develop* the 'rules and principles governing peace-making after conflict' (Stahn [2006] 921. See also Osterdahl and Van Zadel [2009]). The lawyers' proposals for a new *jus post bellum* do not discuss in what sense the principles they identified are 'legal' principles. Most 'principles' seem derived from contemporary peacemaking practices. However, whilst practices are important for customary international law, the proposals do not discuss additional classic international law questions that relate to the identification of custom. For instance, can these dominant peacemaking practices be considered the practices of *states*? And are the practices general and uniform? Is there *opinio juris*: a conviction – of states – that the practices are required *by law*. Instead, in many of these proposals, practices are treated as legally normative per se. For instance, heavy reliance is put on what the Security Council authorises administrators to do in specific occupied or internationally governed territories, without explaining why that Security Council practice should have normative weight beyond the specific cases. The proposals do not claim to be identifying customary international law, but they pay hardly any attention to the question what then is legally normative about the practices. In such work, practices prevalent in global governance are thus presented as 'law'.

5. Lex pacificatoria: 'legalization' and a non-essentialist concept of law

The term **-> 'lex pacificatoria'**, 'a law of the peacemakers', was coined by Christine Bell (Bell [2006] and [2008]) and has had significant uptake. Bell used it for two different ideas.

In Bell's 2006 article, *lex pacificatoria* referred to patterns of 'legalization' across peace agreements in terms of what they address; who they are signed by; what they include; and who is involved in their implementation. The article dealt with the tricky question of -> **the 'legal status' of peace agreements** that had been concluded between, on the one side, a government and, on the other side, an armed opposition group or groups. Bell argued that as a matter of international and domestic law, it is hard to fit peace agreements in existing legal categories. This led Bell to shift from the positivist method, which answers the question as to the legal status of most of the analysed agreements as 'none' (Ozcelik [2020]), to a concept developed in international relations theory: 'legalization' (Abbott et al [2000]). She argued that peace agreements are 'legalized', referring to the fact that peace agreements 'appear' to be legal agreements, have 'legal-type' language and often give roles to third party actors. She concluded that this 'legalization' amounts to an emerging *lex pacificatoria*, a variation of the concept *lex mercatoria*, which refers to the commercial norms developed by merchants.

In her 2008 book, Bell expanded the concept of *lex pacificatoria* not just to cover the characteristics of peace agreements, but also to refer to bodies of international law that had been adjusted to the context of peace negotiations: a 'new law of self-determination', 'a new law of transitional justice' and a 'a new law of third party enforcement' (Bell [2008] 287). Bell's reference to 'law' in this context was inspired by Brian Tamanaha's argument for a non-essentialist, conventionalist, concept of law (Bell [2008] 296): 'Law is whatever people identify and treat through their social practices as "law" (or recht, or droit, and so on)' (Tamanaha [2000] 313).

As a study of characteristics of peace agreements, *lex pacificatoria* has been valuable, but the link to law - whether positive law, the IR concept of legalization or a non-essentialist understanding of law - has been weak. As a matter of positive law, it is not the case that law cannot 'accommodate' peace agreements with non-state actors: law may not give them legal status, but even the category of non-law is created and recognised by law. Positive law can 'accommodate' non-law and even give legal effects to it.

The concept of legalization is not apt to answer or even approximate the question of legal status either. The international relations scholars who theorised 'legalization' were not interested in the question of legal status: they wanted to move beyond the binary law/not-law and therefore developed a multidimensional continuum, according to which institutions could be labelled as more or less 'legalized'. The three criteria shaping their continuum were precision, delegation and obligation. By 'obligation' they meant being '*legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well'. Thus, whilst the IR scholars moved away from the dichotomy law/non law to a continuum of more or less legalized according to these three criteria, they did not, contrary to what Bell suggested, propose the concept of '"legalization" as more useful to understanding an agreement's *legal status*' (Bell [2006] 385). In fact, for the IR scholars, the degree of legalization depends on, rather than answers, the question of legal status, to the extent that the indicator 'obligation' depends on legal status.

Tamanaha's non-essentialist concept of law *could* be the basis of a *lex pacificatoria* but requires in-depth socio-legal research, exploring, for instance: do the parties involved in the peace talks see themselves engaged in a 'legal' process? Do they speak of these agreements

as ‘legal’ texts? Do they call them ‘law’? The answers to these questions cannot be derived from merely looking at the texts of peace agreements: the fact that they look like law to the observer does not mean that the actors concerned identify and treat them as law. Without this detailed, case-by-case sociolegal research, it is hard to conclude that there is a ‘*lex pacificatoria*’ or ‘law of the peacemakers’ in a conventionalist understanding of law.

In sum, the concept of ‘law’ that underpins the *lex pacificatoria* remains ambiguous.

6. ‘Legal tools’: law as that what lawyers do

Other lawyers, who developed a database of peace agreements similar to Bell’s *PA-X*, referred to their database as ‘a legal toolkit’ (Lauterpacht Centre [2012]), raising the question what is ‘legal’ about it. The *Language of Peace* does not establish the normativity of the practice it collates: it presents as ‘legal tools’ provisions from peace ‘agreements’ that have never seen the light of day; we do not learn why the text was included in a peace agreement, for whom, and what it served. Nor does the database specify the legal status of that practice, so this toolkit cannot be ‘legal’ in the sense of containing the law that governs peace negotiations. Likewise, given the absence of an assessment of **-> the legal status of the agreements** included in the database, ‘legal’ cannot be read as suggesting that these are provisions that are part of, in some way, legally binding texts. Rather, ‘legal’ in ‘legal toolkit’ seems to refer to ‘what and how lawyers tend to write’.

7. Epilogue

The booming literature on law and peacemaking can in part be explained by the rise of peacemaking as a phenomenon of global governance. Another factor may be the flexible way in which the concept ‘law’ has been used, as illustrated by the prominent projects discussed above. At the same time, it is remarkable how close this literature on law and peace has stayed to positive law: recognized as law is mostly that what *looks like* positive law (agreements; provisions in Security Council resolutions; lawyerly writing). There has been little attention for law related to other forms of peacemaking: peacemaking in churches, under trees, through joint governance. Whilst many of the scholarly projects discussed above thus deviate from positivism, they are not instantiations of **-> legal pluralism**.

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