

Pacigerence: Legal Status of Peace Agreements Under International Law^{*,**}

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Abstract

In the past, peace processes between a State and an irregular armed group were considered as internal matters and, therefore, were not regulated by international law. During the last decades, though, these processes have had a growing international dimension due, among other reasons, to the possible legal status of peace agreements under international law. This article explores the existing legal instruments which may confer binding force to such agreements at the international level—an international treaty between a State and an insurgent group, an international treaty signed by a State and third-party States, a special agreement under international humanitarian law, a UN Security Council resolution, and a unilateral declaration of a State—. Given the uncertainty regarding

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the effects of these current legal instruments, this paper raises the notion of *pacigerence*, which is based on *lex pacificatoria* and *jus post bellum*, as well as the Colombian experience. *Pacigerence* grants an insurgent group legal personality in order to negotiate and sign peace agreements with the same rights and duties as a State, so that those peace agreements can be understood as true, binding treaties.

Keywords

Legal status, peace agreements, international law, Colombia, *pacigerence*, *lex pacificatoria*, *jus post bellum*.

Pacigerancia: el valor jurídico de los acuerdos de paz en el derecho internacional

Resumen

En el pasado, los procesos de paz entre un estado y un grupo armado irregular eran considerados un asunto interno, por lo cual el derecho internacional no los regulaba. En las últimas décadas dichos procesos han tenido una creciente dimensión internacional, debido, entre otras razones, al posible valor jurídico de los acuerdos de paz en el derecho internacional. Este artículo explora las categorías jurídicas existentes que pueden otorgarles fuerza vinculante a esos acuerdos en el ámbito internacional —un tratado internacional entre el Estado y el grupo insurgente, un tratado firmado por el Estado y terceros estados, un acuerdo especial humanitario, una resolución del Consejo de Seguridad de la ONU y una declaración unilateral del Estado—. Ante la incertidumbre acerca de los efectos de los instrumentos jurídicos actuales, el artículo plantea la noción de *pacigerancia*, que se basa en la *lex pacificatoria* y el *ius post bellum*, así como en la experiencia colombiana. La *pacigerancia* le concede al grupo insurgente la personalidad jurídica para negociar y firmar la paz con los mismos derechos y deberes que tiene el Estado, con el fin de que esos acuerdos de paz puedan ser entendidos como verdaderos tratados vinculantes.

Palabras clave

Valor jurídico, acuerdos de paz, derecho internacional, Colombia, *pacigerancia*, *lex pacificatoria*, *jus post bellum*.

The international legal status of a peace agreement signed between a State and an irregular armed group is a controversial and uniquely important issue as international law has no clear rules on the nature and legal effects of these agreements, and peace negotiations to end civil wars have increased in the last decades. Indeed, between 1990 and 2010, six hundred peace agreements were signed in approximately ninety countries.¹ However, it is reasonable to assume that the uncertainty about the legal effects of these agreements may have negative implications for their effective

1 Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008).

implementation, as there would be controversies over their binding effects, which, in turn, could jeopardize the stability of peace. Several comparative studies show that the success of peace processes depends, to a large extent, on ensuring the implementation of the peace agreements in a sustained and sustainable manner.²

Naturally, the entire peacebuilding enterprise does not necessarily depend on whether the legal effects of peace agreements are clear or binding under international law. Other factors, such as political support for peace³ or the persistence of illegal economies, are much more decisive.⁴ However, recognizing the specific international legal effects of these peace agreements may facilitate their implementation and increase the chances of consolidating peace. This is key, as the risk of these peace agreements failing is already high. According to the Uppsala Conflict Data Program and the Peace Research Institute Oslo⁵, 45% of the peace agreements signed between 1989 and 2004 failed within the first five years of their implementation. Simon Fraser University has also shown that 32% of the peace agreements signed between 1950 and 2004 did not consolidate into a stable peace, as these were followed by residual or recurrent violence.⁶ Similarly, Westendorf points out that, in almost half of the cases, the States returned to civil wars during the first five years of peace agreement implementation.⁷

In this context, however, legal literature has only studied the terms, structure, and legal nature of certain peace agreements in specific cases. However, their legal nature and regulatory effects have been less studied. This article aims to contribute to these discussions by referring to some of the debates in which we participated during the peace negotiations between the Colombian State and the FARC-EP. It also analyzes the possible legal forms through which international law can give legal force to these peace agreements, contributing to their implementation and increasing the chances of achieving a stable peace.

This article is divided into two sections. The first section examines the current concepts of international law that may give legal effects to peace agreements, showing their possibilities and limitations. We conclude that none of these mechanisms alone fulfills this purpose. Based on this observation, the second section proposes *pacigerence*, a concept that grants irregular

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- 2 Caroline Hartzell, Matthew Hoddie and Donald Rotchild, "Stabilizing the Peace after Civil War: An Investigation of Some Key Variables", *International Organization* 55, no. 1 (2001): 183-208, <https://doi.org/10.1162/002081801551450>; Stephen John Stedman, "Implementing Peace Agreements in Civil Wars: Lessons and Recommendations for Policymakers," *IPA Policy Paper Series on Peace Implementation* (2001).
 - 3 Summit Bisarya, Carrie Manning, Victoria Perotti and Seema Shah, "Inclusive peacebuilding in conflict-affected states: designing for democracy's resilience", in *The Global State of Democracy: Exploring Democracy's Resilience*, edited by International Institute for Democracy and Electoral Assistance (Stockholm: International Institute for Democracy and Electoral Assistance, 2017).
 - 4 Amelia Broodryk and Hussein Solomon, "From War Economies to Peace Economies in Africa", *Scientia Militaria: South African Journal of Military Studies* 38, no. 1 (2010): 1-24, <https://www.ajol.info/index.php/smsajms/article/view/55852/44316>; Oliver P. Richmond. "The Problem of Peace: Understanding the 'Liberal Peace'," *Conflict, Security & Development* 6, no. 3 (2006): 291-314, <https://doi.org/10.1080/14678800600933480>.
 - 5 Uppsala Conflict Data Program and Peace Research Institute Oslo (2009). *Armed Conflict Dataset Version 4*. Retrieved from Program and Peace Research Institute Oslo website: <https://www.pcr.uu.se/research/UCDP/>.
 - 6 Simon Fraser University, *Human Security Report 2012* (Burnaby: Simon Fraser University, 2012).
 - 7 Jasmine-Kim Westendorf, *Why Peace Processes Fail: Negotiating Insecurity After Civil War* (Boulder: Lynne Rienner Publishers, 2015).

groups a limited legal personality to sign peace. The text ends with a few brief conclusions on the legal and political potential of this concept, as well as some foreseeable challenges.

1. THE CURRENT OPTIONS

We now proceed to examine the possibility of granting international legal force to peace agreements by discussing some of the current legal existing instruments in international law: (i) a treaty between the State and the insurgent group; (ii) a treaty between the State involved in an internal armed conflict and third-party States; (iii) special humanitarian agreements; (iv) a United Nations Security Council resolution; or (v) a unilateral declaration of State.

1.1. An International Treaty Between the State and the Insurgent Group

According to the Vienna Convention on the Law of Treaties, a treaty must be signed between two subjects of international law. This raises the question of whether a peace agreement between a State and an armed group can constitute an international treaty, since the former has full legal personality while the latter does not. Lang believes that there is a precedent in the International Court of Justice (ICJ) relevant to this matter:⁸ the case of *Armed Activities on the Territory of the Congo (the Democratic Republic of the Congo v. Uganda)*.⁹

In this case, the ICJ decided on whether the Republic of Uganda violated specific international prohibitions by occupying a part of the Democratic Republic of Congo (DRC), referring to the Lusaka Ceasefire Agreement, signed by Angola, the DRC, Namibia, Rwanda, Uganda, and Zimbabwe on July 10, 1999. Later, on August 1 and 31, 1999, the agreement was ratified by the Movement for the Liberation of the Congo and fifty members of the Rally for Congolese Democracy, respectively.

In its judgment, the ICJ decided, among other issues, that Uganda violated the principles of non-use of force in international relations and non-intervention. Notably, the Court asks whether the Lusaka Agreement constituted consent by the DRC to endorse the armed presence of Uganda, but responded negatively for there is no explicit consent on the matter in said agreement. On the contrary, the Court found that the Lusaka Agreement contains some provisions for operating ceasefires and the withdrawal of troops, which do not translate into Congo's assent to the Ugandan occupation. In these terms, the Court understands that the agreement represents a *modus operandi* agreed to by the parties for a ceasefire.¹⁰

8 Andrej Lang, "'Modus operandi', 'Lex pacificatoria' and the ICJ's appraisal of the Lusaka Ceasefire Agreement in the Armed Activities on the Territory of the Congo Case More than just Latin lessons: The Role of Peace Agreements in International Conflict Resolution," *ILJ Emerging Scholars Paper 2*, (2007): 1-36, <http://ilj.org/wp-content/uploads/2016/08/Lang-Modus-operandi-Lex-pacificatoria-and-the-ICJ%E2%80%99s-appraisal-of-the-Lusaka-Ceasefire-Agreement-2007.pdf>.

9 See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, I. C. J. Rep. 2005 (Dec. 19). Available at <https://www.icj-cij.org/en/case/116>.

10 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, cit., para. 99.

Lang argues that this precedent does not recognize the status of peace agreements as legally binding treaties, but rather, that of a mere *modus operandi*.¹¹ For Lang, this distinction has significant consequences in the international legal force of peace agreements, since it downgrades their status as legally binding agreements because they are unsuitable for constituting consent between the signatories.¹² This decision shows that there is no consensus on the legal status of these agreements or on their nature as international treaties.

Now, the question of the possible nature of these kinds of peace agreements as international treaties is more complex. Upon reading Article 2 of the Vienna Convention, the answer is no, since one of the parties—the armed group—is neither a State nor an international organization. However, Article 3 of the Convention could authorize these types of treaties, for it refers to international agreements between States and “other subjects of international law,” raising the question of whether the armed group could be considered as such or as having some degree of international legal personality.

Regarding this matter, there is no broad consensus within the international doctrine. Conceptions are divided into three groups: (i) those who assert that armed groups are only subjects of international humanitarian law (IHL), but not of international law; (ii) those who argue that such groups have limited legal personality; and (iii) those who assert that certain insurgent groups do have legal personality to enter into international agreements.

Those in the first group, on the one hand, argue that armed groups being subjects of IHL does not imply them being full subjects of international law. According to the Geneva Conventions, the parties to an internal armed conflict are bound to comply with IHL, which “shall not affect the legal status of the Parties” (Common Article 3).¹³ Based on this rule, Cassese recognizes that armed groups are subjects of IHL, without implying that they have full legal personality under international law.¹⁴ According to different scholars, the binding force of IHL on armed groups is construed via the “doctrine of legislative jurisdiction,”¹⁵ which establishes that IHL applies to these groups by virtue of the fact that the State in which they operate has accepted the IHL framework in its capacity to legislate for all citizens. Other arguments claim that the binding force of IHL on armed groups does not rely upon the state sovereignty argument and, by contrast, it is based on their *de facto* governmental functions¹⁶, as well as their limited legal personality.¹⁷

11 Lang, “Modus operandi”, 5.

12 Ibid. 10.

13 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Geneva and Cambridge: International Committee of the Red Cross and Cambridge University Press, 2005).

14 Antonio Cassese, *The Status of Rebel under the 1977 Geneva Protocol on Non-International Armed Conflict* (Cambridge, Cambridge University Press, 1981).

15 Lindsay Moir, *The Law of Internal Armed Conflict* (Oxford: Oxford University Press, 2002); *Nicaragua v. United States of America* (Military and Paramilitary Activities in and against), (International Court of Justice, June 27, 1986).

16 Jean Pictet, *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), 37.

17 International Commission of Inquiry on Darfur. Report of the International Commission of Inquiry on Darfur the United Nations Secretary-General in response to United Nations Security Council Resolution 1564, 2005; Jann Kleffner. “The applicability of international humanitarian law to organized armed groups,” *International Review of the Red Cross* 93, no. 882 (2011): 443-461, Doi: 10.1017/S181638311200001X.

On the other hand, Sivakumaran argues that insurgent groups with some degree of organization, stability, and territorial control are granted international legal personality due to their *jus contrahendum*¹⁸, by which they are entitled to sign international agreements and, thereby, bind themselves to such pacts. Along the same line, Bell argues that insurgent groups enjoy a sort of international legal personality granted by international humanitarian law.¹⁹

In between, Alston,²⁰ Sassòli,²¹ Sassòli, Bouvier and Quintin,²² Waschefort,²³ and Zegveld²⁴ recognize a limited legal personality for armed groups. They assert, first, that armed groups are bound to the IHL independently of the State, and, second, that it is not possible to argue that these groups are bound under the IHL without also recognizing some legal personality. Therefore, to the extent that the armed groups are bound under IHL, they also have legal capacity and, in turn, legal personality. This personality, however, is limited, as it only allows them to be the subjects of obligations, yet not rights.²⁵

However, the recognition of such limited personality for insurgent groups is varied. For example, Lauterpacht mentions that the State may autonomously recognize these groups as international subjects and, therefore, as subjects of IHL obligations.²⁶ Watson, in turn, mentions that a limited legal personality has been granted to some groups in international practice, such as in independence or liberation movements (namely, Mozambique, Guinea-Bissau and Angola, among others).²⁷ For instance, as this author points out, by signing the Oslo Accords with the State of Israel (1993), the Palestine Liberation Organization (PLO) acted as a subject of international law. Indeed, Watson finds some similarities between the PLO and the liberation movements which have been granted legal personality in the past.²⁸ Additionally, how this group relates to some of Israel's neighboring States confirms that the PLO has been recognized as a subject of international law by a sector of the international community.

Other actors have questioned this position. Particularly, Sabel believes that, in the Oslo Accords, the PLO did not act as a subject of international law because the accords are not

18 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012).

19 Bell, *On the Law of Peace*, 130-131.

20 Phillip Alston, *Non-State Actors and Human Rights*, (Oxford: Oxford University Press, 2005).

21 Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law," *Journal of International Humanitarian Legal Studies* 1, no. 1 (2010): 5-51, <https://doi.org/10.1163/187815210x12766020139767>.

22 Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?* (Geneva: ICRC, 2011).

23 Gus Waschefort, "The Pseudo Legal Personality of Non-State Armed Groups in International Law," *South African Yearbook of International Law*, 36 (2011) 226-236, <https://ssrn.com/abstract=2466126>.

24 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (New York: Cambridge University Press, 2002).

25 Waschefort, "The Pseudo Legal", 235.

26 Hersch Lauterpacht, "The Subjects of International law," in *International law. Being the collected papers of Hersch Lauterpacht, vol. I: The General Works*, edited by Hersch Lauterpacht (Cambridge: Cambridge University Press, 1970), 136-137.

27 Geoffrey Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford: Oxford University Press, 2010).

28 Idem.

considered bilateral acts under international law.²⁹ For Sabel, such peace agreements may have legal effects at the international level via the action of the only party with a legal personality: the State. Through a unilateral declaration, the State bound not only itself but also the PLO to the peace accord, conditioning its compliance to the armed group's obedience to its obligations under the agreement.

Understanding a peace agreement as a treaty would give the agreement a precise legal force at the international and domestic levels, thus offering guarantees of compliance to the State and the armed group, as both parties would be internationally bound. However, there are legal difficulties due to the different statuses of the negotiating parties in the face of international law. While it is broadly accepted that States enjoy full legal personality, such capacity for a non-belligerent group —i.e. the vast majority of armed groups— remains controversial. For this reason, some authors, such as Bell, believe that peace agreements with insurgent groups do not constitute international treaties in themselves but, at the same time, recognize that these documents are a particular source of international law.³⁰

1.2. An International Treaty Between the State and Third-Party Countries

A second possibility is to resort to a treaty between the State signing the peace agreement and third countries, granting the agreement international legal force through its inclusion in the treaty.³¹ For this approach, Cyprus is an illustrative and comparative case, though it is not an example of a successful peace process.

In 1960, the Republic of Cyprus, Turkey, Greece, and the United Kingdom of Great Britain and Northern Ireland signed the Treaty of Guarantee,³² with the last three countries acting as international negotiators. In general, the agreements set out obligations for Cyprus to ensure its independence, territorial integrity, and security, as well as respect for its Constitution. Greece, Turkey, and the United Kingdom note these commitments and, in turn, agree to forbid any action against the territorial integrity, security, and independence of Cyprus. While compliance with this agreement has been controversial for a variety of reasons, its legal validity has not been called into question.³³ Another example is the Dayton Agreement.³⁴

29 Robbie Sabel, "Book review of 'The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements. By Geoffrey R. Watson'," *The American Journal of International Law* 95, no. 1 (2001): 248-252, doi:10.2307/2642067.

30 Christine Bell, "Peace Agreements: Their Nature and Legal Status," *The American Journal of International Law* 100, no. 2 (2006): 373-412, <http://www.jstor.org/stable/3651152>.

31 Scott P. Psheran, "International Law, Peace Agreements and Self-Determination: the case of the Sudan," *International and Comparative Law Quarterly* 60, no. 2 (2011): 423-458, <https://doi.org/10.1017/S0020589311000091>.

32 The agreement may be downloaded at http://www.mfa.gr/images/docs/kypriako/treaty_of_guarantee.pdf.

33 Ministry of Foreign Affairs, Republic of Turkey. EU and Cyprus: An Expert View Opinion of Professor M.H. Mendelson Q.C on the Application of "the Republic of Cyprus" to Join the European Union Page 3 The Law (s. f.). Retrieved from <http://www.mfa.gov.tr/page-3-the-law.en.mfa>.

34 Paola Gaeta, "The Dayton Agreements and International Law," *European Journal of International Law* 7, (1996): 147-163, <http://www.ejil.org/pdfs/7/2/1358.pdf>.

Through this legal route, then, an insurgent group could be bound to the international treaty as a third party, and thus, be bound at an international level. Articles 34 to 36 of the Vienna Convention mention that international treaties may create obligations or rights for third parties if (i) the parties intend the treaty to have these effects, and (ii) the third-party country consents to these effects. However, this technique has political difficulties. There is no certainty that third-party countries will accept entering into a treaty of this nature, and the transitioning society may see this alternative as an unacceptable external tutelage or encroachment by other States.

1.3. Special IHL Agreements

One could argue that peace agreements can acquire legal status under international law to the extent that they are agreed to as a Special IHL agreement, set forth in Common Article 3 of the Geneva Conventions. Common Article 3 authorizes the parties to an internal armed conflict to enter into these special agreements, giving effect to all or part of the IHL provisions. These agreements, which seek to strengthen compliance with IHL in a non-international armed conflict, need not emerge in specific forms, and therefore, can be expressed in documents, joint declarations, or in any other way that the parties decide.³⁵

Importantly, however, special agreements grant all parties equal treatment —insurgent groups are considered subjects of IHL, though this does not imply that they are full subjects of international law.³⁶ Therefore, a non-state armed actor may, therefore, subscribe to a special humanitarian agreement that would have the legal effects and value of a special agreement, providing an attractive path to give international legal force to a peace accord. However, two crucial questions arise.

First, the special agreements of Common Article 3 are mainly provided to reinforce compliance with IHL —i.e., the rules regulating hostilities and protecting the non-combatant population. However, the peace agreements seek to end hostilities and the armed conflict, not to regulate how all warring parties must act to respect the IHL. Therefore, do peace agreements fall within the scope of the special IHL agreements?

Second, the content of some peace agreements can be broad-reaching, such as the one signed in Colombia between the Government and the FARC-EP, which includes not only provisions to end the armed confrontation—the ceasefire, the disarmament and the demobilization of the guerrilla, among others— but also holistic institutional and democratic reforms —e.g., integral agricultural development and political participation issues (points 1 and 2 of the Final Peace Agreement, respectively). The question is, then, whether such thematically broad accords may be considered as special IHL agreements.

These questions led some scholars and practitioners to doubt that the peace agreements seeking the end of the war and including far-reaching institutional reforms can be considered special IHL agreement. Moreover, an additional concern arises: the international legal force of special IHL agreements remains uncertain.

35 Ezequiel Heffes and Marcos D. Kotlik, “Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime,” *International Review of the Red Cross* 96, no. 895-896 (2014): 1194, <https://doi.org/10.1017/S1816383115000788>.

36 *Ibid.* 1201.

Indeed, relevant literature has formulated at least three ways to regulate the legal force of a special agreement: (i) domestic law, (ii) a *sui generis* legal regime, and (iii) international law.³⁷ According to the first position, the creation of international law is exclusively reserved for those with full legal personality, such as States. Therefore, insurgent groups are obliged to follow IHL rules—and, therefore, special agreements—because they are part of the State in which they operate. This argument faces critical concerns as, from a political point of view, it implies recognizing an unequal relationship between the State and these groups, affecting the guarantee of compliance with special agreements by privileging the State's position.

The second option claims that the current global dynamics of internal armed conflicts have promoted the emergence of a *sui generis* legal regime, which some call *lex armatorum*.³⁸ From this perspective, insurgent groups can create a new legal regime whose effects in the national or international sphere has not been determined until now. Criticisms of this option range from denying the possibility of creating a legal regime that is independent of the normative production of States to questioning the factual feasibility of guaranteeing the wills of the parties—in particular, of the States—to bind themselves and abide by what has been agreed.³⁹

The third avenue resorts to traditional international law to regulate special agreements, including international treaties. However, this option faces obstacles, as the legal status of non-state armed groups under international law is not peaceful. Additionally, some special agreements contain provisions not only pertaining to IHL matters, but also relevant to other subjects regulated by distinct legal frameworks, such as international human rights law. Therefore, regulating peace agreements through a single normative body or precept is a difficult endeavor.

In this context, Heffes and Kotlik argue that special agreements should not be understood under the perspective of traditional institutions of international law.⁴⁰ Instead, they propose that special agreements can be seen as an authoritative decision made by parties interacting under international law, who intend to bind themselves to a set of rules designed to regulate those interactions.⁴¹ This view, unlike the previous ones, avoids the distinction between subjects and objects of international law. Rather, this proposal welcomes the idea that international rights and obligations stem from the continuing process of authoritative decision-making by actors involved. In this sense, special agreements are regulated by international law in general, not by a specific legal institution. The parties are treated as equals, thus avoiding the discussion of their legal status in the international arena.

To summarize, the preceding analysis showed that this route has disadvantages, as it is not clear that peace agreements are regarded as a form of special IHL agreement. There is also no certainty about the legal force of these special agreements. However, this route does have advantages, because the equivalent legal treatment of the State and the insurgent group in the special agreements avoids the debate on the legal personality of the latter under international law, which also favors the fulfillment of the agreements between the parties.

37 *Idem*.

38 *Idem*.

39 *Ibid.* 1216.

40 *Ibid.* 1218.

41 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994).

1.4. Unilateral Declaration of State⁴²

A novel, relatively unexplored, albeit promising, route to give normative force to peace agreements is the unilateral declaration of State. As far as we understand, no case has expressly resorted to a unilateral declaration of State⁴³ to provide legal force to peace pacts between a State and a non-state armed group. Some authors hold that this was the legal mechanism by which the Oslo Accords between Israel and the PLO became enforceable. Notably, as above-mentioned, Professor Sabel has maintained this thesis. He considers it unnecessary to delve into the complex and controversial issue of whether or not the PLO was granted international legal personality in order for the Oslo Accords to have international legal force,⁴⁴ since these Accords derived from a conditional unilateral declaration of Israel, who agreed to comply with the agreement as long as the PLO complied with it. According to Sabel, a State may acquire the international commitment of complying with a peace agreement with a non-state actor through a unilateral declaration as long as the non-state actor also complies with it. For the State, this would be a “binding commitment under international law,”⁴⁵ though it is a conditional commitment. As we explain below, this option is attractive for the regulatory force of unilateral declarations is clear.

The sources of international law provided under Article 38 of the ICJ Statute do not mention unilateral declarations of the States. This, however, does not limit their legal force for the sources mentioned therein are included in a merely enunciative, but in no case exhaustive, fashion.

This was the understanding of the Special Rapporteur⁴⁶ on Unilateral Acts of States in his first report, making a distinction between the formal sources of international law and international obligations. While the former are the techniques to establish international law, the latter constitute the contents of the instruments resulting from formal sources. Based on this difference, we can understand that States have the power to create obligations through unilateral declarations that may or may not follow forms that do not necessarily coincide with the sources set out in Article 38.⁴⁷

The ICJ has mentioned that unilateral declarations of the States create international obligations. In *New Zealand v. France*,⁴⁸ on December 20, 1974, the ICJ received a request to order France to cease atmospheric nuclear tests in the Pacific Ocean, as they were incompatible with international law. The ICJ ruled that there was no reason to give any decision on the matter, as New Zealand’s request had been resolved when France agreed to end the nuclear tests in a

42 We would like to thank Professor Juana Acosta of Universidad de La Sabana and our colleague Mauricio Albarracín for showing us the importance of unilateral declarations for this debate.

43 Advisory Opinion dated July 22, 2010 on the Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, 2010.

44 Sabel, “Book review of ‘The Oslo Accords’...”.

45 Ibid. 251.

46 For some background to the discussion of unilateral acts as source of obligations in international law, see: http://legal.un.org/ilc/summaries/9_9.shtml.

47 Víctor Rodríguez Cedeño, *Document A/CN.4/486. First report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur* (1998). Retrieved from United Nations General Assembly: http://legal.un.org/docs/?path=..ilc/documentation/english/a_cn4_486.pdf&lang=EFSX, para 80-81.

48 For more on the case, see www.icj-cij.org/docket/?sum=317&code=nzf&p1=3&p2=3&case=59&k=6b&p3=5.

public declaration made in 1974. For the Court, these statements were valid and binding for France. In this line, the ICJ argued that unilateral declarations create legal obligations for the international entity issuing them if such is their intention and if specific requirements are met.⁴⁹ These acts, like others under international law, are governed by the principle of good faith. Therefore, once a State has clearly and publicly expressed its intention of being bound, it must comply with these obligations and other States may legally require them to do so.⁵⁰

Just like other precepts under international law, unilateral declarations must meet some conditions to be valid. These requirements are contained in ICJ jurisprudence—particularly in the case mentioned above—and in the governing principles established by the International Law Commission (ILC) in its 2006 Yearbook.⁵¹

First, States are subjects that may be bound by unilateral declarations. For this, the unilateral declaration must be made by an authority vested with the power to do so, such as Heads of State, Heads of Government, and ministers of foreign affairs.

Second, the declaration must respect international law, so a unilateral declaration by which a State seeks to circumvent an international obligation would be null and void.⁵² Similarly, the purpose must be concrete, specific, and precise. These conditions arise from *New Zealand v. France*, ICJ, paragraphs 43 and 51.

Third, States must intend to be internationally bound,⁵³ which distinguishes the field of political declarations from those which constitute unilateral declarations with effects in the international sphere. This was the understanding of the ICJ in *Nicaragua v. the United States of America*,⁵⁴ as mentioned by Yamel and Henkel.⁵⁵ The Court decided that the public declarations by Nicaragua to call democratic elections in a certain period did not create an international obligation, as the Nicaraguan State expressly warned that this declaration would only be valid at the domestic level.

Fourth, declarations giving rise to unilateral declarations of States need not take any specific form. These may be formulated orally or in writing, but they must be public to the international community or, at least, to another subject of international law.⁵⁶ Therefore, the publicity of the unilateral declaration is a constituent element of the act,⁵⁷ though it does not mean that other States must accept the unilateral declaration.

49 *New Zealand v. France* (International Court of Justice, December 20, 1974).

50 *Idem*.

51 United Nations General Assembly. *Official Document A/61/10. Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations* (2006). Retrieved from <https://documents-ddsny.un.org/doc/UNDOC/GEN/G06/636/23/PDF/G0663623.pdf?OpenElement>.

52 Mónica Yamel and Naime S. Henkel, “Ending the Spiral of Chaos: Regulation of Unilateral Legal Acts of States,” *Anuario Mexicano de Derecho Internacional* 12, (2012): 644, <http://dx.doi.org/10.22201/ij.24487872e.2012.12.408>.

53 *Ibid.* 645.

54 *Nicaragua v. United States of America* (Military and Paramilitary Activities in and against), (International Court of Justice, June 27, 1986).

55 Yamel and Henkel, “Ending the Spiral of Chaos,” 646.

56 *Ibid.* 648.

57 United Nations General Assembly, *Official Document A/CN.4/500. Second Report on Unilateral Acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur* (1999).

Finally, as mentioned in the ninth report by the Special Rapporteur on the matter,⁵⁸ States are entitled to limit the duration, suspend, amend, or revoke their unilateral declarations if the intent to do so was clearly expressed at the time when the act was formulated.

A unilateral declaration that fixes the term for its execution through a resolutive condition does not alter the legal nature of the unilateral declarations, but conditions the execution of the obligations deriving from it. The resolutive condition ends the fulfillment of the obligation but does not affect its origin, as these arise with the unilateral declaration of State and, therefore, are binding on the State from that moment. Thus, in these scenarios, a conditioned unilateral declaration emerges.

Unilateral declarations, as other state actions under international law, are guided by the principle of good faith; therefore, States must comply with the obligations contained therein. Furthermore, this implies that the amendments to unilateral declarations are limited. For Yamel and Henkel,⁵⁹ if the amendment increases the unilateral obligations, a new unilateral declaration is created. However, if the amendment limits the obligations, it is considered as a revocation of the unilateral declaration. It is, therefore, necessary to analyze under which conditions and with which guarantees it is admissible for a State to revoke its unilateral declarations. There is controversy on this matter. Yamel and Henkel argue that once the State constitutes the international obligations, it may limit how the declaration can be revoked, provided it is not an arbitrary revocation.⁶⁰ However, doubts remain. For example, if the unilateral declaration was expressed before the entire international community, is the consent of the entire international community required for the State to revoke it? Or, if the legal obligations acquired under the declaration affect certain States, does revoking the act require their consent?

Concerning the latter issue, guiding principles specify that a revocation is not arbitrary if, among other factors, takes into account “the subjects to whom the obligations are owed” (Principle 10). Although these principles do not make any explicit requirement for the consent of the subjects affected by the obligations created by the unilateral declaration, these do not exclude the consideration of the addressees of those duties at the time of revoking the unilateral declaration. This is further reinforced if the act in question not only creates obligations for the State but also rights for third parties. In this scenario, it would be clear that the revocation must take the beneficiaries of those rights into account.

The preceding discussion shows the advantages and shortcomings of granting legal validity to peace agreements under international law through unilateral declarations of the State. First, this legal mechanism circumvents a discussion on the legal status of insurgent groups at the international level. However, this could also be seen as a disadvantage. The question that arises is: how to bind these armed groups to peace agreements under international law if the agreement takes legal form in a unilateral declaration of State in which they do not intervene?

Second, a unilateral declaration guarantees the State’s compliance in favor of the armed group, which is essential for the latter’s demobilization. However, at first glance, one might think that the same does not apply to the State because the insurgent group does not participate

58 United Nations General Assembly. *Official Document A/CN.4/569 and Add.1. Ninth Report on Unilateral Acts of States*, by Víctor Rodríguez Cedeño, *Special Rapporteur* (2006).

59 Yamel and Henkel, “Ending the Spiral of Chaos,” 648.

60 *Ibid.* 649.

in the creation of the unilateral declaration, so the compliance by that group might not be guaranteed. However, this difficulty can be overcome when making the unilateral declaration, since the State may fix the term of compliance with its obligations under a resolutive condition: The State undertakes to comply with the peace agreement as long as the armed group also complies with its duties. As aforementioned, this resolutive condition does not limit the creation of obligations for the State when making the declaration, yet establishes a timeframe for their execution.

Third, unilateral declarations have clear regulatory force. As mentioned earlier, in *New Zealand v. France*, the ICJ stressed that these instruments create international obligations for the State issuing them; hence, there is legal certainty on the type of obligations acquired by the State in international law.

1.5. A Binding Resolution by the Security Council⁶¹

Last, peace agreements may acquire a binding force in the international sphere through their adoption in resolutions by the United Nations Security Council. This is not an unusual form. United Nations Security Council resolutions have been used as a means of resolving various armed conflicts, such as those in Rwanda⁶² and East Timor.⁶³ For the first case, Resolution 955 of 1994 established the International Criminal Tribunal for Rwanda and its rules of procedure. For the second case, Resolution 1272 of 1999 created the United Nations Transitional Administration in East Timor, providing an interim government.

According to Aksu, the intervention of the Security Council in armed conflicts has developed substantially as an *ad hoc* mechanism.⁶⁴ These actions began amidst the Cold War, and have increased since the 1990s.⁶⁵ Also, these interventions have included all kinds of actions, ranging from small-scale observation missions to interventions adopted as enforcement measures which, on occasion, have resorted to force and include traditional actions such as supervising ceasefires.⁶⁶

Traditional interventions, which generally seek to prevent parties from failing to comply with the peaceful resolution of the conflict they have agreed upon, are based on Chapter VI of the Charter that contains provisions to promote and implement recommendations for the peaceful resolution of conflicts. These interventions by the Security Council require consent from the parties in conflict and a ceasefire agreement for their deployment. In turn, the interventions that imply the use of force are based on Chapter VII of the Charter of the United

61 We would like to thank Laura Gil for her comments to the draft of this section, which helped us to specify and clarify some considerations.

62 United Nations Security Council. (1994) S/RES/955.

63 United Nations Security Council. (1999) S/RES/1272.

64 Esgref Aksu, *The United Nations, intra-state peacekeeping and normative change* (United Kingdom: Manchester University Press, 2003), 22.

65 United Nations Department of Peacekeeping Operations and Department of Field Support. *Civil Affairs Handbook*. (New York: United Nations, 2012) 15.

66 Aksu, *The United Nations*, 22.

Nations, establishing the framework for the Security Council to take actions, including coercive measures, to maintain or re-establish international peace and security. These actions do not require consent from the parties and involve the use of force, as occurred in Kosovo.⁶⁷

As an intermediate option, some Security Council resolutions refer both to the consent of the parties (Chapter VI) and to the authorization of the Charter of the United Nations to adopt coercive measures (Chapter VII); or opt for silence and ambiguity on their regulatory source. These are referred to as the “Chapter VI ½ Resolutions.”⁶⁸ This third form was created by the United Nations Secretary-General, Dag Hammarskjöld, amid the Suez and Congo crisis in the early 1960s, which required coercive measures from the Security Council but, at the same time, had the consent of the parties to the conflict. Therefore, it was not appropriate to apply only Chapter VI or Chapter VII of the Charter.⁶⁹

The ICJ also adopted this third form in its Advisory Opinion of July 20, 1962,⁷⁰ which analyzed the regulatory grounds authorizing coercive operations in Congo (ONUC mission) and the Middle East (FONU mission). In the same vein, we have the Advisory Opinion of June 21, 1971 that had to decide whether the continuation of South Africa’s presence in Namibia (Southwestern Africa) created legal consequences for the State despite the provisions of Security Council Resolution 276 of 1970, welcoming the decision of the United Nations General Assembly to end South Africa’s mandate in Namibia, urged the South African government to withdraw from the territory, and mentioned that the occupation would be considered illegal if the mandate was not complied with. To resolve the main issue, the ICJ wondered whether the resolutions adopted in that case (245 and 246 of 1968, 264 and 269 of 1969, and 276 of 1970) by the Security Council were binding on the United Nations member States. Its response was affirmative. The Court found that these resolutions have binding effects due to their wording and because they are based on general competencies of Article 25 of the Charter of the United Nations. Beyond citing Chapters VI or VII as a normative basis, these resolutions are binding due to their wording and their generic grounds on the competencies of the Security Council.

The interventions of the Security Council in armed conflicts may, therefore, be based both on Chapter VI and in Chapter VII of the Charter. The debate on the normative basis of such resolutions does not lie in the explicit reference to the respective chapters of the United Nations Charter. The question lies in the interpretation of the wording used. In these terms, the question of the legal force of the Security Council resolutions can be resolved as a possible option for giving legal status to peace agreements under international law.

However, this intermediate option does not clear all doubts. Some of these are as follows: In the event of non-compliance with the peace agreement, is the coercive capacity of the Security Council triggered? Does this include the use of force? Under which conditions is the Security Council authorized to demand compliance with the agreement coercively? Is

67 United Nations Security Council (1999). Resolution 1244; Bell, “Peace Agreements”, 294.

68 Christine Bell, “Peace settlements and international law: from *lex pacificatoria* to *jus post bellum*,” *Edinburgh School of Law Research Paper*, no. 2012/16 (2012): 35, <https://dx.doi.org/10.2139/ssrn.2061706>.

69 Ove Bring, *Dag Hammarskjöld’s approach to the United Nations and international law* (s. f.), 4, <https://www.cepal.org/sites/default/files/pr/files/44856-Anforande-Ove-Bring.pdf>.

70 See the decision at <https://www.icj-cij.org/en/case/49>.

the consent of the parties necessary for the Security Council to act coercively? These issues also have repercussions on the analysis of the political opportunity concerning the use of this kind of resolution.

As with previous mechanisms, a Security Council resolution has advantages and disadvantages in providing peace agreements with legal status. From a legal perspective, this option has normative force because its coercive power does not derive exclusively from the explicit references to the norms of the United Nations Charter but also from its use of imperative wording. However, this condition may also represent a disadvantage: if the parties do not comply with the agreement and the Security Council must take coercive measures, there would be no certainty as to the scope of the coercive measures that the Security Council could implement, as this is not explicitly stated in this type of resolution. In turn, from a political standpoint, this would imply greater involvement of an international actor than the parties had initially foreseen.

Thus, a United Nations Security Council resolution may potentially bind the signatories to the peace accord; however, by itself, it fails to resolve the uncertainty of the normative nature and legal force of peace agreements in international law.

2. EMERGING OPTIONS

In the first section, we showed that, in isolation, none of the existing precepts in international law give sufficient force and legal certainty to peace agreements. This does not mean that appropriate legal formulas are impossible, but rather that innovative proposals are needed. As such, we now briefly justify the legal legitimacy of exploring options based on the similar concepts of *lex pacificatoria* (or the right to make peace) and *jus post bellum* (or the right to and for post-conflict) put forward by some contemporary authors. We then specify some proposals that we believe can give peace agreements greater legal clarity and solidity.

2.1. “*Lex Pacificatoria*” and “*Jus Post Bellum*”

Comparative research shows that issues specific to peace processes and post-conflict settings—including the legal status of peace agreements—have not been bound by traditional legal institutions or by a single legal regime.⁷¹ On the contrary, each particular case has resorted to different normative channels, giving rise to a sort of legal pluralism, which scholars elaborate by using diverse terms such as *lex pacificatoria* and *jus post bellum*. Despite the differences, these approaches coincide in acknowledging that there is a need to innovate and create new tools and legal concepts to regulate post-conflict issues properly. We will briefly explore both approaches.

71 Bell, *On the Law of Peace*.

The concept of *jus post bellum*⁷² is still being formulated, so there is no consensus on its scope.⁷³ This paper draws on Stahn and Kleffner's understanding of *jus post bellum* as the third dimension of the law of armed conflict,⁷⁴ which would thus complement discussions on *jus ad bello* (or the right to war), discussing the *legitimacy* of waging war, and *jus in bello* or humanitarian law in the strict sense, which regulates the *manner* of waging war. In this context, a third regime emerges, *jus post bellum*, which is aimed at regulating peacebuilding in societies transitioning from an internal armed conflict and facing complex challenges for which there seems not to be legal solutions.

In the past, these peace processes were considered an internal affair of States, so international law did not regulate them. In the contemporary world, such processes have a growing international dimension given, for example, the international recognition of victims' rights.⁷⁵ At the same time, peace processes are mostly national and, thus, feature a hybrid nature, which does not easily conform to the existing categories of international law. For this reason, new legal categories have emerged (such as the right to return of refugees), or existing categories have been reinterpreted (such as the right to self-determination of peoples), to favor the transition from war to a durable and sustainable peace.

The idea of *lex pacificatoria* has been defended above all by Professor Christine Bell, who understands that new legal ways of regulating peace processes have arisen (law of the peacemakers),⁷⁶ which are framed within a new legal framework based more on the practice of the actors of peace processes than on the legal regime of international law.

Lex pacificatoria manages to include and attend to the particularities of these peace processes: the different objectives it pursues, ranging from ceasing armed confrontation to consolidating state autonomy and capacity in post-conflict settings; the dissimilar legal nature of the parties under negotiation (a State recognized as a full legal entity in the face of insurgent groups that lack it under international law); the different legal treatments of peace agreements in the international order (international treaties, special IHL agreements etc.) and in the domestic order (e.g. constitutional or legal norms); and the various mechanisms for the implementation and development of peace agreements.

In this way, peace agreements acquire legal status from the practice of the actors in peace processes, as the traditional rules of law are insufficient. This concept is significantly promising

72 For a review of the relations of Transitional Justice and *Jus Post Bellum*, see Diana Isabel Güiza-Gómez, Rodrigo Uprimny-Yepes and Camila Andrea Santamaría-Chavarro, "The Colombian State Armed Forces before the Special Jurisdiction for Peace. A special or preferred treatment?" in *Restraint in war: essential for a just peace?* edited by Patrick Mileham (Geneva: EuroISME Book Series, forthcoming, 2020).

73 David Rodin, "Two Emerging issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression," in *Jus Post Bellum Towards a Law of Transition from conflict to peace*, edited by Carsten Stahn and Jann K. Kleffner (Netherlands: TMC Asser Press, 2008); Carsten Stahn and Jann K. Kleffner, J. K. (eds.), *Jus Post Bellum. Towards a Law of Transition From Conflict to Peace* (Netherlands: T. M. C. Asser Press, 2008); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

74 Stahn and Kleffner. *Jus Post Bellum*.

75 Rodrigo Uprimny Yepes and Néstor Camilo Sánchez León, "Transitional Justice in Conflict: Reflections on the Colombian Experience," in *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies*, edited by Roger Duthie y Paul Seils (New York: International Center for Transitional Justice, 2017).

76 Bell, *On the Law of Peace*; Bell, "Peace settlements and international law."

as it widens the scope for action of classical legal regimes and pays special attention to the practice and comparative experience of peace processes. At the same time, this notion acknowledges current legal regimes are insufficient to make peace agreements legally binding, and gives them a legal status so that the contents of the agreement are understood as a legal obligation rather than simply political will. Additionally, *lex pacificatoria* allows adapting legal concepts to the particularities of each peace context. Comparative research shows that general and abstract regulations are neither sufficient nor timely, as each peace process has specificities in terms of its context, the actors involved, and the objectives it pursues.

According to these visions of *jus post bellum* or *lex pacificatoria*, it is necessary to legally innovate, in a creative but rigorous and reasonable way, to achieve categories and regulations that allow a negotiated peace that is just, stable, and lasting. This is the objective of the following sections, for which we will study the debates and solutions that emerged from the peace process between the Colombian State and the FARC-EP in some detail. We agree with Bell that this process has been innovative and, therefore, “its eventual success or failure is of global significance to peace processes in the future, and even to new norm creation and application.”⁷⁷ Acknowledging that uncertainty regarding the legal force of the Colombian peace agreement remains unresolved, we will propose a bolder concept: *pacigerence*. In other words, the recognition of full international legal personality for non-state armed groups, similar to the status of belligerence, but, unlike the latter, only to agree on the negotiated solution so that these peace agreements can be understood as valid, binding treaties.

2.2. The Colombian Case: the Combination of Existing Instruments

In law, it is always more prudent and peaceful to start from what exists. Therefore, after many debates on how to give international and national legal status to the peace agreement,⁷⁸ the Colombian State and the FARC-EP decided to introduce three existing international law concepts: the adoption of the peace agreement as a special humanitarian agreement, the unilateral declaration of the Colombian State, and the accompaniment of the UN Security Council. Then, we explore the ingenious resource of the Colombian case, analyzing some debates from that experience. However, our intention is not to assess the international legal force of the Final Peace Agreement in depth.

As mentioned above, a special humanitarian agreement allows parties of non-international armed conflicts to commit themselves to respect international humanitarian law. A restrictive, purely literal and isolated interpretation of Common Article 3 indicates that a peace agreement

77 Christine Bell, “Lex Pacificatoria Colombiana: Colombia’s Peace Accord in Comparative Perspective”. *AJIL Unbound* 110, (2016): 166, <https://doi.org/10.1017/S2398772300003019>.

78 The most intense debate in Colombia was about the internal value of the peace agreement, i.e., if it entered the Constitution entirely via the figure of the constitutional body of law or if, on the contrary, was a purely political document with no legal status or if intermediate routes were possible. We will not deal with this issue here, as we have already discussed in other texts. See Rodrigo Uprimny Yepes, Diana Isabel Güiza Gómez and Hobeth Martínez Carrillo, “Domando la incertidumbre: el control constitucional de actos legislativos en tiempos de transición de la guerra hacia la paz negociada,” in *La justicia al encuentro de la paz en contexto de transición. Reflexiones actuales para desafíos colombianos*, edited by C. E. Umaña Hernández (Bogotá: Universidad Externado de Colombia, 2018).

could never be a special agreement since it has another purpose (to end the war and not to regulate it) and contains clauses that go beyond the content of humanitarian agreements (such as integral rural reform, as is the Colombian case).

These objections resonated in Colombia, although we do not consider them convincing.⁷⁹ A broad and purposive interpretation of Common Article 3 permits the conclusion that the scope of regulation of special agreements is not exhausted by strict provisions on the conduction of hostilities but also includes the efforts of the parties to end the armed confrontation. Indeed, if the purpose of international humanitarian law and special agreements is to reduce the suffering caused by war, is having the parties agreeing to end the armed confrontation not the best way to achieve that purpose? Of course, it is. Therefore, it is reasonable to conclude that a peace agreement has a purpose equal to humanitarian norms and special humanitarian agreements so that they can be assimilated into the latter to some extent. From the perspective of *lex pacificatoria* and *jus post bellum*, it is therefore reasonable to broaden the notion of “special agreement” to include certain peace agreements.

The jurisprudence of the Colombian Constitutional Court supports this broad understanding of IHL. According to the Court, there is a profound link between the humanization of war, which is the immediate purpose of IHL and special agreements, and the pursuit of peace. In the words of the Court, “national and international doctrines have pointed out that humanitarian norms are not limited to reducing the ravages of war, but have a tacit purpose that can sometimes be much more precious: this normativity can also facilitate reconciliation between warring parties, because it avoids unnecessary cruelties in war operations.”⁸⁰

In the same vein, both the specialized literature and the International Committee of the Red Cross (ICRC)—the authority in the interpretation of humanitarian norms—have gradually recognized that the content of special humanitarian agreements is not limited to provisions that reinforce IHL obligations but that these agreements, in addition to humanitarian norms, contain more general human rights clauses and may also be considered as special humanitarian agreements. Thus, Mack points out that special agreements can be constitutive or declaratory.⁸¹ While the former creates new legal obligations by providing for IHL provisions in addition to those already binding on the parties, the latter only takes over IHL contents that are already in force. Among constitutive agreements, Mack emphasizes the San Jose Agreement on Human Rights signed between the Government of El Salvador and the Farabundo Martí National Liberation Front (1990), and the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law signed between the Government of the Philippines and the National Democratic Front of the Philippines.⁸²

Likewise, in its March 2016 commentaries on the Geneva Conventions, the ICRC states that a literal interpretation of Common Article 3 would lead to the conclusion that only those

79 Juan Manuel Charry Urueña, “Acuerdo Especial de Paz,” *Revista Semana*, May 11, 2016, <https://www.semana.com/opinion/articulo/juan-manuel-charry-acuerdo-especial-de-paz-y-convenios-de-ginebra/473101>; Jorge Iván Cuervo, “El Acuerdo de Paz no es un Acuerdo Especial de DIH,” *El Espectador*, May 13, 2016, <https://www.elespectador.com/opinion/opinion/el-acuerdo-de-paz-no-es-un-acuerdo-especial-de-dih-columna-632082>.

80 Constitutional Court of Colombia, Judgment C-225, May 18, 1995. [Original in Spanish].

81 Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts* (Geneva: International Red Cross Committee, 2008), 16.

82 *Ibid.* 18; see the agreement at <https://peacemaker.un.org/philippines-safety-immunity-agreement95>.

agreements that commit the parties to fulfill obligations under the Geneva Conventions may be considered as special humanitarian agreements so that those agreements that contain provisions in addition to the humanitarian provisions would not be special agreements.⁸³ However, as the ICRC points out, to the extent that Common Article 3 seeks to encourage parties to an armed conflict to bring into force a broader set of rules protecting those no longer taking part in hostilities, agreements that include additional humanitarian clauses could also be seen as special humanitarian agreements. Thus, the ICRC distinguishes between purely declaratory special agreements and constitutive special agreements.⁸⁴

From this broad and purposive reading, the ICRC points out that a peace or ceasefire agreement may constitute a special humanitarian agreement even if it contains more obligations than those deriving from the Geneva Conventions and their additional protocols.⁸⁵ Among such agreements, the ICRC mentions the Cotonou Peace Accord on Liberia (1993),⁸⁶ signed between the Interim Government of National Unity of Liberia (IGNU), the National Patriotic Front of Liberia (NFPL) and the United Liberation Movement of Liberia for Democracy (ULIMO).⁸⁷ Although this agreement did not explicitly refer to Common Article 3 and was not signed as a special humanitarian agreement, it contains humanitarian provisions which is why the ICRC believes it is a peace agreement that could be considered as a special humanitarian agreement. This is explained by the fact that special humanitarian agreements do not require special forms to be defined as such and, therefore, do not have to meet particular formal conditions.

Based on this broad view of Common Article 3, the ICRC has also classified agreements that contain obligations inherent to international human rights law as special humanitarian agreements, inasmuch as obligations of this type ultimately contribute to and, in some cases, coincide with the norms of IHL.⁸⁸

However, analysts such as Betancur Restrepo and Charry Urueña argue that while a peace agreement may be adopted in general terms as a special humanitarian agreement, clauses other than humanitarian ones such as political or agrarian reforms should receive a different legal treatment since they do not adhere to Common Article 3 in the strict sense.⁸⁹ However, this approach ignores the fact that due to their nature, peace agreements are inseparable and must be understood as a whole. Given their inherent purpose, peace agreements seek to end an armed conflict with a set of related and interdependent measures that have been negotiated by the parties. Thus, peace agreements' legal status cannot be severed either because they are comprehensive documents. Therefore, if peace agreements are viewed as special humanitarian agreements, this implies doing so in their entirety and not only in respect of those provisions that reaffirm humanitarian obligations.

83 International Committee of the Red Cross. Updated Commentaries on the 1949 Geneva Conventions (Geneva, International Committee of the Red Cross, 2016), para. 496.

84 *Ibid.* para. 497.

85 *Ibid.* para. 500.

86 *Ibid.* para. 806.

87 See the agreement at <http://www.refworld.org/docid/3ae6b5796.html>.

88 International Committee of the Red Cross. Updated Commentaries on the 1949 Geneva Conventions, para. 501.

89 Laura Betancur Restrepo, "The Legal Status of the Colombian Peace Agreement," *AJIL Unbound* 110 (2016): 188-192, <https://doi.org/10.1017/S2398772300003056>; Charry, "Acuerdo Especial de Paz."

From this understanding, the Colombian Final Peace Agreement has been regarded as a special humanitarian agreement.⁹⁰ This decision triggered a heated debate due to the internal legal effects that some wanted to attribute to that thesis with the alleged automatic incorporation of that agreement into the constitutional framework;⁹¹ we have never agreed with this thesis.⁹²

Since special agreements have limits as to their international legal force, it is necessary to also resort to a conditional unilateral declaration of the respective State. Unlike special agreements, there is consensus that unilateral declarations of States create international obligations for them as we explained extensively in the first part of this paper. This has been mentioned by the ICJ in its jurisprudence and by the International Law Commission. Therefore, the State negotiating peace may resort to this precept to reinforce the binding nature of the peace agreement and, as a subject of international law, may bind itself autonomously through the authorities empowered to do so, such as the president, after carrying out the respective constitutional procedures authorizing it to acquire international commitments.

The unilateral declaration may take any form, although it is reasonable that it should be made in writing and publicly communicated to the international community. The purpose of the unilateral declaration —e.g., the implementation of a peace agreement— is a matter that not only respects the rules of international law but also develops them. Indeed, the achievement of peace is significant and necessary to guarantee the rule of law and respect for human rights.

However, the purpose of the unilateral declaration must be specific and precise. In other words, the declaration must express the State's commitment to fulfilling its obligations under all the points agreed to in the peace agreements. Furthermore, the declaration would be conditional on the obligation that the armed group, in turn, complies with the agreement, which is possible, as we explained in the first part of this paper.

In Colombia, that possibility was explored and provided for in the Final Peace Agreement.⁹³ On September 21, 2016, then-President Santos delivered the first peace agreement, signed on August 24, to the United Nations Security Council and the Secretary-General. The Colombian government understood the presidential address as a unilateral declaration binding it to comply with the peace agreement.⁹⁴ Later, on March 29, 2017, the Colombian president sent the second peace agreement, signed on November 24, 2016, following the widespread rejection

90 *Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace*, August 24, 2016, p. 3; *Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace*, November 24, 2016, p. 5.

91 "Corte Constitucional no acogió la propuesta de Eduardo Montealegre para la paz," *Revista Semana*, March 22, 2017, <https://www.semana.com/nacion/articulo/corte-constitucional-fallo-sobre-acuerdos-especiales/519294>.

92 Diana Isabel Güiza Gómez, Rodrigo Uprimny Yepes and Mauricio Albarracín, "Intervención en la demanda de inconstitucionalidad contra la Resolución 339 de 2012 que instala la mesa de conversaciones de paz en La Habana," *Dejusticia*, (2016), https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_843.pdf.

93 *Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace*, August 24, 2016; *Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace*, November 24, 2016.

94 Ministry of Foreign Affairs of Colombia, "Entrega del Acuerdo de Paz al Consejo de Seguridad y al Secretario General de Naciones Unidas," September 21, 2016 <https://www.cancilleria.gov.co/en/newsroom/video/%20entrega-acuerdo-paz-consejo-seguridad-secretario-general-naciones-unidas>. [This article has been removed by Ivan Duque's administration and is no longer available]

of the referendum, to the Security Council and the Secretary-General. The Colombian Government also understood this as a unilateral declaration.⁹⁵

However, it is not entirely certain that the declaration has met the legal requirements for it to be binding upon the Colombian State. Moreover, there is controversy as to whether the declaration was conditional on the compliance of the FARC-EP guerrilla. For now, we will not delve into that discussion as it falls beyond the purpose of this paper,⁹⁶ which is to extract the possible lessons derived from the innovations of the Colombian peace process.

Finally, the legal status of a peace agreement can be reinforced with the involvement of the United Nations Security Council, which can act as a guarantor for the compliance with the agreement and incorporate the respective peace agreement or mention it in a resolution. This was the Colombian case. The Security Council responded positively to the proposal of the State and the FARC-EP to engage in ensuring the implementation of the peace agreement even before it was signed and engage in a ceasefire pact. On January 25, 2016, seven months before the signing of the Final Peace Agreement and its vote in the referendum the Security Council passed Resolution 2261, which establishes a political mission of the United Nations that will be “responsible for the monitoring and verification of the laying down of arms, and a part of the tripartite mechanism that will monitor and verify the definitive bilateral ceasefire and cessation of hostilities.”⁹⁷ The Negotiation Table agreed to the aforementioned tripartite mechanism in Havana by means of the joint communiqué dated January 19, 2016.⁹⁸

The mission was composed of unarmed international observers and operated for an initial period of 12 months that began after the signing of the Final Peace Agreement and could be extended at the request of the parties. Every 90 days, the United Nations Secretary-General had to report to the Security Council on the accomplishment of the mission. Then on July 10, 2017, the Security Council extended the mission for another 12 months in response to a request from the Colombian government and the FARC-EP. On that occasion, its mission would be to monitor the political, economic, and social reintegration of ex-combatants as well as security in the territories.⁹⁹ On September 13, 2018, the Security Council renewed the mission for a further 12 months, with the same functions and at the request of the parties.¹⁰⁰

Thus, this mission did not have coercive measures, as provided for in chapter VII of the Charter of the United Nations. On the contrary, the actions of the Security Council were based on the consent of the parties and, hence, its establishment. Thus, the resolutions mentioned above are based on Chapter VI of the Charter and the recognition of Colombia’s sovereignty, territorial integrity, political independence, and unity.

95 United Nations Security Council. S 2017/272. Letter dated 29 March 2017 from the Secretary General addressed to the President of the Security Council, April 21, 2017, <https://undocs.org/en/S/2017/272>.

96 This limitation is purely methodological, as the issue is superfluous to the Colombian discussion. Due to its complexity, the matter merits separate analysis.

97 United Nations Security Council. Resolution 2261/2016 dated January 25, 2016, <http://unscr.com/en/resolutions/doc/2261>

98 See joint communiqué [in Spanish] at <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-65-19-de-enero-de-2016-1453229764.pdf>.

99 United Nations Security Council. Resolution 2366/2017, July 10, 2017, <https://www.refworld.org/docid/596613174.html>.

100 United Nations Security Council. Resolution 2435/2018, September 13, 2018.

2.3. *Pacigerence* or reverse belligerency

The Colombian experience shows the feasibility of reinforcing the international legal status of peace agreements with a creative combination of instruments existing in international law. However, this same experience shows the limits of this effort due to legal uncertainty about the effects of using these precepts in peace agreements between States and insurgent groups. Indeed, some analysts express their doubts as to whether such peace accords are enforceable and justiciable in case of non-compliance by either party. They question the use of special humanitarian agreements to give legal force to peace agreements between States and non-belligerent irregular armed groups for the ensuing ambiguity in those precepts.¹⁰¹

These criticisms are not forceful, as we argued before, though they are relevant. Using legal institutions for purposes differing from their initial ones seems to be a double-edged sword as it might disfigure and render such institutions useless. With regard to special humanitarian agreements, it may make sense to retain the specificity of the precept to regulate hostilities in armed conflicts, provided that we manage to find another more appropriate legal precept to give legal force to peace agreements.

Given these shortcomings, it appears to be pertinent to work on the progressive construction of specific legal precepts, both for practical effects and for conceptual precision. Based on *jus post bellum* and *lex pacificatoria*, we propose, in an exploratory fashion, a conceptual category that has not been sufficiently examined: *pacigerence*. The concept derives from belligerency, which has fallen out of use since the adoption of the Geneva Conventions. The word “belligerent” comes from the Latin *belligerantis*, which was formed by the noun *bellum*, which means war, and the verb *gerere*, which means to act or to do. Thus, this expression referred to the action of taking part in war. By extension, belligerency was understood as the right of an insurgent group that met certain conditions and was recognized as belligerent, to wage war with the same duties and rights as a State.¹⁰²

In the same sense, the notion we propose, “*pacigerent*” or “*pacigerence*.” It is constructed from the Latin expression for the concept of peace (*pax* in the nominative or *pacem* in the accusative), together with the verb *gerere*. Equivalently, this means recognizing the right of an armed actor to make peace with the same rights and obligations as a State through a declaration of *pacigerency*.

This neologism may seem bizarre to some readers and it is indeed unusual. However, the word *pacigerence* has a short yet beautiful tradition, as it was used with a similar meaning at the turn of the 19th and the beginning of the 20th century when there were many efforts for peace. In particular, Belgian jurist Edouard Descamps and Dutch writer Fredrik Bajer (Nobel Peace Prize winner in 1908) proposed that pro-peace States sign a “pact for *pacigerence*,” by

101 Betancur, “The Legal Status;” Charry, “Acuerdo Especial de Paz;” Cuervo, “El Acuerdo de Paz no es un Acuerdo Especial de DIH;” César Rojas Orozco, “Estatus jurídico internacional del acuerdo de paz colombiano,” *Revista Estudios de Derecho* 75, no. 165 (2018), <https://aprendeenlinea.udea.edu.co/revistas/index.php/red/article/view/334760/20790622>.

102 Ti-Chiang Chen, *The International Law of Recognition* (New York: Frederick A. Praeger, Inc., 1951), 303

which they would oppose participating in European wars as opposed to war alliances or belligerent pacts between States.¹⁰³

If *jus ad bellum* and *jus in bellum* sustained belligerence, *jus post bellum* could find a new precept: *pacigerence*. Contrary to belligerence, *pacigerence* does not seek to recognize the legal personality of the insurgent group at an international level in order to justify or continue armed action. Instead, the concept grants the insurgent group the legal personality exclusively to agree and sign a negotiated settlement aimed at ending internal armed conflict.

Thus, *pacigerence* would potentially solve the puzzle of the legal binding nature of peace agreements under international law. Once an irregular armed group has been recognized as *pacigerent*, these agreements would be equivalent to a treaty, as they would have been signed by a State and an actor with a legal personality in international law to sign the accords. Moreover, this concept would not have the risk that a declaration of *pacigerency* could, in case the negotiations failed, imply tacit recognition of belligerency by the insurgent group. *Pacigerence* would only grant a limited international legal personality: the right of the armed actor to enter into negotiations and make peace with the same rights and duties as a State.

This limitation resolves any resistance to our proposal for possible legitimacy of armed struggle that *pacigerency* could grant to the irregular armed group. It is due to this objection that belligerency went into disuse, as the figure was criticized because it would be equivalent to “a formal confession [by the State] of its temporary impotence and carried with it the risk of strengthening the authority of the rebels.”¹⁰⁴ A recognition of *pacigerency* does not have these risks because the State can engage to achieve peace with the irregular armed group, but it does not entail recognizing the group’s right to make war.

The differentiation between the limited legal personality to make peace and the recognition of belligerency has precedents both in Colombian domestic law and international law, which show the logic and usefulness of the concept. At the national level the law regulating peace processes foresaw, in principle, that when the government initiated peace negotiations with an illegal armed group, it had to make a formal declaration in which it recognized that group as having a particular political character that justified the realization of the negotiation and the subsequent achievement of an agreement (Article 8 of Law 418/1997). In any case, that statement in no way implied a declaration of belligerence or a justification for the armed uprising of that insurgent group.

At the international level, and even more relevant, the development of IHL took a similar turn with the famous Common Article 3 of the Geneva Conventions of 1949. Before these Conventions, some held that the application of IHL in an internal conflict was tantamount to recognizing belligerence by the non-state armed group since the State implicitly accepted the existence of a war.¹⁰⁵ They were wrong. The State’s declaration of the existence of an internal armed conflict does not lead to insurgents being granted the right to wage war.

However, these approaches meant that, in practice, it was not possible to apply IHL to internal conflicts. States were reluctant to do so in order to avoid the risks of a declaration of

103 Sandi E. Cooper, *Patriotic Pacifism* (Oxford: Oxford University Press, 1991), 118.

104 Charles Zorgbibe, “Sources of the recognition of belligerent status,” *International Review of the Red Cross* 17, no. 192 (1977): 111-112, <https://doi.org/10.1017/S0020860400021963>.

105 Ti-Chiang Chen, *The International Law of Recognition*; Ingrid Detter, *The Law of War* (Cambridge: Cambridge University Press, 2005).

belligerency. To overcome this impasse, Article 3 pointed out that the application of IHL in these internal conflicts did not alter the “legal status of the parties.” That is to say, requiring irregular armed groups to comply with IHL does not imply a recognition of belligerence for these groups.

International law then recognized, without any issues, that non-state armed groups meeting specific requirements were subjects of international humanitarian law even if they were not belligerents. Similarly, we do not believe that there is any conceptual obstacle to differentiate the notion of *pacigerence* from belligerence. In this way, this concept allows recognizing international legal personality limited to certain irregular armed groups to enable them to make peace with the same rights and duties of States but without ever granting them the right to make war.

3. FINAL REFLECTIONS

The preceding analysis showed that there is currently no provision under international law to give international legal force to peace agreements that puts an end to internal armed conflict. This uncertainty is not a minor or purely academic problem but rather has practical consequences as it distorts the implementation of these peace agreements and weakens the pact. Thus, inspired by the discussions associated with the Colombian peace process, we propose the concept of *pacigerence*: the recognition by a State facing internal conflict that the irregular armed actor with whom it negotiates has international legal personality to sign a peace agreement. We believe that this concept manages to give international legal force to the peace agreement reached because due to this unilateral declaration of the State with international legal consequences, the irregular armed actor acquires full legal personality to sign peace agreements. Thus, the peace agreement can be assimilated into a treaty. That is, it becomes an agreement between two subjects of international law with full competence to sign peace.

Therefore, *pacigerence* seems to be conceptually clear and normatively justified as an institution fitting into *jus post bellum*. Nonetheless, it must be considered as an emerging concept that despite its theoretical contributions, faces challenging questions that remain unanswered. Without claiming to be exhaustive, it would be necessary to resolve debated complex issues about belligerence. We name at least three. First: does the recognition of *pacigerency* require the establishment of specific material conditions of the irregular armed group such as territorial control and an organized command so that this declaration has international effects? Second: is *pacigerency* recognized only by the State involved in the internal armed conflict or can a third-party country, or in international cases the United Nations Security Council, also recognize it? Third: when should such recognition of *pacigerency* take place and what constitutional procedures are required for it to be valid in domestic law? Although these are not minor concerns, we claim that *pacigerence* is a promising concept as this article has already explained. Peacemakers could incorporate the concept into their practices according to the idea of *lex pacificatoria*. Over time, practice will clarify the contours of the applicability of this concept. This category could even be progressively added to a more structured legal regime in line with *jus post bellum* proposals. This way, fragile peace agreements addressing internal armed conflicts will have a higher chance of consolidating a stable and lasting peace.

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